

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION PRETORIA)**

**CASE NO: 58693/12**

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

**10 May 2021**

DATE

A handwritten signature in black ink, appearing to be "M. M. M.", is written over a horizontal line.

SIGNATURE

In the matter between:

**SANDRA MALEBE-THEMA**

**FIRST PLAINTIFF**

**DAPHNE MOORGHIA-PILLAY**

**SECOND PLAINTIFF**

**and**

**THE MINISTER OF SAFETY AND SECURITY**

**FIRST DEFENDANT**

**BALAKRISHNA NAIDU**

**SECOND DEFENDANT**

**LIEUTENANT-GENERAL KRUSE**

**THIRD DEFENDANT**

**This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 10 May 2021.**

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## **JUDGMENT**

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COLLIS J

### INTRODUCTION

1. An American financier once coined the phrase: '**No good deed goes unpunished,**' and if ever there was a phrase more appropriate to describe the trouble which has befallen the two plaintiffs' before this court, it would be this phrase.
2. In the present action the plaintiffs' had instituted a delictual damages claim, against the Minister of Safety and Security and two of its employees for their unlawful arrest and detention, which occurred on 11 May 2011 and their subsequent malicious prosecution which followed.
3. Pursuant to their arrest they were detained on the same day and stood trial until their discharge in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977.
4. The facts in the present matter are largely common cause between the parties, save for the lawfulness or otherwise of the arrest, the malicious prosecution and the quantum of damages to be awarded to the plaintiffs in the event of them being successful.

5. In brief, their arrest occurred pursuant to the execution of warrants of arrest in relation to events which took place some two years prior on 29 May 2009. At the time of their arrest the plaintiffs were employees and members of the South African Police Service (SAPS). They were both arrested and detained on 11 May 2011 by members of the SAPS on allegations of fraud. The first plaintiff was arrested at about 11h40 whilst at home and the second plaintiff was arrested later the same day at about 12h00, whilst on duty. As such they were arrested at places which were known by the arresting officers and as mentioned some two years after the alleged incident.
6. Subsequent to their arrest, the plaintiffs were charged and tried for committing the offence of fraud. The specific allegations were that they fraudulently used Police funds to hold a birthday celebration for the Police Divisional Commissioner, Khomotso Phahlane, on the same day that a scheduled meeting was also arranged.
7. At the conclusion of their criminal trial, they were acquitted in terms of the provisions of s 174 of the Criminal Procedure Act<sup>1</sup> (*'the CPA'*) and as a result of their acquittal, they claim that their arrest, detention and prosecution were unlawful and malicious.

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<sup>1</sup> Act No. 51 of 1977.

## DISPUTED ISSUES

8. The issues that this Court was called upon to determine were the following:

- 8.1.1 Firstly, whether the plaintiffs' arrest was lawful or unlawful;
- 8.1.2 secondly, if the Police are guilty of malicious prosecution of the plaintiffs; and
- 8.1.3 thirdly, if any of the above are proven what would be an appropriate *quantum* for any of the proven damages suffered by the plaintiffs.
- 8.1.4 In determining the above, this court as such had to make a finding that the event on 29 May 2009 was indeed a feedback session at the end of term and not a birthday party, which happened to coincide with the birthday of the Divisional Commissioner JK Phahlane.

## DEFENCES

9. To the pleaded case the defendants denied that their actions were unlawful and malicious, and that the plaintiffs have suffered the alleged damages. They rely on the following grounds for defending the action:

- 9.1 Firstly, that the Police arrested the plaintiffs in execution of a lawfully issued warrant of arrest by the relevant authority (i.e. a Magistrate). As such the arrest warrant had to be executed by them;
- 9.2 secondly, the prosecution of the plaintiffs was based on the advice

and at the instance of the relevant authority that is legally bestowed with the powers to conduct public prosecutions, i.e. the National Director for Public Prosecutions (*'the NDPP'*). They therefore, deny that they maliciously set the law in motion as the decision to prosecute was taken by the prosecution, who has not been cited in these proceedings.

## ONUS

10. In the present matter the defendants carried the *onus* to prove that the arrest of the plaintiffs was lawful. It is the case for the defendants that the plaintiffs were lawfully arrested in the lawful execution of an arrest warrant that was legitimately issued by a Magistrate.

11. As far as the plaintiffs claim for malicious prosecution, the plaintiffs carried such *onus*. In order to succeed in this claim, they carried the *onus* to prove the following:

- (a) that the defendants set the law in motion-they instigated or instituted proceedings;
- (b) the defendants acted without reasonable and probable cause;
- (c) the defendants acted with malice and
- (d) that the prosecution has failed.<sup>2</sup>

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<sup>2</sup> Minister of Justice and Constitutional Development and Others v Maleko [2008] 3 All SA 47 (SCA) , 2009 (2) SACR 585 (SCA).

## EVIDENCE PRESENTED BEFORE THE COURT

12. General Phahlane gave evidence on behalf of the plaintiffs'. At the time he was the Commanding Officer of the first plaintiff and also her friend whereas, the second plaintiff was his personal assistant. He testified that at no time did anybody ask his opinion on the matter and in respect of the allegations against the plaintiff's and he further testified that no internal investigation was held that he knew of or that he was a part of. The witness also testified as to the quality of characters of the plaintiffs and confirmed that they both have never been accused of any wrong doing in the SAPS, let alone capable of the fraud that they were accused of. During cross-examination, he conceded that he did not know anything about the surprise party which had been arranged by them. Secondly, he conceded that the celebration did take place during official hours. Furthermore, that the Police brass band was booked not for the alleged feedback meeting as scheduled, but for playing a birthday song for him. Furthermore, he conceded that it was common cause that the only programme on the day was that for his birthday, which had the police logo and a picture of him, but that he had no knowledge as to who had arranged for the programme.

13. Both plaintiffs also testified before this court and their testimony to a great extent had overlap as far as the circumstances under which the surprise birthday party was arranged by them to coincide with a scheduled divisional feedback session. Both plaintiffs also testified as to the circumstances of their arrest and the time spent in the cells until their

ultimate release on their own recognizance later that evening at around 19h00 as the bail set could not be paid at that time. The cross-examination did not seriously challenge their evidence placed before this court.

14. On behalf of the defendants, Captain Christiaan Herbst gave evidence. In short his testimony was the following. He is a member of the South African Police Service for the past 32 years, currently stationed at the Head Office Police Academy and a member of the Police brass band. In relationship to the subject matter, he testified that an application was directed for the band to perform at a birthday function on 29 May 2009 and that this birthday celebration was arranged for Commissioner Phahlane. The booking was recorded in their books as is the procedure. This request was acceded to and on the day in question they had performed at the function between 08h00 and 10h00. He was unable to recall as to whether any meeting was also scheduled for the same day. As per the specific request like any other, the band performed and remained present at the venue until all the high-ranking officials had left. During his attendance that morning, he had not observed that any meeting had also taken place.

15. The second defendant Balakrishna Naidu ("*Naidu*") also testified before this court. It was his testimony that he is a former and now retired member of South African Police Service, and held the rank of Colonel stationed at Organized Crime Unit in Pietermaritzburg. On 10 October 2010 he was appointed by then Lt General Dramat, to investigate the complaint of fraud

concerning members of the SAPS who had organised a birthday celebration for General Phahlane using state funds. Upon such appointment he was informed that this birthday party was held during office hours. He gave evidence that not only was he the investigating officer but that he also carried out the arrest in respect of the two plaintiffs. Prior to being appointed to investigate the case, the plaintiffs were unknown to him. During his investigation, and in the process of interviewing a number of witnesses, he established, that the second plaintiff applied for funds to be used towards catering for a feedback meeting which was to be held on 29 May 2009. Instead however, what was to be a formal meeting, turned out to be a birthday celebration for Commissioner Phalane. To confirm that the event was indeed a birthday celebration, he referred to an e-mail dispatched by the second plaintiff <sup>3</sup> addressed to Captain Roberts inviting him and other officers to the celebration of the Divisional Commissioner's birthday celebration scheduled for 29 May 2009. The invitation is contrary to all allegations that the plaintiffs had organised a feedback meeting, as if it was, he testified that minutes would have been recorded of the meeting, if indeed a meeting was held as per the proposed agenda.<sup>4</sup> Upon his investigation having been concluded, he then proceeded to place the matter before the Director of Public Prosecutions and upon a decision received from the Director of Public Prosecutions to charge the plaintiffs' with fraud, he then proceeded to apply for a warrant of arrest in respect of both of them.

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<sup>3</sup> Court Bundle Volume 3 p 297-298.

<sup>4</sup> Court Bundle of documents Volume 2 p 175.

The said warrants were authorised on 10 May 2011 and the following day he carried out these warrants. In the process of executing the warrants, the first plaintiff was arrested at her house and dressed in civilian clothes when the arrest was carried out. During her arrest she was not handcuffed and transported from her residence in an unmarked police vehicle. The second plaintiff however was at work and arrested whilst in her uniform. She was requested to remove her epaulettes and allowed to change into civilian clothes as per her request before they were both taken to court. She too was also not handcuffed and transported in an unmarked police vehicle. At the court their fingerprints were taken, their details entered into the registers and thereafter they were placed inside the police cells until they were eventually released later that same evening on their own recognisance.

## ANALYSIS

16. As mentioned *supra*, the defendants carried the *onus* to prove the lawfulness of the arrest. Their pleaded case were that the plaintiffs were lawfully arrested in accordance with warrants of arrest duly, authorised by the relevant authority and this after the matter was thoroughly investigated and upon advise received on the prospect of conviction form the National Director of Public Prosecutions.<sup>5</sup>

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<sup>5</sup> Court Bundle Exhibit A para 12.2 and 15.2 Defendant's Amended Plea.

17. In the present matter it is common cause that Colonel Naidu was not only the investigating officer, but also the arresting officer, together with the third defendant and that when an application was made for the authorisation of warrants of arrest to be authorised, that his statement under oath was utilised for such warrants of arrest to be authorised.

18. In *casu*, no evidence was placed before this court by the defendants, that the attendance of the plaintiffs before a criminal court could not have been secured or obtained in any other manner other than for the defendants to have applied for the authorisation of a warrant to secure their attendance before court.

19. It is common cause that the arrest of the plaintiff's were made some two years after the 'alleged' transgression and under circumstances where at least one of them at the time was still in the employ of the South African Police Service and where both their addresses were known to the police. If the purpose of an arrest, is to secure the attendance of the plaintiffs' before a court, no evidence was placed before this court on behalf of the defendants, as to the reasons why their attendance could not have been secured, through a drastic and invasive manner, such as through the issuing of a summons to appear.

20. On the evidence presented, the defendants have also not rebutted the evidence presented by the plaintiffs that for the day in question, the cake, decorations and programme was not paid for out of the funds of the first defendant and that the police brass band had performed on the 29 May 2009. Further, that there was nothing untoward with this request, as in the past, similar requests had been directed to the band and that they gladly assisted when so requested.

21. The day, as mentioned, also happens to be the birthday of Commissioner Phahlane, and it is the same day that a feedback session was also scheduled and an agenda prepared and circulated prior to such session.

22. It was also not rebutted by the defendants, that for these types of meetings, and as in the past, there always had been catering arranged, in respect of which prior application for funding was made. As such the benefit derived from the catering on the day, was by all the members present at such gathering and employed by the first defendant and not per se exclusively by only the two plaintiffs before this court. It thus begs the question that if the application for funding for the catering was procedurally not permissible, why authorisation for such funding would have been approved.

23. The inescapable conclusion to be made, is that for one or other nefarious reason, the relationship between the plaintiffs and Commissioner Phahlane, seems to point to the real reason why the plaintiffs were targeted for their noble actions and nothing else and that no criminal conduct could be attributed to their actions. As such it could come as no surprise that the ensuing criminal prosecution had failed.

24. On the unlawfulness thus of the arrest, I therefore conclude that the defendants had failed to establish on a balance of probability that some justification existed for the arrest of the plaintiffs and Colonel Naidu having been the investigating officer, it must have been his complaint that resulted in the ensuing prosecution. On his own evidence he had investigated the matter for almost 6 months, and thus he had ample opportunity to do so and yet he failed to interview Commissioner Phahlane and failed to have regard to the internal findings conducted and reduced in a report regarding the incident in question as undertaken by the third defendant.

25. On his own evidence he was unable to place before this court reasonable and probable grounds to have instigated and initiated the proceedings and his failure to have regard to the findings of the internal report prepared by the third defendant and to obtain all possible evidence on the matter from all potential witnesses, pointed to malice on his part. It is common cause between the parties, that the subsequent prosecution was in the favour of the plaintiff. As such this court is as a result thus satisfied

that the plaintiffs have discharged their *onus* on a balance of probability to prove malicious prosecution on the part of the defendants.

26. In assessing the appropriate *quantum* to be awarded to the plaintiffs previous caselaw has alluded to various factors which a court has to consider in determining an appropriate award to be awarded to the plaintiffs. These factors include the circumstances of the deprivation, the conduct of the defendants, the social standing of the plaintiffs, the nature and duration of deprivation of their freedom. Importantly, is that each case should be determined on its own merits and that previous caselaw should only be used as a guide under the circumstances.<sup>6</sup>

27. In applying these factors to the matter at hand, both the plaintiffs were prominent ranking members in the South African Police Service. At the time of their arrest the incident in question had occurred some two years prior and as previously mentioned the arrest of the second plaintiff was carried out on a day that she was on duty. It cannot be contended that the entire experience had not been a humiliating experience for both of them. Not only was the second plaintiff required to remove her epaulettes on the day that the arrest was carried out, but she was in uniform and had asked to change into civilian clothes in order to save her the embarrassment of appearing in court whilst dressed in her

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<sup>6</sup> Minister of Safety and Security v Seymore 2007 (1) All SA 558 (SCA)

uniform. Both plaintiffs were arrested shortly before midday. They were first taken to the office of the National Inspectorate and detained and later only taken to court. At the court they were fingerprinted and thereafter placed inside a police holding cell. Albeit that a significant low amount in bail was set for them, they were released on their own recognizance prior to the bail money having been paid by them as the office where the bail money had to be paid, by then had closed.

28. This entire experience must have been a traumatizing, humiliating and embarrassing experience and for that they must be adequately compensated for the offending conduct on the part of the defendants.

29. The submission made by counsel for the defendant that the arrest was carried out in a dignified manner, as none of the plaintiffs were handcuffed during the arrest and that they were taken to court speedily, does not minimize the unsavoury experience of having been arrested.

30. Having therefore regard to the totality of the evidence presented before this court, and having considered comparable awards having been made in the past, I conclude to award the plaintiffs' the following respective awards:

- a. Claim for Malicious prosecution R 100 000 each;

- b. Claim for Unlawful Arrest and Detention R 50 000 each;
- c. Claim for legal fees expended: R 19 850 (first plaintiff) and R 22 000 (second plaintiff) respectively.

## COSTS

31. As the plaintiffs are the successful parties in these proceedings, and in exercising my discretion, the costs should follow the result.

## ORDER

32. In the result the following order is made:

32.1 The first second and third defendants, are ordered to pay the first plaintiff jointly and severally the one paying the other to be absolved an amount of R 169, 850.00 together with interest at the prescribe rate from 10 May 2021, to date of payment.

32.2 The first, second and third defendants, are ordered to pay the second plaintiff jointly and severally the one paying the other to be absolved an amount of R 172, 100.00 together with interest at the prescribe rate from 10 May 2021, to date of final payment.

32.3 The first, second and third defendants are further ordered to

pay the first and second plaintiffs' costs of suit, including costs of counsel on a high court party and party scale.



**C.J. COLLIS**  
**JUDGE OF THE HIGH COURT**

### **Appearances**

Counsel for the Plaintiffs	: Adv. M. De Meyer
Attorney for the Plaintiffs	: De Meyer Attorneys
Counsel for the Defendants	: Adv. S. Mathabathe
Attorney for the Defendants	: Office of the State Attorney: Pretoria
Date of Hearing	: 20-22 November 2019, 09-10 December 2020; 19 January 2021
Date of Judgment	: 10 May 2021

**Judgment transmitted electronically.**