



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

07 March 2023
DATE

...
SIGNATURE

CASE NO: 1718 / 2018

In the matter between:

SURPRISE MPHOS MASHABELA

PLAINTIFF

And

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

1ST DEFENDANT

MINISTER OF POLICE

2ND DEFENDANT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 07 March 2024.

[1] Introduction.

“[Women] have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”¹ Sadly, when women try to claim these rights, as entrenched in the Bill of Rights they often fall victims of rape and/or murder right on the very streets meant to give them the enjoyment of peace, tranquillity and security described above. Florence Phiri (Ms. Phiri) of Jerusalem Trust, Mpumalanga, knew of these inherent dangers too well. It must have been this knowledge that alerted her to avoid roaming the streets of White River alone, at night.

[2] One can only imagine the sense of security that Ms. Phiri felt when on 01 May 2015, she walked the streets of White River side by side with her boyfriend, Wyn Ben Mokobane (the deceased). These lovers exhausted the last hours of Workers Day together at a tavern. When the new day started, they were walking freely along William Lynn Street in White River, near the taxi rank. As they walked, a man approached them, grabbed Ms. Phiri and started dragging her away from the deceased. The deceased knew his role to his lover, at that time of the night, and he lived up to it. He pulled Ms. Phiri away from this stranger

¹ Mohamed CJ in *S v Chapman* 1997 (2) SACR 3 (SCA) at 5A-C.

causing her some great agony as the two men fiercely pulled her, one on her left hand and another on her right.

- [3] Like a prey in the claws of a predator in the nearby Kruger National Park, whose cry only alerts the vultures and other scavengers, her plight for help only invited another man who came and joined the battle on the side of this stranger, against the deceased. The second man broke a bottle with which he stabbed the deceased on the neck, causing him to bleed profusely. He succumbed to this injury minutes later right there at the taxi rank.
- [4] A security officer attached to J&M Security, Gezani Samuel Makhubela (Mr. Makhubela) observed this encounter from where he was stationed at that taxi rank. He rushed to the nearby police station to summon the police to the scene. The police followed hot on his heels to the taxi rank where they arrested two men being Oscar Mashile (Mr. Mashile) and Mpho Surprise Mashabela (the Plaintiff). Circumstances that led to their arrest are subject of dispute, and shall be dealt with shortly. Following several court appearances, the Plaintiff applied for bail which was opposed by members of the Second Defendant successfully. The Plaintiff remained in custody until 09 November 2015, when charges against him and Mr. Mashile were withdrawn.
- [5] By this time, the docket had been taken to Karin Joanne Mortlock (Ms. Mortlock), a Senior Public Prosecutor working for the First Defendant for a decision. After giving instructions on further investigations she required from the police, she finally took a decision to charge the Plaintiff with murder. This was on 10 November 2015, a day after the charges were withdrawn in court. She decided not to charge Mr. Mashile. Since charges were by then already withdrawn, the Plaintiff was summoned to appear in court at a later stage.

- [6] After appearing in court on few occasions, a Public Prosecutor handling the matter in court withdrew the charge against the Plaintiff. The said Public Prosecutor has since left the First Defendant's employment. According to Ms. Mortlock, since her decision was not reviewed by herself or any person of the same or senior rank to hers, her decision to prosecute still stands. That means the Plaintiff should again be summoned to face the charge of murder.
- [7] The Plaintiff now claims in Claim 1, R350 000.00 against the First Respondent, being R50 000.00 in legal expenses and R300 000.00 in damages; emanating from malicious prosecution against him. In claim 2 which is based on unlawful arrest and detention, the Plaintiff claims R450 000.00 being R50 000.00 in legal costs, R350 000.00 in general damages and R50 000.00 in future medical expenses. The Defendants deny being liable to the Plaintiff as they allege that the prosecution was not malicious and the arrest was in terms of section 40 of the Criminal Procedure Act, no. 51 of 1977 (the Criminal Procedure Act), and therefore, lawful.
- [8] Trial proceeded in respect of both the merits and the quantum, without separation. Parties also agreed that the Plaintiff bears the onus in proving claim 1 whereas the onus in claim 2 was on the Second Defendant. The Defendants called two witnesses and the Plaintiff was the sole witness in his case. Plaintiff also handed in evidence by an expert by way of an affidavit with agreement by the Defendants, in line with Rule 38(2) of the Uniform Rules. Following is the summary of the evidence led.
- [9] **Case for the Defendants.**
- Antony July Mdlovu: He is a police officer within the South African Police Services (SAPS) holding the rank of a Warrant Officer. He has been a police officer for the past 23 years. In 2015, he was a Sergeant. He was on duty at

White River Police Station on 02 May 2015 between 00h00 and 01h00, when Mr. Makhubela walked into the Community Service Centre and reported an incident of a man who was injured at the taxi rank. He and Constable Mbanze then drove to the taxi rank following behind the security motor vehicle in which Mr. Makhubela was in.

[10] Upon their arrival at the taxi rank, he observed a body of a man lying on a pool of blood, deceased. Another man known as “Scavenger” Edwin Chiloane (Mr. Chiloane) was standing with Ms. Phiri next to the body. Mr. Makhubela then told him that the deceased was injured in a fight with two men whom he described by the clothes they were wearing. He told him one of them wore a black soccer jersey with emblems of Orlando Pirates FC and the other one wore a Scottish shirt.

[11] As he was busy interviewing Mr. Makhubela, Mr. Chiloane approached him and pointed to the two men who were walking away as the men who were fighting the deceased. He then told Constable Mbanze to follow those men as he finished his interview with Mr. Makhubela. The said men were dressed in the clothes described by Mr. Makhubela. Mr. Makhubela further told him that the man dressed in a black soccer jersey was the one who grabbed Ms. Phiri while the man in Scottish shirt was the one who fought and injured the deceased. The man who wore a Scottish shirt is the Plaintiff.

[12] When he finished interviewing Mr. Makhubela, he followed Constable Mbanze who was in the company of Mr. Chiloane. He saw the two men Constable Mbanze was following, a short distance away, near where the police van was parked. Mr. Chiloane pointed the two men as the ones who fought and killed the deceased. At that stage, the Plaintiff (one of the two suspects) was busy talking to a man seated on a driver’s seat of a taxi. He then confronted the

two men with the allegations against them and they all said they knew nothing about the allegations. He immediately had the two men arrested and placed in a police van until the arrival of the detectives, after which, they were taken to the police station for further detention.

[13] Under cross examination, he was confronted with statements made by Ms. Phiri, Messrs. Chiloane and Makhubela who in their statements given to the investigating officer, do not allege that they pointed out the Plaintiff to him. In response he insisted that all the three witnesses pointed out the Plaintiff and identified him as the person who stabbed the deceased to death. He also highlighted that the Plaintiff himself gave a warning statement which was in the docket in which he confirmed that he was pointed out by Mr. Chiloane. He also brought it to the court's attention that Ms. Phiri gave a statement in which she too confirmed that Mr. Makhubela pointed out the Plaintiff as the culprit.

[14] He disputed the Plaintiff's version put to him to the effect that he was arrested by Constable Mbanze and another officer unknown to him, who is not him (the witness), saying he and Constable Mbanze were the only police officers at the scene at the time of the Plaintiff's arrest. He also disputed that the Plaintiff was arrested and placed in a police van alone, saying he was with another suspect named Oscar Mashile. He also disputed that the Plaintiff wore a maroon t-shirt at the time of his arrest saying, he wore a Scottish shirt. He however confirmed that the Plaintiff denied any knowledge of the incident at the time of his arrest saying, he said he was from a nearby Engen garage. He did not see a need to verify if he was indeed from the garage in light of the three witnesses who identified him and placed him at the scene of crime.

[15] Karin Joanne Mortlock: She is a Public Prosecutor in the employ of the First Defendant and has been working as such for 27 years. Seventeen of these years were spent as a Senior Prosecutor, a position she still held at the time she

gave evidence. The docket in this matter was brought to her to make a decision on whether to prosecute or not. Entries in the diary section of the docket reflect that as far back as 21 August 2015, she gave instructions to the investigating officer on outstanding investigations she wanted to be carried out before she could take a decision. Following further investigations conducted from the date of arrest, she took a decision on 10 November 2015 to prosecute the Plaintiff in the Regional Court on a charge of murder, and to withdraw the charges against Mr. Mashile. She took this decision without knowledge of the developments in court as she had just the docket at her disposal.

[16] In taking this decision, she testified that she considered the totality of the evidence as contained in the docket and concluded that there was a *prima facie* case against the Plaintiff of which there were reasonable prospects of success in a trial against him. She did not know the Plaintiff personally and she is not the Public Prosecutor who handled the matter in court. She knew that the charge against the Plaintiff was at some point withdrawn by the Public Prosecutor handling the matter in court. This was however without her sanctioning that decision. The Public Prosecutor in question has since left the National Prosecution Authority (NPA). She had no knowledge on how far the trial could have gone against the Plaintiff at the time she gave evidence. She however testified that for as long as her decision has not been reviewed, like *in casu*; the Plaintiff will have to be summoned and stand trial in line with her decision.

[17] Under cross examination, she denied that her decision to charge the Plaintiff was wrong saying there was evidence implicating him in the docket. It was not true, she said, to suggest that the three eye witnesses (Ms. Phiri, Messrs. Chiloane and Makhubela) did not point out the Plaintiff or that they averred such in their statements. Ms. Phiri and Sergeant Mdlovu gave

statements confirming the pointing out of the Plaintiff by some amongst them. She also testified that the Plaintiff himself gave a warning statement confirming that he was pointed out. She denied that any such statements could be inadmissible saying, she considered all the statements admissible until and if they are ruled inadmissible by the trial court.

[18] Case for the Plaintiff.

Mpho Surprise Mashabela: He is the Plaintiff in this case. At the time of his arrest he was employed as a petrol attendant. He lost his job as a result of being arrested in this case. He testified that in the early hours of 02 May 2015, he was at Joy's place where he stayed until they closed. He then left to a house commonly referred to as White House, an abandoned building belonging to Spoornet or Railway, located in White River. He stopped at Engen garage where he bought a pie and cigarettes. As he walked past the taxi rank, he saw about seven police officers. He stopped to talk to a taxi driver that he knew, asking about the commotion there at the taxi rank. The taxi driver told him that someone was stabbed there.

[19] As he was still talking to this taxi driver, Constable Mbanze appeared there in the company of another police officer. That police officer is however not W/O Mdlovu. Constable Mbanze asked him as to where he was from and he told him that he was from Engen garage going to the railway house. Constable Mbanze then shouted saying "Captain, here is another one." The said captain then told Constable Mbanze to arrest him. Constable Mbanze then placed him under arrest without explaining why he was arresting him, and placed him in a police van.

[20] He testified that at the time of his arrest he was wearing a maroon t-shirt. He was kept alone in the police van. Later he was transported to White River

Police Station where he was further detained. He was alone in the police van. He only met Mr. Mashile when he was in the police holding cell. It was when he was explaining to the other inmates as to the reason for his arrest that he learned that Mr. Mashile was also arrested for that case. There was a toilet in the cell where he was detained with others, which he did not use. The blankets he was given to use, smelled of urine. He took a shower outside the holding cell where there was no privacy as the other inmates would be seated out there and the shower had no door. He was however not bothered by the other people present there, as they were men like him.

[21] He was taken to court on Monday the 4th of May 2015 where the case was postponed by the Magistrate without bail. From there, he was kept at Nelspruit prison where he stayed in one of the 18 prison cells. Each cell accommodated between 40 and 50 inmates. Prison cells were much cleaner than the police holding cells at the police station.

[22] He only applied for bail around September/October 2015 which was opposed by the police. Bail was refused by the Magistrate. He remained in custody until 09 November 2015 when charges against him were withdrawn. He was served with summons to again appear in court on 18 March 2016. The case was postponed on several occasions until charges were again withdrawn due to absence of the witnesses on 08 May 2017. He was again served with summons in 2020 and appeared in court before charges were again withdrawn on 24 May 2021.

[23] On 24 May 2024, the day on which charges were withdrawn, Ms. Phiri and Mr. Chiloane were present in court. Prior to him being informed of the withdrawal, the two witnesses were called to the front and asked by the court if they knew him (the witness), and they answered in negative. He does not know why they said that as he knew them very well prior to the date of the

incident and they also knew him. Lastly, he admitted that the signature in the warning statement was his, but he disputed having said what was reflected therein, to the effect that he was pointed out by Mr. Chiloane

[24] He was cross examined on transcribed record which formed part of his appearance court record from the Magistrate Court, the contents of which were not in dispute. In an attempt to prove that the Plaintiff is the one who chose not to apply for bail until he had a legal practitioner of his choice, counsel for the Defendants referred him to the record where the following appears:

“2015-05-15

Accused 2: I confirm that the rights were explained to me.

Court: And today you still confirm that you conduct your own defence?

Accused 2: I make an application for that Your Worship.

Ms. Mashimane: Your Worship, if the Court may assist. Is accused 2 not the one who mentioned on the first appearance (intervenes)

Court: That he will never ever in his life want Legal Aid. Yes, impress upon him that he said so.

Accused 2: No, I was confused by then your Worship. I make an application.”²

In this action, the Plaintiff disputed having informed the magistrate that he will never apply for Legal Aid in his life.

[25] Counsel for the Defendants put it to the Plaintiff that his bail application was heard only on 01 June 2015 and was refused on the same date.³ The Plaintiff disputed this saying his application for bail was only heard in September or October in 2015. In an attempt to show that part of the reasons for denying the Plaintiff bail could be blamed on himself, counsel for the Defendant indicated that the residential address he gave the police upon his arrest, which was reflected on J15, was in Bizana Trust, which was different

² See p. 326 of the paginated bundle ln 2-12.

³ See p. 370-386 of the paginated bundle.

from the one he gave in his affidavit in support of the bail application which was in Kabokweni. The Plaintiff indicated that he does not know the address in Bizana Trust. He acknowledged the address in Kabokweni as his.

[26] He was confronted with evidence he presented in the affidavit he presented in support for bail application wherein he indicated that at the time of his arrest, he was self-employed, working at a car wash. He confirmed that he did work at a car wash, but the last time he worked there was in 2013. In 2015, he worked as a petrol attendant. He however indicated that he lost his job as a petrol attendant in April 2013, way before his arrest. He could not explain why the affidavit presented by him or his attorney in a bail application had wrong information in this regard. He also could not explain why in his evidence in chief, he testified that he was still employed as a petrol attendant at the time of his arrest.

[27] Before closing the case for the Plaintiff, minutes of joint meeting between the Clinical Psychologists for both the Plaintiff and the Defendant were handed in as evidence.⁴ Contents thereof were not referred to in evidence except that the Defendant was in agreement with the contents thereof. Contents of the docket that were referred to in the trial were also received as evidence without necessarily confirming the truth of the contents thereof.

[28] **Issues for determination**

The Plaintiff submitted that the arrest was unlawful in that the police did not have enough information to suggest that he committed crimes. For the same reason, it was also submitted that the prosecution was malicious. It was submitted by the Defendants that the arrest was lawful because there was

⁴ See p. 447-450 of the paginated bundle.

evidence that the Plaintiff committed a crime of murder, and that the police were in terms of section 40 of the Criminal Procedure Act. The Defendants further submitted that the decision to prosecute the Plaintiff was taken because at that time, there was a probable cause that he was involved in the crime of murder and the decision was not taken maliciously, but based on evidence contained in the docket.

[29] The court has to decide if in arresting the Plaintiff, the police acted lawfully and whether in taking the decision to prosecute, the NPA was malicious. That would entail deciding if the Defendants set the law in motion; whether they acted without reasonable and probable cause; and whether they acted with 'malice' (or *animo injuriandi*).

[30] **The arrest.**

Relevant parts of section 40 of the Criminal Procedure Act provide,

“40. Arrest by peace officer without warrant

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

(a) who commits or attempts to commit any offence in his presence;

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

...”

[31] In *Duncan v Minister of Law and Order*,⁵ the Appellate Division as it was known, held as follows in interpreting section 40(1)(b) of the Criminal Procedure Act,

⁵ 1986 (2) SA 805 (A) at 918G-H.

“The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain a suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That suspicion must rest on reasonable grounds.”

[32] In *Mabona and Another v Minister of Law and Order*⁶, Jones J described the level of suspicion to be entertained by a peace officer before effecting arrest without a warrant, as follows,

“The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

[33] In *Biyela v Minister of Police*⁷, the Supreme Court of Appeal *per* Musi AJA held,

“[T]he standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively. What is required is that the arresting officer must form a reasonable suspicion that a sch 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

⁶ 1988 (2) SA 654 (SE) at 658G-H.

⁷ 2023 (1) SACR 235 (SCA) at para 34-35.

arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a sch 1 offence.”

[34] In *Minister of Police v Dunjana and Others*⁸, Van Zyl DJP writing for the full court held,

“[T]he test for whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective. The enquiry is whether a reasonable person in the position of the arresting officer, and possessed of the same information, would have considered that there were grounds for suspecting that the arrestee committed the sch 1 offence in question. It is not whether the police officer believes that he has a reason to form a suspicion, but whether objectively he had formed a suspicion that is reasonable. The requirement that the arresting officer must have a suspicion, as opposed to probable cause, implies an absence of certainty or adequate proof. The facts or information possessed by the arresting officer must not be equated with evidence that will be admissible in court. 'It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.' It is an important distinction that must be kept in mind when the facts and information possessed by the arresting officer are evaluated against the standard of reasonableness.”

[35] The question the court has to answer in light of the above, is whether the arresting officer formed a reasonable suspicion before arresting the Plaintiff. The facts leading to the arrest of the Plaintiff are not common cause and as such, the court is expected to make a finding in respect of the facts it accepts as having been proved in light of the dispute. This would require evaluation of evidence and credibility finding in respect of the witnesses. It is common cause that Sgt Mdlovu (as he then was) was a peace officer. It is also common cause that he arrived at the scene and found the deceased's lifeless body lying on the pool of blood at White River taxi rank.

⁸ 2023 (2) SACR 486 (ECM) at para 16.

[36] At the heart of the dispute lies the question as to whether anyone identified the Plaintiff to him as the person who killed the deceased. Sgt Mdlovu testified that three witnesses identified the Plaintiff as the man who killed the deceased. The deceased disputes this saying no one pointed him to the police. In fact, he disputes the presence of Sgt Mdlovu at the scene at the time of his arrest. A finding in this regard is crucial because that will explain if the police acted with the required reasonable suspicion. There is no doubt that a finding to the effect that no one pointed out the Plaintiff to the police would also mean that they acted without a reasonable suspicion in arresting him as they were not present when the crime was committed.

[37] The court finds the evidence of Sgt Mdlovu to be probable and in line with the undisputed facts of the case. He and the Plaintiff did not know each other prior to the date of his arrest and as such, had no grudge against each other. For Sgt Mdlovu, this was just another day at work. He was summoned to the scene by a security officer while at the police station going about his daily routine duties. It would be very peculiar for him to just identify a stranger amongst many people gathered at the taxi rank and decide to arrest him saying, he committed murder.

[38] In a statement contained in the docket, Ms. Phiri confirmed that the security officer pointed the Plaintiff as the man who stabbed the deceased to death. The Plaintiff's warning statement made to the Investigating Officer, states that he was pointed out by Mr. Chiloane, as Sgt Mdlovu testified. The Plaintiff however disputes the contents of his warning statement although he admits to signing it. It remains for the court to decide on what to make of his denial. It should be remembered though that Sgt Mdlovu is not the one who took a warning statement from the Plaintiff; it was a different police officer

who was not even there when the Plaintiff was arrested. This officer must have been told by someone else as to what Mr. Chiloane did leading to the Plaintiff's arrest.

[39] It is prudent at this stage to weigh the Plaintiff's denial in this regard. It is not just the warning statement that Plaintiff calls to question. He disputes much of the contents of the court record that his legal representative was at pains to highlight that it was not in dispute. He disputes the date reflected on the record of proceedings as the date on which his application for bail was heard. He also disputes what is alleged therein, to wit, that he refuted the services of Legal Aid practitioners, although the record reflects that he admitted to having said so saying, it was all because then, he was still confused.

[40] The Plaintiff did not prove to be an honest witness even before this court, when he testified about his employment. He claimed he was employed as a petrol attendant and he lost his job as a result of him being arrested. The moment he was reminded of what he had alleged in his affidavit in support of his application for bail, he was quick to admit that at the time of his arrest, he was no longer employed. This aspect unfortunately uncovers him as a witness who would tell the truth only when it suits him and would be willing to mislead the court if it would benefit him. That unfortunately tarnishes his credibility so much that his evidence would only be acceptable when it is not in contradiction with the rest of the undisputed facts.

[41] The court therefore rejects the assertion that the Plaintiff did not tell the police in his warning statement that he was pointed by Mr. Chiloane. What is contained in the Plaintiff's warning statement is in line with the evidence presented by the credible witness, Sgt Mdlovu. The court also accepts Sgt Mdlovu's evidence that Mr. Makhubela also pointed the Plaintiff as the man who stabbed the deceased, as this is in line with Ms. Phiri's statement. With

this finding, it remains for the court to determine if objectively viewed, Sgt Mdlovu formed a reasonable suspicion that the Plaintiff committed a Schedule 1 offence.

[42] Upon his arrival, Sgt Mdlovu found a body of a deceased lying on a pool of blood. There were many bystanders. Three people pointed at the Plaintiff as the person who stabbed the deceased. He expected statements would be obtained by the Investigating Officer from these people as he gave their names and other details in the docket, which was eventually done. I am of a view that any officer in his shoes would have formed a reasonable suspicion that the Plaintiff committed a crime of murder. Murder is one of the offences listed in Schedule 1 of the Criminal Procedure Act. In fact, failure to arrest in those circumstances could be dereliction of duties which could lead to successful litigation against the police.⁹

[43] Sgt Mdlovu could not have anticipated then that the witnesses who identified the Plaintiff would not say anything about that fact in their statements. After all he is not the one who obtained such statements. Equally, failure by the witnesses to aver in their statements, that they are the ones who pointed the Plaintiff to the police does not mean that they dispute that they did. It follows therefore that if Sgt Mdlovu formed a reasonable suspicion to the effect that the Plaintiff committed a Schedule 1 offence, the arrest that followed was sanctioned by section 40(1)(b) of the Criminal Procedure Act and was therefore lawful.

[44] The detention that follows a lawful arrest is equally lawful. Further detention after the appearance of the Plaintiff in court was sanctioned by the court. This was after the accused chose not to apply for bail and even after he

⁹ See for example *AK v Minister of Police* 2023 (2) SA 321 (CC).

applied for bail which was refused. It is not for this court to determine if the court-sanctioned detention was lawful as there is no claim against the Minister of Justice as would be the case in respect of such detentions.

[45] An error is often made as it seems to be the case *in casu*, to make no distinction between the arrest and the detention ordered by the court following such arrest. It is apposite at this stage to give clarity in respect of the finding in *De Klerk v Minister of Police*¹⁰ which is often the source of this confusion. In *De Klerk*, the court had to consider whether the Minister of Police was liable to compensate Mr de Klerk for the entire period of his detention following his unlawful arrest, including the period following his court appearance. The court also had to consider whether the unlawful detention of Mr. De Klerk ceased when the magistrate ordered his further detention and whether the magistrate's order rendered the subsequent harm caused by his detention too remote (for the purposes of legal causation) from the unlawful arrest.

[46] What is important for purpose of this trial is to note that the question of the Second's Defendant's liability regarding the detention ordered by the court, is interwoven with a finding regarding the unlawfulness of arrest. Without a finding of unlawfulness in the arrest, the question of liability on the Second Defendant in respect of the detention ordered by the court does not arise. The liability for detention ordered by the court would thus have to be evaluated independently. This would however be pointless for the reason of non-joinder of the right party in respect thereto. The claim for unlawful arrest and detention stands to be dismissed on those bases.

¹⁰ 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC).

Malicious Prosecution.

[47] The *locus classicus* on the delictual liability of malicious prosecution is *Beckenstrater v Rottcher and Theunnissen*¹¹ which listed the following as the prerequisites for a successful claim on malicious prosecution:

- (a) the defendant set the law in motion in instigating or instituting the proceedings;
- (b) the defendant acted without reasonable and probable cause;
- (c) the defendant acted with malice or *animus injuriandi*;
- (d) the prosecution has failed; and
- (e) the plaintiff has suffered damages.

These requirements are distinct and independent from those in unlawful arrest. They have been restated with approval in various decisions of the Supreme Court of Appeal including recently in *Ledwaba v Minister of Justice and Constitutional Development and Correctional Services and Others*.¹²

[48] *In casu*, there is no dispute in respect of requirements (a), (d) and (e). The dispute lies in requirements (b) and (c). Ms. Mortlock, a Senior Prosecutor with a total of 27 years' experience as a public prosecutor, testified that she did not know the Plaintiff in this matter and that she took a decision to prosecute him guided only by the facts as contained in the docket.

[49] She testified further that upon considering the contents of a docket as a whole, it was clear to her that there was only one person implicated in the stabbing of the deceased who was only described by the clothes he was wearing and by his height compared to his co-accused. The other man who was arrested with the perpetrator was not involved in a fight with the deceased as he was busy pulling the deceased's girlfriend at the time. All she needed was a clarity

¹¹ 1955 (1) SA 129 (A) at para 5 & 27.

¹² (947/2022) [2024] ZASCA 17 (16 February 2024) at para 20. See also *Groenewald v Minister of Justice* 1973 (2) SA 480 (O) and *Minister of Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA) para 8

on who of the arrested men, wore a Scottish shirt. Once a statement was obtained clarifying that the man who wore a Scottish shirt was the Plaintiff, and that the man who wore the black soccer jersey was Mr. Mashile, she took a decision to drop the charges against Mr. Mashile and to prosecute the Plaintiff.

[50] According to Ms. Mortlock, there was a *prima facie* case for the Plaintiff to answer and there were reasonable prospects of success in the prosecution. Of further importance in her evidence is that her decision to prosecute has not been reviewed by a person of equal or higher rank which means, the Plaintiff still has to be prosecuted. For this reason, the court asked the legal representatives to answer the question on whether the requirement under (e) above, that the prosecution must have failed was met. This was in light of the fact that there had not been a trial in which the Plaintiff was acquitted, or a final decision taken by an authorised person to withdraw the charge against him. I will not pursue this question any further since counsel for the Defendants conceded that in withdrawing charges against the Plaintiff (irrespective of the lack of authority to do so by the relevant officer within the NPA); the prosecution should be considered as having failed.

[51] The Defendant's argument was that it acted with probable cause in that a person was murdered and witnesses pointed at the Plaintiff as the murderer. In *Ledwaba v Minister of Justice and Constitutional Development and Correctional Services and Others*¹³, the Supreme Court of Appeal held,

“[A]lthough our law requires that the defendant must have acted with malice or *animus injuriandi*, that question will only become relevant when it is established that the defendant instigated the prosecution without reasonable and probable cause. The latter issue is anterior to the question of whether the defendant acted with *animus*

¹³ *Supra* at para 20,

injuriandi. To succeed on this leg of the enquiry, a plaintiff must not only prove intent to injure but also consciousness of wrongfulness. As held by this Court in *Moleko*, *animus injuriandi* ‘means that the defendant directed his or her will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent’.¹⁴ It follows from this that the determination of whether a defendant had reasonable and probable cause to prosecute the plaintiff, must precede the determination into whether it acted with *animus injuriandi*.”

[52] On the aspect of a reasonable cause, Schreiner JA said the following in *Beckenstrater*¹⁵,

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

[53] There would, thus, be reasonable and probable cause for the prosecution where a defendant is of the honest belief that the facts, available at the time of taking the decision to prosecute the plaintiff, constituted an offence which would lead a reasonable person to conclude that the person against whom charges are brought, was probably guilty of such offence. This question must not be confused with whether there is sufficient evidence upon which the accused may be convicted. That question would ultimately be for the court, in the criminal trial, to decide at the conclusion of the evidence.¹⁶

[54] With the above on the background, it should be remembered that the Public Prosecutor who took a decision to withdraw the charge against the

¹⁴ *Moleko* para 63 citing Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) p181.

¹⁵ *Supra* at p.136

¹⁶ See *Ledwaba v Minister of Justice and Constitutional Development and Correctional Services and Others - supra* at para 23.

Plaintiff, must have been informed by the later developments which were not in the docket when the decision to prosecute, was taken. The developments being what the witnesses told the court that day before charges were withdrawn. The Plaintiff testified that Mr. Chiloane and Ms. Phiri were called to the front and were each asked if they knew him. They indicated that they did not know him, and the Public Prosecutor withdrew charges against him.

[55] It would appear from the Plaintiff's version that when the two told the court that they did not know him, they were not telling the truth as according to him, they knew each other well at the time. After all, on the night of the murder, Ms. Phiri in her statement gave details on how she ran in the middle of the night to call her brother at the old railway house (the white house), which was the same house Plaintiff was headed to sleep there, that night. In my view, this makes the Plaintiff version to the effect that he and these witnesses knew each other to be probable.

[56] At the time that the decision to prosecute was taken by Ms. Mortlock, she could not be expected to have foreseen that the witnesses will later tell the court that they did not know the Plaintiff as it was not in their statements. Equally, nowhere in the statements did Ms. Phiri, Messrs Chiloane and Makhubela refute the allegation to the effect that they identified the Plaintiff as the man who stabbed the deceased. I therefore do not see how it can be argued that there was no probable cause to charge the Plaintiff or that the decision to prosecute was taken with malice.

[57] There is no basis therefore to suggest that when Ms. Mortlock took a decision to prosecute, she did not believe that the Plaintiff was guilty of the crime of murder. While it remains strange as to why Ms. Phiri and Mr. Chiloane would later say that they did not know the Plaintiff, it is not uncommon in criminal matters for witnesses to recant their statements for various reasons,

leading to charges being withdrawn. Chief amongst the reasons would be fear for their own safety, especially when the suspect is released on bail or on warning, as was the case with the Plaintiff at the time.

[58] Before apportioning any blame to these witnesses, one needs to remember that these two witnesses gave details in their respective statements, of how they were violently attacked on the night of the incident. Ms. Phiri gave details of how Mr. Mashile, the erstwhile co-accused of the Plaintiff, tried to pull her away from her lover, the deceased. Mr. Chiloane on the other hand, narrated on how Mr. Mashile, punched him with a fist when he was trying to find out from Ms. Phiri as to what happened that night. What the witnesses told the court on the date the charge was withdrawn is irrelevant. Whether there was reasonable and probable cause for the prosecution depends on the facts at the disposal of the prosecutor, at the time that the prosecution was instigated, and the careful assessment of that information, without added developments in the case.

[59] For the reasons above, I find that there was a probable cause for the decision to prosecute the Plaintiff at the time the decision was taken. I further find that the decision to prosecute him was not taken maliciously. This claim is also bound to fail.

[60] There is no reason advanced as to why costs should not follow suit.

[61] For the aforesaid reasons, I make the following order:
The plaintiff's claims are dismissed with costs.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION
MBOMBELA

FOR THE PLAINTIFF: ADV. AC GOBETZ

INSTRUCTED BY: PIETER NEL ATTORNEY INC
MBOMBELA

FOR THE 1ST & 2ND
DEFENDANTS: ADV. T MODISENYANE

INSTRUCTED BY: STATE ATTORNEYS
PRETORIA

C/O QQ MKHATSWA ATTORNEYS INC

DATES HEARD: 05-08 FEBRUARY 2023

HEADS OF ARGUMENT

SUBMITTED ON: 23 FEBRUARY 2024

JUDGMENT DELIVERED: 07 MARCH 2024