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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: 2233/2011

MZIMKULU ERIC MANZIYA

Plaintiff

And

MINISTER OF POLICE

Defendant

Coram: **Chetty J**

Date Heard: **29 and 30 January 2014, 21 February 2014**

Date Delivered: **6 March 2014**

Summary: **Damages** – *Unlawful arrest – Detention – Malicious prosecution – With warrant – Onus – Wrong person arrested - Absence of reasonable belief – Arrest unlawful*
Assault - *Evidence establishing assault –*
Action for malicious prosecution *misconceived – Legal principles restated – Damages assessed at R350 000.00*

JUDGMENT

Chetty, J

[1] The plaintiff's action for damages against the defendant arises from (i) his arrest on 27 September 2008 by Warrant Officer *Luvuyo Lesley Nyathi (Nyathi)*, an employee of the defendant; his initial detention at the Walmer police station from 27 September 2008 to 29 September 2008; his subsequent detention at the St Albans prison from 29 September 2008 to 3 November 2008; (ii) an assault allegedly perpetrated upon him by *Nyathi* on 27 September 2008 at the Kwadesi police station and (iii) his alleged malicious prosecution from 28 September 2008 until 4 December 2008 when the charges were withdrawn against him.

Wrongful Arrest and Detention

[2] It is common cause that the plaintiff was arrested on a warrant issued by the Magistrates' Court in Port Elizabeth destined for the named arrestee, one *Zama Siyabonga Makhotyane (Zama)*. Section 46¹ of *the Criminal Procedure*

¹ "46 Non-liability for wrongful arrest

(1) Any person who is authorized to arrest another under a warrant of arrest or a communication under section 45 and who in the reasonable belief that he is arresting such person arrests another, shall be exempt from liability in respect of such wrongful arrest.

Act² exempts an arrestor and, a fortiori, the person or entity vicariously responsible for his/her act, who is mistaken in regard to the identity of the person named in the warrant. If the arrestor believes that the person whom he/she takes into custody is the one who, according to the warrant, he/she must arrest, such person would not be held liable for an unlawful arrest. It is trite law that the onus rests on the arrestor to show that he/she acted reasonably and is consequently protected from liability pursuant to the provisions of s 46. Put differently, the section exonerates anyone from the consequences of an unlawful arrest provided he/she had reasonable grounds for believing that the person he/she had arrested was the one who, according to the warrant of arrest, had to be arrested. In **Ingram v Minister of Justice**³ Vieyra, AJ, propounded the law as, viz., ***"whether an ordinarily prudent and cautious person, authorized and bound to execute the warrant, would have believed that the plaintiff was the person named therein."***

[3] Apropos the foregoing legal principles, I turn to consider whether the defendant has discharged the onus resting upon it. *Nyathi*, the defendant's sole witness, was the investigating officer in the case of the **State v Zama Siyabonga Makhotyane**, CAS number 252/11/2007 in which **Zama** had been charged with assault with intent to do grievous bodily harm. After his release on bail, **Zama** failed to appear in court on 7 April 2008 and the magistrate duly authorised a

(2) Any person who is called upon to assist in making an arrest as contemplated in subsection (1) or who is required to detain a person so arrested, and who reasonable believes that the said person is the person whose arrest has been authorized by the warrant of arrest or the communication, shall likewise be exempt from liability in respect of such assistance or detention."

² Act No, 51 of 1977

³ 1962 (3) SA 225 (W) at p

warrant for his arrest. The particulars of the named arrestee were recorded in the warrant as: -

D1073/08
Nyathi

J 160 (B1/810208) **6**

WARRANT OF ARREST

Police Station: <u>Walmer</u>	CAS No: <u>252/11/2007</u>	Case No: <u>27/8/28/07</u>
Name: <u>Jayim Dnyabanga Mkhiziyane</u>		
Address: <u>Mtho Khatovini Walmer P.O.</u>		
Gender: <u>Male</u>	Age: <u>19</u>	

To all police officers and other officers to the law proper to the execution of criminal warrants.

WHEREAS THE ABOVE-NAMED:

*Defendant who has been
or not apprehended:

(a) was duly summoned/summons given notice to appear before the Magistrate
Court No. 25 at PE on charge of
Section 27 of Act 65 of 1977

(b) failed to appear as summoned/summons but failed to remain in attendance.

(c) failed to appear as summoned/summons but failed to remain in attendance.

(d) was admitted to bail on condition
and failed to comply with the said conditions.

Clerk of the Court/Klerk van die Hof - Port Elizabeth

Date / Datum: _____

MAGISTRATE

PRIVATE BAG / PRIVAATSAK KOND 4 / 2009-09-23

PORT ELIZABETH, 6056

MAGISTRAAT

THESE ARE THEREFORE, in the name of the State, to command you that immediately upon sight hereof you arrest and bring the above-mentioned person or cause him/her to be arrested and brought before the said court to be dealt with according to law.

One under my hand at _____ day of _____ year _____

Magistrate

I, No. 252/11/2007 name Jayim Dnyabanga Mkhiziyane hereby certify that I, after ascertaining the identity of the person mentioned in the warrant, arrested said on at 27/8/28/07 at the time 21h40 Nyathi

Notes:

- Where it appears that the accused received the summons in translation and that he/she will appear in court in accordance with a summons under section 72 of Act 65 of 1977, he/she may be released on warning.
- Where it appears that the accused did not receive the summons in translation, or that he/she has given an admission of guilt free in terms of section 27 of Act 65 of 1977 or that there are other grounds on which it appears that he/she failed to appear in the summons, and the due to any fault on his/her part, for which purpose he/she may be required to furnish an affidavit of affirmation, he/she shall be released on warning under section 72 of the above-mentioned Act.
- The accused must have paid on submission of full fine of R_____ if he/she is willing to pay the fine, he/she may be brought before the magistrate in whose district he/she was arrested for the disposal of his/her case.
- The accused must be informed that he/she has the right to consult with a legal practitioner of his/her choice, and if he/she cannot afford a legal practitioner, he/she may apply for legal aid at the local Legal Aid Office.
- If the warrant is not executed within 2 (two) months after receipt, it should be substituted with a J 90 - Warrant of arrest.

[4] It is not in issue that on 27 September 2008, at approximately 21h40 Nyathi, armed with the warrant, arrested the plaintiff in the vicinity of his home situate at [.....]. He testified that earlier that day he had repaired to the plaintiff's home but found the house locked. On his return later that day, he once more found the residence deserted and, on enquiry from a neighbour whether one

Zama Siyabonga Makhotyane resided there was informed that she was unaware of the occupant's name. Synchronously, she pointed to the plaintiff who was walking in the street and identified him as the occupant of the house.

[5] *Nyathi* testified as follows: -

"I approached this man whilst he was in the street. I introduced myself to him as Warrant Officer Nyathi from the detectives in Walmer. I asked him his name. He told me that his name is Eric. I asked him whether he was not Zama Siyabonga Maqotyana, and he told me that no I do not know such a person. I then told him that it is surprising that the name you now give to me appears in the profile that is in my possession, and the very same names that you are mentioning are in the profile and the same person is sometimes using the names Zama Siyabonga Maqotyana."

[6] *Nyathi's* version of the circumstances surrounding the plaintiff's arrest is in direct conflict with the plaintiff's. What follows is his version of the circumstances surrounding his arrest. He testified that *Nyathi* asked him whether he was *Eric Mzimkulu Manziya* and when he replied in the affirmative, *Nyathi* not only denounced him as a liar but importuned that he was in fact one Zama Siyabonga Makhotyane, the name *Eric Mzimkulu Manziya* merely being one of his many aliases. At the police station at Kwadesi, *Nyathi* persisted with the accusation

that he was **Zama** and *inter alia* informed him that the information at his disposal revealed that he was born in Port Alfred and that if he remained resolute that he was not **Zama**, he would ensure that his previously withdrawn cases would be reinstated. His obstinacy that he was not **Zama** moreover precipitated an assault upon him by *Nyathi*. I interpolate to say that I shall detail the plaintiff's evidence concerning the assault allegedly perpetrated upon him by *Nyathi* in due course, but first, a continual of the arrest scenario.

[7] It is common cause that the plaintiff was transported by other policemen from the Kwadesi police station to the Walmer police station. The plaintiff testified that prior to his incarceration in the cell, *Nyathi* repeatedly addressed him as **Zama**, took his fingerprints and detained him in the cells. The plaintiff's evidence concerning his interaction with *Nyathi* at the Walmer police station was denied by him. His evidence was that the sole purpose of going to the Walmer police station was to ascertain whether the plaintiff had arrived there and this he did by checking the occurrence book and the SAP 14 register. He neither saw the plaintiff nor took his fingerprints.

[8] As adumbrated hereinbefore the plaintiff testified that at the Kwadesi police station *Nyathi* had threatened that he would reinstate the charges which had previously been withdrawn against him. Under cross-examination *Nyathi* denied not only having any prior knowledge of the plaintiff but having had anything to do with him prior to his arrest. It is not in issue that at the plaintiff's

first appearance in court where he disputed that he was **Zama**, the magistrate ordered that the matter be investigated. It is evident from the magistrate's manuscript record⁴ of those proceedings that *Nyathi* in fact had prior knowledge of the plaintiff. The longhand record reflects that after being duly sworn in *Nyathi* testified as follows:-

"The fingerprints of the accused before court are those of the person that appears on warrant of arrest. I know accused from the case of murder. He was Eric Manziya. It is his CV that tell me that the person who appears in the w/a is accused before court. This case was with Constable *Poro* before it came to me. He is stationed at CID, Walmer."

[9] Under cross-examination, *Nyathi* initially denied having been called to testify during the plaintiff's first appearance and maintained that he merely spoke to the prosecutor. When the longhand record was put to him by Ms *Ayerst*, and which exposed the untruthfulness of this tittle of evidence, he changed tack and was overcome by a sudden bout of amnesia. The record exposes the untruthfulness of his evidence that he repaired to the local criminal record centre to verify the plaintiff's fingerprints. His amnesiac spell was thereafter not confined merely to the events in court but extended to the circumstances which preceded the arrest of the plaintiff. In his evidence in chief *Nyathi* had steadfastly

⁴ Exhibit "C" page 8 – the correctness of this document, together with all other documents in the bundles handed in at the inception of the trial was admitted.

maintained that on receipt of the warrant of arrest he immediately recognized that the address reflected thereon as being that of the arrestee was fictitious and consequently refrained from visiting the address.

[10] The falsity of this evidence is however underscored by entries made by him in the investigation diary itself. It records that *Nyathi* visited the address stipulated in the warrant, to wit, [...] and the note made by him reads: - "**he doesn't stay there**". Under cross-examination, *Nyathi* initially denied any knowledge of having visited the address to trace the said **Zama**. As adumbrated earlier, the reason proffered for his refrain was his knowledge that the address was non-existent. When the aforementioned entry in the investigation diary⁵, which, he was constrained to admit, ends with his signature, was put to him, he proffered the absurd answer that what he intended to record was that the address did not exist.

[11] As his cross-examination progressed, it became evident that *Nyathi* is an incorrigible liar. The plaintiff's evidence that *Nyathi* took his fingerprints at the Walmer police station was vehemently denied. The falsity of this denial is amply demonstrated by the case docket itself. The SAP192, titled, "**Finger and/or Palm prints for elimination/comparison purposes**" records the name of the suspect as one "*Zama Siyabonga Makhotyane*, case no 252/11/2007"; the date 2008/09/29; contains the plaintiff's finger and palm prints and bears *Nyathi's* signature, number and rank.

⁵ Exhibit "A" page 91

[12] *Nyathi's* lack of candour permeates the entire body of his testimony. It is the height of folly, to suggest that the plaintiff, facing imminent arrest in the immediate vicinity of his home and having decried being **Zama**, would, on being asked to provide his identity document, have stated that he had misplaced it. I accept the plaintiff's evidence that he was not asked to produce his identity document. The reason for the omission is clear – given his previous association with the plaintiff, coupled to the conflated information in his criminal record profile, *Nyathi* assumed that the named arrestee on the warrant was the plaintiff.

[13] The question which ultimately falls for adjudication is whether such belief was reasonable so as to exonerate the defendant from liability. In my judgment the facts compel the conclusion that *Nyathi's* belief was not only unreasonable but that the arrest itself was actuated by vindictiveness. Why else would *Nyathi*, on confronting the plaintiff, have referred to the charges which had previously been withdrawn against him? The belief that the plaintiff was **Zama** was based entirely on the SAP profile which listed the plaintiff's names, surname and address. The plaintiff's vehement and persistent denial that he was not **Zama** should, at the very least, have alerted *Nyathi* to the possibility that he was telling the truth. Recourse to the docket in case number 252/11/2007 would immediately have established that the plaintiff was not the person in respect of whom the warrant had been issued. As the investigating officer in that matter, he had ready access to the docket. cursory examination thereof would have alerted him to the

fallacy of his hunch. Given the ramifications of an arrest, the prudent policeman would have established the facts before proceeding to act on a hunch.

[14] Although the plaintiff's evidence was not without blemish, it is evident that he is an illiterate person. The imperfections in his testimony are no doubt attributable to his indigence and lack of schooling. His truthfulness on crucial aspects however finds resonance in the plethora of documentary evidence. His admission that he had indeed been arrested on a charge of murder, which had subsequently been withdrawn, finds corroboration in *Nyathi's* testimony as alluded to in paragraph [8] hereinbefore and gives the lie to *Nyathi's* testimony that he had no prior knowledge of the plaintiff. Upon a holistic appraisal of the evidence adduced the plaintiff's arrest was clearly unlawful.

The Assault

[15] *Nyathi* confirmed that on his arrest, the plaintiff had no visible injuries. On arrival at the Walmer police station later that evening, an injury to the left eye was however noted in the occurrence book. The correctness of the entry is not in dispute. Given the blatant untruths which permeate his testimony, *Nyathi's* fanciful suggestion that the plaintiff could have suffered the injury in the police van en route to the Walmer police station can readily be discounted. Although the plaintiff exaggerated the extent and sequelae of the injury, I accept that the injury was inflicted upon him by *Nyathi* in the manner described.

Malicious Prosecution

[16] The claim for malicious prosecution is however entirely misconceived. The legal position was articulated by Eksteen, J, in **Thompson and Another v Minister of Police and Another**, where the learned judge said the following⁶: -

"In claims based on malicious arrest, malicious prosecution or malicious execution, however, it has been held that it is essential for the plaintiff to allege and prove that the defendant acted maliciously and without reasonable and probable cause (Hart v. Cohen, 16 S.C. 363; Estate Logie v. Priest, 1926 G A.D. 312 at p. 315; Beckenstrater v Rottcher and Theunissen, 1955 (1) SA 129 (AD) at p. 135; van der Merwe v. Strydom, 1967 (3) SA 460 (AD) at p. 467). In May v. Union Government, 1954 (3) SA 120 (N) at p. 129, BROOME, J.P., held that:

"It is well settled that malice in relation to malicious prosecution means any indirect or improper motive. It is the duty of the plaintiff to satisfy the Court, on a balance of probability, that the prosecutor set the criminal law in motion, not with the object of obtaining the conviction of the wrongdoer, but for some ulterior object."

In Moaki v. Reckitt and Colman (Africa) Ltd. and Another, 1968 (3) SA 98 (AD), WESSELS, J.A., in delivering the judgment of the Court, referred to the cases quoted above, and at p. 104 he says:

"A consideration of the various judgments in the cases cited in the preceding paragraph leads me to conclude that despite

⁶ 1972 (1) SA 371 (E) at 373F-374F

the use of the terms 'malice' and 'maliciously', it was not intended to formulate any principle that in the actions in question the motive of the defendant, in acting as he was alleged to have acted, was in any way a determining element of legal liability. It is, however, equally clear from those judgments that the defendant's state of mind in doing the act complained of is a material determining element of legal liability. In both *Hart v. Cohen*, and *Lemue v. Zwartbooi*, supra, it is indicated that the plaintiff's remedy is provided by the *actio injuriarum*. Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance."

The learned Judge then goes on to refer to the basic elements of the *actio injuriarum*; under which heading malicious proceedings undoubtedly fall. Those elements may be summarised as a wrongful act intentionally done and which constitutes an aggression upon the person, dignity or reputation of another. (*R. v. Chipo and Others*, 1953 (4) SA 573 (AD) at p. 576; *O'Keeffe v. Argus Printing and Publishing Co. Ltd. and Another* 1954 (3) SA 244 (AD) at p. 247). I do not understand the learned Judge, however, to detract in any way from the principles laid down in the earlier cases referred to above, but merely to emphasise that the use of the expressions "malice" or "maliciously" or "indirect or improper motive" should always be seen to refer to the basic requirement of *animus injuriandi*, and that it is as well that this should be clearly stated so as to avoid any misconceptions based on semantic reasoning. This seems to be borne out by the subsequent decision of the same Court in the case of *Lederman v. Moharal Investments (Pty.) Ltd.*, 1969 (1) SA 190 (AD), where JANSEN, J.A., at p. 196, in

delivering the judgment of the Court sets out the essential elements of an action for malicious prosecution as being:

"(a) that the respondent set the law in motion (instigated or instituted the proceedings);

(b) that it acted without reasonable and probable cause; and

(c) that it was actuated by an indirect or improper motive (malice)."

Such an interpretation of the judgment referred to is also entirely consistent with the dictum of INNES, C.J., in *Burkett F v. Smith*, 1920 AD 106 at p. 108, where the learned Judge indicates that in an action for malicious prosecution the plaintiff could only succeed

"by showing a want of real and probable cause, and the existence of *animus injuriandi*."

[17] There is no evidence that *Nyathi* either instigated or instituted any criminal proceedings against the plaintiff. All that happened was that the plaintiff was remanded in custody by the magistrate on the acceptance of *Nyathi's* testimony that he was the person whose particulars appeared on the warrant of arrest. Although the plaintiff was detained thereafter, no prosecution in fact ensued. When the plaintiff's attorney, Mr *van Rensburg*, intervened and established his true identity the plaintiff was immediately released from custody. The plaintiff's prolonged detention is however entirely attributable to *Nyathi's* dereliction of duty. As adumbrated hereinbefore, recourse to the docket would have established that he had arrested the wrong person. The plaintiff's unlawful detention did not

cease when the magistrate issued the detention order in terms of s 50 (1)⁷. It followed upon *Nyathi's* imprudent and careless conduct which renders the defendant liable in damages for the prolonged period of his incarceration.

Damages

[18] The plaintiff was incarcerated from the date of his arrest i.e. 27 September 2008 until his release on 4 November 2008. On his arrest he was assaulted by *Nyathi*, but the true extent of the assault appears to have been exaggerated. However, I accept that he was assaulted and must be compensated. Although the plaintiff's claims resort under separate heads, I propose to award a globular sum for the arrest, assault and detention. The extended duration of the plaintiff's detention is a decisive factor in the assessment of an appropriate award. Having regard to the cases cited by both counsel and the awards made therein, I consider that damages should be awarded in the sum of R350 000.00. In the result the following orders will issue: -

- 1. The defendant is ordered to pay the plaintiff the sum of R350 000.00.**
- 2. Costs of suit.**
- 3. Interest on the amount at the prescribed legal rate of 15.5% per annum a *tempore morae* to date of final payment.**

⁷ Criminal Procedure Act No, 51 of 1977

D.CHETTY

JUDGE OF THE HIGH COURT

Obo the plaintiff: Adv H. B. Ayerst

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