

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 13356/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<p>.....</p> <p>SIGNATURE</p>	
<p>21/5/2021</p> <p>DATE</p>	

In the matter between:

JIMMY HENRY COETZEE

First Plaintiff

THEMBA NKUKWANA

Second Plaintiff

FEZEKA ROSE MAPELELE

Third Plaintiff

SOLOMON KGATLE

Fourth Plaintiff

PATRICIA MOSAE

Fifth Plaintiff

SIPHELELE MATEISE

Sixth Plaintiff

MOTHOKO SITILE PHILLIPPE

Seventh Plaintiff

MPHUTHUMENI NOMNA

Eighth Plaintiff

ZONO TOSHO

Ninth Plaintiff

THOBILE REJOICE NDIMA

Tenth Plaintiff

NUZUKO SYLVIA KANI N.O. EXECUTRIX

Eleventh Plaintiffs

AUBREY MOJALEFA

Twelfth Plaintiff

PHUMELELE NKANI

Thirteenth Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 21 May 2021

SENYATSI J:

- [1] This is a claim for damages arising from an alleged wrongful arrest by members of the South African Police Services and malicious prosecution by the National Prosecution Authority.
- [2] The arrest, which took place on 29 March 2015 and 15 May 2015 was as a result of an incident that took place on 27 March 2015. On the latter date, it is alleged that a community councillor, Mr Velile Gladstone Zide ("Zide"), and his companions were allegedly assaulted by a group of people during a community meeting at a sports grounds in Eden Park.

- [3] With the exception of the first plaintiff, the rest of the plaintiffs voluntarily presented themselves to the police, the plaintiffs were subsequently detained and several charges were preferred against them.
- [4] The plaintiffs contend that the police officers failed to properly investigate the matter prior to taking the decision to arrest them. In the alternative, they contend that the police officers failed to exercise reasonably their discretion under the circumstances.
- [5] The plaintiffs were criminally charged with, amongst others, public violence and attempted murder. The charges were later withdrawn by the Senior Public Prosecutor on 2 July 2018. The plaintiffs furthermore contend that the officials of the second defendant failed in performing their duties or neglected to reasonably apply their minds to the contents of the docket which indicated that the State had no *bona fide* case against them and this failure rendered the prosecution malicious.
- [6] The first issue for determination is whether the plaintiffs' arrest was unlawful owing to the absence of an arrest warrant and whether the arresting officers formed a reasonable suspicion that the plaintiffs had committed Schedule 1 offences of assault where serious injury was sustained by the complainant. The second issue is whether the second respondent engaged in the malicious prosecution of the plaintiffs.
- [7] The common facts are that on 27 March 2015 the complainant ("Zide") and his companions were assaulted by a group of people at a community meeting. Zide and his companions had to be rescued by metro police and he subsequently laid criminal charges against the assailants. The police arrested the first plaintiff

two days later. The other plaintiffs were arrested on 15 May 2015 following their voluntary submission to the police station and were taken to court. In the main, before their arrest, warning statements were taken from them days before their arrest.

- [8] Once the arrest is admitted as in this case, the onus rests on the defendants to show that the arrest and detention of the plaintiffs were lawful. First to testify on behalf of the defendants was Detective Constable Mntungwa ("Mntungwa"). He testified that he was on duty on 28 March 2015 and was given a docket the complainant of which was Zide.
- [9] Mntungwa proceeded to the complainant's residence as he knew him. Upon arrival, he noted that Zide was seriously injured and had suffered a fractured left arm and a head injury. He interviewed him about the incident and the names of the suspects mentioned in the docket. Zide told him that he knew some of the suspects, especially the first plaintiff.
- [10] Mntungwa also testified that he knew the first plaintiff and where he resided. He later stated that the first plaintiff no longer resided at his home due to alleged disputes with his sister.
- [11] On 29 March 2015 Mntungwa spotted the first plaintiff as he was walking the street in Eden Park. He approached him in his police vehicle and invited him to enter upon which he was arrested for assaulting Zide. He explained to the first plaintiff his Constitutional rights and took him to Eden Park Police station where he was detained.

- [12] The second witness for the defendants was Detective Constable Ramoshebi ("Ramoshebi"). He was allocated the docket of Zide and assigned to conduct further investigations around the incident. The docket was only given to him during April 2015. His commander Captain Mbuyisa ("Mbuyisa"), now deceased, was personally involved in the case. The latter arranged with the suspects to report to the Eden Park Police Station for their warning statements to be taken.
- [13] Ramoshebi took some witnesses' statements and warning statements from the plaintiffs and a further statement from the complainant, Zide. He was of the view, so he testified, that the plaintiffs were sufficiently linked to the assault of Zide to stand a criminal trial.
- [14] Ramoshebi was called by his commander, the late Mbuyisa on 15 May 2015 to assist in the arrest of the second to thirteenth plaintiffs. The purpose of the arrest was to take them to court. Other detectives were also asked to come and assist with the arrests as there was a significant number of suspects. Furthermore, the plaintiffs were charged, and outstanding warning statements were taken.
- [15] During cross-examination, Ramoshebi and Mntungwa were challenged on whether they understood the Constitutional rights of the suspects. Mntungwa, under cross-examination, testified that the first plaintiff appeared in court within the time period allowed in terms of the law. It is further the defendants version that the first plaintiffs' arrest took place on Sunday, 29 March 2015, and that he appeared in court on Monday, 30 March 2015.

- [16] Zide also testified and explained in detail how he was chased by a group of people at the community meeting held at a sports ground in Eden Park and gave details of how he was pelted with stones and the specific role played by the first plaintiff. He stated that he laid criminal charges against the assailants and provided names of the suspects to the police.
- [17] The principles on whether a police officer can arrest someone without a warrant of arrest is regulated by s40(1)(b) of the Criminal Procedure Act No: 51 of 1977 ("the CPA") which provides as follows:

"40 Arrest by a peace officer without a warrant

- (1) A peace officer may without a warrant arrest any person-*
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;".*

It is therefore undoubtful that the police are allowed to arrest any person without a warrant provided their conduct is within the purview of this section.

- [18] In dealing with the principles established s 40 of the CPA the Court held in *Minister of Safety and Security and Another v Linda*¹ the Court held as follows:

"The question whether the suspicion of the person effecting the arrest is reasonable must be approached objectively. A suspicion inherently involves an absence of certainty or adequate proof. A police officer is not expected to satisfy himself to the same extent as a Court. A suspicion can be reasonable despite there being inefficient evidence for a prima facie case."

¹ 2014 (2) SACR 464 at para [21]

I will add that each case depends on its own facts.

[19] In *Minister of Law and Order v Dempsey*², of the Court held as follows:

"Once the jurisdictional fact is proved by showing that the functionary, in fact, formed the required opinion, the arrest is brought within the ambit of the enabling legislation and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegation to prove it. There are in such a case two separate and distinct issues, each having its own onus (Pillay v Krisha and Another 1946 at p 53). The first is whether the opinion was actually formed; the second, which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed, is whether it was properly formed."

Having regard to the fact that there was a case of assault on Zide under investigation, that the names of the suspects were given to the police by the complainant; that Mntungwa and Ramosheba had access to the docket, and both police officers had interviewed Zide, it is not unreasonable to accept that they formed a reasonable suspicion that the suspects mentioned in the docket were linked to the crime. I am therefore of the respectful view that the *onus* for justifying the arrest has been discharged by the first defendant.

[20] The plaintiffs testified about the circumstances leading to their arrests. The first plaintiff, Mr Coetzee ("Coetzee") was first to testify and testified as follows, on 27 March 2015 he was not present at the meeting held at the sports ground in Eden Park. It is his evidence that he was approached by a police officer on 29 March 2015 while returning from church and was invited into a police vehicle

² 1988 (3) SA 19 (A) at 37B -39F

and arrested. He was taken to Eden Park Police station where he was charged with assault with the intent to do grievous bodily harm. His testimony in this regard accorded with the testimony of Mntungwa.

- [21] The first plaintiff, however, could not demonstrate how he believed that the arresting officer was not justified in arresting him. His name was mentioned by Zide as one of the suspects who assaulted him. Consequently, I hold the view that he failed to show that the opinion formed by the arresting officer was improper.
- [22] It is the third plaintiff, Fezeka Mapelele's testimony that the twelfth plaintiff Mr Nkani informed her that the police had been looking for her without success and wanted her to report to the police station. She presented herself at Eden Park Police Station on 5 May 2015 and provided her statement regarding the events of 27 March 2015. She was arrested without a warrant on 15 May 2015 at Palmridge Magistrate Court. She testified that she was arrested together with her husband the twelfth plaintiff. She further stated that on the day in question she came to the rescue of Zide who was being attacked by the mob.
- [23] I have not found sufficient evidence from the third plaintiff that the arresting officers did not have a reasonable suspicion that she was linked to the offence for which she was charged.
- [24] The fourth plaintiff to testify was Mr Solomon Kgatle. He was employed as a painter and was working on 27 March 2015. He testified that he started work from 7 am until 5 pm. He testified that he was not present at the community meeting. He presented himself at the police station on 7 May 2015 where he provided his warning statement. He could not deny that he was mentioned as

a suspect. I, therefore, find that he could not prove that the police did not have a reasonable suspicion that he was linked to the offence.

- [25] The tenth plaintiff, Thobile Ndimma testified that she was present at the said community meeting on the day of the incident. She testified that she went home when the assault on Zide took place. She also could not deny that she was identified as a suspect following the police investigation. The police, therefore, were justified in arresting her.
- [26] The twelfth plaintiff, Mr Aubrey Mapelele also testified. He was working at Brackendowns and only returned to Eden Park around 16h:30 on the day of the incident. Upon his arrival at home, his wife was not there, and as he did not have the house keys in his possession so he went to look for her. He was also invited to the police station to give a warning statement and was arrested at the Palmridge Magistrates Court. He did not deny that his name appeared on the list of suspects. The police were justified in arresting him.
- [27] The seventh plaintiff, Mr Phillip Sitile Motheko testified that he was not present at the meeting on 27 March 2015. He testified that Zide mentioned his name because they were not on good terms owing to the alleged unlawful allocation of the RDP houses that Zide had made. He did not deny his name was mentioned on the list of suspects. He gave a warning statement to the police on 14 May 2015 was subsequently arrested. He was granted bail on 11 June 2015 and paid an amount of R500. His arrest was consistent with the list of suspects in the docket.
- [28] The fifth plaintiff, Ms Patricia Mosae testified that she resided in Eden Park West. On the day in question, she was at the sports ground where the

community meeting took place. She testified that she saw Zide run towards her house which is close to the sports grounds. Zide was being chased by a group of people. Some days later whilst she was at a local health clinic she received a call from a female police officer who invited her to report to the police station. She gave her warning statement on 7 May 2015 and was arrested on 15 May 2015 where she appeared before a court on the same day. She denied that she was involved in the assault of Zide.

- [29] The second plaintiff Mr Themba Nkukwana testified that during, March 2015 he resided at Greenfields and not Eden Park. He knew Zide as a ward councillor in Eden Park and Greenfields. He denied the assault. He was arrested between 13 and 14 May 2015 and attended court on 15 May 201. He gave his statement on 13 May 2015. He contended that he was not informed of his constitutional rights and was made to sign papers without explanation. He failed to adduce evidence to support his contention that the arrest was not justified.
- [30] The eighth plaintiff Mr Mphuthumenni Nomna testified that he lived in Eden Park- West and was a member of the ANC and that he knew Zide as a ward councillor. He was present at the meeting on 27 May 2015 where Zide held a pre-meeting with his own people before addressing the community. He testified that on the day Zide had pointed a finger at the first plaintiff. He further pointed out that Zide and the first plaintiff were not on good terms. Zide insulted the first plaintiff and said he was uneducated and that is when the commotion started. He followed the crowd chasing Zide as ran to a neighbouring shack. He protected Zide from further assault whilst inside the shack. He gave a warning statement on 26 April 2015. He went to the police station on 15 May 2015 and was arrested and taken to Court. He paid R500 bail on 11 June 2015. His name

was also on the suspects' list and the police were therefore justified to arrest him.

- [31] I will now deal with the issue of the alleged malicious prosecution. As already stated the plaintiffs aver in their particulars of claim that the officials of the second defendant failed or neglected to reasonably apply their minds to the contents of the docket which indicated that the State had no bona fide case against them.
- [32] Mr Dwera, a Senior Public Prosecutor testified that the second defendant was not actuated by malice or improper motive when the matter was placed on the roll. He stated that the charge of public violence and attempted murder were of serious nature. During his testimony, Dwera demonstrated his intimate knowledge and understanding of the matter. He testified that the charges were based on the statement made by Zide. Upon analysis of the statement it became clear to him that additional charges had to be added.
- [33] Dwera stated that the case was provisionally withdrawn against the plaintiffs as the presiding officer did not want a postponement on the grounds that the plaintiffs had a right to a speedy trial. It also became clear during Dwera's testimony that there had been several postponements of the matter due to reasons such as the unavailability of defence counsel for the plaintiff, unavailability of some of the plaintiffs, and even the presiding officer. Dwera stated that as the number of the plaintiffs was significant and that there were represented by different legal representatives, it was difficult to consolidate their diaries and find dates that were suitable to each one of them. Some of the legal representatives had been briefed by the Legal Aid Board and political parties,

their availability became a significant reason for the postponement of the trial. He denied that the State was the chief cause of the delays.

[34] When confronted with the note written by the investigating officer which ended with the inscription "*nolle prosequi*", he replied that the investigative officer is not the one making such determination.

[35] Dwera testified that on the day the matter was withdrawn, he was on leave. He stated that the other public prosecutors were not allowed to withdraw the charges without consulting him as this was a matter that he dealt with. He unequivocally stated that the provisional withdrawal of the matter did not bring an end to the criminal charges.

[36] The principles on malicious prosecution are trite in our law. For the plaintiffs to succeed in an action for malicious prosecution, they must prove all the requirements set out in *Minister of Safety and Security v Lincoln*³ where the Court held as follows:

"... 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*
- (ii) That the prosecution failed"*

³ [] 3 All SA 341 (SCA); 2020 (2) SACR

- [37] While there may be a measure of overlap between the first three requirements, they remain separate elements of the cause of action, and the plaintiff bears the onus to establish each distinctly.⁴
- [38] Having regard to the totality of evidence led by all the Plaintiffs, I am of the view that they have all failed to prove the first requirement. The law was not set in motion by the second defendant, but by Zide when he laid charges of assault which on the reading of the statement by Dwera, resulted in additional charges being preferred against the plaintiffs. Our law permits for charges to be provisionally withdrawn and there is nothing strange about such withdrawal. It is my view that this action was ill-conceived and completely unnecessary.
- [39] The plaintiffs were also required to prove the second requirement that the defendant acted without reasonable and probable cause. This requirement was not proved. When Dwera considered the content of the docket and the J88 recording injuries sustained by Zide, as an independent public prosecutor, he acted reasonably and with probable cause by adding other serious charges. He had nothing to gain for doing discharging his constitutional mandate on behalf of the second defendant.
- [40] The third requirement that the second defendant acted with malice has not been proved. No evidence was led by the plaintiffs in that regard.
- [41] The other requirement to prove that prosecution has failed has also not been proved. The plaintiffs contend that "*nolle prosequi*" as inscribed by the

⁴ See Minister of Safety and Security v Lincoln, supra para [21]

investigating officer in his notes implies that prosecution has failed. This is further from the truth for reasons already given.

- [43] The Court in *Beckenstrater v Rottecher & Theunissen*⁵ described malice as an improper or indirect motive. The requirement for malice is intended to ensure that liability not to be imposed where a prosecutor places the matter on the roll by reason such as incompetence inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, or negligence.⁶
- [44] It is clear from Dwera's evidence that when he received the docket and studied the docket, he decided to add a charge of attempted murder over and above the public violence charge. He also testified that there were statements filed by other complainants. His decision to add charges is consistent with his duties by virtue of his office.
- [46] Having considered the totality of the evidence before this court I am of the view that the plaintiffs have failed to prove their claim on malicious prosecution.

ORDER

The following order is made:

- (a) The claims are dismissed with costs

⁵ 1955 (1) SA 129 (AD) at 134

⁶ See *Maoki v Reckitt & Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 104B-C



SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 20 January 2021

Date of Judgment: 21 May 2021

1st, 3rd, 4th, 10th, 11th, and 12th Plaintiff's Counsel:

Instructed by: NJ Belcher Attorney

2nd, 5th, 6th, 7th, 8th, and 9th Plaintiff's Counsel: Adv Madyibi with Adv Buthelezi

Instructed by: Mangxola Attorneys

Defendant's Counsel: Adv Zwane

Instructed by: The State Attorney