

SOUTH AFRICA / JUDGMENT

# Mphaleni v Minister of Safety and Security (1495/2007) [2013] ZAECMHC 28 (4 October 2013)

**[2013] ZAECMHC 28****COURT**

Eastern Cape High Court, Mthatha

**BEFORE**

Dawood

**CASE / FILE NUMBER**

1495/2007

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**Source record****IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION : MTHATHA****NOT****REPORTABLE****CASE NO:**

1495/2007

In the matter

**between :**

THOBEKA

MPHALENI

.....PLAINTIFF

and

MINISTER

OF SAFETY AND SECURITY

.....DEFENDANT

**JUDGMENT**

DAWOOD J:

1. The Plaintiff herein sues the Defendant for wrongful and unlawful arrest and detention; humiliation and degradation and contemelia,

and malicious prosecution. 2. The Plaintiff in her particulars of claim attacked the validity of the warrant of arrest, on the basis that:- (a) The Magistrate issued the warrant without information that the Plaintiff defrauded the Department of Social Development and/or any person; and (b) She accordingly sued the second and third Defendant in these proceedings on the basis that the Magistrate did not have information at her disposal which was sufficient to form a reasonable suspicion that an offence of fraud had been committed, she had no reasonable grounds to suspect that the Plaintiff had committed the offence she was allegedly suspected to have committed. 3. The Plaintiff also attacked the validity of the warrant on the basis:- (a) that the warrant of arrest was improper because Inspector Ngcikiza applied for and obtained a warrant of arrest without properly

investigating the allegation against the Plaintiff and without having sufficient or any information to form a reasonable suspicion

that the Plaintiff committed an offence of fraud but nonetheless deposed to an affidavit to that effect. (b) That Inspector Ngcikiza had no reasonable grounds to suspect that the Plaintiff had committed the offence he alleged that the Plaintiff was suspected of having committed. 4. The Plaintiff alleged that her arrest and detention was accordingly without justifiable cause and consequently her arrest and detention were wrongful and unlawful. 5. The Plaintiff was detained for several hours at Wellington prison and released the following morning on bail in the sum of R1000-00. 6. On the 12th of July 2006 Inspector Ngcikiza wrongfully and maliciously set the law in motion against the Plaintiff by laying a false criminal charge of fraud, against her and caused the Plaintiff to appear in court on several occasions. 7. The Plaintiff further alleged that Inspector Ngcikiza set the law in motion against the Plaintiff without probable or reasonable cause for doing so and without any reasonable belief in the truth of the information. He accordingly acted with malice with the intent to injure the good name of the Plaintiff. The prosecution failed in that the criminal charges were withdrawn against the Plaintiff by the prosecuting authority. 8. The Plaintiffs testimony was briefly that:- (a) She was arrested in the presence of her child by Inspector Ngcikiza and placed at the back of the police van on a cold winter night without her being shown any documentation and despite her denial that she was making false claims in respect of non-existent children to the Department of Social Welfare, and despite her producing the birth certificates of her children and grandchildren, to prove to him that she did not have any illegal children that were receiving funds from the State. (b) Inspector Ngcikiza worked with the father of one of her children, Siphiwo Sikuza at the commercial branch offices and she had seen him there on the day that she went to drop off the maintenance letter. (c) She had not spoken to him on that day but assumed that he had seen her as well and knew who she was. (d) She only

spoke to him on the day of her arrest and he made no mention of the DNA tests. According to her there was something

untoward about the manner the tests were conducted in Mthatha and it was for this reason that she requested them to be conducted in East London. (e) She was detained in the cells with 4 other females and did not have anything to eat that evening as they had already been given their food prior to her arrival nor did she eat the following morning as she did not feel up to it. She did not sleep either because of the predicament she found herself in and prayed all night instead. The cell was in a bad state, (f) The toilet was inside the cell and there was no privacy if one wanted to use the toilet. The toilet was overflowing with faeces and there was a horrible stench in the cells\* She did not use the toilet, (g) She received 2 disability grants one in respect of Thandokazi who was asthmatic and the other in respect of Siphokazi who had been injured and blinded in one eye, (h) She was released before lunch the following day after she was granted bail at court and taken to Wellington Prison. (i) Under cross examination she indicated that she was not shown the warrant of arrest and only learnt about it at court so paragraph 2.1 of her particulars of claim where it is alleged that inspector Ngcikiza arrested her with a warrant of arrest is incorrect and she does not know how a warrant is applied for. (j) Inspector Ngcikiza's version that was put to her was that:- (i) She did not produce any clinical records or birth certificates on the evening of her arrest. She denied this saying that she produced them and he read them using the lamp. (ii) Inspector Ngcikiza came to her homestead on a subsequent occasion and it was then that she produced the clinical records and birth certificates. She denied this saying he took the cards on the day of her arrest but he did go to her homestead whilst she was in custody looking for Siphokazj and that also in her presence took Siphokazi and Thandokazi to Doctor Notywala. (iii) It was put to her that he only executed the warrant of arrest on the day of arrest which she denied saying she gave them to him all the medical cards and birth certificates when he asked for illegal children. (iv) It was put to her that he drove a double cab - not a bakkie and she was put in the passenger seat. She denied this saying it was a van that only conveys 2 passengers and is a bakkie without a canopy and she was made to sit at the open portion, at the back. (v) She also denied that there were female officers present when she was arrested stating that there were only male officers. 9. That concluded her testimony and the Plaintiffs case was closed, 10. The Defendant after an Application for absolution from the instance was refused in respect of the Second and Third Defendants called the Second Defendant to testify. 11. Elizabeth Doreen De Waal testimony was briefly as follows:- (a) She is a regional court Magistrate. (b) On the 6th of July 2006 an application was made by the prosecutor who brought a police officer to her. (c) The prosecutor said that the officer wanted to apply for a warrant in terms of section 43 and the application complied with the requirements. (d) She asked if he read the statements to make certain that he had information under oath. (e) She relied on what Ngcikiza told her that the Plaintiff had committed fraud without particulars of the fraud being furnished to her because all she needed to ascertain is that he had reasonable suspicion without specifying the essentials of the offence. (f) Magistrates are not allowed to have insight into the docket; they rely upon the integrity of the prosecutor and the police officer. (g) She was extra cautious as she did not want to put people in jail that should not be there and therefore asked further questions from Ngcikiza.

(h) She believed that the statement made by Inspector Ngcikiza was correct. (i) She expected him to have investigated the fraud against the Plaintiff and to present the evidence in court and documentary proof (j) She stated that if she had known that there was no evidence that SASSA had been defrauded, that she would not have authorized the warrant and she most certainly would not have authorized on the basis of information furnished by Sikuza or had she known that no investigations had actually been conducted, (k) She authorized the warrant on the basis of what he had said to her and the prosecutor that he had conducted all the necessary

investigations, (l) She would have expected him to have applied his mind as to whether or not to arrest if evidence proved that no offence was committed, despite her having issued the warrant, she would have expected him to use his discretion and not arrest. (m) She would not have authorized the warrant if she was aware that the charge concerned SASSA and no one from SASSA had laid a charge against the Plaintiff, nor was there any investigation conducted by or on behalf of SASSA, nor was any statement or documents obtained from SASSA. (n) She would not have issued the warrant if she had seen the statement which concerns a personal issue because Sikuza was prejudiced and she would not have authorized any warrant based on information supplied by him. (o) She believed Ngcikiza and authorized the warrant on the belief that what he said was true. (p) She confirms that she was misled by him and would not have authorized the warrant on the information she now has. 12. That concluded the defendant's case with no further witnesses being called. 13. The Plaintiff was a good witness and readily made concessions. She was not prone to exaggeration even when describing the condition of the prison cells or her sleeping. She did not blame it on the state of the cell but rather on her emotional state of mind. She impressed me as a good, credible witness who gave her evidence in an honest forthright manner. 14. The Magistrate was an objective and impressive witness who willingly made concessions and was totally honest. Her testimony is also accepted as being truthful and credible. 15. The Defendant failed to call the arresting officer who was also the officer who applied for the warrant. 16.

## ISSUES

TO BE DETERMINED 16.1. The first issue is whether or not the Plaintiff has established a claim against the Second and Third Defendants, that is, whether she has established that the Magistrate acted mala fides in authorizing the warrant which is what she would need to prove according to the relevant authorities. 16.2. The Magistrate in issuing a warrant of arrest must comply with the provisions of section 43 of the Criminal Procedure Act which reads as follows:- '(1) Any magistrate, or justice- may issue a 'warrant for the arrest of any person upon the •written application of an attorney-general a public prosecutor or a commissioned officer of police— a) which sets out the offence alleged to have been committed:

- b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a Justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
  - (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.
- (2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.
- (3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed." 16.3. In *May v Union Government*<sup>1</sup>, it was inter alia stated 'It is not necessary for the issuing of the warrant that all the facts necessary for a conviction be given under oath. It is only necessary that reasonable grounds appear from the affidavit. The official requesting the warrant is not limited to the information under oath - when the suspicion is formed. The information under oath must be assessed in the context of all the facts which have been determined, both those under oath and others. The official also does not have to accept all the information under oath as true: he or she can accept some allegations and not others, even doubt them all. He or she must have information under oath and, from that, in the correct context, form a reasonable suspicion.' 16.4. The bona fide exercise of a discretion by a magistrate or justice of the peace under this section cannot be assailed in a court\* See *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883H with reference to *Shidiack v Union Government* 1912 AD 642 at 651. Although *Groenewald* is not fully supported in *Prinsloo v Newman* 1975
- (1) SA 481 (A) at 500C and 505D it is nevertheless confirmed (at 500B-505C) that the discretion the magistrate or justice of the peace has to exercise cannot\* barring exceptional circumstances, be questioned in a court. 17. It is evident from the foregoing that a Magistrate's discretion, exercised in good faith, is not justiciable in a court of law. 18. In this case the prosecutor that approached the Magistrate to issue the warrant did not make the application in writing himself but instead relied upon the affidavit of a non-commissioned officer Inspector Ngcikiza and his verbal testimony to support the

Application\* 19. In *Minister of Safety and Security v Sekotho and Another*<sup>2</sup>, contains a discussion on the role of peace officers and the discretion they hold in respect of an arrest which would, with respect, find equal application in determining the discretion of a Magistrate. "Harms DP (Nugent JA, Lewis JA, Bosiello JA and K Pillay AJA concurring) [34] These principles are in substance no different from those formulated by Innes ACJ in *Shidiack v Union Government*. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide

expressed, the Court will not B interfere with the result Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own, . . . There are circumstances in which interference would be possible and right If for instance such an C officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong, ” 20. The Plaintiff in her testimony failed to set out any basis upon which it could be inferred that the Magistrate acted Mala fides, or even that she was aware that she was arrested on the basis of a warrant of arrest or had even been shown a warrant of arrest, 21. The Magistrate testimony illustrated that she acted upon the evidence presented to her in the form of an affidavit from the investigating officer and his verbal testimony and she had no reason to disbelieve what was contained therein and further confirmed to her by the investigating officer and the prosecutor. 22. The bona fides of the Magistrate was not placed in issue and the evidence tendered by her supports the contention that she acted bona fides. 23. There is no legitimate basis for rejecting the testimony of the Magistrate that she acted properly and prudently in issuing the warrant on the information placed before her and that such information complied with the provisions of section 43 of the

Criminal Procedure Act. 24. She had no reason to disbelieve or question the veracity of the information given to her and she properly acted in accordance with that information. 25. On the basis of the legal proposition, in the absence of mala fides, the Plaintiff cannot succeed in establishing a claim against the Magistrate for the issuing of the warrant. 26. The Plaintiff has failed to discharge the onus resting upon her to show that the issuing of the warrant by the Magistrate was wrongful, unlawful or mala fides. 27. The claim against the second and third Defendant accordingly falls to be dismissed with costs. 28. The next issue whether or not Inspector Ngcikiza arrest of the Plaintiff was lawful or unlawful and whether he was responsible for the malicious prosecution of the Plaintiff. i) The Magistrate in her testimony indicated that if she had had sight of the docket and the actual evidence relied upon by the

investigating officer she would not have issued the warrant of arrest. ii) It was evident from the Plaintiff testimony;- a) That she knew the inspector from seeing him with the father of her child; b) That he accordingly worked with Mr Siphiwo Sikuza and this was not disputed. c) That she was arrested despite her telling him that she was not making any unlawful claims and providing him with proof of the birth certificates and the clinical records of the children for whom she claimed support, as well as her other children. d) That no statement from anyone at SASSA was in his docket. e) That no document or applications made by the Plaintiff to SASSA were in the docket f) That no complaint was lodged by SASSA against the Plaintiff iii) It was further evident from the statement made by Inspector Ngcikiza on the 6th of July 2006 when he applied for a warrant of arrest in connection with an offence of fraud that was apparently

committed on the 2nd of June 1999 and it was granted on the 6th of July 2006 but according to the document he only executed it at 7pm on the 11th of July 2006. iv) His affidavit reads as follows:- “/ am Inspector in the SAPS stationed at the Umtata Commercial Branch ... I am also an investigator of this case Mthatha CAS 818/03/2006. I made all the necessary investigations and dm to the statements received which are in the docket proved with no reasonable doubt that Mpahleni Thobeka Cornelia has committed the offence of fraud. It is on these grounds that I apply for the warrant of arrest for Mphahni Tobeks Cornelia. This statement was made on &h of My 2006.” v) He made a statement on the 30th of November 2005 wherein he stated that Ms Mpahleni was receiving a child support grant with false information submitted or presented at the office of Social Development. “His informant told him she received a child support grant for 5 children. One of those children was fraudulently made as disabled. The said child is a student at Zimele Junior Secondary School. The child was not suffering from any pain or injuries and is always in good health The statement obtained from the deputy principal merely indicates that Thandokazi Mphaleni is not mentally disabled and was fresh and healthy and that they would not be able to register any student who is mentally disabled and they are not authorised to do so.” vi) Mr Sikhuza made a statement where; he alleged that the Plaintiff defrauded him by falsely claiming that the child was his and also defrauded the Department by alleging that the child was disabled for whom he was paying maintenance. vii) He accordingly wanted his money back from her. “I lay a charge against her by getting my money and defrauding the Department.” viii) This bit seems to have been added in. ix) He failed to state where he was employed and in what capacity in this affidavit. x) “In Minister of Safety v Sekotho and Another<sup>3</sup> the court discusses section 40(1) of the Criminal Procedure Act (arrest without a “warrant”) as opposed to section 43 (arrest with a warrant), but the principles seem to be equally applicable. The Court reaffirmed that an arrest is *infraudem legis* when the arrestor has used a power for an ulterior purpose, but a distinction must be made between the object of the arrest and the arrestormotive - “object relevant while motive is not”<sup>4</sup> xi) Courts do sometimes interfere to protect cm injured party against an abuse of power, example, in those well recognised cases in which powers, given to public bodies to be used for certain purposes, are wrongly used by them to achieve other purposes. See *Sinovich v Hercules Municipal Council* 1946 AD 783, To profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act in *fraudem legis*, see *Van Eck and Van Rensburg v Etna Stores* 1947 2 S 984 (A) 998. Thus, where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorized purpose such person acts *mala fide* and in *fraudem legis*. See *Minister van die SA Polisie v Kraatz* 1973 3 SA 490 (A) 508 xii) IN FRAUDEM LEGIS<sup>5</sup> In fraud of the law. “A transaction is in *fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions” (per 1NNES, CJ in *Dadoo Ltd v Krugersdorp Municipal* 1920 AD 547), In such cases the important point is “not the interpretation of the law as the interpretation of the transaction” (ibid 544). See also *R v Gillet* 1929 AD 364; *McAdams v Fiander’s Trustee and Bell* 1919 AD 227. as to the principles to be applied in determining whether a transaction is in *fraudem legis*, see *Commission of Customs v Randles Bros and Hudson* 1941 AD 369; *Du Plessis v Joubert* 1968 1 SA 585 (A) 598; *Thorntons Transportation Ltd v Macaulay* 1962 1 SA 255, *Van Eck v Etna Stores* 1947 2

SA 9S4 (A) 998; Minister van SA Polisie v Kraatz 1973 3 SA 490(A) 507, See Wills's Principles of South African Law 6ed 319 436 525. " xiii) In this case it appears that the arresting officer abused his power and position as a police officer presumably to avenge a wrong or perceived wrong to his colleague and not for any lawful purpose and was accordingly *infraudem legis*. xiv) The warrant was obtained for an ulterior motive. The warrant itself was properly authorised as already indicated and cannot be set aside with regard to any deficiencies relating to the *bona fides* of the Magistrate, xv) Despite the warrant being issued on a Weekday, he chose to wait until after hours on a Sunday to execute the same, further

demonstrating his abuse of power by ensuring she could not be taken immediately upon execution of the warrant and apply for bail. xvi) The actions of Inspector Ngcikiza in obtaining the warrant upon furnishing false information to the Magistrate and executing the same clearly constitutes wrongful action and although the warrant was properly issued his conduct tainted the validity of the same and it is on that basis that despite the arrest taking place pursuant to a warrant of arrest, the arrest by Inspector Ngcikiza is found to be unlawful due to his conduct in obtaining and executing it. xvii) Fourie J in *Brown and Another v Director of Public Prosecutions and Others*<sup>6</sup> had this to say> "The question, however, remains whether the execution of the warrant in regard to 1SI applicant on 9 May 2008 constituted a lawful arrest Put differently, is there merit in the contention of the 1st applicant that there was no need for the 2nd respondent to have had him arrested, as his attendance at Court could have been secured by less intrusive measures, such as warning or summoning him to appear in Court on these new charges? In this regard I (sic) incline to the view that, even if a warrant for the arrest of suspect has been lawfully obtained in terms of section 43 of the Criminal Procedure Act, this in itself does not justify an arrest to secure the attendance of the suspect in Court... Put differently the conduct of the person effecting an arrest should not constitute an abuse of the right given to such person to effect *arrest* " (emphasis *Mini*) " xviii) The Plaintiff in this matter was charged with fraud in that she wrongfully received social support and made false applications to Social Development. This does not appear to have been placed in dispute at court. xix) There was, as already indicated, no statement received from any member of the Department of Social Development, nor a complaint from them, nor any documentary evidence by the contents of the docket, xx) Mr Ngcikiza set the law into motion and he was responsible for the prosecution of the Plaintiff in this case. xxi) In *Minister of Safety and Security v Moleko*<sup>7</sup> it was held that the following must be proven:- In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-

- a) that the defendants set the law in motion (instigated or instituted the proceedings);
- b) that (he defendants acted without reasonable and probable cause;
- c) that the defendants acted with "malice " (or *animo injunandi*); and d) that the prosecution has failed, (in this case, of course, Mr Moleko was acquitted at the end of his criminal trial and requirement (d) need detain us no further) the cases of *Rudolph and others v Minister of Safety and Security*<sup>8</sup>, and *Minister of Safety and Security v Seymour*<sup>9</sup> have discussed this issue as well. (xxiii) In this case these requirements have been met having regard *inter alia*

to the following:- a) Ngcikiza instigated the proceedings; b) He had no reasonable or probable cause to do so since no documentation or statement from anyone at Department of Social Welfare was obtained to constitute evidence or even a complaint against the Plaintiff by an authorised official of SASSA. c) He obtained the warrant in furtherance of his private agenda and acted with malice or animus, injuriandi which is illustrated by the fact that:- i) he obtained the warrant on a week day but chose to execute it after hours on a Sunday; ii) he ignored the Plaintiffs explanation; iii) he worked with the alleged father of one of the Plaintiffs children; and iv) He was aware that the father disputed paternity and had made a statement to him but did not disclose this or base his charges on the DNA findings or on her committing fraud viz a viz his colleague. d) He thus acted with malice, in that his actions appeared to have been motivated by seeking retribution for his colleague rather than any evidence proving that the Plaintiff defrauded SASSA. e) There was no statements in the docket pertaining to SASSA or anyone from SASSA even on the apparent investigation he had conducted. f) The charges against the Plaintiff were eventually withdrawn. g) He failed to testify or give any evidence to gainsay the Plaintiffs version. h) Based on the evidence as tendered, the Plaintiff has discharged the onus resting upon her to establish that despite the warrant her arrest by Inspector Ngcikiza was wrongful and unlawful and that her prosecution was set into motion by him maliciously and accordingly that her prosecution which was instigated by him constituted malicious prosecution. 29. The First Defendant is accordingly liable to compensate the Plaintiff for her wrongful arrest and detention and malicious

prosecution. 30. I have taken due cognizance of the authorities referred to by the parties on the issue of quantum of damages. 31. I have also had regard to the impact of the incarceration and malicious prosecution upon the Plaintiff and the fact that the

Plaintiff was traumatized by the indignities and awful conditions of the cells during her incarceration and the inconvenience of attending court until the charges were withdrawn. 32. Having regard to all the relevant facts and considerations an amount of R75 000-00 is considered appropriate as damages for the Plaintiffs unlawful arrest and detention as well as her malicious prosecution, taking due cognizance of the period of her

incarceration as well as the period it took before charges were finally withdrawn and the impact these would have had on her. 33. The matter warrants costs on a high court scale however not attorney and client costs in my view. 34. I accordingly make the following order:- (i) the Plaintiffs action against the second and third defendant is dismissed with costs; (ii) the first defendant is held liable for the damages suffered by the Plaintiff for her unlawful arrest, detention and her malicious

prosecution; (iii) the first defendant is directed to pay to the Plaintiff the sum of R75 000-00 as and for the aforesaid damages; and (iv) the first defendant is directed to pay the plaintiffs costs of suit. F.B.A. DAWOOD JUDGE OF THE HIGH COURT DATE HEARD: 03 MAY 2013 DATE DELIVERED: 04 OCTOBER 2013 FOR THE PLAINTIFF: MR HINANA PLAINTIFF ATTORNEYS: CAPS PANGWA & ASSOCIATES SUITE 302, OFFICE 311 AND 312 CITY CENTRE COMPLEX YORK ROAD MTHATHA

TEL: 047 532 3664 FOR THE DEFENDANT: MR GAGELA DEFENDANT'S ATTORNEYS: STATE ATTORNEY C/O THE OFFICE OF STATE ATTORNEY BROADCAST HOUSE 94 SISSION STREET FORTGALE MTHATHA REF: 76612/-A1 (MRBEMBE)

1. The Plaintiff herein sues the Defendant for wrongful and unlawful arrest and detention; humiliation and degradation and contemelia,  
and malicious prosecution.
2. The Plaintiff in her particulars of claim attacked the validity of the warrant of arrest, on the basis that:-
  - (a) The Magistrate issued the warrant without information that the Plaintiff defrauded the Department of Social Development and/or any person; and
  - (b) She accordingly sued the second and third Defendant in these proceedings on the basis that the Magistrate did not have information at her disposal which was sufficient to form a reasonable suspicion that an offence of fraud had been committed, she had no reasonable grounds to suspect that the Plaintiff had committed the offence she was allegedly suspected to have committed.
3. The Plaintiff also attacked the validity of the warrant on the basis:-
  - (a) that the warrant of arrest was improper because Inspector Ngcikiza applied for and obtained a warrant of arrest without properly  
investigating the allegation against the Plaintiff and without having sufficient or any information to form a reasonable suspicion  
that the Plaintiff committed an offence of fraud but nonetheless deposed to an affidavit to that effect.
  - (b) That Inspector Ngcikiza had no reasonable grounds to suspect that the Plaintiff had committed the offence he alleged that the Plaintiff was suspected of having committed.
4. The Plaintiff alleged that her arrest and detention was accordingly without justifiable cause and consequently her arrest and detention were wrongful and unlawful.
5. The Plaintiff was detained for several hours at Wellington prison and released the following morning on bail in the sum of R1000-00.
6. On the 12th of July 2006 Inspector Ngcikiza wrongfully and maliciously set the law in motion against the Plaintiff by laying a false criminal charge of fraud, against her and caused the Plaintiff to appear in court on several occasions.

7. The Plaintiff further alleged that Inspector Ngcikiza set the law in motion against the Plaintiff without probable or reasonable cause for doing so and without any reasonable belief in the truth of the information. He accordingly acted with malice with the intent to injure the good name of the Plaintiff. The prosecution failed in that the criminal charges were withdrawn against the Plaintiff by the prosecuting authority.
8. The Plaintiffs testimony was briefly that:-
  - (a) She was arrested in the presence of her child by Inspector Ngcikiza and placed at the back of the police van on a cold winter night without her being shown any documentation and despite her denial that she was making false claims in respect of non-existent children to the Department of Social Welfare, and despite her producing the birth certificates of her children and grandchildren, to prove to him that she did not have any illegal children that were receiving funds from the State.
  - (b) Inspector Ngcikiza worked with the father of one of her children, Siphiwo Sikuza at the commercial branch offices and she had seen him there on the day that she went to drop off the maintenance letter.
  - (c) She had not spoken to him on that day but assumed that he had seen her as well and knew who she was.
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- (e) She was detained in the cells with 4 other females and did not have anything to eat that evening as they had already been given their food prior to her arrival nor did she eat the following morning as she did not feel up to it. She did not sleep either because of the predicament she found herself in and prayed all night instead. The cell was in a bad state,
- (f) The toilet was inside the cell and there was no privacy if one wanted to use the toilet. The toilet was overflowing with faeces and there was a horrible stench in the cells\* She did not use the toilet,
- (g) She received 2 disability grants one in respect of Thandokazi who was asthmatic and the other in respect of Siphokazi who had been injured and blinded in one eye,
- (h) She was released before lunch the following day after she was granted bail at court and taken to Wellington Prison.
- (i) Under cross examination she indicated that she was not shown the warrant of arrest and only learnt about it at court so paragraph 2.1 of her particulars of claim where it is alleged that inspector Ngcikiza arrested her with a warrant of arrest is incorrect and she does not know how a warrant is applied for.

- (j) Inspector Ngcikiza's version that was put to her was that:-
  - (i) She did not produce any clinical records or birth certificates on the evening of her arrest. She denied this saying that she produced them and he read them using the lamp.
  - (ii) Inspector Ngcikiza came to her homestead on a subsequent occasion and it was then that she produced the clinical records and birth certificates. She denied this saying he took the cards on the day of her arrest but he did go to her homestead whilst she was in custody looking for Siphokazj and that also in her presence took Siphokazi and Thandokazi to Doctor Notywala.
  - (iii) It was put to her that he only executed the warrant of arrest on the day of arrest which she denied saying she gave them to him all the medical cards and birth certificates when he asked for illegal children.
  - (iv) It was put to her that he drove a double cab - not a bakkie and she was put in the passenger seat. She denied this saying it was a van that only conveys 2 passengers and is a bakkie without a canopy and she was made to sit at the open portion, at the back.
  - (v) She also denied that there were female officers present when she was arrested stating that there were only male officers.
- 9. That concluded her testimony and the Plaintiffs case was closed,
- 10. The Defendant after an Application for absolution from the instance was refused in respect of the Second and Third Defendants called the Second Defendant to testify.
- 11. Elizabeth Doreen De Waal testimony was briefly as follows:-
  - (a) She is a regional court Magistrate.
  - (b) On the 6th of July 2006 an application was made by the prosecutor who brought a police officer to her.
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  - (e) She relied on what Ngcikiza told her that the Plaintiff had committed fraud without particulars of the fraud being furnished to her because all she needed to ascertain is that he had reasonable suspicion without specifying the essentials of the offence.
  - (f) Magistrates are not allowed to have insight into the docket; they rely upon the integrity of the prosecutor and the police officer.
  - (g) She was extra cautious as she did not want to put people in jail that should not be there and therefore asked further questions from Ngcikiza.
  - (h) She believed that the statement made by Inspector Ngcikiza was correct.

- (i) She expected him to have investigated the fraud against the Plaintiff and to present the evidence in court and documentary proof
  - (j) She stated that if she had known that there was no evidence that SASSA had been defrauded, that she would not have authorized the warrant and she most certainly would not have authorized on the basis of information furnished by Sikuza or had she known that no investigations had actually been conducted,
  - (k) She authorized the warrant on the basis of what he had said to her and the prosecutor that he had conducted all the necessary investigations,
  - (l) She would have expected him to have applied his mind as to whether or not to arrest if evidence proved that no offence was committed, despite her having issued the warrant, she would have expected him to use his discretion and not arrest.
  - (m) She would not have authorized the warrant if she was aware that the charge concerned SASSA and no one from SASSA had laid a charge against the Plaintiff, nor was there any investigation conducted by or on behalf of SASSA, nor was any statement or documents obtained from SASSA.
  - (n) She would not have issued the warrant if she had seen the statement which concerns a personal issue because Sikuza was prejudiced and she would not have authorized any warrant based on information supplied by him.
  - (o) She believed Ngcikiza and authorized the warrant on the belief that what he said was true.
  - (p) She confirms that she was misled by him and would not have authorized the warrant on the information she now has.
12. That concluded the defendant's case with no further witnesses being called.
13. The Plaintiff was a good witness and readily made concessions. She was not prone to exaggeration even when describing the condition of the prison cells or her sleeping. She did not blame it on the state of the cell but rather on her emotional state of mind. She impressed me as a good, credible witness who gave her evidence in an honest forthright manner.
14. The Magistrate was an objective and impressive witness who willingly made concessions and was totally honest. Her testimony is also accepted as being truthful and credible.
15. The Defendant failed to call the arresting officer who was also the officer who applied for the warrant.
- 16.

## ISSUES

TO BE DETERMINED

16.1. The first issue is whether or not the Plaintiff has established a claim against the Second and Third Defendants, that is, whether she has established that the Magistrate acted mala fides in authorizing the warrant which is what she would need to prove according to the relevant authorities.

16.2. The Magistrate in issuing a warrant of arrest must comply with the provisions of section 43 of the Criminal Procedure Act which reads as follows:-

'(1) Any magistrate, or justice- may issue a 'warrant for the arrest of any person upon the •written application of an attorney-general a public prosecutor or a commissioned officer of police—

- a) which sets out the offence alleged to have been committed:
  - b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a Justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
  - (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.
- (2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.
- (3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed."

16.3. In *May v Union Government*<sup>1</sup>, it was inter alia stated

'It is not necessary for the issuing of the warrant that all the facts necessary for a conviction be given under oath. It is only necessary that reasonable grounds appear from the affidavit. The official requesting the warrant is not limited to the information under oath -when the suspicion is formed. The information under oath must be assessed in the context of all the facts which have been determined, both those under oath and others. The official also does not have to accept all the information under oath as true: he or she can accept some allegations and not others, even doubt them all. He or she must have information under oath and, from that, in the correct context, form a reasonable suspicion. "

16.4. The bona fide exercise of a discretion by a magistrate or justice of the peace under this section cannot be assailed in a court\* See *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883H with reference to *Shidiack v Union Government* 1912 AD 642 at 651. Although *Groenewald* is not fully supported in *Prinsloo v Newman* 1975

- (1) SA 481 (A) at 500C and 505D it is nevertheless confirmed (at 500B-505C) that the discretion the magistrate or justice of the peace has to exercise cannot\* barring exceptional circumstances, be questioned in a court.
17. It is evident from the foregoing that a Magistrate's discretion, exercised in good faith, is not justiciable in a court of law.
18. In this case the prosecutor that approached the Magistrate to issue the warrant did not make the application in writing himself but instead relied upon the affidavit of a non-commissioned officer Inspector Ngcikiza and his verbal testimony to support the

#### Application\*

19. In *Minister of Safety and Security v Sekotho and Another*<sup>2</sup>, contains a discussion on the role of peace officers and the discretion they hold in respect of an arrest which would, with respect, finds equal application in determining the discretion of a Magistrate.

"Harms DP (Nugent JA, Lewis JA, Bosielo JA and K Pillay AJA concurring)

- [34] These principles are in substance no different from those formulated A by Innes ACJ in *Shidiack v Union Government*. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not B interfere with the result Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own, . . . There are circumstances in which interference would be possible and right If for instance such an C officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong, ”
20. The Plaintiff in her testimony failed to set out any basis upon which it could be inferred that the Magistrate acted Mala fides, or even that she was aware that she was arrested on the basis of a warrant of arrest or had even been shown a warrant of arrest,
21. The Magistrate testimony illustrated that she acted upon the evidence presented to her in the form of an affidavit from the investigating officer and his verbal testimony and she had no reason to disbelieve what was contained therein and further confirmed to her by the investigating officer and the prosecutor.
22. The bona fides of the Magistrate was not placed in issue and the evidence tendered by her supports the contention that she acted bona fides.

23. There is no legitimate basis for rejecting the testimony of the Magistrate that she acted properly and prudently in issuing the warrant on the information placed before her and that such information complied with the provisions of section 43 of the

Criminal Procedure Act.

24. She had no reason to disbelieve or question the veracity of the information given to her and she properly acted in accordance with that information.
25. On the basis of the legal proposition, in the absence of mala fides, the Plaintiff cannot succeed in establishing a claim against the Magistrate for the issuing of the warrant.
26. The Plaintiff has failed to discharge the onus resting upon her to show that the issuing of the warrant by the Magistrate was wrongful, unlawful or mala fides.
27. The claim against the second and third Defendant accordingly falls to be dismissed with costs.
28. The next issue whether or not Inspector Ngcikiza arrest of the Plaintiff was lawful or unlawful and whether he was responsible for the malicious prosecution of the Plaintiff.
- i) The Magistrate in her testimony indicated that if she had had sight of the docket and the actual evidence relied upon by the

investigating officer she would not have issued the warrant of arrest.

ii) It was evident from the Plaintiff testimony;-

- a) That she knew the inspector from seeing him with the father of her child;
- b) That he accordingly worked with Mr Siphiwo Sikuza and this was not disputed.
- c) That she was arrested despite her telling him that she was not making any unlawful claims and providing him with proof of the birth certificates and the clinical records of the children for whom she claimed support, as well as her other children.
- d) That no statement from anyone at SASSA was in his docket.
- e) That no document or applications made by the Plaintiff to SASSA were in the docket
- f) That no complaint was lodged by SASSA against the Plaintiff

iii) It was further evident from the statement made by Inspector Ngcikiza on the 6th of July 2006 when he applied for a warrant of arrest in connection with an offence of fraud that was apparently committed on the 2nd of June 1999 and it was granted on the 6th of July 2006 but according to the document he only executed it at 7pm on the 11th of July 2006.

iv) His affidavit reads as follows:-

*“/ am Inspector in the SAPS stationed at the Umtata Commercial Branch ...*

I am also an investigator of this case Mthatha CAS 818/03/2006.

I made all the necessary investigations and dm to the statements received which are in the docket proved with no reasonable doubt that Mpahleni Thobeka Cornelia has committed the offence of fraud.

It is on these grounds that I apply for the warrant of arrest for Mphahni Tobeks Cornelia. This statement was made on &h of My 2006."

- v) He made a statement on the 30th of November 2005 wherein he stated that Ms Mpahleni was receiving a child support grant with false information submitted or presented at the office of Social Development.

"His informant told him she received a child support grant for 5 children. One of those children was fraudulently made as disabled. The said child is a student at Zimele Junior Secondary School.

The child was not suffering from any pain or injuries and is always in good health

The statement obtained from the deputy principal merely indicates that Thandokazi Mphaleni is not mentally disabled and was fresh and healthy and that they would not be able to register any student who is mentally disabled and they are not authorised to do so. "

- vi) Mr Sikhuza made a statement where; he alleged that the Plaintiff defrauded him by falsely claiming that the child was his and also defrauded the Department by alleging that the child was disabled for whom he was paying maintenance.

- vii) He accordingly wanted his money back from her.

*"I lay a charge against her by getting my money and defrauding the Department."*

- viii) This bit seems to have been added in.

- ix) He failed to state where he was employed and in what capacity in this affidavit.

- x) "In Minister of Safety v Sekotho and Another<sup>3</sup> the court discusses section 40(1) of the Criminal Procedure Act (arrest without a "warrant) as opposed to section 43 (arrest with a warrant), but the principles seem to be equally applicable. The Court reaffirmed that an arrest is *infraudem legis* when the arrestor has used a power for an ulterior purpose, but a distinction must be made between the object of the arrest and the arrestormotive - "object relevant while motive is not"<sup>4</sup>

- xi) Courts do sometimes interfere to protect cm injured party against an abuse of power, example, in those well recognised cases in which powers, given to public bodies to be used for certain purposes, are wrongly used by them to achieve other purposes. See *Sinovich v Hercules Municipal Council* 1946 AD 783, To profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act in *fraudem legis*, see *Van Eck and Van Rensburg v Etna Stores* 1947 2 S 984 (A) 998. Thus, where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the

intention is not to use it for that purpose, but for another unauthorized purpose such person acts mala fide and in fraudem legis. See Minister van die SA Polisie v Kraatz 1973 3 SA 490 (A) 508

xii) IN FRAUDEM LEGIS<sup>5</sup>

In fraud of the law. "A transaction is in fraudem legis when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions" (per INNES, CJ in Dadoo Ltd v Krugersdorp Municipal 1920 AD 547), In such cases the important point is "not the interpretation of the law as the interpretation of the transaction" (ibid 544). See also R v Gillet 1929 AD 364; McAdams v Fiander's Trustee and Bell 1919 AD 227. as to the principles to be applied in determining whether a transaction is in fraudem legis, see Commission of Customs v Randles Bros and Hudson 1941 AD 369; Du Plessis v Joubert 1968 1 SA 585 (A) 598; Thorntons Transportation Ltd v Macaulay 1962 1 SA 255, Van Eck v Etna Stores 1947 2 SA 984 (A) 998; Minister van SA Polisie v Kraatz 1973 3 SA 490(A) 507, See Wills's Principles of South African Law 6ed 319 436 525. "

xiii) In this case it appears that the arresting officer abused his power and position as a police officer presumably to avenge a wrong or perceived wrong to his colleague and not for any lawful purpose and was accordingly in fraudem legis.

xiv) The warrant was obtained for an ulterior motive. The warrant itself was properly authorised as already indicated and cannot be set aside with regard to any deficiencies relating to the bona fides of the Magistrate,

xv) Despite the warrant being issued on a Weekday, he chose to wait until after hours on a Sunday to execute the same, further

demonstrating his abuse of power by ensuring she could not be taken immediately upon execution of the warrant and apply for bail.

xvi) The actions of Inspector Ngcikiza in obtaining the warrant upon furnishing false information to the Magistrate and executing the same clearly constitutes wrongful action and although the warrant was properly issued his conduct tainted the validity of the same and it is on that basis that despite the arrest taking place pursuant to a warrant of arrest, the arrest by Inspector Ngcikiza is found to be unlawful due to his conduct in obtaining and executing it.

xvii) Fourie J in Brown and Another v Director of Public Prosecutions and Others<sup>6</sup> had this to say>

"The question, however, remains whether the execution of the warrant in regard to 1SI applicant on 9 May 2008 constituted a lawful arrest Put differently, is there merit in the contention of the 1st applicant that there was no need for the 2nd respondent to have had him arrested, as his attendance at Court could have been secured by less intrusive measures, such as warning or summoning him to appear in Court on these new charges? In this regard I (sic) incline to the view that, even if a warrant for the arrest of suspect has been lawfully obtained in terms of section 43 of the Criminal Procedure Act, this in itself does not justify an arrest to secure the attendance of

the suspect in Court... Put differently the conduct of the person effecting an arrest should not constitute an abuse of the right given to such person to effect like arrest " (emphasis Mini) "

xviii) The Plaintiff in this matter was charged with fraud in that she wrongfully received social support and made false applications to Social Development. This does not appear to have been placed in dispute at court.

xix) There was, as already indicated, no statement received from any member of the Department of Social Development, nor a complaint from them, nor any documentary evidence by the contents of the docket,

xx) Mr Ngcikiza set the law into motion and he was responsible for the prosecution of the Plaintiff in this case.

xxi) In *Minister of Safety and Security v Moleko*<sup>7</sup> it was held that the following must be proven:-

In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-

- a) that the defendants set the law in motion (instigated or instituted the proceedings);
- b) that the defendants acted without reasonable and probable cause;
- c) that the defendants acted with "malice" (or *animo injuriandi*); and
- d) that the prosecution has failed, (in this case, of course, Mr Moleko was acquitted at the end of his criminal trial and requirement (d) need detain us no further)

the cases of *Rudolph and others v Minister of Safety and Security*<sup>8</sup>, and *Minister of Safety and Security v Seymour*<sup>9</sup> have discussed this issue as well.

(xxiii) In this case these requirements have been met having regard inter alia to the following:-

- a) Ngcikiza instigated the proceedings;
- b) He had no reasonable or probable cause to do so since no documentation or statement from anyone at Department of Social Welfare was obtained to constitute evidence or even a complaint against the Plaintiff by an authorised official of SASSA.
- c) He obtained the warrant in furtherance of his private agenda and acted with malice or animus, *injuriandi* which is illustrated by the fact that:-
  - i) he obtained the warrant on a week day but chose to execute it after hours on a Sunday;
  - ii) he ignored the Plaintiffs explanation;
  - iii) he worked with the alleged father of one of the Plaintiffs children; and
  - iv) He was aware that the father disputed paternity and had made a statement to him but did not disclose this or base his charges on the DNA findings or on her committing fraud viz a viz his colleague.

- d) He thus acted with malice, in that his actions appeared to have been motivated by seeking retribution for his colleague rather than any evidence proving that the Plaintiff defrauded SASSA.
  - e) There was no statements in the docket pertaining to SASSA or anyone from SASSA even on the apparent investigation he had conducted.
  - f) The charges against the Plaintiff were eventually withdrawn.
  - g) He failed to testify or give any evidence to gainsay the Plaintiffs version.
  - h) Based on the evidence as tendered, the Plaintiff has discharged the onus resting upon her to establish that despite the warrant her arrest by Inspector Ngcikiza was wrongful and unlawful and that her prosecution was set into motion by him maliciously and accordingly that her prosecution which was instigated by him constituted malicious prosecution.
29. The First Defendant is accordingly liable to compensate the Plaintiff for her wrongful arrest and detention and malicious

prosecution.

30. I have taken due cognizance of the authorities referred to by the parties on the issue of quantum of damages.
31. I have also had regard to the impact of the incarceration and malicious prosecution upon the Plaintiff and the fact that the

Plaintiff was traumatized by the indignities and. awful conditions of the cells during her incarceration and the inconvenience of attending court until the charges were withdrawn.

32. Having regard to all the relevant facts and considerations an amount of R75 000-00 is considered appropriate as damages for the Plaintiffs unlawful arrest and detention as well as her malicious prosecution, taking due cognizance of the period of her

incarceration as well as the period it took before charges were finally withdrawn and the impact these would have had on her.

33. The matter warrants costs on a high court scale however not attorney and client costs in my view.

34. I accordingly make the following order:-

- (i) the Plaintiffs action against the second and third defendant is dismissed with costs;
- (ii) the first defendant is held liable for the damages suffered by the Plaintiff for her unlawful arrest, detention and her malicious

prosecution;

(iii) the first defendant is directed to pay to the Plaintiff the sum of R75 000-00 as and for the aforesaid damages; and

(iv) the first defendant is directed to pay the plaintiffs costs of suit.

F.B.A. DAWOOD

JUDGE OF THE HIGH COURT

DATE HEARD: 03 MAY 2013

DATE DELIVERED: 04 OCTOBER 2013

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PLAINTIFF ATTORNEYS: CAPS PANGWA & ASSOCIATES

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1 1954

(3) SA 120 (N) at 125B confirmed in Minister van Polisie v Kraatz supra at 504H).

2 2011

(5) S.A 367 (SCA) at paragraph 34

3 2011

(5) SA 367 (SCA) (also at [2011] 2 ALL SA 157 (SCA)) -

4Ibid, paragraph 31.

5Ibid

6 2009

(1) SACR 218 (CPD) at 226 J - 227 C. See also *Theobald v Minister of Safety and Security* 2011 (1) SACR 379 (GSJ) at 406 paragraph 320.

7 [2008] 3 ALL SA 47 (SCA) at paragraph 8

8 2009

(5) S A 94 (SCA) (also at [2009] 3 ALL SA 323 (SCA))

9 2006

(6) SA 320 (SCA)

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