

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

Case No.: 1071/2003

In the matter between:

<u>H W STEENBERGEN</u>	First Plaintiff
<u>Z J CILLIERS</u>	Second Plaintiff
<u>J J A HILLS</u>	Third Plaintiff
<u>G J DE BEER</u>	Fourth Plaintiff

and

<u>THE MINISTER OF SAFETY & SECURITY</u>	Defendant
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AND Case No.: 1072/2003

In matter between:

<u>N F VAN ZIJL</u>	First Plaintiff
<u>J N MEYER</u>	Second Plaintiff
<u>M A MYBURGH</u>	Third Plaintiff

and

<u>THE MINISTER OF SAFETY & SECURITY</u>	Defendant
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<u>JUDGMENT:</u>	KRUGER, J
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<u>HEARD ON:</u>	6, 7, 8 & 9 JUNE 2006, 5 JULY 2006
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<u>DELIVERED ON:</u>	14 JULY 2006
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[1] Plaintiffs instituted claims for unlawful arrest and detention, malicious prosecution and defamation. Two actions were

consolidated, and a rule 33(4) order was made that liability first be decided. All the plaintiffs except De Beer were police officials of Frankfort Police Station. Superintendent Steenberg was the Station Commandor and Captain Van Zijl was head of the detectives.

[2] The following aspects are common cause between the parties:

2.1 Early in April 2002 all the Plaintiffs were arrested by employees of the Defendant, acting within the course and scope of their employment with the Defendant. The Defendant's vicarious liability is uncontested. All the arrests were made without warrants.

2.2 The Plaintiffs were arrested on the following dates:

2.2.1 Steenberg, Cilliers and De Beer on 3 April 2002;

2.2.2 Hills, Meyer and Myburgh on 5 April 2002; and

2.2.3 Van Zijl on 8 April 2002.

2.3 All of the Plaintiffs, except Cilliers, were released on bail on 9 April 2002. Cilliers' bail was opposed in the Magistrates' Court, but a bail appeal to the High

Court succeeded and he was ultimately also released on bail on 17 April 2002.

2.4 Steenbergen, Cilliers and De Beer, who were all arrested on 3 April 2002, appeared in Court the following day, namely on 4 April 2002, but they remained in custody. Eventually all the Plaintiffs appeared on 9 April 2002.

[3] As far as the claims relating to the unlawful arrest and detention are concerned, the Defendant pleads that both the arrest and detention were lawful and were made in terms of Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977 in that:

3.1 the arresting officer was a peace officer as defined in the Criminal Procedure Act, and

3.2 the plaintiffs were reasonably suspected of having committed the offence of murder.

In respect of the claims for malicious prosecution the defendant pleads that there were reasonable grounds for the institution of legal proceedings and that such proceedings were justified.

[4] As to the defamation claim plaintiffs alleged that employees of defendant published allegations that plaintiffs were

criminals and guilty of murder.

Plaintiffs alleged, apart from entries in court record books, that Provincial Police Commissioner Gaobepe made press statements to the following effect:

¶6.1.1.2.1 “We are here to rid the South African Police Service of people committing crime and abusing their power.”

Sien Aanhangsel “C” hiertoe.

6.1.1.2.2 “I am concerned about such behaviour in the South African Police Service. We will eventually rid the SAPS of officers who abuse their power and are involved in criminal activities.” Sien Aanhangsel “D” hiertoe.”

Defendant pleaded that its employees stated that plaintiffs were suspected of committing the crime of murder, and further that its employees published the statement to persons who had a duty and right to receive the statement, and that the statement was true and that its publication was to the benefit of the public.

[5] The incident which gave rise to the arrest, detention and prosecution of the plaintiffs was the assault of one, Mzolo at the river near Frankfort on the 2nd November 2001.

Mzolo made a statement to the police on 16 December 2001, went to see the doctor on 23rd December 2001, and died on 27 March 2002.

WITNESSES CALLED

[6] The Plaintiffs called a single witness, namely Van Zijl. In response the Defendant called the following four witnesses:

6.1 Inspector S E Mbele (“Mbele”). He was the first police officer that investigated the criminal charge laid by Mzolo;

6.2 the head of detectives in the Eastern Free State area, Snr Superintendent Qubushane (“Qubushane”);

6.3 Superintendent S S Moteka (“Moteka”). He was one of the senior detectives instructed by Qubushane to assist in the investigation of the matter

6.4 Superintendent R K Mokoena, who was also one of the senior officers later tasked to assist in the investigation.

INSPECTOR MBELE

[7] He is a member of the South African Police Service stationed at Villiers. He was the initial investigating officer in the incident involving the assault on Mzolo. He did not know how the docket was transferred from Frankfort to

Villiers. His commander, Inspector Viljoen, gave him the docket for further investigation on 20 November 2001. The alleged assault took place on 2 November 2001 and the complainant opened a case on 16 November 2001 according to the investigation diary.

[8] Mr. De Beer, who worked for the municipality, was the only plaintiff named in the diary at that stage. De Beer was also the commander of the SA National Defence Force Commando at Frankfort.

[9] Mbele took several witness statements. He went to the Frankfort Hospital where he took the statement of one Masilo, a male nurse, who said that Myburgh and De Beer off-loaded Mzolo at the hospital on 2 November 2001.

[10] He also took the statements of Motlaung, Ntlapo and Elizabeth Mofokeng.

[11] Mbele knew that Myburgh was an inspector in the SAPS and Frankfort. Myburgh promised to give Mbele a statement. That statement is in bundle D, at page 8. It is dated 30 March 2002.

[12] Mbele asked Inspector Hills and Sergeant Meyer about the incident. Both said they would make statements. They did not at that stage tell him what happened. While he was waiting he got the news that Mzolo had died.

[13] After having confirmed that Mzolo had died, Mbele again

spoke to Hills and Meyer about statements on the 2nd of April 2002. At that time they told him they were present when the incident happened, and would tell him in full what had happened. The next day he went to Hills and Meyer. They had already written their statements. At the bottom Mbele wrote the attestation. Meyer's statement is contained at D.4, dated April 3rd 2002 at 11:00 am. The statement of Hills is at D.1, dated 3rd April 2002 at 15:50.

[14] Mbele phoned Inspector Matthysen, the supervisor at the Detective Unit at Bethlehem and told him that Mzolo had died. They agreed that they should change the charge to murder. Matthysen asked Mbele to go to Bethlehem urgently.

[15] At Bethlehem Mbele saw Qubushane and left the docket with him. He thought he handed the docket over during the afternoon of the 2nd April 2002. He got the statements of Hills and Meyer later, after he had handed over the docket. He gave those statements to Moteka. Mbele had told Moteka that Hills and Meyer had promised to give him statements.

[16] In cross-examination Mbele was asked about the date the docket was handed over. He confirmed that the entry in exhibit “E”, the Investigation Diary, at C.10:

“2002/4/4:

Supt Moteka and Mokoena for further investigation. Insp.

Mbele will help in the investigation.”

(Although he could not read the dates, Senior Superintended Qubushane later confirmed that the date of the entry was 4 April 2002.)

[17] Immediately below that, there is an entry by Superintendent Moteka:

“2004/4/4 Docket received for further investigation.”

And below that:

“2002/4/4 The suspects Steenbergen, De Beer and Cilliers approached on 2002/4/3. Case against them explained, and their rights explained. The three suspects were arrested and apprehended in Police Cells”.

Also signed by Moteka.

[18] Mbele said that before any suspects were arrested, the docket went out of his hands.

[19] Asked why he did not request De Beer for a statement,

Mbele said De Beer could be a suspect. It was better to get all the witness statements before going to De Beer. Mbele wanted to get all the information and send it to the DPP so that the DPP could decide on the prosecution. The previous cases he had investigated where police members were involved were not serious cases. It had never happened before in his experience that suspects from Frankfort were detained at police cells in Qwa Qwa, about 200km away from Frankfort.

[20] When Mbele asked Myburgh for a statement, he was very co-operative. Myburgh was asked to make a witness statement. He was under the impression he would be a witness.

[21] In re-examination Mbele testified that if you are of the view that a suspect's colleagues might interfere with the investigation, you detain the suspects at other places than the place where they are employed in the case of police officers.

QUBUSHANE

[22] Senior Superintendent Qubushane is the area head of the

Detective Services in the SAPD of the Eastern Free State, stationed at Bethlehem. All detectives in the Eastern Free State report directly to him.

[23] Qubushane heard about this case from his deputy, Matthysen, who arranged for the docket to be brought to him. Qubushane and Mbele went to the Area Commissioner, whom Mbele briefed on the matter. Qubushane then appointed Senior Superintendent Moteka and Senior Superintendent Mokoena as joint investigating officers. They both arrived the same day. Mbele briefed them.

[24] Qubushane did not make notes in the Investigation Diary on that day because he had to attend a meeting in Bloemfontein and was in a hurry.

[25] Qubushane testified that the next day he was in Bloemfontein when Moteka told him telephonically he was going to make arrests. Qubushane informed the Area Commissioner of that fact.

- [26] In cross-examination Qubushane stated that he was not the person who decided to arrest the plaintiffs. He could not avoid the arrest.
- [27] Asked when a police official can make an arrest under section 40(1)(b) of the Criminal Procedure Act, Qubushane said, you can arrest if you have enough evidence to secure a conviction and before a police officer can be arrested the opinion of the DPP must be sought according to Standing Order 107 of 5 August 1993.
- [28] Both these statements by Qubushane were incorrect. Section 40(1)(b) requires a “reasonable suspicion”, not “enough evidence”. Standing Order 107 requires the prior authority of the DPP for the prosecution not for the arrest. Standing Order 107 states that at serious offences, police officials may well be arrested without further ado in accordance with section 40 of the Criminal Procedure Act.

[29] Qubushane said a summons is only issued where the docket was sent the DPP or Public Prosecutor, who will then send a summons to be served. As a warning can only be used where the expected penalty is less than R1 500 up to 2003, when the amount was increased to R2 500, that leaves arrest as the only practical option.

[30] Qubushane testified that if the case is not serious, it will be investigated by the DPP. However, if the case is serious, and the evidence is there, the member will be arrested, taken to court. The public prosecutor will postpone the case and the docket will be sent to the DPP for decision.

[31] It was put to Qubushane that he instructed Moteka to arrest, which he denied. He also denied that he made up his mind to arrest before the 3rd of April 2002.

[32] Qubushane said he never regarded the plaintiffs as persons who would flee and not stand trial.

- [33] Asked why a warning was not used, Qubushane said in certain circumstances the instructions do not allow the use of a warning, also not a summons.
- [34] Regarding the question why some of the plaintiffs were held in Qwa Qwa, Qubushane said he had nothing to do with that decision. Qubushane said Moteka should be asked why Cilliers was held at Phuthaditjhaba. Qubushane could not explain why De Beer (not being a police official) was also held at Qwa Qwa.
- [35] It was put to Qubushane that 16 police vehicles were used, with 36 police officials to execute the three arrests on the 3rd April 2002. Qubushane said Moteka requested enough manpower. Qubushane could not dispute that the officials effecting the arrest had R5 rifles and sharp ammunition. Qubushane could not explain the need for the back-up.
- [36] Qubushane testified that on the morning of 3rd April 2002

Mbele brought him the docket. That evidence is clearly incorrect, because it is an admitted fact that Cilliers, Steenberg and De Beer were arrested on the 3rd of April 2002 all relatively early in the morning.

[37] On the day he saw the docket, Qubushane left for Bloemfontein at about 11:00, he had a 14:00 meeting in Bloemfontein. While he was at that meeting, in Bloemfontein, before 16:00 Moteka telephoned Qubushana and said he was going to arrest. He did not say when.

[38] The Constitution 35 Notice explaining rights to Cilliers, was dated 3rd April 2002 at 10h10. According to Mokoena, Cilliers was the last of the three to be arrested that day. Qubushane could not explain how Cilliers could have been arrested at 10h10 if Moteka only told him at 16:00 that he intended effecting arrests.

[39] Portions of an affidavit which Area Commissioner Nkuna had made in a related urgent application were read to Qubushane, *inter alia* where he said that he gave Nkuna a written report of 3 pages on 26 March 2002, that is, before 3rd April 2002 when according to Qubushane he first saw the docket. Qubushane could not explain how it was

possible that Nkuna could refer to a report written by him before he had knowledge of the matter.

[40] It was put to Qubushane that Motaka took a rushed decision to arrest, to which Qubushane replied that that he did not know what information Moteka had. Qubushane did say, though, that when the docket was with him, the information in it was insufficient for arrest.

[41] In re-examination Qubushane was asked whether, in his office, he is required to decide whether there are grounds to arrest without a warrant. He said if he had doubt he can ask the legal officer.

SENIOR SUPERINTENDENT MOTEKA

[42] Moteka is a senior superintendent in the SAPS. He was called to Bethlehem by Qubushane. He said it could have been the 2nd of April 2002, he was not sure. Qubushane showed him the docket of the case where Mzolo had died. Qubushane said he wanted Moteka and Superintendent

Mokoena to investigate the case. He took the docket back to Harrismith with him, where he read it. The statements, he said, implicated police officers. There was also a witness statement by Myburgh.

[43] Moteka said he arranged with Mokoena to make arrests the morning after he read the docket. They met at Frankfort Police Station at 7am and went out to make the arrests.

[44] The basis for the decision to arrest was:

1. They had statements;
2. The statements said that the deceased was assaulted by approximately six people;
3. De Beer and Cilliers were implicated;
4. They also realised there was a cover-up in this case, because after the deceased had been assaulted and murdered, it was never reported at the police station.

[45] They arrested Steenberg, Cilliers and De Beer that morning and detained them at Qwa Qwa. That was because there were area arrangements that a police officer should not be detained at the where he works. The suspects were officers who were senior to officers working

there. After the arrests Mbele brought the statement of Hills, and the others were arrested.

[46] Moteka set out the sequence of events as follows:

- (i) He met Qubushane, left with the docket.
- (ii) The next day he arrested three persons.
 - iii) Then he got further statements.
 - iv) Then effected other arrests.

[47] Moteka testified that Advocate Giorgi from the DPP's office issued an instruction that the charges against Hills, Myburgh, Meyer and Van Zijl be withdrawn. She wanted to use Van Zijl as state witness, and instructed Moteka to obtain his statement. Van Zijl refused to make a statement. Advocate Giorgi withdrew the case against Myburgh because she saw nothing which linked him to the charge. Moteka tried to draw her attention to the fact that there were statements which place him on the scene. Moteka also pointed out that Myburgh took Mzolo to hospital, and that Myburgh gave a false statement, saying that he found the deceased injured but did not know by whom he had

been injured and Myburgh did not report this at the police station. Moteka said to advocate Giorgi that this was a cover-up or defeating the end of justice. Advocate Giorgi said there was no statement to show that he gave false information. She said they could be charged later for defeating the ends of justice.

[48] In cross-examination Moteka said he arrested Steenberg and Cilliers; he was present when Mokoena arrested De Beer.

[49] Asked whether he made the decision to arrest the three that day, Moteka said they made the decision together, that was why they met at Frankfort. It was pointed out to him that he had testified in chief that he studied the docket and resolved that the three should be arrested. He said that was correct. Asked whether he arranged for extra police reinforcements that afternoon, Moteka said Mokoena made those arrangements. He thought that Mokoena made the arrangements for the reinforcements the previous day

because when they parted the previous day, there was the understanding that they would meet the next day.

[50] It was pointed out to Moketa that he had testified that, after having studied the docket at Harrismith, he decided to arrest the three. Now his evidence suggested that the decision to arrest was taken before he left Bethlehem.

[51] Asked under what circumstances a police officer can effect an arrest without a warrant, Moteka responded that he could do that if he was satisfied that a crime has been committed, and does not have time to go and get a warrant. He said that is stated in the Criminal Procedure Act.

Counsel wanted to ensure that he understood the answer correctly and asked

“As long as a policeman is satisfied that a crime has been committed, he can arrest irrespective of the type of crime?”

To which Moteka responded:

“Correct.”

[52] When it was put to him that he was completely wrong, he explained that the confusion might arise from the translation from Sesotho to English. He said he had “reasonable suspicion” in mind. He said he had a reasonable suspicion that those three persons had committed murder; he took the decision to arrest according to the Criminal Procedure Act, the Standing Orders cannot overrule it, they are just administrative; there is nothing which says he must check the Standing Orders before arrest; there is no provision in the Standing Orders which says he must not arrest.

[53] Moteka did not consider applying for a warrant because it was during the night that he got the docket. Moteka said Qubushane did not remember correctly, their meeting was not at 11:00, or 14:00, it was at night. It was at Harrismith, during the night, when he was studying the docket that he decided to arrest. He did not phone Qubushane after studying the docket. Qubushane knew that they were going to make the arrests.

[54] It was put to Moteka that he took a rushed decision to arrest, to which he responded that a person was dead, people had to be arrested. He confirmed that he took the decision to arrest senior police officers after having the docket in his possession for a couple of hours. He did not see that as a rushed decision, although the death of Mzolo had occurred 8 days previously.

[55] Moteka said that after the plaintiffs were in custody, he requested the court that plaintiffs should not be released the same day so that he could hold an identity parade. The suspects were scattered, some of them were on leave, it was not easy to get them together.

[56] As to the cause of death, Moteka did not have a pathologist's report. He had the J88. It did not cross his mind that the deceased could have died from other causes.

[57] It was put to Moteka that he could have asked the suspects

for statements rather than arrest, to which he responded that most of them had already given statements. When it was pointed out that as at the 3rd April 2002 only Myburgh had made a witness statement, he agreed. He said the plaintiffs could not be trusted from the beginning, they were hiding something.

[58] Regarding the place of detention, Moteka said that he was the one who decided that the men were to be held in Qwa Qwa. First he said that there were area arrangements that a police officer should not be held where he works. When pressed he said he did not investigate the possibility to detain them at other nearby police stations. He could not find space at Bethlehem. Asked why not Heilbron, he said he was not obliged to phone all the other police stations. It was put to him that Heilbron, Vrede, Warden, Reitz, Roadside, Cornelia were all closer than Qwa Qwa, which was about 180km away. He could not dispute that.

[59] De Beer, not a policeman, was also held at Qwa Qwa.

Moteka said he held De Beer in Qwa Qwa because he could not separate him from the others. It was put to him that those detained in Qwa Qwa were also separated, each held at a different police station there. The police stations were close to each other, he said.

[60] Asked whose idea the Task Force for the arrest was, Moteka said he did not know.

[61] Regarding the question why only 3 of the 6 suspects were arrested on the 3rd of April 2002, Moteka replied that the others were not there. Immediately thereafter he said he did not look for them at that stage. The third version was that they only arrested those they could find. They did not look for the others. Then Moteka said that Mbele had told him that the others would make statements, he assumed they would make statements but that he had not received them yet. That was the fourth version.

[62] Moteka said Mbele had told him what the statements would

say, saying who the persons were who assaulted the deceased. It was put to Moteka that Mbele had said he knew no details of what Hills and Meyer would say except that they were at the scene. Moteka responded that if Mbele had only told him that they were on the crime scene that would not be enough for him. It does not follow that because a person is at a crime scene an inference of guilt can be drawn, he said.

[63] Asked why he did not arrest Myburgh and Hills on the 3rd, Moteka said he was waiting for their statements so that he could see what they say.

[64] From this response it appears that the reason for the arrest was to obtain statements. The fourth version as to why he only arrested three on the 3rd of April was that he would decide after receiving their statements and other statements from other witnesses what to do.

[65] Regarding Van Zijl, Moteka was asked what information he

had that Van Zijl had committed murder. Moteka responded that he had the following:

- (i) Statements in the docket which said that the deceased had been assaulted by 6 males;
- (ii) Myburgh's statement which placed him on the scene;
- (iii) The statement from a person near the scene who could identify Cilliers and De Beer;
- (iv) The statement of Steenbergen, where he said that
Van Zijl and Cilliers are the persons who assaulted the deceased.

(v) The statement of De Beer said the same.

[66] The statement of Steenbergen was put to Moteka, and he was asked to point out where he says that Van Zijl assaulted the deceased. Moteka agreed that the statement did not say that.

[67] The statement of De Beer (B.19) was put to Moteka, and he was asked where it says that Van Zijl assaulted the deceased. He responded that Van Zijl pushed Mzolo off the vehicle. It was put to him that De Beer said:

i°Op pad polisie stasie toe het ek in Vanreenenstraat gery en met my

regter kantste spiëel gesien die verdagte lê in die pad. Ek het stilgehou en teruggestoot en ek het weer die persoon opgelaai. Agter die bakkie saam met die verdagte was kapt VAN ZIJL, insp CILLIERS, insp HILLS en sersant MYBURG, supt STEENBERGEN en sersant MEYER het saam met my voorgery. Ek het hulle gevra wat te donder dink julle doen julle. Een van hulle het gesê hy het afgeval maar ek kon nie onthou wie was dit gewees nie. Ek het toe gesien verdagte is baie deurmekaar. Ek het besluit om hom hospitaal toe te vat. Ons het toe almal die verdagte na die hospitaal geneem.”

[68] Moteka said that was all he had against Van Zijl.

[69] Asked about the case against Meyer, Moteka said he was an accessory because he was present.

[70] As to Myburgh, Moteka testified the following:

He agreed that he was at the scene. Witnesses say that the deceased was assaulted by about 6 people. A crime was committed in his presence. He gave false information at the hospital in that he concealed the crime which had been committed. If the deceased could not open the case himself, no one would have known what had happen to him. Those were the grounds on which he believed that Myburgh could be convicted.

[71] When it was put to Moteka that it was totally unnecessary

to arrest, he said it was necessary because of the seriousness of the offence.

[72] In re-examination Moteka testified that he had read the statements of Hills, Meyer and Myburgh when the second arrest were made, and they played a part in making those arrests.

SUPERINTENDENT MOKOENA

[73] The other investigating officer was Superintendent Mokoena. He and Moteka got the docket from Qubushane. They got instructions to proceed. Early the next day he met Moteka at Frankfort. There were also members of ACCU, the Area Crime Combating Unit. They arrested Steenbergen at his house, De Beer as his office, and after that Cilliers. He said Qubushane arranged for the ACCU; in cross-examination he however said he did not know, he thought Qubushane had done so.

[74] In cross-examination, Mokoena said that Mbele only

brought the docket; he did not stay with them. It was put to him that when they left Qubushane they had decided to make the arrests with which he agreed. Asked whether Qubushane said they should arrest the next day, he said Qubushane left that to them.

[75] Asked whether the decision to arrest involved all, he said, no, it was limited to the 3 who were involved according to the statements. It was put to him that Moteka had testified that he decided at Harrismith to arrest all. Mokoena could not explain that.

[76] As to the reason why the plaintiffs were detained at Qwa Qwa, Mokoena testified that Moteka had said that was done because there was enough space at Qwa Qwa.

[77] In response to a question what evidence he had to arrest Van Zijl for murder, Mokoena responded:

(i) The statement by Meyer;

- ii) The explanation of De Beer, and
- iii) The statement by Steenberg.
- Those three documents.

[78] Mokoena said he never feared that the plaintiffs might interfere with state witnesses. He also did not regard them as a flight risk. He said the type of crime did not allow that a summons be given.

VAN ZIJL

[79] Van Zijl was the only witness for the plaintiffs. During 2001 a docket landed on his desk where Cilliers and others were the accused. The charge was assault with intent to do grievous bodily harm. He read the docket and changed the charge to common assault. He forwarded the docket to Bethlehem. Subsequently he got a message to call Qubushane. Qubushane was very angry about two things:

- (i) That he had changed the charge;
- (ii) That Cilliers had not been arrested immediately.

[80] Qubushane instructed Van Zijl to arrest Cilliers. Van Zijl said he was not prepared to arrest Cilliers without a warrant and according to him there was no reason to arrest Cilliers. The next day Qubushane arrived at Frankfort and arrested

Cilliers without a warrant. Cilliers instituted a claim for wrongful arrest, for which he was later compensated. Qubushane made a case of defeating the ends of justice against Van Zijl because Van Zijl refused to arrest Cilliers. The DPP declined to prosecute Van Zijl.

[81] It is significant that during his evidence either in chief or in cross-examination Qubushane did not contest any of these allegations.

[82] On the 3rd of April 2002 Van Zijl was in the Kruger Game Reserve with his family. He got news that Cilliers, De Beer and Steenberg had been arrested. On the 4th of April 2002 Qubushane telephoned Van Zijl, asked where he was. Qubushane told Van Zijl that other people said he was at the scene where Mzolo was injured. Qubushane wanted a statement from Van Zijl. Van Zijl said he first wanted to speak to his attorney.

[83] The afternoon of the 5th of April Qubushane called him

again. Qubushane told him to return to Frankfort, because the Commissioner said he had to be arrested. Van Zijl asked Qubushane whether the people said he had committed an offence, to which Qubushane replied “No, they said you were there”. Qubushane said he would send a vehicle to fetch Van Zijl. Van Zijl promised to return, but later changed his mind and only returned on Monday the 8th of April 2002.

[84] On the 8th April 2002 Van Zijl went to Tweeling Police Station with his attorney. There Mokoena, the investigating officer, arrested him. The charges were murder and defeating the ends of justice. Van Zijl was locked up in the police cells at about 10-11am. An identity parade was held during the afternoon. Van Zijl saw some of the other plaintiffs. Hills, Meyer and Myburgh went to court but not Van Zijl because he had not been charged yet. He did not know why he had not been charged yet.

[85] Later the afternoon, Mokoena came to take Van Zijl's

fingerprints. They told Van Zijl to pack his things, they were going to Qwa Qwa because Van Zijl was not co-operating. Van Zijl said that he had a constitutional right to be detained near his family; Van Zijl's attorney had also said that to Mokoena previously. Then Mokoena told them not to take Van Zijl and he remained there.

[86] On the morning of the 9th April 2002 they went to court. All the plaintiffs got bail except Cilliers. At court Van Zijl got two documents:

- (i) Notice of suspension with immediate effect without pay;
- (ii) Notice to vacate his government house.

[87] After 5 court appearances, the charges against Van Zijl were withdrawn. He was not re-appointed.

[88] The outcome of the case was that all the plaintiffs against whom the charges had not been withdrawn, were discharged under section 174 at the end of the State case. The charge at the trial was culpable homicide, not murder.

Not one of the plaintiffs was ever charged with defeating the ends of justice.

[89] On the defamation claim Van Zijl referred to the particulars of claim and said nothing further.

LEGAL PRINCIPLES AND EVIDENCE

I. Unlawful arrest and detention:

(a) Legal principles

[90] Unlawful arrest and detention arises when a person has intentionally and without lawful justification, totally restrained the personal liberty of another. The onus of proving justification rests on the defendant (**MAY v UNION GOVERNMENT** 1954 (3) SA 120 (N) at 124 G – H). All arrests are *prima facie* illegal, and if the defendant alleges the existence of reasonable grounds of suspicion, defendant must prove that (*loc cit*).

[91] Mr. Notshe, for the defendant with reference to **DUNCAN v MINISTER OF LAW AND ORDER** 1984 (3) SA 460 (T) confirmed on appeal in 1986 (2) SA 805 (A) stressed that reasonable suspicion is not to be equated with *prima facie* proof. Suspicion is a state of conjecture where proof is lacking.

[92] Mr. Van der Merwe on the other hand, says that the suspicion has to be reasonable.

[93] With reference to **CARMICHELE v MINISTER OF SAFETY AND SECURITY AND ANOTHER** 2001 (4) SA 938 (CC)

Mr. Notshe submitted that the police had a duty to protect the public by detaining persons where appropriate. He says that if the courts require a high level of suspicion before an arrest can be made the constitutional objects of the police may be chilled.

(b) **The facts:**

[94] Mr. Notshe says the circumstances at the time of the arrest, from which a reasonable suspicion arose, were the following:

1. A police docket, CAS No. 60/11/01 had been opened in Frankfort;
2. Prior to the opening of the docket no report of the incident had been made to the police;
3. Although the police docket was a Frankfort docket it had found its way to Villiers;
4. Nobody knows how the docket was transferred to Villiers;
5. Dockets are transferred to other stations only if the matter concerns police officials of that particular

station;

6. It was therefore clear at the time that police officials of Frankfort were involved;
7. At the time of the arrest of plaintiffs the police docket contained the information which is in Bundle A of plaintiff's bundle of documents;
8. Inspector Mbele had interviewed Messrs Hills, Meyer and Myburgh and all three had undertaken to make written statements regarding the incident.

[95] The first question to be determined is who decided to arrest, for it is the suspicion of that person which has to be assessed (**BIRCH v JOHANNESBURG CITY COUNCIL** 1949 (1) SA 231 (T) at 239). On the facts of this case I find that Qubushane took the decision to arrest. That appears from the evidence from both Moteka and Mokoena that, when they left Bethlehem on the 2nd April 2002, the decision to arrest had been taken. That was why the arrest task force was arranged. There are parts of the evidence of both Moteka and Mokoena which clearly indicate that the decision to arrest was made before they left. Moteka, for instance, says that he did not telephone Qubushane to tell him that he was going to arrest but Qubushane knew he was going to arrest. The evidence of Mokoena is to the

same effect. I reject the evidence of Moteka that he decided during the evening at Harrismith to arrest the persons. Qubushane was a very poor witness. For example, he gave five different reasons as to why the persons were detained in Qwa Qwa and not at another place.

[96] Having decided that the defendants did not give truthful evidence as to how the decision to arrest was arrived at, the question arises, why the egg dance? Moteka is now taking all the responsibility in circumstances where it was at the very least a joint decision. And not to forget Qubushane's evidence that, when he saw the docket, the same docket on which Moteka decided to arrest, there was not sufficient evidence to arrest according to Qubushane.

[97] The defendant bears the onus to prove justification for the arrest. The factual evidence of the defendant as to who decided to arrest is unreliable, and stands to be rejected. Apart from that, neither Qubushane nor Moteka was aware

of the test to be applied for an arrest without a warrant.

There motive was to arrest because a person had died.

It is not possible to determine whether there was a reasonable suspicion, because one does not know whose suspicion to assess. Qubushane was the senior officer who probably took the decision to arrest. He testified that when he saw the docket there was not a sufficient basis to arrest.

The docket as at 3 April 2002

[98] At the time when the arrests of Steenbergen, Cilliers and De Beer were made on 3 April 2002, the docket contained the following information:

- i) The statement by Mzolo, who was assaulted and died on 27 March 2002. (He would therefore not be available as a witness). He stated that a number of persons chased him and assaulted him, and one of them hit him on the head with a garden fork. He became unconscious and woke up in hospital. He mentions no names
- ii) Mokgo Neria Masilo, a male nurse at the hospital. He states that Meyburg and De Beer off-loaded

Mzolo at the hospital. They told Masilo that they found the unknown man next to the road, he was seriously injured.

- iii) Daniel Buti Mofokeng: On 2 November 2001 he saw Mzolo being assaulted by men. De Beer was there.
- iv) Puseletso Abram Motloun: On 2 November 2001 Mzolo took a fishing net under a tree. They were fishing. A bakkie arrived, and men got out of it and pulled the net, which then broke. They took the net and ran away, but the bakkie chased them. He will be able to recognise a person who arrived there in a Camry motor car, but will not be able to point out any other person.
- v) Michael Nhlapo: He was fishing on the other side to where Mzolo was. There were five persons drinking beer, they arrived in a bakkie. One of them pulled Mzolo's net. At that stage Cilliers was in the water swimming in a tube. Mzolo won the tug-of war for the net, and put it in a plastic bag. Cilliers got out of the water and chased Mzolo and the other man.

The other men shouted to Cilliers that he must shoot. They got into their vehicles and chased Mzolo. The witness knows Cilliers very well. He will also be able to identify the other men.

- vi) Elizabeth Mathapelo Mofokeng: On 2 November 2001 she saw a person being chased. She saw a bakkie and persons drinking beer. She later heard it was Mzolo who was being chased. There were about six persons who assaulted Mzolo, and one of them hit Mzolo with a garden fork. Two of them picked him up and dropped him on the ground. She mentions no names and does not say whether she will be able to identify any person.
- vii) Myburgh: A witness statement was taken from Myburgh on 30 March 2002. He states that on 2 November 2001 he and De Beer, Cilliers and Steenberg were at the river. Cilliers chased a man on foot, De Beer and Steenberg drove in the bakkie. The man that Myburgh was chasing got away. Myburgh went to the bakkie. When he got

there Mzolo was on the back of the bakkie. They drove to the hospital where they left him.

[99] The arresting officers arrested the three persons whose names are mentioned in that statement, possibly because their names appear there. However, that is not Moteka's evidence. He said on the night of 2 April 2002 he decided to arrest all the plaintiffs. He did not arrest those who were on leave and those he could not find. He never said he only wanted to arrest these three, because Myburgh's statement gave rise to a reasonable suspicion of their guilt. The defendant bearing the onus to justify the arrests, it can only be inferred that the arrests were done with an improper motive.

[100] The test is objective, and there was not a basis for a reasonable suspicion to justify the arrests. Two factors influence this view:

- (i) The constitutional rights;
 - (ii) The manner in which the arrests were effected.
- Further, the fact that the plaintiffs were detained at Qwa Qwa

shows the real intent which came out during the evidence of Moteka: the true object of the arrests was to obtain statements. There was not objectively a basis for a reasonable suspicion from the evidence. All that they had was evidence of the persons having been there, and Mzolo having been assaulted. On that basis there was no reason to arrest all the plaintiffs without a warrant. The detention at Qwa Qwa shows that there was an ulterior motive with the arrests. This is also indicated by the fact that Moteka never even considered to apply for a warrant.

[101] Standing Order 341 of 13 September 1999 to which Qubushane was also referred states as follows:

° Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996 (Act No. 108 of 1996), the Criminal Procedure Act, 1977 (Act No. 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be arrested, must therefor be strictly adhered to.

Any reference in this order to “reasonable suspicion/grounds” must be interpreted to mean that a person will have

‘reasonable suspicion/grounds’ to believe or suspect something or that certain action is necessary if:

- a) he or she really believes or suspects it;
- b) his or her belief or suspicion is based on certain facts from which he or she had drawn an inference or conclusion; and
- c) any reasonable person would, in view of those facts, also have drawn the same conclusion.

...

There are various methods by which an accused’s attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.

...

A member, even though authorised by law, should normally refrain from arresting a person if

- (a) the attendance of a person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or ...

....

As a general rule, the object of a arrest is to secure the attendance of such person at his or her trial. A member may not arrest a person in order to punish, scare, or harass such person.”

[102] The starting point is a reasonable suspicion that a person has committed a schedule 1 offence. However, further investigation may be required before it will be possible to determine whether the suspects should be charged. Then arrest can only be made if the police official has reasonable grounds to believe that the investigation will be hampered should the person not be arrested (Standing Order 341 paragraph 4(2)(a)). It was not the respondents' case that the arrests were made with a view to assist with the procedure of further investigation.

[103] The Constitution places a high premium on freedom. Arrest should only be used as means to bring a suspect before court as a last resort, as is set out in the document headed: "Instructions relating to the arrest and detention of suspects" from the National Commissioner of the South African Police Service, dated 18 May 2005, where the following is stated:

"6. There are various methods by which an accused's

attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and should therefore be regarded as an absolute last resort. It is expected of a member to always exercise his or her discretion in a proper manner when deciding whether the presence of a suspect at his or her trial should be secured through an arrest or can be ensured in another manner.

7. A member, even though authorised by law to arrest a person, should normally refrain from arresting the person if-

- (a) the attendance of that person at his or her trial may be secured by first completing the investigation and referring the docket to the public prosecutor to issue a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or ..."

[104] In the letter the National Commissioner quotes from the judgment of Bertelsmann J in **LOUW AND ANOTHER V MINISTER OF SAFETY AND SECURITY AND OTHERS**

2004 TPD case No 8835/03:

"What these statements mean is that the police are obliged to consider, in each case when a charge has been laid for which

a suspect might be arrested, whether there are less invasive options to bring the suspect before the Court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in Court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in Court is obtained, then it is constitutionally untenable to exercise the power to arrest."

[105] Section 40(1)(b) has to be interpreted in the light of the Constitution (Constitution 39(2)). Even if I am wrong in my finding that there was not a reasonable suspicion to arrest, the arrests were unlawful because they constituted an unnecessary intrusion on the liberty of the plaintiffs. This is especially so because the plaintiffs were not immediately taken to court and allowed to apply for bail. On the evidence there was no fear that the plaintiffs would flee or interfere with state witnesses. The death of Mzolo occurred three months after the alleged assault, and causality did pose a problem, yet no medical substantiation as to cause of death was obtained. There was no need for the haste with which the arrests were made. The demands

of a Constitutional state must be taken into account when applying the general test set out by Schreiner JA in **TSOSE V MINISTER OF JUSTICE AND OTHERS** 1951 (3) SA 10 (A) at 17G-H. See **RALEKWA V MINISTER OF SAFETY AND SECURITY** 2004 (2) SA 342 (T) par [12], **LOUW AND ANOTHER V MINISTER OF SAFETY AND SECURITY AND OTHERS** (TPD case 8835/03 dated 6 December 2004), and see the support for **RALEKWA** in Juta's Annual Survey of SA Law (2004).

[106] The evidence shows that section 40(1)(b) was not applied in compliance with constitutional values, thereby making the arrests unlawful.

[107] The question arises, what about the arrests on the 5th of April and that of Van Zijl on the 8th of April 2002? At that stage statements had been made by the arrested persons which possibly created a reasonable suspicion and a *prima facie* case.

[108] However, it would be wrong to allow defendant to rely on evidence it obtained as a result of its wrongful conduct in arresting and detaining the first three plaintiffs. A person cannot justify wrongful conduct by means of information acquired through other wrongful conduct.

The arrest and detention of all the plaintiffs was unlawful.

II **Malicious prosecution:**

[109] In order to succeed in an action for malicious prosecution the plaintiff must prove that the defendant:

- (a) set the law in motion;
- (b) acted without reasonable and probable cause; and
- (c) was actuated by an improper motive (*malice*).

See **PRINSLOO AND ANOTHER v NEWMAN** 1975 (1) SA 481 (A) at 491 G – H.

In order to succeed the plaintiffs must show that the defendant was actively instrumental in the prosecution (**WATERHOUSE v SHIELDS** 1924 CPD 155 at 160).

[110] In this case the DPP decided to prosecute De Beer,

Cilliers, Steenberg, Myburgh and Hills and declined to prosecute Van Zijl. The case against Meyer was apparently withdrawn earlier. This is recorded in a letter of the DPP dated 6 August 2002. There was no evidence to suggest that any one of the defendant's witnesses or any of the defendant's employees actively associated himself with the prosecution or pressed for a prosecution. This claim cannot succeed.

III **Defamation:**

[111] The allegations of defamation flow from the arrests of the plaintiffs. A separate cause of action has not been made out on the evidence before me. The events complained about can be considered by the court dealing with the quantum for the claims for unlawful arrest and detention.

Costs:

[112] By far the most time in the hearing was spent on the claims of unlawful arrest and detention – probably 90%.

The most equitable order would be that the plaintiffs are entitled to 75% of their costs in respect of these proceedings.

Finding and Order:

[113] 1. The arrest and detention of all the plaintiffs was unlawful.

2. The plaintiffs' claims for malicious prosecution and defamation are dismissed.

3. Defendants are ordered to pay 75% of the plaintiffs' costs to date.

A. KRUGER, J

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