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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1896/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MOEKETSI WILLIAM LESUPI

Plaintiff

and

MINISTER OF POLICE

First Defendant

LEFA LETLOJANE

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

HEARD ON: 19 MAY 2023

JUDGMENT BY: RANTHO, AJ

DELIVERED ON: 19 OCTOBER 2023

Introduction

- [1] This matter concerns the action proceedings instituted by the plaintiff against the defendants for alleged unlawful arrest and detention and malicious prosecution.

- [2] The matter was set-down for trial on 17, 18 and 19 January 2023, 4, 5 and 6 April 2023 and 19 May 2023.

Facts

- [3] It is of common cause between the parties that the second defendant (“Sergeant Letlojane”) arrested the plaintiff without a warrant on 3 June 2018 on account of rape and murder of a woman (“the deceased”) that took place at or near Botshabelo. Sergeant Letlojane was also responsible for the investigation of the case brought against the plaintiff in this regard.
- [4] It is also common cause that the plaintiff was taken to Botshabelo Magistrate Court for his first court appearance on 5 June 2018 and the case against him was postponed to 12 June 2018 in terms of section 50(6) of the Criminal Procedure Act 51 of 1977 (“CPA”). The plaintiff elected not to apply for bail during the said court appearances and was remanded in custody until his release on warning on 24 October 2018. Following his release from detention, he appeared before the criminal court on few occasions pursuant to the third defendant’s (“NPA”) decision to prosecute him for charges related to rape and murder of the deceased. The charges against him were subsequently withdrawn by the NPA on 19 March 2019.
- [5] On 11 June 2020 the plaintiff issued summons against the defendants on the basis of the following as alleged in his particulars of claim:

Claim 1: Unlawful arrest and detention.¹

- [6] That his arrest was unlawful and wrongful based on the fact that Sergeant Letlojane:

¹ Index: Pleadings: pp 8- 9 at para 12 - 12.5 of particulars of claim.

- a. caused his arrest and detention without reasonable and probable cause;
- b. failed to take reasonable steps to avoid his unlawful arrest and detention;
- c. misled the court hearing his bail application that the case against him was strong;
- d. proceeded investigating another suspect, despite his 'strong belief' that he was the perpetrator in the matter; and
- e. failed to cause the charges against him to be withdrawn despite having arrested the correct suspect in 2019 and even after receiving a confession statement taken of the said accused ("Accused 2").

[7] The plaintiff alleges to have suffered the right to his freedom and dignity, loss of income, *contumelia* and emotional pain and suffering emanating from the alleged unlawful arrest and claims damages in the amount of R 6 017 000.00 (SIX MILLION AND SEVENTEEN THOUSAND RAND) as a result thereof.

Claim 2: Malicious prosecution.

[8] The plaintiff further alleges in his particulars of claim that the employees of the third defendant ("the NPA") set the law in motion and initiated the prosecution against him under circumstances where, upon being released on warning on 24 October 2018, the court remarked that the case against him was so weak and lacked prospects of successful prosecution in the trial court.²

² Index: Pleadings p 11 at para 19.

- [9] He alleges to have suffered damages in the amount of R 5 172 000.00 (FIVE MILLION ONE HUNDRED AND SEVENTY-TWO THOUSAND RAND) for infringement of his dignity, deprivation of liberty, discomfort and suffering and *contumelia* resulting from alleged malicious prosecution.
- [10] The total amount claimed by the plaintiff for payment of damages allegedly suffered is R 11 189 000.00 (ELEVEN MILLION ONE HUNDRED AND EIGHTY-NINE THOUSAND RAND) plus interests at the rate of 10% *a tempore morae* and the costs of suit.

Defendants' plea

- [11] The defendants had initially raised a special plea against the plaintiff for non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 Of 2002 ("Act 40 of 2002"). Pursuant to the condonation order granted in favour of the plaintiff by Van Zyl J on 29 August 2019, the special plea was disposed of accordingly.³
- [12] The defendants further plead as follows in respect of claim 1:⁴
- [13] The plaintiff's arrest and detention were lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA");
- [14] The arresting officer was a peace officer as defined in the CPA at the time when the plaintiff was arrested;
- [15] While the investigation officer was at the scene of crime where the body

³ Index: Pleadings p 25 - 26.

⁴ Index Pleadings pp 25 – 27 at paras 5 - 11.

of the deceased was discovered, he received information from an informer who implicated the plaintiff in the commission of the offence(s) committed towards the deceased;

[16] The arresting officer formed a reasonable suspicion that the plaintiff was involved in the commission of a Schedule 1 offence;

[17] The plaintiff's detention was consequent upon his lawful arrest; and

[18] The plaintiff's further detention after his first appearance on 05 June 2018 was pursuant to a court order issued by the presiding officer.

[19] In respect of Claim 2 the defendants plead that:⁵

[20] The law was set in motion by the police who opened a case against the plaintiff at Boithuso Police Station ("Boithuso") on charges of murder and rape;

[21] The first and second defendants ("the police") were obligated by virtue of section 205 of the Constitution⁶ to investigate the crime that had been committed pursuant to a complaint that was lodged with them;

[22] The NPA was obligated in terms of section 179(2) of the Constitution read with section 20 of the NPA Act⁷ to institute the criminal proceedings on behalf of the state and to carry out any necessary functions and thus did not act *mala fide*; and

[23] Their opposition to the plaintiff's application for release from custody was based on reasonable grounds and *prima facie* evidence that was

⁵ Index Pleadings pp 29 - 30: paras 14 - 15.

⁶ Act of 1996.

⁷ Act of 32 of 1998.

before the prosecutors at the time.

Issues

- [24] The court is required to determine as to whether or not the arrest and detention of the plaintiff were unlawful. It is further required of this Court to determine as to whether the prosecution of the plaintiff by the NPA was malicious under the circumstances of this case.

- [25] Should the Court find in the plaintiff's favour, it is required to determine if he is entitled to the amount claimed in damages suffered as a result of the defendants' conducts.

- [26] At the commencement of trial proceedings, the parties confirmed the agreement made during the pre-trial conference held that there should be no separation of merits and quantum in respect of both claims.

- [27] They further agreed that, notwithstanding the fact that the defendants bore the duty to begin in respect of claim 1 (i.e. unlawful arrest and detention), the plaintiff would, for practical purposes, assume the duty to begin based on the fact that he bore the duty to begin in respect of claim 2 (i.e. malicious prosecution).

Plaintiff's evidence

- [28] The plaintiff was the only person called to testify in support of his case and his evidence may be summarised as follows:

- [29] He was at a tavern called "*Diphenting*" ("the tavern") at W-Section in Botshabelo on the night of 02 June 2018. Under cross examination, he stated that on 02 June 2018 he was at a tavern called '*The Dance*' with his cousin '*Siphelele Helman Dlamini*' ("Dlamini") and only arrived at '*Diphenting*' in the early hours of the morning on which the incident occurred. He was not in a position to call Dlamini to come and confirm his version because the latter worked elsewhere and not sure if he

would come even if he were issued with a subpoena. He could not explain as to why he did not inform the court about the said whereabouts when he presented his evidence in chief.

[30] He was arrested by Letlojane, who was in the company of three other police officials on Sunday of 3 June 2018, for rape and murder while drinking liquor with a group of people at a house near the tavern. He was put inside the police van (“the van”) in full view of about 20 people who were at or near the tavern.

[31] After being put in the van, Sergeant Letlojane left him in the said vehicle to go and speak to the tavern owner while the people came and surrounded the van. The tavern owner also came out of the tavern and came to the police van whereafter Sergeant Letlojane removed a crowd of people from the van and informed him (the plaintiff) that he was arrested for rape and murder before driving-off with him to the police station.

[32] On arrival at the police station Sergeant Letlojane asked him if his name was ‘*Spice*’, to which he responded in the negative and urged Sergeant Letlojane to go and enquire at the tavern about the whereabouts of ‘*Spice*’. He was not informed as to why Sergeant Letlojane was looking for the said person (“*Spice*”). Under cross-examination, he admitted to the fact that he indicated in his warning statement⁸ taken on 04 June 2018 that he would only speak or make a statement in court. He also admitted that he was given the opportunity to state his case before the police but elected not to do so because he did not want to speak to Sergeant Letlojane.

[33] He was detained at Boithuso Police Station and taken to court on 05

⁸ Index: Trial Bundle p 17.

June 2018 before being transferred to Grootvlei prison where he was kept in a cell with 47 other prisoners. He appeared before the court again on 24 October 2018 for bail application after being in custody for 141 days. Sergeant Letlojane opposed his bail application but same was granted by the presiding Magistrate. He admitted under cross-examination that he only applied for bail on 24 October 2018 and elected not to apply when he appeared before the court earlier out of fear for his life because the community was very angry about the incident that had happened on 03 June 2018.

[34] He was referred to the statement deposed to by Tsimane Finger⁹ (“Finger”) on 04 June 2018 and stated that he knew Finger as a person who worked at a tavern where he was arrested. He testified under cross-examination that he did not know if Finger knew him but he knew that he (Finger) worked at a tavern he attended on the day before the incident took place. He also denied Finger’s statement that he was wearing a ‘*beanie*’ on the day of the incident. He testified under re-examination that he did not give full factual account of what is contained in Finger’s statement because the said statement was never read out to him paragraph by paragraph at the time when the investigating officer took his warning statement.

[35] He was referred to the affidavit deposed to by Sergeant Letlojane¹⁰ and asked if he knew a person referred to as ‘*Ramoleane Mokgothu*’ (“Mokgothu”) also known as ‘*Mduks*’ and said he did not know him quite well but knew that Mokgothu was sentenced for the same offences he was charged with. He could not remember if there was any mention of Mokgothu’s name by Letlojane during the hearing of the bail application

⁹ Index: Trial Bundle p 11.

¹⁰ Index: Trial Bundle p 67.

on 24 October 2018. He was also referred to a confession¹¹ made by Mokgothu on 14 February 2019 and stated that the charges against him had not yet been withdrawn on the said date. Instead, Mokgothu became his co-accused in the case opened against him whereafter they both appeared in court on 28 February and 11 March 2019 before the withdrawal of the charges against him on 19 March 2019. He did not know why the prosecution did not withdraw charges against him after Mokgothu made a confession but was of the view that the prosecution acted in bad faith.

[36] Under cross-examination, he was referred to the investigation diary showing that he did not appear in court on 11 March 2019 but said he could not remember if he was mistaken about that. He admitted that even though Mokgothu was arrested on 13 February 2019 he (plaintiff) was only due to appear in court on 28 February 2019 as he had previously been warned during his prior court appearance. He could not deny that the inscription made as entry number 5 in the docket on 14 February 2019 meant that Mokgothu's confession was only filed in the docket on 14 February 2019 and thus the prosecutor could not have known about Mokgothu's involvement in the incident at the time when the decision to prosecute him was taken. He further admitted that the prosecutor was only in position to present his (plaintiff's) DNA results and Mokgothu's confession before the court on 28 February 2019.

[37] He testified that his arrest affected him badly and that following his release from custody, he went and stayed with his uncle at K-Section in Botshabelo because the community did not trust him anymore. He also testified that he lost the piece-jobs of installing palisade fencing he had prior to the arrest and that the situation also caused him to acquire clearance of his fingerprints before applying for any job in the security

¹¹ Index: Consolidated Discovery Bundle pp 136 - 139.

industry.

- [38] He testified that the incident relating to his arrest also impacted on his family and that the members of the public attended the court proceedings in numbers during his appearance. This also affected the relationship he had with his girlfriend at the time, whom they share a child together. Because his girlfriend no longer trusted him, their child, who now stayed with his mother, was also affected.
- [39] He described the general conditions under which he was detained as unhygienic and had to sleep on a dirty thin sponge/mattress placed on the floor that was full of water caused by the leaking basin. He was served food he was not supposed to eat two times a day and could not wash himself from the time of his arrest until being taken to court for his first appearance on 05 June 2018.
- [40] He admitted under cross-examination that his freedom of movement was not interfered with after his release on bail on 24 October 2018 until the charges were withdrawn on 19 March 2019.
- [41] He also admitted under cross-examination that the prosecutor was not at the tavern when he was arrested and he took the decision to prosecute based on the information contained in the docket. He could not dispute that at the time when the decision was taken to prosecute him, the prosecutor was armed with two statements, namely, that of Finger and Sergeant Letlojane's and that the NPA officials did what was required of them in terms of their job. He testified under re-examination that his admission to the effect that the prosecution acted reasonably when they took the decision to prosecute him was in line with the question asked to him under cross-examination but not in contradiction to the evidence he gave in examination in chief about malice in the prosecution against him.

Defendants' evidence

[42] Defendants presented the evidence of three witnesses, namely, Sergeant Letlojane, Patrick Kenosi Koloane and Shane Martin Lewis.

Sergeant Letlojane's evidence

[43] The crux of Sergeant Letlojane's evidence was that:

[44] He currently holds the rank of a Sergeant in the employ of the South African Police Service ("SAPS") and was the arresting and investigating officer in the case of rape and murder opened against the plaintiff on 03 June 2018. He held the rank of a Constable and stationed at Boithuso Police Station with 13 years of service at the time when the plaintiff was arrested on 03 June 2018.

[45] On 03 June 2018 he attended to a scene of crime in the company of two of his colleagues at an open space near a crèche at W-Section in Botshabelo and met with Sergeant Modise from the Uniform Branch of the SAPS, who pointed him to the body of the deceased who was half naked and lying on her back with her clothes put alongside of her. While at the scene he was informed that the body found was that of a person named 'M[...]', who lived at a place not far from the crime scene.

[46] He visited the crime scene upon being notified by Boithuso Police Station about a complaint that was received *via* a telephone from a tavern-owner at W-Section in Botshabelo. The tavern owner had received information from his employee (i.e. Finger) about the plaintiff's involvement in the crime(s) committed towards the deceased. Finger got to know about the occurrence of the crime when he overheard people talking about it in the morning after the incident had occurred and informed the tavern owner, who then phoned the police station to give information about someone who knew about the plaintiff's involvement in the crime.

- [47] Before the deceased body was taken away to the mortuary, he had requested the Local Criminal Record officials ("LRC") to take the pictures of the crime scene and collect the clothes found on the scene. Among the clothes that were seized by the LRC was a '*sporty*' or '*bucket-hat*' ("the hat") that was found a few metres from the crime scene.
- [48] He then drove with his colleagues to the tavern and found the plaintiff at a house near the tavern in the company of people who were consuming alcohol. He identified the plaintiff after the informer, whom he said was Finger, pointed the plaintiff out to him. He then approached the plaintiff and identified himself as a police official before asking him (plaintiff) to accompany him to the police station.
- [49] On arrival at the police station he asked the plaintiff about his whereabouts at the time when the crime took place and further if he knew about the woman who was found dead in the open space near the crèche. After having received no answers from the plaintiff he proceeded to inform him (plaintiff) of the allegations against him and further read out the rights afforded to him under those circumstances before arresting him without a warrant.
- [50] On 04 June 2018 he took the plaintiff's warning statement but the plaintiff informed him that he would only speak about the matter in court. The plaintiff was taken to court on 05 June 2018 but elected not to apply for bail.
- [51] He believed the information he received from Finger was sufficient to justify the plaintiff's arrest. According to Finger's statement, he (Finger) was on duty at the tavern when he noticed the plaintiff persistently following the deceased around the tavern on the night preceding the incident. At about 3H30 on 03 June 2018 while accompanying his girlfriend, named Nthabeleng, home he noticed the plaintiff lying on top

of someone at a nearby open space that was about ten feet away from where they were walking. He was able to see the plaintiff clearly because of the streetlights that lit brightly but could not see the person on top of whom the plaintiff was lying. On his return back to the tavern he again noticed the plaintiff in the same position he was when he walked past them to accompany Nthabeleng home and there appeared to be no conflict or disagreement between the persons concerned.

[52] He testified that some hours after arresting the plaintiff he received the information to the effect that the hat that was found on the crime scene belonged to a person nicknamed “*Papa*” or “*Spice*” (“*Papa/Spice*”), who had lent it to someone nicknamed “*Mduks*”. He then went to look for “*Papa/Spice*” and “*Mduks*” but could not find any of them. Mokhothu (nicknamed ‘*Mduks*’) was subsequently arrested on 13 February 2019 in connection with the case opened against the plaintiff and became Accused no. 2.

[53] Although the information about the hat being connected to Mokhothu was available to him on the afternoon of 03 June 2018, he was still satisfied that Finger’s information that placed the plaintiff on the scene of crime was sufficient to warrant his (plaintiff’s) arrest. He further testified that the issue of the hat was still a rumour at the time when the plaintiff was arrested and not confirmed by any statement under oath. Under cross-examination, the witness admitted that the issue of ‘*Spice*’ arose during the bail proceedings but said “*Spice*’ was merely sought for the purpose of verification as to who the owner of the hat was. However, he could not provide explanation as to why he did not inform the court that he was also looking for “*Spice*’ in connection with the allegations faced by the plaintiff during the plaintiff’s court appearance on 05 June 2018.

- [54] He was referred to the statement dated 26 February 2019¹² deposed to by Themba Joseph Mashibini (“Mashibini”) who had stated that he had lent his hat to ‘*Mduks*’ (i.e. Mokhothu) during May 2018. He testified that Mashibini’s statement was only taken in 2019 because he did not know his (Mashibini’s) whereabouts until being revealed by Mokhothu upon his arrest on 13 February 2019.
- [55] He testified that he had no bad intentions but acted on reasonable grounds formed on the basis of Finger’s statement when he arrested the plaintiff. He said that Mokhotu’s confession and the DNA results linking him to the crime were not yet available at the time when he arrested the plaintiff. He testified under cross-examination that the hat found on the crime scene was taken by the LRC with the purpose of establishing the DNA linking the plaintiff to the crime.
- [56] According to him, there was no basis for withdrawal of the charges against the plaintiff during his court appearance in October 2018 as the investigation against other possible persons connected to the crime was continuing. He was only able to apprise the NPA with the latest development about Mokhothu’s involvement on 28 February 2019 and that the powers to withdraw the charges against the plaintiff vested with the NPA and not the police.
- [57] The witness could not provide the explanation under cross-examination as to why his attempts to locate ‘*Mduks*’ and ‘*Papa/Spice*’ were not recorded in his statement and the investigation diary dated 03 June 2018. When referred to Nthabiseng Shedile’s (“Shedile”) statement¹³ taken on 04 June 2018 at 13H43, which statement indicates that the deceased was seen going outside the tavern with “*Papa*” around

¹² Index: Consolidated Discovery Bundle p 7.

¹³ Index: Trial Bundle p 14.

midnight before the deceased's body was discovered, he denied that it was the same '*Papa*'/'*Spice*' he went looking for but said it was another '*Papa*' staying near the deceased home. He said that he only became aware that the '*Papa*' being referred to in Shedile's statement was the same '*Papa*'/'*Spice*' he was looking for at the time when he interviewed him in February 2019. I find the witness's version in this regard quite contradictory to what he testified about in chief to the effect that '*Papa/Spice*' being referred to on Mashibini's statement was the same person he went looking for as recorded in his investigation diary on 26 June 2018. Nowhere else was it recorded that there were two "*Papa's*".

- [58] When asked under cross-examination if Mokhothu was a suspect at the time when the plaintiff was arrested, he denied that and said that he was rather '*a person of interest*'. This is contradicted by the statements of the police officials who traced and arrested Mokhothu at Marquard in February 2019, namely, Maimane Paulus Mohoboko and Mokone Abram Hlapisi, wherein Mokhothu is referred to as a wanted suspect.¹⁴
- [59] Counsel for the plaintiff pointed out to Sergeant Letlojane under cross-examination that Finger's version in relation to the incident was not supported by his girlfriend's (Nthabeleng) statement.¹⁵ According to Nthabeleng's statement, she '*saw a male person standing while the other person who was a lady was kneeling down*'. Sergeant Letlojane responded by saying that Nthabeleng's statement was only taken on 14 June 2018 after the plaintiff had already been arrested on 03 June 2018. When asked if he would still have arrested the plaintiff had Nthabeleng made her statement earlier than 14 June 2018, he responded in the affirmative and said that he would have still prosecuted the plaintiff on the basis of Finger's statement.

¹⁴ Index: Consolidated Discovery Bundle pp 17 – 21.

¹⁵ Index: Trial Bundle p 25.

- [60] The witness was also questioned at length under cross-examination about whether the information leading to the arrest of the plaintiff was from Finger or the tavern owner. His version remained that Finger was the informer from whom he obtained the information about the plaintiff's involvement in the commission of the crime committed towards the deceased. He was also questioned at length about what the plaintiff believed to be the facts he should have ascertained before resorting to arrest the plaintiff on 03 June 2018 but he kept to his version that Finger's statement was sufficient to form a reasonable suspicion that the plaintiff was involved in the commission of the crime he was accused of.

Evidence of Patrick Kenosi Koloane ("Mr Koloane")

- [61] Defendants' second witness, Mr Koloane's evidence was that:
- [62] He is the Regional Prosecutor in the employ of the NPA and stationed at Botshabelo Regional Court and that he worked at the same court in 2018 when the plaintiff was charged with rape and murder.
- [63] On 25 June 2018 he dealt with the docket involving the case opened against the plaintiff and was responsible for the decision taken to prosecute the plaintiff on charges of rape and murder. In the exercise of his discretion, he perused the docket and considered the statements of the first officer on the scene, arresting officer as well as Finger to determine if there were prospects of successful prosecution against the plaintiff.
- [64] What was key to the decision taken to prosecute the plaintiff was Finger's statement, which indicated that he (Finger) was employed at the tavern and was on duty on the night before the incident occurred. In particular, he considered Finger's statement to the effect that:

- [65] He saw the plaintiff following the deceased around on a number of occasions on the night preceding the incident;
- [66] The plaintiff was a person well known to Finger and thus he (Finger) had ample opportunity to observe both the plaintiff and deceased on the night before the incident occurred;
- [67] He saw the plaintiff when he walked his girlfriend home in the early hours of the morning on which the incident occurred and that there was clear visibility around the crime scene that enabled him (Finger) to recognise the plaintiff; and
- [68] That he gave a full description of what the plaintiff was wearing on that day.
- [69] He concluded on the basis of Finger's statement that there was sexual intercourse between the plaintiff and the deceased that had flown from the events that took place at the tavern on the night before the incident occurred. He admitted under cross-examination that his conclusion in this regard was not based on what is contained in Finger's statement.
- [70] He was referred to Shedile's statement dated 04 June 2018 about having seen the deceased in the company of '*Papa/Spice*' and Sergeant Letlojane's inscription in the investigation diary on 26 June 2018 about looking for '*Papa/Spice*' and asked if he was still satisfied that the plaintiff had to be prosecuted. He testified in the affirmative and said that Finger's statement was sufficient to inform the decision to prosecute the plaintiff because he (Finger) was the 'eye witness' who saw the plaintiff following the deceased around the tavern on the night before the incident and later at the crime scene.

- [71] He was referred to the inscription he made in the investigation diary on 12 June 2018¹⁶, wherein he instructed the investigating officer to make further enquiries at the tavern to establish if anyone saw the deceased leaving with the accused and asked if he had considered Shedile's statement about seeing the deceased leaving with 'Papa/Spice' and testified that he did consider the said statement. Under cross-examination, he testified that when he made the entry in the investigation diary on 12 June 2018, he regarded the information about 'Papa/Spice' as part of the on-going investigation at the time and that Shedile's statement about seeing the deceased leaving the tavern with "Papa"/Spice" did not really concern him because she (Shedile) said it only took about 20 minutes for "Papa/Spice" to return back into the tavern after leaving with the deceased. According to him, he found Finger's version about seeing the plaintiff on top of someone between 24H00 and 01H00 on the day of the incident as *prima facie* evidence linking the plaintiff to the crime committed.
- [72] He was not involved in the plaintiff's bail application on 24 October 2018 but admitted to be responsible for the entry made in the investigation diary on 6 November 2018 wherein he stressed the importance of the plaintiff's DNA results being obtained and issued a final remand of the case to 28 February 2019.¹⁷
- [73] On 28 February 2019 he was informed about the person who had made a confession before the District Court in relation to the case opened against the plaintiff. He also learnt on the same day of the fact that the plaintiff's DNA had been obtained and filed in the docket on 14 February 2019.¹⁸ However, due to the serious nature of the offences involved, the plaintiff's DNA results were not the only thing to be

¹⁶ Index: Trial Bundle p 102.

¹⁷ Index: Trial Bundle p 107.

¹⁸ Index: Trial Bundle p 108.

considered for the purpose of evidence against him because there was also 'eye witness' statement of Finger, which placed the plaintiff on the crime scene. This required that they should still ascertain if the plaintiff was not involved with Mokhothu in the crime before the charges against him could be withdrawn.

[74] As a result of the developments that took place on 28 February 2019, he requested that the matter be postponed to 11 March 2019 in order to consult the investigating officer so as to establish if Mokhothu acted alone or with the plaintiff in the commission of the crime. He testified that he also needed to consult with his supervisor, Mr Lewis, who was the Acting Control Regional Prosecutor, on the way forward in the matter. Mr Koloane testified under cross-examination that the consultation with the investigating officer did not take place as intended because he never got the opportunity to do so.

[75] He was responsible for taking the decision to withdraw the charges against the plaintiff on 19 March 2019 and explained that prior to taking the said decision, the NPA's protocols required of him to complete a form authorising him to do so and further consult with the Regional Court Control Prosecutor and Senior Public Prosecutor.

[76] During the discussion he held with Mr Lewis, they had certain concerns around Mokhothu's confession. That necessitated that they further consult with the investigating officer to discuss, among others, the concerns regarding Mokhothu's confession indicating that the incident took place on 20 June 2018 instead of 3 June 2018 and the use of the Afrikaans word '*bang*' (meaning afraid) in Mokhothu's confession to ascertain if there was no possibility of him (Mokothu) claiming to have been coerced into making the said confession.

[77] The plaintiff was not prejudiced by a further postponement for the purpose of consultation with the investigating officer because he was no

more in detention at the time. Furthermore, the plaintiff was represented by an attorney at all material times and did not object the case being postponed to March 2019.

Shane Martin Lewis's evidence ("Mr Lewis")

[78] Mr Lewis was the third witness to be called by the defendants and his evidence was that:

[79] He is employed by the NPA at its Head Office in Bloemfontein in the capacity of the State Prosecutor. During 2018 to 2019 he was posted at Botshabelo Magistrate Court as Acting Regional Control Prosecutor. His involvement in the matter was reliant on the guidance provided by Mr Koloane as the Regional Court Prosecutor.

[80] In the course of his duties, he perused the contents of the docket involving the plaintiff and confirmed that he made an entry in the docket on 28 February 2019¹⁹ after Koloane informed him that the matter had been postponed for several times due to outstanding DNA results.

[81] He testified under cross-examination that the purpose of the DNA results that were stressed as important as per Koloane's inscription in the investigation diary were necessary to establish the link between the plaintiff and the rape committed as well as the hat that was found at the crime scene.

[82] He became aware of the fact that Mokhothu was to be joined as Accused 2 in the charges brought against the plaintiff but was not aware that the said person had already appeared in the District Court before his involvement in the matter.

¹⁹ Index: Trial Bundle p 109.

- [83] On perusal of Mokhothu's confession he became concerned that: the date of the offence was indicated as 20 and 3 June 2018; Mokhothu only referred to the deceased by her first name, M[...], which name was common in Botshabelo; that Mokhotu denied to have assaulted the deceased and the possibility of Mokhothu having been coerced to make a confession. According to him, these concerns required of him to consult with the investigating officer, who was not available on that day, before the NPA could make a final decision to withdraw the charges against the plaintiff.
- [84] They had past experiences involving multiple accused where one of the accused would confess to a crime with the intention of vindicating the others and thus it would have been irresponsible of the NPA to act hastily under the circumstances of this matter.
- [85] He explained the reason for not having withdrawn the charges against the plaintiff earlier than 19 March 2019 was based on the contents of Finger's statement and thus they needed to further consult with him (Finger) and the investigating officer. This, he said was necessary in order to adhere to the NPA's protocols which required that there should be consultation with the parties involved before a final decision to withdraw the charges against the accused could be taken.
- [86] He testified under cross-examination that reliance on Finger's statement before withdrawing the charges was informed by his evidence to the effect that he (Finger) worked at the tavern and saw the plaintiff following the deceased and later saw the plaintiff on top of someone when he accompanied his girlfriend home. On that basis, Finger's version had to be tested before deciding to withdraw the charges against the plaintiff. He was not aware if the consultation with the investigation officer and Finger did in fact materialise.
- [87] Among the things he considered with Mr Koloane on the final

withdrawal of the charges against the plaintiff was the fact that Botshabelo was plagued with rape cases, which crime was one of the highest reported and a priority for the NPA. He also considered that if the charges were to be withdrawn on 28 February 2019 and the need arose in future to reinstate them, it would create difficulties for the prosecution to re-apply for a warrant with the possibility of the Accused becoming untraceable. He further testified that the State also needed to take precautions before withdrawing the charges against the plaintiff because the community was angry about what had happened and that mob justice was rife in Botshabelo.

- [88] On being asked under re-examination as to whether Nthabeleng's statement should not have prompted the NPA not to rely on Finger's statement to initiate the proceedings against the plaintiff, he testified that the said statement did not change the NPA's view on the strength of Finger's statement. This was based on the fact that it was common for witnesses to experience or view the crime scene(s) differently.

Evaluation of merits

- [89] The defendants' justification for the plaintiff's arrest is reliant on the provisions of section 40(1) of the CPA in terms of which a peace officer may without a warrant arrest any person –

“...(b)whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

- [90] The jurisdictional facts to be proved for a defence based on section 40(1)(b) are that:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and

(iv) the suspicion must be based on reasonable grounds.

[91] Once the jurisdictional requirements for an arrest have been met, the arresting officer is faced with the discretion as to whether or not to arrest a person suspected of having committed a Schedule 1 offence. That arresting officer's discretion must be exercised in good faith, rationally and not arbitrarily.²⁰

Did the arresting officer form a reasonable suspicion?

[92] In evaluating the question as to whether the plaintiff's arrest by Sergeant Letlojane was lawful, the Court is required to assess if he (Sergeant Letlojane) had a reasonable suspicion that the plaintiff committed the alleged offence as contemplated in section 40(1)(b) of the CPA.

[93] In justifying his actions, Sergeant Letlojane's evidence was that he arrested the plaintiff on the strength of the information he received from an informer, whom he said was Finger, which information implicated the plaintiff in the commission of the crime. On his version, Finger's statement was sufficient to form a reasonable suspicion that an offence contemplated in Schedule 1 of the CPA had been committed.

[94] Counsel for the plaintiff challenged the truthfulness of Letlojane's evidence and submitted that he (Letlojane) acted on the basis of the information obtained from the 'tavern-owner' even before Finger's statement was taken.²¹ He based his argument on the evidence tendered by the plaintiff to the effect that, on the morning of his arrest he saw Letlojane going to see the 'tavern-owner' before arresting him. He also directed a challenge at Letlojane's testimony that he received

²⁰ Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA) at para 38.

²¹ Plaintiff's heads of argument at paras 31 – 38.

information from Boithuso Police Station as conveyed to the police by the ‘tavern-owner’ and submitted that such pointed to the fact that the informer being referred to in Sergeant Letlojane’s statement was the ‘tavern-owner’ and not Finger as claimed by Sergeant Letlojane.

[95] The plaintiff further submitted that by virtue of the informer’s identify not being disclosed in Sergeant Letlojane’s statement and the latter’s failure to provide a reasonable explanation under cross examination as to why Finger was not mentioned in his statement, the Court should find that the plaintiff was arrested on the basis of the information received from an informer, which information Sergeant Letlojane failed to subject to objective verification before arresting the plaintiff. In his view, the information from an informer could not arouse a reasonable suspicion contemplated in section 40(1)(b) of the CPA.

[96] I do not agree with the plaintiff’s submission that there are sufficient grounds to conclude that the informer being referred to in Sergeant Letlojane’s statement was the ‘tavern-owner’ and not Finger as testified by Sergeant Letlojane. This is so when regard is to the following as recorded in Finger’s statement:

“...I went back to the tavern while I was at the tavern around 7:00 to 8:00 I heard people saying that M[...] was found dead behind a Creche at W Section Botshabelo. I then remembered that I saw Moeketsi there lying on top of another person that I could not see.

9.

...Around 9:00 to 10:00 Moeketsi arrived. When he arrived he was wearing a jean top (sync) inside was wearing a red top. At night (sync) when I saw him he was wearing a brown top with the red top inside and on the head he was wearing a dark coloured beanie.

10.

I then alerted the tavern owner who called the police. After that police arrived and took Moeketsi...”

- [97] The reading of Finger's statement points to the fact that he was the one who alerted the tavern owner about the plaintiff's involvement in the crime and further that he was present at the tavern at the time when Sergeant Letlojane came to arrest the plaintiff. In my view, the fact that the informer's identity is not disclosed in Sergeant Letlojane's statement is insufficient for one to conclude that the person referred to in the said statement was the 'tavern-owner'. The plaintiff's oral testimony about seeing Letlojane approaching the tavern owner before he was arrested is not corroborated by any evidence. On objective facts presented before me, it can be accepted that Finger was present at the tavern when the plaintiff was arrested. I therefore find that Letlojane's evidence that Finger was the person who pointed out the plaintiff to him is probable.
- [98] The plaintiff further argued that even if the Court was to accept that Sergeant Letlojane acted on the basis of Finger's information, the said information was wholly inadequate to engender a reasonable suspicion in the mind of the arresting officer that the plaintiff had committed the offence he was accused of. He also highlighted the following aspects that he submitted were deficient of Finger's statement and thus should have prompted Sergeant Letlojane to act with caution:
- [99] First, the photographs taken of the scene showing the deceased lying where there was a lot of grass contradicted the allegation that Finger saw the plaintiff at an open space. In his view, this should have raised concerns to any reasonable police officer about the reliability of Finger's observations given the fact that he was a single witness at the time.
- [100] Second, the fact that Sergeant Letlojane received information about the hat belonging to '*Papa/Spice*' whilst at the crime scene but made no attempts to follow up on the said information before arresting the plaintiff. Furthermore, the plaintiff confirmed in his testimony that on arrival at the police station on the day of the arrest Sergeant Letlojane

asked him if his name was ‘*Spice*’.

[101] Third, the statement of Shedile pointed to another person who was seen with the deceased on the night preceding the day on which the deceased’s body was discovered. The plaintiff argues that although Shedile’s statement was deposed to on 4 June 2018, the investigation diary indicates that she was interviewed on 03 June 2018. In his view, the arresting officer was not obliged without more, to merely accept the ‘say-so’ evidence but rather, it was also required of the said officer to evaluate the information provided to him by a witness or an informant critically.²²

[102] The SCA in ***Sekhoto*** (*supra*) explained that:

“[39] ... *The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.*”

[103] Therefore, to expect of Sergeant Letlojane to have interviewed numerous people who were present at the tavern the night before the incident occurred and/or conducted more investigation before arresting the plaintiff would be stretching the jurisdictional requirements for a lawful arrest way too far.

[104] The plaintiff also raised an issue with Sergeant Letlojane’s failure to interview Finger’s girlfriend (Nthabeleng) before arresting the plaintiff. In my view, whether or not Nthabeleng’s statement was taken before the plaintiff was arrested does not take away the crucial aspects of Finger’s

²² Plaintiff’s heads of argument at para 59.

statement to the effect that, he saw the plaintiff following the deceased around the tavern on the night before the incident happened, he was able to see the plaintiff clearly because of the brightness occasioned by the streetlights and the identification of the clothes worn by the plaintiff.

[105] The reasonableness of the suspicion of any arresting officer must be approached objectively, with the question being whether a reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule 1 offence.²³ This means that, even if there was insufficient evidence for a *prima facie* against the arrestee, it may still be found that the arresting officer entertained a reasonable suspicion that an offence set out in Schedule 1 has been committed.²⁴

[106] In explaining what is required of an arresting officer faced with having to exercise the discretion on the basis of a reasonable suspicion, the court in ***Mabona v Minister of Law & Order 1988 (2) SA 654 (SE) at 658 G-H*** held that:

“the reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion”.

[107] It is trite that a party challenging the discretion exercised by the

²³ *Duncan v Minister of Law and Order 1984 (3) SA 460 (T) at 465-6; Minister of Police v Dunjana and others [2022] ZAECKMHC 88; [2023] All SA 180 (ECG) at para 16.*

²⁴ *Mvu v Minister of Safety and Security and Another 2019 (2) SACR 291 (GJS) at para 9.*

arresting officer must show that such discretion was exercised unreasonably. This stems from the general rule that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof.²⁵ The effect of the location of the onus is that the issue of the improper exercise of the arresting officer's discretion will only arise when it has been pertinently pleaded.²⁶

[108] Relying on Hefer JA's reasoning in *Minister of Law and Order v Dempsey*²⁷, the SCA as per Harmse DP in **Sekhoto** said that:

'Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegation to prove it. There are in such a case two separate and distinct issues, each having its own onus (Pillay v Krishna and Another 1946 A D 946 at p 953). The first is whether the opinion was actually formed; the second, which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed, is whether it was properly formed.'

[109] The SCA in **Sekhoto** went on to say that:

"[50]...It cannot be expected of a defendant, he said, to deal effectively in a plea or in evidence with unsubstantiated averments of mala fides and the like, without the specific facts on which they are based, being stated. So much the more can it not be expected of a defendant to deal effectively with a claim (as in this case) in which no averment is made, save a general one that the arrest was 'unreasonable'. Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the onus has not been discharged, may ensue. Such a state of affairs, said Hefer JA, is quite untenable.

²⁵ See *Sekhoto* at para 49.

²⁶ See footnote 24 (*supra*) at para 13.

²⁷ 1988 (3) SA 19 (A) at 37B – 39F.

[110] As correctly pointed out by the defendants' attorney, the challenge mounted on Sergeant Letlojane's exercise of discretion in arresting the plaintiff was not pertinently pleaded in the particulars of claim but rather raised in argument. I therefore find that Sergeant Letlojane's reasoning of how he arrived at the decision to arrest the plaintiff cannot be faulted and thus the plaintiff's claim 1 based on unlawful arrest and detention should fail.

Malicious prosecution

[111] In order to succeed with a claim based on malicious prosecution, the claimant must allege and prove that:²⁸

- (i) the defendants instigated and instituted the proceedings against her/him;
- (ii) that the defendants acted without reasonable and probable cause;
- (iii) that the defendants with malice or *animo iniuriandi*; and
- (iv) that the prosecution has failed.

[112] It is common cause that the NPA initiated the prosecution against the plaintiff and that same had failed based on the withdrawal of the charges that were levelled against him by the NPA on 19 March 2019.

[113] What then remains to be determined is whether the NPA initiated the prosecution against the plaintiff without reasonable and probable cause and with malice or *animo iniuriandi*. The reasonable and probable cause in the context of a claim for malicious prosecution was explained in ***Minister of Justice and Constitutional Development and Others v Moleko***²⁹ as:

²⁸ Minister of Justice and Constitutional Development v Moleko 2008 (3) All SA 47 at para 8.

²⁹ *Ibid* at para 20.

“...an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both subjective and an objective element –

‘Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.’

[114] As the SCA puts it in ***Minister of Police and another v Du Plessis***³⁰:

“[34] The Prosecutor’s function is not merely to have a matter placed on the roll, to then simply be postponed for further investigation. A Prosecutor must pay attention to the contents of the docket... a Prosecutor must act with objectivity and must protect public interest.”

[115] Mr Koloane’s evidence before this Court was that his decision to initiate the prosecution against the plaintiff was influenced mainly by the contents of Finger’s statement. In particular, he considered the fact that Finger stated that there was clear visibility when he saw the plaintiff at the crime scene in the early hours of the day of the incident, that the plaintiff was well known to him and that he noticed the plaintiff following the deceased around the tavern on the night preceding the incident and the fact that he provided a full description of the clothes worn by the plaintiff at the tavern and at the crime scene.

[116] The plaintiff submitted that the NPA’s decision to prosecute the plaintiff was unreasonable in the extreme from the onset. He based his argument on the fact that the statement of Finger, which was key to influencing Mr Koloane’s decision to prosecute the plaintiff, could not be relied upon because, firstly, Finger did not see the person the plaintiff was allegedly lying on top of, and secondly, it appeared to Finger that

³⁰ [2013] ZACSA 119; 2014 (1) SACR 217 (SCA).

there were no disagreements between the persons he saw at an open space.

- [117] He further submitted that the NPA acted without reasonable and probable cause and with malice against the plaintiff for relying on Finger's statement until the case became withdrawn on 19 March 2019 and argued that the NPA's prosecution of the plaintiff was deficient when regard is to the following:³¹
- [118] Shedile's statement indicating the fact that she saw the deceased leaving the tavern with '*Papa*'/'*Spice*' in the night preceding the incident;
- [119] Mabote's statement that contradicted Finger with regard to the manner in which the two persons seen at an open space were positioned as well as the clothes worn by a male person while in Finger's company in the early hours of the day of the incident;
- [120] A photo album depicting the crime scene being full of grass whereas Finger said there was clear visibility;
- [121] The DNA results that excluded the plaintiff from being a possible suspect; and
- [122] Mokhotu's confession to having raped and murdered the deceased.
- [123] In the plaintiff's view, the NPA should have reconsidered its stance towards the plaintiff's case based on the events that ensued after Finger had made his statement. I do not agree with the plaintiff's submission in this regard on two-fold: firstly, on objective facts, it can be accepted that the developments deemed deficient of the NPA's case by

³¹ Plaintiff's heads of argument at paras 87 – 87.5.

the plaintiff occurred after the decision to initiate the prosecution against the plaintiff had been taken as testified by Mr Koloane; and secondly, Mr Koloane's testimony was that, notwithstanding the developments in the investigation following the plaintiff appearance in court on 5 June 2018, he was still satisfied that the plaintiff was linked to the crime and that there was also a possibility that there could be other persons involved. He also explained that his reasons for not relying on Shedile's statement about having seen the deceased going out of the tavern with '*Papa*'/'*Spice*' was because the time taken by '*Papa*'/'*Spice*' to return back to the tavern as explained by Shedile was only twenty minutes, which period he regarded as short to have had enabled the commission of the crime of that nature.

[124] The plaintiff further raised an issue with Mr Koloane's entry made in the docket on 06 November 2018 wherein he stressed the importance of obtaining the plaintiff's DNA to the investigating officer. He argued that although Mr Koloane was reluctant to accept under cross-examination that the plaintiff's DNA was sought for the purpose of linking him with the deceased, his colleague, Lewis accepted to that effect.

[125] What the plaintiff seemed to have overlooked, however, is the evidence given by both Sergeant Letlojane and Mr Koloane to the effect that the plaintiff remained a suspect to the crime even after the evidence pointing to the possibility of other suspects such as "*Papa/Spice*" and "*Mduks*" was obtained. One would have reasonably expected that the investigation into the plaintiff's involvement in the crimes he was accused of did not end when the decision to prosecute him was taken, but that it continued until the NPA was satisfied that there was no evidence linking him to the crime. The reasonableness of the length of the time taken and the methodology adopted by the NPA in arriving at the decision to withdraw the charges against the plaintiff should be assessed objectively on the basis of the facts confronting the NPA at the time.

[126] The defendants challenged the issue raised by the plaintiff in relation to the photo album depicting the scene of crime as full of grass and submitted that there were no facts presented to the Court to supported the plaintiff's argument.³² I agree with the defendants' submission in this regard because in any event, the quality of the photographs being referred to by the plaintiff were of poor quality and the Court did not have the benefit of the evidence of the compiler of the photo album in the first place.

[127] Having considered the relevant principles outlined above and the facts as presented before this Court, I find that the plaintiff did not succeed in discharging the onus that rested on him to show that the NPA's prosecution against him was malicious.

Costs

[128] The general rule is that the costs should follow the result, being the successful litigant. I find no reason to deviate from this general rule in the circumstances of this matter.

ORDER

[129] In the result, I make the following order:

1. The plaintiff's claim 1 based on unlawful arrest and detention is dismissed with costs.
2. The plaintiff's claim 2 based on malicious prosecution is dismissed with costs.

³² Defendants' heads of argument at para 4.7.2.

M.R. RANTHO, AJ

APPEARANCES:

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