

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
Signature <u>[Signature]</u>	
Date <u>28.02.2020</u>	

CASE NO: 1676/2015,
1678/2015, 1072/2015, 283/2018

In the matter between:

MOTHATA MASHIBA ZACHARIAH
MABOTJA THABO ALPHEUS
SEKWADI COLLINS LEKATELA
RAMAHLAHA BOITUMELO

FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF
FOURTH PLAINTIFF

and

MINISTER OF POLICE
INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE
EDWARD MAPHETO
NATIONAL PROSECUTING AUTHORITY

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiffs instituted actions for damages arising out of alleged unlawful arrest and detention of the Plaintiffs by a member of the Independent Police Investigative Directorate ("IPID") and alleged malicious prosecution by members of the National Prosecuting Authority ("NPA"). The Third Plaintiff ("Sekwadi") instituted only a claim for unlawful arrest and detention and not the claim for malicious prosecution.
- [2] The Plaintiffs instituted separate actions under different case numbers. The four cases were ultimately consolidated and heard together under Case no. 1676/2015 at the trial which served before this Court on the 3rd, 4th, 6th and 18th February 2020. At the heart of this matter the Court is called upon to decide whether Plaintiffs' arrest without a warrant was lawful and justified in the circumstances and whether the subsequent prosecution was justified.
- [3] The following facts are common cause and not disputed:
- 3.1. The Plaintiffs are all Police Officers stationed in Polokwane who after the arrest of one Theophilus Ratau on 20 May 2013 arrested the second suspect McDonald Monyela. The latter led the Police Officers to a certain house in Ladanna, Polokwane where the deceased, Onyebuchi Iweaku stayed.

- 3.2. The Police Officers were in search of a cellphone that was a subject of a criminal investigation involving Theophilus Ratau ("Ratau") and McDonald Monyela ("Monyela"). On their arrival at the house of the deceased they found the cellphone, placed the deceased under arrest and placed him in the Police vehicle, a Quantum Combi.
- 3.3. They drove to the Police Station and on their arrival the deceased, Onyebuchi Iweaku was certified dead. Two post mortem examinations were conducted by Dr Selatole and Dr Perumal and the Plaintiffs were subsequently arrested, charged and prosecuted for the alleged murder of the deceased.
- 3.4. The Plaintiffs were all found not guilty and discharged by this Court before Baqwa J on 2 December 2014 in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("CPA"). It is against this background that each Plaintiff instituted the present action proceedings against the Defendants.

CLAIM 1: UNLAWFUL ARREST AND DETENTION

- [4] It is well-established that the onus rests on the arresting officer to prove the lawfulness of the arrest. This is so because as Rabie CJ stated in **Minister of Law and Order & Others v Hurley and Another 1986 (3) SA 568 (A)** at 589E – F that an arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that

the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.

- [5] In the present case the arresting officer is Mr Edward Mapheto who effected the arrests on the Plaintiffs on the 29 May 2013. Mr Mapheto was therefore the Defendants' main witness who testified for the Defendant with regard to the justification of the Plaintiffs' arrest and detention.

Factual Matrix

- [6] Mr Edward Mapheto is a senior investigating officer attached to IPID in Polokwane. He was assigned the case of the alleged murder of Onyebuchi Iweaku ("the deceased"). He received a case docket which contained some statements of his colleagues, Ms Ramoba and Mr Mashapu. He interviewed and took the statements of witnesses being Ratau, Monyela and Mr Miracle Okonye on 23 May 2013. The latter was found together with the deceased in the house at Ladanna when the deceased was arrested by the Plaintiffs on 20 May 2013. He further attended the post mortem conducted by Dr Perumal and received his report dated 26 May 2013.

On account of the statements of Ratau, Monyela and Okoye and the findings of Dr Perumal that the cause of death is consistent with smothering, he decided to arrest the Plaintiffs and charged them with murder of the deceased.

- [7] Mr Mapheto stated further that he arrested the Plaintiffs on the basis of the provisional report of Dr Perumal and also on the basis of the allegations that the Plaintiffs were visiting Ratau and Monyela in the police cells and intimidating them not to give information concerning the deceased's death. He stated that he found it to be in the interest of justice, given the seriousness of the matter, to arrest the Plaintiffs.

He stated that he arrested the Plaintiffs despite the fact that the initial post mortem conducted by Dr Selatole stated that the cause of death was unascertainable because the report of Dr Perumal, a specialist, indicated that the death was consistent with smothering. On the other hand the statements of the witnesses in the docket indicated that the deceased was smothered with a tube.

- [8] The first post mortem report was issued by Dr Selatole on 23 May 2013.

Mr Mapheto testified that he did not have Dr Selatole's findings at the time of the arrest. He based his decision to arrest on the post mortem report of Dr Perumal who did an independent autopsy on the 24 May 2013. Both post mortem reports described the cause of death as either unascertainable or no anatomical cause of death. However both reports do make mention that asphyxia cannot be ruled out and that the cause of death was consistent with smothering.

Mr Mapheto conceded that he informed both pathologists that the deceased was allegedly tortured and smothered, the information which he derived from the contents of the witnesses' statements, that is Ratau, Monyela and Okoye.

[9] In conclusion Mr Mapheto stated that he did not have prior knowledge of the Plaintiffs and the witnesses including the deceased. He did not have any ulterior motive to arrest the Plaintiffs. That the arrest according to him was based on a reasonable suspicion, based on the contents of the docket and his investigations, that the Plaintiffs have committed an offence of murder. Upon executing his duty of arrest of the suspects, he concluded, he handed over the case to the Director of Public Prosecutions for a decision whether to prosecute.

[10] This Court does not find any fault with the evidence of Mr Mapheto. His testimony is straightforward and he was able to answer questions truly and honestly during cross-examination. His credibility as a witness has not been tarnished and the Court finds him to be a truthful and reliable witness.

[11] It is appropriate that the evidence regarding the contents of the statements made to Mr Mapheto by Ratau, Monyela and Okoye as well as the contents of the two postmortem reports by Dr Selatole and Dr Perumal be put on record. After all, these statements and reports constitute the information relied on by

Mr Mapheto to decide to effect the arrest of the Plaintiffs. The statements of Ratau and Maonyela were handed in as Exhibits "B" and "C" respectively. The post mortem report of Dr Selatole is Exhibit "D" and that of Dr Perumal is Exhibit "E". Okoye's statement was handed in as Exhibit "L".

[12]

Ratau: After his arrest he was put inside the police combi and covered with a tube over his face. They arrived at a certain house where the police alighted with Monyela and went into the house. He remained in the police combi with one policeman. He heard a sound of beating but was not clear as his ears were covered with a tube. After a while the police who went into the house came back with an unknown person who is the deceased. The tube was removed from him. The unknown person (deceased) was weak and breathing very hard. His clothes were wet. He did not know if it was water or urine. The deceased was seated on the floor inside the combi, rested his head on the seat and breathing fast.

The other police officer who was wearing adidas track suit, grey in colour, took out a pistol and started to hit the deceased very hard on the head with the but of the pistol. He saw the deceased bleeding and his head falling between the seats. The police officer pulled him and when he left him the deceased fell down again.

The police officer who assaulted the deceased with a firearm went out to Nandos shop and bought 500ml bottle of water and poured the water over the deceased but that did not help. They drove to the police station. At the police station they alighted the combi and left him and Monyela inside with the deceased. The EMS came and certified the deceased dead.

[13]

Monyela: Inside the combi were five police officers in civilian clothes, Ratau and himself. One of them asked him where is the phone and he said he forgot it at a Nigerian boy in Ladanna. They said he was lying and will reveal the truth. They told Ratau to sleep so that he cannot see where they were going. They drove to a certain bush outside Polokwane. On their arrival they stopped the car at the gate. They ordered him to alight and he was still handcuffed. They started to kick him with booted feet on the head and all over the body. One of them kicked him on his private parts. He heard one of the police officers saying he is bleeding from the ear and they stopped assaulting him.

They instructed him to take them to that Nigerian to collect the said cellphone. He pointed out to them the room of the Nigerian boy. They entered and found one guy relaxed on the sponge mattress being

alone. He told the police that this was not the one he gave the phone.

They said this one must produce the drugs.

The deceased said he does not know and they said he is lying. They covered his head with a tyre tube. They started to kick him with booted feet and they took the handcuffs from him and handcuffed the deceased from the back. They started to kick him all over the body until he fainted. One of them said he fainted. One of the policemen brought water and poured same over the deceased and he was awoken. They started to hit him with a chair all over his body saying he is playing he will tell the truth.

They ordered him to put the trouser on and he assisted him to put the trouser on. Then they went to the combi. The tube was removed from the deceased. The deceased was unable to walk properly and two police officers held him both sides and assisted him to the combi. They threw him inside the combi and one of them hit him very hard on the head with the butt of the pistol. He told them that this man is dead and they said how do you know a dead person. They drove away.

While at Nandos police bought 500ml water and poured same over the deceased but he never woke up. They drove to the police station and while there, the EMS arrived and certified the deceased dead.

The police officers involved he used to see them in town. He can point them out if he can see them. The deceased never fought with the police. The police were looking for drugs which they did not find.

[14]

Okoye: He stated that on 20 May 2013 at about 18h30 he was at home with deceased (Onyebuchi Iweaku) who is his cousin busy watching a movie on a laptop. People knocked, entered and told them that they are police. They were not in police uniform. On their entry in the house they started to beat them without telling them what wrong they had done. During the assault only one guy concentrated on him. About four or five police officers were busy assaulting the deceased with fists and open hands all over his body. The deceased was seriously crying and shouting to them saying you police are killing me. During the assault on the deceased one police officer managed to cover his head with a plastic bag. By that time he managed to run away from the room and went out. He did not know what happened in the room during his absence. Outside he saw a combi parked and suspected that the police used that combi. He stood at a distance of about 50m away from the house and saw those people coming out of the house holding and helping the deceased to walk. The deceased was very weak and could

not walk on his own. He did not go back to the house because he was scared of those police. He slept at his friend's place around town. He went back to the house on Wednesday 22 May 2013.

[15]

Dr Selatole Post Mortem Report:

The chief post-mortem findings made by the doctor on the deceased's body were:

- Abrasions on elbows, wrists and scalp.
- Mild subcutaneous bruises over the back.
- Rib fractures, mild lung contusions.
- Congested organs with petechial hemorrhages.
- Pen-pancreatic hemorrhage, liver hemorrhage.

As a result of her observations Dr Selatole came to the following conclusion:

(a) that death occurred on 2013-05-20 as she was informed prior to her examination and

(b) that the cause / causes of death was / were

- **UNASCERTAINABLE GROSSLY, AWAITING HISTOLOGY AND TOXICOLOGY.**

[16]

Dr Perumal Post Mortem Report:

The chief post mortem findings made by the doctor were:

- Congested organs.
- No pathology identified macroscopically to account for death.
- No direct trauma to the organs to account for death.
- Superficial lacerations of the buccal mucosa.
- Bruises in the subcutaneous tissue of the back.
- Bruise of liver, pancreas, right hemi diaphragm and lower lobe of right lung.
- Historical examination of tissue did not reveal any natural disease to account for death but revealed pulmonary oedema.

On the cause of death Dr Perumal concluded as follows:

As a result of my observation, a schedule of which follows, from post mortem examination, historical examination and toxicological analysis, I concluded:

No anatomical cause of death but is **CONSISTENT WITH SMOTHERING**.

Mechanism of death: HYPOXIA

- [17] Given the totality of the evidence as contained in the witnesses statements and the contents of the two post mortem reports it remains to be seen whether a reasonable police officer or investigator in the position of Mr Mapheto would have suspected and / or believed that a crime had been committed which justified the arrest of the Plaintiffs.

I proceed to set out the evidence of the Plaintiffs before deciding on this issue.

- [18] All the four Plaintiffs testified and gave the factual background relating to their arrest, detention and alleged malicious prosecution. Their version is basically the same. All of them were summoned to the offices of IPID in Polokwane on the 29 May 2013 where they were arrested by Mr Mapheto on a charge of murder and two counts of attempted murder. They were released on bail on 21 June 2013 after an entire period of detention for close to 24 days. The Defendants admitted the arrest (without warrant) and subsequent detention of the Plaintiffs but allege that the arrest was lawfully effected in terms of the provisions of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [19] The Plaintiffs submitted a comprehensive written representation to the Fourth Defendant (NPA), giving reasons why the prosecution is destined to failure. This notwithstanding, the NPA decided to proceed with the prosecution. The said written representation stands as evidence before this Court and same is taken into consideration in the present proceedings.
- [20] Upon their arrest on 29 May 2013 all the Plaintiffs gave warning statements to Mr Mapheto explaining their role in the arrest and subsequent death of the deceased. Their statements are exculpatory and obviously in conflict with the witnesses statements of Ratau, Monyela and Okoye.

For the sake of convenience I shall set out hereunder the version presented by the Fourth Plaintiff, Captain Boitumelo Ramahlaha which represents the version of all the Plaintiffs herein.

[21] Captain Ramahlaha in summary testified as follows:

21.1. On the 20 May 2013 he arrested Ratau and Monyela and Monyela took the Plaintiffs to the house of the deceased. He instructed the deceased to stand up so that he could search the room. He found the stolen cellphone on the deceased but not the firearm. The said red cellphone belonged to a female SAPS member that was murdered. The deceased resisted arrest and the Plaintiffs used minimal force to get him under control. They struggled for approximately 5 minutes and then he handcuffed the deceased. They went out of the room and then the deceased still resisted arrest, slipped and fell on a cupboard. On their way to the SAPS station the deceased started gasping for air. While driving to the SAPS station they called the ambulance. When they reached the Police Station the deceased was declared dead.

21.2. He received a call on 28 May 2013 and was summoned by Mr Mapheto to be at the offices of IPID on the 29 May 2013. During interrogations he was told that he murdered the deceased. He had to do a warning statement but realized that there were already contradictions in the statements of Monyela, Ratau and Okoye with regard to time frames

which did not correlate with the AVL reports of the police combi they drove in.

- 21.3. Mr Mapheto, being the senior investigating officer, never requested the AVL report (vehicle movement report) during his investigation.

Mr Mapheto admitted during cross-examination that he knew about the existence of these AVL reports. According to Captain Ramahlaha contradictions in the statements of Ratau and Monyela with regard to their whereabouts during the assault confirms that their evidence was not credible.

- 21.4. Captain Ramahlaha testified that he was arrested and detained on the 29 May 2013 in the presence of his colleagues, seniors and community. There was no warrant for his arrest. He testified that the arrest was not executed lawfully and referred to Standing Order (G) 341 of the SAPS as well as Section 40 of the Criminal Procedure Act. They were detained in inhumane circumstances in a police cell which could only house four people. There was no hot water and no electricity. They had to sleep on the floor. They were transported to and from the Court with common criminals and convicted persons.

- [22] It is common cause that only three police officers, First, Second and Fourth Plaintiffs went into the house with Monyela to search and arrest the deceased.

The Third Plaintiff (Sekwadi) who was the driver of the police combi remained outside in the vehicle with Ratau.

[23] In his evidence Captain Ramahlaha stated that en route to the Police Station he noticed that the deceased was wheezing but could not detect any injuries on the deceased. He instructed the driver to stop the vehicle and rushed to Nandos shop to get 500ml bottle of water with which he sprinkled the deceased in an attempt to arouse him. He stated further that there was no scuffle in the combi. The deceased had abrasions on the elbows and the head that could have been from the scuffle in the house during the arrest.

He denied that the deceased could not walk to the police vehicle and had to be assisted. He denied dragging the deceased to the vehicle but stated that he held his pants at the back to lead the deceased to the vehicle.

[24] In addition to the evidence of Captain Ramahlaha, the First Plaintiff (Mothata) testified that the deceased became angry after he was placed under arrest and minimum force was used to arrest him. The deceased fell on a cupboard in the sitting room and they assisted him to get up and walked to the vehicle. In the vehicle the deceased sat on the floor of the combi while the police sat on the seats.

He stated that the injuries sustained by the deceased might have been sustained when the deceased injured himself.

- [25] The First Plaintiff, Mothata stated that he was surprised by their arrest because he knew the case to be an inquest and not a murder case. He was hurt by the fact that his bail was opposed. It was put to him that Ratau and Monyela might have lied to Mapheto in their statements that resulted in the arrest. His response was that Mapheto ought to have investigated more.
- [26] The Second Plaintiff (Mabotja) stated that he did not see the deceased fall on the cupboard in the dining room. He was told by Captain Ramahlaha that the deceased fell and he did not see the scuffle that occurred in the dining room as he walked ahead of the deceased, Mothata and Ramahlaha.
- When it was put to him that his arrest was due to the statements of Ratau and Monyela (which might not have been truthful) he responded that the investigating officer ought to have investigated the lies told by the witnesses before arrest and therefore he was unlawfully arrested.
- [27] My finding with regard to the evidence of the Plaintiffs is that there were no material contradictions between them specifically regarding what happened during the arrest of the deceased and the subsequent unfolding events. In any event there is no onus on them to prove that their arrest was unlawful. The lawfulness of the arrest will be determined on the question whether Mr

Mapheto, possessed with the statements of the witnesses, Ratau and Monyela, reasonably believed that the Plaintiffs have committed an offence.

Law Applicable

[28] Section 40(1) (b) of the CPA provides that:

“40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a)

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

[29] It is clear from section 40(1)(b) that the following are the essential jurisdictional facts which have to be present to justify an arrest without a warrant:

- (a) the arresting officer must be a peace officer;
- (b) the arresting officer must entertain a suspicion;
- (c) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1 ; and
- (d) the suspicion must be based on reasonable grounds.

See **Duncan v Minister of Law and Other 1986 (2) SA 805 (a) AT 818G – H; Minister of Safety and Security v Sekhoto & Another 2011 (1) SACR 315 (SCA) para 6.**

- [30] It is trite that the reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether a reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule I offence –

M v Minister of Safety and Security 2009 (2) SACR 291 (GSJ).

In **Tsose v Minister of Justice & Others 1951 (3) SA 10 (A)** it was held that the arrest must be with the intention of bringing the arrestee before Court. An arrest can still take place lawfully where the arrestor objectively speaking, has a reasonable suspicion against the suspect **but** has still to conduct further investigations after the arrest but before finally deciding to charge the arrestee.

In **Sekhoto** supra, it was held that once the jurisdictional facts for an arrest are present, a discretion whether or not to arrest arises. Where the exercise of discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee.

- [31] The reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) of the CPA must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts would form a suspicion that a person has committed a Schedule I offence or not. See **Minister of Safety and Security v Swart 2012 (2) SACR 226 (SCA)** at

232. In **Minister of Safety and Security v Linda 2014 (2) SACR 464 (GP)**

the Full Court said the following:

"The question whether the suspicion of the person effecting the arrest is reasonable must be approached objectively. A suspicion inherently involves an absence of certainty or adequate proof. A police officer is not expected to satisfy himself to the same extent as a Court. A suspicion can be reasonable despite there being insufficient evidence for a prima facie case".

In **Shabaan Bin Hussein and Others v Chong Fook Kam and Another** the Privy Council said:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end". See also **Minister of Safety and Security v Magagula (991/2016) [2007] ZASCA 103.**

[32] In **Duncan** supra, Van Heerden JA said the following at page 818B:

"Hence an arrest under s 40(1)(b) of the present Act is not unlawful where the arrestor entertains the required reasonable suspicion but intends to make further enquiries after the arrest before finally deciding whether to proceed with a prosecution, provided it is the intention throughout to comply with s 50 of the Act".

[33] In the present case it is common cause that Mr Mapheto who arrested the Plaintiffs is a peace officer. The arresting officer received information from Ratau and Monyela that the Plaintiffs were involved in the commission of the offence. With this information Mr Mapheto entertained a suspicion that Plaintiffs were involved in the murder of the deceased. The question is whether such a suspicion is reasonable in the circumstances of this case.

When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a "reasonable" suspicion before the arrest is made. This test was succinctly summarized in **Mabona v Minister of Law and Order 1988 (2) SA 654 (SEC)** where it was established that what is required is suspicion not **certainty**. Such suspicion must make sense otherwise it is frivolous or arbitrary and not reasonable. Arrests can therefore take place even if the arrestor realised that at the time of the arrest he does not have sufficient proof for a conviction – **Songono v Minister of Law and Order 1996 (4) SA 384 (SEC)**.

Reasonableness of the Suspicion

[34] In the present case Mr Mapheto was faced with the following circumstances before he could arrest the Plaintiffs on the 29 May 2013:

- 34.1. Written statements were made to him by the witnesses, Ratau, Monyela and Okoye that an assault took place on the deceased at a house in Ladanna and en route to the Police Station.
- 34.2. Ratau and Monyela made statements to the effect that they too were assaulted and smothered with a tube.
- 34.3. The post mortem reports of both Drs Selatole and Perumal revealed that the deceased sustained injuries like broken ribs, abrasions on the wrists, elbows and scalp. The deceased also had bruises over the back, suffered mild lung bruising and haemorrhage around the pancreas and liver.
- 34.4. Although the cause of death could not be anatomically ascertained, the post mortem report of Dr Perumal indicates that the deceased's death is consistent with smothering and that the mechanism of death is Hypoxia. This conclusion is in the face of the evidence of Ratau and Monyela that the deceased was smothered with a tube.
- [35] In my view and in the light of the authorities referred to above, it is not expected of Mr Mapheto to have interrogated or cross-examined Ratau, Monyela and Okoye in order to obtain certainty that the deceased was indeed assaulted. He need not believe them, but all what was expected from him was to form a reasonable suspicion that there had been an assault on the

deceased. It remained to the prosecution to prove in Court that the Plaintiffs were guilty of an offence.

Whether Ratau, Monyela and Okoye told the truth or lies in their statements is neither here nor there. It will be asking too much from a peace officer effecting an arrest to go all out to establish the truthfulness of a witness' statement before he can arrest a suspect.

- [36] The test of whether the suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA is objective. The enquiry is therefore: Would a reasonable man in Mr Mapheto's position and possessed with the same information, have considered that there were good and sufficient grounds for suspecting that the Plaintiffs were guilty of the offence for which he sought to arrest the Plaintiffs?

In evaluating such information a reasonable man would bear in mind that the section authorises drastic action. It authorizes an arrest on the strength of a suspicion and without the need to issue out a warrant, that is something which otherwise would be an invasion of private rights and personal liberty.

- [37] The case of **Mabona v Minister of Law and Order**, supra is instructive in this regard. Jones J said the following at page 658G – H:

"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.** However, the suspicion must be based upon solid grounds.....)*"

(My underlining)

- [38] Granted, at the prosecution or trial of the Plaintiffs the witnesses Ratau and Monyela were found to be untruthful and contradicted themselves in their evidence. Likewise, the cause of death of the deceased could not be conclusively proved on the basis of the available post mortem reports. This was at the trial where the witnesses were subjected to an intensive cross-examination. It cannot be expected of Mr Mapheto to have embarked on such an exercise when he decided to arrest the Plaintiffs on 29 May 2013.

Discretion to Arrest

- [39] A peace officer who harbours a reasonable suspicion that an offence was committed has a discretion whether or not to arrest the offender. The discretion whether to arrest or not must be exercised properly.

[40] In **Minister of Safety and Security v Sekhoto**, supra, the Supreme Court of Appeal, per Harms DP made the following remark:

“[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it would be emphasised, is not obliged to effect arrest.”

“[40] An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorizing statute read in the light of the Bill of rights. Where the statute is silent on how they are to be exercised that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner decribed by Langa CJ in Hyundai.”

[41] It is significant to note further remarks of Harms DP in **Sekhoto** case at page 327b – c where he said:

“Once the required jurisdictional facts are present, the discretion or not to arrest arise. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. The standard

was not breached because an officer exercised the discretion in a manner other than that deemed optimal by the Court. The standard is not perfection, or even the optimum, judged from the vantage of hindsight, and as long as the choice made fell within the range of rationality, the standard is not breached."

- [42] Arrest is one of the methods to secure an accused's attendance at a trial. It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits.

In my view, and based on the facts of this case, there is no other method that Mr Mapheto would have used to investigate the veracity of the allegations of assault contained in the statements of Ratau, Monyela and Okoye. Still less could he have ignored the post mortem findings that the cause of death was consistent with smothering.

I am of the view that it would have amounted to a dereliction of duty on the part of Mr Mapheto had he not arrested the Plaintiffs who faced serious allegations of murder and attempted murder. His conduct in effecting arrest cannot be faulted.

- [43] Having regard to the evidence before this Court and in the light of the aforesaid authorities, I am satisfied that a reasonable suspicion was established and that it was based on solid grounds. The peace officer,

Mr Mapheto investigated the accuracy of the information from the witnesses before he acted upon it. All the witnesses identified the Plaintiffs as the perpetrators. The discretion to arrest was properly exercised. Consequently this Court is convinced that the arrest was lawful.

CLAIM 2: MALICIOUS PROSECUTION

- [44] It is common cause that pursuant to their arrest and detention the Plaintiffs were charged and prosecuted for murder and two counts of attempted murder. They were found not guilty and discharged in terms of section 174 of the CPA at a trial in Polokwane before Judge Baqwa on the 2 December 2014. Against this backdrop all the Plaintiffs except the Third Plaintiff (Sekwadi) instituted claims for malicious prosecution against the Defendants.
- [45] After the Plaintiffs were arraigned and indicted for murder and attempted murder they, through their legal representative, made written representation to the NPA in an effort to persuade the NPA not to prosecute them. The NPA considered the Plaintiffs' representation but declined to withdraw the charges against them.
- [46] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person. The requirements are that the prosecution is instigated without a reasonable and probable cause and with malice or *animo iniuriandi*.

The Defendant will not be liable if he or she held a genuine belief found on reasonable grounds in the Plaintiffs guilt.

Factual background

[47] The Defendants' evidence was given by Advocates Bethuel Manyuha and Eric Mabapa. Both are attached to the office of the Director of Public Prosecutions in Limpopo. Adv Manyuba is the Deputy Director of Public Prosecutions and Adv Mabapa is the Senior State Advocate.

[48] Advocate Eric Mabapa is the State Prosecutor who took the decision to prosecute and ultimately handled the prosecution of the Plaintiffs at the criminal trial before Baqwa J. He has been in this career as State Advocate since December 2007. Amongst his duties are to study the case dockets and make a decision whether to prosecute or not.

He testified that at the time he took the decision to prosecute the Plaintiffs he had before him the following:

Case docket, warning statements of the Plaintiffs, sworn statements of Ratau, Monyela and Okoye and post mortem reports of Dr Selatole and Dr Perumal. According to Adv Mabapa it appeared from the contents of the case docket that possible crimes of murder and attempted murder have been committed and that the Plaintiffs were linked to the offences. On the documents before

him at that relevant time, he was convinced that there was a reasonable prospect of a successful prosecution.

- [49] At the time he took a decision to prosecute he did not know any of the suspects (Plaintiffs) and had never met them before. He never received any complaint against them and he also did not know all the victims of the offences committed by the Plaintiffs. He stated that he had no reason to be biased in favour or against any of the parties. He stated further that after he had taken a decision to prosecute he drew up the indictment and presented the whole docket and indictment to his senior, Adv Manyuha for confirmation. Indeed Adv Manyuha confirmed the decision to prosecute and signed the indictment. He had the opportunity to consider the written representation of the Plaintiffs but he was not persuaded that his decision to prosecute should be rescinded. In this regard he obtained the second opinion of another Senior State Advocate, Mr Ngobeni, in the absence of Adv Manyuha.
- In conclusion Adv Mabapa stated that he had no reason to harbour any malice in that prosecution. His duty as a prosecutor is to be objective without gunning for a conviction at all costs. His ethical duty, he concluded, is to present the facts of the State case before Court and for the Court to decide on the guilt of an accused person.

[50] Adv Bethuel Manyuha confirmed that after Adv Mabapa had taken a decision to prosecute and drawn up the indictment, the case docket was brought to him for confirmation or otherwise. He studied the whole contents of the docket. Dr Perumal's post mortem report convinced him that the cause of death was consistent with smothering, more so that there were statements of eyewitnesses to the effect that during the alleged assault the deceased was smothered with a tube. He stated further that despite the fact that the Plaintiffs had stated that they used minimum force to subdue the deceased, when he considered the post mortem report of Dr Perumal, he concluded and was convinced that the Plaintiffs had used more force than necessary. In his view there was therefore a *prima facie* case for the Plaintiffs to face the trial in Court.

Adv Manyuha stated that the contents of the post mortem reports, statements of witnesses, photo album and the suspects' warning statements weighed heavily on him when he confirmed the decision to prosecute. He confirmed that Adv Ngobeni did consider the written representation of the Plaintiffs in his absence.

[51] The evidence of both Mabapa and Manyuha is straightforward with no contradictions. They are both truthful and reliable witnesses whose versions I accept with no hesitation.

The Law

[52] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy –

Relyant Trading (Pty) Ltd v Shongwe & Another [2006] ZASCA 162 [2007] 1 All SA 375 (SCA) para 5.

To succeed with this claim, a claimant must allege and prove that:

- (a) the defendant set the law in motion (instigated or instituted the proceedings);
- (b) the defendant acted without reasonable and probable cause;
- (c) the defendant acted with malice (or *animo injuriandi*) and that
- (d) the prosecution failed.

These requirements were set out in **Minister of Justice and Constitutional Development & Others v Moleko [2008] ZASCA 43; [2008] 3 All SA 47 (SCA) para 8; 2009 (2) SACR 585 (SCA) and later restated in Rudolph & Others v Minister of Safety and Security & Another [2009] ZASCA 39; 2009 (5) SA 94 (SCA) para 16.**

[53] In **Prinsloo v Newman 1975 (1) SA 481 (AD)** it was held that the plaintiff has to prove that the defendant instituted the proceedings without reasonable and probable cause. The reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of the proceedings is

justified. It was further held that the concept involves both a subjective and objective elements.

The test of reasonable and probable cause, in so far as the subjective element and as well as the objective element is concerned, is not limited to the factual situation but extends to the other aspect, namely, whether the facts (known or suspected) constitute an offence in law.

In applying the test, each case must be considered on its merits.

See also **Minister of Justice and Constitutional Development & Others v Moleko**, supra, and **Relyant Trading (Pty) Ltd v Shongwe** supra.

- [54] The requirement for malicious prosecution that the prosecution be instituted “in the absence of reasonable and probable cause” was explained in **Beckenstater v Rottcher and Theunissen 1955 (1) SA 129 (A) at 136A – B** as follows:

“When it is alleged that the defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite him having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.”

See also **Minister of Safety and Security NO v Schubach (437/13) [2014] ZASCA 216.**

[55] In the light of the aforesaid authorities, it follows that the defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for a prosecution exists the conduct of the defendant instigating it is not wrongful.

[56] It is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those they believe to have committed offences, even if in so doing they are actuated by indirect and improper motive. The motive of defendant is not of any legal relevance.

See: **Beckenstater v Rottcher and Theunissen**, supra at 135D – E and **Relyant Trading (Pty) Ltd v Shongwe**, supra at para [14].

[57] Malice is not a separate element of the delict and means the intention to injure or *animus iniuriandi*. Although the expression "malice" is used, it means in the context of *actio iniuriarum*, *animo injuriandi*. Where relief is claimed by this *actio*, like in the present case, the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*) –

Relyant Trading, supra at para [5].

[58] In the present case, like in any claim based on malicious prosecution, the onus is on the Plaintiffs to prove and show that the Defendants set the law in motion without reasonable and probable cause and further that the Defendants were actuated by malice or had the intention to injure (*animus injuriadi*) them. I revert to the facts of this case in order to make this determination.

Application of the Law to the Facts

[59] The evidence of both Advocates Manyuha and Mabapa is acceptable in totality as being honest and truthful. Both State Advocates took reasonable steps to determine whether the Plaintiffs as suspects had a case to answer. They both considered the witnesses statements, post mortem reports and the warning statements of the Plaintiffs. Advocate Mabapa first took the decision to prosecute and thereafter referred the matter to Advocate Manyuha for a second opinion and confirmation. Both of them were convinced on reasonable grounds that the contents of the case docket disclosed an offence linked to the Plaintiffs. The written representation submitted by the Plaintiffs were considered by Advocate Mabapa who after such consideration was not persuaded that the Plaintiffs were innocent. In the absence of Adv Manyuha, another Senior State Advocate, Mr Ngobeni considered the representation and agreed with Advocate Mabapa that the Plaintiffs had a case to answer.

[60] The fact that the two main state witnesses, Ratau and Monyela contradicted themselves at the trial of the Plaintiffs and were ultimately found to have lied is immaterial. A trial Court is a different forum where the credibility of a witness is tested. The mechanism of cross-examination at a trial is used to test the credibility of a witness. This mechanism is not available to public prosecutors or members of the NPA when they study the case docket in order to decide to prosecute an accused person.

One could not have expected Advocates Manyuha and Mabapa to have interrogated and / or cross-examined the three witnesses in order to satisfy themselves that the witnesses were truthful.

[61] Regarding the contradictions between Ratau and Monyela, Advocate Mabapa gave a good explanation thereon and stated that such contradictions were not apparent in their written statements. The contradictions became apparent at cross-examination during the trial. There is therefore no way that as the Prosecutor he ought to have foreseen or foretold that these witnesses would contradict each other in Court. When taking the decision to prosecute he believed that there was a *prima facie* case against the Plaintiffs.

In my view, the two Sate Advocates believed on reasonable grounds that the contents of the case docket had sufficient facts which linked the Plaintiffs to the commission of an offence.

[62] In **Neethling, Potgieter and Visser: The Law of Delict 7th edition at p 366 – 367** it was said that:

“There is an absence of reasonable and probable cause for prosecution either (i) if there are, from an objective viewpoint, no reasonable grounds for the prosecution, or (ii) if, where such grounds are in fact present, the defendant does not, viewed subjectively, believe in the plaintiff’s guilt. The defendant will thus be acquitted if, on the one hand, there existed reasonable grounds for prosecution and, on the other hand, he also believes in the plaintiff’s guilt. The question of whether reasonable grounds exist may only be answered by reference to the facts of each particular case.”

Conclusion

[63] The summarised facts of this case as presented in the case docket before the prosecution ensued are that the deceased allegedly resisted arrest, minimum force was used to subdue him and was transported to the Police Station. En route to Police Station he lost consciousness and on arrival he was declared dead. Ratau, Monyela and Okoye stated that the Plaintiffs assaulted and smothered the deceased with a tube. The allegations and findings of assault and smothering are supported by the post mortem reports, in particular that of Dr Perumal. The conclusion arrived at by the latter as to the cause of death is that it is consistent with smothering.

I am of the view that on these given facts and viewed objectively, any reasonable Public Prosecutor would have decided to prosecute, as was done in the present case. The Plaintiffs' contention that the Prosecutor (NPA) acted without reasonable and probable cause is flawed. The element of malice or *animus injuriandi* can also not be established in this case. The Plaintiffs have failed to discharge the onus of proof in this regard.

Consequently, the Plaintiffs have failed to make out a case on a balance of probabilities for malicious prosecution against the Defendants and their claims are bound to fail.

ORDERS

[64] The following orders are made in respect of claim 1 (unlawful arrest and detention) and Claim 2 (malicious prosecution):

- 64.1. The Plaintiffs' claims for unlawful arrest and detention are dismissed with costs.
- 64.2. The First, Second Fourth Plaintiffs' claims for malicious prosecutions are dismissed with costs.
- 64.3. The costs awarded shall be payable jointly and severally the one paying the other to be absolved.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on : 3, 4, 6 & 18 February 2020

Judgment delivered on : 28 February 2020

For the 1st, 2nd & 3rd Plaintiffs : Adv. L A Nkoana

Instructed : S Rangoanasha Incorporated

For the 4th Plaintiff : Adv. JJ Hattingh SC

Instructed : TC Hitge Attorneys

c/o Bosman Attorneys

For the Defendants : Adv. TR Masevhe

Instructed : State Attorney