IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17132/15

In the matter between

SANDILE KHUMALO PLAINTIFF

AND

MINISTER OF POLICE 1ST DEFENDANT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND DEFENDANT

JUDGMENT

THULARE AJ

[1] Plaintiff's action against the defendants is for unlawful arrest, subsequent detention and malicious prosecution. The defendants denied the unlawfulness of the arrest and detention and denied that there was no reasonable and probable cause to institute the prosecution. The merits and quantum were separated and the trial proceeded for the determination of liability on the merits only.

[2] On 21 February 2014 at around 16H00 Mboneni Andrew Sifuba reported a crime to the SAPS in Plettenberg Bay. He had been stationed as a Security Guard by Prime Security at Checkers at around 01H50 that morning. After a routine patrol and whilst around the steps next to the Coffee shop, he heard a banging sound and went to inspect. He saw four men and one female running up the stairs around Kodak store. He noticed that one of the males was big or fat wearing a pink cap and the female was wearing a tracksuit with two pink stripes and was about 1,6m. The female was carrying a black bag and the group got away. He went back to Kodak store and noticed that the door was forced open and broken, and he saw the broken glasses. He could see that some items had been removed from the store but could not say what it was. He reported this to his company immediately. A docket was opened and allocated CAS 277/02/2014 on the police case management system. His statement was filed as A1. The docket was handed in as part of the record of these proceedings as an exhibit bundle. The list of the stolen items was subsequently received by the police from the Kodak store Manager and amounted to a loss of R182 070-00.

[3] On 7 March 2014 the plaintiff walked on Kodak shop to have photos developed. He handed the necessaries over, paid for the development and waited. The police arrived at the shop. He could see the eye and head gestures by the shop assistants amongst themselves and to the police and he was arrested. He was told about a video footage which formed the basis of his arrest and charges of housebreaking with intent to steal and theft against him. He denied the allegations and told the police that it was his first visit in Plettenberg Bay. He appeared before court in the district court. He was about to proceed with a bail

application when he was informed that there were further charges to be put against him and he abandoned his bail application. His case was transferred to the Regional Court. The charges against him were withdrawn after he spent almost a year in prison.

[4] Vincent Windvogel was an employee of Kodak store at the time that the plaintiff was arrested. In his testimony before this court, he had no recollection of what was said or done on 7 March 2014. He could not recall seeing the plaintiff. He could not say that the person who appeared on the photos provided to this court as exhibits was the plaintiff. There had been a housebreaking at the store and it was captured by video cameras. The store manager had downloaded that footage onto Windvogel's phone.

[5] According to the affidavit he deposed to the police a day after the arrest, filed as A4 in the docket, he is the one who caused his colleague, Henie, to call the police to the store on 7 March 2014. This was the day the plaintiff was arrested. In that affidavit, he had said that he was with two of his colleagues inside the Kodak store, one of which was Hennie. He saw three men inside the store and had recognized two of them as those captured on the video footage during the housebreaking and theft. He had another look at the video on his phone and saw that the two men in the store were the same persons as those on the video. It was on that basis that he caused that the police were called and the plaintiff was arrested. He had identified the plaintiff as one of the persons who was on the video footage that captured the housebreaking and theft. Plaintiff was the one, on the video footage, who first tried to force the door open. If he saw the person who was arrested again he would be able to recognize him.

[6] John Nomdoe was a detective warrant officer in the South African Police Service stationed in Plettenberg Bay. He received the call and drove to Kodal store. Windvogel pointed out the plaintiff to him and reported that the plaintiff was one of those who broke into the shop. Windvogel also showed him photos on his

phone and he could see that the plaintiff was identical to the person on the photos on Windvogel's phone. He arrested the plaintiff for the housebreaking and theft. There were other photos which he saw at the shop, which were enlarged photos of those on Windvogel's phone. Windvogel was with two of his colleagues who worked inside the store.

[7] Nomdoe recognized the plaintiff by his physical features being his built. These features were that he was tall, slender with long legs, small ears in comparison to how tall he is, the shape of his head and slightly sharp nose. He made the comparison on a combination of all the physical features and not one striking feature. Nomdoe knew that there was video footage but did not view it.

[8] The plaintiff wanted to make a call from a Samsung phone. Nomdoe prevented him from doing so, and confiscated the phone. Nomdoe asked the plaintiff as to that phone's ownership. The plaintiff said it was his. Upon circulation at the police station, Nomdoe determined that the cellphone was stolen from Oudsthoorn and reported and CAS 69/11/2013. Nomdoe confiscated the phone and added a further charge of unlawful possession of stolen property against the plaintiff. The background check of the plaintiff on the criminal record system indicated about ten pending cases with four having warrants of arrest issued for failure to attend court.

[9] Henriette Breedt was the prosecutor who dealt with the matter on the first appearance in Plettenberg Bay. There was a *prima facie* case against the plaintiff. There was evidence under oath, that an offence had been committed. There was evidence under oath by Nomdoe and Windvogel linking the plaintiff to the commission of the offence. There was evidence under oath there was a video available as evidence on the question of the identity of the plaintiff. The plaintiff had previous convictions and it was a schedule 5 offence. She opposed the plaintiff being granted bail. The matter was transferred to Knysna for a formal bail

application when the plaintiff indicated that he wanted to bring a formal bail application.

[10] The contents of the docket and the charge sheets were admitted into the record by agreement between the parties. From a reading of the docket, there was outstanding evidence in that the entries by the investigating officer and the Detective Branch Commander on the C part of the docket, which is the investigation diary, indicated that the Local Criminal Record Centre report was outstanding. In other entries, especially on the one dated 10 March 2014, the impression left by the Branch Commander's entry, which reads that "fingerprints results outstanding", created an impression that there were fingerprints lifted from the scene of the housebreaking and theft.

[11] The plaintiff made his first appearance on 10 March 2014 in Plettenberg Bay. Breedt argued for the further investigation and further detention of the plaintiff pending investigation and trial. She only dealt with the matter when it was in Plettenberg Bay. The matter was moved from Plettenberg Bay to Knysna on the same day of first appearance to enable the plaintiff to proceed with his bail application. At Knysna the matter was postponed to 20 March 2014 for the formal bail application. The plaintiff abandoned his bail application on 20 March 2014 when he learnt about further charges intended to be brought against him. The matter was on the same date of abandonment referred back to Plettenberg Bay where it was postponed to 5 May 2014 for further investigation. On 5 May 2014 Breedt argued for the postponement of the matter to 6 June 2014 for a Regional Court date. That day, 5 May 2014, was the last day she had the docket with her. She only dealt with the matter until 6 June 2014 when the matter was postponed for the intake into the Regional Court to 16 July 2014.

[12] From 16 July 2014 to 17 July 2014, when the matter was ultimately transferred to the Regional Court for appearance on 14 August 2014 different prosecutors dealt with the matter. There is no entry on the docket which indicate that Noyi, who

prosecuted on 16 July 2014 or Goloda, who prosecuted on 17 July 2014 ever had the docket at any stage. Breedt testified that she did not have the docket on 6 June 2014. The charge sheet of 16 July 2014 recorded that Noyi addressed the magistrate and told him that there is no Regional Court date available. The docket could not be traced and that was the reason for the request for the postponement. It means Noyi did not have the docket that day. There is no indication that Goloda had the docket either. If they had it, there is no entry of their industry on the investigation diary.

[13] Lawrence Ntlabati was the detective sergeant in the SAPS who investigated the theft at Vivido shop in Plettenberg Bay, the second docket. Sophie Spies had done stock control on the morning of 01 November 2013 in the shop. In the afternoon she had attended to three unknown black men who had shown interest in some jewellery. It was only after they had left the shop that she had noticed that three diamond rings were stolen. On checking the video footage, it was discovered that the rings were removed whilst she was distracted during her interaction with the men.

[14] Ntlabati received the video footage from what the police call the “war room” on 17 March 2014. He was viewing the pictures when Nomdoe, his colleague in the detective unit who also saw the pictures, told him that the person matching the tall guy in the photos was in prison. Nomdoe was referring to the plaintiff. Ntlabati went to prison and identified the plaintiff as the person on the photo. It was the shape of the plaintiff’s head, the ears which are smaller than an average person’s ears, his short sharp nose, his big hands, the area between his waist and knees, his complexion, his height and his long legs. He conceded that the plaintiff’s nose was not as sharp as the nose of the person on the photos on which he relied. The video footage reflected an incorrect date. The Vivido case was added as an additional charge to the charge that Nomdoe was already investigating against the plaintiff. The investigating officer himself, who is the person linking the

plaintiff to the crime through a photograph, conceded the differences of the person on the photo and the person of the plaintiff.

[15] The first page of the record of proceedings before the Regional Magistrate, MP Fourie, went missing. Be it as it may, the plaintiff made his first appearance before the Regional Magistrate on 14 August 2014 according to the charge sheet. It is unknown what the magistrate was told. The available record indicated that the plaintiff appeared on 9 September 2014 and the matter was postponed to 25 September 2014 by agreement and the further detention of the accused was ordered. Strangely, the magistrate recorded that bail was formally refused. It is not clear who told the magistrate this simple untruth.

[16] On 25 September 2014, the Regional Court Prosecutor, J Erasmus, told the court that the fingerprints were lifted and that the video material was available. The matter was postponed to 26 January 2015 for further investigation with possible trial dates indicated as 3,11 and 12 February 2015. On 26 January the matter was postponed to the next day for the docket and the investigating officer. On 27 January 2015 the prosecutor, K Barnard, informed the court that she had called the investigating officer who indicated that he had arranged for the video material and that the Prosecution would strive to avail it the following week, and further that they would keep contact with the defence including with the fingerprints evidence. The matter was postponed to 3, 11 and 12 February 2015 for trial. On 3 February 2015 the charges against the accused were withdrawn.

[17] Following the decision of the prosecutors, the matter was transferred to Regional 1, George for appearance on 14 August 2014 for trial. Indications on records titled “Regional Court Notice, George” dated 26 August 2014 are that the matter was on that day postponed for follow-up work and set down for 25 September 2014 as a provisional trial date. By 9 September 2014 the prosecutors were still aware that the fingerprint reports and the report from the war room were outstanding. They were aware that the investigation was not complete. Be it as it

may, the regional court prosecutors set the matter down for trial for 3 February 2015. By 26 January 2015 they still did not have the copies of the video footage and the photo albums. What is worse, is that the evidence of Nomdoe and Ntlabati, the two investigating officers, was that the last time they heard of the matters and had the dockets, was when they submitted the dockets to Breedt in the district court in April 2014. The next time they both heard anything about the case or saw any instructions on the docket for purposes of investigation was after the cases were withdrawn in March 2015.

[18] Julian Le Roux is the Regional Court Co-ordinating Prosecutor in George. He told the court that a docket and a copy of the charge sheet would be sent from the district court to the Regional Court Prosecutor when the investigation is complete. If according to the Regional Court Prosecutors the investigation is incomplete, the necessary entries are made in the investigation diary and the docket is sent back to the investigation officer. If the investigation is complete, the matter is enrolled on the regional court roll. The plaintiff's case was allocated a date on the regional court roll on 14 August 2014.

[19] The docket was kept by the prosecutors for safe keeping, under his control and a covering letter was sent to the investigating officer with instructions from the prosecutor after each appearance. He kept the docket because there would be nothing more for the investigating officer to do because the investigation would be complete. This explains why there would be no instructions in the investigation diary. He received both dockets complete with still photos relating to both charges. The evidence according to him was sufficient. He did not see the plaintiff at the time that he screened the docket.

[20] Barnard called him to discuss the matter with him on the trial date in March 2015. It was decided to provisionally withdraw the case against the plaintiff. The investigation of the matter was interrupted by the civil claim. There was no information or instruction in the investigation diary between 28 April 2014 and 31

March 2015 due to the fact that the docket was in his possession. Any instructions from the prosecutor to the investigating officer would have been recorded on a covering letter. The first time that he became aware of the existence of the other two witnesses who were in the Kodak shop at the time of plaintiff's arrest was when Barnard informed him on 3 February 2015. If he had become aware earlier, he would have requested their statements.

[21] The investigation diary of the housebreaking and theft charge makes a telling reading. The still photos of the break-in were made and were handed to the investigating officer on 21 February 2014 and were filed by him in the docket. Of all the photos there is only once close-up photo of the person the State alleged was the plaintiff. The photo itself is not clear enough. In his entry of same date the investigating officer already mentions that the LCRC report was outstanding with reference to fingerprints lifted on the scene, and that the CD of the video footage of the break-in would be sent to what the SAPS call the "war room" in Cape Town. The officer commanding detectives also made these observations in his note to the Public Prosecutor before the first appearance of the plaintiff. In fact, it is Captain Klein who on that date, 10 March 2014, suggested to the investigating officer some investigation into the possibility of holding a formal identity parade to determine if the security officer may identify the plaintiff as one of those involved in the crime.

[22] The video footage was given to the war room on 17 April 2014. According to the SAPS, this was to help in the development of the photos to enhance identification of the suspects through the photos. The results of the fingerprints as well as the photos from the war room on the video footage were not yet received back from the war room when the investigating officer, Nomdoe, last saw the docket when it was submitted to the public prosecutors on 28 April 2014.

[23] The next entry thereafter was the entry of 31 March 2015 when a prosecutor gave instructions to him to guide the investigation and it reads:

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(1) Were any fingerprints lifted on the scene and compared?

(2) There were two colleagues in the shop who assisted A1 on the day that the accused was apprehended, please obtain their statements.

(3) After above queries had been complied with please send docket back for decision.

Postea: Matter was prov. Withdrawn."

[24] In *Minister of Safety and Security v Lincoln* (Case No 682/19) [2020] ZASCA 59 (5 June 2020] it was said at para 20:

" … In order to succeed in a claim for malicious prosecution a plaintiff must establish that:

(i) The defendant:

(a) Set the law in motion (instituted or instigated the proceedings);

(b) Acted without reasonable and probable cause; and

(c) Acted with malice (or *animo injuriandi);* and

(ii) That the prosecution failed."

[25] The police did not do anything more than to investigate the matter and compile the evidence. Thereafter the police left it to the prosecutors to act on the prosecutors' own judgment. The exercise of the discretion by the Prosecutors and their decision to institute the criminal prosecution of the plaintiff, in both the District and the Regional Courts, was the decision of the prosecutors alone. It was for the prosecutors to assess all the material before them in the dockets and allow themselves to be led thereby in their ultimate decision. There is no evidence that Nomdoe or Nhlabati actively sought to persuade the Prosecutors to prosecute the plaintiff. I am not persuaded that there is a case against the Minister of Police. In my view, the plaintiff had not *prima facie* established the absence of reasonable and probable cause for the arrest and detention by members of the SAPS. Both Nomdoe and Nhlabati were peace officers, who entertained a suspicion that the plaintiff committed an offence and the suspicion

was based on reasonable grounds [*Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) .

[26] At para 45 of the *Lincoln* judgment it was said:

"… Objectively reasonable and probable cause can only be gleaned from an analysis of the contents of the dockets. It involved the weighing up of the evidence favourable to Lincoln against that incriminating him and testing the averments contained therein against the objectively established facts and the real evidence contained in the docket."

The dockets were discovered and used in the trial, and the court was able to listen to the prosecutors identifying the evidence therein contained which justified their decisions. The court was able to consider the dockets as a whole and obtained a full picture of what happened for purposes of its assessment.

[27] The court has to assess whether the prosecutors, objectively viewed, had reasonable grounds to believe that a prosecution of the plaintiff was justified. In my view, Breedt was the only effective prosecutor in this case. She read the docket, considered the law, and made a decision on the matter, to wit, further investigation. At the time, the fingerprints and the war room results were outstanding. Until the decision by the Regional Court Prosecutors for the remand of the matter to 16 July 2014 for the intake of the matter in the Regional Court, her decision to postpone for further investigation and to argue for the further detention of the plaintiff and his prosecution was sound.

[28] There is no indication and no evidence before me that Noyi or Goloda had the docket or even read it. It seems to me that the two were legally qualified, duly delegated information transmitters or super-graced messengers wearing gold-embroidered National Prosecuting Authority black gowns. The power to decide was taken away from them by the management systems of the National Prosecuting Authority which were in place in Knysna and George. Their primary duty had been reduced to be to parrot before magistrates what prosecutors in offices said. They did not read the docket, consider the law or make any decision

on the matter involving the plaintiff, yet they appeared before a magistrate under the pretext that they were public prosecutors and addressed the magistrate as such. The DPP is silent on these issues.

[29] Since Nomdoe submitted the docket on 28 April 2014, the dockets had always been with the prosecutors and were never returned to the investigating officers. The investigating officer, Nomdoe, never had any guidance on the investigation of the matter from the prosecutors since the docket was sent to court in April 2014 until he received it back after the charges were withdrawn on 15 March 2015. In fact, sad as it may sound, Nomdoe received better guidance from the senior management of the SAPS on the investigation of the matter, than from the Regional Court Prosecutors in George.

[30] If Le Roux is to be believed, the plaintiff's matter would not, by the Regional Courts Prosecutors of George's own alleged standards, been placed on the Regional Court roll. In my view, had any of the Regional Court Prosecutors, including Le Roux, read the docket when it was submitted for their decision by Breedt after 5 May 2014, they would have known that the investigation was not complete and that the matter was not ready for trial. Paragraph 5 of Windvogel's affidavit reads:

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Ek het toe vir een van my kollegas naamlik Henie ingelig om die polisie te skakel en ek het toe die ander se foto's gehou tot W/O Nomdoe opgedaag het."

[31] For Le Roux to suggest that the Regional Court Prosecutors were not aware, until 3 February 2015, that Windvogel was with colleagues in the shop when the plaintiff was arrested, was simply untrue unless they did not read the docket. In my view, it is only a person who did not read the docket before 3 February 2015 who can lay claim to that excuse. Le Roux's testimony was that had he been aware, he would have sought that those statements be obtained. The inescapable conclusion is that he and the Prosecutor who appeared in court did

not read Windvogel's statement. They also did not read the investigation diary, for they would have been aware that the LCRC report on the fingerprints were outstanding and that the results of the video footage from the "war room" were also outstanding.

[32] Against this background, it was irrational for Le Roux or the Prosecutor who appeared in court to conclude that the investigation was complete and that the matter was ready for trial as at 16 July 2014. The photo relied upon which was in the docket at the time was not clear. Be it as it may, the picture was visible sufficient enough for a reasonable prosecutor to observe that the shoulders, ear lobes, nose and the hairline of the person on the picture did not match that of the plaintiff who stood in the dock. Where reliance was placed on the photograph, as in this instance, the facts upon which Windvogel relied to conclude that it was the plaintiff depicted, should lead a reasonable observer of the photograph to the same conclusion.

[33] The person on the picture had broader shoulders and his earlobes were bigger, longer and more pointed at the top- end than those of the plaintiff. The person on the picture had a long pointed nose whilst that of the plaintiff is broader and flatter. The person on the picture's hairline starts far later on his forehead than the plaintiff's. Sitting with the picture before you and looking at the plaintiff, one finds it difficult to understand how a prosecutor would conclude that it was evidence of identity of the plaintiff sufficient to put the plaintiff on trial. The Regional Court Prosecutors in George, as regards the photos, if they ever viewed them, acted robot-like. They acted purely on the strength of the existence of the photos without applying their deemed independent mind thereto. I agree with the police management in their instructions to Nomdoe that this is one matter where an identity parade was necessary as regards the security officer who was on duty at the time of the break-in.

[34] In *Minister for Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA) at para 63-64 it was said:

"[63] Animus injuriandi includes not only the intention to injure, but also consciousness of wrongfulness:

'In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus,* namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of animus injuriandi.'

[64]The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice."

[35] The Prosecutor(s) who appeared in court before the District Court on 16 and 17 July 2014 and in the Regional Court between 14 August 2014 and 3 March 2015 were identified. They were inexplicably not called to testify in support of the DPP's case. There was no suggestion that any of them were not available to testify. The inference that they would not support the DPP's case is justified. There was no reason for the prosecutors not to ensure that no enrollment in the Regional Court for trial happened until there was reliable and credible evidence found to support the identity of the plaintiff as the perpetrator of the crime.

[36] The time has arrived for the DPP to trust Prosecutors who appear before magistrates in the courts. They must be returned from well-decorated glorified messengers to duly delegated legal professionals with the authority of the State

to read dockets, apply their mind thereto against the background of the applicable law, and decide on such matters. Office-based Managers should also return to their space which includes to train and guide, assess work-performance, promote service standards and quality control, enhance effective management and promotion of effective utilization of resources and other related leadership duties. Accused persons languishing in jail for long periods of time on matters before the magistrates courts in particular, and the nation of the Republic, deserve that.

[37] On 17 July 2014, when the matter was postponed to 14 August 2014 for trial in the Regional Court, the decision was not well-founded upon evidence reasonably believed to be reliable as regards the identity of the plaintiff. The decision to enroll the matter in the Regional Court was not taken with care, and its profound consequences for the plaintiff were not considered [*A Practical Guide to the Ethical Code of Conduct for Members of the National Prosecuting Authority*]. The decision to keep the docket in the safe because there was nothing more for the investigating officer to do because the investigation was complete, and consequently no instructions could be written in the investigation diary of the docket was not based on the available evidence and cannot be reasonable under the circumstances. There was sheer dereliction of duty on the part of the prosecution.

[38] The authority to decide to institute criminal proceedings in the Regional Court envisages drastic action which carries the invasion of rights and liberties. It requires an analytical mind and a critical assessment of the available evidence as to its quality and cogency. The evidence presented to the Regional Court Prosecutors in George on 17 July 2014 was the same evidence considered on 3 March 2015, upon which a decision was reached that the matter was not trial ready, and if the instructions then given in the investigation diary are contextualized, for want of evidence as regards the identity of the plaintiff as the perpetrator. The decision to enroll the matter in the Regional Court for trial from

17 July 2014 and the decision of the Prosecutors in George to argue for the detention of the plaintiff between 17 July 2014 and 3 March 2015 was arbitrary.

[39] In my view the plaintiff proved *animus injuriandi* on the part of the DPP. Le Roux and the Prosecutors in the Regional Court of George clearly intended to prosecute the plaintiff fully aware of the fact that, by so doing, he would in all probability be 'injured' as regards his privacy and liberty. The decision to enroll the matter in the Regional Court and to keep the plaintiff in custody was not based upon evidence reasonably believed to be reliable to put the plaintiff on trial. The continued detention of the plaintiff whilst there was no reliable evidence on his identity as the perpetrator and there was no continued investigation done in regard thereto infringed on his liberty. With this knowledge, Le Roux and the prosecutors in the Regional Court in George took the decision to prosecute him without making any of the enquiries which cried out to be made. They were reckless as to the possible consequences of their conduct.

[40] For these reasons I find in favour of the plaintiff against the second defendant, the Director of Public Prosecutions, in his claim for malicious prosecution and detention from 17 July 2014 to 3 March 2015.

The Registrar of the High Court is ordered to cause a copy of this judgment to be served on the Director of Public Prosecutions, Western Cape Province, for her attention.

No cost order is made in respect of First Defendant.

The Second Defendant to pay the costs.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT