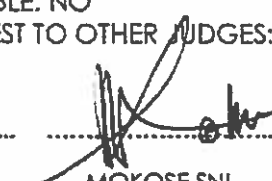


REPUBLIC OF SOUTH AFRICA



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

Case Number: 2017/1837

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
10/11/2020	
DATE	MOKOSE SNI

In the matter between:

NELSON CUBANE LANGA

Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

AND CORRECTIONAL SERVICES

2nd Defendant

THE DIRECTOR OF PUBLIC PROSECUTION: GAUTENG

3rd Defendant

JUDGMENT

MOKOSE J

Introduction

[1] The plaintiff instituted a civil suit against the defendants for unlawful arrest and detention and malicious prosecution having been arrested at his home in Soweto on 14 July 2016 by members of the South African Police Services ("SAPS"). He was arrested for allegedly being in possession of a South African identity document which had been obtained illegally and was detained for approximately 41 (forty-one) days.

[2] The defendant bore the duty to begin and of proving the lawfulness of the arrest and detention of the plaintiff on a balance of probabilities and the plaintiff bore the onus to prove that he is entitled to succeed on the merits of the matter.

[3] The common cause facts are that the plaintiff was arrested on 14 July 2016, was charged at the Moroka Police Station and held at the Johannesburg Prison until 31 August 2016 when the charges were withdrawn against him.

FACTUAL BACKGROUND

[4] The plaintiff was arrested by members of the SAPS on 14 July 2014 at his home in Mofolo South, Soweto. He was arrested for allegedly being in possession of a South African identity document which had been obtained illegally. He was detained at Moroka Police Station for a day then transferred to the Johannesburg Prison where he was held for a period of 41 days. He was released on 31 August when charges against him were withdrawn.

DEFENDANT'S VERSION OF EVENTS

[5] Constable Hlongwane and Sergeant Louw, on behalf of the defendants, testified that in the performance of their duties, they arrested the plaintiff at approximately 20H00 after he had been found in possession of two documents containing contradictory information pertaining to him. The plaintiff was in possession of a South African identity document with the names of *Nelson Cumbane Langa* born on 15 December 1964 and a driving licence issued by the Government of Mozambique which bore the names of *Alfredo Cambane Cande* born on 1 January 1964. Furthermore, at the time that he was arrested, he had made utterances that he had fraudulently obtained such identity document for the purposes of purchasing vehicles from Lesotho. As such, they had suspected that the plaintiff had obtained the South African identity document by fraudulent means as the photograph on both the documents corresponded but the names thereon differed.

[6] The arrest of the plaintiff emanated from a complaint by the plaintiff that a tyre had been stolen at a scrapyard in Mofolo. When Constable Hlongwane and Sergeant Louw arrived at the scrapyard in the presence of the plaintiff, they realised that they had come to investigate the same people who had earlier laid a complaint against the plaintiff of a lost cell phone. The cell phone was not found despite all parties being searched. With the plaintiff's permission, Constable Hlongwane and Sergeant Louw went to the plaintiff's home and conducted a search for the cell phone. It was not found. During such search, the driver's licence issued by the Mozambique licensing authority was found which belonged to the plaintiff.

[7] In cross-examination, Constable Hlongwane testified that he arrested the plaintiff because he reasonably suspected that the plaintiff had fraudulently obtained a South African identity document.

[8] Warrant Officer Solomon Leseka testified on behalf of the defendant that he was not involved in the arrest but that he booked the plaintiff into the cells. He took the plaintiff's finger prints and read the warning statement to him.

[9] The investigating officer, Constable Nkhensani Louisa Makhubele testified that after receiving the docket and reading the statements of Constable Hlongwane and Sergeant Louw, she noted that the identity document of the plaintiff and the driver's licence bore different names and dates of birth although the pictures on the documents bore a great resemblance to one another and to the plaintiff. She testified further that she went to the Home Affairs office to verify the authenticity of the identity document. She ascertained that it had not been fraudulently obtained. This information was obtained on 19 July 2016 and passed onto the prosecutor on 20 July 2016.

[10] In cross-examination, Constable Makhubele testified that on 20 July 2016 she went to the Kliptown Licensing Department in pursuit of her investigations where she was informed that they are unable to give any information pertaining to licences issued in a foreign jurisdiction. The information pertaining to the investigations was passed onto the prosecutor on the same day and she conducted no further investigations. When she was asked why bail was not granted despite the investigations, Constable Makhubele said that a person such as the plaintiff was '*risky*' as he would probably not return to attend his trial if he were granted bail.

[11] Mr Setlelele, the prosecutor, gave evidence that he had encountered the plaintiff. He testified that from the documentation he was presented with, the matter was a fraud case. Accordingly, there was a need to verify the plaintiff's address and his immigration status before granting bail in terms of Section 50(6)(d) of the Criminal Procedure Act 51 Of 1977 ("the Act").

[12] In cross-examination, Mr Setlelele testified that the documents which had been handed to him as proof of having acquired citizenship did not appear to be authentic and requested an affidavit in confirmation of same be furnished. Once the authentic documents had been furnished, would he consider the granting of bail. On 31 August 2016, Mr Katise, the plaintiff's legal representative, furnished a certificate of naturalisation together with a letter from the Department of Home Affairs confirming same which convinced him of their authenticity and led him to withdraw charges against the plaintiff. He confirmed that had he refused to accept the documents, he 'would have been involved in a malicious prosecution'. He conceded further that the certificate of naturalisation had been issued long before the plaintiff had been arrested.

PLAINTIFF'S VERSION OF EVENTS

[13] The plaintiff testified in his own case. He testified that he had been arrested on 14 July 2016 at his place of residence at approximately 22H00 by two police officers, one of whom was female. They asked him for his identity document which they alleged was fraudulent. He denied that he had been arrested by Constable Hlongwane and Sergeant Louw but confirmed that he had met them earlier in the evening when he sought their assistance to retrieve a tyre which had been taken by 'some boys' at the scrapyards.

[14] The plaintiff further testified that he was dropped off at his place of residence by Constable Hlongwane and Sergeant Louw at about 20H30. They merely dropped him outside his house and did not enter his home. He testified that at about 22H30 and whilst asleep, he heard a knock on the door with people calling out "Mandela, Mandela" being his nickname. He then opened the door to the two police officers who demanded his identity document which he handed over. He testified further that

the officer who he handed the document to, nicknamed "Never Die" then said that the identity document was a forgery and proceeded to arrest him.

[15] The plaintiff testified further that he was approached by the investigating officer the next morning who took him to his place of residence in a private car. He was then asked to produce other documents whereupon he handed them over. This included a letter from the Department of Home Affairs dated 4 March 2016 (Form "E") being a letter of confirmation of naturalisation and the certificate of naturalisation itself (Form "F"). He testified that the investigating officer just looked at the documents and did not take any notice of same. He was subsequently taken to court, having been instructed to withdraw the sum of R1000 from an ATM machine by the investigating officer. The withdrawal failed due to the lack of funds in his bank account.

[16] He testified further that on 31 August 2016 he appeared in court where the Magistrate informed him that he was being released. At the time of his arrest he was suffering with a hip injury. On 25 July and whilst he was in custody, he attended at Baragwanath Hospital for this injury to be seen to.

[17] The plaintiff's landlord, Mr Godfrey Lethabo, testified that on 14 July 2016 in his sleep he heard the plaintiff being called and subsequently being asked for his identity document. When he looked through the window, he saw the plaintiff being escorted from the premises by two police officers, one of them being a female officer. This was at approximately 22H00. He testified that he was present at the Magistrate's Court on 21 July 2016 during the plaintiff's second appearance. He was approached by a person who identified himself as an attorney who demanded that he pay the sum of R2000 in respect of bail but was told by the plaintiff not to pay the said sum to this person.

[18] In cross-examination, Mr Lethabo insisted that he had seen the plaintiff being arrested by a male and a female officer and not by two male officers as had been testified by the defendants. Furthermore, he heard the officers making reference to the identity document and not the driver's license.

Issue

[19] At issue is whether the Minister is liable to compensate the plaintiff for damages for the unlawful arrest and detention and malicious prosecution of the plaintiff. The onus to justify the arrest and detention of the plaintiff rests on the defendant which must either be on constitutional or statutory grounds.¹

Unlawfulness of the arrest

[20] Section 38 of the Act provides that in addition to the summons, written notice and indictment, an arrest is one of the methods of securing the attendance of a person in court for the purposes of trial. A distinction must be drawn between the object of the arrest and the arrestor's motive. An arrest cannot be used for ulterior purposes such as interrogation or subjecting one to an identification parade or even blood tests to strengthen or dispel a suspicion. The power of arrest may only be exercised for the purpose of bringing a suspect to court.

[21] Section 39 of the Act provides that such arrest shall be effected with or without a warrant of arrest and, unless the person to be arrested submits himself to custody, by actually touching his or her body or if the circumstances so require, by forcibly confining his or her body.

¹¹ Minister of Correctional Services v Kwakwa 2002 (4) SA 455 (SCA)

[22] Section 40(1)(b) of the Act authorises a peace officer to arrest without a warrant, a person who an officer suspects of having committed a Schedule 1 offence. Schedule 1 offences include assault, robbery, assault when a dangerous wound is inflicted and any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1. The jurisdictional factors are that the arrestor must be a peace officer and that the arrestor must entertain a suspicion. That suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds.²

[23] The presence of jurisdictional facts enables the arrestor to exercise his discretion but does not place an obligation on the arrestor to arrest a suspect. Such discretion must however be exercised judicially. It must be exercised in good faith, rationally and not arbitrarily.³

[24] Whilst Section 38 authorises an arrest as a method of securing the attendance in court, Section 40(1)(b) authorises a peace officer to arrest one without a warrant of arrest where he reasonably suspects a crime of having been committed which falls within the realms of Schedule 1. It must be noted that an arrest is a contravention of a person's right to freedom and security as provided by Section 12 of the Constitution of South Africa. The deprivation of the person's right to freedom must be justified by the arrestor whilst the plaintiff need only prove his arrest.

[25] The question to be asked in the matter *in casu*, is whether the police officers had reasonable grounds to arrest the plaintiff. Have the jurisdictional factors referred to in Section 40(1)(b) of the Act been established by the defendants?

² The Minister of Safety and Security v Thei Jona Sekhoto 2011 (1) SACR 135 (SCA) at para 5 & 6

³ Sekhoto (supra) at para 38; Masetlha v The President of the RSA 2008 (1) SA 566 (CC) at para 23

[26] The defendants pleaded in their amended plea that the jurisdictional factors had in fact been established in that the plaintiff was arrested for a fraud offence which falls under Schedule 1 of the Act. Furthermore, the defendants further pleaded that the arrest of the plaintiff was in accordance with the Act as he was reasonably suspected of having committed an offence referred to in Schedule 1. The defendant pleaded further that the plaintiff had been arrested because he was, on reasonable grounds, suspected of having committed fraud by obtaining a South African identity document using fraudulent means.

[27] The preliminary jurisdictional factors have been established. However, the court needs to consider whether the discretion which was then exercised by the arrestor had been exercised judicially. The exercise of a discretion will be unlawful where the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator.⁴ It must not be forgotten that the decision to arrest must be based on the intention to bring the suspect to justice.

[28] The parties' versions of the arrest differ in certain respects the most material being in the arrest itself. The plaintiff alleges that he was arrested by two officers, one of them being a female officer and the defendant alleges that the arrest was conducted by two officers, both of whom were male police officers. Without determining which version is the most probable, the court is satisfied that it is common cause that the plaintiff was arrested on the night of 14 July 2016 on a suspicion of being in possession of a South African identity document which had been obtained by fraudulent means.

⁴ Minister of Safety and Security v Sekhoto (*supra*) at para 30

[29] In testing the legality of the exercise of the discretion, I turn to the salient facts which are common to the parties. I accept that the police officers duly exercised their discretion judicially having seen both the driver's licence of the plaintiff as well as his South African identity document which bore similarities in the photograph and of him but with different details pertaining to names and dates of birth. There is no evidence of a lack of rationality in the exercise of the discretion.

[30] Accordingly, I am of the view that the arrest of the plaintiff was lawful.

Malicious prosecution

[31] The plaintiff claims compensation in the sum of R600 000 for the damages he suffered as a result of the wrongful arrest and detention and R700 000 for wrongful, alternatively, malicious prosecution and deprivation of liberty and R800 000 for malicious prosecution, totalling R2 100 000. It is common cause that the plaintiff appeared in court on 15 July 2016 at which time the case was remanded to 21 July 2016 for further investigations. On 21 July the matter was remanded further to 31 August 2016, on which day the charges were dropped and he was released. All in all, the plaintiff spent 41 days in detention.

[32] Malicious prosecution is the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy. To succeed in this action, one must allege and prove the following:

- (i) that the defendant set the law in motion by instigating or instituting proceedings;
- (ii) the defendant acted without reasonable and probable cause;
- (iii) the defendant acted with malice (or *animo injuriandi*); and

(iv) that the prosecution failed.

[33] These requirements were set out by the SCA in the matter of **Minister of Justice and Constitutional Development & Others v Moleko**⁵ and have been re-stated in the matter of **Rudolph & Others v The Minister of Safety and Security & Another**⁶.

[34] The requirement of malice has been discussed in many a case. The approach adopted by the SCA is that, although the expression of 'malice' is used, the claimant's remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved is *animus injuriandi*. In the matter of **Minister of Justice and Constitutional Development & Others v Moleko** (supra) at para 64 the court held:

"The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or I would say, even gross negligence) will not suffice."

[35] The court is obliged to determine whether the plaintiff has proved that the defendant intended to injure him, whether directly or indirectly. I believe not. No evidence has been proffered suggesting that the defendant intended to injure the plaintiff in charging him with fraud.

⁵ [2008] 3 All SA 47 (SCA) at para 8

⁶ 2009 (5) SA 94 (SCA) at para 16

[36] It is evident that the defendants set the law in motion. However, the question to be asked is whether the members of the South African Police who arrested the plaintiff did anything more than one would expect from a police officer in the circumstances. I think not. The defendants further aver that the statement which was given to the prosecutor was fair and honest and the decision to prosecute was left to the prosecutor to prosecute or not.

[37] Reasonable and probable cause in the context of a claim for malicious prosecution means an honest belief in the guilt founded upon reasonable grounds that the institution of proceedings was justified. The onus is on the plaintiff to establish *prima facie* the absence of a reasonable and probable cause to believe that a prosecution is justified.⁷

[38] From the evidence proffered by the defendant, the police officers, having had sight of the identity document of the plaintiff and his driver's licence, had reason to believe that the South African identity document had been fraudulently obtained and proceeded to arrest the plaintiff. The defendants further aver that the plaintiff told them that he had obtained it for the purpose of purchasing vehicles in Lesotho. This could have been said in jest.

[39] Whilst counsel for the plaintiff has requested the court to take judicial notice of the fact that a person in possession of a fraudulent identity document would be less inclined to go to the police station to seek assistance, I am of the view that the defendants acted with reasonable and probable cause in the circumstances.

⁷ Minister of Safety and Security v Andre Edward Lincoln (2020) 3 All SA 341 (SCA) at para 20

[40] It is common cause that the charges against the plaintiff were withdrawn by the prosecutor on 31 August 2016. The final requirement that the prosecution must have failed has been met.

Unlawful detention

[41] From the evidence of the investigating office, Ms Makhubele, it is apparent that having ascertained the nature of the matter, called the Home Affairs Office on 15 July 2016 who advised that they were off-line and as such, were unable to confirm the authenticity of the identity document. She testified further that on 20 July 2016 she went to the licencing department to obtain information about the plaintiff's licence. She was told that they are unable to assist her in this regard. Ms Makhubele checked the authenticity of the identity document with the Department of Home Affairs where she was advised that it was in order. On the same day Ms Makhubele gave the prosecutor feedback on her investigations ahead of the second appearance by the plaintiff.

[42] In cross-examination, Ms Makhubele confirmed that she signed the bail statement on the morning of 21 July 2016 wherein she opposed bail. She confirmed that she believed that the plaintiff would be a 'flight risk' at a time that she had ascertained that the identity document had not been fraudulently obtained.

[43] Counsel for the plaintiff requests this court to make a negative inference against Ms Makhubele and make a finding that her conduct was malicious. I am not convinced that her conduct was malicious. I am however, inclined to believe that Ms Makhubele did not diligently apply herself to the task of investigating the matter thoroughly and placing before the prosecutor evidence pertinent to the charges being faced by the plaintiff. I am also of the view that as early as 21 July 2016

and on the second appearance of the plaintiff in court, the prospect of proving a case based on possession of a fraudulent identity document had collapsed.

[44] Mr Setlelele confirmed that he had received information on the authenticity of the identity document from Ms Makhubele ahead of the plaintiff's second appearance on 21 July 2016. Counsel for the plaintiff was of the view that Mr Setlelele was also malicious in his conduct. Again I am not convinced that there was malice on the part of the prosecutor. To the contrary, I am of the view that he had an honest belief in the guilt of the plaintiff. However, I believe that he was negligent in his assessment of the information received. He believed that the information had to be furnished in a particular format which he had not been given but was subsequently furnished on 31 August, at the plaintiff's third appearance.

[45] Accordingly, I come to the conclusion that the plaintiff had been unlawfully detained after the 21 July 2016. The evidence of the authenticity of the identity document had been obtained at that stage.

Damages

[46] The plaintiff claims compensation for damages he suffered as a result of the wrongful arrest, detention and malicious prosecution. He was arrested on 14 July at about 22h00, appeared in court the next day where he was remanded in custody until 21 July 2016. He appeared in court on 21 July 2016 and the matter was further remanded to 31 August 2016, on which day the charges were withdrawn.

[47] The plaintiff gave evidence that he was humiliated and embarrassed by his arrest and subsequent detention. Furthermore, he was unwell at the time and was in fact taken to Baragwanath Hospital for his hip to be attended to. In support of the damages claim and in an effort to assist the court in determining the damages, counsel for the plaintiff brought to the court's attention several cases.

[48] It is so that awarding damages for wrongful arrest, detention and malicious prosecution is not to enrich the plaintiff but a mere *solatium* for his injured feelings. The SCA in the matter of **Minister of Safety and Security v Tyulu**⁸ dealt with the issue of determining damages in such cases. The courts were cautioned to ensure that wards made in these circumstances "*reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.*"⁹

[49] Kubushi J in the matter of **Strydom v Minister of Safety and Security and Another**¹⁰ held that the time spent in detention is not the only factor to be considered. I agree with her view. The conditions under which he was held should also be taken into consideration. No evidence was led in this regard. The plaintiff only led evidence that he was unwell in prison causing him to go to the hospital for attention. He also gave evidence that he was humiliated and embarrassed by the arrest. Furthermore, he was detained for 41 days in total.

⁸ 2009 (5) SA 85 (SCA)

⁹ *Mbiza v The Minister of Police* (27069/2014) [2017] ZAGPPHC 1308 (8 December 2017) at para 25

¹⁰ (31353/2007) [2014] ZAFSHC 73 (28 May 2014)

[50] The defendants were however of the view that the plaintiff could have been released immediately had he given evidence of his naturalisation certificate. Furthermore, they were of the view that bail could also have been granted to the plaintiff.

[51] I am of the view that by 21 July when the plaintiff appeared in court for the second time, he could have been released as the investigating officer had obtained information that the identity document was authentic. There was no need at that time to grant bail.

[52] Accordingly, the court finds as follows, that:

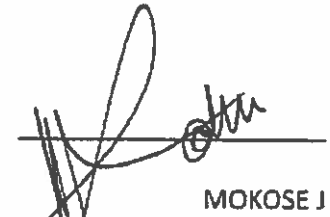
- (i) the defendant has proved the onus placed on it by the provisions of Section 40(1)(b) of the Act and as such, the plaintiff's claim of unlawful arrest fails;
- (ii) the plaintiff has failed to prove on a balance of probabilities that he had been maliciously prosecuted; and
- (iii) the plaintiff has proven that on a balance of probabilities that he was unlawfully detained for the period from 21 July 2016 to 31 August 2016.

Order

[53] The following order is granted:

- (i) the defendants are ordered to pay the sum of R300 000 to the plaintiff for the unlawful detention of the plaintiff for the period 21 July 2016 to 31 August 2016;
- (ii) the defendant is ordered to pay interest on the sum of R300 000 at the rate of 7% per annum *a tempore morae* from the date of judgment to the date of payment;

(iii) the defendant is ordered to pay the plaintiff's costs of suit.

A handwritten signature in black ink, appearing to be 'Mokose J', is written over a horizontal line.

MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Plaintiff:

Adv MS Lufele

instructed by

Mehlo & Ndedwa Inc

For the Defendant:

Adv MW Dlamini

instructed by

The State Attorney

Johannesburg

Date of Judgement:

10 November 2020