



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION: MBOMBELA MAIN SEAT

<u>DELETE WHICH IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED 
<u>11/07/2024</u>	
DATE	SIGNATURE

CASE NO: 1359/2017

1360/2017

1361/2017

In the matter between:-

MPENDULO MAKAMU

(1359/2017) PLAINTIFF

SONENI VUSI MHLABANE

(1360/2017) PLAINTIFF

ABBSEY HASWELL NKOSI

(1361/2017) PLAINTIFF

AND

MINISTER OF POLICE

DEFENDANT

JUDGMENT

VUKEYA J

This judgment is handed down electronically by circulation to the parties' legal representatives by email, the date and time for the hand-down is deemed to be 12h00 on 11 July 2024.

INTRODUCTION

[1] The three plaintiffs under cases 1359/2017; 1360/2017 and 1361/2017 were arrested by members of the defendant in one incident on 8 November 2013. They then sued the defendant separately for damages suffered as a result of the arrest. It was alleged by the defendant that they had committed the offences of Murder, Robbery and Housebreaking with intent to commit an offence.

[2] When the trial commenced on 29 January 2024, the parties brought to the attention of the court that an order for the consolidation of the three actions instituted against the defendant under the aforementioned case numbers was granted on 10 December 2018. They then requested the court to proceed on trial in the matter involving Mr Mpendulo Makamo and that the outcome of the trial will be binding on the actions instituted by Mr Abbsy Nkosi and Mr Soneni Mhlabane under case numbers 1360/2017 and 1361/2017, respectively.

[3] The parties also brought an application for the separation of the issues of merits and quantum. This application was granted and the trial proceeded only on the merits. The issue of quantum was postponed *sine die* pending the outcome of

the trial on the merits. I further indicated that I would include an order in this judgment that the outcome of this trial shall be binding on the other matters.

[4] The trial then proceeded on the merits. The defendant relied on the evidence of Lieutenant Colonel Pilusa ("Pilusa") although the arresting officer involved in arresting the three plaintiffs was Constable Sibiya. It was established that Sibiya and the officers he was with when the arrests were effected have since passed on.

[5] The claim against the defendant is for unlawful arrest and detention; unlawful assault and malicious prosecution. The plaintiffs allege that the arrest effected on them on 8 November 2013 and the subsequent detention were unlawful. They further allege that they were also unlawfully assaulted by members of the defendant while in their custody. According to the plaintiffs, they were charged and maliciously prosecuted for the abovementioned offences which were later withdrawn by the NPA on 20 January 2015.

[6] According to the defendant, as submitted by Counsel at the beginning of the trial, the arrest was justified by the fact that the police officer who effected the arrest had reasonable suspicion to do so. He had information at his disposal that warranted or merited that the plaintiffs be arrested without a warrant of arrest. As the arresting officers were not alive to give evidence. Retired Colonel Mohale Reuben Pilusa of the SAPS testified on behalf of the defendant that in

2012 he was based in Tonga with the rank of Lieutenant Colonel. In the early hours of the morning at approximately 4:00 on 8 November 2013 he received a call from the Community Service Centre informing him that a member of the defendant has been attacked and killed at Langeloo Trust at his residence.

[7] He went to the scene and on arrival, it was confirmed that a member of the SAPS had been shot and killed. He had to make sure that the crime scene is secured and cordoned off. He also had to summon experts to conduct an investigation of the crime scene. While busy with the experts, he received information that there was a suspect who might be implicated in the murder and that the police were going to investigate further. These members left the scene to go and interview the suspect. Constable Sibiya was one of the members who went to interview the suspect.

[8] The suspect was the plaintiff Mr Mpendulo Makamu. According to Pilusa, although he was not present when this happened, Sibiya interviewed the plaintiff Mr Makamu and based on the information accruing from the interview, Sibiya and his crew then left for Matsulu to follow up on the information provided by Makamu. It came out from the interview that Mantinti Ngomane; Absalom Nkosi and Vusi Mhlabane came to see Makamu in the early hours of the 8th of November 2013 and it was also mentioned that a 9MM Pistol which was in the possession of Mantinti was placed in an air cleaner before the three left for Matsulu

[9] On the members' arrival in Matsulu they traced the vehicle at the car wash in Matsulu, a VW Jetta. The police were able to trace Absalom Nkosi and Vusi Mhlabane and arrested them. They could however not trace Mantinti. The police then drove back to Tonga where Makamu, Nkosi and Mhlabane were detained. A criminal case proceeded against Makamu, Absalom and Vusi in the absence of Mantinti. Mantinti was later arrested in Watervalboven and the fire-arm was confiscated. Constable Sibiya from K9 unit effected the arrest of these three suspects in Matsulu, as testified by Pilusa.

[10] Pilusa told the court that the police had information that on the 7th of November 2013, Mantinti, Vusi and Absalom Nkosi came from Matsulu and went to sleep in Bosfontein. In the early hours of the 8th November 2013, they went to Makamu's place to visit him. Makamu resides a few meters away from the residence of the policeman who was killed that morning. It was discovered around that time that the police officer had been shot and killed. The three were said to have driven back to Matsulu after concealing the 9MM in the air cleaner. Members of the defendant, according to Pilusa went to the tollgate and obtained photographs confirming that the three passed the tollgate when going to Matsulu and also confirming the time when they passed the toll-gate. That is how they proceeded to arrest the plaintiffs.

[11] Pilusa further testified that, one day while in his office, he was informed that Mantinti wanted to speak to him. When Mantinti was brought to his office he told him that a certain person who was in detention wanted to see him. The young man who asked to see him was brought to his office and he had a discussion with him. The young man confessed to him that he was the one who shot the police officer. The investigations proceeded. He was prepared to make a confession and arrangements were made for him to make a confession. The real killers of the police officer were arrested based on the information provided in the confession and the charges against Makamu; Mantinti; Nkosi and Mhlabane were withdrawn after Pilusa gave a statement exonerating them from the charges. According to Colonel Pilusa, the plaintiff and his accomplices were not assaulted in his presence and no reports were made that the plaintiffs may have been assaulted in his absence.

[12] It was put to Col Pilusa that the plaintiffs were taken to offices at Tonga Police Station where they were interrogated and assaulted. In the room where they were assaulted there were two crowbars anchored on tyres and a pole from where the crowbars were hanging. It was alleged that the plaintiffs were made to have their feet holding on to the pole, hanging upside down while they were assaulted. They were assaulted with bare hands and sometimes suffocated. Col, Pilusa vehemently denied the allegations and stated that nothing of that sort happened in his presence neither did it happen in his absence. It was further alleged that they were also kicked with booted feet and electrocuted and forced to admit to the allegations of murder. Col. Pilusa again denied these averments saying there was no entry of them being detained with injuries in the

Occurrence Book. He further stated that the plaintiffs would reasonably be expected to report the assault when they made their first appearance in court but nothing of that sort happened.

[13] Mpendulo Makamu's evidence was that he was arrested on 8 November 2013 by the police from Tonga Police station before 7 am. When he was arrested he was in a motor vehicle on the road driving with his uncle Safa Jeffrey Makamu. He was heading to the plantations when the police stopped the vehicle looking for him. They first greeted his uncle and told him they were looking for him. His uncle asked what he did but they told him not to interfere. They then took him into the police vehicle. They took him to the house where a policeman had been killed. The police assaulted him with open hands before they took him to the scene. There were many people at the scene, the place had been cordoned off. The vehicle stopped at the gate and the police went inside leaving him in the car. When they returned they were with other police officers.

[14] The police questioned him, asking why he killed the policeman. He denied the allegations but the police said they were aware that he had visitors in the morning. They asked him where those visitors were and where were they from. He told the police that they were from Matsulu and that they had left. They enquired why they were there and he explained they had come to greet him and that one of them was there to check his furniture which was at his place. The police asked whether these people had a fire-arm and he confirmed that

he had seen them in possession of a fire-arm which they put in the engine compartment of the car before they left.

[15] Mr Makamu testified that he told the police that he does not know where they reside in Matsulu but explained that I know where Mantinti's girlfriend resides in Bhevula. They also took the girl with and went to Matsulu. They drove around searching for the vehicle and when he saw it at the car wash he notified the police. Nkosi and Mhlabane were arrested on that day but not Mantinti as the police could not trace him. They were then taken to Tonga Police station where they were charged with murder of the policeman.

[16] Makamu said that when he was arrested he was not given his rights or told what his charges were. He was not even given an opportunity to explain his side of the story. Soneni and Absalom were also not given their rights. At Tonga Police station they put Absalom in a well laminated cell with people inside while he was put with Soneni in a dark cell with an overflowing toilet. They were taken to a park-home for interrogation. They were asked about the murder of the police officer, when they denied the allegations the police told them they were lying and started assaulting them. His body was hung upside down. The police also suffocated him by covering his face with a plastic bag and also used an electric wire to hit him and slapped him several times. After a while they took him back to the cell.

[17] Bail had not been granted at that stage, and when it was granted he was able to pay it. After bail was granted he never went back to court, he was informed while he was at home to go to court to collect his bail. He went to get his bail money. Of the police who assaulted him he knows Pilusa, Bhembe, Simelane and does not know the rest. During cross examination, Mr Mpendulo Makamu told the court that he was not aware of the fact that the police were able to make a breakthrough in the murder case because of some assistance from Mantinti. He told the court that he does not know why his particulars of claim do not clearly describe the manner in which he was assaulted by the police, for example it was not alleged in his evidence in chief that he was hit on the head with an iron bar.

[18] Mr Safa Jeffrey Makamu, the plaintiff's uncle confirmed Makamu's version of the arrest and said the plaintiff was arrested while he was in his presence on the day. He said while driving to his fields with Mpendulo, he came across the police who stopped his car and demanded to have the plaintiff. When he asked what was going on they told him not to ask anything and took the plaintiff with them.

[19] It is common cause in this trial that the plaintiffs were arrested by members of the defendant without a warrant of arrest on 8 November 2013; they were detained on the same date subsequent to their arrest; Mr Mpendulo Mkamu was released on the 3rd of May 2014 when he paid bail in the amount of R2000, 00; the arresting officer Constable Sibiya passed away; the plaintiffs were

charged with the murder of a police officer who had been killed at a street near the Makamu's residence.

[20] It is also common cause that the three were also charged with housebreaking with intent to commit a crime and robbery; all the charges against them were withdrawn by the state on the 20th of January 2015 and that other people were later charged and convicted of the offence after it was discovered that the plaintiffs were not involved in the commission of the offence. It is also not in dispute that Nkosi, Mhlabane and Mantinti went to visit Makamu at his place of residence in the morning of the 8th of November 2013.

[21] The issues for determination in this trial are very crisp and can be listed as follows:

1. Whether the arrest and subsequent detention of the three plaintiffs was lawful;
2. Whether they were assaulted by the police at any time from time of arrest and while in detention; and
3. Whether they were maliciously prosecuted.

[22] Despite the fact that Counsel for the plaintiffs submitted that it was never the defendant's case that the arrest was based on reasonable suspicion, he argued that even so, the defendant has failed to discharge the onus of proving that the arrest and detention were lawful. This because the witness for the defendant,

Col. Pilusa was not the arresting officer. The arresting officer Constable Sibiya has since passed away and could not testify in the trial.

[23] Col. Pilusa, according to Counsel, did not know the reason why Constable Sibiya arrested the Plaintiffs, he also did not know whether Constable Sibiya based his reasons for arresting the plaintiffs on reasonable suspicion or not. It was further argued that Col. Pilusa did not know whether the plaintiffs' rights were given to them by Const. Sibiya at the time of their arrest. Col Pilusa is also not in a position to dispute the plaintiff's version that he was not given a chance to explain his side of the story as he was not present when the plaintiff was arrested, the plaintiff submits.

[24] Regarding the claim for assault, it was submitted that because Mr Makamu was able to mention the place and premises where the assault took place, the existence of which was not denied by Col. Pilusa, his evidence is probable. The plaintiff further submits that he has successfully proven the necessary prerequisites for malicious prosecution because they were charged and the charges were later withdrawn by the prosecutor. The charges, according to the plaintiff, were influenced by misinformation and the defendant could not, under the surrounding circumstances of the case, have reasonably believed that the prosecution would be successful.

[25] Counsel referred, in the plaintiff's heads, to the case of *Rudolph v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) wherein the court held that:

"The requirements for successful claims for malicious prosecution have most recently been discussed in Minister of Justice & Constitutional Development v Moleko ([2008] All SA 47 (SCA)) as follows:

'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove —

- 1. that the defendants set the law in motion (instigated or instituted the proceedings);*
- 2. that the defendants acted without reasonable and probable cause;*
- 3. that the defendants acted with "malice" (or animus injuriandi); and*
- 4. that the prosecution has failed.'*

[26] On the other hand, the defendant's submission is that the plaintiffs were arrested by its members after being reasonably suspected of having committed a schedule 1 offence. Starting with the alleged assault on the plaintiffs, the defendant's Counsel submitted that the plaintiffs were failed to discharge the onus which rested on them to prove the assault claim. He averred that the plaintiff had to present facts which indicate, *prima facie* and objectively, a wrongful act. Relying on the case of **Kali v Incorporated General Insurance Limited 1976 (2) SA 179 (D)** Counsel for the defendant contended that: "a

pleader cannot be allowed to direct the attention of the party to the issue and then at the trial attempt to canvass another “

- [27] The defendant's contention is based on the fact that the plaintiff did not disclose or describe fully, the manner in which he was allegedly assaulted by members of the defendant in his Particulars of Claim. He referred the court to the case of **Minister of Safety and Security v Slabbert (668/2009) 2009 ZASCA 163** in which it was stated that:

“The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.² It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

- [28] The defendant submitted that the plaintiffs' particulars of claim allege that he was assaulted with open hands; hit with an iron bar on their heads; kicked with booted feet and suffocated with a plastic bag. Whereas, in court Mr Makamu testified that his hands and feet were bound together and an iron bar which was attached to a tyre rim, one on each side, was placed between their feet and hands and that they hung with their feet while their heads were facing down. According to the defendant this version defers materially with the version contained in the plaintiffs' particulars of claim. The defendant therefore submits that the claim for assault came as an afterthought to the plaintiffs as it is also

no referred to in the plaintiff's Section 3 Notice and this indicates that the plaintiffs were never assaulted.

- [29] The defendant submits further that the plaintiffs, in order to succeed with a claim for malicious prosecution have to allege, other than what was stated in *Minister of Justice & Constitutional Development v Moleko* ([2008] All SA 47 (SCA), that the police were actively instrumental in the prosecution of the charges. It referred the court to **Laderman v Moharal Investments (Pty) Ltd 1969 (1) SA 190 (A.D)** in which the case of **Waterhouse v Shields 1924 CPD 155** was referred to with approval. Counsel therefore submits in the defendant's heads of argument that it cannot be said that Constable Sibiya did not have the reasonable and probable cause in taking the plaintiffs into custody and that he acted with the required *animus*. The defendant submits that the plaintiffs carried and conducted themselves as suspects on the morning of the 8th of November 2013. They have failed to prove the requirements of the absence of reasonable and probable cause not the necessary *animus injuriandi*, the defendant submitted.

Unlawful arrest and detention

- [30] The legal principle that arrest and detention are prima facie wrongful and unlawful can be found in numerous decisions in our law. In *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), it was stated as follows:

“The plain and fundamental rule is that every individual’s person is invaluable. In actions of damages for wrongful arrest or imprisonment our courts have adopted the rule that such infractions are prima facie illegal. Once the arrest or imprisonment has been admitted or proved, it is for the defendant to allege and prove the existence of grounds in justification of the infraction”

[31] In *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC) the court stated that:

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

This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where

there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case, and the law casts an obligation on the police official to do so. In Mvu v Minister of Safety and Security and Another Willis J held as follows:-

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

It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is any legal justification for the further detention of the person.

[32] Section 12 of our Constitution (Act 108 of 1996) guarantees every citizen's right to freedom and it provides as follows:

12. Freedom and security of the person –

(1) Everyone has the right to freedom and security of the person, which includes the right -

(a) Not to be deprived of freedom arbitrarily or without just cause;

(b) ...

[33] Section 40 of the Criminal Procedure Act 51 of 1977 however, authorises the arrest of a person without a warrant under different circumstances. Subsection 40(1) (b) of the Criminal Procedure Act 51 Of 1977 reads as follows:

"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 custody."

[34] The jurisdictional prerequisites for a subsection 40(1) (b) defence are that: 1) The arrestor must be a peace officer; 2) The arrestor must entertain a suspicion; 3) The suspicion must be that the suspect committed an offence referred to in Schedule 1; and 4) The suspicion must rest on reasonable grounds. (See *Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 467 (SCA)*).

[35] In Heimstra's *Criminal Procedure*, the learned author, with reference to the *Sekhoto* case (*supra*) summarises the law pertaining to arrest without a warrant as follows: The jurisdictional prerequisites for subsection 40(1)(b) must be present; The arrestor must be aware that he or she has a discretion to arrest; he or she must exercise that discretion with reference to the facts; there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[36] It has been established in *casu* that Const. Sibiya was a member of the defendant and the arresting officer of the plaintiffs. There is no dispute regarding the fact that he was a peace officer when the arrests were effected. It is also common cause that Col. Pilusa, the defendant's witness, did not arrest the plaintiffs, however, he was the Branch Commander of the Detective's Unit at Tonga Police Station at the time. Although he was at the scene of crime soon after the incident happened, he told the court that while he was busy with the experts at the scene, he received information that there was a suspect and that the police were going to investigate further. Constable Sibiya and other members left the scene to go and interview the suspect. Constable Sibiya is the one who interviewed the suspect and eventually effected the arrest of the plaintiffs.

[37] The arrest itself, the circumstances surrounding the arrest of the plaintiffs and the question whether the plaintiffs' rights were explained when they were arrested are not within the personal knowledge of the witness, Col Pilusa. His testimony regarding these three issues was hearsay evidence. Hearsay evidence is generally inadmissible. The Law of Evidence Amendment Act 45 of 1988 (LEAA) redefined hearsay to mean '*evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*'. In this case, the person upon whose credibility the probative value of the evidence depends on is Const. Sibiya. Constable Sibiya could not be called as a witness and it was reported that he has since passed on.

[38] Although Col. Pilusa was confronted, during cross examination, about a statement which is purported to have been prepared by Const. Sibiya, this statement was not admitted as evidence in terms of section 3 of the Act 45 of 1988 (LEAA) and therefore every part of that statement becomes inadmissible as hearsay evidence in this trial. This therefore means that the court remains with the evidence of Col Pilusa which is also, mostly hearsay evidence especially on the issues of more importance in the adjudication of this matter.

[39] Having established that Col Pilusa was not the arresting officer, it is rather difficult to establish whether Const. Sibiya entertained a suspicion that the plaintiffs committed an offence referred to in Schedule 1 and whether the suspicion rested on reasonable grounds. The meaning of “suspicion” within the context of section 40 was clearly explained in *Koekemoer v Minister of Police* (unreported, GP case no 9326/2015, 10 March 2017) and the court cited (at [13]) the definition set out in *Shabaan Bin Hussein & others v Chong Fook Kam & another* [1969] 3 All ER 1626 (PC) at 1630 as follows:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: “I suspect but cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.”

[40] In *Minister of Police v Dunjana and Others* [2023] 1 All SA 180 (ECG); 2023 (2) SACR 486 (ECM) (25 October 2022) Van Zyl DJP, as he then was, stated that:

“The requirement that the arresting officer must have a suspicion, as opposed to probable cause, implies an absence of certainty or adequate proof. “The 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”. 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 is evaluated against the standard of reasonableness.

- [41] I am in agreement with all the above cases, however, in the absence of Const. Sibiya’s evidence, one cannot say that the suspicion was reasonable. Even if the state were to rely on the fact that Mr Makamu was visited by the other two plaintiffs, namely Soneni Mhlabane and Abbsy Nkosi with Mantinti, in the early hours of the morning while Mantinti had a firearm. The question is, did the police do enough to investigate their involvement in the commission of the offence, enough to say they had a reasonable suspicion.

[42] First of all, the undisputed evidence is that the three arrived at Mr. Makamu's place of residence. Even if it were to be assumed that the others were involved in the commission of the offence, there is no evidence that Mr Makamu had been with them. The only reason one could deduce from the evidence of Col. Pilusa was that Mr Makamu resides a few meters from the police officer who was killed on that day. There is no indication that Mr Makamo had been with his visitors elsewhere than in his house when they showed up to visit him. the question therefore remains, why was he arrested? Except for the fact that the three visited Mr Makamu at his house no other reason could be found from the evidence of the defendant.

[43] Furthermore, Mr Makamu stated in his evidence that when he was arrested, he was never given an opportunity to explain anything to the police about the incident. Col. Pilusa is not in a position to explain whether this is indeed true or not. He will also be unable to indicate what transpired in the interview which was conducted by Const. Sibiya and led to the arrest and detention of the plaintiffs. An arresting officer in the position of Sibiya, not Pilusa, was required to act like a reasonable man. He would analyse and assess the quality of the information at his disposal critically, and he would not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he would allow himself to entertain a suspicion which would have justified an arrest. The court cannot determine whether he has done this and Col. Pilusa is not in a position to indicate whether Sibiya entertained a suspicion.

[44] To sum up on the arrest and detention, Col. Pilusa's evidence is based on hearsay evidence. He is not in a position to give credible evidence regarding whether the plaintiffs' rights were explained when they were arrested, whether they were provided with an opportunity to give any explanation to the arresting officer regarding their involvement in the commission of the offences they were suspected of. The defendant has failed to show that the arrestor, Const. Sibiya, entertained a suspicion which rested on reasonable grounds that the plaintiffs had committed a Schedule 1 offence. In other words the defendant has been unable to discharge the onus resting on it to show that the arrest and detention of the plaintiffs was lawful.

Unlawful Assault

[45] Assault is a violation of a person's bodily integrity. It is trite that every infringement of the bodily integrity of another is prima facie unlawful. In an assault claim, the onus to establish the assault, and damages related thereto, is on the plaintiff. An allegation of assault implies wrongfulness. (See *V.F v Minister of Police* (2464/2019) [2023] ZANWHC 24 (8 March 2023)). Once the infringement is proved, the onus shifts to the defendant to show grounds of justifying the assault.

[46] The question is, did the plaintiff discharge the onus he has to prove that he was unlawfully assaulted by members of the defendant? Although the plaintiff

indicated that he was assaulted with open hands when he was arrested, he contradicted himself when he testified. It was not clear whether he was assaulted at the scene as he was taken from his uncle's motor vehicle; when he was put in the police van or when he was taken to the scene where the policeman had been killed. Furthermore, the plaintiff's uncle did not corroborate his evidence with regards to the incident of assault if it happened at the scene where he was arrested.

[47] Regarding the assault at the offices in Tonga, the plaintiff gave details of the assault and a description of the office where he was assaulted. Pilusa denied the version of the plaintiff and even stated that he would not have allowed it to happen. When he stated that he knew of no charges laid against him or any of his members for assault by any of the plaintiffs, Counsel for the plaintiffs conceded and said there were no charges laid against any of the members because the plaintiffs felt threatened. It came as a surprise to the court when Mr Makamu testified and told the court that he actually did lay charges of assault against Pilusa subsequent to his release from custody. It became clear that this was information he had not provided to his legal representative. This evidence I found to be unreliable because no CAS number was provided and it seemed that only the plaintiff had such information.

[48] Counsel for the plaintiff made submissions that the claim for unlawful assault stands to be granted because in so far as the plaintiff mentioned the place and premises where the assault took place, and the existence of which was not

denied by Pilusa, the evidence of the plaintiff is probable. This submission has no merit. Pilusa testified that the offices in question are the offices used by the Detectives when performing their normal duties. Whether the accused was taken there to be interviewed or for any other reason, it does not then necessarily mean Pilusa was supposed to deny the existence of these offices. The existence of the offices as described by the plaintiff does not mean the assault happened.

[49] The version of assault is also not supported by the general circumstances of the case. There is no evidence of an Occurrence Book indicating that the plaintiff was detained with injuries after being assaulted by the police. There is no medical evidence to support these allegations or any indication that after the assault he received medical attention, even after having been assaulted in the manner as described. Furthermore, the plaintiff did not report the assault to the Magistrate on first appearance stating that when he raised his hand he was told to sit down. This version is improbable.

[50] It is therefore my respectful view that the plaintiff has failed to discharge the onus he has to prove that he was unlawfully assaulted by the police while he was in their custody and when he was arrested.

Malicious Prosecution

[51] In *Heyns v Venter* 2004 (3) SA 200 (T) it was stated that malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. In *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) the court stated that

“In seeking to hold the respondent company liable in damages for this unsuccessful prosecution, the onus was upon the appellant to establish in the Court a quo -

(a) that the respondent set the law in motion (instigated or instituted the proceedings);

(b) that it acted without reasonable and probable cause; and

(c) that it was actuated by an indirect or improper motive (malice);

(Also See **Prinsloo and another v Newman** 1975 (1) SA 481 (A) 498 H – 499)

[52] In *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA), Van Heerden JJA stated the following: -

“61. In the Relyant case, this court stated the following in regard to the third requirement:

Although the expression “malice” is used, it means, in the context of the actio iniuriarum, animus iniuriandi. In Moaki v Reckitt & Colman (Africa) Ltd and another Wessels JA said:

“Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either dolus directus or indirectus).

Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance." '

62. In so doing, the Court decided the issue which it had left open in Lederman v Moharal Investments (Pty) Ltd and again in Prinsloo v Newman, namely that animus injuriandi, and not malice, must be proved before the defendant can be held liable for malicious prosecution as injuria.

63. Animus injuriandi includes not only the intention to injure, but also consciousness of wrongfulness:

'In this regard animus injuriandi (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of dolus, namely of consciousness of wrongfulness, and therefore animus injuriandi, will be lacking. His mistake therefore excludes the existence of animus injuriandi.'

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

[53] What the plaintiff has to prove is that the defendant was actively instrumental in the prosecution of the charges thereby setting the law in motion against him with the intention to injure him. In order to be able to answer this question, the defendant's true intention must be proven by the plaintiff. He has to prove the existence of *animus injuriandi*, which also has to do with consciousness of wrongfulness and not malice, before the defendant can be held liable for malicious prosecution. The question to be asked is whether this was the state of mind of the defendant when it proceeded to charge the plaintiffs and have them prosecuted for the murder and robbery charges they faced when they were prosecuted and, at that time, did the defendant direct his will to prosecuting the plaintiffs in the awareness that reasonable grounds for the prosecution were absent?

[54] To be able to answer this question, the evidence of Sibiya would have been helpful to determine whether when he charged the plaintiffs he honestly believed that they were guilty even though reasonable grounds to charge and ultimately have the plaintiffs prosecuted were lacking. The absence of this

evidence in the defendant's case leaves a void in the defendant's defence. Only Sibiya can tell the court whether he was aware that what he was doing, by setting the law in motion thereby initiating the prosecution against the plaintiffs even though the evidence was insufficient to do so was a wrongful act and whether he foresaw the possibility that he was acting wrongfully and nevertheless continued to charge the plaintiffs reckless as to the consequences of his conduct.

[55] In this case, the averments of malicious prosecution cannot be disputed and in the absence of any evidence disputing the averments made by the plaintiffs I can only find that the defendant has no defence and that the plaintiff has succeeded to show on a balance of probabilities that the defendant set the law in motion against them without reasonable and probable cause. I find that the decision to charge and have the plaintiffs prosecuted was actuated by an indirect or improper motive (malice) as the charges were ultimately withdrawn. It is therefore my respectful view that the claim for malicious prosecution against the defendant stands to succeed.

[56] In the result I make the following order:

56.1. The plaintiff's claim for unlawful arrest, detention and malicious prosecution succeeds.

56.2. The claim for unlawful assault is dismissed;

56.3. The defendant is 100% liable for the plaintiff's proven damages;

56.4. The order in favour of case number 1359/2017 applies similarly to cases 1360/2017 and 1361/2017; and

56.5. Costs for the plaintiffs, such costs are to include costs of two Counsel.



VUKEYA LD

Judge of the High Court

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