

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)**

CASE NO: 411/2015

(1)	<u>REPORTABLE:</u> YES/NO
(2)	<u>OF INTEREST TO THE JUDGES:</u> YES/NO

In the matter between:

ADV AZIFANELI GEORGE MPHANAMA PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

CAPTAIN SIWELE

SECOND DEFENDANT

CONSTABLE MAKANANISE

THIRD DEFENDANT

D/CST PJ LEBESE

FOURTH DEFENDANT

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

FIFTH DEFENDANT

WILHELM SMIT

SIXTH DEFENDANT

NATIONAL PROSECUTING AUTHORITY

(SPECIALISED COMMERCIAL CRIME UNIT

SEVENTH DEFENDANT

ADV NF DOUBADA

EIGHT DEFENDANT

JUDGMENT

KGANYAGO J

[1] The plaintiff who was a senior magistrate at Dzanani magistrate court was investigated by Magistrate Commission for alleged misconduct in relation to his conduct when administering the estate of the late Mr Mabirimisa. The Anti-Corruption Unit of the South African Police Service also investigated him for alleged corrupt activities in relation to the administration of the estate of the late Mr Mabirimisa.

[2] On the 23rd February 2015 the second and third defendant met the plaintiff at his former attorneys' offices in order to serve him with criminal summons (J175). As per J175 the plaintiff was supposed to appear in court on the 27th March 2015. According to the second and third defendants, the plaintiff refused to accept the J175 and there was therefore no proper service on him. However, the second and third defendants state that despite there being no proper service, they left a copy of the J175 with the plaintiff on the instruction of the eighth defendant. On the front

page of the J175, the plaintiff wrote “noted and representation to follow,” and thereafter signed the front page and also wrote a date.

[3] The plaintiff alleges that there was a proper service as he had accepted the summons and on top of the front page wrote noted and representation to follow and thereafter also signed on the top of the front page. On the bottom corner of the second page he also appended his signature and also wrote a date. The plaintiff alleges that he was aware that he was supposed to appear in court on the 27th March 2015.

[4] The third and eighth defendants were not satisfied with the manner in which the J175 was served on the plaintiff, and decided to apply for a warrant of arrest in terms of section 43 of the Criminal Procedure Act 51 of 1977 (the CPA) on the 13th March 2015. On the 16 March 2015 the second defendant approached the sixth defendant with the application in terms of section 43 of the CPA. The sixth defendant granted the warrant of arrest on the 16th March 2015. On the same date the second, third and fourth defendants arrested the plaintiff in terms of the warrant of arrest. The plaintiff was released the same day on police bail and was requested to appear in court on the 17th March 2015. However, on the 17th March 2015, the court officials at Louis Trichardt magistrate court for some reasons did not place the matter on the roll. The plaintiff ended up making his first appearance in court on the 27th March 2015.

- [5] The plaintiff has issued summons against the defendants alleging that the issuing, authorization, signing and execution of the warrant of arrest was premature, illegal, unlawful and invalid as it was obtained with malice since the plaintiff was already served with the J175 and was warned to appear in court on the 27th March 2015. The defendants in their plea have stated that there was no proper service of the criminal summons and therefore the J175 could not be filed with the clerk of the court at Magistrate Court Louis Trichardt as there was no proof of service to justify the authorization of a warrant of arrest in case the plaintiff failed to appear in court on the 27th March 2015. With regard to the sixth defendant, they have pleaded that he issued the warrant of arrest in his official capacity as a magistrate after he was informed that the plaintiff has refused to accept the J175 on the 23rd February 2015.
- [6] The parties in their pre-trial minutes have agreed to separate the merits and quantum, and to proceed with the issue of merits first. The parties have also agreed that the plaintiff bears the duty to begin and also the general onus of proof.
- [7] The plaintiff testified and stated that currently he is a practicing advocate. On the 23rd February 2015 he was on duty as a senior magistrate. As he was driving to Thohoyandou he got a call from the second defendant informing him that he wanted to serve him with a certain document. They agreed to meet at Anton Ramaano Attorneys who are his former attorneys. At the attorneys' office he met with the second and third defendants who served him with a J175, criminal summons. He accepted the J175 and on top of the first page he wrote "noted and representation to

follow.” He also signed and wrote the date on top the page and at the bottom of the second page he signed and also wrote a date.

- [8] At the time he was served with the J175 he was heading Dzanani Magistrate Court. He was served with the J175 after the Magistrate Commission has failed to subject him to an alleged misconduct enquiry regarding the same issues he was now being criminally charged. He felt that he had enough of it, and on the 24th February 2015 he tendered his registration as a magistrate.
- [9] The charges which he was facing related to alleged corruption and fraud. As per the J175 he was supposed to appear in court on the 27th March 2015.
- [10]. On the 16th March 2015 he had booked in a Lodge around Polokwane as he was appointed as an assessor at Polokwane High Court. Around 18h00 whilst at the lodge he was arrested by the second, third and fourth defendants based on a warrant of arrest that has been authorized by the sixth defendant. When he asked them why he was arrested as he was supposed to appear in court on the 27th March 2015, he was told that the warrant has been signed by the magistrate.
- [11] He co-operated with them and was taken to Louis Trichardt Police Station where he was formally charged and released on R5000.00 police bail and required to appear in court on the 17th March 2015. After paying bail he was taken back to the lodge in Polokwane where he had booked.

- [12] On the 17th March 2015 he went to Louis Trichardt Magistrate court in order to appear in court. His matter was never enrolled to be heard. He heard the senior prosecutor Mr Mostert and regional court prosecutor Ms Hilke telling the third defendant that his matter will not be enrolled for the 17th March 2015 as he was supposed to appear in court on the 27th March 2015. Mr Mostert then told him to leave as they did not want to delay him any further. He left and went back to Polokwane to continue with his work.
- [13] On the 27th March 2015 he made his first appearance in court. He was charged together with the other two accused. He was accused number 1.
- [14] The plaintiff was cross examined and he conceded that the application to obtain his warrant of arrest was in order, but that the sixth defendant should have requested to see the J175 before he authorized the warrant. He disputed that the sixth defendant has executed his judicial officer's duties in a reasonable manner. He conceded that the sixth defendant when he authorized the warrant, he was executing his official functions. The plaintiff insisted that he had signed on the reverse side of the J175. He denied that he was rude and shouting at the second, third and eighth defendants telling them that those were junk charges, unconstitutional and that he will not attend court. When shown the original of the J175 which was not signed on the reserve side, he stated that it is for the first time he sees it and does not know where it comes from. That concluded the evidence of the plaintiff and he closed his case.

- [15] The defendants called Nomphe Frans Doubada (eighth defendant) as its first witness. He testified that he is the deputy director of public prosecutions attached to the National Director of Public Prosecutions. He was the dedicated prosecutor in the plaintiff's criminal case since there was no prosecutor in Limpopo who had the appetite to prosecute him. He guided the investigations from his office. After the investigations were finalized he found that there was a prima facie case against the plaintiff and took a decision to charge him.
- [16] The plaintiff was facing a Schedule 5 offence. Out of respect for him as a senior magistrate, he and the investigators came to an agreement that the plaintiff should be summoned to appear in court. He had also prepared an annexure containing the charges which were attached to the J175.
- [17] On the 23rd February 2015 whilst in his office in Pretoria, he was phoned by the second defendant informing him that the plaintiff was refusing to accept the J175. He instructed the second defendant to go back and leave a copy of the J175 with the plaintiff. Later he received a call from the second defendant telling him the plaintiff wanted to talk to him. The plaintiff told him that the charges were unconstitutional and that he should have approached him first to hear his side of the story since he was not being charged for stealing a goat. He further told him that the J175 was based on junk charges and that he will not appear in court on the 27th March 2015. He told the plaintiff that if he was having issues with the charges he can make a representation to the prosecutor at the DPP's office and also fax him (witness) a copy of the representation. He gave the plaintiff his direct fax number. The plaintiff

told him that he will make the representation the following day on the 24th February 2015.

[18] The plaintiff did not make any representation, and the fact that the J175 was not properly served, and that the 27th March 2015 was approaching, as a team they decided to apply for a warrant of arrest against the plaintiff. On the 13th March 2015 the third defendant brought to him the application for a warrant of arrest (J50), and he signed it. He also prepared the charges. After signing the J50 he gave it to the second defendant together with the charges for their further attention.

[19] The plaintiff was supposed to make his first appearance in court on the 17th March 2015, however, the matter was not placed on the roll for that date. The plaintiff and other co-accused made their first appearance in court on the 27th March 2015. On arrival in court on the 27th March 2015, he found that again the matter was not placed on the roll. He went to the senior prosecutor and regional court prosecutor and found that they were hostile towards him. They told him that they did not want to be involved in the matter as they did not want to lose their pension funds. He had to go to the clerk of the court and prepare a charge sheet (J15). The plaintiff and the other co-accused were released on bail. He is the one who prosecuted the matter in the High Court up to its finality.

[20] The witness was cross examined and he stated that on the 23rd February 2015 when he talked to the plaintiff on the cellphone, the plaintiff was abusive and used vulgar words towards him. He also stated that he did not know of any reason to fabricate a

story against the plaintiff. He stated that the reason why he signed the J50 was that the plaintiff has said that he will not accept junk charges, has refused to accept the J175 and that his main reason was to secure the plaintiff's attendance in court. He stated that the J175 was not properly served, as page 2 of the J175 was supposed to have been completed by the investigating officer but was not completed, and that it will only be completed after service has been effected. He further stated that the plaintiff did not sign page 2 of the J175 where it state "signature of recipient".

[21] The defendants called Magezi Freddy Siwele as their second witness. He testified that during 2015, he was attached to the hawks in Polokwane as commander and the third defendant was reporting to him. Normally it is the duty of the investigating officer to serve the J175. In this case as the J175 was supposed to be served on a senior magistrate his major general requested him to effect the service of the J175 on the plaintiff.

[22] He and the third defendant arranged with the plaintiff to meet with him at his attorneys' offices in Thohoyandou. They met in the boardroom of Anton Ramaano's office. The plaintiff was not happy with being served with J175. He asked how could he be served with the J175 before they could hear his side of the story. He was not co-operating and he told them that he was not going to accept receipt of the J175 as those were junk charges. He was furious. There was also a confrontation between the plaintiff and the third defendant. Seeing that the situation was getting out of hand, he called the third defendant and told him that they must leave. They left without serving the J175.

[23] As they were in the parking lot, he phoned the eighth defendant to inform him that the plaintiff had refused to accept the J175. The eighth defendant advised them to go back and leave a copy of the J175 with the plaintiff. The plaintiff requested to speak to the eighth defendant. He (witness) phoned the eighth defendant with his cellphone and gave it to the plaintiff to talk to him. As they were talking, he could hear the plaintiff telling the eighth defendant that he is not going to receive the J175 as they decided to charge him without hearing his side of the story. He was also threatening to sue the State if they proceeded with the charges against him. At the end there was an agreement that he will make a representation. Then the plaintiff wrote on the first page of the J175 at the top "noted and representation to follow". They took their copy and left the plaintiff with his copy. The page of the J175 that was written "noted and representation to follow", was not signed where he was supposed to acknowledge receipt of the J175.

[24] One day whilst sitting in his office he received a telephone call from Anthon Raamano informing him that the plaintiff will not attend court on the 27th March 2015 as he was sitting as an assessor in the Polokwane High Court. He gave this information to the eighth defendant. The eighth defendant requested him to come to his office together with the docket. He sent the third defendant to the eighth defendant's office.

[25] When the third defendant came back from the eighth defendant, he (third defendant) gave him the J50 application. He took the J50 application to Thohoyandou Magistrate Court to be authorized. At Thohoyandou Magistrate Court he was

directed to the sixth defendant. The sixth defendant requested him to file an affidavit detailing the circumstances which led to them applying for a warrant of arrest against the plaintiff. He did that and the sixth defendant authorized the warrant of arrest against the plaintiff on the 16th March 2015.

[26] On the same date on which the warrant was authorized, he, the third and fourth defendants executed the warrant. The plaintiff was arrested at a lodge in Polokwane. From there he was taken to Louis Trichardt Police station where he was charged and released on police bail of R5000-00. He was informed to appear in court on the 17th March 2015. After that he was taken back to the lodge where he was arrested.

[27] The witness was cross examined and he stated that page 2 of the J175 is completed only after the suspect had acknowledged receipt of the J175. He denied that by writing the words “noted and representation to follow” there was sufficient compliance with acknowledgment of receipt of the J175.

[28] Rudzani Ephraim Makhananisa testified as the defendants third witness. He testified that he was the investigating officer in the criminal case against the plaintiff. After his investigations were finalized he handed over the docket to the eighth defendant. The eighth defendant told him that since the plaintiff was a senior magistrate, they will have to secure his attendance in court through the J175. He and the second defendant arranged to meet with the plaintiff at his attorneys’ office in Thohoyandou in order to effect the service of the J175.

- [29] They met the plaintiff together with his attorney Anton Ramaano at the attorneys' office. The second defendant explained to the plaintiff the purpose of their visit. The plaintiffs started swearing at them telling them that he will not appear in court and that those were junk charges and were also unconstitutional. He accused them of doing things behind his back and why he was interviewing witnesses without consulting him. The plaintiff told him that he (witness) was having a vendetta against him. He told the plaintiff that he was having nothing against him and did not need his permission to interview the witnesses.
- [30] The second defendant intervened and told them that they are not there to fight but to serve the J175. He again told them that those were junk charges. They could not serve the plaintiff with the J175 and the second defendant called him and they went out of the boardroom. As they were outside, the second defendant phoned the eighth defendant and reported to him that they were unable to serve the J175. The eighth defendant told them to go back and leave a copy of the J175 with the plaintiff. They went back and gave the plaintiff a copy of the J175. After giving the plaintiff his copy, the second defendant phoned the eighth defendant on his cell phone and thereafter gave it to the plaintiff to talk to the eighth defendant.
- [31] When the plaintiff was talking to the eighth defendant he was shouting at him and telling him that he will not sign for the J175, and that those were junk charges and unconstitutional. He further told the eighth defendant that he was unprofessional and will not appear in court. He then saw the plaintiff writing something on top of the first page of the J175. He was not present when the plaintiff wrote a note that appears at

the bottom of the next page. The plaintiff did not sign where he was supposed to sign the J175 as a recipient. They then took their copy and left.

[32] After the plaintiff has failed to make representation to the DPP, he took the docket to the eighth defendant in Pretoria. Whilst in Pretoria he completed the J50 application and gave it to the eighth defendant for signing. After the J50 was signed by the eighth defendant, he came with it back to Polokwane and handed it to the second defendant for his further attention. He did not go with the second defendant to Thohoyandou to apply for the authorization of the warrant of arrest against the plaintiff.

[33] After the second defendant had obtained the warrant of arrest, he came back to Polokwane and asked him and the fourth defendant to accompany him to a lodge in Polokwane where the plaintiff has booked in. The three of them went to that lodge and arrested the plaintiff. After the plaintiff was arrested he was taken to Louis Trichardt police station where he formally charged him. After he was charged, they released the plaintiff on R5000-00 police bail and took him back to the lodge where he was arrested. The plaintiff was informed to appear in court on the 17th March 2015.

[34] On the 17th March 2015 he went to Louis Trichardt magistrate court where he found the plaintiff together with the prosecutor Ms Hilke van Rensburg. Ms Hilke was negative towards him, and she refused to place the matter on the roll saying the charges were unconstitutional. He and constable Mongwane went to the court

manager for assistance. The court manager told them that he was willing to assist them, but that if the prosecutor was refusing to enroll the matter, there was nothing he could do. The plaintiff was shouting at them, telling them that they were unprofessional. They then left and contacted the eighth defendant in order to update him about what transpired at court.

[35] The witness was cross examined and was asked why they did not complete page 2 of the J175 after the plaintiff had made notes on the front page. His answer was that they could not have completed page 2 as the J175 was not properly signed by the plaintiff.

[36] Willem Jacobus Smith (sixth defendant) was called as the defendants fourth and last witness. He testified that on the 16th March 2015 he was an additional magistrate at Thohoyandou Magistrate Court. He is the one who authorized the warrant of arrest against the plaintiff.

[37] On the 16th March 2015 he was approached by the second defendant who wanted to apply for a warrant of arrest against the plaintiff. The second defendant informed him that although the plaintiff was facing a Schedule 5 offence, initially they wanted to secure his attendance in court through the J175 but had refused to accept it. He then requested the second defendant to prepare an affidavit explaining the circumstances relating to the J175. After the second defendant had prepared an affidavit, he perused the it and found the J50 application to be in compliance with section 43 of the CPA. He then authorized the warrant of arrest against the plaintiff.

He told the second defendant to also go and serve the other two suspects with the J175 before he could apply for a warrant of arrest against them. The witness further stated that it was not necessary for him to inspect the J175 which was supposed to have been served on the plaintiff as the second defendant had deposed an affidavit to that effect. The second defendant never came back to him in relation to obtaining warrants of arrest against the other two suspects.

[38] The witness was cross examined and nothing new came out. That concluded the evidence of the defendants. Both parties submitted their closing address.

[39] It is trite that a person's liberty, personality and dignity are usually compromised by wrongful and malicious arrest. An arrest or detention is prima facie wrongful and unlawful and it is for the defendant to allege and prove the lawfulness of the arrest or detention once admitted (See **Lombo v African National Congress 2002(5) SA 668 (SCA)**).

[40] In the case at hand the plaintiff was arrested based on a warrant of arrest that was authorized by the sixth defendant. It is trite that an arrest pursuant to a warrant is prima facie lawful. The onus of proving the wrongfulness of the arrest rest on the plaintiff by showing that the warrant was irregular.

[41] The plaintiff was facing a Schedule 5 offence, which under normal circumstances he should have been arrested and had to show that the interest of justice permits his release on bail. However, in this case, the eighth defendant took into consideration that the plaintiff was a senior magistrate, and that it will make no harm if his

attendance in court was secured by way of J175. As per the J175, the plaintiff was supposed to appear in court on the 27th March 2015. The defendant alleges that there was no proper service of the J175 hence they opted to apply for a warrant of arrest in order to secure the attendance of the plaintiff in court. On the other hand, the plaintiff alleges that there was proper service of the J175 and he was aware of his appearance date, and that the defendant had prematurely applied for the warrant of arrest.

[42] The first question which this court must determine is whether the J175 was properly served on the plaintiff. The purpose of having a properly served J175 is to enable the court to issue a warrant of arrest in case the accused fails to appear in court on the scheduled date. In **Minister of Police v Goldschagg 1981 (1) SA 37 (A)** the court held that a magistrate is entitled to satisfy himself on the basis of the return of service of the summons that the respondent had been properly summoned before exercising his discretion in issuing a warrant for the arrest of the respondent on his non-appearance. It therefore follows that if there was no proper service of the J175, a warrant of arrest will not be authorized against an accused who fails to appear in court despite being served with the J175.

[43] For a properly served J175, the recipient must sign on the second page on the space provided and also insert his/her full names, thereafter the empowered officer must sign on the space provided and also state his /her full names and capacity. The time, date and place where the J175 was served must be inserted. The person who served the J175 must also complete a certificate stating the manner of service,

whether it was personal service or another form of service. In this case page 2 of the J175 is blank, and all these prerequisites I have referred above have not been inserted.

[44] The plaintiff on the front page of the J175 has written “noted representation to follow” and thereafter signed and also put a date. He also signed on the second page at the bottom and also inserted a date. The question is whether this was sufficient to be regarded as proper service. In my view this has some short comings. Firstly, the plaintiff has not inserted his full names. Nobody will know whose signature appears on that document. Secondly, he had failed to insert the place where it was served, thirdly he had failed to insert the time it was served, fourthly, the names of the officer who served it has not been inserted, and fifthly, the method of service has not been inserted.

[45] The plaintiff is not just an ordinary lay person. On that particular date, he was still a senior magistrate who had issued several warrants of arrest for accused who failed to appear in court despite been served with the J175. He therefore knew what was required to have a proper service of the J175. With all these shortcomings that I have listed, it was going to be difficult is not impossible to authorize a warrant of arrest against the plaintiff had he failed to appear in court on the 27th March 2015. I therefore agree with counsel for the defendant that the J175 was not properly served on the plaintiff.

[46] Since there was no proper service of the J175, the defendants were therefore justified in resorting to other methods of securing the plaintiff's attendance in court. In this case they opted for a warrant of arrest. The manner in which the warrant of arrest was obtained against the plaintiff cannot be faulted. The plaintiff has failed to show any irregularity in the manner in which the warrant was obtained. What he is complaining about is what he would have done had the application for authorization of the warrant was brought before him. Failure to do what he would have done does not amount to an irregularity. The sixth defendant was guided by section 43 of the CPA and was satisfied that the application met the prerequisites as stated in that section. Even the plaintiff himself had conceded that the application itself cannot be faulted, but that the sixth defendant should have gone an extra mile of checking the J175 itself. The sixth defendant testified that he was satisfied with the affidavit that was deposed by the second defendant as it covered everything. The sixth defendant cannot be faulted for his approach and not following what the plaintiff would have done. This court is therefore satisfied that the sixth defendant has lawfully authorized the warrant of arrest against the plaintiff.

[47] After the plaintiff was arrested based on the warrant of arrest, he was well aware that he was facing Schedule 5 offences. Despite the plaintiff having not co-operated with the second and third defendants on their first encounter with him, they proceeded to give him a police bail whilst they were not supposed to have done so. If they had malicious intentions, they would have locked him up and let him apply for bail in court. It is clear that their interest was to secure his attendance in court and nothing else. They were not influenced by what had transpired on their first

encounter with the plaintiff. The arrest of the plaintiff on the 16th March 2015 was based on the warrant of arrest that was lawful. It therefore follows that the plaintiff's action stands to be dismissed.

[48] In the result I make the following order

48.1 The plaintiff's action is dismissed with costs.

MF KGANYAGO J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

Appearances

For the Plaintiff	: Adv EK Matlou
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Date of hearing	: 28th February 2020
Date of Judgment	: 13th May 2020

