



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

Reportable:	NO/YES
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CASE NO.: 1436/2022

In the matter between:

FAKO PHILLIP CHETANE

Plaintiff¹

and

THE MINISTER OF POLICE

First Defendant

THE NATIONAL DIRECTOR:

PUBLIC PROSECUTIONS

Second Defendant

Coram: M Opperman J

Heard: 24 & 25 October 2023 and 2 February 2024

Delivered: 30 April 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives via email and release to SAFLII on 30 April 2024. The date and time of hand-down is deemed to be 15h00 on 30 April 2024

¹ ("The plaintiff"/ "Mr. Chetane")

Summary: Trial – merits – quantum – arrest in terms of section 40 of the Criminal Procedure Act 51 of 1977² read with section 3 of the Domestic Violence Act 116 of 1998³, detention and prosecution

JUDGMENT

INTRODUCTION

[1] This is a case of domestic violence. It turns on the arrest of the plaintiff without a warrant of arrest; his further detention and prosecution for acts of domestic violence that were allegedly perpetrated.

[2] I will not be able to say it better than Justice Albie Sachs when he proclaimed the definition and disgrace of domestic violence in South Africa in *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC) (3 December 1999). I will present the quote from this case hereunder but must first sketch the nature and atmosphere of the claims in this case. The preamble of the Domestic Violence Act 116 of 1996 will suffice for now. The legislation was promulgated:

To provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith.

Preamble.—RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic

² The “CPA”/Criminal Procedure Act”.

³ The “DVA/Domestic Violence Act”.

violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;

IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence,

- [3] Contrasted with the above is the reality emphasized in the Supreme Court of Appeal, that I align myself with, and it is that our legal system sets great store by the liberty of an individual.⁴ The decision to arrest must be reasonable and rational. Our constitutional reality is the same when prosecution is instituted in a criminal court of law. Liberty is not only physical freedom; it is to be free and protected from malignant, harmful and defamatory persecution.
- [4] The factual scenario in this case yet again demonstrates the persistent reality of the police, the prosecuting authority and the courts in their battle against

⁴ *Biyela v Minister of Police* (1017/2020) [2022] (1 April 2022) ZASCA at [36].

crime and the protection of our democracy; they have to take split second decisions to arrest and make complicated choices to prosecute and release.⁵

- [5] Domestic violence cases are examples of these predicaments that often present itself and are challenging and complicated to deal with. It is emotional and often grim; the people involved and evidence are also unpredictable. The battle against criminal anarchy that threatens our society is grave.⁶
- [6] In *casu* the police, the prosecuting authority and the court would surely have been confronted with severe criticism and liability had the plaintiff not been arrested and the complainant and her family came to some harm at the hands of the same Mr. Chetane if he was release without proper adjudication.
- [7] On 1 April 2021 the complainant in the case stated the following in a sworn statement⁷ that caused the arrest and prosecution of the plaintiff. It is the golden threat that bound the incidents and decisions to arrest, detain and prosecute:
- On Thursday 2021 – 04 – 01 at about 7h10 I had woken up and was about late. I told my boyfriend Thobi Phillip Mokoena⁸ that my aunt are (sic) coming to the wedding and they are coming to sleep at my rooms. My boyfriend started threatening by saying nobody is going to sleep at my rooms as he is going to kill me and assault me. I was about to (sic) out

⁵ *Ditsele and Others v Minister of Police and Another; Hesie v Minister of Police and Another* (3131/2019; 805/2019) [2023] ZAFSHC 33 (25 January 2023).

⁶ *Ditsele and Others v Minister of Police and Another; Hesie v Minister of Police and Another* (3131/2019; 805/2019) [2023] ZAFSHC 33 (25 January 2023) at [3].

⁷ A1 statement in the docket with Phuthaditjhaba cas no. 27/4/2021 that forms part of the discovered documents by the defendants and referred to by the witnesses in their testimony.

⁸ Mr. Chetane, the plaintiff also goes by the name of “Thobi Phillip Mokoena”.

the door when he try (sic) to grab me. I manage to escape but he grabbed my bag and I ran away.

I ran until I arrived at the work and explain (sic) my supervisor. This things (sic) started on the 10 March 2021 at about 5h00 he threatened me by saying he will kidnap me and nobody will find me. He will find people who will kill me and throw my body away. I explain to him that he should leave my room. He said that if I told him to leave or even ran away, he will kidnap my children and kill them. On that Wednesday 2021 – 03 – 10 I ran away to my brother's place.

When at my brother's place Bobby at Bluegumbush he went further by threatening me by using the same words that he will kidnap me and make me vanish forever. He also said that he will kidnap my children (sic) MP⁹ who is 8 years old. I felt threatened all the way. I am also suffering from Highblood (sic) Pressure and he kept on threatening me. I had lost concentration at work. My biggest pain is my children that he threatened to kill with his gun.

I request police investigations into the matter as I felt threatened and my life is not the same since he arrived into (sic) my life and the doctors (sic) are on my (illegible) that my Highblood is not going down, what is happening in my life. I tried to obtain the Protection Order but the office was closed. I request the court to order him to move out of my life to save me. That is all I can state. (Accentuation added)

[8] The plaintiff claims for unlawful arrest and detention and malicious prosecution. The defendants oppose the claims and deny any liability on the facts of the case. The result is that the trial court is called upon to decide the issues of merits and quantum of damages.

[9] The judgment will be structured further as follows:

1. The facts that are common cause, undisputed and proven.
2. The claims and the defence.

⁹ Abbreviation used to protect the identity of the minor.

3. The issues to be adjudicated and the onus.
4. The law on domestic violence.
5. The law on arrest, detention & prosecution.
6. The trial.

A. The case for the defendants.

The *viva voce* evidence of the following witnesses:

- i. Sergeant Mkhwanazi (The officer that effected the first arrest on 1 April 2021).
- ii. Captain Mokoena (The officer that effected the second arrest on 3 April 2021).
- iii. Ms. Mahlakoane (The prosecutor that prepared the case for the first appearance on 6 April 2021).

Other evidence:

- iv. Some summaries of the court proceedings that caused the detention of the plaintiff from 6 April 2021 until the release of the plaintiff on 13 April 2021 and the further progress of the case.

B. The case for the plaintiff.

- i. The evidence of Fako Phillip Chetane.
7. Conclusion; the facts and the law.
 8. Order.

FACTS COMMON CAUSE, UNDISPUTED AND PROVEN

[10] The Plaintiff was first arrested on 1 April 2021 and released the same day. He was not detained at all (he was never placed in a police cell or detention facility); it was just the formality of arrest that happened and the process was

then immediately followed by a release on warning on a so-called SAPS 496 form.¹⁰

- [11] The plaintiff was warned on 1 April 2021 to stay away from the complainant, that she does not want to have any contact with him and not to interfere with the investigation of the case. The law pertaining to domestic violence in South Africa was explained to him. He is a Lesotho citizen.
- [12] It is undisputed and proven beyond any doubt that the complainant feared for her life and that of her family as result of the threats and conduct of the plaintiff alleged.
- [13] The plaintiff admitted unequivocally that he got arrested the second time because; as he put it, he went to the brother of the complainant to explain to him that the complainant is not sleeping at home anymore. The brother of the complainant and the plaintiff had a conversation, and it was decided between them that the plaintiff must go to the manager of Shoprite where the complainant was employed: "Because the brother informed me to request the manager to bring us together."
- [14] The above shows a disrespect for the right of the complainant to decide her fate and her privacy. Two men took a decision as if she does not have any recognition under the Constitution of the Republic of South Africa, 1996 as a human being in her own right.

¹⁰ INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023 at page 7.

- [15] The plaintiff also disregarded the verbal warning of Sergeant Mkhwanazi not to interfere with the investigations and stay away from the complainant. It will be shown later that he admitted this in court and apologized for this.¹¹
- [16] The plaintiff was again arrested on 3 April 2021 and detained until 6 April 2021, when the plaintiff first appeared in court. He was arrested because the manager of the shop where the complainant was employed reported to the police: “a male that was fighting a lady”. It was proven beyond doubt that the manager reported to Captain Mokoena that the plaintiff was “chasing” the complainant in the shop and she had to be locked into a room for her safety.
- [17] The plaintiff was brought before a court within 48 hours, considering the public holidays at the time. This was on 6 April 2021. He was not released nor was an application for bail entertained.
- [18] The plaintiff was at all times from the first appearance on 6 April 2021 represented by a legal representative appointed by Legal Aid: South Africa. He did not initiate a bail application on 6 April 2021 as was his right to do.
- [19] As indicated; the plaintiff is a Lesotho citizen and also went by the name of Thobi Phillip Mokoena.¹² This complicated his release.

¹¹ See pages 99 to 140 of the bundle: INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023.

¹² See the arrest statement, the warning statement, and the A1-statement of the complainant in the docket with Phuthaditjhaba cas 25/4/2021 in the bundle INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023 at pages 11, 14, 16, 21 and 128 .

[20] The matter was remanded to 9 April 2021 to verify the passport of the plaintiff and then to 12 April 2021 for the address referred to hereunder to be confirmed. The facts show that the postponement of the hearing of the application for the release of the plaintiff at this stage was under section 50(6)¹³ of the CPA. The presiding officer, on reading of the transcribed record, also wanted more information in terms of sections 60(2) and (3)¹⁴ of the CPA in order to apply his mind to the release of the plaintiff.

¹³ Section 50(6) of the CPA confirms that a presiding officer may:

50(6)(d): The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if—

- (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
- (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (1A);
- (iii)

[Sub-para. (iii) deleted by s. 8 (1) (c) of Act No. 62 of 2000.]

- (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to—

- (aa) procure material evidence that may be lost if bail is granted; or
- (bb) perform the functions referred to in section 37; or

- (v) it appears to the court that it is necessary in the interests of justice to do so.

Sub-s. (6) added by s. 1 (b) of Act No. 75 of 1995 and substituted by s. 1 (b) of Act No. 85 of 1997.]

¹⁴ Section 60 of the CPA

60(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

[Para. (a) substituted by s. 9 (a) of Act No. 62 of 2000.]

- (b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

[Para. (b) substituted by s. 4 (a) of Act No. 85 of 1997 and by s. 5 (a) of Act No. 34 of 1998.]

- (c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court. Section (2) In bail proceedings the court—

- (a) may postpone any such proceedings as contemplated in section 50 (6);

- (b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

- (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

- (d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (1) (a), (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application

[Sub-s. (2) substituted by s. 4 (b) of Act No. 85 of 1997. Para. (d) substituted by s. 4 (a) of Act No. 12 of 2021 w.e.f. 5 August 2022.]

(2A) The court must, before reaching a decision on the bail application, take into consideration—

- (a) any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and

[21] The plaintiff was residing with the complainant at the place that she rented. She was so fearful of him that she was willing to move out of the place and reside where he could not find her. She made it clear to the police that the plaintiff may not know her whereabouts and where she took up residence after the 1st of April 2021.

[22] During the court proceedings and according to the transcribed records of said proceedings a so-called “alternative address” whereto the plaintiff could be traced should he be released was, lawfully so, demanded.¹⁵ The plaintiff was not certain of the address and the investigating officer had to search for the place (the home of the sister of the plaintiff) and confirm the address for purposes of the bail application. The investigating officer brought the sister to court on 13 April 2021 and he was immediately released on bail when she confirmed the address.

(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety.

[Sub-s. (2A) inserted by s. 4 of Act No. 55 of 2003 and substituted by s. 4 (b) of Act No. 12 of 2021 w.e.f. 5 August 2022.]

(2B) (a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph (a), it is found that the accused is—

(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13) (b); or

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances.

[Sub-s. (2B) inserted by s. 9 (a) of Act No. 66 of 2008.]

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

¹⁵ See section 60 of the CPA.

[23] It is crucial to take cognizance of the transcribed record of the proceedings as a whole wherein the magistrate among others remarked that:

Court: Okay are there any other reasons why you did not want to grant him bail? Is he a threat to the witness?

Mr. Mkhwanazi: Actually, we issued to him a form 6 (sic) before and seemingly he went back to the complainant, before the appearance.

Court: So, you will be kind to him?

Mr. Mkhwanazi: So, the other people who, who, the complainant complained to, I mean to the other police officers and then we cancelled the SAPS 4 and 6 (sic) and helping him in ... (indistinct)

Court: Okay, so he is, he is to blame for that one. No, it is fine, let me, I will just, if we can confirm the address then and the sister then we can take it from, but you must understand Mr Fako, Mr Phillip that this type of offence is very serious. If the investigating officers want me to keep you there, I will keep you in custody. You understand?

Accused: Yes

Court: Because they have said to me, he has been kind to you by issuing out 496, which means you were out. And then the complainant complains which means there is a real threat that you do not want to listen or to adhere to what, does she have a protection order against him?

Accused: Ja, I am very, very sorry My Lord. I am very sorry.

Court: You must not be sorry for me, you must do the right thing at home, you understand. You get out and we give you bail, you killed that lady then, then we have made a mistake here. You understand? (Accentuation added)

Accused: Yes

Court: Because gender-based violence is very serious here.

Accused: Okay

Court: You are a bit reluctant that we because I, what there actually is no need for me to get Sergeant Mkhwanazi here to because I could have made a decision in my own... (intervenes)

Accused: Okay

Court: And keep you in custody. But I want to give you a second chance to see if you are going to resolve that because you guys make the work difficult for the police in this way. Because we have to be careful about what we are doing from the bench, and from the investigating officers.¹⁶

Further:

Court: Sorry man, you must not do that. You are putting us under pressure here because the courts are bound to look serious into gender - based violence cases. Understood? I am not even supposed to entertain this, I am just supposed to postpone it until the investigation officers is here. But I am trying to be lenient to you.

CASE POSTPONED UNTIL 13 APRIL 2021.¹⁷

- [24] On 13 April 2021 the plaintiff was released on R300-00 bail. The matter was remanded to 14 May 2021. On 14 May 2021 the matter was remanded to 31 May 2021 for further investigation.

- [25] On 31 May 2021 the matter was struck off the roll by the court because the docket was not at court.

- [26] The plaintiff was again summoned for court but the matter was mediated between the parties and the charges withdrawn on that basis. The docket depicts that the decision to withdraw the case was due to successful mediation in January 2023; not due to a lack of evidence or evidence to support prosecution.¹⁸

¹⁶ INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023 at pages 130 line 7 to page 131 line 30.

¹⁷ INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023 at page 125 from line 18 to line 30.

¹⁸ INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023 at page 3.

[27] The plaintiff was subpoenaed to appear on 3 November 2022 in Phuthaditjhaba Court A on a charge of “assault by threat”.¹⁹ This is correct given the allegations and no malice or fault can be ruled to have occurred.

[28] To conclude for completeness; the Plaintiff was detained for a period of 10 (ten) days and prosecuted for approximately 2 (two) months. The detention and the prosecution were explained by the facts above. This brings the law to the fore. I will first depict the claims and the defence for perspective.

THE CLAIMS AND THE DEFENCE

[29] The plaintiff claims for unlawful arrest and detention and malicious prosecution. The defendants oppose the claims and deny any liability on the facts of the case. The result is that the trial court is called upon to decide the issues of merits and quantum of damages:²⁰

¹⁹ INDEX – DEFENDANTS DISCOVERED DOCUMENTS SET DOWN 24, 25 & 27 OCTOBER 2023 at pages 3 to 5.

²⁰ AD CLAIM 1-AD UNLAWFUL ARREST AND DETENTION:

9.

9.1 On or about 1 April 2021 at the Phuthaditjhaba Police Station, the Plaintiff was arrested by Sgt Makwanasi, without a Warrant of Arrest, for intimidation or common assault, whereafter he was issued with a SAPS496 and released on warning.

9.2 On or about the 3rd of April 2021 at or near Phuthaditjhaba Setsing Complex at Shorprite the Plaintiff was arrested by Cpt Mokoena, without a Warrant of Arrest, for allegations of assault, intimidation and malicious damage to property.

10.

10.1 The Plaintiff after his arrest on 3 April 2021 was detained and charged at the instance of the First Defendant, for assault, intimidation and malicious damage to property.

10.2 On the 6th of April 2021 the Plaintiff was transported to the Phuthaditjhaba Magistrate's Court where the Plaintiff's Application for Bail was denied by members of the First and Second Defendants and he was further detained until the 13th of April 2021.

10.3 The further detention from the 6th of April 2021 until the 13th of April 2021 was at the Harrismith Correctional Facilities and after a further appearance at the Phuthaditjhaba Magistrate's Court on the 13th of April 2021 the Plaintiff was granted bail in the sum of R300.00.

11.

At all relevant times the aforementioned members were acting within the course and scope of their employment as employees of the Defendant.

12.

The arrest of the Plaintiff was unlawful in the fact that:

12.1 The members of the South African Police Services respectively did not take into account the Plaintiff's rights in terms of article 12 of the Constitution, Act 106 of 1996, (herein after called "the Constitution");

12.2 The Plaintiff was arbitrarily and without good cause deprived from his freedom;

12.3 That the members of the South African Police Services had no grounds to interfere with the Plaintiff's Constitutional rights, by that:

12.3.1 The Plaintiff did not pose any risk to the community;

12.3.2 The Plaintiff would not have evaded the court hearing;

12.3.3 That the members of the South African Police Services had no grounds to believe that the Plaintiff would harm himself or any other person of the public;

12.3.4 That the Plaintiff was in condition and/or had the will to refute the allegations against him;

12.3.5 That the members of the South African Police Services had no urgency towards the arrest of the Plaintiff;

12.3.6 That the members of the South African Police Services did not take into consideration whether the Plaintiff had a known and fixed residence;

AND/OR ALTERNATIVE:

13.

The arrest and detention of the Plaintiff was unlawful due to the fact that the members of the South African Police Service and National Prosecuting Authority had no *prima facie* and/or reasonable grounds to arrest, detain and charge the Plaintiff.

AND/OR ALTERNATIVE:

14.

The arrest of the Plaintiff was unlawful due to the fact that the members of the South African Police Services did not exercise their discretion/or did not exercise their discretion properly by:

14.1 That there was no obligation on the members of the South African Police Services to arrest the Plaintiff;

14.2 That the members of the South African Police Services did not investigate the matter properly and did not follow up on the Plaintiff's explanation;

14.3 That there were no grounds to suspect that the Plaintiff had committed an offence;

14.4 That the members of the South African Police Services did not exercise their discretion properly and *bona fide*;

15.

As a result of the unlawful arrest, detention and further detention on the instance of the First and Second Defendants, the Plaintiff suffered damages in the sum of R500 000.00 for:

15.1 Depriving of the Plaintiff's freedom;

15.2 Contumelia;

15.3 Emotional stress and Psychological trauma;

15.4 Embarrassment suffered by the Plaintiff by keeping him in holding cells and being arrested in front of members of the public;

The amount of R500 000.00 is a global amount for the Plaintiff's damages.

AD CLAIM 2-MALICIOUS PROCEEDINGS:

16.

On or about the 3rd of April 2021 at Shorprite grocery store in Setsing Complex Phuthadithjaba and at the Magistrate's Court the Defendants wrongfully and malicious set the law in motion and proceeded with the prosecution by arresting, detaining and charging the Plaintiff for:

16.1 assault, intimidation and malicious damage to property;

16.2 by causing the Plaintiff to appear before Court on the 6th of April 2021 and opposed his bail and again on the 13th of April 2021 when Plaintiff was granted bail in the sum of R300.00; and

16.3 after five further appearances in the matter was struck off the roll on the 31st of May 2021 by a member of the Second Defendant due to a lack of evidence and/or probable cause to successfully prosecute the Plaintiff.

17.

AD CLAIM 1: UNLAWFUL ARREST AND DETENTION:

1. Payment of the sum of R500 000.00;
2. Interest at the rate of 7% per annum from date of summons until date of payment;
3. Cost of suit;
4. Further and/or alternative relief.

AD CLAIM 2: MALICIOUS PROCEEDINGS:

1. Payment of the sum of R150 000.00;
2. Interest at the rate of 7% per annum from date of summons until date of payment;
3. Cost of suit;
4. Further and/or alternative relief.

17.1 The Prosecutor(s) dealing with the case on behalf of the Defendant elected to proceed with the said prosecution, which prosecution commenced on the 6th of April 2021 in the Phuthaditjhaba Magistrate's Court when Plaintiff's bail was denied.

17.2 On the 13th of April 2021 the Plaintiff appeared again in the Phuthaditjhaba Magistrate's Court and was granted bail in the sum of R300.00;

17.3 After five more appearance the matter was strike from the roll due to the lack of evidence and/or probable cause to successfully prosecute the Plaintiff.

17.4 The members of the Prosecuting authority failed to properly execute their duty of care by considering all the relevant informaiton pertaining to the charges instituted against them by members of the First and Second Defendants.

18.

The member(s) of the South African Police and prosecutor(s) dealing with the Plaintiff's case on behalf of the Defendant had no reasonable or probable cause for charging and prosecuting the Plaintiff alternativley had no reasonable or probable cause for continuing the prosecution of the Plaintiff for the offence referred to above, nor did he/they have any reasonable belief in the truth of the information at their disposal.

AND/OR IN THE ALTERNATIVE TO PARAGRAPH 18:

19.

The actions of prosecutor(s) dealing with the Plaintiff's case on behalf of the Defendant was wrongful in that he/they;

19.1 Did not consider and/or evaluate the evidence to his/their disposal properly; and/or

19.2 Should have realised that sufficient evidence did not exist to constitute a prima facie case against the Plaintiff; and/or

19.3 Should have realised that a successful prosecution against the Plaintiff would not follow if the available evidence were properly considered.

20.

The actions of the member(s) of the South African Police dealing with the Plaintiff's case on behalf of the Defendant was wrongful in that he/they

20.1 Failed to investigate properly the allegations as leveled by the complainant.

21.

At all relevant times member(s) of the South African Police acted within the course and scope of their employment for the Defendant.

22.

As a result of the foregoing the Plaintiff suffered damages in the amount of R150 000.00 for contumelia and deprivation of freedom and discomfort suffered by the Plaintiff.

- [30] The particulars of claim of the plaintiff and defendants were amended by agreement between the parties and on order of the court. The defendants specifically relied on section 40(1)(b) of the CPA to defend the arrest:

7.

AD PARAGRAPH 9 THEREOF

- 9.1 On the 1st of April 2021 the Plaintiff was arrested by Sergeant Mkhwanazi for intimidation and released on warning (SAPS 496) without being detained.
- 9.2 The Plaintiff defied the warning (SAPS 496) and continued to intimidate the complainant. On Saturday the 03rd of April 2021 Captain Mokoena was called to the complainant's workplace where the Plaintiff was intimidating and threatening the Complainant, the Plaintiff was arrested on the scene for intimidation, common assault, and malicious damage to property, which arrest is lawful and justifiable in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977.²¹

- [31] The facts of the case that were adduced do however invoke sections 40(1)(q) of the CPA and section 3 of the DVA. Although not pleaded I will regard it as the law to be applied. The law cannot be ignored because the specific legislation was not quoted when the facts direct to it.

THE ISSUES TO BE ADJUDICATED AND THE ONUS

- [32] The arrest of the plaintiff without a warrant is not in dispute. The parties were agreed that the onus is on the first defendant to prove on a balance of probabilities that the arrests and detention were lawful. The plaintiff has the same onus to prove that there was malicious prosecution.

²¹ Defendants' amended plea dated 8 May 2023. Bundle: INDEX – PLEADINGS PAGES 24 TO 30.

THE LAW AND DOMESTIC VIOLENCE

[33] I now return to the striking words of Justice Sachs in *S v Baloyi supra*. I apologize for the lengthy quote, but it is clearly necessary to educate the plaintiff and remind legal practitioners that deal with cases of this nature what the scourge is that causes harm to women in South Africa and what the law demands.

The constitutional requirement to deal effectively with domestic violence.

[11] All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished. The Law Commission, supporting the need for appropriate legislation to reduce and prevent family violence, invoked the following quotation from a document drafted by the US National Council of Juvenile and Family Court Judges: “Domestic and family violence is a pervasive and **frequently lethal problem** that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually, and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities’ safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.”

The imperative for such legislation, as noted by the Law Commission derives from section 12(1) of the Constitution, which reads:

“Everyone has the right to freedom and security of the person, which includes the right— . . .

(c) to be free from all forms of violence from either public or private sources; . . .”

The specific inclusion of private sources emphasizes that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.

- [12] In my view, domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form. As Joanne Fedler points out: “Intrafamily offences include arson, assault, assault with intent to do grievous bodily harm, threats to do bodily injury, obstructing justice, cruelty to children, incest, kidnapping, murder, culpable homicide, rape, forced prostitution, unlawful entry on to property, malicious damage to property, stalking, theft, robbery, unlawful possession of a firearm, involuntary sodomy, extortion, blackmail and sexual assault.”

The non-sexist society promised in the foundational clauses of the Constitution, and the right to equality and non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy impunity. In the words of White J in *United States v Dixon et al*:

“Realisation of the scope of domestic violence . . . ‘the single largest cause of injury to women,’ . . . has come with difficulty, and it has come late.”

The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends

an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorization of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behaviour are normalized rather than combatted. Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.

- [17] The ambivalence of the victim and the reluctance of law enforcement officers to ‘take sides’ in family matters, coupled with the intimate and potentially repetitive character of the violence, is highly relevant to the creation of a special process for the issuing of domestic violence interdicts... (Accentuation added)

- [34] This is what the legislation decreed at the time of the arrests in April 2021 and that is the law:

1. The Domestic Violence Act:

3. **Arrest by peace officer without warrant and assistance to complainant.—**

- (1) A peace officer who attends the scene of an incident of domestic violence, may without a warrant, arrest any respondent who such peace officer reasonably suspects of having committed an act of domestic violence which constitutes an offence in terms of any law.
- (2) A peace officer must, without a warrant, arrest any respondent at the scene of an incident of domestic violence who they on reasonable grounds believe of having committed an act of domestic violence which constitutes an offence containing an element of violence against a complainant. (Accentuation added)

2. An act of domestic violence is described in section 1 of the Domestic Violence Act as:

“domestic violence” means—

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal or psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (fA) sexual harassment;
- (fB) related person abuse;
- (g) spiritual abuse;
- (h) damage to property;
- (hA) elder abuse;
- (hB) coercive behaviour;
- (hC) controlling behaviour;
- (hD) to expose a child to domestic violence;
- (i) entry into the complainant’s—
 - (i) permanent or temporary residence without their consent, where the parties do not share the same residence; or
 - (ii) workplace or place of study, without their consent, where the parties do not share the same workplace or place of study; or
- (j) any other behaviour of an intimidating, threatening, abusive, degrading, offensive or humiliating nature towards a complainant, where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant; (Accentuation added)

3. The Criminal Procedure Act:

Section 40(1)(a) decrees that a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence;

Section 40(1)(b) permits that a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

Schedule 1 was amended by Act 12 of 2021 with effect from 25 January 2022. The arrests in the instance were on 1 & 3 April 2021. The offences applicable to section 40(1)(b) on the facts of this case were thus:

SCHEDULE 1

(Sections 40 and 42)

Assault, when a dangerous wound is inflicted, malicious injury to property. Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder,²² the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.

Since 25 January 2022 it is assault:

(a) when a dangerous wound is inflicted; (b) involving the infliction of grievous bodily harm; or (c) where a person is threatened—(i) with grievous bodily harm; or (ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013).

²² Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Any person who—(a) commits torture; (b) attempts to commit torture; or (c) incites, instigates, commands or procures any person to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life. Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.

Section 40(1)(q) of the CPA provides for arrest without a warrant in that a peace officer may without warrant arrest any person who is reasonably suspected of having committed an act of domestic violence as contemplated in section (1) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

The facts here show that violence was an element in both cases. To reiterate:

“...he threatened me by saying he will kidnap me and nobody will find me. He will find people who will kill me and throw my body away. I explain to him that he should leave my room.”

When at my brother’s place Bobby at Bluegumbush he went further by threatening me by using the same words that he will kidnap me and make me vanish forever. He also said that he will kidnap my children (sic) MP²³ who is 8 years old. I felt threatened all the way. I am also suffering from Highblood (sic) Pressure and he kept on threatening me. I had lost concentration at work. My biggest pain is my children that he threatened to kill with his gun.”

- [35] If the police are not allowed to arrest and detain a suspect on the above then when can they arrest? When may the prosecutorial authority then institute prosecution if not here? The Domestic Violence Act 116 of 1998 decrees in section 3 that: “(2) A peace officer **must**, without a warrant, arrest...”
- [36] To threaten the complainant with murder of her and her family and then confront her at her place of employment after she made it clear that she does not want to have any contact with him and fear for her life; is beyond any

²³ Abbreviation used to protect the identity of the minor.

doubt an act of domestic violence which constitutes an offence containing an element of violence. The violence or probability thereof was so severe that, according to the information available to the arresting officer, she had to be locked in a room for her safety. The manager deemed it necessary to call for the assistance of the police. This was not an innocent peaceful visit by the plaintiff. The individual that summoned the police clearly did not hold the opinion that their private security would be the appropriate authority to deal with the situation.

[37] But the more general aspects of arrest are also crucial.

THE LAW ON ARREST, DETENTION AND PROSECUTION

[38] The principles that guide arrest, detention and prosecution in South African law were set out in *Ditsele and Others v Minister of Police and Another* (805/2019; 3131/2019) [2023] ZAFSHC 16 (25 January 2023) and *Ditsele and Others v Minister of Police and Another* (805/2019) [2023] ZAFSHC 122 (21 April 2023).

[39] Regarding unlawful arrest the Supreme Court of Appeal in *Biyela v Minister of Police* (1017/2020) [2022] (1 April 2022) ZASCA, stressed that the decision to arrest must be reasonable and rational.

[40] It is a legal fact that the decision to arrest and to prosecute does not demand prove of the case beyond reasonable doubt or any doubt at the time. *The Biyela - case supra* noted that the standard of a reasonable suspicion for arrest is remarkably low.

- [34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.
- [35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.
- [36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly...
- [41] Section 38 of the CPA prescribes the methods of securing attendance of accused in court:
- (1) Subject to section 4(2) of the Child Justice Act, 2008 (Act No. 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.
[Sub-s. (1) substituted by s. 4 of Act No. 42 of 2013.]
- [42] Section 39 of the CPA prescribes the manner and effect of arrest:
- (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.
- (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of

the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

- (3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

[43] Before now and as far back as on 19 November 2010, Harms JP, Nugent JA, Lewis JA, Bosielo JA and K Pillay AJA in the matter of *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) concluded that section 40 of the Criminal Procedure Act 51 of 1977 is not unconstitutional. The parameters or “jurisdiction” for a lawful arrest are:

To prove that the arrest was lawful, it must be proven that:

- (i) the arresting officer was a peace officer;
- (ii) the arresting officer entertained a suspicion;
- (iii) that the suspect to be arrested committed an offence referred to in schedule 1;
- (iv) the suspicion rested on reasonable grounds.²⁴

[44] The Sekhoto - case categorically denounced a fifth jurisdictional requirement that arrest will be unlawful if a less invasive option exists such as summons or written notice.²⁵

[45] In defending a claim for unlawful arrest, the four jurisdictional facts set out in section 40(1)(b) or, here also, 40(1)(q) of the CPA must be pleaded. It was done in the instance as will be pointed out hereunder. The facts were pleaded. The facts also cause the DVA to become applicable as was pointed out above.

²⁴ *Biyela supra* and also see *Duncan v Minister of Law-and-Order* 1986 (2) SA 805 (A) at 818G – H.

²⁵ *Sekhoto supra* at paragraphs [21] to [22].

[46] The Sekhoto - case ruled that once the required jurisdictional facts were present the discretion whether to arrest arose. Harms JP set some margins; not a *numerus clausus*, to the reasonable suspicion – discretion.

1. Peace officers are entitled to exercise this discretion as they see fit, provided they stay within the bounds of rationality.
2. This standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court.
3. The standard is not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard is not breached.
4. It is clear that the power to arrest is to be exercised only for the purpose of bringing the suspect to justice; however, the arrest is but one step in that process.
5. The arrestee is to be brought to court as soon as reasonably possible, and the authority to detain the suspect further is then within the discretion of the court.
6. This discretion is subject to a wide-ranging statutory structure and, if a peace officer were to be permitted to arrest only when he or she was satisfied that the suspect might not otherwise attend the trial, then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.
7. The arrestor is not called upon to determine whether or not a suspect ought to be detained pending trial; that is for the court to determine, and the purpose of an arrest is simply to bring the suspect before court so as to enable it to make that determination.

8. The enquiry to be made by the peace officer is not how best to bring the suspect to trial, but only whether the case is one in which that decision ought properly to be made by the court. The rationality of the arrestor's decision on that question depended upon the particular facts of the case, but it is clear that in cases of serious crimes, such as those listed in Schedule 1 or domestic violence, an arrestor could seldom be criticized for arresting a suspect in order to bring him or her before court.²⁶

[47] The Biyela - case confirmed the above and ruled that the evidence or suspicion considered by the officer need not be based on information that would subsequently be admissible in a court of law. Information regarded by the arresting officer may be hearsay evidence.

[48] The party who alleged the infringement of a constitutional right bears the onus of establishing it. Furthermore, a party who attacked the exercise of a discretion where the necessary jurisdictional facts were present, bears the onus of prove.

[49] Regarding detention Kruger²⁷ made the following clear:

The court's duty to obtain information (section 60(3)) — In *S v Mpofana* 1998 (1) SACR 40 (Tk) the accused was refused bail because *inter alia* an identification parade had not yet been held. In a renewed application, more than 30 days later, it appeared that still no identification parade had been held. On appeal, the court held that the trial court should have made enquiries in terms of section 60(3) into the reasons

²⁶ Sekhoto *supra* at paragraphs [42] to [44] at 331c–332a.

²⁷ Criminal Law, *Hiemstra's Criminal Procedure*, Chapter 9 Bail, 60 Bail application of accused in court, Author: Albert Kruger, Last Updated: March 2024. <https://www.myllexisnexis.co.za/Index.aspx>.

why there had been no parade. The case was referred back to the magistrate for that reason (at 47b–c). A similar case where the court should have actively investigated the matter itself, is *S v Swanepoel* 1999 (1) SACR 311 (O). In bail proceedings the court should not call witnesses under section 186 but should order the parties to place the evidence before the court (*S v Mdhuli* 2020 (1) SACR 98 (LP)). The magistrate should set out the information or evidence sought in a simple, frank, honest and straightforward way (*S v Motsi* 2023 (1) SACR 218 (WCC) par [17]).

DPP’s duty — The prosecutor has a duty to place before the court any information relevant to the exercise of the discretion with regard to the granting or refusal of bail and, if bail is granted, any appropriate conditions attaching thereto. In appropriate cases the state could be held liable if bail was wrongly granted (*Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2002 (1) SACR 79 (CC) paras [72], [81]– [83]). (Accentuation added)

Detention after first appearance in court — A remand order by a magistrate does not necessarily render subsequent detention lawful (*De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) par [62]). If the arresting officer subjectively foresees the mechanical remand after the first court appearance and reconciles her or himself to this possibility in proceeding to arrest, the Minister will be liable in damages for detention after the court remand if the arrest was unlawful (*De Klerk* par [86]).

Arrest and detention—Both terms are used in the Criminal Procedure Act (see, for instance, section 50(1)) and are treated separately in the Constitution (in C 35(1) and (2) respectively). Although the dividing line between them is sometimes vague, there is indeed a clear distinction between arrest and detention. The first is a narrow and specific term which refers to the initial deprivation of liberty with intent to charge; the latter is a fairly wide generic term which relates to the continued deprivation of freedom. The one usually follows the other. Someone who has not been arrested but is questioned in connection with an offence, as either a suspect or source of information, can be called a “detained person”. Such a detained person is free to withdraw but doing so could possibly lead to his or her arrest if he or she is a suspect. Prospective witnesses can be detained in

terms of section 185. Arrest and detention were analyzed in *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (EC) and distinguished from each other where municipal police effected a lawful arrest for drunkenness (“arrest”) but then locked up the arrestee in a municipal van overnight (“detention”) in contravention of the duty under section 50 that an arrested person “shall as soon as possible be brought to a police station”. Continued detention by virtue of a court order does not automatically render the detention lawful (*Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) par [38]). The judgments in *Tyokwana* were analysed in *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) pars [40] – [41]).

[50] Malicious prosecution is characterized by malice or intend to do harm. Whether a prosecution is wrongful or unlawful depends on whether there was a reasonable and probable cause coupled with the *animus iniuriandi* of the defendant in instigating, initiating or continuing it.²⁸

1. Under Section 179 of the Constitution, 1996 and the National Prosecuting Authority Act, 1998, the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions’ incidental to institution of criminal proceedings. Section 179 of the Constitution places the decision to prosecute within the sole power of the Prosecuting Authority.
2. The Directives or Code of Conduct²⁹ promulgated in terms of the National Prosecuting Act, 1998, demand that prosecutors shall, among others:

²⁸ Okpaluba, C., *Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decision*, PERIPELJ 2013 (16)1 241- 279.

²⁹ <https://www.npa.gov.za/npa-code-conduct> accessed on 21 January 2023.

- i. Perform their duties fairly, consistently and expeditiously.
- ii. Perform their duties fearlessly and vigorously in accordance with the highest standards of the legal profession.
- iii. They shall give due consideration to declining to prosecute, discontinuing criminal proceedings conditionally or unconditionally or diverting criminal cases from the formal justice system; particularly those involving young persons, with due respect for the rights of suspects and victims, where such action is appropriate.
- iv. In the institution of criminal proceedings; proceed when a case is well-founded upon evidence believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence.
- v. They must ensure that, throughout the course of the proceedings, the case shall be firmly but fairly and objectively prosecuted.
- vi. They must consider the views, legitimate interests, and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavor to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility, if any, of victim compensation and witness protection.
- vii. They shall safeguard the rights of accused persons, in line with the law and applicable international instruments as required in a fair trial.
- viii. A prosecutor must examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained and shall refuse to

use evidence which is reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the accused person's human rights and particularly methods which constitute torture or cruel treatment.

3. *In Kubeka v The Minister of Police and Another* (63675/2016) [2022] ZAGPPHC 298 (4 May 2022) Collis J ruled and confirmed that:

[30] ... To succeed with a claim for malicious prosecution a claimant must allege and prove that (i) the defendants set the law in motion, they instigated and instituted the proceedings; (ii) they acted without reasonable and probable cause; (iii) they acted with malice, and (iv) the prosecution failed.

4. Okpaluba,³⁰ after scrutiny of the South African law, case law and international principles, emphasized that:

... the requirement of reasonable and probable cause plays such a central role in an action for malicious prosecution that the success of such an action depends largely on there being a lack of reasonable and probable cause for the prosecution among the other three requirements. The presence or absence of reasonable and probable cause more or less dictates whether or not there is any basis for the prosecution and leads the way to the inquiry as to whether there was malice or improper purpose on the part of the prosecutor. Again, whether or not the defendant lacked reasonable and probable cause to instigate, initiate or continue the prosecution depends ultimately on the facts and information carefully collected and objectively assessed, on which the prosecutor based his/her belief that the plaintiff was guilty; it is not the probability that those facts would secure a conviction. Yet the prosecutor is faced with the difficulty in that his/her conduct in this regard is subject to both the subjective and objective tests. In evaluating the material that is available to him/her arising from the investigations, the objective sufficiency of the material must be considered by the prosecutor and assessed in the light of all the facts of the

³⁰ Okpaluba, C., *Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decision*, PERIPOLJ 2013 (16)1 241- 279 at 241.

particular case. In effect, his/her belief must be honestly held and founded on reasonable grounds, such that would lead a reasonable person in his/her position to hold a similar belief. It essentially requires the plaintiff to establish a negative, rather than for the defendant to prove the existence of reasonable and probable cause. (Accentuation added)

SUMMARY AND EVALUATION OF THE EVIDENCE

[51] I regress to depict the evidence as it was adduced in the trial for the sake of completeness.

[52] The trial, among others, consisted of the *viva voce* evidence of Mr. Fako Phillip Chetane (plaintiff), Sergeant Mkhwanazi (arresting officer on 1 April 2021), Captain Mokoena (arresting officer on 3 April 2021) and Ms. Mahlakoane (the prosecutor that prepared the case for the first appearance in court). The contents of the docket, charge sheet and transcribed record of the court proceeding in the case also formed part of the evidence.

[53] **THE CASE FOR THE DEFENDANTS³¹**

I SERGEANT MKHWANAZI

1. Sergeant Mkhwanazi is a detective in the South African Police Service with 18 years' experience and stationed at Phuthaditjhaba.
2. He received information from the complainant that she was threatened by the plaintiff that he will kill her and kidnap her children. The girlfriend/complainant realised the situation when they quarrelled and she ran away. Plaintiff grabbed her but she managed to get free but her

³¹ Also see paragraph [23] above.

bag remained with the plaintiff after the scuffle. She was on her way to work.

3. The complainant appeared very frightened and they had to calm her down at this time when she was at the police station. She related to him what happened and also what happened on the 10th of March 2021. They went with her to the place where she resided with the plaintiff. They expected to find the perpetrator there. They could not find him. Sergeant Mkhwanazi left a message with someone on the premises for the plaintiff to report to the police station.
4. The room where they rented was locked. The complainant tried looking for the key but she could not locate it. Thereafter they took the complainant back to her work because she was still on duty. She was dressed in her Shoprite uniform.
5. A case was opened and registered.
6. On the same day, 1 April 2021, he received a call and the person introduce himself as Tobi Mokoena. The person indicated he received information that the police and complainant were at the place they rented. Sergeant Mkhwanazi then realized who was calling. According to the statement in the docket the suspect is one Tobi Phillip Mokoena. Sergeant Mkhwanazi informed him that he must report to the police station and report to him. He also informed him of the charge against him.
7. Sergeant Mkhwanazi indicated that the plaintiff was very cooperative when he arrived at their offices. He is a Lesotho citizen. On his arrival he informed him of the charges against him. According to the Sergeant the plaintiff did not grasp that what transpired that morning was a crime

in this country. Sergeant Mkhwanazi explained the law to him. The plaintiff indicated that he understood and indicated that he will abide by the law.

8. A SAPS 496 form was issued. This is a form that explains the charges to the accused and when he is expected to be in court. The plaintiff/accused was under arrest but not detained. The contents of the SAPS 496 was explained and he was warned not to have any contact with the complainant. The accused was further informed that the court will provide him with further formal conditions. The date to appear in court was the 15th of April.
9. The reaction of the plaintiff was to promise that he will not have contact with the complainant or interfere with the investigations.
10. Since the plaintiff was in possession of the key he asked if he could fetch his clothes and move to another place. Sergeant Mkhwanazi phoned the complainant at work and they then met with the plaintiff and went to the room where they rented. The complainant said seeing that the plaintiff knows where she resides, she would rather take her property and move elsewhere. He took her to a village known as Bollata. She made it clear that she did not want for the plaintiff to know where she resides. He left the complainant there.
11. He did explain what the consequences would be should the plaintiff not comply with the conditions. Sergeant Mkhwanazi emphasized that he explained to the plaintiff that he must not "trouble" any witnesses and the complainant. He explained that he can end up in custody. During cross examination the witness reiterated that he warned the plaintiff not

to contact the complainant. He did this to prevent the plaintiff from getting into further trouble.

12. Sergeant Mkhwanazi was under the impression that he is dealing with a dangerous man with a gun.
13. Sergeant Mkhwanazi was a very good witness. The credibility of his evidence and the correctness thereof cannot be faulted.

II CAPTAIN MOKOENA

1. Captain Mokoena is a seasoned policeman with 11 years' experience in the South African Police Service. He arrested the plaintiff on 3 April 2021.
2. On the day he was on duty and on standby over the weekend. He received a message from the charge office informing that there is an incident that took place at Shoprite, Setsing, Phuthaditjhaba. The complaint was about "a male that was fighting a lady". The manager of Shoprite reported the complaint. The manager called Warrant Officer Matopo that conveyed the message to the Captain.
3. Captain Mokoena and Warrant Officer Matopo proceeded to Shoprite. At Shoprite they located the manager in his office. Captain Mokoena was not wearing a uniform but Matopo was in uniform.
4. They introduced themselves to the manager and he explained the reason for summoning the police. As they spoke there was a male person standing outside the office. The manager introduced them to the person and he indicated that it is the man that caused the complaint.

5. The manager explained that he saw the plaintiff chasing the lady inside the shop. Fortunately, they managed to rescue the lady and locked her inside an office for her safety.
6. Captain Mokoena requested to see this lady who was mentioned. On meeting with the lady in the cash office he introduced himself to her. Captain Mokoena noticed that it looked as if she had been crying. He then asked what happened. She explained the violence perpetrated by the plaintiff as depicted in her statement and the manager. She further explained that not long ago she opened a case against him. He realised it was the case wherein a SAPS 496 was issued and arrested the accused.
7. He applied the law in relation to domestic violence. From experience he knows how sensitive these kinds of cases are. **He realized the lady's life was in danger.**
8. The Captain made very sure of his facts before he arrested the plaintiff by phoning around to obtain evidence on the history of the case. On a question by counsel for the plaintiff the Captain indicated that the complainant's life was not in danger by the time they arrived because she was locked in an office for her safety. He was not there when the incident started. The manager of Shoprite said the accused was chasing the lady around and they salvaged her from him.
9. The demeanour of the plaintiff when the police arrived at the shop was that of "a person who had been in a fight. He is busy calming down".
10. Captain Mokoena was also a good witness. His evidence cannot be faulted.

III MS MAHLAKOANE

1. The witness is a prosecutor based at Trompsburg. She worked at the magistrate's court at Phuthaditjhaba previously. When the matter of Mr. Chetane came to court she was at Phuthaditjhaba. On the 6th of April 2021 the docket came as a first appearance before court. She read the docket and the statement of the complainant. Mr. Chetane, according to the statement, threatened the complainant to an extent of killing her and her children. She decided the accused should be charged with assault by threat.
2. After reading the docket and making a charge sheet she took it to court. She handed it over to the prosecutor in court. She was an aspirant prosecutor. She was not involved in the matter afterwards at all. The fact that the matter was struck of the roll does not indicate that prosecution has been stopped.

[54] PLAINTIFF'S CASE

FAKO PHILLIP CHETANE (THE PLAINTIFF)

1. The evidence of this plaintiff concluded the case for the plaintiff.
2. The plaintiff, Mr. Fako Phillip Chetane, is a 42-year-old taxi driver. He is a Lesotho citizen that lives and works in South Africa. On all accounts he has a valid passport to work and live in South Africa. He is not married but has two children born in 2012 and 2018.
3. The complainant was his girlfriend with whom he shared a room.
4. The plaintiff indicated that he came to meet with Sergeant Mkhwanazi after "I had differences with my girlfriend. I did not know where she went. I woke up and went to work as usual. While on duty I phoned the

landlord to find out if the girlfriend arrived at home. The landlord informed me that the lady arrived in the presence of two detectives they were looking for the key to the house...”

5. He phoned the police station and was requested to report there. He reported later the afternoon and on arrival was informed that his girlfriend reported that he is threatening her.
6. He informed the police that they had a verbal argument and she left the house. The officer did ask for details and he explained what happened. He explained they only had a verbal argument.
7. It is the evidence of the plaintiff that Sergeant Mkhwanazi informed him that the lady indicated that she does not want to “meet” with him. She wanted to fetch her belongings at the house they shared. At that instance Sergeant Mkhwanazi requested the plaintiff to accompany him to fetch the lady at her workplace and get her clothes. The plaintiff complied, the complainant was fetched and she collected her clothes.
8. The plaintiff was then requested to remain behind whilst the police took the complainant to her new residence.
9. On a question by his counsel if he was given any documentation the witness confirmed that Sergeant Mkhwanazi gave him a document which had a date whereby, he had to appear in court with reference to the complaint laid by the complainant. He could not recall the date that he had to appear in court. The document was handed over to him at the police station.
10. The witness was then asked if he was arrested and he answered that he was not arrested.

11. The witness explained that the arrest on the 3rd of April was because of the fact that he went to the brother of the complainant to tell him that she is not sleeping at their home anymore. After the conversation with the brother the witness went to Shoprite where he met the manger. The plaintiff stated that he went to Shoprite because the brother told him: "to request the manager to bring them together". The reason he went to Shoprite was to fix the issues between himself and his girlfriend.
12. After he arrived at the shop he spoke to the manager. The witness indicated that all that happened is that the manager said he will fetch the complainant and then suddenly the police appeared. He was ordered to leave Shoprite and then arrested. The rest is common cause.
13. The witness did not mention why the police was summoned to the shop.
14. During cross examination the witness admitted that he had a quarrel with his girlfriend and the policeman said that after the complainant took her belongings, he must stay away from her. He must not follow them. Since the complainant is frightened, he must not follow them and that she might return herself.
15. The witness was very selective with his evidence. The witness admitted that he was warned to stay away from the complainant. He admitted that; against her wishes and the reprimands of the police he initiated contact with her. He got the authorization of her brother to consult with the manager of the complainant to resolve their issues. This, with a contempt of the wishes of the complainant. He is quiet on why the manager deemed it necessary to call the police and why the complainant had to be locked in a room. He did not testify about the fact that he was represented by a legal representative since his first appearance in court.

He did not inform the court that an alternative address had to be supplied to the court where he will be located and that he could not give the address and that the police had to confirm it to be correct. He did not inform the court, as stands undisputed, that prosecution did not proceed because the case was mediated. The matter was removed from the roll because the docket was not at court and not because of a lack of evidence to prosecute. He did not inform the court that his legal representative could at any time have demanded a bail application but did not. They did not oppose the postponements.

CONCLUSION

- [55] It was proven beyond any doubt that the information against the plaintiff was serious and that severe violence was implied. Both sections 40 of the Criminal Procedure Act and section 3 of the Domestic Violence Act demanded the arrest of the plaintiff.
- [56] His detention after his first appearance was not unlawful. The police and prosecution had to investigate the citizenship of the plaintiff, confirm his address, and investigate the issue of the firearm. The plaintiff operated under an alias in South Africa. Sections 50 and 60 of the Criminal Procedure Act decreed the manner in which the police, the prosecutor and the presiding officer in the circumstances of the case had to deal with the case and they complied diligently. He was taken to court within the prescribed 48 hours and after the information was obtained, he was released on bail immediately on 13 April 2021. The period between 6 and 13 April 2021 cannot be described in

any way whatsoever as illegal and unconstitutionally and as extended and delayed. It was eight days at the most and to comply with the law.

[57] The evidence against the plaintiff presented to the prosecutors was overwhelmingly *prima facie* prove of the crimes he allegedly perpetrated. The representative of the Office of the Director of Public Prosecutions had to instigate and institute prosecution. If they did not do so they would have recklessly failed in their task. They did due diligence to their constitutionally imposed task to in terms of section 179(4) of the Constitution exercise their functions without fear, favour or prejudice. The statement of the complainant and the conduct of the plaintiff caused reasonable and probable cause. There was not an inkling of malice to be detected in any of the facts proven; in fact, the police, the prosecutor and the court did all they could to protect the interest of the plaintiff in the circumstances of the case and to protect him against his own bad conduct. The prosecution as a fact beyond any doubt did not fail. This is an example of successful alternative dispute resolution that forms part of the task of the National Prosecuting Authority.

[58] The plaintiff, in complete contempt of the constitutional rights of others and the law of this country misbehaved to the extent of criminality and his claims in this case are unacceptable and cannot be entertained.

[59] Costs must follow the cause in the instance.

[60] **ORDER**

The plaintiffs' claims are all dismissed on the merits with costs.


M OPPERMAN J**Appearances**

For plaintiff:

C Zietsman

Instructed by:

Loubser van Wyk Inc.

PRETORIA

c/o Jacobs Fourie Inc.

BLOEMFONTEIN

For defendants:

M Mopeli

Office of the State Attorney

BLOEMFONTEIN