REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

8/9/2016

CASE NO: A628/2012

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

.....
.....

DATE 26.08.2016 SIGNATURE:.....

In the matter between:

MAHLAKOANE FANNIE PATRICK	**APPELLANT**
And	
MINISTER FOR SAFETY & SECURITY	**FIRST RESPONDENT**
INSPECTOR CT MASHEGO	**SECOND RESPONDENT**
INSPECTOR SEKATANE	**THIRD RESPONDENT**

APPEAL JUDGMENT

RAULINGA J.

Introduction

[1] The appellant appeals against the part of the judgment and order of the Court a quo of the 9 December 2011, leave having been granted by the Court a quo.

[2] In his combined summons the appellant claimed damages for unlawful arrest and detention, malicious prosecution and unlawful search without a warrant. Appellant also submitted that the respondents should pay costs of the trial on a scale as between attorney and client.

[3] At trial, parties agreed to separate merits from quantum in terms of Rule 33.4 of the Rules of this Court.

[4] The Respondents bore the duty to begin and the onus of proving the lawfulness of the arrest and the search of appellant's house and premises on a balance of probabilities and that the appellant in turn bore the onus (if *prima facie* case would have been made by the respondents) to prove that he is entitled to succeed on the merits.

[5] In its judgment the Court a quo made the following order:

"1. That the plaintiff's claim on unlawful arrest be and is hereby dismissed.

2. That the plaintiff's claim for unlawful detention be and is hereby upheld.

3. That the plaintiff's claim for malicious prosecution be and is hereby dismissed.

4. That each party to pay its own costs"

CONDONATION

[6] When the matter was called, the appellant prayed that he be granted condonation for the late filing of his practice note and heads of argument and extending the time periods accordingly for missing the filing date by four days.

[7] The delay was occasioned by the untimely death of the previous attorney of the appellant.

[8] The application was not opposed by the respondents and we accordingly granted same.

FACTUAL BACKGROUND

[9] On 10 November 2004 the appellant was subjected to a search on his house, arrest and detention without a warrant in respect of an

alleged offence of buying and receiving stolen goods from one Obed Kukuku Khoza ("Khoza"). After search at his home, he was charged and detained at the Acornhoek police station by inspector Mashego, second respondent for a different and more serious offence of house-breaking and theft.

[10] No stolen goods were found by the second respondent in the search he conducted on appellant's house.

[11] It is common cause between the parties that the charges of house-breaking and theft against the appellant were ultimately withdrawn on 25 February 2005 when the appellant was freed.

[12] In his testimony, the second respondent conceded that there was no factual basis for him to arrest, charge and detain the appellant for the offence of house-breaking and theft. The second respondent in cross-examination also conceded that Mr. Mahlakoane's arrest and detention were unfair and not lawful.

ARGUMENT BY THE PARTIES

[13] The appellant submits that it was common cause before the *Court a quo* that the evidence and version of the respondent's witness before the *Court a quo* was in direct conflict with and completely contradicted the version of the respondents as was asserted to and set out in the relevant statement attached to the pre-trial minute of 9 December 2010. Furthermore, that it is common cause that under cross- examination the second respondent conceded that his arrest and detention of the appellant 'were unfair and unlawful.'

[14] It is also the submission of the appellant that, it is trite that every allegation of fact in the appellant's combined summons which is not stated in the respondents' plea to be denied or to be admitted, had to be deemed admitted, and if any explanation or qualification of any denial is necessary, it had to be stated in the respondents' plea.

[15] Insofar as it concerns malicious prosecution, the appellant submits that the sentiments and findings of the *Court a quo* are materially

flawed and not supported by the evidence which served before the Court and the law. Furthermore it was argued that *Court a quo* misconstrued the meaning and application of the requirements of instigating or instituting proceedings and that of malice for purposes of proving a claim for malicious prosecution.

[16] On the issue of costs the appellant submits that the *Court a quo* did not properly direct itself on such facts and the law and consequently failed to judicially exercise its discretion on the issue of costs and the scale thereof.

[17] It is therefore the contention of the appellant that based on these submissions the *Court a quo* ought to have found in favour.

[18] On the other hand, the respondents submit that, once the jurisdictional facts for an arrest in terms of any of the paragraphs of section 40(1) are present, discretion arises. In the instant case, the second respondent acted lawfully when he arrested the appellant. Further, that, where a matter is left to the discretion of a public officer or where his/her discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court would

not interfere with the result. The Court can only interfere in circumstances in which a public officer acted *mala fide* or from ulterior improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provision of a statute.

[19] Regarding the issue *malice*, the respondents submit that the second respondent was not actuated by an indirect or improper motive. Instead he had a reasonable or probable cause for instituting the proceedings when he charged the appellant with house breaking and theft. This was despite the fact that the second respondent knew that according to Khoza, he (Khoza) was the one who committed the offence of house breaking and theft.

[20] Insofar as concerns the costs, the respondents submit that the appellant was unsuccessful in his claims against the respondents and his success was only limited to the further detention beyond 48 hours within which the appellant should have appeared before Court.

[21] It is on this basis that the respondents are of the view that the *Court a quo* didn't err in its findings and the order.

JURISDICTIONAL FACTS

[22] In terms of section 40(1)(a) of the Criminal Procedure Act 51 of 1977 ("the Act'), a peace officer is granted authority to arrest without warrant a person who commits or attempts to commit a crime in his presence. Such authority is limited to crimes already completed and attempts to commit crimes. Accordingly, the mere intention to commit a crime, or actions which, although suspicious, do not amount to such an attempt, are not sufficient for an arrest in terms of section 40(1)(a) (see, Du Toit et al – Commentary on the Criminal Procedure Act [Service 55, 2015] 5-9).

[23] The jurisdictional facts necessary for an arrest under section 40(1)(b) are the following:

(i) The arrestor must be a peace officer,

(ii) He must entertain a suspicion.

(iii) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).

(iv) That suspicion must rest on reasonable grounds.

Duncan v Minister of Law and Order 1986(2) SA 805 AD at 818 G – H. See also **Sekhoto 2011 (1) SACR 315 (SCA) at 320 h – 321 a.**

UNLAWFUL ARREST AND DETENTION

[24] I deal with both unlawful arrest and detention conscious of the outcome arrived at by the *Court a quo* when it ordered that the appellant was entitled to relief only insofar as his detention beyond the 48 hours was concerned. In my view, this did not cover the period from the date of his detention up to the time the 48 hours expired.

[25] In this respect the appellant submits that the *Court a quo* erred by holding that the respondents have discharged the *onus* of proving that the plaintiff's arrest and detention was lawful in terms of section 40(1) (b).That accordingly the *Court a quo* misconstrued

the law regarding the concept of *animus injuriandi* and onus of proof in cases involving unlawful arrest and detention.

[26] In **Whittaker v Roos and Bateman, Morant v Roos and Bateman 1912 AD 92 at 130 - 131**, the Court held per Solomon J that it is not necessary in order to find that there was an *animus injuriandi* to prove any ill-will or spite on the part of the defendants towards the plaintiffs...This *dictum* was approved in **Minister of Justice v Hofmeyer 1993(3) SA 131 AD at 155 I – J and 156A,** in which **Hoexter JA** writing for the full bench held that a plaintiff in a claim for unlawful arrest and detention was not in law required to allege and prove the presence of *animus injuriandi*, an intention to injure or an awareness of unlawfulness. In fact, as was further stated in the Whittaker case (supra) at 131 '.... and it is quite immaterial what the motive was or that the object which the defendants had in view was a laudable one....' It seems to me that we have in the present case, all the requisites which are necessary to found an action of *injuria.*

[27] One is alive to the fact that the common cause facts which were presented before the *Court a quo* showed that the reason for the

search and arrest of the appellant on 10 November 2004 was that he was suspected of having bought and received stolen goods from the second respondent's informant, one Khoza. The goods were however not found in the appellant's possession or his house. I agree with the submission of the appellant that there was no evidence at all that the appellant bought or received stolen goods. Also, the second respondent's informant, Khoza did not implicate the appellant in relation to the offence of house-breaking and theft. Similarly the complainant in her written statement which served before the *Court a quo* which was confirmed by the second respondent in his evidence did not implicate the appellant in any manner.

[28] Interestingly, in his evidence, the second respondent admitted that the offence of buying and receiving stolen goods is different from the offence of house-breaking and theft and that he had neither a factual basis nor justification to charge and detain the appellant for either of the offences, but nonetheless decided to charge and detain the appellant for the latter offence. In fact as I said, the second respondent conceded that the detention and arrest of Mr. Mahlakoane were unfair and not lawful.

[29] I am therefore with the appellant in his submission that the *Court a quo* should have found, in respect of the claim for unlawful arrest, that the second respondent had conceded that the arrest was not lawful, and that in any event had no evidence to support or to continue to entertain a suspicion that the appellant had made himself guilty of the offence of buying and receiving stolen property and that the fact that the second respondent charged the appellant with house breaking and theft was relevant and material to the question whether the respondents discharged the onus on them of proving and justifying the basis of the arrest and detention of the appellant on 10 November 2004.

[30] Flowing from the fact that the arrest of the appellant was unlawful, it follows that equally the detention of the appellant from the 10 November 2004 up to and beyond the expiry of 48 hours is also unlawful.

SEARCH WITHOUT A WARRANT

[31] I part ways with the appellant in his argument that the *Court a quo* ought to have found in his favour that the search was unlawful, on the basis that the respondents in their plea did not admit or deny or confess and avoid the allegations by the appellant that the search on his house and premises was without a warrant (and thus unlawful), nor did they state any facts upon which they rely in respect of the appellant's claim arising from the search.

[32] Disappointing as it is, that the respondents do not traverse the issue of the search without a warrant in their heads of argument, that does not strengthen the case for the appellant at all.

[33] Section 22 of the CPA provides as follows:

> *"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:*

(a) if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the article in question, or

(b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant and,

(ii) *that the delay in obtaining such warrant would defeat the object* of the search".

[34] The evidence tendered by the respondents through the second respondent during the trial is that, on the 10 November 2004, the second respondent proceeded to the home of the appellant and found his sister. At the time the appellant was not present and as a consequence he didn't search the premises. The premises were later visited in the presence of the appellant who granted the second respondent permission to search, which yielded no positive results. As gleaned from the record the second respondent stated that if the appellant stated:"... had he refused

us permission, we would not have been in a position to visit the premise".

[35] It is therefore clear that the appellant consented to the search without a warrant, which covers the second respondent under subsection 22(a). Otherwise the second respondent could have been covered by subsections (b) and (c).

MALICIOUS PROSECUTION

[36] The respondents object to the contention of the appellant that the second respondent acted wrongfully and had been reckless as to the possible consequences of his conduct and accordingly acted *animus injuriandi.* They aver that the second respondent had reasonable suspicion that the appellant had committed the offence with which he was charged on the basis of the information which was at his disposal. In support of their argument, the respondents refer to the decision in **Prinsloo and Another v Newman 1975(1) SA 481 (A) 499 A – C** in which it was found that a defendant will not be liable if there exist, objectively, reasonable grounds for the

prosecution and he or she, subjectively believed in the plaintiff's guilt.

[37] In **Rudolph v Minister of Safety & Security & Another 2009(5) SA 94 (SCA) page 99 para 16**, the Supreme Court of Appeal ("SCA") stated that requirements for successful claims for malicious prosecutions have most recently been discussed in **Minister of Justice & Constitutional Development v Moleko [2008] 3 All SA 47 (SCA) at para [8]** as follows:

> "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.

[38] Further, in the **Rudolph** case*(supra)* the SCA in the course of explaining the requirement of malice, as the appellant puts it, assisted in providing clarity on the meaning and applications of the first requirement and in that regard the SCA opined "the *malice*" must be that of the person responsible for initiating the prosecution against the appellants. In this case, the appellants were formally charged with contravening the Gatherings Act on Saturday 19 July 2003 by members of the SAPS at the Pretoria Moot Police Station. It would appear that this is the stage at which the proceedings were initiated. Although Capt Bekker's police statement was made only on 18 August 2003, it is safe to assume that the member of SAPS who charged the appellants did so, on the basis of the information furnished to him or her by the arresting officer..."

[39] One can safely say that the approach now adopted by the SCA is that, although the expression '*malice*' in a claim for malicious prosecution lies under the *actio injuria* rule and that what has to be proved in this regard is *animus injuriandi.*

[40] In his article, Professor Chuks Okpaluba, Nelson Mandela University – "Reasonable and Probable Cause in the Law of Malicious Prosecution – A Review of South African and Commonwealth Decisions", opines that, it is not every prosecution that is concluded in favour of the accused person that necessarily leads to a successful claim for malicious prosecution. So much depends on the absence of a reasonable and probable cause, the defendant in instigating, initiating or continuing the prosecution.

[41] It was held in **Newman v Prinsloo** (supra) at 127H that in wrongful arrest the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff makes the restraint of plaintiff's freedom no longer the act of the defendant but the act of the law. See also **Relyant Trading (Pty) Ltd v Shongwe [2007] 1 All SA 375 (SCA)** para 4. On the other hand **Van Rooyen AJ in Heyns v Venter 2004(3) SA 200(T)** at 208 B held that malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also

his or her good name and privacy. The requirements are that the prosecution be instigated without reasonable and probable cause. And with "*malice*" or *animo iniuriandi*. **Thompson v Minister of Police 1971(1) SA 371** E and 373 F-H. See also **Moaki v Reckitt and Colman (Africa) Ltd 1968(3) SA 98(A) 104 B-C**.

[42] Another important distinguishing factor between reasonable suspicion to arrest and the requirement of reasonable and probable cause in the law of malicious prosecution, is the factor of proof. In malicious prosecution the burden of proof is on the plaintiff, who must show that all four elements developed by the courts over the years are present. In an action for wrongful arrest, on the other hand, the burden is always on the defendant to justify the arrest and detention and he/she must prove in defence that he/she had reasonable suspicion as grounds to arrest as one of the four statutory jurisdictional facts in terms of section 40(1)(b) of the CPA. The four jurisdictional facts which the defendant must plead were restated by the SCA in **Minister of Safety and Security Sekhoto 2011(1) SACR 315 (SCA) para 6.**

[43] Professor Okpalupa (supra) refers to cases in English common law, which apart from false imprisonment or malicious prosecution also deal with a tort of abuse of process. This is distinct from the "shameful misuse of coercive power or a gross abuse of power". **Attorney General of Trinidad and Tobago v Ramanoop** 2005 2 WLR 132 (PC). But like malicious prosecution, the abuse of process concerns misuse and abuse of the criminal process. Both of them deal with the deliberate and malicious use of the officer's position for ends that are improper and inconsistent with the public duty entrusted upon the officer – See **Hill v Hamilton – Wantworth Regional Police Services Board 2007 3 SCR 129** para 182. Similary, the same sentiments were expressed in the Australian case of **Zreika V State of New South Lakes 2011 NSW** 667 para 134. In my view, this is an indication that there are no parallels between our law and foreign law.

[44] Having said this, I now revert to **Moleko and Rudolph** (supra). In **Moleko**, the SCA concluded that the *animus injuriandi* includes not only the intention to *injure*, but also consciousness of wrongfulness. Further, that 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 wrongly, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*).

[45] In arriving at its conclusion in Rudolph (supra) the SCA continued and said the following:

"19. The respondent's argument as set out in paragraph 14 above is misconceived. The 'malice' must be that of the person responsible for irritating the prosecution against the appellants. In this case the appellants were formally charged –with contravening the Gatherings Act on Saturday 19 July 2003 by members of the SAPS at the Pretoria Moot Police Station. It would appear that this is the stage at which the proceedings were inititated. Although Capt Bekkers' Police statement was made only on 18 August 2003, it is safe to assume that the member of the SAPS who charged the appellant did so on the basis of the information furnished to him or her by the arresting officer... by no stretch of the imagination could this 'demonstration' be regarded as a 'gathering' within the meaning of the Gatherings Act.

20. In this case, there can be no question that the person who charged the appellants was aware of the fact that, by so doing the appellants would in all probability be 'injured' and their dignity ('comprehending also...[their] good name and privacy') in all probability negatively affected. Knowing that the 'gathering' in question comprised only eight persons, the police member concerned must at the very least have foreseen the possibility that no offence in terms of the Gatherings Offence Act had been committed and that in charging the appellant with a contravention of that Act, he or she nevertheless continued so to act, reckless as to the possible consequences of his or her conduct. In our view, he or she thus acted *animo injuriandi*. This being so, the appellants proved the requirements of malicious prosecution and their claim in this regard should have succeeded."

[46]. The appellant correctly submits that in the present matter, the second respondent's evidence was clearly that the information he had was that the appellant bought and received stolen goods from one Khoza and he had arrested the plaintiff for that reason or

offence. The second respondent's informat, Khoza and the complainant in her statement did not implicate the appellant of having been involved in the offence of house breaking and theft and the appellant informed the second respondent that he never bought or received any stolen goods from Khoza. Further that, the second respondent concluded that there was a difference between the offences of house-breaking and theft on the one hand and receiving stolen property on the other. To make matters worse, the second respondent concluded in his evidence that the arrest and detention of the appellant by him "were unfair and not lawful".

[47]. It is my considered view, that it was at that stage when it became apparent that there was no case against the appellant that the second respondent ought to have refrained from arresting, charging and detained the appellant on the offence of house-breaking and theft. The appellant was detained until 15 November 2004 when he was released on bail.

[48]. As a consequence thereof, the *Court a quo* on the basis of the dictum in **Rudolf**, ought to have found and concluded that the second respondent acted wrongfully and had been reckless and

accordingly that the second respondent had acted *animo injuriandi*. Therefore, the *Court a quo* erred and materially misdirected itself both in law and fact in finding and concluding to the contrary.

COSTS AND SCALE THEREOF

[49]. To the extent that the appellant has succeeded substantially in the appeal and the respondents insisted on the opposition thereof even in circumstances where they had no leg to stand on, the respondent must be mulcted with costs.

ORDER

[50]. In the result I make the following order:

1. The appeal is upheld in part and dismissed in part.
2. The order of the Court a quo is set aside and replaced by the following:
    2.1 The plaintiff's claim for unlawful arrest and detention is upheld
    2.2 The plaintiff's claim for malicious prosecution is upheld.

2.3 The plaintiff's claim for unlawful search is dismissed.

2.4 The first respondent is ordered to pay the costs of the trial and the appeal (on the attorney and client scale).

TJ RAULINGA
JUDGE OF THE HIGH COURT

I agree

MF LEGODI
JUDGE OF THE HIGH COURT

I agree

WRC ~~WCR~~ PRINSLOO
JUDGE OF THE HIGH COURT

APPEARANCES

Attorneys for the Appellant	: Tshishonga Mundalamo Incorporated
Counsel for the Appellant	: Adv G Shokoane SC
Attorney for the Respondent	: The State Attorney
Counsel for the Respondent	: Adv T B Hutamo
Date of Judgment	: