



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 3953/2019

In the matter between:

THIEHO WILLIAM MOFOKENG

1st Plaintiff

JACOB SAOANA LETUKA

2nd Plaintiff

MAQAESA OSIAH SEHLAKO

3rd Plaintiff

TLADINYANE DAVID TLALE

4th Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

2nd Defendant

CORAM: MTHIMUNYE, AJ

HEARD ON: 26, 28 JANUARY, 22 MARCH & 26 MAY 2022

DELIVERED ON: 24 AUGUST 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 24 August 2022

Introduction

- [1] This is a delictual claim against the Minister of Police and the National Director of Public Prosecutions for an alleged unlawful arrest, unlawful detention and malicious prosecution respectively. This claim was brought by four plaintiffs viz Thieho William Mofokeng, Jacob Saoana Letuka, Osiah Sehlako Maqaesa and David Tlale Tladinyane. Thieho William Mofokeng, the first plaintiff, has since become deceased and Counsel for the plaintiffs, at the onset, requested that Mr Mofokeng's claim be postponed *sine die* pending the finalisation of his deceased estate. The matter proceeded in respect of the second, third and fourth plaintiffs, to whom I refer throughout this judgment as the plaintiffs, unless the context indicates otherwise.
- [2] The plaintiffs were arrested at different times viz 12 May 2013, 23 May 2013 and 5 May 2014 and were collectively charged with murder, attempted murder, robbery with aggravating circumstances and housebreaking with intent to steal and theft. At their first appearance they were all denied bail in the lower court. Their case was subsequently moved to this court where they again applied for bail in February 2017. The second and third plaintiffs were granted bail whilst the fourth together with one Thabang Makoko Mmaki ("Mmaki"), who was the first accused were denied bail. All of them were subsequently discharged by my brother Mathebula J in terms of Section 174 of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [3] On 27 August 2019, the Plaintiffs issued summons suing the Minister of Police and the Director of Public Prosecutions for Unlawful Arrest, Detention and Malicious Prosecution respectively, claiming a total of R4 000 000.00 (Four Million Rand) for *contumelia*, emotional stress and psychological trauma, loss of amenities of life, loss of income, and general damages.
- [4] At the beginning of the trial, the parties agreed that the Plaintiff's case be dealt with first and that there would be no separation between merits and quantum. This court was ceased with making a determination on both. The plaintiffs

have also prayed for costs for the duration of this trial in the event that this court finds in their favour. For this reason, I deem it necessary provide a chronological history of this matter prior to summarising the evidence.

- [5] The hearing was set down to commence on 25 January 2022, on which day both Counsels requested that the matter be stood down to 26th January 2022 as the plaintiffs' Counsel had just received the records of the bail proceedings and needed time to read through.
- [6] The matter was then heard on 26th and 28th January 2022 at the end of which the plaintiffs closed their case. It was then postponed to 22nd, 23rd and 25th March 2022 for the defendant's case. Although the defendants had stated that they would call three (3) witnesses; on 22nd March 2022 they called only one (1) witness and closed their case. By agreement from both Counsels, the court then directed the plaintiffs to file their heads of argument by 4th April 2022 and the defendants by 8th April 2022. A date for arguments would be communicated to both parties once both heads have been filed.
- [7] Heads of argument were finally filed by the Plaintiff's on 25th April 2022 and by the Defendants on 03rd May 2022. To both Counsels I am most grateful as I refer to their heads in this judgment. Following some logistical glitches, arguments were finally heard on 26th May 2022, at which stage this judgment was then reserved. I deemed this explanation important as Counsel for the plaintiffs has asked this court for costs for the 6 days that were allocated for the hearing of this matter, notwithstanding that the last two days were not utilised.
- [8] I now turn to deal with the summary of evidence. The second plaintiff, Mr Letuka Jacob Saona, testified that on Saturday 3rd May 2014, he was herding his father's sheep in the veld when two police vans arrived between 11:00am and 13:00pm. A number of police officers, including a Mr Mohale, alighted the vehicles and pointed firearms at him, demanding that he lies down, which he

did. They handcuffed him, put him in the van and drove him to Namahadi Police Station. They did not ask him his name, neither did they give him any information about who they were and why they were arresting him, neither did they inform him of his rights.

- [9] It was at the Police Station that they asked him his name, registered him, removed his shoe laces and belt and took him to a cell which he shared with ten other people. The cell had no water and the toilet was not flushing. As a result, they could only pass urine but were not able to empty their bowels. He slept on the cement floor for two days.
- [10] At the time of his arrest he was taking lessons to obtain a Code 14 Drivers Licence and attempting to upgrade his matric results to gain entrance to a college. As a result of the arrest he did not go to college neither did he obtain his Driver's licence.
- [11] He was charged on Sunday 4th and appeared in court on Monday 5th May 2014 for the first time where he was represented by a practitioner from the Legal Aid of South Africa. It is only in court that he was informed that he was arrested for murder, attempted murder and other charges. The matter was postponed to the following day i.e. 6 May 2014 where he was then joined with other accused including the first, third and fourth plaintiffs who had been arrested in 2013. Other than the fourth plaintiff who is his brother, he did not know the other co-accused in the criminal trial.
- [12] On the next appearance, he applied for bail which was opposed by the first and second defendants, resulting in bail being denied on the basis that he was a flight risk. After the bail was denied he was taken to Harrismith Correctional Services. In February 2017 he, together with the co-accused brought a second bail application and he and the third plaintiff were granted bail whilst two others, including the fourth plaintiff were denied.

- [13] On 20 June 2017, he was discharged in terms of section 174 of the CPA. He stated that he was very hurt and regrets the time wasted whilst he was in prison. After his release, no one ever approached him to explain or apologise for what happened.
- [14] Under cross-examination, he confirmed that he was arrested a year after his brother, who is the fourth plaintiff. Counsel for the defendants put it to him that if police wanted to arrest him for nothing, they would have arrested him together with his brother. Counsel for the Defendant further contended that at the time of arrest, Mr Saoana was informed of his rights and the reason for his arrest as his signature appears on the warning statement and that he had asked to speak in court. In this regard he referred him to his warning statement where he stated that the police had told him he was arrested because he was a suspect in a murder case. Mr Saoana denied this and explained that when he signed the warning statement, he was never told what it was, neither was he ever given details of the murder charges and whom he had murdered. He signed the paper because he was instructed to do so but no one explained to him what he was signing.
- [15] The third plaintiff, Mr Maqaesa Osiah Sehlako testified that in 2013 he was working as a builder and was also doing deliveries for people who bought building materials from the warehouse. On 12 May 2013 at about 15:00pm, as he was driving home, police officers Messrs Mohale and Tsotetsi stopped his vehicle and asked to search it. They then told him they were arresting him for murder. When he asked what murder he was told they would talk at the police station.
- [16] Without informing him of his rights, he was handcuffed, put in the police car and taken to Namahadi Police Station. Nothing more was said. At the police station he was put in a cell where he stayed for two days before he was charged for murder. When he asked for details on this murder, he was told he

will speak in court. His first appearance was on 15th May 2013, the third day after he was arrested.

- [17] From the day of his arrest, he was kept in a cell which he shared with 6 other people. The cell was filthy and had a toilet that did not flush as there was no water. He was given a torn brown blanket and sponge to sleep on the floor. The shower was not working. They were given 5 litres of water to bath with and 10 litres to flush the toilet with.
- [18] On 15 May 2013, he appeared with the first and the fourth plaintiffs and were charged with Murder and House breaking. He was represented by an attorney from Legal Aid who informed him that they should bring a bail application in seven days. After the first appearance he was taken to Kroonstad correctional services and was brought back to appear after about 7 days when the matter was remanded for further investigations. At the subsequent appearance, he applied for bail which was opposed by the defendants and was refused on the basis that he was a flight risk.
- [19] After a while at Kroonstad correctional services, he was moved to Harrismith correctional services. He appeared a number of times. In February 2017 after the matter was moved to this court he, together with the second, the fourth plaintiff and one Thabang Makoko Mmaki, who was the first accused applied for bail. He and the third plaintiff were granted bail, whilst the fourth plaintiff and Mr Mmaki were denied. On 20 June 2017 he was acquitted in terms of Section 174 of the CPA. After his release, no one approached him to explain or apologise for what happened.
- [20] At the time of his arrest, he was staying in his house with his partner and their child, who at that stage was crawling. He was the breadwinner for his family. Upon return from prison, his partner had died, and the child was staying with his aunt in Harrismith. His house had been vandalised and he had to ask for

shelter from relatives. This has hurt him deeply. In 2018 he was able to take his child back and they now live together.

[21] Under cross examination, he was asked how he knew the other co-accused. He explained that he did not know the first plaintiff, he met him for the first time when they were in the cells and appearing in court. He knew the fourth plaintiff from selling sheep at Savemor as he used to load and deliver sheep for his customers. He did not know Makoko at all and had never interacted with him before. He met him for the first time in the dock in court.

[22] Under cross-examination, he stated that Messrs Mohale and Tsotetsi assaulted him and others in the police cells telling them to agree to the murder. To this day he has a pain on his knee. Counsel for the defendant's put it to him that he had been assaulted by members of the community because they believed he was the one terrorising the community. In response, he confirmed that he was assaulted by the community but that passed. He did not terrorise the community, they assaulted him when the police dropped him off as that created an impression that he was the culprit. He even laid charges against members of the community who assaulted him and he did inform his Legal Aid attorney of all this.

[23] The Defendants' Counsel under cross examination put it to the third plaintiff that he was informed of the reason for arrest and all charges as he confirmed same on his warning statement dated 31 May 2013 where his signature, which he confirmed was his, appeared. The third plaintiff explained that he did not even know what a warning statement was, he was just told to sign without anything being explained to him.

[24] Although it is common cause that the second and third plaintiffs were granted bail in February 2017, I consider it prudent to mention herein that the actual date of bail was never mentioned in the papers, nor during evidence. Neither was it stated in Counsel's heads of argument. This court could not find bail

receipts in the dockets or any document submitted to the court. For this reason, the date bail was granted to the second and third plaintiff is referred to only as February 2017.

- [25] The fourth Plaintiff, Mr Tladinyane David Tlale testified that on 23 May 2013 he was sleeping at home with his brother, the second plaintiff, when a number of police officials, including Mr Mohale arrived in the early hours of the morning. The police woke him up, handcuffed him and told him they would talk to him at the police station. His brother had to help him put his shoes on since he was already handcuffed. He was taken to Namahadi Police station. He left his brother there and only saw him after a year when he himself was arrested.
- [26] On arrival at the police station, the police decided to drive back home with him, got inside his rooms and collected an amplifier he had borrowed two days before his arrest from the first plaintiff, who is now deceased. He had borrowed the amplifier from the first plaintiff because his music system was damaged and his intention was to return it after his was fixed. They never told him the relevance of the amplifier other than saying it belonged to the first plaintiff.
- [27] Back at the Police Station, he was given some paper to sign without any explanation of what it was. Only in the cells did one inmate tell him that those were his rights. He cannot read Afrikaans or English and no one explained the document to him.
- [28] The cell he was kept in, which he shared with 7 or 8 other people who were unknown to him, was filthy and smelly. He slept sitting on the floor as he was given no blankets to sleep in. The toilet was blocked and did not flush. Everyone had to relieve themselves in front of others. There was no privacy. There was no water to wash hands. They were given some pieces of bread to eat.

- [29] On Saturday 25 May 2013, two days after his arrest, Mr Mohale told him to sign another document and when he asked what it was he was told he would talk in court and was threatened with beatings if he did not sign. His first appearance was on 27th May 2013 where he appeared jointly with the first and third plaintiffs, whom he knew. He lived in the same neighbourhood with the first plaintiff and he is the one who had loaned him the amplifier. He knew the third plaintiff from delivering livestock for customers. In court he remembers hearing a charge of murder, amongst others. He also was represented Legal Aid. They asked for bail and were told the matter is remanded for seven days. Thereafter each time they tried to request bail they were told the detective was not available. It was approximately a year later when the bail application was heard and was opposed by the defendants. Bail was denied on the basis that he was a flight risk per Mr Mohale's opposing testimony at the bail application. His first bail application was in the lower court and the second in the high court three years later, both were denied. He was detained from arrest to 20 June 2017 when he was discharged.
- [30] After the first appearance he was detained at Kroonstad Correctional Services for a year, and thereafter he was moved to Harrismith Correctional Services until 20 June 2017 where he was discharged in terms of Section 174 of the Criminal Procedure Act. He did not testify at the trial, only police officers testified but none of them told the court what he did wrong, including the prosecutor.
- [31] Upon his release, he found all his livestock stolen and had to start life afresh. No one approached him to apologise or explain. In prison he was traumatised as there were always fights. He is hurt and aggrieved.
- [32] During cross-examination, Counsel for the defendant attempted to put it to the fourth plaintiff that the amplifier was stolen from the complainant, this statement was withdrawn when Counsel for the plaintiff objected and explained that in the criminal trial, the finding was that there was no nexus

between the stolen amplifier and the one that was collected by the police from the fourth respondent's house, to which Counsel for the defendants conceded.

[33] At the end of each plaintiff's evidence, Counsel for the defendants put it to them individually that in the criminal trial, the prosecutor and the defence attorney had agreed that the offences they were charged with fell under Schedule 6 therefore the reason they were refused bail was because they failed to adduce evidence to the existence of exceptional circumstances allowing him to be released on bail. The plaintiffs individually stated that they were never made aware of this as their legal representatives never discussed it with them.

[34] Mr Lefa Victor Rathaba was the defendants' sole witness. He testified that he was the prosecutor in the case from the plaintiffs' first appearances until the matter was transferred to the High Court. The plaintiffs were facing charges of Murder, Attempted Murder, Possession of Unlicensed Firearm, Housebreaking with intent to steal and theft.

[35] He said he and Mr Mokhachane, the Legal Aid Attorney representing the plaintiffs agreed that the charges fell under Schedule 6. The plaintiffs thus bore the onus to prove the existence of exceptional circumstances allowing them to be released on bail, which onus they failed to discharge hence the bail was denied. When asked for clarity in terms of this agreement he said there was no objection from the Plaintiff's representative that the charges were serious and they fell under Schedule 6. They also agreed that the State had a *prima facie* case.

[36] He stated that after their first appearances, the plaintiffs were detained in terms of the court order. The matter was subsequently transferred to the High Court and he believed it was for trial as bail had already been denied. He was not aware that they were granted bail by the High Court.

- [37] Although in evidence in chief he said he had prosecuted the case until it was transferred to this court, under cross examination, he said whilst the case was being remanded in the District court, there were instances where the prosecutors were being rotated so there may have been appearances he was not part of.
- [38] When asked about his reasons for enrolling the docket for prosecution, he said it was the Control Prosecutor is the one who took the decision to enrol the docket and charges against the plaintiffs after screening the documents and reading the dockets. He was not part of this decision but only received the docket after it was enrolled.
- [39] Under cross-examination, he conceded that it was the State that proposed that the bail application and charges should fall under Schedule 6 and the defence agreed. When asked what would the State have done had the defence refused he said the State would have persisted and proceeded on Schedule 6. When it was put to him that the plaintiffs had testified that they were never consulted by their representative on Schedule 6, he said he did not know about that.
- [40] Counsel for the plaintiffs asked if he was aware that there were at least seven (7) dockets on the case. He said he could not recall. When asked if he had read the dockets and complainants' statements and found therein a link to the second, third and fourth plaintiffs, Mr Rathaba was silent for a notable time before he said he believes so.
- [41] He referred to the witness statement where a certain 'Moetsuwa' and his aliases were identified and described as 'Lesotho Nationals'. Noting that none of the plaintiffs were 'Moetsuwa' he said what linked them was that they were 'Lesotho nationals'. When told that of the three plaintiffs before court, only one i.e. the fourth plaintiff is a citizen of Lesotho, he said he could not dispute that. Counsel for the plaintiffs put it to him that there was nothing in the

complainants' statements linking the plaintiffs to the offenses with which they were charged hence they were discharged by the criminal court after finding no evidence against them. In a resigned manner, he pointed out that an acquittal can occur for a number of reasons.

[42] Mr Rathaba further said the other link was the firearm that was found in possession of the plaintiffs. When informed that the gun was found from Thabang Makoko Mmaki ("Mr Mmaki") who was the first accused in the criminal matter and is not part of the plaintiffs before court he just said 'ok'.

[43] During re-examination, Mr Rathaba was referred to Mr Mmaki's warning statement where he stated that he was with Maseru, Tladinyana and Kaetsane when they committed a series of offences. In re-cross examination which I allowed since new averments were made during re-examination, Counsel for the plaintiff's put it to Mr Rathaba that there were issues of admissibility with the implication of an accused by a co-accused and he could not dispute that. When asked why he did not refer to this statement under the first cross-examination, Mr Rathaba waffled and could not remember which documents he read when preparing for criminal trial against the plaintiffs.

[44] The evidence of the plaintiffs corroborated each other's versions in many respects e.g. not being told of their rights at the time of arrest and reasons thereof, being forced to sign documents without any explanations, the conditions of the cells where they were kept and their knowledge and non-knowledge of each other when they were in custody and meeting in court. None of the plaintiffs that testified contradicted themselves or avoided answering any question. They were all calm, honest, reliable and I found them to be credible witnesses.

[45] The defendants' witness on the other hand was cagey and evasive. He could not remember the documents and critical information pertaining to why the plaintiffs were prosecuted and where he could remember, he shifted the blame

either to the Control Prosecutor or the court. Although he confirmed being the prosecutor throughout the case until it was referred to the High Court, he took no responsibility for any oversight or error that could be attributable to the prosecution in respect of what transpired in the criminal matter. It was clear that he either did not read the dockets or did not bother to apply his mind thereto when he did. For him to concede that the link to the plaintiffs was that they were Lesotho nationals when only one of them was shocking. It became clear from his testimony that from the onset of the criminal investigations there was no link or evidence against the plaintiffs to justify them being charged. His evidence did not do much for the defendant's case other than appear to be trying very hard to hide their remiss work and shift the blame.

[46] I will now deal with the issue of the arrest. At the end of the Plaintiff's case, Counsel for the defendants brought it to the court's attention that the issue of arrest was not properly pleaded in the Plaintiff's papers in that the Particulars of claim contained no claim for arrest. He pointed out that although the arrest itself is not in dispute, at the time the action was brought, the claim pertaining thereto had prescribed. Counsel for the plaintiffs conceded that they would have a challenge with prescription if a special plea was brought by the defendants. In the result the plaintiffs abandoned the claim for unlawful arrest.

[47] For purposes of completeness, it is noteworthy that the plaintiffs were arrested between 12th May 2013 and 3rd May 2014. The defendants admit that the plaintiffs were arrested without a warrant or arrest. Their first appearances were between 14 May 2013 to 5th May 2014. Summons were issued on 27th August 2019, five years after the arrest took place.

[48] Notwithstanding prescription, Counsel for the plaintiffs requested this court to make an advisory finding on the lawfulness of the arrest as this might have an effect on the claim for unlawful detention. I do not agree with Counsel for the plaintiffs in this regard, the lawfulness or otherwise of the arrest does not necessarily render the subsequent detention unlawful or otherwise. This point

was dealt with by the Appellate Division in **Isaacs v Minister van Wet en Orde 1996 (1) SACR 314 (A)** as follows:

“So I believe that where section 50(1) speaks of someone who is “arrested”, it is not limited to a lawful arrest. It includes someone who, under an attempt to exercise the power of arrest, was brought under the arrestor’s control...”

[39] The Appellate Division thus concluded that competence afforded by s 50(1) of the Criminal Procedure Act was not dependent on the prior arrest being lawful. It found that a detainee’s continued detention pursuant to an order of court remanding him in custody in terms of s50 (1) of the Criminal Procedure Act may be lawful, even though the detention followed from an unlawful arrest.

[49] Also, in my view, the concession that the claim arising from the arrest has prescribed puts the issue to rest. In any event the arrest itself is not in dispute. It escapes this court why it should be burdened with making a ruling on the lawfulness of an issue that is not before it. For this reason, I will make no finding on the lawfulness of the arrest.

[50] I now turn to deal with the plaintiffs’ detention. The plaintiffs claim that their detention was unlawful and that the Defendants were responsible for the detention and as such must be held liable for damages. The Defendants on the other hand have contended that the detention was in terms of Section 50(1)(a) of the Criminal Procedure Act and was thus lawful.

[51] It must be clarified that there are two distinct periods of detention the lawfulness and the liability of which this court is called upon to determine. The first being from the date of the plaintiffs’ arrest to first appearance; and the second one is from the first appearance to the date of release be it on bail or on discharge.

[52] With regards to the first period of detention, much as it is trite that the first period of detention cannot be separated from arrest as one is as a result of

the other, it is inarguable that these are two different claims and they arise at different times. A claim for arrest arises on arrest whilst a claim for detention arises on release and the plaintiffs were released between February and 20 June 2017 respectively. I accept that when summons was issued, the claim for the first period of detention had not prescribed.

[53] The defendants have further argued that the plaintiffs did not plead pre and post first appearance detention with sufficient particularity neither was there an amendment to establish this claim. On reading the papers, I established that on 29 June 2021 the plaintiffs filed their notice of amendment in terms of Rule 28(10) and their amended summons and particulars of claim on 14 July 2021. In my view, the amendment clearly articulated the basis of the claims for detention and malicious prosecution. I must therefore dismiss the defendant's contention in this regard.

[54] The defendants have further argued that the plaintiffs were charged with Schedule 6 offences, and they bore the onus to adduce exceptional circumstance allowing them to be released on bail in accordance with Section 60(II)(a) of the CPA. They failed to discharge this onus hence bail was denied. As a result thereof, the defendants submit, their further detention was as result of a court order and they as such cannot be held liable.

[55] It is trite that the onus to prove the lawfulness of the detention rests on the defendants – **Zealand v Minister of Justice and constitutional Development and Another 2008 (4) SA 458 (CC)**. In **Mahlangu and Another v Minister of Police [2021] ZACC 10; 2021 (7) BCLR 698 (CC)** at **para 22** the Constitutional Court held

"It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the Plaintiff has to establish is that the interference has occurred. Once this has been established, the deprivation is prima facie unlawful and that the defendant bears an onus to prove that there was justification

for the interference. In this matter, the arrest was not in dispute; it was therefore common cause that the Respondent bore the onus to prove the lawfulness thereof."

- [56] The Plaintiffs claim that the defendants had no reasonable and/or probable cause for laying charges against them nor did they have any reasonable belief in the truth of the information at their disposal and the charges so initiated. The defendants argue that the detention of the plaintiffs post the first appearance was in terms of the court and that bail was refused due to the failure by the plaintiffs to adduce exceptional circumstances for them to be released on bail. On this basis, they deny liability for detention of the plaintiffs.
- [57] Evidence which was undisputed by the defendants was led to the effect that the third plaintiff was arrested on 12 May 2013 and only appeared in court on 15 May 2013. Similarly, that the fourth plaintiff was arrested on 23 May 2013 and brought before court on 27 May 2013. Counsel for the plaintiff argued the third and fourth plaintiffs were brought to court outside of the statutory 48-hour period for their first appearances and has asked the Court to make a finding in this regard. This aspect was never pleaded and as rightly argued by Counsel for the defendants, no claim can arise from the Heads of argument. For this reason, I will make no such finding.
- [58] The defendants' contention that the plaintiff's detention post first appearance was as a result of a court order and as such cannot be held liable necessitates some interrogation. The plaintiffs' bail application was opposed by the defendants on the basis that they were a flight risk, and was denied on that basis. It has been stated that them being branded a flight risk was because they were 'wrongfully' perceived to be Lesotho nationals. This baseless conclusion has been discussed under evidence and requires no further condemnation. Even prior to having to contend with the defendants in a fight for bail, the plaintiffs had to cross a hurdle of being charged with Schedule 6 offences and thus bearing the onus of convincing the court to grant bail. This was despite the fact that there was no link between them and the offences they were charged for. It was clear from the evidence of the witness for the

defendants that he did not apply his mind to the contents of the docket. In **Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA)**, the court, in para 12, the Supreme Court of Appeal addressed the influence of the defendants in the decision to further detail the plaintiffs and held:

“...As explained by Harms DP in Sekhoto’s case, the relevant decision is no longer that of the police but of the court. But before the court’s decision comes the decision of the prosecutor to charge each accused. Mr Pretorius was the prosecutor, he studied the information furnished to him by the police and decided to proceed against all the accused, including both plaintiffs. He had no basis for proceeding against the first plaintiff”.

[59] In **Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR 409 (SCA)**, referred to in approval by the Constitutional Court in **Mahlangu and Another v Minister of Police (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC)**, the Supreme Court of Appeal dealt with the liability arising out of such influence and held:

“the Minister was liable for post appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. Its reasoning effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly if through the prosecutor”

In S v Mahlangu (supra) the Constitutional Court, in para 18 held that:

“Although the lawfulness or otherwise of a court order for an arrested person’s judicial detention depends primarily on the conduct of the prosecutor and/or magistrate, the police can incur liability for damages for detained persons being denied their freedom after their appearance before a court, notwithstanding the court having ordered such detention”

[60] As stated in the foregoing paragraphs, Mr Rathaba had no basis for proceeding against the plaintiffs in this matter. Yet he did so, as a result the plaintiffs were in detention for years. They were denied bail on the information provided by members of the first defendant that they were flight risks, which

assertion by the defendants was without substance. I am persuaded that in this case, causality between the conduct of the police officials and further detention of the plaintiffs has been established for the defendants to be held liable for the plaintiff's detention post first appearance as per **De Klerk v Minister of Police 2018 (2) SACR 28 (SCA) and 2020 (1) SACR 1 (CC)**.

[61] I now turn to consider the claim for malicious prosecution. The onus to prove malicious prosecution rests with the plaintiffs. To this end, the plaintiffs must prove that (1) the defendants set the law in motion (instigated or instituted the proceedings); (2) the defendants acted without reasonable and probable cause; (3) the defendants acted with 'malice' (or *animo inuriandi*); and (4) the prosecution has failed. These requirements were laid out in **Minister of Justice and Constitutional Development and Others v Moleko 2009 (2) SACR 585 (SCA) ([2008] 3 All SA 47; [2008] ZASCA 43)** para 8.

[62] A submission was made by Counsel for the plaintiffs for this court to consider the judgment by Mathebula J in terms of which he granted the plaintiffs a discharge in terms of Section 174 of the CPA. The Defendants objected to this on the basis that it is an opinion that has no bearing on these proceedings and is excluded based on the Hollington v Hewthorn Rule, which precludes the court to rely on criminal conviction in subsequent civil proceedings. In terms of this rule, a finding of a criminal court has no probative value in subsequent civil action as such inadmissible as evidence. The plaintiffs argued that the Hollington rule applies in subsequent civil proceedings following a criminal conviction which is not the case *in casu*.

[63] In my view this is relevant is as far as proving the second and the fourth requirements for malicious prosecution i.e. that the defendants acted without reasonable and probable cause, and that the prosecution failed. For this reason, it is my considered view that the judgment by my brother Mathebula J is, to the extent that it proves the above, is one of the relevant factors and as such I have taken it into consideration. It is important to mention that an acquittal in itself, does not necessarily mean the arrest and the detention were

unlawful. The test for lawfulness of a prosecution is a *prima facie* case whereas the test for an acquittal in terms of Section 174 of the Criminal Procedure Act is whether or not there is before court, evidence upon which a reasonable person / court may convict. So the arrest may have been lawful and the State could as well have had a *prima facie* case and still fail to present evidence to secure a conviction, in which case the accused would be acquitted.

[64] I now consider the questions to be satisfied for the plaintiff to prove malicious prosecution. It cannot be denied that by arresting, detaining and instituting proceedings against the plaintiffs, the defendants set the law in motion. *In casu*, on the basis of the evidence presented before me, I am persuaded the State had no *prima facie* case against the plaintiffs in the first place. It is common cause that the prosecution failed. The plaintiffs were discharged. One outstanding element that I must now consider is whether or not the defendants acted with malice '*animo iniuriandi*'.

[65] In **Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA)**, the court dealt with the prosecutors and arresting officers who fail to apply their minds to the docket and stated that where such conduct leads to further prosecution after it was clear that there were no reasonable of a successful prosecution, it amounts to a failure of justice and accordingly can be regarded as malicious proceedings. In para 12, the court stated:

"As explained by Harms DP in Sekhoto's case the relevant decision is no longer that of the police but of the court, but before the court's decision comes the decision of the prosecutor to charge each accused. Mr Pretorius was the prosecutor, he studied the information furnished to him by the police and decided to proceed against all the accused, including both plaintiffs. He had no basis for proceeding against the first plaintiff."

[66] In **Patel v NDPP 2018 (2) SACR 420**, Ledwaba DJP dealt with the issue of malicious prosecution and prosecutorial authority and in para 24 stated:

"[24] Courts are not overly eager to limit or interfere with the legitimate exercise of the prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from scrutiny of a court which can intervene where such discretion is improperly exercised."

...

[27] A prosecutor should assess whether there sufficient and admissible evidence to provide a reasonable prospect of successful prosecution, otherwise the prosecution should not commence..."

[67] Having regard to the evidence of the Plaintiffs as well as of the Defendant, I am persuaded that from the very onset, there was no link between the plaintiffs and the alleged offences for which they were arrested, detained and prosecuted. The witness for the defendants told this court at some point that the only link was that they were Lesotho nationals which turned out not to be true in respect of the two plaintiffs. Had the prosecutor applied his mind to the contents of the docket, he would not have commenced with the prosecution, let alone drag it for years whilst the plaintiffs remained in custody.

[68] The second plaintiff was detained post first appearance from 05 May 2014 to February 2017; the third plaintiff was detained post first appearance from 15 May 2013 to February 2017 whilst the fourth plaintiff was detained from 27 May 2013 to 20 June 2017. During all these times, there was nothing new that had not been there at the onset of the prosecution. The defendants could and should have halted the prosecution earlier, but persisted to the end, with not a shred of evidence implicating the plaintiffs until the plaintiffs were acquitted following an application in terms of Section 174 of the CPA, which application is brought at the end of the state's case. I am satisfied that, on the balance of probabilities, the defendants acted with *animo iniuriandi* and a claim for malicious prosecution has been proven.

[69] In the assessment of damages, I have been guided by the Supreme Court of Appeal in **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 326** at para 17 and 20:

[17] The assessment of awards of general damages with reference to awards made in the previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and a few cases are directly comparable...

...

[20] Money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."

[70] It is an established principle that the longer the detention, the more the courts are inclined to grant a holistic award for damages rather than a day-by-day consideration. In **Minister of Safety and Security v Augustine 2017 (2) SACR 332**, the Supreme Court of Appeal at para 25 stated that the amount to be awarded for general damages is not susceptible to precise calculation but arrived at in the exercise of a broad discretion.

[71] The individual impact of the arrest, detention and prosecution must be taken into account. The plaintiffs have testified on the conditions they were subjected to in the cells where they were initially kept as well as the trauma they had to endure in prison. These need not be repeated herein.

[72] I now turn to deal with the issue of costs. The Plaintiffs have asked for costs including costs of the two days on which the matter was not heard. They have argued that the defendants never informed them that they will no longer call 3 witnesses but only 1. As a result, they have booked the accommodation for the three days i.e. 22nd, 23rd and 25th March 2022. The principles to awarding costs are trite. They are firstly that unless expressly otherwise enacted, the granting of costs falls within the discretion of the court; secondly that generally, costs follow the result, i.e. they are awarded in favour of the successful litigant. A cost order in favour of the successful party is further to ensure that the successful litigant is not out of pocket in respect of expenses caused to him or

her by the losing party's approach to litigation – **Nel v Waterberg Landbouwers Kooperatiewe Vereeniging (1949) AD 597 at 608.**

[70] Counsel for the plaintiffs requested costs including costs of accommodation for the two days that were not used i.e. the 22nd and 25th of March 2022. In exercising my judicial discretion, I am not convinced that granting these costs would be appropriate. I hold a view that the plaintiffs' counsel would have been able to cancel the accommodation and recoup the costs, especially because the matter was finalised just before lunch on day one of the final three days. Similarly, with travelling arrangements, flight tickets could have been moved forward. In any event plaintiff's counsel would still have to back to Gauteng regardless of when the matter would have been finalised. For this reason, I am not inclined to grant the travelling and accommodation costs for the 23rd and 25th March 2022.

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

1. The claim in respect of the First Plaintiff is postponed *sine die*.
2. The defendants shall pay to the plaintiff's the following amounts as compensation:
3. Second Plaintiff
 - 3.1. An amount of R1 300 000.00 (One Million Two Hundred Rand) for the entire period of detention.
 - 3.2. An amount of R250 000.00 (Two Hundred and Fifty Thousand) for malicious prosecution.
4. Third Plaintiff
 - 4.1. The third Plaintiff, an amount of R1 400 000.00 (One Million Four Hundred Rand) for the entire period of detention.
 - 4.2. An amount of R250 000.00 (Two Hundred and Fifty Thousand) for malicious prosecution.
5. Fourth Plaintiff
 - 5.1. An amount of R1 400 000.00 (One Million Four Hundred Rand) for the entire period of detention.

- 5.2. An amount of R250 000.00 (Two Hundred and Fifty Thousand) for malicious prosecution.
6. The defendants shall pay interests at the applicable legal rate on the said amount from 14 (fourteen) days from the date of judgment to the date of payment.
7. The defendants shall pay the plaintiffs' agreed or taxed costs, including costs of Counsel, travel and accommodation for 4 days.


D.P. MTHIMUNYE, AJ

Appearances:

For the Plaintiffs : Adv. C Zietsman
Pretoria Society of Advocates
Instructed by Loubser Van Wyk Inc

For the Defendants : Adv. L Bomela
Bloemfontein Society of Advocates
Instructed by Office of the State Attorney
Bloemfontein