

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO: 963/2015

Date Heard: 26 – 28 June 2019

Date Delivered: 24 October 2019

In the matter between:

KHAYA SANDI

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

JAJI J:

[1] This is an action where the plaintiff sued the defendant for:-

Claim 1: Unlawful arrest and detention. An amount of R 60 000.00 is claimed for wrongful arrest and R 140 000.00 for wrongful detention and R 50 000.00 for contumelia, totalling to R 250 000.00.

Claim 2: Is a claim for damages for malicious prosecution in the region of R 100 000.00. The total amount claimed for both claim 1 and claim 2 is R 350 000.00.

[2] The defendant filed a plea as follows:

- (i) Denied that the arrest and detention were wrongful;
- (ii) Admitted detention of the plaintiff in police custody until his first appearance on 31 July 2014, court issued a warrant of detention and ordered that plaintiff be kept in custody until the next court appearance. Plaintiff was released on bail on 01 August 2014.
- (iii) The defendant pleaded that the correct defendant is the minister of police but no amendment has been forthcoming from the plaintiff. It simply inserted Minister of Police in the place of Minister of Safety and Security. Suffice to say that the Rule 37 minute stated that no prejudice suffered by neither party as a result of non-compliance with the Rules.
- (iv) Defendant pleaded that plaintiff's arrest was lawful in terms of s 40(1)(b) of the Criminal Procedure Act, 51 of 1977.
- (v) Defendant denied any further allegations which were in conflict with its plea.

[3] The plaintiff and his witness testified. Subsequently, in closing, the plaintiff abandoned both unlawful arrest and malicious prosecution claims. It only proceeded with the claim of unlawful or wrongful detention.

[4] The judgment therefore will pre-occupy itself and adjudicate on the claim of unlawful detention. The defendant submitted as follows in respect of plaintiff's evidence:-

- (i) Plaintiff was a bad witness, could not give a proper version of events which included a date and times;
- (ii) Plaintiff did not concede even when he was confronted with the truth for instance, the date of arrest which was common cause on pleadings;
- (iii) His witness, Akhona Mtotoyi was a very poor witness;
- (iv) She disavowed of her initial statement;
- (v) Her evidence had various contradictions; the contradiction related to time frames;
- (vi) Probabilities were against her evidence. For instance, if she was assaulted and handcuffed as she claimed, both the plaintiff and herself would have stated and reported it;
- (vii) The details of her second statement accorded with the real facts of the case. For instance, affidavits of the two (2) Spur employees and also how Hi-Tech security vehicle chased the bakkie which was subsequently abandoned and suspects fled.

[5] Plaintiff realised that it could not succeed with the claim for unlawful arrest and malicious prosecution, hence the concession and decision to proceed only against unlawful detention.

[6] **UNLAWFUL DETENTION**

- (i) The defendant submitted that charges faced by the plaintiff were serious charges, for instance, robbery with a firearm. So in the circumstances, summons as required by section 54 of the Criminal Procedure Act, 51 of 1977, notice as required by section 56 of the Criminal Procedure Act, bail prior first appearance and section 59 and 59(A) were all not applicable due to the seriousness of the offence.
- (ii) The plaintiff had contended that detention after his unlawful arrest was similarly wrongful. The question facing plaintiff was the fate of the unlawful/wrongful detention claim in light of the concession not to proceed with unlawful arrest claim.
- (iii) It is alleged in the particulars of claim that the defendant acted without considering whether the detention of the plaintiff was necessary at all, and in particular:-
 - Whether the plaintiff was a flight risk;
 - Whether the plaintiff would interfere with witnesses;
 - Whether the plaintiff would hamper investigation or whether the plaintiff was of fixed abode and could easily be traced.
- (iv) Plaintiff contended that its detention was wrongful and without any justification or excuse.

[7] **EVIDENCE OF THE INVESTIGATING OFFICER, DETECTIVE WARRANT
OFFICER ZUKILE MPIYANE**

- (i) He testified about the arrest of the plaintiff, his first appearance in court and the subsequent bail proceedings;
- (ii) W/O Mpiyane testified about the previous convictions of the plaintiff for armed robbery. He testified that the plaintiff provided false information to the police relating to the alleged theft of his vehicle. The investigating officer testified that he had read the plaintiff's statement regarding the theft of his vehicle and that was false information;
- (iii) He also testified that he had a statement from a witness (Akhona) and the plaintiff was going to interfere with the witness;
- (iv) He further testified that the plaintiff was going to interfere with the investigation by going to other suspects which were not yet found. This would happen whilst the investigating officer was investigating;
- (v) W/O Mpiyane testified that the docket to proceed and the public prosecutor is the one that takes decision regarding the docket;
- (vi) Akhona Mtotoyi, plaintiff's girlfriend was the witness with whom the plaintiff may not communicate. She was a witness of the state and at that stage the plaintiff did not know that Akhona had made a statement;

- (vii) He testified that the case was serious, firearm was involved and as such plaintiff had to go to court for bail and apply formally. It was a Schedule 6 offence (robbery with firearm);
- (viii) Plaintiff's first court date was 31 July 2014 and released on 01 August 2014. There was a bail application which was opposed. As stated above, the investigating officer gave evidence;
- (ix) As stated above, he explained to court regarding seriousness of the offence, the manner the robbery was committed, firearms involved and was still investigating and looking for other suspects. He told the court the connection in the case to the plaintiff;
- (x) W/O Mpiyane testified that when he asked the plaintiff regarding outstanding warrants, he gave no answer. He averred that the plaintiff would evade arrest in that it would be difficult to trace him. He had lot of places that he goes to and would be difficult to find him;
- (xi) Regarding the statement by Akhona, Mr Mpiyane knew that if the plaintiff had to know about it, he would definitely interfere with Akhona;
- (xii) He also submitted that the plaintiff would commit further offences if he was released on bail. Plaintiff was at one stage on parole and committed another offences;

- (xiii) He stated that the plaintiff could be harmed by other suspects who were still at large especially if they hear or found out that he had spoken to the police. Even though the plaintiff did not speak it was for his own safety to keep him in jail. It was on the above basis that the investigating officer recommended that plaintiff be kept inside jail. He submitted that he applied his mind to the bail issue. He submitted that from the public prosecutor's side, he did not know why the public prosecutor decided to oppose bail. He could not speak for the public prosecutor.

[8] **PLAINTIFF'S CLOSING ARGUMENTS**

- (i) As stated above, Mr *Stamper* for the plaintiff conceded that he was not proceeding with claims for unlawful arrest and malicious prosecution but for unlawful subsequent detention;
- (ii) He submitted that the investigating officer testified that he knew the plaintiff had fixed address and could be traced. This was allegedly in favour of the plaintiff's case. Regarding the time plaintiff was arrested, the subsequent detention was not necessary. The plaintiff was not a flight risk. The police knew he had a family and plaintiff testified that he would have attended his trial;
- (iii) Mr *Stamper* submitted that there was no information that the plaintiff knew any other witnesses other than Akhona. As such the plaintiff ought to have been released;

- (iv) Strangely, Mr *Stamper* contended that police bail could not be given in the circumstances but further detention was not necessary;
- (v) He submitted that the recommendation by the investigating officer that the plaintiff be kept in custody, the issue of the offence committed whilst plaintiff was under parole, had to be taken into consideration along, cumulatively with the fact that he had fixed place of abode and as such further detention was premature;
- (vi) It was argued that the same information that the investigating officer had, was the same one that the public prosecutor had and therefore there was no need for further detention. The plaintiff prayed that the subsequent detention to be ruled unlawful and as such plaintiff was entitled to his relief;
- (vii) It was submitted that the detention after his first arrest on 29 July 2014, plaintiff ought to have been released on 29 July 2014 inspite of the fact that it was a Schedule (6) offence. It was contended that plaintiff could have been brought to court on 29 July 2014.

[9] **DEFENDANT'S REPLY IN CLOSING**

- (i) It was submitted by Ms *Watt* for the defendant that from the plaintiff's concession and evidence led, court can accept that state's witnesses evidence was uncontested. Therefore, the plaintiff and his witness, Akhona, were not credible;

- (ii) Once there was a concession that plaintiff was arrested lawfully, section 50 of the Criminal Procedure Act 51 of 1977 kicks in. There was no evidence from the plaintiff regarding date of arrest. Actually, he was convinced that he was arrested on 23 July 2014. There was no evidence that the matter was postponed at the first appearance. No evidence of his release. It was only on the docket by W/O Mpiyane who set out the basis;
- (iii) Plaintiff was arrested on 29 July 2014, charged on 30 July 2014 and first appearance on 31 July 2014. The matter was within 48 hours and postponed the following day for bail which was granted;
- (iv) The defendant submitted that the only option available when one conceded lawful arrest is as per s 59(A) of the Criminal Procedure Act. The court was referred to the matter ***Matebese v Minister of Police*** case no 2224/2017, Eastern Cape Division, Port Elizabeth, Lowe J's judgment. It was submitted that armed robbery which was a serious offence, no police could give plaintiff bail in those circumstances. The other option which was as per section 50(9)(A) of the Criminal Procedure Act, release on bail by Attorney General in respect of Schedule (7) was also not available herein;
- (v) It was contended further that the idea that after lawful arrest, plaintiff could be warned and summonsed was incorrect. Summons does not apply, plaintiff was lawfully in detention. The section 56 notice in terms of Criminal Procedure Act was also not applicable herein as it is for minor offences;

- (vi) It was submitted that after the arrest of plaintiff, it was never put to the investigating officer that there were other options available and that he could have done something to release the plaintiff. The court was referred to the matter of ***President of the Republic of South Africa and Others v South African Rugby Union*** (2000) 1 SA (1) CC at para 61 – 63;
- (vii) In so far as to what happened after the first appearance, there is one defendant before court. The Director of Public Prosecutions is not cited at all. Quite clear from Mpiyane's evidence, that it was the public prosecutor who decided whether to oppose bail or not. The Director of Public Prosecutions should have been cited and asked why they opposed bail and why the matter was postponed for formal bail. If it was proved that police were dishonest and malicious, plaintiff could succeed in further detention. Unfortunately that was not the evidence before this court. The court was referred to the matter of ***Minister of Justice and Constitutional Development v Moleko*** (2008) 3 All SA 47 (SCA);
- (viii) It was also submitted that the plaintiff focused on the fact that he had a fixed address and that he was easily accessible. That was one of many considerations which the public prosecution could have taken into consideration. The contention that the plaintiff could have been brought prior 31 July 2014, there was no evidence led and was never put to W/O Mpiyane. What had been raised in closing by plaintiff has never been an issue at trial. There was no evidence led by plaintiff regarding s 60(11)(a) (Schedule 6).

There is no case made for the claim of detention from 29 July 2014 to 31 July 2014;

- (ix) The plaintiff gave no evidence of the duration of his detention, circumstances or condition of his detention. Even though the information could transpire later to the attention of the defendant and court, there was no evidence from plaintiff regarding that. The plaintiff had claimed R 140 000.00 for four (4) days. There was no evidence of time of arrest and time of release. There was no evidence regarding his feelings towards his detention. He proved no damages and gave no evidence in respect of this claim. He simply approached the matter on the law. The appropriate order was for the plaintiff's claim to be dismissed with costs.

[10] **APPLICABLE LEGAL PRINCIPLE**

- (i) It is the public prosecutor's prerogative to oppose or not oppose bail. It therefor does not matter what the investigating officer had. In the present matter the investigating officer testified that he did not know why the public prosecutor opposed bail.
- (ii) In the matter of ***MM MVU v Minister of Safety and Security and Another***, case no. 07/20296, South Gauteng judgment, Willis J it was stated at page 10 para 12, that if the sentence is likely to be imposed upon conviction in any case will be in the form of a fine or one other than imprisonment, it is highly undesirable that the accused person should be subjected to pre-trial

detention. (See **S v Moeti** 1991 (1) SACR 362B at 463h). In the matter at hand, it is not the case of a fine or non-custodial or imprisonment but a long term imprisonment, (Schedule 6) offence.

- (iii) In **Zeeland v Minister of Justice and Constitutional Development and Another** 2008 (2) SACR 1 (CC); 2008 (4) SA 458 para 24 the following is said: “. . . The respondents bore the burden to justify the deprivation of liberty, whatever form it may have taken.” In the present matter, W/O Mpiyane did just that. He stated his reasons when he testified in the bail hearing opposing same and in court during the present proceedings. It was further stated in the abovementioned case that “if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.” The present case is clearly distinguishable because there was no such clarity regarding innocence of the plaintiff.
- (iv) The court in the matter of **Matebese** (supra) at para 30 and 31 held that “Once an arrest has been lawfully executed without a warrant the question arises as to an arrestee’s rights thereafter. Generally this is governed by section 50 of the Criminal Procedure Act but must be read with section 59 and 59(A) thereof.” At para 57, it was stated that “the fact of the matter is however that an accused person cannot be released on warning but only on bail in terms of section 59(A) of the Criminal Procedure Act. The court held

that it was more than reasonable for the police to act as they did after the arrest. That can be safely said in the circumstances of the present matter.

- (v) In the matter of ***B. Damane and The Minister of Police***, case no. 1780/12, Mthatha judgment by Nhlangulela DJP. At para 14, in accepting the evidence of the police as straight forward and free of contradictions held that “Given the existence of such inherent defects in the evidence of the plaintiff coupled with the absence of corroborating evidence, the version of the plaintiff cannot be relied upon. In comparative terms whereas the evidence of the defendant’s witnesses is probable that of the plaintiff is not Consequently, the claims for unlawful arrest and detention fell to be dismissed. It is so with the present matter, to such an extent the plaintiff abandoned both unlawful arrest and malicious prosecution claims.

- (vi) In the *locus classicus* case of ***The Minister of Police and Another v Zweni*** 2018 ZASCA 97 (01 June 2018), the question whether detention after lawful arrest but before first court appearance was unlawful and whether further detention after first court appearance was unlawful. It transpired in argument that the plaintiff was conceding the lawfulness of the arrest similar to para (7) of the abovementioned matter. The court held that “it must follow that his initial detention must also have been lawful.” Clearly it should be the same with the present case.

- (vii) Quoting Van Heerden JA explained in ***Duncan v Minister of Law and Order*** 1986 (2) SA 805 (A) at 821B-C: “. . . It is only when a policeman . . . has subsequent to the arrest, but whilst the arrestee is still lawfully detained, reached the conclusion that *prima facie* proof of the arrested person’s guilt is unlikely to be discovered by further investigation that it is his duty to release him from custody.” In the ***Zweni*** matter and the present matter there was no such evidence.
- (viii) In ***Minister of Safety and Security v Sekhoto*** [2010] ZASCA 141, Harms DP stated: “. . . Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours. Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The suspect further is then within the discretion of the court. The discretion of a court to order the release or further detention of the suspect is subject to wide ranging and in some cases stringent statutory discretions . . .” The above clearly applied to the present matter up until the court released the plaintiff on bail.
- (ix) Again, at para (9) of the ***Zweni*** matter, similar to the present case, it was held that “the respondent’s release from custody after his arrest was subject to section 60(11)(a) of the Criminal Procedure Act. The provision reads:

“Notwithstanding any provision of the Act, where an accused is charged with an offence referred to –

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.”

This is what the defendant precisely did in the matter at hand as per the act.

- (x) Similarly with the matter at hand, ***Zweni*** matter tells us that “respondent’s detention after his first appearance in court is dependent upon the lawfulness of the magistrate’s order. Even on that score as well, there is no merit in the plaintiff’s claim. It was held in the ***Zweni*** matter that the respondent would hardly have been able to satisfy court that there were exceptional circumstances present that justified his release, particularly since he already had a previous conviction for the rape of a minor child similar to the one charge he had faced. It is similar to the present case where the plaintiff had a previous conviction for armed robbery and as such would have been obliged to disclose to the court seized with the bail application. The court held that even his continued detention was not unlawful. Similarly with the present matter the detention of the plaintiff before his first appearance or after was not unlawful.

CONCLUSION

[11] Having regard to the evidence, the timely concession by plaintiff in respect of claims for unlawful arrest and malicious prosecution, applicable legal principle especially the consequences following a lawful arrest, it is inescapable conclusion that plaintiff's claims are dismissed with costs.

[12] It is accordingly ordered that:

Plaintiff's claims are dismissed with costs.

N P JAJI
JUDGE OF THE HIGH COURT

APPEARANCES

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|---------------------------|---|---------------------|
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