

SOUTH AFRICA / JUDGMENT

Tesana and Others v National Director of Public Prosecutions (3844/2017) [2019] ZAECHGHC 28 (19 March 2019) [2019] ZAECHGHC 28

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

3844/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION – GRAHAMSTOWN
CASE
NO: 3844/2017
DATE
HEARD: 13 - 14/03/2019
DATE
DELIVERED: 19/03/19
NOT
REPORTABLE
In

the matter between:

AYANDA
TESANA
FIRST PLAINTIFF
XABISA
MENZI
SECOND PLAINTIFF
BRANDON
SYSTER
THIRD PLAINTIFF
LUVUYO
KULA
FOURTH PLAINTIFF
and
NATIONAL

DIRECTOR OF PUBLIC PROSECUTIONS
DEFENDANT

JUDGMENT

PLASKET J

- [1] Mr Ayanda Tesana, Mr Xabisa Menzi, Mr Brandon Syster and Mr Luvuyo Kula, the first to fourth plaintiffs, claim damages from the National Director of Public Prosecutions, the defendant, arising from what they claim to be their unlawful detention for a period of seven days.
- [2] The facts are uncomplicated and, to a large extent, common cause or not seriously disputed.
- [3] On 25 June 2015, warrant officer Catharina Geyer of the South African Police Service interviewed Mr Tesana at his home about an incident that had occurred some 12 days before. He led her to the other three plaintiffs who were working at an abattoir in Somerset East.
- [4] After warrant officer Geyer had spoken to all four of the plaintiffs, they accompanied her to the Detective Branch offices in Somerset East. Although the particulars of claim allege that warrant officer Geyer arrested the plaintiffs, their evidence suggests that they went to the Detective Branch offices voluntarily, albeit on warrant officer Geyer's request. Nothing turns, however, on whether or not they were arrested at that stage.
- [5] After warrant officer Geyer had taken statements from each of the plaintiffs she issued them with warnings, in terms of s 72 of the Criminal Procedure Act 51 of 1977, to appear in the Somerset East Magistrate's Court on the following day, 26 June 2015. The charge that they were to face, according to the forms, was 'common robbery'.
- [6] The plaintiffs presented themselves at the court on 26 June 2015 and when they appeared their case was postponed to 29 June 2015, and they were remanded in custody. They were unrepresented and played no part of any significance in the proceedings.
- [7] On 29 June 2015, they appeared in court again. This time they were represented by an attorney who either worked for Legal Aid South Africa or was instructed by it. The matter was postponed to 3 July 2015 for a bail application.
- [8] On 3 July 2015, when the public prosecutor, Mr Baartman, noticed that the plaintiffs had originally been brought to court by means of a s 72 warning, they were released from custody.
- [9] They appeared in court a number of times before the charges (of theft and robbery with aggravating circumstances) were withdrawn because the complainant no longer wanted the prosecution of the plaintiffs to be pursued.

- [10] Ms Christelle Wiese was the control prosecutor when the plaintiffs appeared in court on 26 June
2015. When she testified, she explained how and why the plaintiffs were remanded in custody.
- [11] She received the docket from warrant officer Geyer on the morning of 26 June 2015. After perusing it she drafted the charges and requested either the clerk or the interpreter to complete the J15 forms to which the charges were attached.
- [12] When the matter was called, she handed the J15 forms together with their annexures, to the magistrate. Those annexures were the charges and a document that is completed in court by the magistrate for purposes of capturing case information. Ms Wiese told the magistrate that the plaintiffs' case was a Schedule 6 matter that was to be postponed for a formal bail application. The magistrate then postponed the matter to 29 June 2015 with the plaintiffs to be held in custody.
- [13] Ms Wiese testified that she knew that the plaintiffs had been issued with warnings but, on the assumption that they had been arrested, was of the view that warrant office Geyer had no power to release them on warning in the circumstances. Even if that was so, and I express no view on it, she could not simply disregard the reality that the plaintiffs were in fact free and not under arrest.
- [14] Ms Wiese at first said that she could not recall whether she informed the magistrate that the plaintiffs were on warning. Later in her evidence, she was more definite that she had not told him. There also was no formal application made to cancel the warnings (in terms of s 72A, read with s 68 of the Criminal Procedure Act).
- [16] They alleged that Ms Wiese breached the duty owed to the plaintiffs by failing to inform the magistrate that the plaintiffs 'were already out on warning to the knowledge of the Investigating Officer and that no bail conditions had been imposed by the Investigating Officer or any other State Official'.
- [17] Ms Wiese impressed me as an honest and frank witness who tried her best to recall events that happened nearly four years ago. She played open cards with the court in explaining her thought processes on the day. I wish to make it clear that, in my view, any errors of judgment on her part were made in good faith.
- [18] That said, however, it appears to me that she erred in her approach. She took the view that as she had determined that there was a prima facie case of robbery with aggravating circumstances against the plaintiffs, and because that is a Schedule 6 offence, there had to be a formal bail application.

- [19] As the bail application could not, practically speaking, be heard then and there, the matter would have had to be postponed for that purpose. If she had told the magistrate that the plaintiffs were on warning, I am certain that he would have asked her how they could be required to apply for bail if they had not been under arrest.[1] I am equally certain that he would have taken the view that, in the absence of an application in terms of s 72A read with and s 68(1) and
- (2) of the Criminal Procedure Act to cancel the warnings, they could not have been held in custody.
- [20] It is probable that when Ms Wiese informed the magistrate that the charge concerned a Schedule 6 offence and that the matter was to be postponed for a formal bail application, he assumed that the plaintiffs were already in custody. Her failure to inform him that they were on warning and not under arrest, assumes great significance in this context.
- [21] Support for the inference that the magistrate believed that the plaintiffs were already in custody is to be found in one of the documents attached to the J15 forms. The form with case information that is filled in by the magistrate indicates that he believed that they were in custody, despite crosses marked on the J15 forms that indicated that they were on warning. First, where the magistrate had to indicate whether the accused appeared 'on warning/ bail/ J175/ in custody after arrest', he deleted everything except the last phrase, 'in custody after arrest'. Secondly, in a box containing various options and headed: 'Prosecutor informs Court that the State', he placed a cross next to two of the options and crossed out the others. The options he identified were first, 'Applies for case to be remanded in terms of sec 50(6)(d) Act 51/77 to determine the address/ status/ previous convictions/ pending cases/ any further information of Accused' and secondly, 'Opposes the release of the Accused from custody on the following grounds', after which he wrote by hand 'Sch
- 6'.
- [22] From these entries, the inference can safely be drawn that the magistrate believed the plaintiffs were already in custody and had to be held in custody pending their bail application. It is clear, in my view, that what Ms Wiese informed the magistrate, taken with what she failed to inform him, were the triggers that led to the loss of the plaintiffs' freedom.
- [23] I turn now to the question whether Ms Wiese owed the plaintiffs a legal duty to protect their right to freedom of the person and, if so, whether she was in breach of that duty.
- [24] In *Carmichele v Minister of Safety and Security & another* (Centre for Applied Legal Studies Intervening)[2] the Constitutional Court, with reference in particular to the fundamental rights to life, human dignity and freedom and security of the person, held that the Constitution 'imposed a duty on the state and all of its organs not to perform any act that infringes these rights'. (This obligation arises from s 8(1) which provides that the bill of rights binds 'the legislature, the executive, the judiciary and all organs of state' and s 7(2) which provides that the state 'must respect, protect, promote and fulfil the rights in the Bill

of Rights’.)

[25] In *Woji v Minister of Police*[3] this dictum was referred to by Swain JA when he stated:

‘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. . . On the facts of this case Inspector Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Wojj’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 Wojj’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 Wojj was entitled to have his right to freedom protected by the state. In consequence, Inspector Kuhn’s omission to perform his public duty was wrongful in private law terms.’

[26] Having found that a legal duty bound the investigating officer in that case, Swain JA turned to causation. He set out and applied the test for causation as follows:[4]

‘The detention of Mr Wojj, however, resulted from the order granted by the magistrate. In order to determine whether the conduct of Inspector Kuhn was a sine qua non and therefore the factual cause of Mr Wojj’s detention, it has to be determined “what the relevant magistrate on the probabilities would have done” had the application for bail not been opposed, or Inspector Kuhn had revealed that Mr Wojj was not clearly depicted on the video. . . Because the video was the only evidence ostensibly linking Mr Wojj to the crime, the magistrate more probably than not would have released him on bail. It is also clear that Inspector Kuhn’s wrongful conduct was sufficiently closely connected to the loss for liability to follow, hence it also constituted the legal cause of that loss.’

[27] I am aware of the onerous tasks placed on public prosecutors due to overcrowded rolls and the administrative work that precedes their court work. Despite that, however, a duty nonetheless is imposed by the law on prosecutors to act objectively and to protect the public interest.[5]

[28] In the present case, the legal duty described in *Carmichele* and *Woji* rested on Ms Wiese to respect the right to freedom of the plaintiffs. That duty entailed, at the very least, informing the magistrate that the plaintiffs were not in custody and that they were on warning. Had the magistrate known this, it is more probable than not that he would not have ordered the detention of the plaintiffs.

[29] I conclude that the plaintiffs have established that their detention from 26 June 2015 to 3 July 2015 was unlawful. I now turn to consider the quantum of their damages.

- [30] The plaintiffs are young, unmarried men. The first, second and third plaintiffs are unemployed but do casual work as and when they can. The fourth plaintiff is permanently employed at an abattoir in Somerset East.
- [31] They spent seven days in custody in the cells of the Somerset East Police Station. The conditions of their detention were adequate: they were provided with three meals a day and a mattress each to sleep on. They were held in a large communal cell with other prisoners. They were allowed to see visitors. Obviously, the uncertainty as to when they were to be released played on their minds.
- [32] I have considered the case law to which I have been referred and to the submissions of counsel on the quantum of the plaintiffs' damages. I am of the view that an award of R150 000 each would be appropriate and just in the circumstances.
- [33] I am of the view that even though the amount of each claim is within the jurisdiction of the Magistrate's Court, the issues involved were sufficiently complex to warrant costs on the High Court scale.
- [34] I make the following order.
- (a) It is declared that the detention of the first, second, third and fourth plaintiffs from 26 June 2015 until 3 July 2015 was unlawful.
 - (b) The plaintiffs are each awarded damages in the amount of R150 000, together with interest on those amounts at the legal rate from date of demand to date of payment.
 - (c) The defendant is directed to pay the plaintiffs' costs on the High Court scale, together with interest at the legal rate from a date 14 days after taxation to date of payment.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiffs:

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Instructed by

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For the defendant:

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- [1] Section 60(1)(a) of the Criminal Procedure Act contemplates that only arrested persons apply for bail. It says: 'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail . . .'. This is consistent with the definition of bail as a 'contract in terms of which an accused who is being held in custody is set at liberty upon his payment of, or his furnishing of a guarantee to pay, a fixed sum of money and, further, upon his express or implied undertaking to comply with the general conditions . . . and specific conditions . . . relating to his release' (Du Toit et al Commentary on the Criminal Procedure Act (Vol 1) at 9-1).
- [2] Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)
- [2001] ZACC 22; 2001 (4) SA 938 (CC) para 44.
- [3] Woji v Minister of Police 2015 (1) SACR 409 (SCA) para 28. (References omitted.)
- [4] Woji (note 3) para 32. (References omitted.)
- [5] Minister of Police & another v Du Plessis 2014 (1) SACR 217 (SCA) para 34.

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