IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no:1315/2022

In the matter between

TLHORISO JOHNY TETSOANA **PLAINTIFF**

And

MINISTER OF POLICE **FIRST DEFENDANT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND DEFENDANT**

Neutral citation: *Thloriso Johny Tetsoana & Minister of Police & 01 other (Case no 1315/2022)*

Coram: Mgudlwa AJ

Heard: 17 April 2024

Delivered: 10 September 2024

Summary: Delict – wrongful and unlawful arrest and detention – proof that arrest and detention was justified and lawful – malicious prosecution – *animo iniuriandi* – Plaintiff's claim is unsuccessful.

ORDER

1. Claims 1 and 2 are dismissed.
2. The plaintiff is ordered to pay costs on a party and party scale.

JUDGMENT

Mgudlwa AJ:

INTRODUCTION

[1] The plaintiff instituted delictual action and claims damages for unlawful arrest and detention against the first defendant (the Minister) and for malicious prosecution against the second defendant (the NPA). The arrest, detention and prosecution arise out of allegations of rape by the plaintiff.

PLEADING

[2] The plaintiff instituted two claims for damages: in Claim 1, in an amount of R400 000, together with interest and cost, for unlawful arrest and detention and in Claim 2, in an amount of R300 000 together with interest and costs, for malicious proceedings. The claim in respect of Claim 1, pivots on the allegation that the plaintiff suffered deprivation of his freedom; *contumelia* (indignity inflicted); discomfort, severe emotional stress and psychological trauma; and embarrassment and humiliation after being arrested within sight of members of the public and the plaintiff's friends being kept in detention. Additionally, in regard to Claim 2, the damages suffered are made up of legal fees, *contumelia* and depravation of freedom and discomfort.

[3] The plaintiff alleges that on 3 December 2020, he handed himself over to officers

at Phuthaditjhaba Police Station after receiving information from his colleagues that a police officer was looking for him. This prompted him to go to the police station where he was wrongfully and unlawfully arrested by a member of South African Police Service (SAPS), without a warrant of arrest. The alleged charge in respect of which he was arrested was one of rape. He was detained at the Phuthaditjhaba Police Station from 3 December 2020 until 10 December 2020. On 4 December 2020, the plaintiff appeared in the Phuthaditjhaba Magistrate Court, where bail was opposed by the prosecution which resulted in him remaining in custody until his next appearance on 10 December 2020 when he was released on bail in the amount of R500. The plaintiff alleged that at all relevant times, the members of SAPS and prosecutors were acting in the course and scope of their employment with the first and second defendant respectively.

[4] The plaintiff alleges that his arrest was unlawful for a number of reasons, which in principle, are that:

(i) the unknown member of SAPS did not take into account his rights as set out in s 12 of the Constitution of the Republic, and without good cause, arbitrarily deprived him of his freedom;

(ii) the unknown officer had no grounds to interfere with his constitutional rights, as there was no obligation on the officer to arrest him and detain him, as he did not pose any danger to himself and the community; he would not have evaded his court hearing; there was no urgency to justify his arrest by SAPS; the officer did not take into account that he had a fixed address; and the officer breached the public law duty not to violate the plaintiff's private law right not to be unlawfully arrested and detained.

[5] Additionally, the plaintiff pleaded in the alternative that his arrest was unlawful as the officer had no *prima facie* case and or any reasonable grounds to arrest him. Furthermore, he alleged that the officer did not exercise his discretion properly and *bona fide*, as there was no obligation on him to arrest him; he did not consider alternative methods to bring the plaintiff before a court of law; he did not investigate the matter properly prior the arrest; did not follow up on the plaintiff's explanation; and there were no grounds to suspect that the plaintiff had committed an offence.

[6] With regard to claim 2, the plaintiff alleged that on 3 December 2020, the member of SAPS, wrongfully and maliciously set the law in motion by arresting and charging him

with a charge of rape. The second defendant wrongfully and maliciously proceeded with the prosecution from 4 December 2020 until 11 August 2021. During this time, the employees of the first and second defendants, acting in the course and scope of their employment, continued to prosecute the plaintiff until the charge against him was withdrawn by the state, on 11 August 2021. They also had no reasonable or probable cause for charging and prosecuting the plaintiff, alternatively had no reasonable or probable cause for continuing the prosecution of the plaintiff for the offence of rape, nor did was there any reasonable belief in the truth of the information at their disposal.

[7] The defendants, in response, admitted the arrest and detention of the plaintiff on 3 December 2020, however, they deny that the arrest and detention were unlawful, as the arresting officer was a peace officer as described in s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) who had a reasonable suspicion that the plaintiff had committed an offence in terms of Schedule 1 of the CPA. The defendants admit that the arresting officer, while arresting, acted on a reasonable suspicion and assert that *animus iniuriandi* and malice were absent in the arrest and subsequent prosecution of the plaintiff. The defendants further pleaded that, based on the available facts, there was a *prima facie* case against the plaintiff, and that, as a result, there was a reasonable cause to arrest him. They assert further that, due to lawfulness of the arrest and detention, and good faith in prosecution, no legal consequences could flow from the same. The arresting officer and the prosecutors acted within the obligatory prescripts of the law, relevant policies, code of conduct and directives. The defendants also deny that the plaintiff gave any explanation or alibi regarding the date on which the offence was allegedly committed.

EVIDENCE OF THE PLAINTIFF

[8] The plaintiff's evidence is that on 3 December 2020 he was off duty and, while doing his errands, he received a call from his cohabitant informing him about the police officers who were looking for him. After requesting their phone numbers from his cohabitant, he phoned and made arrangement to meet with them at their offices. On his arrival at the police station, he was informed of the rape allegation. He told the police officer that he was informed by his colleague about the allegations. The police officer thereafter told him that he is going to be detained. According to him, the alleged victim was one of the inmates at his place of employment, Thabo Mofutsanyane Secure Care Centre (Secure Care Centre). He was not given an opportunity to give his version of

events, at the time of his arrest. He was lodged in the police cell with 13 to 14 other inmates.

[9] On 4 December 2024, he appeared in court and bail was opposed by the prosecutor. He was then transferred to Harrismith Correctional Prison, where he was detained in deplorable circumstances: He had to sleep on the floor, was bullied by other inmates and had his food portion stolen at times. However, the Harrismith Correctional Facility was slightly better than the police cells. On 10 December 2020, he again appeared in court and was released on bail of R500.00. Subsequently, he was suspended by his employer after being released on bail. On 21 September 2021, he was called by his employer, where he was informed that his suspension was uplifted and he was placed on cautionary transfer to Clarens. As a result of his detention and prosecution, his cohabitant left with his child because she did not trust him anymore. He was admitted three times at a mental hospital and he is currently taking medication to assist in falling asleep.

EVIDENCE OF THE DEFENDANT

[10] The defendants called three witnesses, the arresting officer, Warrant Officer Mantantase Molefe (arresting officer or Molefe), the control prosecutor, Goodman Langelihle Makhanya and the prosecutor Mamogale Nteo (Nteo) who was involved in the prosecution of the matter on 4 December 2020. Molefe testified that he was attached to FCS unit as an investigating officer. On 3 December 2020, he was allocated a docket pertaining to an allegation of rape. After acknowledging the docket, he read the complainant's statement (A1). Thereafter, he discovered that the complainant was allegedly raped by someone known to her. He visited the complainant and discovered that she was a juvenile detained at Thabo Mofutsanyane Secure Care Centre. He interviewed her in the presence of a social workers since she was 15 years old at the time. The complainant identified the suspect as 'Short virgin', which nickname was given to the plaintiff by her. According to him, before interviewing the complainant, he went to the plaintiff's place of residence, where he met with his wife who told him that the plaintiff was somewhere in Qwaqwa. He left a message with the wife to tell him about his visit. The very same day, the plaintiff came on his own to his office. Upon the plaintiff's arrival at his office, he informed him of the allegations and the latter denied knowledge of the allegations.

[11] After explaining everything to the plaintiff, he took him to the Secure Care Centre where they met with a social worker and the alleged victim. The plaintiff was identified by the alleged victim as the perpetrator. Thereafter, the plaintiff's constitutional rights were explained to him and he was taken back to the Phuthadtjhaba Police Station where he was charged and detained. According to Molefe, he completed a bail form where he indicated that, he is not opposed to the plaintiff being released on bail. According to Molefe, due to the seriousness of the offence he could not release the plaintiff on bail. He was obliged to refer the matter to court as it was the court's prerogative. Furthermore, Molefe confirmed the complainant's age on her birth certificate which was in the file. He also testified that accused elected not to give a warning statement.

[12] The second witness, Goodman Langelihle Makhanya (Makhanya) testified that he received a police docket as a control prosecutor from Molefe. He perused it and subsequently decided to prosecute the plaintiff on a charge of rape. He testified that the complainant was 15 years old, and she was a detainee at the Secure Care Centre at the time of the alleged offence. He drafted a charge sheet and allocated it to Nteo to deal with the matter in court. According to Makhanya, though, Molefe recommended that bail be granted, the plaintiff was charged with a schedule 6 offence and he instructed Nteo to oppose bail and to request the Magistrate to postpone the matter for seven days. He later consulted with the complainant on 31 May, who was adamant that she does not want to proceed with the matter. Subsequently, he made a decision that charges be withdrawn against the plaintiff.

[13] The third witness, Mamogale Nteo's role on the matter was only on 4 December 2020. She confirmed the better part of Makhanya's testimony. According to her, she received the docket from Makhanya, who instructed her to oppose bail and request a postponement for 7 days. During cross examination by the plaintiff's attorney, she was confronted about a comment relating to 16 days of activism for no violence against woman and children, which the plaintiff alleged to have been made by her in opposing bail. She vehemently denied the allegation and asserted that, she opposed bail on instructions given to her by Makhanya.

ISSUES FOR DETERMINATION

[14] The issues for determination by this court are:

(i) whether the plaintiff has succeeded in proving the merits of his claim, in respect of claim 2;

(ii) whether the first defendant discharged the onus on him to show that the arrest of the plaintiff was lawful;

(iii) whether the plaintiff established a causal link between the actions of the defendant/ their employees and the patrimonial loss he alleges he suffered.

(iv) the quantum in respect of claim 1 and claim 2.

LAW AND ASSESMENT

Unlawful arrest and detention – Claim 1

[15] It is trite law that the defendant bears the onus of proving that the arrest and detention of the plaintiff was justified and lawful. The test as to whether the arresting officer's suspicion is reasonable is assessed objectively.[1] Once the required suspicion exists, an arresting officer is vested with a discretion to arrest, which he must exercise rationally. When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own merits.[2] In *Biyela v Minister of Police*,[3] Musi AJA affirmed that the test whether a suspicion is reasonable, is objectively justiciable held, as a follows:

'The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances is determined objectively.

What is required is that the arresting officer must form a reasonable suspicion that a schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in court of law be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a schedule 1 offence.

The arresting officer is not obliged to arrest based on a reasonable suspicion because he has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and therefore, the discretion must be exercised after taking

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[1] *S v Nel and Another* 1980 (4) SA 28 (E) at 33H. See also *Le Roux and Another v Minister of Police, Republic of South Africa and Another* [2022] ZAFSHC 316 para 19.

[2] *Olivier v Minister of Safety and Security and Another* [2008] ZAGPHC 50; 2009 (3) SA 434 (W) at 445C.

[3] *Biyela v Minister of Police* [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) para 34-36. See also *Minister of Safety and Security and Another v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA).

all the prevailing circumstances into consideration.' (My emphasis.)

[16] I examine now the conduct of Molefe who arrested the plaintiff on 3 December 2020. He received the docket at 08h50 on 3 December 2020, whereafter he read the statement of the complainant which indicated that the plaintiff inserted his penis in her mouth, on 19 November 2020, some two weeks prior to 3 December 2020. It is apparent from the reading of the complainant's statement that the plaintiff is one of the employees at Thabo Mofutsanyane Secure Care Centre (Secure Care Centre). Molefe visited the complainant on the same day and interviewed her in the presence of a social worker. He testified that the complainant confirmed the allegations contained on her statement. He also verified the age of the complainant from the birth certificate which was contained in the file at the Secure Care Centre. On the same day, Molefe went to the plaintiff's place of residence where he met with his wife and left his contact details. Molefe testified that, the plaintiff came to his office where he informed him of the allegations and the plaintiff did not offer any explanation. He took the plaintiff to the Secure Care Centre, where the complainant identified him as a perpetrator. Molefe, thereafter, took the accused to the police station where he charged him. After being informed of his constitutional rights, the plaintiff elected to make a statement in court.

[17] In my view, Molefe, gave a good impression to the court as a diligent, objective and reasonable officer who performed his duties in accordance with the standard required by the law. The preliminary investigations which Molefe conducted before the arrest of the plaintiff buttresses the fact that he had a reasonable suspicion that an offence referred to in Schedule 1 has been committed and that his discretion to arrest the plaintiff was properly exercised. I deem it apposite to mention that it is uncontroverted that Molefe consulted with the plaintiff during his preliminary investigations and the plaintiff elected not to give any statement with regards to the allegations. I am not oblivious of the fact that the plaintiff has a constitutional right to remain silent, however, his silence thwarted any attempts by Molefe to have a discussion with him regarding the allegations at the time of his arrest. It is my finding that it would be incongruous to expect Molefe not to act in a manner he did in the circumstances of this case in order to bring the plaintiff to justice. In my considered view, failure to act in the manner he did would be an abdication of his responsibility.

[18] I am satisfied that the evidence of Molefe surmounts the threshold of the

requirements in section 40(1)*(b)* of the CPA, the relevant provision of which stipulated that:

'(1) A peace officer may without warrant arrest any person –

(a) . . .

(b) Whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escape from lawful custody;'

Similarily, in my view, all four jurisdictional factors were established and I am also satisfied that the first defendant was able to discharge the onus on the balance of probabilities that the arrest of the plaintiff was justified and lawful.

MALICIOUS PROSECUTION – CLAIM 2

[19] The plaintiff's claim for damages against the defendants for malicious prosecution is a sequel to his arrest and subsequent prosecution on a charge of rape. His legal woes only came to an end after a lengthy period of nine months. On 11 August 2021, charges were withdrawn by the prosecutor and the charge sheet reflects that no reasons were given to the court. The evidence of Makhanya reveals that the decision to withdraw charges was made after a consultation with the complainant.

[20] In order to succeed (on the merits) for a claim of malicious prosecution, a claimant must allege and prove the following four requirements:[4] (a) that the defendant set the law in motion (instigated or instituted the proceedings); (b) that the defendant acted without reasonable and probable cause; that the defendant acted with 'malice' (or *animo injuriandi*), and (d) that the prosecution has failed. In this particular matter, two questions require determination, namely whether the second defendant acted without reasonable and probable cause and whether the second defendant acted with malice. The other two requirements ((a) and (d)) are common cause and need not be proved. It is also common cause that all officials involved in decision-making were acting within the cause and scope of their employment at all material times.

[21] The test for reasonable and probable cause was set out in *Beckenstrater v Rottcher and Theunissen*[5] as follows:

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that

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[4] *Minister of Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43; 2008 (3) All SA 47 (SCA) para 8.

[5] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A).

the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'[6]

[22] The manner in which Makhanya and Nteo dealt with the docket is relevant to assessing whether the Prosecuting Authority acted with malice or *animus injuriandi*. I deem it apt to mention that Nteo's involvement on this matter only appears to be on 4 December 2020, which was the first court appearance of the plaintiff. It remains uncontroverted that she acted on instructions issued to her by Makhanya. Nteo's evidence was corroborated by Makhanya regarding the decision to oppose bail, in that it was his instructions. This is also fortified by the instructions given on 4 December 2020 as recorded in the investigation diary[7] provided by Makhanya to the police to conduct further investigations. I deem it apposite to mention that, according to the bail information form attached in the police docket, Molefe did not oppose the release of the accused either on warning or bail. According to Nteo, she was instructed by Makhanya to request a seven-day remand from the court, because the plaintiff was charged with a Schedule 6 criminal offence. Furthermore, there were investigations that had to be conducted. The matter, according to the charge sheet, was postponed on 4 December 2020 until 10 December 2020, as recorded by the Magistrate.

[23] The plaintiff's legal representative argued that further detention of the plaintiff from 4 December 2020 to 10 December 2020 was occasioned by the conduct of the prosecutors, who not only did not apply their minds properly to the information at hand, but ignored vital and helpful information by the arresting officer in the issues of whether bail should be opposed or not. I deem it necessary to mention that the plaintiff was legally represented by an attorney on 4 December 2020. The procedure after the arrest of an accused in a criminal court is outlined in s 50 of the CPA. With regard to the arguments raised by the plaintiff's legal representative, the provisions of s 50(6)*(d)* of the CPA are relevant for consideration and the relevant provisions of which stipulates that:

'The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with

[6] Ibid at 136A-B.
[7] See: Index documents, Phuthaditjhaba Police Case Docket under Cas No:47/12/2020, pg 44.

any provision of this Act, if

(i) . . .

(ii) . . .

(iii) . . .

(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to–

(aa) procure material evidence that may be lost if bail is granted; or

(bb) perform the functions referred to in section 37; or

(v) it appears to the court that it is necessary in the interest of justice to do so.'

[24] In my view, the conduct of both Makhanya and Nteo falls within the ambit of section 50(6)*(d)* of the CPA and I interpose to mention that the presiding officer ceased with the application has the final say in remanding a matter, which he does by exercise of his discretion. There is no evidence to suggest that Nteo played any part in improperly influencing the exercise of that discretion by the presiding officer, more so that the plaintiff was legally represented. According to Makhanya, he read the complainant's statement and, in his belief and mindset, the plaintiff was guilty of rape of a minor, which falls under Schedule 6. Additionally, he testified that, the statement of the first report witness confirmed the allegations about the incidence. Clearly, his decision to charge the plaintiff on a charge of rape and to oppose bail was informed by his understanding of the facts at that time. It is in my considered view that Makhanya was acting within the legitimate exercise of prosecutorial authority in deciding not to adhere to the recommendations of the arresting officer.

[25] While courts may be reluctant to limit or interfere with the legitimate exercise of prosecutorial authority, the discretion to prosecute is not immune from the intervention by the court where such a discretion is improperly exercised. Having considered the totality of evidence in regard to prosecution of the plaintiff *in casu*, the interference of this court in the discretion to prosecute or the exercise of prosecutorial authority in this matter is not warranted. Clearly there was a *prima facie* case against the accused. This is fortified by the fact that the plaintiff's legal representative argument is pivoted on a wrong charge preferred by the prosecution.

[26] It is common cause that charges were withdrawn by the prosecution after Makhanya's consultation with the plaintiff on 31 May 2021, and the charge was only

withdrawn against the plaintiff on 11 August 2021 in the Regional Court. The matter was transferred on 14 May 2021 to the Regional Court. I deem it apt to mention that Makhanya consulted with the complainant after the matter was already transferred from the District Court to the Regional Court and that the charge sheet (J15) reflects the next date as 11 August 2021. Furthermore, charges were withdrawn on 11 August 2021 in the Regional Court. In my view, the delay in withdrawing charges between the 31 May 2021 and 11 August 2021 is on account of the long postponement by the court. According to Makhanya, the reason for his decision to withdraw the charge was *inter alia*, that the complainant was full of mendacity, and it was difficult to believe any aspect of her version. Although the matter appears to have been on the court roll for more than eight months, there is nothing on record to show that Makhanya deliberately and maliciously delayed the matter or acted contrary to the requirements of his position as a prosecutor to prejudice the plaintiff. I, accordingly, find the plaintiff to have failed in proving the essential element of malice on the part of the prosecuting authority, thus claim 2 accordingly fail.

Costs

[18] I now turn to deal with the issue of costs. Costs are governed by two basic principles: firstly, that unless expressly otherwise enacted, the granting thereof rests within the discretion of the court, which discretion must be exercised judiciously and secondly, that generally, costs follow the result, that is, they are awarded in favour of the successful litigant. In my view the latter is found to be the most appropriate, in that costs should follow the results.

Order

[19] The following order is made:

3. Claims 1 and 2 are dismissed.
4. The plaintiff is ordered to pay costs on a party and party scale.

Mgudlwa AJ

Appearances

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