THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 380/2008

PETRUS JOHANNES RUDOLPH **First Appellant**

WENTZEL LAUBSCHER **Second Appellant**

MARTHINUS ANDRIES VAN DER WALT **Third Appellant**

and

THE MINISTER OF SAFETY AND SECURITY **First Respondent**

THE MINISTER OF CORRECTIONAL SERVICES **Second Respondent**

Neutral citation: *Rudolph v Minister of Safety and Security* (380/2008)[2009] ZASCA 39 (31 March 2009)

Coram: Farlam, Mthiyane, Brand, Lewis and Van Heerden JJA

Heard: 9 March 2009
Delivered: 31 March 2009

Summary: **Claim for damages – Arrests and detention of appellants unlawful as no offence committed in the presence of peace officer – Prosecution of appellants malicious – Requirement of 'malice' considered in the context of *animus injuriandi* held to have been met – Substantial damages awarded on appeal.**

ORDER

On appeal from: Transvaal Provincial Division (Mokgoatlheng AJ sitting as court of first instance)

1 The appeal succeeds with costs, the costs to be paid by the first respondent. The order of the court a quo is set aside and replaced with the following order:

'1. Judgment is granted in favour of the first plaintiff as follows:

(a) (i) against the first and second defendants jointly and severally, the one paying the other to be absolved, for payment of damages in the sum of R100 000 in respect of claim 1;

(ii) against the first defendant for payment of damages in the sum of R50 000 in respect of claim 2;

(iii) against the first defendant for payment of damages in the sum of R50 000 in respect of claim 3.

(b) Interest on each of the above amounts will run at the prescribed rate *a tempore morae* (from 5 April 2007) to date of payment.

(c) The first defendant is ordered to pay the costs of suit.

2. Judgment is granted in favour of the second plaintiff as follows:

(a) (i) against the first and second defendants jointly and severally, the one paying the other to be absolved, for payment of damages in the sum of R100 000 in respect of claim 1;

(ii) against the first defendant for payment of damages in the sum of R50 000 in respect of claim 2.

(b) Interest on each of the above amounts will run at the prescribed rate *a tempore morae* (from 5 April 2007) to date of payment.

(c) The first defendant is ordered to pay the costs of suit.'

JUDGMENT

MTHIYANE and VAN HEERDEN JJA (FARLAM, BRAND and LEWIS JJA concurring):

[1] This is an appeal from a judgment of the Pretoria High Court (Mokgoatlheng AJ) dismissing with costs three claims instituted by the appellants against the respondents, in which they claimed damages arising out of their alleged unlawful arrest, detention and malicious prosecution. The appeal is with the leave of the trial judge.

[2] The first claim arises out of the unlawful arrest of the first appellant on 18 July 2003 near Capital Park in Pretoria and the subsequent unlawful detention of both appellants. Both were taken to Pretoria Moot Police Station (via Wonderboompoort Police Station) and detained in a police cell until 21 July 2003. On that day they appeared before a magistrate where they were granted bail of R500 each. Although a member of the first appellant's group, the second appellant was apparently not arrested, as will be discussed in more detail below.

[3] When the appellants tendered payment of bail at the magistrate's court on the afternoon of Monday 21 July 2003, the prisoner's friend was not available to receive bail money. The appellants were then removed to the Pretoria Central Prison. At the prison the appellants again tendered payment of bail in vain; there, too, nobody was prepared to receive

payment of it.

[4] The appellants remained in custody until the following day, viz Tuesday 22 July 2003, having been arrested on the previous Friday. Although their bail was paid at 08h30, they were only released at 12h00. They were therefore detained from about 17h00 on the Friday until approximately midday on the Tuesday.

[5] After several appearances in the magistrate's court, the charge against the appellants was withdrawn by the State in January 2004.

[6] The second claim, for damages for malicious prosecution, is based on the fact that the members of the South African Police Service (SAPS) brought false charges against the appellants, in that the former had neither evidence, nor reason to believe, that the appellants had committed any offence; that they acted with 'malice', and that the charges were subsequently withdrawn.

[7] The third claim arises out of the first appellant's arrest by Captain Ngobeni near Rayton on 26 July 2003, on a charge of sedition. The first appellant was thereafter taken (via Cullinan Police Station) to Mamelodi Police Station, where he was detained in a police cell. On 28 July 2003 he appeared before a magistrate on a charge of contravening the provisions of an administrator's notice in respect of the unauthorised display of placards or flags next to a public street.

[8] The arrests and detention of the appellants are not in dispute. What is disputed is the lawfulness or otherwise of these arrests and detention. In argument, counsel for the first respondent contended that, in relation to

the arrest of 18 July 2003 and subsequent detention, an offence was committed in the presence of one Captain Bekker. A similar argument was advanced in respect of the arrest and detention of the first appellant by Captain Ngobeni on 26 July 2003.

[9] As to the claim for damages arising out of the alleged malicious prosecution of the appellants, the sole issue is whether the appellants proved that members of SAPS acted with 'malice'.

[10] Captain Bekker gave evidence for the first respondent in relation to the events of 18 July 2003. She testified that, after receiving a report, she went to the Low Water Bridge in Capital Park where she found eight persons: four adults and four children. The first and second appellants, the first appellant's wife and Mr M A van der Walt (nominally the third appellant, who did not pursue his appeal before us) formed the adult component of the group and the rest were children. Upon arrival she informed them that their assembly was an unlawful gathering as they did not have the requisite permission to hold it. The first appellant enquired who she was and, after she had identified herself, he gave her his full names, his ID number and the name of the political organisation of which he formed part. Captain Bekker then asked if they had permission to hold the gathering and when, none was produced, she asked them to disperse. The first respondent refused and maintained that they were in law entitled to be there.

[11] Captain Bekker then gave the group 15 minutes to disperse. The deadline came and went and Captain Bekker was compelled to extend it by a further 10 minutes. The extended time did not have the desired effect and, an hour or so after the deadline, the first appellant and his group

were still on the scene.

[12] After consulting with a Captain Sithole and a SAPS legal adviser, one Mr Nel, Captain Bekker arrested the first appellant for contravening the provisions of the Regulation of Gatherings Act 205 of 1993 ('the Gatherings Act'). As already indicated, the second appellant was also told to accompany the police to the police station, but it would appear that he was not actually arrested. He testified that he had not been arrested, but had accompanied the police voluntarily. Captain Bekker also said that she only arrested the first appellant.

[13] The court below accepted that the appellants had held an unlawful gathering in contravention of the provisions of the Gatherings Act in that they did not have the required permission. The trial judge appears to have accepted also that the arrest without a warrant was effected in terms of s 40(1)(a) of the Criminal Procedure Act 51 of 1977.[1] In addition, the learned judge held that Captain Bekker was 'not unreasonable in entertaining a suspicion that a crime listed in Schedule 1 of the Criminal Procedure Act was being committed'. This apparent reliance on s 40(1)(b) of the Criminal Procedure Act[2] was clearly incorrect, in that a contravention of the Gathering Act is *not* one of the offences listed in Schedule 1.

[14] The onus of justifying the arrests and detention of the appellants lies upon the first respondent. See *Zealand v Minister of Justice and*

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[1] Section 40(1)(a) reads as follows:
'(1) A peace officer may without warrant arrest any person —
(a) who commits or attempts to commit any offence in his presence'.

[2] Section 40(1)(b) reads as follows:
'(1) A peace officer may without warrant arrest any person —
. . .
(b) whom he reasonably suspects of having committed an offence referred to in Schedule1'.

Constitutional Development.[3] In concluding that the appellants had committed an offence, the court below clearly erred. The first appellant and his group were only eight in number and the Gatherings Act proscribes an assembly of more than 15 persons in a public place without permission. The first appellant and his small group did not constitute a 'gathering' within the meaning of that Act. In section 1, a 'gathering' is defined as follows:

'"gathering" means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air . . .'.

There was therefore no evidence of a 'gathering', no offence had been committed in the presence of Captain Bekker, and the first respondent accordingly failed to discharge the onus of proving that the arrest of the first appellant on 18 July 2003 without a warrant and the subsequent detention of both appellants in a police cell at the Pretoria Moot Police Station were justified.

[15] As regards the detention of the appellants at the Pretoria Central Prison between the time of their arrival there in the late afternoon of Monday 21 July (at which time bail was tendered and should have been accepted by the prison authorities), and the release of the appellants on bail the following day at about midday, counsel for the respondents did not seriously contend that this period of detention could be justified. In our view, therefore, the second respondent must be held liable for this period of unlawful detention. Counsel for the appellants submitted that, should this appeal succeed, both respondents should be held liable for the damages in respect of claim 1, but that the first respondent should be ordered to pay all the costs. This submission was not disputed by counsel

[3] 2008 (2) SACR 1 (CC) paras 24 and 25.

for the respondents and appears to be a practical one.

[16] We will now deal with the appellants' claim for damages for malicious prosecution (claim 2). The requirements for successful claims for malicious prosecution have most recently been discussed in *Minister of Justice & Constitutional Development v Moleko*[4] as follows:

'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.'

As already indicated, in so far as this claim is concerned, requirements (a) (b) and (d) above are not disputed by the respondents.

[17] Counsel for the respondent was content to pin his colours to the mast solely in respect of requirement (c), arguing in this regard that it had not been established that Captain Bekker had acted with malice. It was submitted that, because Captain Bekker had sought legal advice before effecting an arrest, malicious prosecution had not been established.

[18] The requirement of 'malice' has been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the expression 'malice' is used, the claimant's remedy in a claim for malicious prosecution lies under the *actio injuriarum* and that what has to be proved in this regard is *animus injuriandi.* See *Moaki v Reckitt & Colman (Africa) Ltd & another*[5] and *Prinsloo & another v*

[4] [2008] 3 All SA 47 (SCA) para 8.
[5] 1968 (3) SA 98 (A) at 103G-104E.

Newman.[6] By way of further elaboration in *Moleko* it was said:

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.' (Para 64).

[19] The respondent's argument as set out in para 14 above is misconceived. The 'malice' must be that of the person responsible for initiating the prosecution against the appellants. In this case, the appellants were formally charged ─ with contravening the Gatherings Act ─ on Saturday 19 July 2003 by members of the SAPS at the Pretoria Moot Police Station. It would appear that this is the stage at which the proceedings were initiated. Although Captain Bekker's police statement was made only on 18 August 2003, it is safe to assume that the member of SAPS who charged the appellants did so on the basis of the information furnished to him or her by the arresting officer, viz that there were only eight persons (four adults and four children) gathered at the scene of the supposed 'illegal gathering'. By no stretch of the imagination could this 'demonstration' be regarded as a 'gathering' within the meaning of the Gatherings Act.

[20] In this case, there can be no question that the person who charged the appellants was aware of the fact that, by so doing, the appellants would in all probability be 'injured' and their dignity ('comprehending also . . . [their] good name and privacy')[7] in all probability negatively affected.[8] Knowing that the 'gathering' in question comprised only eight

[6] 1975 (1) SA 481 (A) at 492A-B.
[7] *Relyant Trading (Pty) Ltd v Shongwe & another* (2007) 1 All SA 375 (SCA) para 5.
[8] See also the *Moleko* case para 65.

persons, the police member concerned must at the very least have foreseen the possibility that no offence in terms of the Gatherings Act had been committed and that, in charging the appellants with a contravention of that Act, he or she was acting wrongfully. He or she nevertheless continued so to act, reckless as to the possible consequences of his or her conduct. In our view, he or she thus acted *animo injuriandi*.[9] This being so, the appellants proved the requirements of malicious prosecution and their claim in this regard should have succeeded.

[21] We turn to the third claim based on the unlawful arrest of the first appellant by Captain Ngobeni on 26 July 2003 and his subsequent unlawful detention. It is not disputed that the first appellant was arrested for sedition on 26 July 2003. There was, however, simply no evidence that the first appellant had committed this offence.

[22] Captain Ngobeni's evidence was that, upon his arrival at the scene, he found more than 100 people. They were carrying banners with the words 'Vryheid vir die Boerevolk', 'May 1902 women and children killed', 'Stem vir die doodstraf', 'Mbeki flies high while hungry children die' and 'Democratic right to Freedom of speech, no to police state'. The sentiments displayed on the banners do not by themselves suggest that the first appellant was advocating unlawful insurrection. Captain Ngobeni's explanation as to what the banners meant showed a complete lack of insight and can hardly be accepted as having founded a reasonable belief that the offence of sedition was being committed.

[23] Another shortcoming in Captain Ngobeni's evidence is the extent to which it is contradicted by his police statement. In that statement he

[9] See the passage from the *Moleko* case para 64, quoted in para 17 above.

did not mention that upon his arrival he found 100 persons on the scene. On the contrary, he said that he noticed 'two males standing next to the banners and flags' and that, when he told them to 'stop and pack their belongings', they 'refused by sitting down on their chairs while some other members of the public [came] and signed some documents on their tables'. This version tied up with the evidence given by the first appellant and is at variance with Captain Ngobeni's testimony during the trial.

[24] Captain Ngobeni's evidence was that the purpose of the gathering was to overthrow the government. On the contrary, the established facts indicate that what the appellant was involved in was no more than a peaceful protest. He stood there collecting donations from persons who were supportive of his beliefs and policies. The petition that he was asking people to sign stated that the person signing supported 'die Orde Boerevolk se poging om *deur middel van onderhandeling* ons vryheid te verkry' and further that, 'in *die proses van onderhandeling*, ook in gesprek getree sal word met ander organisasies waarvan die huidige Suid-Afrikaanse regering deel is of deel kan uitmaak' (emphasis added in both instances). There was nothing seditious about his conduct or utterances. It is probable that Captain Ngobeni was annoyed by his conduct or by the tone of the placards, but such is the democratic society in which we find ourselves. It behoves us to be tolerant even of views which may seem unpalatable.

[25] The court below found that Captain Ngobeni was justified in effecting the arrest without a warrant. It bears noting that the offence of sedition is indeed one of the offences listed in Schedule 1 to the Criminal Procedure Act. It is not, however, at all clear whether the trial court applied s 40(1)(a) or s 40(1)(b) of the Act (or both) in coming to the

conclusion that the arrest was lawful. As no offence of sedition was committed, s 40(1)(a) is clearly not applicable. Moreover, as it can hardly be said that Captain Ngobeni *reasonably* suspected the first appellant of committing sedition, the arrest also cannot be justified under s 40(1)(b). It follows that the arrest was unlawful and that the trial court was wrong in concluding otherwise.

[26] As regards the quantum of damages, the first and second appellants claimed payment of R100 000 each in respect of claim 1 and R50 000 each in respect of claim 2. The first appellant also claimed R100 000 in respect of claim 3. Counsel for the respondent did not contend that the damages claimed were excessive. It needs to be pointed out at the outset that the award of damages is by no means an easy task. The ever-changing value of money makes reference to previous decisions not altogether helpful. As was stated in *Minister of Safety and Security v Seymour*,[10] in the assessment of general damages the facts of the particular case must be looked at as a whole. There the court dealt with the case of a 63-year-old man who had been unlawfully arrested and detained for five days. He was awarded damages in the amount of R500 000 by the trial court, but the award was reduced to R90 000 on appeal. This court considered that the plaintiff had had free access to his family and doctor throughout his detention at the police station and that he had suffered no degradation beyond that inherent in being arrested and detained. It also considered that, after the first 24 hours, the plaintiff had spent the remainder of his detention in a hospital bed at a clinic and that, although the experience had been traumatic and distressing, it warranted no further medical attention after his release.

[10] 2006 (6) SA 320 (SCA) para 17.

[27] Although the imprisonment of the appellants in the present matter was somewhat shorter that that in the *Seymour* case (viz for four nights and three days), the humiliating conditions to which they were subjected makes their case more serious than that of the plaintiff in *Seymour*. The appellants were arrested and detained under extremely unhygienic conditions in the Pretoria Moot police station. The cell in which they were held was not cleaned for the duration of their detention. The blankets they were given were dirty and insect-ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water. Throughout their detention the first appellant, who suffers from diabetes, was without his medication. They were not allowe to receive any visitors, not even family members. The first appellant later wrote a letter to the Commissioner of Police complaining about the conditions of their detention. As regards the last night of their detention, viz the night spent in the Pretoria Central Prison, there is no evidence regarding the conditions under which they were detained. Both appellants testified, however, that their reputations had been negatively affected by the detention ─ as the first appellant put it, 'in our country a jail bird is a jail bird' ─ and the first appellant also stated that his illness had been aggravated by his period of detention.

[28] After his arrest on 26 July by Captain Ngobeni, the first appellant was taken to Mamelodi police station and detained there for two nights and one full day (from about 18h00 on Saturday 26 July 2003 to about 08h00 on Monday 28 July 2003). The conditions were little better than at the Pretoria Moot Police Station. He was made to sleep on a small coarse mattress in a freezing cell and was not even provided with a blanket on the first night. It was only on the Sunday that his wife was allowed to visit him and bring him his medication and a sleeping bag.

[29] Counsel for the respondent advanced no argument in respect of the amounts of damages claimed. However, in our view, there can be no doubt that the indignity to which the appellants were subjected merits substantial damages. For the arrest and detention of the appellants in respect of the first claim, we consider that an award of R100 000 each (as claimed) would be appropriate. Similarly, in respect of claim 2 (malicious prosecution), the amount of R50 000 damages claimed by each appellant is appropriate. As regards claim 3 (the second unlawful arrest and detention of the first appellant), although the conditions of detention were most unsatisfactory, it would appear that they were not as bad as in respect of the first claim. Moreover, the period of detention was considerably shorter. An appropriate award in respect of the third claim is R50 000.

[30] In the result the appeal succeeds with costs, the costs to be paid by the first respondent. The order of the court below is set aside and replaced with the following order:

'1. Judgment is granted in favour of the first plaintiff as follows:

(a) (i) against the first and second defendants jointly and severally, the one paying the other to be absolved, for payment of damages in the sum of R100 000 in respect of claim 1;

(ii) against the first defendant for payment of damages in the sum of R50 000 in respect of claim 2;

(iii) against the first defendant for payment of damages in the sum of R50 000 in respect of claim 3.

(b) Interest on each of the above amounts will run at the prescribed rate *a tempore morae* (from 5 April 2007) to date

of payment.

(c) The first defendant is ordered to pay the costs of suit.

2. Judgment is granted in favour of the second plaintiff as follows:

(a) (i) against the first and second defendants jointly and severally, the one paying the other to be absolved, for payment of damages in the sum of R100 000 in respect of claim 1;

(ii) against the first defendant for payment of damages in the sum of R50 000 in respect of claim 2.

(b) Interest on each of the above amounts will run at the prescribed `rate *a tempore morae* (from 5 April 2007) to date of payment.

(c) The first defendant is ordered to pay the costs of suit.'

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KK MTHIYANE
JUDGE OF APPEAL

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BJ VAN HEERDEN
JUDGE OF APPEAL

Appearances:

For Appellant:	G C Muller M B Matlejoane Instructed by: Coetzer Attorneys Pretoria Azar & Havenga Bloemfontein
For Respondent:	B R Tokota SC K Mokotedi Instructed by: The State Attorney Pretoria The State Attorney Bloemfontein