

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1904/2004

In the case between:

SEKHOTO & OTHERS

Plaintiffs

and

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT AND OTHERS Defendants

HEARD ON: 17 FEBRUARY 2006

JUDGEMENT: RAMPAL, J

DELIVERED ON: 13 APRIL 2006

- [1] On Friday the 26th July 2002 murder and armed robbery were committed on the premises of Royal Hotel at Reitz. Following the incident a certain Buti Fusi Mofokeng was arrested as a suspect at Reitz on Tuesday the 13th August 2002. On the same day the 1st plaintiff was also arrested as a suspect in connection with the same incident.

[2] Three days later, on Friday the 16th August 2002, the police also arrested the 2nd plaintiff and the 3rd plaintiff as suspects in connection with the same crimes.

[3] The said Mofokeng and the three plaintiffs were charged together. The four accused appeared in court at Reitz on the 23rd Augusts 2002. Their case was provisionally remanded to the 29th August 2002 and then to the 3rd September 2002 for a formal bail application. Their application for bail was opposed by the state. After hearing evidence, the Bethlehem Regional Court refused their bail applications. They were then arraigned to appear in the high court on four charges namely:- murder, robbery with aggravating circumstances, unlawful possession of a fire arm and unlawful possession of ammunition.

[4] On Monday the 19th January 2004 they appeared in the Bethlehem circuit court for trial. All the charges against accused number 2, accused number 3 and accused number 4 in other words the 1st plaintiff, the 2nd plaintiff and the 3rd plaintiff were withdrawn. The trial proceeded against Buti Fusi Mofokeng in other words accused number 1 alone. He was subsequently convicted of murder, robbery with aggravating circumstances and unlawful possession of a firearm. He was sentenced to life imprisonment in respect of murder, fifteen years imprisonment in respect of the armed robbery and again one year imprisonment in respect of unlawful possession of a firearm.

- [5] This civil action was initiated on the 18th June 2004. The 1st plaintiff, a postman, the 2nd plaintiff, a businessman and the 3rd plaintiff a teacher are now suing the defendants for the combined sum of R2 352 000,00 (R784 00,00 each). There are five defendants. They are being sued jointly and separately – the one paying the others to be absolved.
- [6] In their composite summons the plaintiffs averred that they were arrested and detained without reasonable or probable cause. Their complaint is more fully set out in paragraphs 12, 13, 15, 17, 18 and 21 of the particulars of claim – vide page 9 – 13 of the record. These are the parameters of the plaintiffs' cause of action.
- [7] In their composite plea the defendants confessed the arrest and detention of the plaintiffs but pleaded that such arrest and detention were lawful – vide page 19 – 28 of the record.
- [8] The cause of action in respect of unlawful arrest and detention originates from the *actio iniuriarum*. Generally speaking, in the *action iniuriarum* the plaintiff must prove the following essential elements: That the defendant has committed some act; That the act complained of was wrongful; That the plaintiff has suffered loss as a result of

such wrongful act; That the resulting harm was not too remote from the wrongful act; and that the responsibility for the plaintiffs' loss was imputable to the defendants' fault in the form of *dolus* or *culpa* (vide **LEE & HOMORE: THE SOUTH AFRICAN LAW OF OBLIGATIONS**, 2ND Edition, paragraph 539 on page 596).

[9] There are certain peculiar features that impact on the requirements of the *action iniuriarum* in the context of the arrest and detention. Two such special features relate to wrongfulness and to intent. I briefly deal with these special features below.

[10] As regards wrongfulness, it has to be pointed out that the arrest of an individual is *prima facie* a wrongful and an unlawful act. It deprives an individual concerned of his or her civil liberty. Precisely the same can be said about the detention. It is, therefore, not really necessary for the plaintiff to allege in the summons and to prove at the trial the wrongfulness or unlawfulness of the arrest or the detention. It is for the defendant, who repudiates the liability imputed to him or her, to plead and to prove the lawfulness of the arrest and detention.

(**LOMBO v AFRICAN NATIONAL CONGRESS** 2002 (5) SA 668 SCA at paragraph 32; **MINISTER VAN WET EN ORDE v MATSHOBA** 1990 (1) SA 280 (AD) and **STAMBOLIE v**

COMMISSIONER OF POLICE 1990 (2) SA 369 ZSC.)

[11] Thus where the police have arrested and detained a person, once the arrest and detention are admitted, as in the instant case, the onus of proving the lawfulness of such restrictive police actions rests on the state as the defendant. To discharge such onus the defendant has to show by means of evidence that there was reasonable and probable cause which prompted the arrest and detention.

(**MAHAGA v MINISTER OF SAFETY AND SECURITY** 2001 (2) ALL SA 534 (Tk) and **MANQALAZA v MEC SAFETY AND SECURITY ECP** 2001 (3) ALL SA 255 (Tk).)

[12] Where the police have effected an arrest pursuant to a valid warrant of arrest, such an arrest is *prima facie* lawful. The onus of proving the wrongfulness of an arrest in such a situation rests upon the plaintiff. In *casu* the situation was different. No warrant authorising the arrest of any of the plaintiff was first sought and obtained.

“The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty.”

Per Van Dijkhorst J in **DUNCAN v MINISTER OF LAW**

AND ORDER 1984 (3) SA 460 (TPD) at 466 D – E.

1984 (3) SA p460.

- [13] An arrest without a warrant is lawful, provided that at the time of the arrest, the arresting police officer had a reasonable belief for suspecting that the plaintiff had committed an offence specified in schedule 1, Criminal Procedure Act No. 51/1977. Among others schedule one offences include murder and robbery. See also section 40, 42, and 49, Act No. 51/1977. Here the onus rests on the defendant to prove the lawfulness of the arrest without a warrant. The defendant has to show not only that the arresting police officer suspected the plaintiff of having committed an offence, but that the officer reasonably suspected the plaintiff of having committed a schedule 1 offence. (**MHAGA v MINISTER OF SAFETY & SECURITY** 2001 (2) ALL SA 534 (Tk) at 538 d – g per Zilwa AJ.)
- [14] As regards *animus iniuriandi*, the plaintiff does not have to allege and prove that in arresting and detaining the plaintiff the defendant acted *cum animo iniuriandi*. The mere intention to arrest or detain suffices. An awareness or appreciation of the unlawfulness of such act is not an essential element. This is another special feature of the *actio iniuriarum*.

(**MINISTER OF JUSTICE v HOFMEYER** 1993 (3) SA 131
AD at 154 – 157.)

[15] Seeing that the defendants admitted the arrest and the detention of the plaintiffs by the government agents of the 5th defendant, Mr. Cassim, counsel for the defendants, submitted that the defendants had to present their case first. Mr. Greyling, counsel for the plaintiffs, conceded. Having regarded to the pleadings it appeared to me too that indeed the defendants had to begin adducing evidence. It must be borne in mind that the defendants had put up the defence that the arresting police officers arrested and detained the plaintiff because they reasonably suspected that the plaintiff had committed at least two offences specified in schedule 1. Therefore they pleaded, on the strength of this that there existed a reasonably an probable cause for the arrest and detention of all the plaintiffs.

[16] Ndamini Daniel Moshoaduba was the first of the two witnesses called by the defendants. He testified that he was an inspector in the South African Police Service attached to the serious and violent crime unit stationed at Bethlehem. He and his colleague Buurman visited the scene of the murder and robbery at Reitz. They arrived on the scene at 22h30 on the 26th July 2002. On 13th August

2002 an informer contacted him in connection with the Royal Hotel episode. Acting on the informer's tip-off, he and his colleague, Inspector Maseko travelled from Bethlehem to Reitz to question the suspect.

[17] They found the suspect Buti Fusi Mofokeng at 1300 Petsana. They told him who they were and what they were up to. When Mofokeng heard who they were and what the nature of their business was, he spontaneously blurted out that the 2nd plaintiff, Makhoba did the killing. He informed Mofokeng of his constitutional rights and then arrested him.

[18] Soon after Mofokeng's arrest, he, Inspector Moshoaduba hurriedly drove away from Reitz to Phuthaditjhaba to apprehend an illusive suspect in an unrelated case. He left his colleague, Inspector Maseko behind. He later gathered from Inspector Maseko that the 1st plaintiff, Sekhoto, was also arrested on the same day, the 13th August 2002, on the information furnished by the police informer and Mofokeng as well.

[19] The police investigation continued. On the 16th August 2002 three days after the apprehension of the 1st plaintiff, the 2nd plaintiff Makhoba and the 3rd plaintiff Lesalaisa

were also arrested. Mofokeng and the three plaintiffs were detained until the 19th January 2004, the first day of the trial. The charges against the plaintiffs were withdrawn. The trial against their co-accused, Mofokeng proceeded. He was convicted and sentenced. Mofokeng has since died in prison. During cross-examination he denied the suggestion that he gave false evidence, knowing it to be false, in the Bethlehem Regional Court so that the plaintiff could be detained further.

[20] Patrick Maseko was called as the second witness for the defendants. His testimony was substantially the same as that of Inspector Mashoaduba in a number of respects. He testified that he was an inspector by rank, attached to the serious and violent crime unit and stationed at Bethlehem Police Station. From Mofokeng's residence he proceeded to another place still at Petsana in Reitz where he arrested the 1st plaintiff.

[21] The 1st plaintiff volunteered to make a sworn statement. He confirmed that that he took the statement on the 21st August 2002 being the date that appears on the statement. He read the statement into the record – vide pages 61 – 64 of the exhibit C. In the statement the 1st plaintiff stated

how the plaintiffs participated in the Royal Hotel murder and armed robbery. During cross-examination he denied the suggestion that he took the statement two days after the arrest of the 1st plaintiff. He also denied that the 1st plaintiff was assaulted to make the statement. The defendant's case was then provisionally closed.

[22] Slabbert was called as the witness for the plaintiff. He testified that he practised law as an advocate. He was a member of the Durban Bar. He represented the plaintiffs during their bail application in the Bethlehem Regional Court. He testified that Moshoaduba opposed the bail application of the plaintiffs. In doing so, Moshoaduba gave false evidence. He falsely told the magistrate that the state had an independent eye witness who implicated the accused (in other words Mofokeng and the three plaintiffs) in the Royal Hotel episode. By doing so, Moshoaduba misled the magistrate. On the strength of such untruthful police testimony the magistrate refused to let the plaintiffs out on bail.

[23] The plaintiffs were committed for trial in the high court. The three plaintiffs together with their co-accused, Mofokeng were incarcerated further until the 19th January 2004 after the magistrate had refused their application to be released

on bail. They appeared in the Bethlehem Circuit Court on the 19th January 2004 for trial. They were still legally represented by Slabbert. According to him, on the 19th January 2004 the state did not have any eye witness. The representative of the 3rd respondent approached him with the proposal that all the charges against the first plaintiff would be dropped provided he became a state witness against his co-accused. Slabbert testified further that the 1st plaintiff rejected the proposal by the counsel for the state. Since the 1st plaintiff was not prepared to testify against his 3 co-accused, the charges against him, the 2nd plaintiff and the 3rd plaintiff were withdrawn. The case of the plaintiffs was then closed. The defendants also finally closed their case without any further evidence.

[24] I deal with the issue of unlawful arrest first. The allegations of the plaintiff relating to this issue were contained in paragraphs 9 – 13 of the summons. They alleged that they were accused of murder, arrested, detained and prosecuted by the defendants. To start with I shall confine myself to the facts pertaining to the arrest. I shall deal with the facts pertaining to the detention and prosecution later. The plaintiffs alleged that the police actions in effecting their arrest in August 2002 amounted to unlawful arrest.

- [25] The defendants' plea concerning the issue of unlawful arrest was contained in paragraphs 3 – 6. They denied the plaintiffs allegations to the extent that such allegations were inconsistent with theirs. They admitted the arrest of the plaintiff in August 2002 but denied the claim that such police actions amounted to unlawful arrest. They averred that the arrest was lawful because the police acted with reasonable and probable cause in effecting the arrest.
- [26] I heard evidence tendered on behalf of the defendants by two police officers, Moshoaduba and Maseko. According to their uncontested evidence, a hotelier was murdered and certain guests robbed at the Royal Hotel of Reitz in the evening of Friday the 26th July 2002. The police witness received information from an undercover agent that a certain Buti Fusi Mofokeng and his criminal gang were involved. The information led to the arrest of Mofokeng on 13th August 2002. His arrest led to the immediate arrest of Mkhulu John Sekhoto, the 1st plaintiff on the same day as a suspect in the said criminal activity. They were arrested without a warrant.
- [27] The 1st plaintiff implicated himself together with the 2nd

plaintiff and the 3rd plaintiff as having participated in the said criminal activity. Three days later, on the 16th August 2002 to be precise, the 2nd plaintiff, Mthikelei Windvoel Makhoba and the 3rd plaintiff Tshepo Robert Lesalaisa were also arrested in connection with the same criminal activity. They too were arrested without a warrant. Mofokeng and the three plaintiffs were arraigned in the Bethlehem Circuit Court of the Free State High Court on murder, armed robbery, unlawful possession of firearm and unlawful possession of ammunition. Mofokeng was found guilty and sentenced to life imprisonment. On 19th January 2004 all the charges against the 1st plaintiff, the 2nd plaintiff and the 3rd plaintiff were withdrawn. These then were the proven facts.

- [28] None of the plaintiffs testified. Their sole witness, Advocate Slabbert readily conceded that the arrest of every plaintiff was justified and lawful. On the facts, the concession was correctly made. In the heads of argument and during argument, Mr. Greyling advanced no submission in this regard. Therefore, this first issue of unlawful arrest is no more an issue. Paragraph 12 and 13 of the summons are not supported by any evidence before

me. In the light of all this, my finding is that the defendants have proven that the arrests of the plaintiffs were lawful. There was reasonable and probable cause to justify such arrests without warrants of arrest.

(MHAGA v MINISTER OF SAFETY AND SECURITY 2001

(2) ALL SA 534 (Tk) at 538 e – f per Zilwa AJ.) This leg of the action has to fail.

[29] The second issue is the unlawful detention. Here the factual matrix dictates that a distinction be made between two distinct phases, namely: The detention prior to the bail application and detention period subsequent to the bail application.

[30] I deal first with the detention period before the bail application. The issue is traversed in paragraph 10, 11, 12, 13 and 4 of the summons. The synopsis of the plaintiff's version is that the 1st plaintiff was detained from the 13th August 2002 and that the 2nd and 3rd plaintiffs were detained from the 16th Augusts 2002 by the employees of the 5th defendant. The plaintiffs aver that they were detained against their will and by threat of force in the police cells at Reitz and Bethlehem before they appeared in the Reitz District Court in connection with their bail application. But their bail application was not entertained by the Reitz District Court. Instead their case was transferred to the Bethlehem Regional Court. While they were in detention, the police accused them of murder

committed at Royal Hotel in Reitz on Friday the 26th July 2002. The accusation was devoid of any truth. It was made with the sinister intention of instigating further detention of the innocent plaintiffs. So they claimed.

[31] On the strength of such false accusation, the plaintiffs complained, they were further detained until the 3rd September 2002. They launched an application in terms of section 60 Act No. 51 of 1977 on that day to be released on bail. Their application was opposed by the prosecuting authority in other words the 2nd, the 3rd, and the 4th defendants. The bail proceedings, they alleged, came to an end on the 14th October 2002. Their bail application was unsuccessful. It is the case of the plaintiffs that their detention until then was unlawful.

[32] In their plea the defendants repudiated liability based on the unlawful detention of the plaintiff. They pleaded that the detention of the plaintiffs was for a good cause because: they were incriminated in the criminal activities; the 1st plaintiff was implicated by Mofokeng as a participative member of the criminal gang which robbed and killed at the Royal Hotel; the 1st plaintiff admitted that he actively participated in the criminal activity; the 1st plaintiff in turn implicated the 2nd and the 3rd plaintiffs in the criminal activity as active members of the criminal gang and the criminal activity in respect of which Mofokeng and the plaintiff stood accused and subsequently arraigned was

very grave.

- [33] The allegations by the plaintiffs to the effect that they were detained against their will and by threat of force, has to be understood to mean that their detention was unlawful; that they were falsely accused of murder by the police; that the false accusation was a sinister motive to prolong their unwarranted detention; that their bail application was punitively and deliberately transferred in order to delay their release from detention – all these remained factual allegations and nothing more. Virtually no attempt was made by any of the plaintiffs to tender evidentiary proof to beef up these allegations. Their decision not to give evidence as one would normally expect from the plaintiff created the negative impression that they did not believe in their own cause of action.
- [34] On the contrary the defendants' plea as regards the detention period prior to the bail application was backed up by the evidence of two witnesses. The testimonies of the two were in harmony with each other and substantially consistent with the defendants' case as pleaded.
- [35] In the premises and on the proven facts before me I have come to the conclusion that the detention of the plaintiffs by the police was indeed lawful. Their detention was, in my

view, for reasonable and probable cause. I dismiss the allegations of the plaintiffs as contained in the aforesaid paragraphs of their summons insofar as they are at variance with what was pleaded and proven by the defendants.

Mr. Cassim submitted that if the arrest was lawful the detention which flowed from such arrest was also justified and therefore lawful. In my view the submission was correct. It is a matter of logic. Therefore the submission relating to the unlawfulness of the initial detention of the plaintiffs as contended for by Mr. Greyling is flawed. It is not supported by any evidence.

[36] As regards the continued detentions of the plaintiffs, we have to turn to paragraphs 14, 15, 16, 17, 17 and 19 of the particulars of claim annexed to the summons. The plaintiffs averred that their bail application was heard in the Bethlehem Regional Court from the 3rd September 2002; that their application was opposed by the prosecuting authorities herein represented by the 2nd, the 3rd and 4th defendants; that such opposition was a malicious ploy designed by the defendants to prolong their detention; that the opposition was as such unnecessary since it was grounded on false evidence; that the defendants were prompted to act in this punitive manner by an ulterior motive to prolong the continued detention of the plaintiffs without a reasonable or probable cause; that on the 14th

October 2002 the regional court magistrate refused their application to be released on bail on the strength of the false evidence placed before him by the defendants and authorised their continued detention.

[37] In response to the plaintiffs claim the defendants admitted that the plaintiffs applied for their release on bail and that the defendants opposed such an application. But they averred that on behalf of the state the 2nd, the 3rd and 4th defendants were entitled to oppose the bail application particularly because of the seriousness of the allegations of criminal conduct imputed to the plaintiffs. They denied that the bail opposition was malicious and unnecessary as alleged. They reiterated that since the plaintiffs were implicated in the robbery and murder at the Royal Hotel the defendants' opposition to the release of the plaintiffs on bail was reasonable and justified. They specifically denied that they presented false evidence to the regional court magistrate which evidence led to the refusal of the plaintiffs bail applications.

[38] On behalf of the plaintiffs, Mr. Greyling contented that the defendants acting with malicious intent misled the regional court in order to secure the continued detention of the plaintiffs. Therefore he submitted that the continued

detention of the plaintiffs was unlawful – **GROENEWALD v MINISTER OF JUSTICE** 1973 (3) SA 877 AD.

[39] On behalf of the defendant, Mr Cassim contented that the defendants acted with no malice and that they placed no false evidence before the regional court in order to have the continued detention of the plaintiffs authorised. He submitted that the regional court weighed up all the facts and came to the conclusion that it was in the interest of the administration of justice that the continued detention of the plaintiffs be authorised.

[40] The plaintiffs' allegations concerning the bail proceedings were contained in paragraph 16 of the particulars of claim. The defendants' response thereto was contained in paragraph 9 of the defendants' plea. The defendants pertinently denied each and every allegation made by the plaintiffs in this regard. It must be borne in mind that the plaintiffs did not give evidence. At the hearing their sole witness was Advocate Slabbert, the man who represented them during the bail application. He did not cover all the important aspects of the bail proceedings. For instance there is no evidence before me as to when the plaintiffs applied for bail and when the regional magistrate refused to let them out on bail. The allegations made in the particulars of claim in this regard were not supported by any evidence.

[41] The cornerstone of the plaintiff's case was that the regional magistrate dismissed their bail application because he was falsely told that the police had a sworn statement by an eye-witness who implicated the plaintiffs. Mr. Greyling argued that the regional magistrate in his judgement during the bail application proceedings heavily relied on the evidence relating to an eye-witness – vide page 342 exhibit C.

Die Hof bevind dat die Staat met die eerste oogopslag oor 'n sterk saak beskik. Afgesien van sekere uitwysings wat gemaak is en ook 'n bewysstuk wat gevind is as gevolg van 'n mededeling van een van die beskuldigdes, is daar ook die getuienis van 'n ooggetuie wat die beskuldigdes positief sal verbind met die pleging van die misdryf. Die Hof moet op hierdie stadium aanvaar dat alles reëlmatig sal verloop en dat hierdie getuienis uiteindelik voor die Verhoorhof sal beland."

- [42] Besides Exhibit C there was no oral evidence in support of the plaintiffs' case on this aspect. The regional magistrate was not called. There is therefore no evidence whatsoever that the regional magistrate would have granted the bail application had there been no mention of an independent witness who would testify against the accused. The regional magistrate did not say so in his judgement. The contention of the plaintiffs in this connection was therefore speculative. He might well have granted bail. However he might still have refused bail. We can only speculate because he did not testify in these proceedings. Therefore we shall never know for certain the whole story as to why he exercises his discretion as he did. It is clear, however, from the quotation that the alleged eye-witness was but one of the factors and not the one and only factor which he took into account.

[43] It must be borne in mind that the 1st plaintiff had made a sworn statement implicating Mofokeng and the 2nd plaintiff in the murder and the 3rd plaintiff and himself in the robbery. Moshoaduba testified that because of this he genuinely believed that the 1st plaintiff would become a state witness in due course. The effect thereof was that the 1st plaintiff would testify against the other plaintiffs and Mofokeng. This testimony was reasonably plausible in the circumstances. The prospect might well have been diminished by the 1st plaintiff's testimony during the bail application but it remained a reasonable possibility nonetheless. Moshoaduba's explanation was that he got the impression that the 1st plaintiff deviated from his sworn statement merely to appease his co-accused and that he thought he would sing a different tune come the trial time.

[44] The foregoing optimism of Moshoaduba must be considered against the backdrop that the 1st plaintiff had intimated the willingness to make certain pointing out. Besides their co-accused Mofokeng had not only implicating the plaintiffs but had also placed himself on the scene as did the 1st plaintiff. Moreover, Mofokeng like the

1st plaintiff had also intimated the willingness to point certain things out. He did so. Looking back now, of course we now know that he was convicted in the end. Lastly, there was also a chance, however slim, of the police informer getting the courage of his convictions and giving evidence against one or more or all the plaintiffs at the trial.

[45] In the light of all the foregoing considerations I am of the opinion that the plaintiffs have not proven that the defendants were actuated by sheer malice in opposing the bail application. On the proven facts the continued detention as authorised by the magistrate was prompted by a reasonable and probable cause. Therefore such detention was justified and lawful. The continued detention of the plaintiffs from the moment the regional magistrate pronounced his verdict upon their bail application until the charges against them were dropped on the 19th January 2004 could not have been unlawful, as it was argued on behalf of the plaintiffs because such detention was authorised, as it were, by a court of law, whose order was never appealed against. The failure or omission of the plaintiffs to appeal taken together with the factors mentioned in paragraph 44 above militates against the contention that no reasonable and probable cause existed to justify such detention. It follows therefore the plaintiff must fail in respect of this leg of their claim as well.

[46] I turn now to the alleged issue of malicious prosecution of the plaintiffs by the defendants. The issue was alleged in various paragraphs of the particulars of claim such as paragraphs, 15.3, 15.4, 17, 18, 19, 20, 21, 22, 23 and 24. Annexure A to the summons showed that the 3rd defendant took a decision on the 29th May 2003 to have

the plaintiffs arraigned in the high court on murder and robbery charges. The decision was conveyed to the plaintiffs and their co-accused in the Bethlehem Regional Court seemingly on the 17th June 2003 and not 17th April 2003 as stated in the summons. On the 4th August 2003 the plaintiffs appeared in the high court for the first time. Their case was then remanded to the 19th January 2004 for trial in the Bethlehem Circuit Court. On that day all the charges against the plaintiffs were withdrawn on account of lack of evidence. However, their co-accused Mofokeng was convicted and sentenced to life imprisonment. These then are, broadly speaking, the undisputed facts according to the testimony of Slabbert for the plaintiffs and Moshoaduba and Maseko for the defendants.

- [47] The real bone of contention between the plaintiffs and the defendants was whether the criminal proceedings which the defendants instituted were actuated by an improper or ulterior motive which rendered them malicious prosecution or whether such criminal proceedings were instituted in good faith based on an honest and genuine belief founded on reasonable ground that the criminal prosecution of the plaintiffs as the suspects was justified. The concept of reasonable and probable cause in this delictual context connotes both an objective element and subjective element

of the inquiry. (**PRINSLOO v NEWMAN** 1975 (1) SA 481 AD and **VAN DER MERWE v STRYDOM** 1967 (3) SA 460 AD.)

- [48] The cause of action for a delictual claim of damages caused by malicious prosecution is the *actio iniuriarum*. I have said enough about the requirements of this delictual remedy earlier in this judgement. Suffice to say that in this delictual claim the plaintiff bears the onus in respect of all the elements of the delict – vide **GROENEWALD v MINISTER OF JUSTICE** 1973 (2) SA 480 (O).
- [49] The author Harms: *Amblers Precedents of Pleadings* (April 2003) page 238 – 239 submits that in addition to proving wilful intent, a plaintiff is well advised to allege and prove not only *aminus injuriandi* but also motive on the part of the defendant – **STAMBOLI v COMMISSIONER OF POLICE** 1990 (2) SA 369 (ZSC) and **THOMPSON v MINISTER OF POLICE** 1971 (1) SA 371 (ECD).
- [50] In the instant case the plaintiffs have led no evidence whatsoever to show that the defendants instituted the criminal proceedings in question without any reasonable and probable cause. Similarly the plaintiffs have led no tangible evidence to prove on a balance of probability that

the defendants acted maliciously in prosecuting them.

[51] The defendants' unchallenged evidence before me was narrated by Moshoaduba in the first instance. His version was that acting on a tip-off from an informer Mofokeng, was arrested. The informer claimed to have witnessed Mofokeng and the three plaintiffs flee from the scene of the crime. When Mofokeng was confronted by the police he spontaneously blurted out. He volunteered to let the police know that he was involved. He went on to implicate the 1st plaintiff. The spontaneous disclosures by Mofokeng verified the informer's information. Mofokeng later made a sworn statement and did the pointing out. He was convicted in the end. The 1st plaintiff initially wanted to point out but decided to not to do so because he was threatened by a certain member of the public on the scene of the crime.

[52] The further uncontested evidence of the defendants was narrated by Maseko in the second place. The version of this witness was that the 1st plaintiff made a voluntary statement to him. In the statement the 1st plaintiff implicated himself and three others including the 3rd plaintiff in the commission of the robbery. Apart from that

the 1st plaintiff also implicated the 2nd plaintiff together with Mofokeng in the commission of the murder.

[53] The crux of the plaintiffs case was that the defendants knew very well at the time they took a decision to prosecute the plaintiff on the 29th May 2003, to be precise, that no admissible evidence existed implicating the plaintiffs in the aforesaid crimes. Based on this, Mr. Greyling submitted that in the absence of admissible evidence, there was no reasonable and probable cause to justify the decision of the 3rd defendant to arraign the plaintiffs for trial. Counsel for the plaintiff urged me to infer from this and the eventual withdrawal of the charges against the plaintiffs that their prosecution was actuated by malice.

[54] In paragraph 48 I was at pains to show the uncontested highlights of the defendants' case. Objective assessment of those incriminating aspects would probably have led any reasonable person in the position of the third defendant to the conclusion that there existed a genuine and honest belief founded on reasonable grounds that criminal prosecution of the plaintiff was justified. The contention of counsel for the plaintiffs that no admissible evidence was available to justify the decision to prosecute is flawed. That has never been the test. The test, as we have seen, is

whether reasonable and probable cause exists to justify the criminal prosecution. In a case where all the suspects, as in the instant case, were implicated by one or more of their own kind, it can hardly be contended that no reasonable and probable cause existed to justify the criminal prosecution. That is the one reason. But there is another why the contention of the plaintiff is flawed. The arrest of the plaintiff was triggered off by the vital information provided by an informer. Such information was confirmed by at least two suspects including the 1st plaintiff.

[55] It is so that the statements of the two suspects, accused number 1 and accused number 2, in other words Mofokeng and Sekhoto, the 1st plaintiff, could not be used as evidence against the 2nd plaintiff and the 3rd plaintiff. But such statements constituted admissible evidence which could be used against Mofokeng and the 1st plaintiff themselves provided certain legal requirements were met. Therefore there was good cause for the criminal prosecution of at least those two gentlemen. As regards to the 2nd plaintiff and the 3rd plaintiff it cannot be said that their criminal prosecution was engendered by improper ulterior motives. They were implicated by their co-accused

rightly or wrongly. Whether such implicating evidence was admissible or inadmissible in a court of law was not the decisive consideration to the enquiry as to whether to prosecute or not to prosecute. The initially inadmissible evidence of their co-accused could subsequently become admissible. For instance the charges against the 1st plaintiff could be dropped at the commencement of the trial, the 1st plaintiff offered conditional indemnity and used as a state witness against the 2nd plaintiff and the 3rd plaintiff if he accepted the offer – section 204, Act No. 51 of 1977. According to Slabbert this is precisely what counsel for the state tried to do but failed on the 19 January 2004. In criminal cases it is not unusual for one accused to turn against his co-accused when the prospects of a long prison term looms on the horizon for him.

- [56] The third reason why the contention of the plaintiff is flawed is this: It was uncontested that the primary source of the vital information which led to the arrest of the plaintiffs and their co-accused was the unnamed police informer. Although the informer preferred to remain an undercover agent he remained a potential and possible state witness. Nothing but his fear precluded him from testifying at the trial. His information was available at all times. Between

the 29th May 2003 and 19th January 2004 both dates inclusive, in theory the informer could have overcome his fear. On the 19th January 2004 he could have taken his stand in the witness-box as a state witness. His evidence against all the four accused would have been perfectly admissible. About that potential evidence there was nothing inadmissible as on the 29th May 2003 when the decision to prosecute was taken. Therefore the edifice of the entire argument about the lack of admissible evidence collapses. I can find no evidence to support the plaintiffs' version that their criminal prosecution was actuated by malice or any other wrongdoing on the part of the defendants as alleged in the paragraphs of their summonses which I have previously specified.

[57] Instead of giving oral evidence in support of their allegations that the defendants had subjected them to malicious prosecution in addition to unlawful detention, the plaintiffs relied on the court record of their criminal proceedings in the Bethlehem Regional Court. Such record was handed in as exhibit C. Mr. Greyling argued that the record was admissible evidence but Mr. Cassim argued that it was not.

[58] The authors Zeffertt *et al*: **The South African Law of Evidence** (2003) p. 400 remarked as follows:

“A record of a witness’s evidence in earlier judicial proceedings is ordinarily hearsay at common law, but there are a number of exceptional cases in which such evidence can be tendered to prove the truth of the facts which the witness has stated. It is usual for the record of an inquest or criminal trial to be made an exhibit at a subsequent civil action, but at common law its evidential value is only to prove that the witnesses said what they are recorded to have said. Unless the parties consent, it cannot be used as evidence of the facts stated.”

The mere handing in of the criminal record in these civil proceedings by the plaintiffs without calling the witnesses concerned and without first seeking and obtaining the consent of the defendants, did not have the real evidential value of proving the truth of what was contained in the record. The minutes of the rule 37 conference showed that no attempt was made by the plaintiffs to obtain the admission of the criminal record by the defendants. Such criminal record contains opinion evidence of the regional court which according to our law is not admissible in these subsequent civil proceedings – *vide Zeffertt supra* p. 315 and the authorities cited there.

[59] In the light of all those considerations I am persuaded that the plaintiffs must fail in their delictual claim as a whole.

The objective facts support the contention of counsel for the defendants that at all times material to this dispute the defendants genuinely and honestly believed that they had a reasonable and probable cause to arrest, to detain and to prosecute. As I see things here such cause was justified and therefore lawful throughout the entire course of the criminal proceedings. The claim of the plaintiffs has to be dismissed.

[60] The only witness who testified for the plaintiffs was their advocate in the criminal case. His evidence was that the instructing attorney in the criminal case had only paid him R48 000 of the agreed fee of R72 000. He proffered evidence that he was suing the instructing attorney for the balance of R24 000. As regards this civil case, he stated that he had concluded contingency agreements with each of the plaintiffs. The essence of such agreement was that the payment of his fees for the work he had done in connection with this civil case including the preparatory work and the conduct of the proceedings was dependent upon the plaintiffs succeeding in their civil claim.

[61] Slabbert was certainly an interested party. He appeared to be the real third force in this case. On the probabilities the action was the brainchild of Slabbert. His driving motivation was obviously the expected windfall of money.

The decision of the plaintiffs not to give evidence was therefore not surprising. They were apparently a small fry in the pond. Their witness was seemingly a big fish. Slabbert's evidence was largely unhelpful and unsatisfactory. For instance, he failed to give a satisfactory answer as to why the plaintiffs did not sue for general damages seeing that it was suggested to the defendants' witnesses that the plaintiffs were severely assaulted. Moshoaduba and Maseko impressed me as witnesses. Their versions were satisfactory and trustworthy in all material respects.

[62] Notwithstanding the strange features of the plaintiffs' case, I am not persuaded that this is a case where a punitive order of cost should be made in favour of the defendants against the plaintiffs. I am inclined to suspect that powerful forces were at play behind the scenes which drove them to take this line of delictual action – a route which they would probably not have followed on their own free will. However, paying the costs of the defendants they must. The primary rule of costs must apply.

[63] Accordingly I make the following order:

63.1 The combined action is dismissed;

63.2 The plaintiffs are directed to pay the costs of the

action jointly and severally the one paying the others to be absolved;

63.3 The costs due to the defendants shall include the costs occasioned by the employment of two counsels.

M.H. RAMPAL, J

On behalf of the plaintiffs:	Adv. P. Greyling Instructed by: Van Wyk & Preller BLOEMFONTEIN
On behalf of the defendants:	Adv. N. Cassim SC with him Adv. B. S. Mene Instructed by: The State Attorney BLOEMFONTEIN

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