



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 14445/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 12 NOVEMBER 2021

SIGNATURE

A handwritten signature in black ink, appearing to be "J. Davis", is written over the signature line.

In the matter between:

FATHUWANI VINCENT LUVHENGU

Plaintiff

and

THE MINISTER OF POLICE

Defendant

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

It is easy to image one's dismay at finding out that, unbeknown to oneself, the records kept by the Local Criminal Records Centre (LCRC) of the South African Police ("the Police") indicate that one has either been found guilty of a crime or that there is a criminal case pending against one. This is what the Plaintiff claims happened to him. He further claims that, despite the records having been set straight, he has suffered damages until this had been done.

[2] The parties

- 2.1 The Plaintiff is a director in the Department of Labour and holds a law degree, among other qualifications.
- 2.2 The Defendant is the Minister of Police (the Minister) in his representative capacity as such.

[3] The trial

At the onset of the trial, being one of five trials which came before me yesterday, a separation of the issues of merits and quantum was ordered in terms of Rule 33, by agreement between the parties. The Plaintiff was the only witness and both parties closed their cases on the merits at the conclusion of his evidence. By agreement between the parties, a set of documents pertaining to extracts from the Criminal Administration System (CAS) and the LCRC were produced and was accepted as evidence without any need for further proof thereof. The docket reference in all the documents reflecting the Plaintiff's name is CAS 149/4/2011.

[4] The facts

The facts, as chronologically reconstructed from the abovementioned documents and that evidence of the Plaintiff which had not been placed in dispute, are briefly the following:

- 4.1 On 9 April 2011 the Plaintiff was involved in a motor vehicle accident on the N1 highway between Musina and Makhado in the Limpopo Province. It appears that he was a driver of a motor vehicle at the time.
- 4.2 On the same day, the Plaintiff was arrested on charges of driving under the influence, negligent or reckless driving or culpable homicide. The last charge emanated from the fact that a 20 year old female person involved in the accident had passed away on the scene.
- 4.3 The Plaintiff's first court appearance was on 11 April 2011 whereupon he was released on R 1000.00 bail.
- 4.4 On 26 April 2011 another person involved in the accident, a 38 year old male, passed away due to blunt force trauma to the head sustained in the accident. It appears that a third person also passed away but scant particulars hereof are available.
- 4.5 The police docket was referred to an inquest court which, after having reviewed some 31 affidavits in terms of section 13(1) of the Inquests Act 58 of 1959, concluded that the accident was the result of a tyre which had burst, resulting in the vehicle rolling. The inquest court further found on 12 March 2012 that no conduct of any person prima facie indicated the commission of any crime.
- 4.6 On 22 March 2012, after the docket had made its way past the senior state prosecutor at the Louis Trichardt Court, it was closed at the Makhado police station by a captain Mpephu.
- 4.7 On 23 March 2012 the case docket, under signature of a captain Mulele indicated that the charges (including that of drunk driving) were

“*withdrawn as inquest*”, presumably referring to the findings of the inquest court.

- 4.8 Hereafter the Plaintiff was telephonically informed by the police that the matter had been finalized and that no further court appearances were expected of him and that he could go and collect the bail money, which he did.
- 4.9 Many years later in 2018, at the instance of the current incumbent Minister of Police, all police officers had to be vetted in respect of possible criminal cases pending against them or for disclosure of previous convictions. This included the Plaintiff who was since 2012 employed as a Legal Admin Officer at Police Headquarters in Pretoria.
- 4.10 On 8 February 2018 the Plaintiff submitted his fingerprints for purposes of verification. To his great surprise, the Police HR department subsequently called him and reported that the LCRC system had flagged him. A printout dated 5 March 2018 identified “Illicit Activity” against his name. Upon investigation, the records indicated a case “awaiting trial” in respect of culpable homicide/reckless or negligent driving in respect of docket 149/4/2011.
- 4.11 The above record was apparently based on information contained in the CAS which recorded a finding of guilty in respect of culpable homicide in CAS no 149/4/2011 with a sentence recorded in an ambiguous and oblique fashion as “*Acknowledgment of guilt or bail estreatment: R1000 RAND of which 0 Rand is suspended or 0 years*”.
- 4.12 The Plaintiff, upon his explanation of the facts regarding the inquest finding, was told to resolve the matter or “step aside”. He reverted to the Station Commander at Makhado who told him the issue would be resolved.

When, according to the Plaintiff's perception, it wasn't attended to promptly, the Plaintiff went to his attorney who wrote a letter to the Police demanding rectification of the LCRC records.

4.13 The CAS records however, show that the docket was re-opened on 10 May 2018, dealt with by A Lieutenant-Colonel at the Makhado detective branch, was booked out to the inquest court at Louis Trichardt and subsequently closed again on the same day. The docket was then again filed at the police station at Makhado on 11 May 2018 together with a separate file note of the "court result" that the charge of culpable homicide in CAS No 149/4/2011 had been withdrawn.

4.14 Pursuant to the above, the LCRC was accordingly amended to correctly reflect the true position namely that there are no cases pending against the Plaintiff (all three charges, irrespective of their differing nature, were treated jointly and never further investigated or pursued other than by way of the inquest proceedings) and that there was no longer any record of a previous conviction.

[5] Liability

It goes without saying that only correct and true facts are to be recorded on the LCRC. It, in fact, contains a reflection of the record of previous convictions of a person as contemplated in various sections of the Criminal Procedure Act 51 of 1977 (the CPA) (such as section 47(3) regarding preliminary enquiries, section 52(1) regarding diversion, section 59 referring to the Child Justice Act, section 87 regarding expungement of records and section 211 regarding evidence of prior convictions during the course of a trial). Most importantly, the LCRC records form the basis of the customarily known SAP 69 record, being a certificate in daily use by prosecutors in criminal courts in terms of section 271 of the CPA, which

forms the introductory section of Chapter 27 thereof, dealing expressly with an accused person's previous convictions. Identification of a person and linkage to the record is done via fingerprints which are in turn kept on record as contemplated in Chapter 5A of the South African Police Service Act, 68 of 1995. Section 15D of this Act contains stringent requirements regarding the accuracy and integrity of information in the fingerprint database. The possible adverse consequences which may flow from incorrect records and the breach of the statutory obligation to maintain these records, clearly impose a duty on the Police to ensure the accuracy thereof. There was no dispute in the case before me that a breach of these duties, whether intentionally or negligently, would render the Police liable for damages caused as a consequence thereof.

[6] Damages

As a result of the fact that the issues of merits and quantum have been separated, this court need not make any determination on the issue of damages or the extent thereof. However, as certain aspects of the alleged damages were touched upon in evidence (both in chief and in cross-examination) and in argument, it is apposite to make certain observations for the sake of clarity:

- 6.1 The fact that the police had breached its obligations to accurately record the status of the CAS 149/4/2011 record insofar as it pertains to the plaintiff, will render the Minister liable for any damages that the Plaintiff may prove he has suffered as a result thereof.
- 6.2 Firstly, the Plaintiff claims general damages for the psychological shock and trauma which he claims he suffered. I find that this aspect, which includes both the issue of a determination of the existence of such damage and, if it does exist, what monetary value should be attached thereto, to be

a separate issue from the merits. To put it bluntly: the fact that the Police has wrongfully recorded a previous conviction or a pending criminal case against the Plaintiff's name, has been proven. Whether this resulted in any damages and, if so, what the extent thereof may be, must still be proven at the next portion of the trial.

- 6.3 Secondly, the Plaintiff has discovered documents reflecting numerous instances where he has been shortlisted or invited for interviews for positions which would or could have advanced his career. He was not appointed to any of these positions. He has however, during 2018, been appointed to a position with his current employer which at that time, was a promotion of his career and a stepping stone for its advancement. The Plaintiff indicated that during his interviews he was customarily asked whether he had previous convictions or criminal cases pending, to which he had (truthfully) answered in the negative. He assumed that a vetting process had revealed a discrepancy between his answers and the incorrect contents of the LCRC records. He was however never informed of any such discrepancy nor was he informed that the LCRC records were the reasons for him not being appointed to these positions. In cross-examination in particular, it was put to him that there could have been innumerable other reasons why he had not been appointed. Again, this is a matter which stands over for determination at the damages portion of the trial. The situation is no different from that customarily encountered during so-called RAF-trials: the fact that an insured driver had run over a minor pedestrian with his vehicle may render the RAF liable (the merits portion of the trial) but that liability would only extend to so much of the damages or sequelae that the Plaintiff may prove that has been suffered as a result of the negligent conduct of the insured driver. In respect of such proof (the damages portion of the trial) aspects such as pre-existing conditions or subsequent interventions may play a significant role.

6.4 Thirdly, counsel for the Minister questioned why no further enquiries had been made by the Plaintiff, himself employed by the Police, when, during or after the first interview, he must have realised that his Police records or a Police clearance certificate may play a role. Had he done so, this could have been prevented or mitigated any possible adverse effects or damages. Again, this forms part of the damages issue in the same fashion as a person claiming future medical costs of surgery which could have been prevented or mitigated, had the Plaintiff as a patient simply timeously sought preventative medical attention.

6.5 The finding of liability on the merits does not equate to a finding that actual damages had been suffered. The existence of such damages, the casual link thereof and the extent thereof, will still need to be proven.

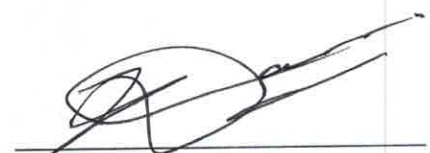
[7] Costs

I debated with counsel whether a costs order should be appropriate at this stage. One school of thought is that it should not be granted because, should the Plaintiff not succeed in proving any consequential damages, then the Minister should have never been dragged to court. On the other hand, such costs are often awarded as it is success for a Plaintiff in a series of hurdles he or she has to overcome in pursuance of a claim. In the present instance, had the Police, upon receipt of the prior demand in April 2018 in terms of the Institution of Legal Proceeding Against Certain Organs of State Act 40 of 2002, properly investigated the matter and/or conceded their error, the trial would have proceeded in a very different fashion. The same applies after the institution of the action. The plea was a bare denial. The Minister pleaded to be agnostic about each and every element of the Plaintiff's case. Having regard to the CAS and LCRC documents, this could simply not be true. Counsel for the Minister countered that "at that stage", the Minister knew very little of the details of the case. This might

be so (although that could have been remedied by the simplest access to the records, which can easily electronically have been done from the Police Headquarters Offices), but nothing had been forthcoming in the subsequent years. The Plaintiff had been forced to come to court to prove what had, by and large, turned out to common cause. I therefore find that it would be appropriate to award the Plaintiff costs in respect of this separated issue. Previously reserved costs unrelated to the merits and prior to the separation of the issues can remain reserved until the conclusion of the litigation.

[8] Order:

1. The defendant is found to be liable for whatever damages the Plaintiff may be able to prove resulted from the fact that, in respect of CAS 149/4/2011, Makhado Police Station, any record had, after 22 March 2012 reflected anything other than that the charges against the Plaintiff had been withdrawn pursuant to a finding of an inquest court.
2. The defendant shall pay the Plaintiff's costs of the hearing in respect of this (the merits) portion of the action.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 11 November 2021

Judgment delivered: 12 November 2021

APPEARANCES:

For the Plaintiff:

Adv L Kalashe

Attorneys for the Plaintiff:

Patience Chavalala Inc, Pretoria

For the Defendant:

Adv E Mapelane

Attorney for the Defendant:

State Attorney, Pretoria