

SOUTH AFRICA / JUDGMENT

Nogqala v Minister of Police (1898/2014) [2018] ZAECHGC 83 (4 September 2018)

[2018] ZAECHGC 83**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson

CASE / FILE NUMBER

1898/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1898/2014

DATE HEARD: 21 & 22/08/2018

DATE DELIVERED: 04/09/2018

In the matter between

KHOLISILE JULIUS NOGQALA PLAINTIFF

and

THE MINISTER OF POLICE DEFENDANT

JUDGMENT

ROBERSON J:-

- [1] In this action the plaintiff claims damages from the defendant for alleged wrongful arrest and detention. It is common cause that on 20 February 2012, at Sterkspruit police station, the plaintiff was arrested by a member of the South African Police Service, on the authority of a warrant of arrest which was applied for and issued, in terms of s 43 of the Criminal Procedure Act 51 of 1977, on 19 July
2011. According to the application for the warrant of arrest there was a reasonable suspicion that the plaintiff had committed the offence of dealing in dagga on 18 May 2009 in the district of Humansdorp. The Humansdorp police docket reference number on the warrant was 282/05/2009 and the court case number was 783/2009. The plaintiff was detained in the police cells and on 21 February 2012 appeared in the Sterkspruit Magistrate's Court. On that

day he was remanded in custody to 24 February 2012 in order to appear in the Humansdorp Magistrate's Court on that day. On 23 February 2012 he was taken by car from Sterkspruit to Humansdorp and detained in the police cells there. On 24 February 2012 he appeared in the Humansdorp Magistrate's Court where the charge was withdrawn. He was released thereafter.

- [2] In his particulars of claim the plaintiff alleged that Captain Jonck of the Humansdorp SAPS had wrongfully and maliciously and without probable cause applied for the warrant of arrest, when he knew that the charge of dealing in dagga had previously been withdrawn against the plaintiff and that consequently there were no reasonable grounds for the issue of a warrant of arrest. The plaintiff further alleged that the officer who executed the warrant of arrest, Constable Mda, was not aware that he had a discretion to execute the warrant, alternatively that he failed to exercise that discretion properly. The plaintiff claimed damages for the arrest and for the full period of detention.
- [3] In his plea the defendant alleged that the warrant of arrest was issued prior to the withdrawal of the charge. However this ground of defence fell away after the unchallenged evidence of Attorney Louis van Rensburg was led. He represented the

plaintiff after the plaintiff was arrested on the same charge as that referred to in the warrant of arrest. The police docket

reference number was 282/05/2009. The plaintiff was arrested on 18 May 2009 and, together with two other persons, appeared in the Humansdorp Magistrate's Court on 20 May 2009. The court case number was 783/2009. The matter was postponed to 18 June 2009 for the three accused to obtain legal representation and they were all released on bail. Mr van Rensburg was instructed to represent them. He appeared on their behalf on 18 June 2009 and the matter was postponed to 20 July 2009. On that day the charge was withdrawn against the plaintiff, who was accused number 1, and against Mr Benjamin Mhlonyane, who was accused number 2. According to the prosecutor's note on the docket cover there was no evidence against them. The prosecutor's instruction to the investigating officer was to obtain statements from the plaintiff and Mhlonyane to be used in the prosecution of accused number 3, Mr Elvis Dangala. The case against Dangala was postponed for trial to 19 October

2009. On that day the charge was withdrawn against Dangala.

- [4] Mr Rugananan, who appeared for the defendant, fairly and properly conceded that the warrant of arrest was improperly obtained and conceded liability for the wrongful arrest and detention up to the time the plaintiff was remanded in custody by the Magistrate,

Sterkspruit. From a perusal of the diary in the police docket pertaining to the dealing in dagga charge (the diary was included in the plaintiff's bundle of documents), it seems that the police's purpose was to arrest Dangala but confused him with the plaintiff. There is no need to speculate however, because there was no evidence led by the defendant in support of a justification for the application for and issue of the warrant of arrest.

- [5] What remained chiefly in dispute was the defendant's liability for the further detention, after the plaintiff's appearance in court in Sterkspruit, until 24 February 2009, and to a lesser extent the question of the exercise of discretion by Constable Mda. Given the concession that the arrest and detention up to the plaintiff's appearance in court at Sterkspruit were wrongful, it is not really necessary to consider this latter question but it was canvassed in evidence and in argument and I prefer to deal with it.
- [6] It is only necessary to refer to the plaintiff's evidence insofar as it relates to events after the withdrawal of the charge in
2009. At the time of his arrest he was 35 years old and self employed as a mechanic and driver. He had achieved Grade 12 at school and undertaken tertiary studies in motor mechanics. In 2009 he was living in Humansdorp and later moved to live in Sterkspruit.
- [7] On 25 January 2012 he went to the police station in Sterkspruit to have his fingerprints taken for the purpose of his application for a public driving permit. On Friday 17 February 2012 Constable Mda telephoned him and requested him to call at the police station. The plaintiff asked if he could call on the following Monday and Mda agreed. The plaintiff went to the police station on Monday 20 February 2012 at about 08h00 but Mda was not there. The plaintiff obtained Mda's cell number and called him. Mda said he was on his way and eventually arrived at about 10h00. Mda asked him why he had not attended court. The plaintiff told Mda that he was not aware of a pending case. Mda said that he (the plaintiff) had been arrested in Humansdorp in connection with dagga. Mda showed the plaintiff an official police document which recorded that the plaintiff was a wanted person who had been verified through fingerprints, and that he was wanted in connection with a charge of possession or use of dependence producing substances. The police docket reference number in this document was Humansdorp 282/05/2009 and the investigating officer was named as Warrant Officer Hoffman.
- [8] The plaintiff told Mda that the case had been withdrawn in Humansdorp and asked for an opportunity to go to Humansdorp to clarify the matter. Mda telephoned the Humansdorp police and the person he spoke to said that he did not have the docket and that Mda should detain the plaintiff. Mda then detained the plaintiff, his rights were explained and he was placed in the police cells. Mda did not show the plaintiff the warrant of arrest.
- [9] On 21 February 2012 the plaintiff appeared before the magistrate in Sterkspruit. The prosecutor told the magistrate that it was a Humansdorp case and that the plaintiff was to be fetched by Humansdorp officials. The magistrate advised the plaintiff that he would wait in the cells until he was fetched. He remained in the police cells until 23 February 2012. He shared the cell with a number of other persons. The cell, the blanket he was given, and the toilet in the cell were all dirty. He did not leave the cell until a Detective Prinsloo arrived on 23 February 2012 to fetch him and take him to Humansdorp. Prinsloo handcuffed him and shackled his ankles and he remained in this state until his arrival in Humansdorp. He was placed in the Humansdorp police cells. He shared this cell, which was in a worse condition

than that in Sterkspruit, with a larger number of persons than in Sterkspruit, some of whom were drunk.

- [10] On 24 February 2012 Prinsloo fetched him and took him to his office. There the plaintiff met a police officer, one Booysen, who showed him the police docket and asked him why he had not come to court. The plaintiff explained that he did not have to because there was no case. Booysen asked him to tell the truth and tell him to whom the dagga had belonged. The plaintiff told him that the person who knew that was Dangala. The plaintiff was taken to court where the magistrate said that the case was an old one. The plaintiff was placed in the court cells where he remained until after lunch. From there he was taken to the police cells and was eventually released at about 15h00.
- [11] The plaintiff described the effect the experience had had on him. He said he had suffered emotionally. He had to leave his four year old child for whom he was the only provider (the child was cared for by the plaintiff's wife). As a result of his arrest he lost work he would have obtained as a mechanic. The experience of being handcuffed and shackled and remaining in that condition for the long drive to Humansdorp, made him feel that he was being treated like a murderer or robber, when he knew that he was not guilty of anything.
- [12] Constable Mda testified that on receipt of the circulation document (the one shown to the plaintiff) and the warrant of arrest, he telephoned Hoffman who confirmed that the plaintiff was wanted and that Mda should arrest him. Mda had no knowledge of the particulars of the case, nor of the fact that the charge had previously been withdrawn against the plaintiff. Mda met the plaintiff on 20 February 2012 and showed him the circulation document and the warrant of arrest. He explained to the plaintiff that he was wanted in Humansdorp and the plaintiff told him that the charge had been withdrawn. Mda did not contact Hoffman to follow up what the plaintiff had told him. He arrested the plaintiff at about 11h00 on the strength of the warrant of arrest and because he was authorised to do so.
- [13] Mda maintained that he had applied his mind before arresting the plaintiff and considered what the plaintiff had told him, namely that the charge had been withdrawn, but, as he said, he was in possession of the warrant of arrest. He had considered other means of ensuring the plaintiff's attendance at court in Humansdorp but he had been instructed by Hoffman to arrest the plaintiff. Furthermore, according to Mda, the plaintiff had two different addresses, one in Sterkspruit and the other in Humansdorp (the address on the warrant of arrest was a Humansdorp address). He asked the plaintiff for an explanation for the two addresses and the plaintiff told him that when he was in Humansdorp he stayed at the Humansdorp address, and when he was in Sterkspruit he stayed at the Sterkspruit address. Mda said for these reasons he did not trust the plaintiff and could not warn the plaintiff to appear in court. He was also of the view that if the case had been withdrawn, there would not have been a warrant of arrest. He conceded that if he had been informed (presumably officially) that the charge had been withdrawn, he would not have been able to arrest the plaintiff.

[14] Mda made arrangements for the plaintiff to be taken to court but the court was already closed because the magistrate and the prosecutor had gone to the Lady Grey court. He instructed other officials to ensure that the plaintiff was taken to court the next day. When asked if he had told the prosecutor and the magistrate that the plaintiff had told him the charge had been withdrawn, Mda's answer was that he had not taken him to court.

[15] In *Minister of Safety and Security v Sekhoto and Another* 2011

(1) SACR 315 (SCA) at paragraph [28] Harms JA said the following (footnotes omitted):

"Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest."

Further at paragraph [38] Harms JA said:

"..... it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily."

[16] I am of the view that in the present matter, leaving aside the validity of the warrant of arrest, Mda's evidence revealed that he did not exercise any discretion at all. It was apparent from his initial answers that he arrested the plaintiff merely because he was armed with a warrant of arrest and because Hoffman had instructed him to execute it. This attitude was made clear when he said that he had considered what the plaintiff had told him but nonetheless he was in possession of a warrant of arrest. It was only when he was asked in cross-examination whether he had considered other means of ensuring the plaintiff's attendance at court that he mentioned the two addresses. This was in my view an afterthought when Mda realised that he did have a discretion and that execution of the warrant was not automatic. The aspect of two addresses was never put to the plaintiff and Mda had no grounds for not trusting the plaintiff merely because there was a Humansdorp address in the warrant of arrest.

[17] If Mda had exercised his discretion properly he would have followed up the information from the plaintiff that the charge had been withdrawn. Further he would have taken into account that the plaintiff had not shown any resistance to his request to come to the police station. On the contrary the plaintiff had agreed to meet him and had waited at the police station until Mda arrived. If Mda had exercised his discretion rationally he would not have considered it necessary to arrest the plaintiff in order to ensure the plaintiff's attendance at court in Humansdorp. On this ground alone the arrest and detention until the plaintiff's appearance in court in Sterkspruit were wrongful.

[18] I deal now with the further period of detention, from the time the plaintiff was remanded in custody by the Sterkspruit magistrate until his release on 24 February 2012. It was submitted on behalf of the defendant that this further period of detention was in terms of the order of the Sterkspruit magistrate and that the defendant was not liable.

[19] In *Singata and Another v Minister of Police and Another* [2015] ZAECBHC 19 the defendants had pleaded that the further detention of the plaintiffs after their appearance in court was by virtue of a court order. In this regard Van Zyl ADJP (as he then was) said the following (footnotes omitted):

*“The plaintiffs wisely anticipated that the defendants would place the lawfulness of their detention in issue on that basis, and they accordingly in the alternative also based their claim on the existence and breach of a “duty of care” on the part of the first and second defendants’ officials. This is based on decisions such as *Woji v Minister of Police*, *Minister of Police v du Plessis*, and *Minister of Safety and Security v Tyokwana* where it was found that the existence of a detention order does not preclude a determination of the legality of the manner in which the Court exercised its discretion in granting that order, and that conduct, including an omission, which constitutes a breach of a public law duty may render an arrested person’s detention after his appearance in court unlawful for purposes of a delictual claim for damages.”*

[20] In *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) (referred to by Van Zyl ADJP) the following was said at paragraph [28]:

*“The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2002*

(1) SACR 79 CC (2001 (4) SA 938; 2001 (10) BCLR 995; [2001] ZACC 22) para 44. On the facts of this case, Insp Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Wojji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Wojji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr Wojji was entitled to have his right to freedom protected by the state. In consequence, Insp Kuhn's omission to perform his public duty was wrongful in private law terms.”

[21] It was found in this matter that had the application for bail not been opposed or had the relevant facts been placed before the magistrate, the magistrate would “more probably than not have released [the appellant] on bail” (at paragraph [32]).

[22] In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) (also referred to by Van Zyl ADJP) it was found that two police officers had misled the prosecutor and the magistrate by not bringing all the relevant facts and circumstances to the attention of the prosecutor and the magistrate, and had on the contrary wilfully distorted the truth. The result was that the respondent (Tyokwana) was refused bail and remanded in custody until his acquittal. Fourie AJA expressed the view that if the prosecutor and the magistrate had been apprised of all the relevant

facts and circumstances, “it is inconceivable that the prosecutor would have permitted the prosecution to proceed, or that

the magistrate would have refused bail” (at paragraph [39]).

[23] Further at paragraph [40] Fourie AJA said:

“It has often been stressed by our courts that the duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.”

[24] Fourie AJA referred to Carmichele (supra) where it was held that the police have a clear duty to bring to the attention of the prosecutor any factors known to them, relevant to the exercise by the magistrate of his discretion to admit a detainee to bail.

[25] In the present matter Mda was the official given the duty to execute the warrant of arrest. He made the arrangements for the plaintiff to appear in court in Sterkspruit. He appeared to be the official in control of the manner in which the plaintiff’s case was dealt with, from the time of arrest to the time he appeared in court in Sterkspruit. He had been told by the plaintiff that the charge had been withdrawn. In these circumstances, and as a police officer, I am of the view that he had a public law duty to inform at least the prosecutor that the plaintiff had informed him that the charge had been withdrawn. This was a highly relevant circumstance. Mda obviously did not tell the prosecutor. It is significant that when asked if he had informed the prosecutor and the magistrate his answer was that he did not go to court. He therefore breached this public law duty. Mda was also negligent. A reasonable police officer in his position would have informed the prosecutor that the plaintiff had told him that the charge had been withdrawn, and would have foreseen that his failure to inform the prosecutor would have resulted in the plaintiff remaining in custody. (See Woji at paragraphs [31] and [32].) With regard to causation, I am of the view that it is probable that if Mda had informed the prosecutor, the prosecutor would have taken steps to ascertain the correct position. Once the correct position had been ascertained and the magistrate had been informed accordingly, it is more probable than not that the magistrate would not have remanded the plaintiff in custody. Matters might even have ended there.

[26] It follows that I am of the view that the defendant is liable for the full period of the plaintiff’s detention.

[27] Mention must be made of the conduct of the prosecutor and the magistrate. The plaintiff's account of what took place in court in Sterkspruit is borne out by the record which was included in the defendant's bundle of documents. It is a pre-typed form which records the date and appearances and an explanation of the right to legal representation and to peruse the police docket. The form provides for the magistrate to ask the accused if he understands his rights and to ask him what he elects to do. No answers by the plaintiff were recorded. There is also provision in the form for the determination of bail with a space to record the accused's request regarding bail. Nothing was recorded. All that is recorded is that the plaintiff was "remanded in custody to 24 February 2012 for transfer to Humansdorp". On the face of it, this form accords with the plaintiff's description of what took place in court. This reflects, to put it mildly, very poorly on the prosecutor and the magistrate. What happened in court appears to have been a mechanical process with no consideration whatsoever for the right of the plaintiff to have been released on bail or on warning.

Quantum

[28] Although it was alleged in the particulars of claim that the defendant's servants acted maliciously, I am unable to find

that they did so.

[29] The plaintiff suffered a harrowing and humiliating experience. He voluntarily and in a cooperative spirit went to the police station to meet with Mda, only to learn that he was wanted by law enforcement for a charge which had been withdrawn two and a half years earlier. He told Mda that the charge had been withdrawn and responsibly requested to go to Humansdorp to clear the matter up, to no avail. His conditions of detention in the Sterkspruit and the Humansdorp police cells were unpleasant and unhygienic. He suffered emotional distress at leaving his young child behind. He was taken from his home town to another town hundreds of kilometres away. He was treated like a dangerous criminal, in that he was handcuffed and his ankles were shackled, for the whole distance. Even when he arrived in Humansdorp he was confronted about not attending court, which was a false accusation. One can only try to imagine his feelings of helplessness and frustration at the circumstances in which he found himself. This case illustrates vividly the gravity of the wrongful deprivation of liberty.

[30] I have had regard to awards in other matters, as well as those to which counsel referred me. In a recent matter in the Supreme Court of Appeal[1], an award of R300 000.00 was considered appropriate for wrongful arrest and detention for eight days. Apart from his experience in detention the appellant had suffered persistent psychological sequelae. Considering the circumstances of this matter I am of the view that a suitable award is R200 000.00.

[31] This action was postponed on 24 April 2017 with the costs of the postponement reserved. In his plea the defendant had raised non-compliance with the provisions of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The plaintiff replicated and prayed for condonation for such non-compliance. Thereafter the plaintiff brought a substantive

application for condonation, which was opposed. On 17 August 2017 Brody AJ granted the application with costs. It was

submitted on behalf of the plaintiff that the defendant should pay the costs of the postponement because the issue of condonation could have been part of the trial proceedings. In my view however in the light of the application for condonation which was brought after the replication, a fair costs order would be that each party should pay his own costs.

[32] The following order will issue:

[32.1] The defendant is to pay to the plaintiff R200 000.00 together with interest thereon at the legal rate from a date 14 days after the date of this order to date of payment.

[32.2] The defendant is to pay the plaintiff's costs of the action, together with interest thereon at the legal rate from a date 14 days after date of allocatur to date of payment.

[32.3] Each party is to pay his own costs occasioned by the postponement of the action on 24 April 2017.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv H Ayerst, instructed by Whitesides, Grahamstown

For the Defendant: Adv S Rugananan instructed by Yokwana Attorneys, Grahamstown

[1] De Klerk v Minister of Police 2018 (2) SACR 28 (SCA). This was a minority judgment. However the differing findings related to the period for which the respondent was liable.

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