

SOUTH AFRICA / JUDGMENT

Matamela v Minister of Justice and Constitutional Development (11654/2016) [2017] ZAGPJHC 151 (13 June 2017) [2017] ZAGPJHC 151

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van der Linde

CASE / FILE NUMBER

11654/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 11654/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

13/6/2017

In

the matter between:

Matamela,
Richard
Luvhengo Plaintiff
and
Minister
of Justice and Constitutional
Development Defendant

JUDGMENT

Van der Linde, J:

Introduction:

the facts

- [1] The plaintiff is an ex-colonel in the South African Police Services. He sues the defendant, the Minister of Justice and Constitution

Development for damages for unlawful arrest and incarceration. No aspect of the matter was separated under rule 33(4), and both parties closed their cases without leading evidence. The evidential material before me is an exhibit comprising a bundle called the “trial bundle”, which Mr Lubbe for the plaintiff handed up during opening, and said that its status was that the documents are what they purported to be. He said too that since the documents were mostly common cause, he thought that it could actually be received as being truth for contents. Ms Mofokeng for the defendant, when she opened and before she too closed her case, did not dispute these statements.

- [2] The facts are straight-forward. On 5 July 2001 the plaintiff was convicted in the Regional Court of one count of attempted theft and one count of fraud. He was sentenced by Regional Magistrate Mr Roux to six years’ imprisonment, of which three years were suspended for five years on appropriate conditions. He applied for leave to appeal both conviction and sentence; the former was refused and the latter granted. The plaintiff was also granted R5000 bail pending his appeal against sentence.
- [3] The appeal against sentence first came before Mathopo J and Phatudi AJ (then), who postponed the appeal to 30 January 2008, extended the bail, and noted that the appellant was immediately filing a petition for leave to appeal his conviction to the then Witwatersrand Local Division. On 30 January 2008, the plaintiff’s appeal against sentence was postponed sine die, in view of the petition for leave to appeal his conviction that was then still pending. On 30 April 2009 the petition for leave to appeal his conviction was dismissed by Willis J (then) and Mokgoathheng J.
- [4] With the plaintiff still out on bail, his petition for leave to appeal his conviction having been dismissed, and his appeal against sentence having been postponed sine die (pending the petition), the incentive for the plaintiff to enrol his appeal against sentence must have been dwindled. But the prosecution appeared equally disinterested in enrolling the appeal, because five and a half years later, by 28 July 2014, the appeal had not yet been heard and the plaintiff was still free on bail. On that day the magistrate issued a written order in terms of s.307(3)(b) of the Criminal Procedure Act 51 of 1977 to be served on the plaintiff, requiring that he surrender himself to serve his sentence.

- [5] It will at once be appreciated that by this date the postponed appeal against sentence had not been heard and so, arguably, the plaintiff's bail conditions had not yet been fulfilled, and he was entitled to remain free on bail. I say "arguably", because this inordinate lapse of time during which the appeal was not being enrolled may justify the inference, if it did not have that effect in law, that the appeal had been abandoned; or at least had lapsed for failure to have prosecuted it.
- [6] At all events, it would appear that the surrender order could not be served personally on the plaintiff, and instead it was served by affixing it to some door. I am prepared to accept, as Mr Lubbe argued, that it was required to have been served personally. Next, when a year later by 6 March 2015 the plaintiff had still not surrendered himself, or for that matter enrolled the appeal against sentence, the magistrate authorised a warrant for his arrest, so that he be "brought before the said court to be dealt with according to law."
- [7] The reason furnished in the warrant, not wholly coherent given the little space left within which this was to be supplied, for it being issued was: "Whereas the above-named was admitted to bail and failed to comply with the said conditions, that the accused failed to surrender himself (sic). On the 30th April 2009 in the High Court of South Arica (Witwatersrand Local Division) (Johannesburg) in case no P54/08 it is ordered that: Petition for leave to appeal against conviction is dismissed."
- [8] On 27 May 2015 the warrant was executed and the plaintiff arrested and incarcerated. This was just more than a month less than eleven years after back on 5 July 2004 he had been granted bail pending his appeal against sentence. And still his appeal had not been enrolled. On 30 September 2015 the plaintiff applied urgently to the High Court for a variety of orders, not all of them coherent (he was acting without legal representation); but the upshot of which was that on 9 October 2015, apparently by agreement between the DPP and the plaintiff, Mashile J granted an order cancelling the warrant of arrest. The learned judge ordered too that the plaintiff be released immediately, and that his bail of R5000 is reinstated "on condition that he prosecute his appeal on the 7th of March 2016."
- [9] What had happened in the meantime, shortly after the plaintiff had launched his urgent application, was that the DPP wrote to him on 1 October 2015, advising that the appeal against sentence had been set down for 7 March 2016. On 5 October 2015 the appeal was in fact enrolled for 7 March 2016.
- [10] In all the plaintiff had spent 137 days incarcerated during this period, and he claims damages for this, and for the unlawful arrest, in the amount of R6 496,200. When the matter came before the full bench on 7 March 2016, Weiner and Keightley JJ dismissed his appeal against sentence, but ordered that "Sentence is to include 137 days that the appellant was held in custody prior sentence."

Discussion:

[11] In this country magistrates are appointed by the defendant in terms of s.9(1) of the Magistrates' Courts Act 32 of 1944; and in terms of s.10 of the Magistrates' act 90 of 1993, the defendant appoints magistrates in consultation with the Magistrates' Commission.

[12] It follows that the defendant is, as a matter of law, and in principle, vicariously liable for the unlawful conduct of a magistrate.[1] But this statement must be substantially qualified, because a magistrate is not liable for his/her negligent conduct when

performing judicial functions, because such conduct is not regarded as being unlawful.[2] This principle has been referred to "judicial independence immunity". And it follows too from this principle of judicial

independence immunity that the defendant cannot be held liable if the magistrate cannot be held liable. There is one exception against these statements of the legal position, and it is that malice destroys the judicial independence immunity.[3]

[13]So it follows that the plaintiff, to succeed, must show that the magistrate acted maliciously. That has not been shown; not only did Mr Lubbe accept that the magistrate acted bona fide, a concession fairly made since there was nothing at all to suggest differently, but the plaintiff – who has the onus – does not even assert in his particulars of claim that the magistrate acted maliciously. Certainly no such inference can be drawn on the facts set out above.

[14]It follows from this conclusion that even if I am wrong in pitching the standard at the malice threshold, and even if it could be argued that the issuing of the warrant was a function not of a judicial nature but of a mere clerical nature, then still there is no allegation let alone evidence of even negligence on the part of the magistrate. For this reason alone the plaintiff's case must fail.

[15]If I am wrong in having concluded that the plaintiff was onus-bound to show culpa and has failed to show it, then I believe there is a second reason why the plaintiff's case must fail. It is that the plaintiff actually failed to prosecute the appeal when he was able to take steps to enrol the postponed hearing of the appeal against sentence. In this regard the dicta in the Supreme Court of Appeal in *S v Malgas*,^[4] to which Ms Mofokeng referred, are apposite (emphasis supplied):

"[20] There can be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of the appeal for those persons fortunate enough to have been granted bail, pending the appeal. The phenomenon whereby inertia descends upon an appeal, like a cloud from the heavens, once bail has been granted to an accused after conviction and sentence, has been recurring with increasing frequency, especially in certain parts of the land. Our own experience as judges indicates that the clouds have been accumulating ominously, like a storm which is gathering momentum. Although from time to time the long delay between the passing of a custodial sentence and the hearing of an appeal may justify interference with that sentence, it is only in truly exceptional circumstances that this should occur. Each case must be decided on its own facts.

- [21] The appellants have adopted a supine attitude to the hearing of their appeal. Their attitude to this case throughout has been to adopt the attitude of a nightjar in the veld: do as little as possible, hope that nobody will notice and expect that the problem will go away. Fortunately for the administration of justice, the appellants do not enjoy a nightjar's camouflage. They may have hidden, but they have not been invisible.
- [22] It will be hard on the appellants and their families that, 10 years after their sentencing by the magistrate, they should now have to report to jail to commence serving their sentences. We have anxiously reflected upon the needs of justice in this case, including the requirement that this court should show mercy to and compassion for our fellow human beings. Having done so, the conclusion remains inescapable that, if this court were to regard this case as yet another 'exception', it would undermine the administration of justice. The appellants are to blame for the long delay in bringing this matter to finality. The predicament in which the appellants find themselves is largely of their own making.”
- [16] I have no doubt that, as Mr Lubbe submitted, the DPP is entitled to set down a postponed appeal against sentence; that is indeed what the local practice manual says. I do not believe that it follows from that that an appellant is precluded from taking steps to procure that result. An appellant is free to approach the DPP to secure a date. But more importantly, an appellant is free to abandon an appeal; it often happens. And it need not happen in court; that too often happens. There is no suggestion here that the State had given notice of an intention to ask for the imposition of an increased sentence.
- [17] In this case the passage of time between the dismissal on 30 April 2009 of the petition for leave to appeal the conviction and the issuing of the warrant of arrest on 6 March 2015 was six years. There is on the material before the court no evidence that anyone, including the plaintiff, did anything in that time to set the appeal down for hearing. It is difficult to accept that the plaintiff retained any desire to appeal his sentence in these circumstances.
- [18] Indeed, his founding affidavit in the urgent application before Mashile, J complains not of being arrested despite anxiously awaiting the hearing date of his appeal against sentence. It speaks rather of the iniquity of forfeiting his bail money when he did nothing wrong; his attorney never informed him, he said, of the outcome of the appeal – not that no date had yet been allocated.
- [19] The order issued by my learned colleague then entitled him to get his bail money back – but on condition that he prosecutes his sentence appeal. That is telling, because it shows the slip of what the urgent application was all about – getting the bail money back, not getting a date for the hearing of the appeal against sentence.
- [20] In these circumstances I believe the inference is warranted that the sentence appeal had been abandoned by the plaintiff. If that is correct, then the bail condition, that it had been granted pending the appeal, lapsed and so too the bail. Since he did not report to serve his sentence once he had decided to abandon his appeal, the plaintiff's arrest was not unlawful.

[21]But there is a third reason why in my view the plaintiff's claim must fail. It is that I do not believe that any damages have been shown. The plaintiff's appeal against sentence was, in the event, dismissed. The order also deducted from his effective sentence the 137 days served before the appeal.

[22]This period of imprisonment was never intended to serve any purpose other than for the plaintiff to commence serving a sentence lawfully imposed by a court of law in respect of a conviction that at that stage had become unassailable. The sentence was suspended pending the appeal, but that temporary condition was lifted when the appeal was dismissed. Had the plaintiff not been granted bail pending the appeal, the time spent incarcerated while awaiting the sentence appeal, would have been time served in respect of the sentence originally imposed.

[23]Thus, even if the incarceration was technically unlawful, in the event no damages were suffered because the period of 137 days had to be served in any event. The plaintiff was not incarcerated for one minute longer than the effective period to which he had been sentenced, and the 137 days for which he had been incarcerated were in every sense part of the period of imprisonment to which he had been sentenced in any event. Had I concluded that the plaintiff's incarceration was unlawful I would not have awarded him any damages.

[24]Concerning costs, Mr Lubbe relied on Limpopo Legal Solutions and Others v Vhembe District Municipality and Others^[5] for the proposition that if I found against the plaintiff, no order as to costs should issue, as the plaintiff was merely litigating to enforce his constitutional rights. I regret that I am not persuaded that the plaintiff was in this case merely litigating to enforce constitutional rights. Although of course the plaintiff did not testify, the facts with which I am left rather justify the inference that the plaintiff was being overly technical in seeking damages of more than six million rand for having served a period of imprisonment which he was always bound to serve for crimes of which he had lawfully been convicted.

[25]In the result I make the following order:

The plaintiff's claims are dismissed with costs.

WHG van der Linde

Judge, High Court

Johannesburg

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Date of trial: Friday, 9 June 2017

Date of judgement: Tuesday, 13 June 2017

[1] Minister of Safety and Security and Others v Van der Walt and Another, (1037) [2014] ZASCA 174 (19 November 2014).

[2] Van der Walt op cit at [23].

[3] Tsotetsi v The Honourable Magistrate Delize Smith and Another (23969/2015) [2016] ZAGPJHC 329 (29 November 2016) at [15], [16].

[4] S v Malgas and Others, 2013 (2) SACR 343 (SCA).

[5] (CCT159/16) [2017] ZACC 14 (18 May 2017).

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