

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



CASE NO: 10179/2021

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

30 January 2023

In the matter between:

PATRICK MAFANELE

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SECOND DEFENDANT

JUDGMENT

LUKHAIMANE AJ:

Introduction

- [1] This matter concerns action proceedings instituted by the plaintiff against the first and second defendants for delictual damages arising from his unlawful

arrest and detention (claim 1) and malicious prosecution (claim 2) by members of the first and second defendants.

- [2] The alleged arrest was effected by members of the South African Police Services (SAPS), the first defendant, without a warrant, on 25 June 2020 in Pretoria. It is alleged at the time of the arrest, the members concerned were all acting within the course and scope of their employment.
- [3] By agreement between the parties, pursuant to an application in terms of rule 33(4) of the Uniform Rules of Court, the trial before me was only for the merits of the claim, with the issue of quantum standing over for later determination.
- [4] As per the first defendant's initial plea, it was pleaded that:
- The plaintiff, a police officer with the rank of Constable and member of the detective unit falling under the Sunnyside cluster, Pretoria, was arrested by members of the SAPS.
 - The arrest took place on 25 June 2020 without a warrant.
 - The plaintiff was lawfully arrested in terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977, (the Act) on charges of corruption and extortion.
 - The arresting officer at the time had reasonable suspicion that the plaintiff had committed the offences of corruption and extortion.
 - Pursuant to the arrest, the plaintiff was detained and processed at Sunnyside Police and later transferred to Tembisa for further detention. He appeared in court on 26 June 2020 and was released on bail of R1 000.00.

- Thereafter the plaintiff appeared in court on several occasions until 26 November 2020 when the charges were withdrawn.

[5] It is pleaded on behalf of the second defendant that the institution of the criminal proceedings against the plaintiff was for reasonable and probable cause as the National Prosecuting Authority (NPA) had in its possession at least minimum evidence upon which the plaintiff might have been convicted. Further that, members of the NPA honestly believed the plaintiff to be guilty of an offence of corruption and extortion with which he was charged.

[6] In the amended plea, the defendants pleaded as follows:

- The defendants plead specifically that the plaintiff was lawfully arrested in terms of section 40(1)(a) of the Act for committing the offence of corruption and extortion in the presence of the police officers.

[7] Plaintiff's arrest was based on an undercover operation duly authorised in terms of the provisions of section 252A of the Act, which undercover operation was conducted after the Anti-Corruption Unit of the SAPS in Gauteng received a complaint that the plaintiff is suspected of soliciting money from the complainant in exchange of avoiding arrest and removing the complainant's fingerprints from the SAPS records.

Issues to be decided upon

[8] This court is now called upon to decide the following issues:

- The lawfulness of the arrest and detention; and
- The lawfulness of the plaintiff's prosecution and proceedings instituted against him by members of the defendants.

Onus

- [9] The first defendant bears the onus of proving the lawfulness of the arrest and detention of the plaintiff, whilst the plaintiff bears the onus in respect of the malicious prosecution.

Evidence

- [10] Plaintiff testified that he is a police officer stationed at Sunnyside, now Warrant officer. He has been with the SAPS since 1 August 2000. He was on duty on 25 June 2020. Docket 2504/2020 was booked out to him on the system. During the Covid 19 period, he had dockets of approximately 70 accused persons, some of whom were not attending court and as a result had warrants of arrest issued and stayed. Nathaniel Judas, the complainant, was one of those accused whose warrant was issued and stayed on 15 April 2020 during his first appearance for violating lockdown restrictions – and stayed again on 12 May 2020.
- [11] The plaintiff alleges that the docket as it stands is incomplete as some of his entries are missing. It was his job to pursue the complainant and, in that regard, he called the complainant regularly to advise him to go to court. The plaintiff testified that he was never given the warrant for the complainant and when the

matter was last on the roll on 20 August 2020, he was no longer the investigating officer. The plaintiff testified that he used both his landline and cell phone to contact the complainant. His last contact with the complainant was on Monday 22 June 2020.

[12] On 25 June 2020, the complainant contacted him indicating that the document proving that his matter was finalised in court was with his brother. As per agreement, the complainant called plaintiff on his way back from Silverton – they arranged to meet. Plaintiff saw that the complainant did not have the document. The plaintiff indicated that when he noticed some suspicious movement around his car, he thought a robbery was about to take place, he only relaxed when the persons identified themselves as police officers (two females and five males).

[13] He was then pulled out of the car and asked where the money was. The plaintiff indicated that he had no money. He was cuffed and heard someone utter the words “ashi, ashi re e kreile”. After the plaintiff signed for the R100 x 5 and the fact that the notes correspond with the photocopies, he was cuffed on both hands.

[14] Plaintiff testified that whilst he considered himself to be under arrest, he does not remember being warned accordingly. At the Sunnyside Police Station, he

was put in the holding cells. Plaintiff testified that he believes that his role as a shop steward for the South African Police Union (SAPU) is what precipitated the arrest. He was read his rights at the Sunnyside Police Station. His cell phone was taken as section 205 Exhibit. Thereafter plaintiff testified that he was taken to Tembisa Police Station.

[15] Plaintiff testified that he appeared in court the next day and was granted R1 000 bail. Matter was postponed to 31 July 2020 for proof of the section 252A authorisation and section 205 evidence. The matter was finally 'withdrawn on merits' in November 2020. Plaintiff testified that the complainant had disappeared, left his flat and his mobile phone was no longer available.

[16] Under cross-examination, the plaintiff conceded that he was arrested outside the complainant's flat. Although the complainant's address is on the docket, the plaintiff testified that he only knew the address after the complainant relayed it to him. The plaintiff could not explain why if the police station was only 120 metres away from the complainant's flat, he could not just ask the complainant to bring the documents proving the finalisation of his matter to the police station. The plaintiff then conceded having met the complainant at Roman's Pizza and the complainant's flat twice.

- [17] The plaintiff denied having asked the complainant for R500 so that the warrant is not executed and his fingerprints are removed from the SAPS records.
- [18] The plaintiff again suggested that his colleagues must have been behind his arrest. He conceded that he cannot say whether the R100 x 5 notes were found in his car or not, but that the discovery was after the complainant had exited his vehicle.
- [19] When confronted with the statement the complainant deposed on 24 June 2022, the plaintiff denied having made any arrangement with the complainant. The plaintiff conceded that the complainant does not have a motive to implicate him. This then is the totality of the plaintiff's evidence.

Sergeant Phineas Tshwaredi Seopa

- [20] Sergeant Seopa testified that he has been a police officer for 18 years. He is stationed at the Provincial Anticorruption Unit in Germiston. He was present on 25 June 2020 during a section 252A operation. They received a complaint and took a statement from the complainant stating that when he went to look for his brother at Sunnyside Police Station, he was arrested and the investigating officer demanded R500 saying he had a warrant for his arrest.

- [21] He took the statement on 24 June 2020. He asked Colonel Matlabo to get verbal authorisation for a section 252A as it was urgent. On 25 June 2020 he applied for the section 252A money – R500. He received the funds at about 10h00. He informed members via WhatsApp that they will meet at Sunnyside. The complainant had phoned him to say the plaintiff talked to him that morning that he will come and fetch the money. He met with the team at Sasol garage. Officers Makamu, Molepo and Mohlala were amongst those present.
- [22] He introduced the complainant to the others and searched him. After verifying that the complainant had no money on him, he gave him the R500, compared with the photocopies to confirm that they matched. They agreed with the complainant that he will signal by taking his mask off when he has given the plaintiff the cash.
- [23] The complainant called the plaintiff and informed him that the funds cleared. The complainant went to his flat whilst the team was always observing him. Plaintiff arrived in a red car. From where he was sitting in the car with Sergeant Mokatswa, he could see other members of the team. Makamu informed the team via WhatsApp that the complainant is in plaintiff's car, then sent a message that the money was taken by the plaintiff.

- [24] Him and Makamu approached plaintiff's car and Makamu informed the plaintiff that they need to search him. He could not find the money on the plaintiff. Sergeant Molepo searched the car and found the money. He testified that the plaintiff was standing, shocked and trembling. Thereafter he took out copies of the money to compare and then the plaintiff signed the copies there and then. The plaintiff was then arrested for corruption and extortion.
- [25] They drove with the plaintiff to Pretoria Central where the plaintiff retrieved Sunnyside CAS 04/2020 docket. The warrant for the complainant was not in the docket. The plaintiff was then detained in Tembisa. On 26 June 2020, the plaintiff appeared in court and was granted R1 000 bail. Seopa finalised his evidence-in-chief by stating that he knew of the section 252A authorisation as Colonel Matlabo had confirmed it to him and they opted for it instead of a warrant because of the urgency of the matter.
- [26] Under cross-examination, he indicated that he is not certain as to how the Anti-Corruption Unit received the complaint. After meeting with the complainant in Pretoria, he completed his statement in the office in Germiston. Colonel Matlabo sent a message to Captain Sithole, the coordinator for section 252A authorisation. Colonel Matlabo sent confirmation of authorisation to WhatsApp group.

[27] After the money was recovered, the plaintiff was arrested. He denied that the plaintiff was handcuffed in the one hand, indicating that plaintiff was only handcuffed by Sergeant Makamu when they were leaving for Pretoria Central Police Station. He indicated that he last saw the complainant on 25 June 2020 when he entered his flat.

[28] He finally testified that the plaintiff was detained at Tembisa because that is the police station they knew and they did not consider where he resided because visiting hours had already passed at 11am. He testified that they did not investigate the plaintiff's cell phone records ahead of his arrest because they decided on a section 252A instead.

[29] Under re-examination he clarified that although the authorisation was received via text, they refer to it as verbal authorisation and that the authorisation process forms part of the investigation.

Sergeant Ramasela Lindy Molepo

[30] Sergeant Molepo testified that she has been a police officer for 18 years. At the time of the plaintiff's arrest, she was an investigator with the Anticorruption Unit in Germiston. She received a WhatsApp message to meet at Sasol garage from Sergeant Seopa for a section 252A undercover operation. When they got there, they were briefed about the complainant. Sergeant Seopa searched the

complainant, gave him R500 and showed him the copies of the notes. It was also agreed as to how the complainant would signal that the plaintiff has taken the money.

[31] Then they proceeded as a team to the complainant's flat. She was with Sergeant Mohlala behind a wall whilst Sergeant Makamu was in front of the complainant's flat. Sergeant Makamu confirmed that the maroon Polo vehicle was the complainant's. When they received a message that plaintiff has taken the money, they approached the vehicle. Her other colleagues had already opened the driver's door and asked the complainant where the money was. Sergeant Molepo approached the complainant who informed her that the money was in the storage compartment in front of the gear. She found the money, approached Sergeant Seopa, who had the copies, and the complainant to compare the money to the copies. Once it was confirmed as a match, Sergeant Seopa sealed it.

[32] Under cross-examination, she denied that she was the one who uttered the words "ashi, ashi ..." as heard by the plaintiff. She also denied that the plaintiff was in handcuffs and forced to sign for the compared notes.

Advocate V Nemaorani

- [33] Advocate Nemaorani is the Deputy Director Public Prosecutions from 2007. From 2012, he also serves as the Coordinator for the Organised Crime Component including section 252A of the Act. He testified that he received a WhatsApp communication from Captain Sithole requesting authorisation for a section 252A, which he considered on 24 June 2020 and granted. He explained the section 252A authorisation process and indicated that if a request was urgent, an SMS or WhatsApp may be sent and in line with the guidelines, the request will be approved and confirmed later in writing. He conceded that there was a typing error on paragraph 3 of the letter dated 24 July 2020; it should have read 24 June 2020.

Captain Makamu

- [34] Captain Makamu testified that he has been a police officer for 16 years. In June 2020, he was with the Anti-Corruption Unit stationed in Germiston. On 25 June 2020, he was monitoring the movements of the complainant after he was given money by Sergeant Seopa. They had been briefed of the complaint before they left the office. He testified that Sergeant Seopa asked the complainant if he had any money on him, searched him and then handed him the R500 notes after counting it and comparing it with the copies.

- [35] He confirmed that he was present when plaintiff was arrested by Sergeant Seopa, that he was with Sergeant Mkatshwa. They had opened the bonnet of their vehicle, pretending to fix it. They observed the complainant approach red Polo vehicle of plaintiff, get inside passenger side and then coming out after approximately five minutes then removing mask. He sent the WhatsApp message to signal that the money was taken.
- [36] He ran to plaintiff's car, put hand through open driver's window, switched off the vehicle engine. He identified himself and instructed the plaintiff to get out of the car so that he can search him. When they did not find any money on the plaintiff, he requested to search car. The money was found in the ashtray/cubby hole area by Sergeant Molepo. Thereafter, he handcuffed the plaintiff.
- [37] He confirmed that the plaintiff was charged, his fingerprints taken and he appeared in court.
- [38] Under cross-examination, he confirmed that the plaintiff's telephone was taken for a section 205 investigation – information was only downloaded from it and thereafter it was booked back at Sunnyside Police Station.

Advocate Jacobson

[39] Advocate Jacobson is a Senior Public Prosecutor. On 26 June 2020 she was working at Court 16 as Manager of that Reception Court. She confirmed that the investigating officer has implemented some of the prosecutor's instructions including the section 205 which has been confirmed.

[40] She confirmed that the matter was provisionally withdrawn on 28 November 2022 to obtain the correct authorisation document from Advocate Nemaorani. The correct authorisation was received but before the matter could be referred to the DPP for further instructions, the file was taken by the Civil Manager until the week preceding the start of these proceedings. She indicated that she still believes that the plaintiff has a case to answer, hence the matter was summarised and referred to the DPP. She reiterated that court 16 is extremely busy, with between 30-65 cases a day. There were never instructions for the matter to be withdrawn and that such instructions would have been on a J15 form.

[41] Under cross-examination, she testified that she confirmed that the authorisation was from Advocate Nemaorani. She also indicated that there was nothing untoward with the plaintiff being in possession of his cell phone as they had downloaded the information for the section 205 and did not need it for mapping.

[42] This then was the totality of the evidence presented on behalf of the first and second defendants.

Applicable Law

[43] It is trite that an arrest or detention is *prima facie* wrongful. The defendant bears the *onus* of alleging and proving that an arrest or detention was lawful. When the arrest or detention is admitted the onus is on the State to prove lawfulness. That is the position in this instance.

[44] Section 40(1)(a) of the Act provides police officers with extraordinary powers of arrest. It requires that a factual situation must exist which justifies an arrest. It does not however require a reasonable suspicion which requires the application of an objective standard. However, neither good faith nor a reasonable mistake would help, i.e. absent the particular factual situation, being a crime committed, or attempted to be committed, in his presence, a police officer may not effect an arrest. At the time of the arrest, the arresting officer(s) must have personal knowledge of the conduct and facts relevant, this test being objective.¹ Therefore, the following must be established:

- The arresting officer is a peace officer;

¹ *Scheepers v Minister of Safety and Security* 2015 (1) SACR (ECG) [17] and [18]

- An offence committed or an attempt;
- The said offence or attempt must be in the peace officer's presence.

[45] In *Scheepers* (supra), it was indicated that section 40(1)(a) requires a determination of whether the facts observed by the arresting officer “as a matter of law *prima facie* establish the commission of the offence in question”. The arresting officers may also act on reasonable inferences². He may therefore consider what he observed before the arrest and the surrounding circumstances.

[46] In this matter, the common cause facts are set out above as to the plaintiff's arrest outside the complainant's flat.

[47] This is the crucial moment of arrest and it was an arrest flowing from the arresting officer's observations and the section 252A operation. It is the plaintiff's own evidence that he was outside the complainant's flat to collect documents that would indicate that the complainant's court matter has been finalised.

² Minister of Justice and Others v Tsose 1950 (3) SA 88 (T)

[48] To establish the essential factors justifying the arrest under section 40(1)(a), *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*³ finds application.

[49] Plaintiff was observed in his car, waiting for the complainant to join him. According to the evidence of the police officers who had good demeanour throughout, the complainant joined plaintiff in the car and after a few minutes, gave the police officers the agreed upon signal of removing his mask from his face to indicate that the plaintiff has taken the R500.00 from him. The officers approached the vehicle, instructed the plaintiff to get out of the vehicle and proceeded to search him. When they could not find the money on him, one of the officers approached the complainant who at that stage was a bit away from the plaintiff's vehicle. The police officer came back and searched in front of the gear where the R500 was found. This was after they had questioned the plaintiff on where the money was and he had indicated that he knows nothing of such. The plaintiff was shown the money, which he signed for on the copies as being the same notes.

[50] The plaintiff is of the view that both Sergeant Matlabo and Captain Sithole should have been called to testify. It is the finding of the court that the documentary evidence in the form of the docket and the evidence from the first

³ 2003(1) SA 11 (SCA) at 14-15

defendant's witnesses were sufficient and therefore it was unnecessary for these two officers that only got involved in the administrative facilitation of the section 252A operation to testify. No negative inference is drawn from such failure to testify.

- [51] The plaintiff could not explain why he went to the complainant's flat, which was only 150 metres from the police station, instead of demanding that the complainant brings the documents indicating that his matter was finalised to the police station. What makes this even more inexplicable, is that the plaintiff was returning to the complainant's flat for the second time that morning, when he was arrested. The plaintiff could not explain why if he was in possession of the docket, such document indicating the finalisation of the complainant's matter was not therein. The court has said the following regarding witness testimony:

‘the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story he tells are true’⁴

- [52] Given that the complainant had laid a complaint against the plaintiff and there was prior agreement in line with the section 252A operation that the complainant would give a signal by removing his mask once the plaintiff had accepted the money; once this happened and the funds were recovered from the vehicle, the police officers had reasonable grounds or suspicions that the

⁴ Santam BPK V Biddulph 2004 (5) SA 586 (SCA) PARA [10]

plaintiff had committed an offence. Whilst Sergeant Matlabo might have given the instructions to investigate, apply for a section 252A authorisation, conduct the operation and apprehend the suspect; at the point that the plaintiff was placed under arrest, there were reasonable grounds or suspicions that he had committed the offences of extortion and corruption.

[53] As for the alleged hearsay evidence by Sergeant Seopa relating to the interview with the complainant for purposes of taking down his statement on 24 June 2020, it is not necessary for the court to pronounce on this as the line of questioning was abandoned and the complainant's statement was admitted into evidence as all parties testified that his whereabouts are unknown.

[54] In the result, this court finds the arrest to have been lawfully effected in terms of section 40(1)(a) of the Act.

[55] It is unnecessary for the court to consider the plaintiff's theories as to the motives for the section 252A as plaintiff offered no evidence of a conspiracy by his superiors or those in management at SAPS because of his role as SAPU shop steward. Although plaintiff kept peppering his evidence with suggestions, conjectures and innuendos, in often long-winded answers that led him to even neglect to answer the questions asked, plaintiff offered no evidence at all. I will deal with the section 252A authorisation later.

[56] Although the complainant was not called by the first defendant to testify, the circumstances are such that his statement was available and both plaintiff and the defendants admitted that they could not get hold of the complainant from immediately after the arrest – his cellular telephone was no longer in use and he was no longer at his place of residence.

[57] Therefore, this is not a case where a complainant was readily available but not called as a witness.

[58] Plaintiff was only detained overnight for purposes of appearing in court the next day. There was nothing untoward about the period of detention nor the circumstances surrounding such detention. As per testimony of Sergeant Makamu, visiting hours were already over, therefore there was nothing untoward about detaining him at Tembisa Police Station. Section 50(1) of the Act authorises the police to bring a suspect to the police station after the arrest. If the police do not release the suspect, he must be detained until he appears in court. In this instance the evidence is that the plaintiff appeared in court the following day. Therefore, the detention was lawful.

[59] In addition to the unlawful arrest, plaintiff also has a claim for malicious prosecution. To succeed with such a claim, plaintiff must allege and prove that

(i) the defendants set the law in motion, they investigated and instituted the proceedings; (ii) the defendants acted without reasonable and probable cause; (iii) they acted with malice, and (iv) the prosecution failed.

[60] It is common cause that the criminal charges against the complainant were withdrawn on merits on 26 November 2020. Plaintiff only testified that the matter was withdrawn on merits and no one has presented any evidence to this court as to the reason why the charges were withdrawn. It is the plaintiff's case that members of the first defendant wrongfully and maliciously set the law in motion by arresting, charging and detaining him. He then further alleges that both members of the first and second defendants participated in his malicious prosecution.

[61] There was no evidence presented before this court that members of the defendants acted with malice or that they failed to perform their duties, powers and functions in good faith from the arrest, to the opening of the docket, to the court appearances. Therefore, for this court to find otherwise would be contrary to the case as pleaded by the plaintiff and against the common evidence presented before this court that the arrest of the plaintiff was preceded by an authorised section 252A operation wherein the police officers observed him committing a crime.

[62] Much was made of the section 252A authorisation process. However, both Advocate Nemaorani and Advocate Jacobson were able to explain in detail how a section 252A authorisation is granted and the circumstances under which a verbal authorisation (granted via WhatsApp) may be granted. It was also clear from Advocate Nemaorani's evidence that the formal letter for the section 252A authorisation did indeed have a typing error with reference to the date. The plaintiff, whilst alleging that this was a fabricated authorisation after the fact, could not provide any evidence in that regard. Meanwhile from the reading of the entire letter, Advocate Nemaorani's evidence appears most probable. Both Advocate Nemaorani and Advocate Jacobson were found to be credible witnesses. They spent considerable time under cross-examination meticulously explaining the processes and procedures that were followed in this matter and in their duties in general.

[63] Therefore, there is no indication on the evidence that the defendants were moved by any intention other than to have the plaintiff stand trial on the charges against him and to bring him to justice. To succeed on a claim for malicious prosecution, a plaintiff must prove all four elements listed above. The plaintiff failed in proving malice on the part of the defendants. Negligence on the part of the defendants, even gross negligence, is not sufficient.⁵ ()

⁵ Minister of Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SC) at paragraph 64

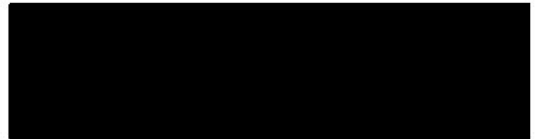
[64] The complainant lodged a complaint which was relayed to the Anti-Corruption Unit. The Anti-Corruption Unit set in motion a section 252A operation and the plaintiff was arrested, which arrest took place after observing the plaintiff's actions, receiving the signal from the complainant and recovering the money used in the operation from the plaintiff's car. Therefore, it cannot be argued that the first defendant acted with malice and without probable and reasonable cause.

[65] As regards the second defendant, both Advocate Nemaorani and Advocate Jacobson testified in great length as to the section 252A authorisation procedure and the goings-on in the Pretoria Magistrates Court once the matter was enrolled. Several instructions from the Prosecutor for further investigations are in the docket, some of which have been carried out by members of the first defendant. Advocate Jacobson testified that she is unsure as to why the matter was withdrawn on merits on 29 November 2020, as she continues to believe that the plaintiff has a case to answer, which has been interrupted by the current proceedings. The evidence before this court indicates that from the notes in the docket, there were several issues that were in the process of being investigated and outstanding when the matter was withdrawn on 29 November 2020, some of these have since been completed. As a consequence, I am left with no option but to conclude that the plaintiff has failed to discharge the onus

resting on him regarding a claim for malicious prosecution against both defendants.

Order

[66] In the circumstances, the plaintiff's claims are dismissed with costs.



**M A LUKHAIMANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Appearances:

On behalf of the applicant	:	Adv P Dube
Instructed by		Tshuketana Attorneys
On behalf of the respondent	:	Adv MS Phaswane
Instructed by		The State Attorney
Date of hearing	:	31 October 2022
Date of judgment	:	30 January 2023