

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

**CASE NO: 29235/2016**

.....

**Date**

.....

**ML TWALA**

In the matter between:

**MULAUDZI THOMAS MASHUDU**

**PLAINTIFF**

**AND**

**MINISTER OF POLICE**

**FIRST DEFENDANT**

**NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**SECOND DEFENDANT**

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## JUDGMENT

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### TWALA J

- [1] The plaintiff sued the defendants out of this Court for damages arising out of his arrest and detention by members of the South African Police Service on the 21<sup>st</sup> of December 2015. The plaintiff was held in detention as he was prosecuted until he was released on the 1<sup>st</sup> June 2016 when he was found not guilty and discharged by the trial court.
- [2] The defendants filed their plea to the plaintiff's particulars of claim admitting the arrest and detention of the plaintiff but alleging that it was lawful and justified. Only the plaintiff testified in support of its case and the defendant called three witnesses to testify in its defence.
- [3] This matter came before this Court for determination of the merits only, the issue of quantum having been postponed sine die on the previous occasion. The defendant closed its case after leading the second witness. However, before the matter was argued, the defendant applied for the re-opening of its case to allow a third witness to testify whom it was alleged is the arresting officer. The application was granted but it turned out the witness was not the arresting officer and his testimony was withdrawn by the defence.
- [4] The plaintiff testified that he was employed by Diplomat Warehouse as a dispatch clerk. On the 21<sup>st</sup> December 2015 he was at work and was called by his senior to her office where he was arrested by members of the South African Police Service. His senior told him to tell the truth as the police officers asked her if this is the man they were looking for. Nobody explained to him why he was arrested. He was hand cuffed on his back and bundled into the police vehicle. They drove to a scene

where he found his employer's truck parked with other vehicles. The police officer started assaulting him by pulling a plastic bag over his face and pepper spraying into it suffocating him. The police officer strangled him and he started bleeding from his mouth, nose and ears. The police officer kept on saying he must tell the truth whilst assaulting him. He told the officer that he knew nothing. The plastic bag was pulled over his head on three occasions. The police officer also used some machine to shock him by placing it under his armpit and he ended up wetting his pants. He was later taken to the cells in Sebenza police station. The T-shirt he was wearing was full of blood. There were two police officers who were at the counter at Sebenza police station and they allocated him an empty cell as requested by the officers who arrested him. He was kept in that cell with his hands still cuffed on his back.

- [5] Later in the afternoon, he was taken to Edenvale police station where he spent the night. The next day he was interviewed by Captain Masha (Masha) whom he told that he knew nothing about the truck hijack. Masha proceeded to write something and asked him to sign it. He never read it back to him nor told him what was contained in the document. During the interview with Masha, he was asked for his name and address which he gave to him (Masha). He made his first appearance in Court on the 23<sup>rd</sup> of December 2015 and was remanded in custody until the 5<sup>th</sup> of January 2016. He applied for bail on the 5<sup>th</sup> of January 2016 and bail was successfully opposed by the State – hence he was kept in custody until his release on the 1<sup>st</sup> of June 2016. He was never taken to the doctor for his injuries.
- [6] During cross examination he testified that he informed his attorney about his injuries and the attorney assured him that he will inform the court. On his first appearance the court could not see his injuries and his blood - stained clothes because he was seated at the back. He relied on his attorney to communicate all his problems to the court. Masha saw that he was injured and asked him about it but

did nothing further. He was scared to tell any police officer about the assault on the first day of his arrest. He knew nothing about the truck hijacking and had told Masha about that. He did not know who removed his belongings from the room he was renting and living in. He only requested his friend to take his children to his aunt but not his belongings.

- [7] Detective Sergeant Dalmain David Morris (Morris) testified that he has been a member of the South African Police Service for 17 years. He was the investigation officer in the case of a truck hijack in which the plaintiff was involved. When he interviewed the plaintiff on the 21<sup>st</sup> of December 2015, he indicated to him that he would like to confess to the crime. He immediately stopped the interview for he is not qualified to take a confession from an accused and called Masha to assist. Masha interviewed the plaintiff and recorded the confession which he placed in the docket and was submitted to the prosecutor. The matter was then enrolled for the 23<sup>rd</sup> of December 2015. Since he was going on leave, he handed the docket to Sergeant Nkosi to assist with the verification of the plaintiff's address for the purposes of bail.
- [8] Under cross examination he was adamant that the plaintiff gave him a false address as his residential address which turned out to be that of the victim. He warned the plaintiff about his rights in terms of the Constitution before he said he wanted to confess to the crime. He would not deal with somebody who has been injured or assaulted by the police or public without making an entry in his occurrence book and reporting to his commander. He did not see any visible injuries on the plaintiff on that day and he did not investigate if he was injured. The plaintiff did not report to him that he had been assaulted and injured by his arrestors. He did not know if the statement read into the record was a confession. Cellphone records were in the docket but did not implicate the plaintiff. He read the confession taken by Masha

from the plaintiff before submitting the docket to the prosecutor but did not see the address of the plaintiff on the confession.

- [9] Sergeant Sizwe Patrick Nkosi (Nkosi) testified that he has been a police officer in the service of the South African Police Service for 17 years. His involvement in this case was only with regard to the bail application which was heard on the 5<sup>th</sup> of January 2016 at the request of Morris who was on leave. He first familiarised himself with the docket and visited the address of the plaintiff as provided in the docket on the 4<sup>th</sup> of January 2016 to verify if it was correct. He was told by Lebogang who lives at the address, [...] M Section, Tembisa, that the plaintiff is unknown to her and that it is only the victim who lives at that address. At the bail hearing on the 5<sup>th</sup> of January 2016, he testified that the plaintiff was not known at the address he gave to the police, therefore opposed that the plaintiff be admitted to bail.
- [10] During cross examination he conceded that he was not aware of the plaintiff's address as [...] E Section Tembisa and that he only verified the address which appeared on the docket as [...] M Section Tembisa. He then testified further that it was his colleague who verified the address but not himself. However, he could not explain why in the court hearing the bail application he testified that he verified the address and informed the court that the plaintiff has given the police a false address.
- [11] It is trite law and in terms of the bill of the rights enshrined in the Constitution of the Republic of South Africa Act, 108 of 1996 that, everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[12] Section 40 of the Criminal Procedure Act, Act 51 of 1977 (CPA) provides as follows:

“Arrest by peace officer without warrant:

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

*(a) Who commits or attempts to commit any offence in his presence;*

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

*(c) .....*

[13] In *Van Wyk and Another v The Minister of Police and Another* (A617/15) 2016 ZAGPPHC 942 (17 November 2016) (Unreported) the court stated the following:

*“I consider it to be good policy that the law should be as there stated. An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”*

[14] In *Minister of Safety and Security and Another v Mhlana* 2011 (1) SACR 63 (WCC) the court stated the following:

*“..... In order for a peace officer to be placed in a position to rely upon s40 (1) (a) it is not necessary that the crime in fact be committed or that the arrestee be later charged and convicted of the suspected offence.”*

[15] In *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG) the court said the following:

*“The test is an objective one and the question to be answered is in our view whether the arresting officer had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded*

*that the arrestee had prima facie committed an offence in his presence. Stated differently, did the arresting officer have knowledge at the time of arrest of the arrestee, of such facts which would, in the absence of any further facts or evidence, constitute proof of the commission of the offence in question. The aim is not to determine whether the arrested person is guilty of the offence on which he was arrested. It accordingly matters not that the arrestee was not prosecuted or was acquitted at a subsequent trial on the basis of evidence other than what the arresting officer had in his possession at the time when he executed the arrest. An acquittal simply means that the prosecution failed to prove the guilt of the arrested person beyond a reasonable doubt on the evidence available to it at that time and placed before the trial court.*

*To hold otherwise is, as a matter of public policy, undesirable. It would mean that knowledge is ex facto attributed to the arresting officer, of the facts he did not have actual knowledge of at the time of effecting the arrest. It requires the search for a balance between two equally important aims of public policy, namely the liberty of the individual on the one hand, and the maintenance of law and order on the other. Arrests under s 40 (1) (a) usually take place in circumstances where prompt and decisive action is called for, and which is of necessity founded on the circumstances of the moment, such as public order offences. The arresting officer cannot be expected to determine the guilt of the arrestee in such circumstances in advance, and to hold otherwise would unnecessarily discourage peace officers from arresting offenders who are in the act of committing an offence. The arrest of a person in flagrante delicto without a warrant is a necessary power to effectively maintain order and combat crime and should not be unduly curtailed.”*

- [16] I am in agreement with counsel for the plaintiff that the only version before this Court is that of the plaintiff. However, it is a trite principle of our law that for judgment to be given for the plaintiff, the Court must be satisfied that sufficient reliance can be placed on his story for there exist a probability that his version is true.
- [17] There is no evidence before this Court to gainsay that the plaintiff was arrested and detained without a warrant of arrest and no explanation was given to him for his arrest and detention by the two police officers. I am unable to agree with counsel for the defendants that the plaintiff was arrested in terms of s40 (1) (b) there being a reasonable suspicion that the plaintiff has committed an offence. The arresting officer did not testify in this case and therefore there is no evidence before this Court as to what information did he have which led him to arrest and detain the plaintiff. I am therefore satisfied with the testimony of the plaintiff that he was arrested and detained without a warrant of arrest. The ineluctable conclusion I come to is that the arrest and detention of the plaintiff on the 21<sup>st</sup> of December 2015 was wrongful and unlawful.
- [18] I find myself in disagreement with counsel for the plaintiff that the plaintiff was assaulted by the arresting officers on his arrest. The plaintiff was detained in two police stations on the day of his arrest. In both police stations it is his testimony that there were other police officers present other than those who arrested him. However, he failed to lay a complaint with any of these officers about the assault he sustained in the hands of his arrestors. He alleges that he was wearing his blood stained t-shirt when he made his first court appearance on the 23<sup>rd</sup> December 2015 but never alerted the presiding officer to his plight. He alleges that he informed his attorney who undertook to take the matter up with the magistrate, but he never did.
- [19] The unchallenged testimony of Morris is that he does not deal with a person who was assaulted either by the public or the police on his arrest. He never noticed any



visible injuries on the plaintiff when he interviewed him on the 21<sup>st</sup> December 2015. He did not notice any swelling on his face nor blood stains on the clothes he was waearing. The plaintiff did not make any report to him about being assaulted by the arresting officer nor did he show him any injuries he sustained in the assault.

[20] If one has regard to the principles and criteria set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martel et Cie & others 2003 (1) SA 11 (SCA)* para 5, and especially the unchallenged evidence of Morris and the record of events, the probabilities are that indeed there was no assault inflicted on the plaintiff at the time of his arrest. I am of the respectful view that the police officers would not have risked public vilification and assault the plaintiff in public as he alleges. The irresistible finding I make therefore is that the alleged assault did not happen and therefore the plaintiff's claim in this regard falls to be dismissed.

[21] For the plaintiff to succeed in a case of malicious prosecution, which is the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy, the onus is on him to prove that:

- (a) the defendant set the law in motion (instigated or instituted the proceedings);
- (b) the defendant acted without reasonable and probable cause;
- (c) the defendant acted with malice (or animus injuriandi); and that
- (d) the prosecution failed.

These requirements were set out by the Supreme Court of Appeal in *Minister of Justice and Constitutional Development & others v Moleko [2008] ZSCA 43; [2008] 3 All SA 47 (SCA) PARA 8* and were stated with approval in *Minister of Safety and Security N.O & another v Schubach (437/13) [2014] ZSCA 216 (1 December 2014)*.

[22] I am in agreement with counsel for the plaintiff that the police failed to investigate and verify the address of the plaintiff known as [...] E Section, Tembisa as was

contained in the statement recorded by Masha as a confession of the plaintiff on 22<sup>nd</sup> December 2015. This statement was in the police docket when it was submitted to the control prosecutor for enrolment of the case on the 23<sup>rd</sup> December 2015. However, Nkosi testified in the bail hearing on the 5<sup>th</sup> of January 2016 that the plaintiff has furnished the police with a false address and he has verified it himself. He therefore suggested that the plaintiff should not be admitted to bail. He changed tune when he testified before this Court that it was his colleague who verified the address.

[23] It is my respectful view that there was absolutely no reason for the police to verify only the address known as [...] M Section Tembisa which appeared on the docket but turned out to be that of the hijacked driver. The police and Nkosi in particular never bothered to look at the statement of the plaintiff which was attached to the docket to verify his address. He did not even know that there was such an address on the plaintiff's statement. The conduct of Nkosi under the circumstances was, in my view, malicious and deliberately intended on the part of the police to mislead the Court – hence the plaintiff was not admitted to bail and was only released on his discharge on the 1<sup>st</sup> June 2016. I am therefore satisfied that the detention of the plaintiff from the 21<sup>st</sup> December 2015 up to the 1<sup>st</sup> of June 2016 was wrongful and unlawful.

[24] I am mindful of the salutary duty of the prosecutor to put all the facts before the Court. However, the prosecutor relies on the police to investigate the matter and report to him. The prosecutor was placed in possession of the docket which had a statement in which the plaintiff confessed to his involvement in the commission of the crime. Suffice it to say that it is irrelevant whether the said statement is a confession or not, the document contained information upon which the prosecution relied in prosecuting the plaintiff. It would be an absurdity for this court to accept

only the address of the plaintiff as appearing on the statement and disregard the rest of it as suggested by counsel for the plaintiff.

[25] Counsel for the plaintiff agreed that about 5 prosecutors handled the case before it was finalised. I am unable to agree with counsel that all 5 prosecutors acted maliciously in pursuing the prosecution of the plaintiff. There is a duty on the prosecution to ascertain that it has a proper case against a person by perusing the docket. However, the failure of the prosecution to notice that the said confession does not comply with the requirements of a confession cannot be said to be malicious. Further, the fact that the successful prosecution of the plaintiff failed on a technicality does not in itself amount to a malicious prosecution. I hold the view therefore that the prosecution of the plaintiff in this case cannot be said to be malicious and the plaintiff's claim in this regard falls to be dismissed.

[26] It is disturbing to note the manner in which the State Attorney conducted this case. The case was set down for 4-5 days before this Court. However, from the first day, the defendants were not ready to proceed with this case since they did not have witnesses. It was apparent that counsel for the defendants was not properly briefed on the matter and kept on asking for indulgencies to consult his witnesses some of whom never showed up in Court. Counsel for the defendants was placed in an unenviable position by his clients. The lax attitude with which this case was conducted by the defendants should not be tolerated. It comes at a cost to other litigants who have to wait long periods to get trial allocation and have their matters finalised when litigants like the defendants keep playing for more time than to deal with the issues.

[27] In terms of the practice manual of this Court, these matters go through the judicial pre - trial where they are certified ready for trial. The defendants did not raise any issues about the readiness of the matter either in the pre-trial between the parties

nor in the judicial pre-trial before the Judge. I am persuaded by counsel for the plaintiff that the defendants should be mulct with a punitive costs order for their inept attitude in the handling of this case.

[28] In the circumstances, I make the following order:

- I. The arrest and detention of plaintiff from the 21<sup>st</sup> December 2015 up until 1<sup>st</sup> June 2016 was wrongful and unlawful;
- II. The first defendant is 100% liable to compensate the plaintiff for his damages for the unlawful arrest and detention;
- III. The first defendant is liable to pay the costs of the action on the scale as between attorney and client,
- IV. The plaintiff's claim for malicious prosecution against the second defendant is dismissed with costs.

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**TWALA J**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

**Date of hearing: 11 - 14 September 2018**

**Date of Judgment: 11 October 2018**

**For the Plaintiff: ADV. G E KERR-PHILLIPS**

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