

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

Case No. 1883/2010

In the matter between:

PHINDILE RASMENI

Plaintiff

And

MINISTER OF SAFETY & SECURITY

1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTION

2nd Defendant

JUDGMENT

JOLWANA J

Introduction

[1] The plaintiff instituted action against the first and second defendants alleging unlawful arrest and detention, assault and malicious prosecution. In their plea the defendants denied engaging in any unlawful actions that culminated in plaintiff suffering any damages.

Plaintiff's case

[2] In his particulars of claim the plaintiff alleged that he was arrested by the police on 10 February 2006 at his home at Qokolweni Administrative Area, Mthatha without a warrant of arrest. He was subsequently detained at Ngangelizwe Police Station from the 10 February 2006 to the 14 February 2006. The arrest and detention and

prosecution related to the murder of one Mthobeni Mcengwa (the deceased) and the robbery of Bongani Ndesi.

[3] The plaintiff testified that in the morning on the 10 February 2006 between 9:00 and 10:00 he was at his home. Three detectives, Messrs Dlanaye, Tile and Zwakala arrested him. They did not tell him why they were arresting him, they only said there was something that they wanted to enquire from him. On arrival at Ngangelizwe Police Station he was locked in a police cell without being told the reason for his arrest and detention.

[4] He recalled that it was Mr Dlanaye who locked him in the police cells. Shortly thereafter Mr Tile arrived and handcuffed him. He was taken to an office at the back of the police station within the premises. He found Messrs Dlanaye and Zwakala in that office. He was asked why he had killed the deceased. When he denied any knowledge about the killing of the deceased the handcuffs were tightened and Mr Tile stepped on the tight handcuffs. Mr Dlanaye pulled a plastic bag over his face thus suffocating him by tightening it around his neck.

[5] When the plastic bag was taken off he cried loudly. He was then taken to another building down the street. The police continued questioning and torturing him until he admitted to some knowledge about the crimes. He was taken back to the holding cells where he was put in a small single cell with no carpet. There were light sponges in that cell but there were no blankets. The cell had a flushing toilet but it was dirty.

[6] The following morning Mr Tile took him from the cells to the office at the back of the police station where he again found Mr Dlanaye and Mr Zwakala there. Mr Dlanaye produced some papers and said he was teaching him how to make a confession because on Monday he would be taken to a Magistrate to make a confession. He was later taken back to the cell. In the afternoon Mr Zwakala took him to that office down the street outside the police station. He found Mr Zondelelo Vuke seated on a table with Mr Dlanaye. He already knew Mr Vuke. He was taken to another office in the same building where he found Mr Lizo Ndzamela who was also already known to him. After some discussions with Mr Ndzamela who seemed to have some information about

his arrest and promised to pay him R30 000.00 for saying it was Sikholiwe who shot the deceased and for protecting his vehicle, he was taken back to the cells.

[7] On Monday he appeared at court where the case was postponed. Mr Dlanaye took him to an office within the court building. He found two male persons who introduced themselves as an interpreter and a magistrate respectively. He was told about his rights to legal representation. He told the magistrate that he wanted to speak to his legal representative. Mr Dlanaye was then called to take him away. Mr Dlanaye came and took him back to Ngangelizwe Police Station.

[8] Mr Dlanaye later took him to the building down the street where he found Messrs Zwakala and Tile. He was threatened with being killed and he apologized for not confessing to the magistrate. The following morning which was a Tuesday he was taken to an office in the Magistrates' Court building by Mr Dlanaye. They found a male person who introduced himself as a Magistrate together with a female person who introduced herself as an interpreter. It was on this occasion that he signed the confession after narrating the story that had been agreed upon with the police which he had practiced with the police.

[9] He was later fetched by Mr Dlanaye and he was not tortured again. On Monday the day of his first appearance in court with his co accused Sikholiwe Sutuku and Siyabonga Gcaza, they had been told that they would go to Court B where they could make formal bail applications. The case was then postponed to Wednesday for that purpose.

[10] Indeed on the 15 February 2006 he appeared in Court B. Nothing was said about bail and the matter was again postponed to another date. He did not tell court that he wanted to be released on bail. They were taken to Wellington Prison where he was detained for a period of about a month since his arrest. He was later released on bail of R500.00.

[11] He later appeared in the High Court on a charge of murder where he was discharged. He testified that he should never have been charged or prosecuted. The charges grieved him as his rights were unjustifiably violated for a crime he did not

commit. Even under cross-examination he maintained that he should never have been arrested or prosecuted as he did not commit any offence.

First defendant's case

[12] Captain Dlanaye was called to testify on behalf of the first defendant. He testified that the identity of the persons who had committed the offences he and his colleagues were investigating were not known. They planted informers to assist them. They received information that the plaintiff was involved in the offences. He came to the conclusion that they should go and search for the plaintiff. He, together with warrant officer Zwakala and warrant officer Notshokovu who has since passed away went to the home of the plaintiff. They found him at his home and told him that they were arresting him for the murder of the deceased Mthobeli Mcengwa. They informed him about his constitutional rights after which they asked him to come to Ngangelizwe Police Station with them. At the police station they informed him that he was going to be detained. They informed him of his rights before he was taken to the cells. He was given a copy of the notice of rights.

[13] For purposes of interrogation he was booked out of the cells and taken to an office in the police station. The plaintiff told them that he was present when the deceased was killed but it was Sikholiwe who actually shot the deceased. He denied that the plaintiff was assaulted or tortured in any way. The plaintiff signed a warning statement in which he implicated himself. He also voluntarily agreed to make a confession before a magistrate. He was taken to the magistrate and he made the confession at once. Having been arrested on the 10 February 2006 on Friday, confession was taken on Tuesday the day after he appeared in court. Both the arrest and detention were effected in accordance with the law.

[14] Under cross-examination he testified that the informers informed them that the plaintiff and Phindile Gcaza were involved in the murder. They also told them that the assailants were travelling in a white cressida. He did not recall when exactly this information was given to them by the informers. They did not get any additional information from the informers because the informers were very close to the suspects.

[15] They also got some information from Mr Bongani Ndesi who was a complainant in the case. He confirmed that the initial investigating officer was Mr Notshokovu before the docket was given to him. He conceded that in his statement Mr Notshokovu does not say Bongani Ndesi said the plaintiff was involved in the commission of the offences and that Bongani Ndesi talks about two assailants who robbed them.

[16] He confirmed that he acted and arrested the plaintiff on the information from the informers exclusively. He testified that in his statement Mr Ndesi spoke of two assailants from a white vehicle. He got the information which led to the plaintiff's arrest not on the 9 or 10 February 2006 but before and he did not think of applying for a warrant of arrest because the suspects were well known. He knew that there is an option of arresting with or without a warrant of arrest. The vehicle said to have been used in the commission of the offences belonged to Mr Lizo Ndzamela. They did not arrest him because he told them that he had lent the vehicle to Mr Sikholiwe Sotuku. They searched for the car but could not find it. He could not explain why they could not get the registration number of the vehicle from its owner, Mr Lizo Ndzamela.

Second defendant's case

[17] The second defendant's witness Mrs Van Wyk testified in respect of the claim for malicious prosecution. She testified that she received the docket containing a statement by a complainant, Bongani Ndesi. In his statement Mr Ndesi stated that he was robbed by two occupants of a vehicle. There was also a statement by the plaintiff in which he said he was one of the occupants of the said vehicle. On the basis of these two statements he concluded that there was a *prima facie* case to be answered by the plaintiff. On this basis prosecution was justified and there was no malice.

[18] Under cross-examination she testified that in the charges preferred against the plaintiff common purpose was not included. But in his statement the plaintiff placed himself at the crime scene even though there was no unequivocal admission to murder. She denied that it was reckless to prosecute the plaintiff. She decided to prosecute because the docket had a statement by Bongani Ndesi in which he said he was robbed by occupants of the vehicle. There was a deceased person who had been killed in the

incident and there was the plaintiff's statement in which he said he was one of the occupants of the vehicle. In the circumstances she denied that the decision to prosecute was not legally warranted. The defendants closed their cases.

The arrest

[19] It is trite law that for arrest and detention it is sufficient for the plaintiff to allege that he was arrested and detained. Thereafter, the onus shifts to the defendant who must justify the arrest and subsequent detention. In this case the first defendant filed a plea in which the arrest and detention were admitted but pleaded that they were lawful. It was argued on behalf of the first defendant that the police were entitled to arrest the plaintiff in terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 as they reasonably suspected him of having committed an offence referred to in Schedule 1, the murder of Mthobeli Mcengwa.

[20] It was submitted that in the main the justification for the arrest of the plaintiff was given by Inspector Zwakala, an investigating officer who testified in the criminal case. It was submitted that his evidence in the criminal trial was that he received information from informers on 9 February 2006 that one of the perpetrators of the offences was the plaintiff. This was also confirmed by a co accused Siyabonga Gcaza before the plaintiff was arrested.

[21] The difficulty with the first defendant's reliance on the evidence given during criminal proceedings in civil proceedings is that in this case the defendant did not call those two witnesses, Inspector Zwakala and the co accused Siyabonga Gcaza to come and testify. It was not explained why they were not called nor was it suggested that the evidence of Inspector Zwakala in the criminal record which was admitted into the civil proceedings was the best evidence available from him. I find neither comfort nor justification in placing reliance on the evidence given by a witness in criminal proceedings when there is no explanation why that witness has not been called to testify in the civil case.

[22] In my view a court should not easily rely on the record of criminal proceedings to determine an issue in civil proceedings. The plaintiff is entitled to cross examine the

witness in the civil proceedings and test his credibility. At the same time the accused is entitled to maintain his silence in criminal proceedings. This, in my view, immediately exposes the limitations of the evidence given in the criminal trial when it is sought to be used in civil proceedings. For this reason I do not understand the submission that Inspector Zwakala's evidence during the criminal trial was not refuted. No authority was given for the proposition that a party in civil proceeding does not have to call a witness who had testified during a criminal trial and that his evidence as contained in the criminal trial record suffices. I am equally not aware of any authority for this submission.

[23] The only witness called to testify for the first defendant was Mr Dlanaye who was part of the team of detectives that arrested the plaintiff. Simply put, his evidence amounted to no more than that he had information from informers that the plaintiff was involved in the offences. On the basis of that information they proceeded to arrest the plaintiff without a warrant of arrest. He did not give evidence on how that information was verified and found to be reliable. He did not explain why, being aware of who was the owner of the vehicle driven by the assailants, he did not establish its whereabouts. He did not explain why he did not ask the owner of the vehicle for the registration number of the vehicle so that he could have access to it for further investigation. He did not explain the reason for the haste with which the plaintiff had to be arrested before the information from the informers could be verified.

[24] This is important because section 40 (1) (b) of the Criminal Procedure Act requires the police to act on reasonable suspicion that the plaintiff had committed an offence referred to in Schedule 1. Furthermore section 13 of the South African Police Service Act 68 of 1995 places certain constraints on police officers. Section 13 reads as follows:

- “(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.
- (2) ...
- (3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.”

[25] It seems to me that the police acted not only in total disregard of the Constitution but also ignored completely their own legislation to which they must be held to account. In *Lapane v Minister of Police* 2015 (2) SACR 138 at 143 para 28 the court stated that:

“What is meant by s13 of the SAPS Act is that all police officers must act in accordance with the requirements of the Constitution and in doing so must have regard to particularly, the fundamental rights of every person they are dealing with in the course of their duties.”

[26] Clearly police acted in total disregard of the rights of the plaintiff and appear to have regarded those rights as an unnecessary irritant worthy of being ignored. It goes without saying that the arrest was unlawful as no attempt was made prior to the arrest of the plaintiff to guard against the possibility of a misinformed informer or a rumour mongering informer. This possibility could only be excluded through informers’ information being subjected to some form of objective verification so as to conclude that it was reliable. Only through this process could police have acted reasonably, even if it were to turn out that their conclusions and therefore their decision to arrest the plaintiff were wrong. In the circumstances the arrest of the plaintiff could not have been lawful. It seems to me that plaintiff was arrested, not on reasonable suspicion but on suspicion of being involved in the commission of the crimes based on the informer’s information.

Detention

[27] Having found the arrest to be unlawful it should ordinarily follow that the subsequent detention is unlawful¹. For the sake of emphasis, I must point out that the onus to justify the lawfulness of the detention is that of the defendants. It has been conceded on behalf of the defendants that the murder for which the plaintiff was arrested is the one envisaged in Schedule and therefore the plaintiff would not have been required to discharge the onus placed on a bail applicant by section 60 (11) (b) of the Criminal Procedure Act.

[28] Section 60 (11) reads as follows:

“60 (11) notwithstanding any provisions of this Act, where an accused is charged with an offence referred to –

¹ In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 at 600, para 12 it was held that “If the arrest of the respondent were unlawful it would follow that his subsequent detention was also unlawful.”

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release;
- (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his release.

[29] This concession is well made as neither section 60 (11) (a) or (b) are applicable to the murder charge which is a Schedule 1 offence in this case. However, it was submitted that the other charge for which the plaintiff was arrested was robbery with aggravating circumstances in which a firearm was used. This is a Schedule 6 offence and therefore the provisions of section 60 (11) (a) are applicable. Therefore the onus on the granting of bail was on the plaintiff to adduce evidence which satisfies the court that exceptional circumstances existed which in the interests of justice permitted his release.

[30] The case of the first defendant is that it was up to the accused to *“pilot his bail application and discharge the onus of proving the existence of exception circumstances before he could be granted bail.”*² For a better and full understanding of the defendants’ case in this regard I quote the full submission as contained in defendants’ further supplementary heads of argument:

“6. That being the position; when on the date of his first appearance before court the plaintiff was remanded to the bail court where he was to appear two (2) days later, the onus was on him to pilot his bail application and discharge the onus of proving the existence of exceptional circumstances before he could be granted bail. The duty to bring the bail application and lead evidence first in support thereof lied foursquare on him.

7.

7.1 His evidence to the effect that on that date he did not make any bail application puts paid to any suggestion that there could be any fault on the part of the police or the state for him being remanded in custody on that date. Having been brought to court by the police on that date specifically with the objective of affording him a chance to bring his bail application, the decision whether to actually bring the bail application or not rested exclusively with him. He could not be forced to do so.

7.2 Having decided not to bring the bail application the plaintiff’s remand in custody by the court was in full accordance with the provisions of Section 60 (11) (a), which required him to be detained in custody unless and until he had made a bail

² Paragraph 6 page 3 of defendant’s further supplementary heads of arguments

application and discharged the onus on him to show the existence of the required exceptional circumstances with regard to the robbery charge.”

[31] The difficulty with this submission is that it does not account for the detention from the 10 February 2006, the day of the plaintiff’s arrest to Monday the 13 February 2006, the day of the plaintiff’s first appearance in court. It merely focuses on the plaintiff having allegedly failed to apply to be released on bail two days after the date of the first appearance.

[32] This, in my view, is not in accord with what I consider to be the trite legal position that the police must justify the detention in the first place even before the first court appearance. It cannot be that because a person has been charged with an offence reflected in Schedule 6, that person must necessarily be detained as a matter of statutory law, namely section 60 (11) of the Criminal Procedure Act.

[33] More is required of the police in making a decision that detention is required in the first place and indeed further detention is justifiable. That this is a requirement is a matter of constitutional law. In this regard the legal position was fully explained by Tshiki J in *Botha v Minister of Safety and Security and Others; January v Minister of Safety and Security and Others* 2012 (1) SACR 305 at 316 para 29 – 31 where the learned judge said:

“[29] It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of s 12 (1) of the Constitution, which provisions are described in para [11] of this judgment. These provisions, therefore, place an obligation on police officials, who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish, before detaining the person, the justification and lawfulness of such arrest and detention.

[30] This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case, and the law casts an obligation on the police official to do so. In *Mvu v Minister of Safety and Security and Another* Willis J held as follows:

'It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all.'

It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention, includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is any legal justification for the further detention of the person. The above view was echoed by Froneman J in *Tobani v Minister of Correctional Services NO* at 323b-e as follows:

'What I have said thus far about the issue of the unlawfulness of plaintiffs' detention is based squarely on the principle of constitutional legality. This is a clear case of a public power being exercised by part of the executive administration of the State, namely, in this case, the defendant and the servants in the Department of Correctional Services. In these circumstances I think it is correct to approach the matter at the outset from the viewpoint of legality. That is what I understand is called for in terms of the Constitutional Court's decision in the *Pharmaceutical Manufacturers'* case, above, and it appears to me that the pre-constitutional common-law would have made the same demand, albeit perhaps couched in different terms.

In the *Pharmaceutical Manufacturers'* case Chaskalson P, writing for the full court, emphasized that the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law (at paragraph [20]).'

[31] It follows from what I have stated above that our constitutional provisions referred to above make it obligatory for police officers to first establish the legal justification for the further detention of a person so as to relay such information to the public prosecutor and the latter would then, after applying his mind to the matter, be in an informed position whether or not to apply for the further detention of the person in custody. In my view, and in practice, it is the police official investigating the case who should be in a position to, and must, inform the prosecutor about the strength or otherwise of his or her case. Failure by the police officer to apply his mind in the manner suggested supra, could result in the further detention being contrary to the constitutional provisions and liable to be declared to be unlawful.

[34] It is common cause that the plaintiff was arrested at his home in Qokolweni on the 10 February 2006 in the morning. He was thereafter interrogated and detained and appeared in court on the 13 February 2006. No evidence on the basis of which it was sought to justify that initial detention. The further detention is now sought to be justified on the provisions of section 60 (11) (a) of the Criminal Procedure Act. In simple terms the case of the defendants is that a citizen who is arrested for a Schedule 6 offence faces automatic detention. The legal basis for this proposition has not been given nor is

the justification being made on the facts. This section is clearly being used to abdicate constitutional accountability.

[35] As indicated in the authorities cited above, there has to be same rational basis for interference with constitutional rights. I simply do not think that the defendant can avoid constitutional responsibility by using legislation arbitrarily. Doing so would be like making the Constitution accountable to a statutory provision when in fact a statute obtains its validity and therefore its power from the Constitution³. In my view detaining people arbitrarily is invalid and has no legal justification. There can be no justification without fact based evidence. The defendants cannot just refer to the provisions of section 60 (11) (a) in a vacuum especially where the onus rests on them as in this case, to justify the detention at all stages of the criminal trial.

Malicious prosecution

[36] The evidence of the plaintiff is that he should never have been prosecuted as he never committed any offence. It is common cause that the plaintiff was charged with murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. The witness for the second defendant, Ms Van Wyk testified that when she received the docket it contained two statements on the basis of which she decided that prosecution was justified and on reading those statements decided to go ahead and prosecute the plaintiff.

[37] One of those statements was that of a complainant, Bongani Ndesi in which he said he was robbed by two occupants of a vehicle. The second statement was that of the plaintiff in which he said he was one of the occupants of the said vehicle. Based on those two statements she believed that there was a *prima facie* case against the plaintiff. Prosecution was justified and there was no malice for prosecuting the plaintiff, so the evidence went.

³ Section 2 of the Constitution provides that: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[38] The starting point must be the two statements referred to above. The statement of Bongani Ndesi, the complaint was admitted into the record as exhibit "E". In that statement he says in part:

- "3. On Saturday 24 December 2005 at about 21:15 Mthobeli Mcengwa and myself were walking on the gravel road from Qokolweni Mission to Mahodini Store. As we were walking up the gravel road, a white sedan car approached from the opposite direction and suddenly stopped next to us. The occupants of the vehicle alighted and came straight to us. They instructed us to lie down and so we did. The suspects robbed me of my cellphone Nokia 5210 blue in colour, cell no. 0733327756, R6.00, khakhi grasshoper shoes.
4. As we were lying down the suspects fired two shots as they were both in possession of pistols. The deceased was busy trying to loosen the shoe laces so as to hand over his shoes to the suspects. One of the suspects fired one shot on the deceased's head and killed him. Thereafter the suspects were speaking Xhosa fluently. Hence it was dark on the scene, I could not even recognize the suspects. I cannot even identify them. The cellphone of the deceased Mthobeli Mcengwa was not taken. I could not even identify the registration plates and type of the vehicle."

[39] The statement of the plaintiff is contained in exhibit "A", captioned record of confession. The statement of the plaintiff reads as follows:

"On the 24 December 2005 I arrived at a certain tarven called Mahodini. There I found my friends Sikholiwe and Siyabonga. They told me that they were waiting for Lizo so that he could borrow them the vehicle. Indeed Lizo arrived and at that time we were consuming liquor and he took us to his own tavern. On our arrival at the tarven of Lizo Sikholiwe asked Lizo to borrow him the vehicle. Lizo asked Sikholiwe where he was taking the vehicle to & he replied that he wanted to go home to change his attire. Lizo gave us the vehicle and we turned to another tarven where we bought two beers & we proceeded taking the direction of Qokolweni.

Our aim to go to Qokolweni was to look for girls. We did not reach Qokolweni we turned in a junction taking a direction to the Great Place. Sikholiwe was complaining about the fuel saying that he was running out of the fuel. On the way back we met two young men. Another those young men there was the deceased by the name Mthobeli. Siyabonga told Sikholiwe that here is a young man who is in love with my girlfriend who is the mother of my child. We called the deceased to come next to the vehicle. When he was close to the vehicle we opened the doors of the vehicle. Then Sikholiwe asked from the deceased what he was wearing and the deceased responded that he was wearing a pair of shoes.

Sikholiwe further told the deceased to take off his shoes. The deceased only took off one shoe but while I was still looking at that I heard a gun shot. I noticed that the person who was shooting was Sikholiwe and he was shooting at the deceased. I did not notice exactly where he was shot at his body. Then I become shocked and I entered the vehicle as I was drunk. When I was boarding the vehicle I noticed that the other young man who was going with the deceased was running away. It was during night time. We drove the Cressida at a high speed to the tarven where we were I was shocked and I also noticed that Siyabonga was also shocked. We wanted to alight at the tarven. We did not alight at Mahodini we proceeded to Lizo's shebeen to give him the vehicle.

We arrived at Lizo's place and Lizo came out of his house and we were inside his vehicle. Lizo asked Sikholiwe why he was still wearing the same attire as he had told him that he wanted to change his clothing. He told him that he decided not to change his clothes. From there Siyabonga left for Mahodini and we i.e. I and Sikholiwe followed. I then entered Mahodini tarven and Sikholiwe went home to sleep. I remained at the tarven until the following morning. That is all."

[40] Whether or not the decision to prosecute based on these two statements without further investigation was the correct decision is irrelevant. The question is whether based on these two statements on which Ms Van Wyk decided to prosecute the plaintiff, she was malicious in doing so as was suggested by the plaintiff.

[41] The legal position on malicious prosecution was restated by the Supreme Court of Appeal in *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 SCA at 50 where the requirements for malicious prosecution were stated as follows:

"[8] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

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

[42] All four requirements must exist for the claim on malicious prosecution to succeed. In this case the first and the last requirements are not in dispute and are in fact common cause. There is therefore no point in dealing with the facts relating to these two requirements.

[43] Was there absence of reasonable and probable cause? At paragraph 20 of the *Moleko judgment*, Van Heerden JA defined reasonable and probable and cause as follows:

"[20] Reasonable and probable cause, in the context of a claim for malicious prosecution, means a honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore, involves both a subjective and an objective element."

[44] I can do no better than refer to the case of *Minister of Safety and Security NO v Schubach* (473/13) [2014] ZASCA 216 (1 December 2014) in which Zondi JA, writing a judgment of the full court had this to say:

"[14] This Court in *Beckenstrater v Rottcher and Theuniseen* 1955 (1) SA 129 (A) at 136A-B set out the test for 'absence of reasonable and probable cause' as follows:

'When it is alleged that a 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 his 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.'

[15] The test contains both a subjective and objective element which means that there must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances (J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2 ed, 2005) at 176)."

[45] The other requirement is malice or *animus injuriandi*. On this requirement the learned judge of appeal stated the law as follows in *Moleko*:

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

[46] When the decision to prosecute was made, it was not known whether the plaintiff's statement was to be admitted as evidence against the plaintiff in terms the Criminal Procedure Act. What was important is that the prosecutor had a statement purportedly in which the plaintiff mentioned the deceased by his name. He also placed himself at the scene of crime and identified the person who fired the fatal shot at the deceased. In addition to that the motive for the shooting is revealed in that the deceased is said to be in love with the girlfriend of the shooter.

[47] That the prosecution was unsuccessful does not necessary translate into lack of a reasonable and probable cause for prosecution. The fact that in the statement the plaintiff seems to be identifying somebody else as the killer may mean that the plaintiff did not unequivocally admit to killing the deceased. But still it does not mean that in subjectively believing as she did, the prosecutor was malicious. Whether or not the decision to prosecute in the circumstances was correct is irrelevant and the fact that prosecution did not succeed is of no consequence to the decision that was taken at the beginning of prosecution.

[48] It may very well be that with the benefit of hindsight further investigation would have been a wise thing to do instead of going ahead with prosecution. In that sense it could be that the decision to prosecute was negligently made at that stage. Still as the Supreme Court of appeal said in *Moleko*, negligence, even gross negligence does not translate to malice. The plaintiff cannot, in my view, succeed on this head of damages. On the evidence the case for malicious prosecution has not been made.

[49] The last claim by the plaintiff relates to his alleged assault by the police who arrested and interrogated him. The attorney for the defendant, Mr Mgxaji advised court that he was no longer proceeding with the claim for unlawful assault. He advised court that there mere say so of the plaintiff is not enough and on this basis this claim of damages based on assault was being abandoned. This decision was correctly made as in any event, the onus to prove the alleged assault rested squarely and only with the plaintiff.

[50] This brings me to the quantum of compensation for unlawful of arrest and detention in respect of which the plaintiff has been successful. The plaintiff testified that he was detained for a period of about a month after which he was released on bail of R500.00. He did not produce any bail receipt or call any other witness to corroborate his evidence on the period of detention. In this regard I was urged to award damages of a period of 30 days for which period the plaintiff claimed to have been detained.

[51] There are a number of problems with this submission but I will only deal with two difficulties. The first one is the amended particulars of claim of the plaintiff. At paragraph 6 thereof the following allegation is made:

“6. Subsequent to his arrest the aforesaid plaintiff was detained at Ngangelizwe Police Cells from the 10th February 2006 to 14 February 2006.”

[52] It is noteworthy that even in the original particulars of claim prior to the amendment, the same allegation was made in exactly the same terms.

[53] In addition to that Mr Mgxaji made an opening address at the commencement of the trial as follows:

“M’Lord, by way of an opening statement the plaintiff, Phindile Rasmeni, in this matter instituted action proceedings based on unlawful arrest, detention and assault as claim A whose genesis was murder allegation that had occurred on the 24th December 2005. And the plaintiff was arrested by the first defendant’s members on the 10 February 2006 without a warrant of arrest and detained until the 14th February 2006, which arrest and detention the plaintiff will lead evidence to demonstrate that it was unlawful and during which arrest and detention the plaintiff will lead evidence of an assault on him as having been unlawful and wrongful.”

[54] This is the case that the defendants pleaded to and came to answer. No legal basis was laid for the court to find that the plaintiff was in fact detained for about a month when that is not the case the defendant was called upon to answer. The particulars of claim were not amended in this regard nor was any evidence led beyond the mere *ipse dixit* of the plaintiff. In the result the first defendant is liable to the plaintiff for unlawful arrest and detention from the 10 February 2006 to the 14 February 2006.

[55] In the circumstances the plaintiff succeeds in his claim in respect of unlawful arrest and detention against the first defendant from the 10 February 2006 to the 14 February 2006. As indicated above no role was played by the second defendant which resulted in the plaintiff’s arrest on the 10 February 2006 and his detention until the 13 February 2006. There is also no evidence of any role having been played by the second defendant which resulted in plaintiff’s further detention from the 13 to the 14 February 2006.

Costs

[56] I was urged on behalf of the plaintiff to find that this case never required the services of senior counsel. Even worse it never needed that senior counsel should be assisted by junior counsel. Therefore, so the submission went, the costs consequent upon the employment of two counsel should not be allowed. I agree. There was nothing complicated about this case. There was no justification for the employment of two counsel. This is worse that the law on unlawful arrest and detention, assault and malicious prosecution is trite and there is nothing novel or complicated about it as it has been stated and restated a number of times before by our courts. There was also nothing peculiar or complicated about the facts of this case as would justify the employment of two counsel.

[57] In the result the following order will issue:

1. The first defendant is ordered to pay to the plaintiff an amount of R125 000.00 as and for damages in respect of unlawful arrest and detention.
2. The first defendant is ordered to pay interest on the amount of R125 000.00 to be calculated at the prescribed rate of interest from a date 14 days after the date of judgment to date of payment.
3. The first defendant is ordered to pay plaintiff's costs of suit together with interest thereon, such interest to be calculated at the prescribed rate of interest from a date 14 days after *allocatur* to date of payment.
4. The plaintiff's claim in respect of malicious prosecution against the second defendant is dismissed with costs, save that the costs of one counsel only shall be allowed on taxation.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Attorney for the Plaintiff: SL MGXAJI

Instructed by: MGXAJI & CO. INCOPORATED

MTHATHA

Counsel for the Defendant: PHS ZILWA WITH ND NGADLELA

Instructed by: STATE ATTORNEY

MTHATHA

Heard on: 21 September 2018

Delivered on: 30 October 2018