



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 366/2021

In the matter between:

MINISTER OF POLICE

FIRST APPELLANT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

SECOND APPELLANT

and

EDWARD ALBERTO ERASMUS

RESPONDENT

Neutral citation: *Minister of Police and Another v Erasmus* (366/2021)
[2022] ZASCA 57 (22 April 2022)

Coram: DAMBUZA, VAN DER MERWE and MOCUMIE JJA
and TSOKA and WEINER AJJA

Heard: 17 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 09h45 on 22 April 2022.

Summary: Delict – *actio iniuriarum* – unlawful arrest and detention – liability of police for post-court appearance detention – not caused by unlawful conduct of police – elements of malicious deprivation of liberty not proved in respect of prosecution.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Malusi and Roberson JJ, sitting as court of appeal):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and replaced with the following order:
 - ‘(a) The appeal is upheld with costs.
 - (b) The cross-appeal is upheld with costs.
 - (c) The order of the Port Elizabeth Regional Court is set aside and replaced with the following order:
 - “(i) The first appellant is liable to the respondent in respect of the unlawful arrest on 4 May 2016 and initial detention until 5 May 2016, in the sum of R25 000;
 - (ii) The respondent’s claim in respect of the subsequent detention from 5 May 2016 until 19 May 2016 is dismissed”.’

JUDGMENT

Tsoka AJA (Dambuza, Van der Merwe and Mocumie JJA and Weiner AJA concurring)

[1] This appeal concerns the arrest and detention of the respondent, Mr Edward Alberto Erasmus (Mr Erasmus) from 4 to 5 May 2016 (the first period) by members of the South African Police Service (the police) and his further

detention, after his appearance in court, from 5 May to 19 May 2016 (the second period).

[2] Subsequent to his release from detention on 19 May 2016, Mr Erasmus instituted an action for damages in the Port Elizabeth Regional Court (the regional court) against both the first appellant, the Minister of Police (the Minister) and the second appellant, the National Director of Public Prosecutions (NDPP). The regional court found that the arrest and the detention for the first period was not unlawful, but that the detention for the second period was unlawful. The regional court awarded Mr Erasmus damages in the amount of R250 000 plus costs.

[3] Dissatisfied, the Minister and the NDPP (the appellants) appealed against the order of the regional court to the Eastern Cape Division of the High Court, Grahamstown (the high court). Mr Erasmus cross-appealed against the judgment and order in respect of the arrest and the first period of detention. On 19 January 2021, the appellants' appeal was dismissed and the cross-appeal upheld. The high court awarded Mr Erasmus damages in the amount of R50 000 for unlawful arrest for the first period of detention and R250 000 in respect of the second period. The appellants applied for leave to appeal against the high court judgment and order, but it was refused. As a result, the appellants petitioned this Court for special leave to appeal. On 26 March 2021, this Court granted the appellants special leave to appeal the high court judgment and order.

[4] The facts giving rise to the appeal are as follows. On 4 May 2016, the police received a report that there had been a housebreaking and theft of a safe with its contents, including a firearm, at House 5 Habelgaarn, Gelvanpark, Port Elizabeth (the property) and that a suspect was apprehended by members of the public. The police drove to the scene where they found Mr Erasmus and the items allegedly stolen from the property.

[5] After interviewing the persons at the scene, the police were satisfied that there were reasonable grounds for believing that Mr Erasmus was the person who had broken into the property and stolen the safe and its contents. The police placed him under arrest. He was then taken to Gelvandale Police station where he was detained. On 4 May 2016 at 23h30, Warrant Officer Raynier Ritzma de Koning (W/O de Koning) interviewed Mr Erasmus and perused the police docket that contained two statements implicating Mr Erasmus. W/O de Koning being satisfied that there were reasonable grounds to detain Mr Erasmus, proceeded to charge Mr Erasmus with housebreaking and theft, which charges are schedule 1 offences in terms of the Criminal Procedure Act 51 of 1977 (the CPA). W/O de Koning conducted the following investigations: he obtained two further statements; verified Mr Erasmus' place of residence; obtained his profiles; and verified that he had previous convictions of reckless and negligent driving, possession of dagga and contravening the Domestic Violence Act 116 of 1998. These are offences for which a sentence of imprisonment of six months without the option of a fine may be imposed, within the ambit of schedule 1 of the CPA. Thereafter, W/O de Koning charged Mr Erasmus and detained him until his first appearance in court on 5 May 2016. As he was of the view that Mr Erasmus was not a flight risk, he did not intend on opposing an order releasing Mr Erasmus on bail and recorded that in the bail information sheet in the police docket.

[6] On 5 May 2016, Mr Erasmus appeared in the magistrates' court for the first time. His constitutional rights to legal representation were explained to him and he elected to be represented by a Legal Aid lawyer. As a result of the previous convictions, pointed out above, he was facing schedule 5 offences. In terms of s 60(11)(b) of the CPA, the magistrate's court was obliged to detain him until he was dealt with in accordance with the law, subject to the proviso that he be granted a reasonable opportunity to satisfy the court that the interest of justice

warranted that he be released on bail. The onus rested on him to satisfy the court that the interest of justice warranted that he be admitted to bail. The magistrate's court, accordingly, postponed the matter to 12 May 2016 for the purposes of enabling Mr Erasmus to apply for bail in terms of s 60(11)(b) of the CPA.

[7] On 12 May 2016, Mr Erasmus' legal representative requested the magistrate's court to consider the amount of R100 as sufficient for bail purposes, while the prosecution submitted that the appropriate amount, in the circumstances of this matter, should be R1 000. The court, being satisfied that the charges levelled against Mr Erasmus were schedule 5 offences and indeed serious, fixed the amount of bail in the sum of R500. As he was unable to raise the bail amount, the matter was again remanded to 19 May 2016, ostensibly, for the purposes of trial. He was kept in custody until the said date. On 19 May 2016, again, the police docket was not at court. The matter was then struck off the roll and Mr Erasmus was accordingly released from custody.

[8] As I have said, the matter is before us on appeal from the high court (Malusi J, Roberson J concurring). The high court issued the following order:

‘81.1 The appeal is dismissed with costs;

81.2 The cross-appeal is upheld with costs;

81.3 The order of the court a quo is set aside and substituted with the following:

(a) The Minister of Police is liable to Mr Erasmus in respect of the unlawful arrest on 4 May 2016 and initial detention until 5 May 2016, in the sum of R50 000,00;

and

(b) The Minister of Police and the NDPP are jointly and severally liable to the Mr Erasmus, the one paying the other to be absolved, in respect of the unlawful detention of Mr Erasmus from 5 May 2016 until 19 May 2016, in the sum of R250 000,00;

(c) Interest on the aforesaid sum of R50 000.00 and R250 000.00 at the prescribed legal rate of 10,25% per annum, from date of judgment to date of payment;

81.4 The Minister of Police and the NDPP are liable for the costs of suit.’

[9] In the main, the high court concluded that the arrest of Mr Erasmus and his consequent detention for the first period was unlawful because the regional court ought to have rejected the evidence of the police officer who effected the arrest, Cst Schoeman, because his evidence was unsatisfactory on when he had advised Mr Erasmus of his rights and whether Mr Erasmus had given him an exculpatory statement at the scene of arrest. It held that the detention for the second period was unlawful on the basis that W/O de Koning failed to prepare and submit a 'bail affidavit' which would, inevitably, have enabled the court to exercise its discretion by admitting Mr Erasmus to bail. The high court reasoned that '... on the facts it is clear that "but for" the unlawful arrest by Cst Schoeman, the magistrate would not have remanded Erasmus in custody for a week'. Regarding the second period of detention, the high court accepted that '... there was proper judicial intervention by a magistrate in setting bail. However, on the facts this did not break the chain of unlawful conduct by both the police and the NDPP'.

[10] On a reading of the record, it is difficult to fathom the reasons for the high court's findings that the arrest and detention for the first period were unlawful. These findings were not, however, appealed against. The appellants challenge only the quantum of damages in respect of the arrest and initial detention, to which I shall revert. I now turn to the detention for the second period from 5 May to 19 May 2016.

[11] It is necessary, at the outset, to set out the basic principles of our law that are applicable to the determination of the liability of the Minister and the NDPP for the deprivation of the liberty of Mr Erasmus for this period. These are the following. Both wrongful and malicious deprivation of liberty are *iniuria* actionable under the *actio iniuriarum*. Wrongful deprivation of liberty (detention) takes place where the defendant himself, or his agent or employee, detains the

plaintiff. Malicious detention takes place under or in terms of a valid judicial process, where the defendant makes improper use of the legal machinery of the state. The requirements to succeed in an action for malicious detention are therefore like those for malicious prosecution namely: that the defendant instigated the detention; that the instigation was without reasonable and probable cause; and that the defendant acted with *animus iniuriandi*. See Neethling et al *Law of Delict* 5 ed (2006) at 304-306. It follows that the NDPP could only be liable for the second period of detention if these stringent requirements were proved in respect of the relevant prosecutors.

[12] When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, and (b) was the factual and legal cause of the post-hearing detention. In *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA), the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty. Similarly, in *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime. In *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR (CC) paras 58 and 76, the decisive consideration in both the judgments that held in favour of the appellant was that the investigating officer knew that the appellant would appear in a ‘reception court’ where the matter would be remanded without the consideration of bail. Finally, in *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC), the investigating officer deliberately suppressed the fact

that a confession which constituted the only evidence against the appellants, had been extracted by torture and thus caused their continued detention.

[13] Section 60(11)(b) of the CPA is of relevance as Mr Erasmus was charged with offences that are referred to in schedule 5 of the CPA. In the present matter, it is common cause that theft and the breaking and entering the property with intent to commit an offence, fall within schedule 1 of the CPA. It is also common cause that, as Mr Erasmus had previous convictions of offences that may attract a sentence of six months imprisonment without the option of a fine, he was charged with schedule 5 offences. In terms of s 60(11)(b) of the CPA, the magistrate's court was obliged to detain Mr Erasmus until he was dealt with in terms of the law. It was then up to Mr Erasmus to satisfy that court that it was in the interest of justice for him to be admitted to bail. That court was only expected to afford him a reasonable opportunity to satisfy it, on a balance of probabilities, that the interests of justice permitted his release on bail.

[14] In the present matter, no unlawful conduct of the police influenced the decisions that led to the second period of detention. The position was quite the contrary. There was no legal obligation on W/O de Koning to submit a 'bail affidavit'. The police indicated in writing in the police docket that bail should not be opposed. The detention of Mr Erasmus from 5 May 2016 was caused by the effect of s 60(11)(b) of the CPA and the independent decision of the prosecutor to oppose bail. His detention from 12 May 2016 was caused by the inability of Mr Erasmus to pay the bail amount of R500 that the magistrate had set in the exercise of his or her judicial discretion.

[15] As I have said, the liability of the NDPP depended on proof that the prosecutors, who appeared on 5 May 2016 (Ms Naidoo) and 12 May 2016 (Ms Le Bron), had caused the second period of detention or part thereof and had acted

without reasonable and probable cause and *animo iniuriandi*, that is, with the intent to injure Mr Erasmus. Both prosecutors testified in the regional court. Ms Naidoo said that she had acquainted herself with the contents of the police docket and that she had opposed bail despite the recommendation of the police because Mr Erasmus was charged with serious offences (housebreaking and theft of a safe with its contents) which were also schedule 5 offences. Ms Le Bron testified that on 12 May 2016, the police docket was not at court and that therefore she did not oppose bail. Mr Erasmus had legal representation and the magistrate granted the application for bail in the amount of R500. There was no basis for rejection of any of this evidence.

[16] It is not necessary to consider whether Ms Naidoo caused any part of the second period of detention. That is so because she had reasonable and probable cause to oppose bail and clearly did not act with *animus iniuriandi*. Ms Le Bron's conduct did not cause the detention from 12 May 2016 and nothing more needs to be said in respect thereof. It follows that the high court erred in holding the Minister and the NDPP liable for the second period of detention.

[17] It remains only to consider the award of R50 000 in respect of the arrest and detention of the first period. Mr Erasmus was detained for approximately 20 hours in unpleasant conditions. Nevertheless, there is a striking disparity in the amount of damages that I would award (R25 000) and that of the high court. This justifies this Court's interference with the exercise of the discretion of the high court in this regard. The appeal against the quantum of damages in respect of the arrest and detention for the first period must also succeed and the award must be replaced with one in the amount of R25 000.

[18] The order of the court a quo must be varied in accordance with these findings. There should be no order as to costs in the regional court. Although the

appellants employed three counsel on appeal, they only asked to be awarded costs of two counsel, which was justified.

[19] For these reasons the following order is issued:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and replaced with the following order:
 - ‘(a) The appeal is upheld with costs.
 - (b) The cross-appeal is upheld with costs.
 - (c) The order of the Port Elizabeth Regional Court is set aside and replaced with the following order:
 - “(i) The first appellant is liable to the respondent in respect of the unlawful arrest on 4 May 2016 and initial detention until 5 May 2016, in the sum of R25 000;
 - (ii) The respondent’s claim in respect of the subsequent detention from 5 May 2016 until 19 May 2016 is dismissed”.’

M TSOKA
ACTING JUDGE OF APPEAL

Appearances

For appellants: F Petersen (with him V Madokwe and M Ndamase)

Instructed by: State Attorney, Port Elizabeth
State Attorney, Bloemfontein

For respondent: M du Toit

Instructed by: Peter McKenzie Attorneys, Port Elizabeth
Webbers Attorneys, Bloemfontein.