

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **27561/2018**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
<u>05/09/2024</u> DATE  SIGNATURE	

In the matter between:

SIEGHART ERNST DUVEL

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

WARRANT OFFICER BRIJALL

Second Defendant

MONICA KHALEMA

Third Defendant

PAUL MPETE

Fourth Defendant

THE NATIONAL DIRECTOR OF PUBLIC

Fifth Defendant

PROSECUTIONS

JUDGMENT

KRÜGER, AJ

Summary

Claims for payment of damages for contumelia, deprivation of bodily freedom, liberty and discomfort as well as the infringement of the plaintiff's good name, reputation and standing in the community resulting from the plaintiff's unlawful arrest and detention, malicious prosecution as well Aquilian relief for past and future loss of earnings from the plaintiff's businesses in consequence. Judgment in Groves N.O v Minister of Police [2023] JOL 61903 (CC) considered and applied pertaining to the discretion of the arresting officer when executing a warrant of arrest. Effect of invalidity of warrant on the liability of arresting officer and the Minister of Police. Divisional Commissioner of SA Police Witwatersrand Area v SA Associated Newspapers Ltd [1966] 3 All SA 1 (A) and Prinsloo and Another v Newman 1975 (1) SA 481 (A) considered and distinguished. Factual and legal causation were interrogated, the latter with reference to the direct consequences theory, the foreseeable consequences theory and applying a flexible approach. Malicious prosecution- Minister of Justice & Constitutional Development v Moleko 2008 3 All SA 47 (SCA) applied -negligence and gross negligence not sufficient to establish animus iniuriandi.

Introduction

- [1] In the joint minute of a pre-trial conference dated 9 May 2024 signed by the respective legal representatives of the plaintiff and the first, second and fifth defendants, common cause facts are recorded. These are, amongst others, that the plaintiff was arrested and detained on 10 February 2016 at around 16:00 and at or near 14 Vaal Drive, Sylviavale, Vanderbijlpark, in the presence of members of the public by the second defendant together with other unknown members of the South African Police Service ("SAPS"), all acting within the course and scope of their employment with SAPS. The plaintiff was then transported to the Vanderbijlpark Police Station where he was detained in the police cells from around 18:00 until 08:30 on 11 February 2016 when he was taken to the Vanderbijlpark Magistrates' Court holding cells. He was charged by the prosecuting authority with theft, money laundering and fraud. At 13:00 the

plaintiff was released on payment of R 20 000,00 bail. The plaintiff was compelled to make five appearances at court until 10 November 2016.

- [2] The arrest was ostensibly executed in terms of a warrant of arrest issued on or about 11 August 2015. The plaintiff was charged personally together with Vuma Construction CC (“Vuma”) represented by the plaintiff, as well as with 10 others. The latter, amongst others, included Messrs Van den Heever, Da Silva and Mkaza as well as Sikhulile Engineers (Pty) Ltd (“Sikhulile Engineers”) represented by Van den Heever, Sikhulile Infratec Engineering Consultants SA (Pty) Ltd (“Sikhulile Infratec”) represented by Mkaza and Sikhulile Infratec Vaal Engineering Consultants (“Sikhulile Vaal”) represented by Da Silva.
- [3] The trial was struck off the roll in terms of section 342A of the Criminal Procedure Act, 51 of 1977 (“CPA”) with reference to an unreasonable delay in the completion of the trial. An attempt at re-instating the prosecution was declined after due consideration by the Director of Public Prosecutions, Gauteng Division, Pretoria as recorded in a letter dated 21 January 2021 addressed to the fourth defendant.
- [4] The plaintiff claims for payment of damages suffered firstly against the first, second and third defendants for *contumelia*, deprivation of bodily freedom, liberty and discomfort as well as the infringement of the plaintiff’s good name, reputation and standing in the community in the total amount of R 500 000,00 as a result of his unlawful arrest and detention; secondly, against the third, fourth and fifth defendants, as a result of malicious prosecution for *contumelia*, deprivation of bodily freedom, liberty and discomfort as well as the infringement of the plaintiff’s good name, reputation and standing in the community in a further total amount of R 500 000,00; thirdly, against all the defendants for past loss of earnings in the amount of R 359 925,00 and fourthly, against all the defendants for future loss of earnings in the amount of R 2 455 047,00. The plaintiff contends that he suffered past and future loss of earnings because of the decline in the business of a museum, restaurant and pub he had the benefit of in consequence of his arrest, detention and prosecution.

- [5] On 11 October 2022 the court made an order in terms of Rule 33(4) that the plaintiff's claim is separated from all other issues, including any intended counterclaim and that the determination of the remainder of the issues, including any intended counterclaim is postponed *sine die* to continue independently from the plaintiff's claims. The third and fourth defendants amended their pleadings to include counterclaims against the plaintiff.
- [6] At the hearing, it appeared that there was uncertainty as to what exactly had been separated out in respect of the plaintiff's claims and which issues exactly was before me for adjudication. It was agreed between the parties that, in amplification of the separation ordered on 11 October 2022, the issue of causation be included in the determination of the merits at the hearing in respect of the plaintiff's claims and that the adjudication of quantum be postponed *sine die* for determination by another trial court.
- [7] There also was a dispute as to who had the duty to begin. The third defendant represented herself and was not certain as to the procedure and the course she should take, which complicated the matter. In respect of the duty to begin, counsel for the plaintiff and the first, second and fifth defendants as well as the fourth defendant presented heads of argument. Prior to making a ruling, by agreement, the plaintiff withdrew his action against the third and fourth defendants with no order as to costs. On 10 June 2024, I made a ruling, with due regard to the nature of the pleadings and the separation of issues, that the first, second and fifth defendants bear the duty to begin.
- [8] At the end of the trial and at the instance of the plaintiff, the parties agreed that they would file heads of argument on 17 June 2024 for consideration in adjudicating the matter. The plaintiff's heads of argument were received on 17 June 2024 and the first, second and fifth defendants' on 1 July 2024.
- [9] Hereinafter I refer to the first, second and fifth defendants collectively as "*the defendants*", the second defendant as W.O Brijlall and the fourth defendant as "*Mr Mpete*".

Evidence presented at trial

- [10] Three trial witness bundles contained documents which consisted of close to 1700 pages. Only a fraction of these documents were dealt with by the parties during the trial.

Testimony presented on behalf of the defendants

- [11] The only witnesses called by the defendants were Mr Mpete who was a complainant in the criminal proceedings and the investigating officer, W.O Brijlall.

- [12] Mr Mpete testified that the plaintiff is unknown to him. Mr Mpete discovered that his name was recorded at the bottom on the letterhead of Lekoa Cementeries as being a director of Lekoa African Rainbow Funeral Homes (Pty) Ltd. The letter is dated 21 December 2005. This was news to him as neither the company nor its directors was known to him. He did not consent to be a director and did not know that his name was so used. He investigated the matter which included an application in terms of the *Promotion of Access of Information Act*, 2 of 2000 to the Midvaal Local Municipality to obtain information relating to the application for and awarding of certain tenders. Exactly what information was obtained by him was not divulged to the court. According to Mr Mpete, it appeared that his name was included in tender documents. From Mr Mpete's evidence, it appears that this conduct involved other entities such as some of the Sikhulile companies, but not Vuma. He discovered he was recorded as being a shareholder and director of some of the Sikhuleli companies.

- [13] Mr Mpete deposed to an affidavit on 10 September 2012 consisting of 18 pages (the "A1 statement"). In it, he sets out in some detail his complaint that a fraud was perpetrated with reference to Sikhuleli Infratec, Sikhuleli Vaal and others. No mention of the plaintiff, Vuma or Lekoa appear anywhere in the affidavit. His hope was that the SAPS would investigate his complaints with the information provided by him in his affidavit.

- [14] Mr Mpete was interviewed by the SAPS and attended various meetings with W.O Brijlall and representatives of the prosecuting authorities. He was

introduced to Advocate Nkuna, a senior state advocate of the Specialised Commercial Crime Unit of the National Prosecuting Authority (“SCCU”) by Advocate Louw, and had contact with the former.

[15] Additionally, Mr Mpete agreed his actions set in motion the process which unfolded. He qualified this by stating that the decision what to do with the information provided by him was not his to make, but was left to the authorities. When asked by W.O Brijlall if he knew the plaintiff he responded that he did not. The events that unfolded were not exclusively based on the information provided by him.

[16] The third defendant and Mr Mpete made available a so-called whistle-blower affidavit dated 27 December 2012 deposed to one Jabulani Dhlamini consisting of 13 pages (the “*Dlamini affidavit*”). In it, no reference is made to the plaintiff, which Mr Mpete readily conceded to during cross examination. No reference is made to Vuma either. Nor is any reference made to the plaintiff or Vuma in an affidavit deposed to by the third defendant dated 14 May 2015 (the “*Khalema affidavit*”). Mr Mpete was referred to a multitude of documents relating to the prosecution of the plaintiff and Vuma such as a written enquiry by Col Mokoena of the SCCU to the Sedibeng Municipality seeking information pertaining to fraud in respect of a number of tenders. The names of the juristic persons in respect of which information is sought, are therein recorded. Neither Vuma nor Lekoa are mentioned. The witness testified to the effect that he did not depose to any affidavit prior to the application for a warrant of arrest, the arrest, detention and prosecution of the plaintiff and the prosecution of Vuma in which he accused the plaintiff, Vuma or any other entity that the plaintiff is involved in any wrongdoing. Neither did he at the relevant time inform the SAPS that the plaintiff had committed any crime.

[17] According to Mr Mpete, he was in contact with Advocate Nkuna. He was informed that they would acquire company information from the records of the Company and Intellectual Property Commission (“CIPC”) in respect of the matter and the use of his name as alleged by him. When re-examined, he testified that Advocate Nkuna was instrumental in obtaining company records from the CIPC as well as the shareholding certificates in respect of the matter.

[18] Mr Mpete testified that he referred only to fraud when complaining. Other charges in the charge sheet was not at his instance, but followed upon an investigation by the SAPS. From Mr Mpete's evidence it appears that prior to the application for the warrant of arrest, the arrest, detention and prosecution of the plaintiff, the only connection with the plaintiff is that he is recorded as a director of Lekoa in its register of directors in 2000 together with Mr Mpete and, amongst others, Van den Heever. The plaintiff's name also appears on the letter dated 21 December 2005 as one of its directors, together with that of Mr Mpete and Mr Van den Heever.

[19] During cross examination Mr Mpete testified that Lekoa was never charged with any offence. No tender was awarded to it and the contrary allegation contained in the application for a warrant of arrest deposed to by W.O Brijlall is not correct. He never witnessed the plaintiff using his name. Mr Mpete conceded that neither the plaintiff nor Vuma had any part in any crime and that he never informed the SAPS that they were involved in any wrongdoing prior to the application for the warrant of arrest, the arrest, detention and prosecution of the plaintiff and the prosecution of Vuma. His affidavit of 10 September 2012 was used the pursuit of obtaining a warrant for the arrest of the plaintiff. Mr Mpete reiterated that though his affidavit "set the law in motion", he did not mention either the plaintiff or Vuma in it. He was adamant that the decision to arrest and charge the plaintiff and Vuma resided with the authorities and he had nothing to do with it.

[20] After the trial was struck off the roll, further documents and evidence were presented to the SACCU for consideration to re-instate the prosecution. In a supplementary report dated 17 July 2019 under the hand of a senior state advocate of the SCCU, an attempt was made in terms of section 342A for re-instatement. This came to naught. In a letter to Mr Mpete dated 22 January 2021 the Chief Clerk of Public Prosecutions recorded that it had been decided not to re-instate prosecution of the matter.

[21] W.O Brijlall testified that he was the investigating officer in the matter. He left the employ of the SAPS during 2016 after some 27 years' service. The warrant for the arrest of the plaintiff was applied for in terms of section 43 of the CPU on

a charge of fraud. It was obtained on the basis of the information contained in his affidavit. The warrant only refers to the plaintiff personally. No mention is made of Vuma. He conceded that the warrant was defective. The other charges in the charge sheet were added by a senior advocate of the SCCU. However, the affidavit deposed to by W.O Brijlall in support of an application for the warrant of arrest for the plaintiff in terms of section 43 of the CPA is “...for offences ranging from corruption, fraud and theft allegedly committed over a period of time from October 1999 to about August 2015 at the Sedibeng District Municipality...”

[22] When asked during cross examination, W.O Brijlall was unable to state all the requirements stipulated in section 43 upon which a warrant of arrest is allowed to be issued. In particular he was unaware that the application is required to state “... that from information taken upon oath there is reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.”¹

[23] W.O Brijlall conceded that Mr Mpete’s A1 statement did not mention the plaintiff or Vuma and that the same applies to the Dhlamini affidavit as well as the Khalema affidavit. Neither are they implicated in the commission of any crime in these affidavits. W.O Brijhall testified that prior to the application for the warrant of arrest on 11 August 2015, no affidavit or witness statement was obtained in which the plaintiff and Vuma was mentioned in respect of any involvement in crime. He further testified that the warrant issued for the arrest of the plaintiff was on the basis of his affidavit in support of the application to obtain the warrant.

[24] W.O Brijlall’s affidavit in support of the application for a warrant of arrest makes no mention of Vuma and does not implicate it in the commission of any crime. It does mention Lekoa, which was not charged with any offence. The plaintiff is referred to in the context of being a director of Lekoa together with Van den Heever and one Johannes Mohale, that Lekoa was awarded a tender bid and that “...the suspects acted with common purpose...” During cross examination W.O Brijlall did not contest the proposition that mere association does not a

¹ Section 43(1)(c)

crime make and that the contents of an affidavit in support of an application to obtain a warrant of arrest must accord with the facts. In respect of his allegation in the affidavit that the Tshepiso Bulk Water tender was awarded to Lekoa, W.O Brijlall testified that he had not verified whether or not it was in fact true. He conceded and that no evidence under oath was obtained indicating any common purpose between the plaintiff, Van den Heever and any of the others mentioned in the affidavit. The witness further conceded that the requirements of section 43(1)(c) of the CPU were not complied with. He was unable to state that the plaintiff was involved in fraud or what crime he may have committed. He conceded that the warrant was irregularly obtained and wrongful, as well as that the arrest of the plaintiff was wrongful.

[25] The warrant of arrest recorded the plaintiff was to be arrested for the crime of fraud committed on 20 October 2000. According to W.O Brijlall, the other charges the plaintiff was charged with were added by Advocate Nkuna. These appear to be theft and money laundering with which Vuma also appears to have been charged. W.O Brijlall testified that the charge sheet was drawn by members of the fifth defendant. He was aware of the fact that after the conclusion of an investigation, the docket is referred to the prosecuting authority for consideration, who may decide whether or not to prosecute.

[26] Regarding the actual arrest of the plaintiff on 10 February 2024, it is not disputed that W.O Brijlall was the arresting officer. He could not remember if it took place in the vicinity of the restaurant on the premises from which the plaintiff conducted his business at which there was a social gathering at the time. It was put to him that he first arrived on the premises to arrest the plaintiff without a warrant. He later returned on the same day with a warrant and executed the arrest. W.O Brijhall could not recollect the circumstances surrounding his arrest of the plaintiff well. He refused to comment on propositions put to him that there existed no reasonable belief to prosecute the plaintiff and that as a result of his conduct the plaintiff suffered damages.

[27] The defendant closed its case after the testimony of W.O Brijlall.

Testimony presented on behalf of the plaintiff

[28] The plaintiff as well as Ms Heidi Margarita Callow testified.

[29] The plaintiff, Mr Duvel, testified that he was born in September 1952 and that he is a civil engineer who holds an MBA qualification from the University of the Witwatersrand. He used to have businesses which he conducted from the premises where he was arrested. These were a heritage museum, a restaurant named 'Urban Vibes' and a pub named 'Cock & Bull'; these premises were located on agricultural holdings to the west of Vanderbijlpark. The museum takes up some 3000 square meters under roof. Objects of a cultural nature portraying development of household items, fashion, technological aspects, toys and the like were displayed. The toy section included a display of rare dolls. Many vintage, classic and exotic cars were available for display to the public such as a collection of up to 12 Model T Fords and the like. The restaurant and pub were located to the left and right side of the museum. The pub is around 20 meters and the restaurant some 40 meters from an office from where he conducted the businesses. There is a court yard which borders the museum, pub and restaurant where around 60 patrons can sit on benches under a multitude of trees.

[30] It is the plaintiff's testimony that on 10 February 2016 he was in the office when W.O Brijlall arrived at around 16:00. W.O Brijlall stated that he was going to arrest the plaintiff. He did not have a warrant and left to collect it. At around 17:00 he returned accompanied by other officers. They were dressed in police uniforms. He was arrested and W.O Brijlall took him by the sleeve, leading him through the court yard to a vehicle parked just outside of it. At the time the court yard was packed with patrons. As was often the case, Rotarians were in attendance. On this day they had brought with them visitors from the United States of America. A large number of them sat on benches under the trees in the court yard. They all observed the plaintiff's arrest. On a later occasion the plaintiff was shown a text message from a Texan stating that he had just witnessed the plaintiff's arrest.

[31] The plaintiff further testified that he was detained in a police cell together with 7 other people, two of whom stated that they were in on charges of assault and another for fraud. He slept in the cell on a mattress some 50mm thin. He was given two blankets, one of which he used as a pillow. He couldn't sleep well. He is a diabetic on chronic medication and needs to urinate often. The experience was daunting and unpleasant. Medication he is on was brought to him by Ms Callow. The next morning, he was taken to court and at around 12:00pm the charges were read to him. He applied for and was granted bail in the sum of R 20 000,00 which he could not afford. It was eventually paid by another person and he was then released. Thereafter he was obliged to appear in court on five occasions, the last of which was in November 2016.

[32] On 14 April 2016 the plaintiff deposed to an affidavit on Vuma's behalf and personally in an application to the prosecuting authorities for extensive further particulars pertaining to criminal proceedings. The requested further particulars run to some 9 pages in single spacing. It is accompanied by 11 attachments of documents. The further particulars sought included attempts at establishing from the prosecuting authority how he and/or Vuma was connected with the crimes they were accused of. When no reply was forthcoming, the plaintiff addressed a request for a response to the senior prosecutor on 3 June 2016, stating that the next court date was 10 June 2010. It met with no response.

[33] The plaintiff testified that the arrest, detention and prosecution emotionally affected him to the extent that he became despondent and depressed. Prior to his arrest, detention and prosecution he held a positive view of South Africa and its people. The events disappointed and traumatised him to the extent that he lost faith in the country. He could not grasp or understand how something like it could happen in this country. The word of his arrest in front of patrons, detention and prosecution spread on social media. The plaintiff was unjustly stigmatised as being involved in criminal activity. He was prescribed further medication in the wake of the trauma he suffered as a consequence of what he was subjected to.

[34] Mr Duvel further testified that the arrest and detention had a devastating effect on the museum, pub and restaurant and caused him substantial financial

stress. The pub and museum were established around 2000 and the restaurant around 2013. Prior to the arrest, detention and prosecution they were financially sound. Despite the businesses being run in the same manner as before his arrest, detention and prosecution patrons were not frequenting the businesses as before. The plaintiff does not recall the Rotarians ever again attending the premises. Owners who had their items of cultural value and the like displayed at the premises were unhappy to continue doing so because of the arrest, detention and prosecution. In the result, the plaintiff returned such items to their respective owners.

[35] In an attempt to keep the businesses afloat, other items were auctioned off and sold off to generate income, all to no avail. Most of the vintage cars were auctioned off. The 'Wheels at the Vaal Motor Show was a yearly two-day event hosted by the plaintiff at the premises to the benefit of his businesses. People were invited to bring their classic and vintage cars to the premises for show together with other stuff connected to various eras. A fee was charged to vendors who came to attend the event setting up stalls to offer their wares for sale to the patrons and visitors. It was a popular event which did well before the plaintiff's arrest and detention. Income generated from each show came to approximately R100 000,00. Afterwards, sponsors of the show lost interest and potential vendors no longer applied for a stall. The 2016 show was the last. Sponsors and vendors could not be enticed to the extent that the show could not be held again. The plaintiff became reclusive.

[36] Further evidence of the plaintiff is that a weekly market was held at the premises. He was unaware of any complaint against him and was not consulted on the matter before being arrested.

[37] Ms Callow testified that for many years she was employed by the plaintiff in an administrative capacity which included the capture of data in respect of income and expenses of the businesses as well as their submissions to the South African Revenue Services. She witnessed the plaintiff's arrest on 10 February 2016 at his business premises which occurred in the presence of the public, specifically patrons of the businesses. She also compiled and formulated the budget of the plaintiff's businesses being the pub, restaurant and museum.

[38] Regarding the Wheels at the Vaal Motor Show, she was intimately involved in organising the event. In particular, her functions included seeking out sponsors and vendors. The yearly event usually took place around September. It took around six months to organise.

[39] Ms Callow further testified that prior to the plaintiff's arrest the businesses were popular and did well financially. The same was true of the yearly motor show held at the premises of the businesses. Prior to the plaintiff's arrest, the sourcing of sponsors and vendors for the stalls was easy. It was so popular that vendors would approach them for a booking to attend the motor show. Some vendors would book a stall for participation in the following year's event shortly after the event they had just participated in. They felt like family. After the plaintiff's arrest, the picture changed dramatically. The effect of the plaintiff's arrest was such that vendors who had already booked stalls cancelled participation. Sponsors lost interest and many could not be convinced of continuing their patronage. Vendors who had participated in previous years, failed to continue doing so. Contrary to previous years, the 2016 motor show was unsuccessful and was the last to be held.

[40] It is Ms Callow's evidence that the downturn in the businesses must be attributed to the plaintiff's arrest, detention and prosecution. A negative perception was created amongst the public because of the plaintiff's arrest. The stigma attached to the plaintiff following upon his arrest was such that the attendance of patrons dropped. Even regular patrons no longer supported the businesses and stayed away. An example is the Rotarians who regularly booked at the premises. It was the plaintiff who suffered financial damages due to the loss of the businesses. The downturn in the fortunes of the businesses and the plaintiff was such that within around six months after the arrest, artefacts which supporters had previously provided to be displayed had to be returned and collections displayed at the museum auctioned off. None of the businesses survived.

[41] The further testimony of Ms Callow is that it was she who took the plaintiff's medication to him during his detention and fetched him after his release. She noticed marked emotional trauma in the plaintiff. He became quiet and

withdrawn. In her view, the plaintiff told people what had happened to him in an attempt at dealing with the trauma he suffered as a result of his arrest.

[42] No witnesses were called by the defendants in rebuttal of the concessions made by Mr Mpete and W.O Brijlall as well as the evidence of the plaintiff and Ms Callow.

Analysis and consideration

Generally

[43] The Constitution of the Republic of South Africa² is endowed with a Bill of Rights³ which enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.⁴ The State is compelled to respect, protect, promote and fulfil the rights contained in the Bill of Rights.⁵

[44] Several of the rights contained in the Bill of Rights are pertinent to the adjudication of this matter. First is the right of everybody to have their dignity respected and protected⁶ and second is everyone's right to freedom and security of their person.⁷ The latter includes, amongst others, the right not to be deprived of freedom arbitrarily without just cause, to be free of all forms of violence and not to be tortured in any way. Thirdly, everyone has the right of bodily and psychological integrity which includes, amongst others, the right to security in and control over their body.⁸

[45] Unlawful arrest and detention as well as malicious prosecution constitute deprivation of liberty and involve infringement upon a person's rights to bodily integrity,⁹ dignity¹⁰ and on occasion, privacy.¹¹

² 108 of 1996

³ Above, Chapter 2

⁴ Above, section 7(1)

⁵ Above, section 7(2)

⁶ Above, section 10

⁷ Above, section 12(1)

⁸ Above, section 12(2)

⁹ *Zealand v Minister of Justice & Constitutional Development* 2008 4 SA 458 (CC) at [24]-[25]

¹⁰ *Minister of Police v Du Plessis* 2014 1 SACR 217 (SCA) at [15]

¹¹ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at [4]

Unlawful arrest and detention

[46] Briefly stated, the plaintiff's case as framed in the particulars of claim is that the warrant for his arrest was irregular and bad in law. W.O Brijlall alternatively another member of the SAPS, further alternatively Advocate Nkuna, or other members of the fifth defendant, all acting within the course and scope of their employ with their respective employees, applied for the warrant without a proper investigation of all the facts and in circumstances which did not reasonably justify an application for a warrant and it being issued. Advocate Nkuna alternatively another member of the fifth defendant drafted the charge sheet containing the charges against the plaintiff and Vuma. The decision to bring the plaintiff before court by way of arrest is alleged to have been unreasonable, irrational, arbitrary and not in good faith. In the alternative, it is alleged that the arresting officers had a duty to exercise a reasonable discretion whether or not to execute the warrant which they failed to do. It was unreasonable in the circumstances to have arrested the plaintiff when his attendance could have been secured by a summons.

[47] As regards the alternative plead of the arresting officers having a duty to exercise a discretion whether or not to execute a warrant, the Supreme Court of Appeal in *Sekhoto*¹² held:

*"Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in Groenewald v Minister of Justice"*¹³

[48] This dictum was followed in innumerable cases concerning arrests in obliging an arresting officer to exercise a discretion whether or not to execute an arrest regardless of a warrant for arrest having been obtained.

¹² 2011 (5) SA 367 at [28]

¹³ 1973 (3) SA 877 (A) at 883G – 884B

[49] In a judgment dated 14 November 2023, the Constitutional Court in *Groves N.O v Minister of Police*¹⁴ held Sekhoto in that respect to be unsafe:

*“...Groenewald did not decide that a peace officer making an arrest on the strength of a warrant has a discretion; the case dealt with the discretion of the Magistrate or peace officer authorising the warrant of arrest. The statement made in Sekhoto with reference to Groenewald constitutes an error in law and leaves the question open as to whether a peace officer executing a warrant of arrest must exercise a discretion when executing the authorised warrant. I should add that, because Sekhoto dealt with an arrest without a warrant, what the court said in that case about an arrest on the strength of a warrant was an obiter dictum...”*¹⁵

[50] The court found that section 43(2)¹⁶ obliges an arresting officer to arrest the person identified in the warrant in accordance with its terms.¹⁷ In the case of a warrantless arrest, the position differs in that once the jurisdictional prerequisites stipulated in section 40(1) are satisfied, a discretion arises whether or not to arrest with reference to the prevailing circumstances of the particular matter.

[51] An arresting officer’s obligation to execute an arrest where a warrant for it has been issued, is not wholly unfettered. There may be circumstances where an arresting officer will have to make a value judgement before performing an arrest:

“Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and “[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries”. An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be effected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the

¹⁴ [2023] JOL 61903 (CC)

¹⁵ Above [51]

¹⁶ “A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.”

¹⁷ Above [56]

*removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.*¹⁸

[52] Had W.O Brijlall taken into account the plaintiff's known age, his health and that it is unlikely he was a flight risk as well as the possible consequences of arresting him in full view of his patrons, he might well have gone about the arrest differently. If he had been more circumspect, the consequences of the arrest and detention might well have been very different.

[53] Regarding the claim that the warrant of arrest was irregular and bad in law, W.O Brijlall conceded not only that in obtaining the warrant the requirements of section 43(1)(c) of the CPU were not complied with, but that the warrant was irregular and wrongful, as well as that the arrest of the plaintiff was wrongful. In my view these concessions were correctly made.

[54] The attendance of an accused in court may be procured either by indictment, written notice, summons or arrest. By its nature, the effect of an arrest is the harsher of these as it constitutes an infringement upon the rights of the arrested person, such as dignity, liberty and freedom, security of their person as well as the bodily and psychological integrity of their person.

[55] A decision to arrest a person must be sparingly exercised.¹⁹ Although the matter in *S v More*²⁰ pertains to a warrantless arrest, the judgment of the full bench is instructive. It found that even when a right exists in terms of the CPA to arrest a suspect, it does not mean that it is desirable to do so. A person should not be deprived of their freedom lightly. The court approvingly refers to *South African Criminal Law and Procedure*.²¹

"The method of securing the attendance of the accused by summons is one which should be preferred to arrest in cases where there is no reason to suppose that, because of the gravity of the offence, or of any particular circumstance affecting the accused, the adoption of the former course might be attended with results prejudicial to the interests of justice. Where the accused is known and his interests are such as

¹⁸ Above [60]

¹⁹ *Tsose v Minister of Justice* 1951 3 SA 10 (A) at 17G-H

²⁰ 1993 (2) SACR 606 (W) at 608

²¹ Lansdowne and Campbell, Volume 5 at 254

to dispel any suspicion that he might decamp, there is usually no necessity for resorting to a method which, however tactfully exercised, must result in some loss of liberty, and in the imposition of some measure of indignity. In such cases it is genuinely desirable that a summons should be issued: but there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.”

[56] I can find no reason why this approach should not be considered when deciding whether or not application should be made for a warrant of arrest to be issued and obtained. It is my understanding that as our law currently stands, it is not a rule of substantive or procedural law.

[57] In respect of warrants authorising search and seizure, the Supreme Court of Appeal in *Powell NO and Others v Van der Merwe NO and Others*²² held that the courts examined their validity with a jealous regard for the liberty of the subject and her or his rights to privacy and property. This applied to both the authority under which a warrant was issued and the ambit of its terms. The same court held in *Minister of Safety and Security v Kruger*²³ that the principle applies to warrants of arrest, the more so since it authorises the deprivation of personal freedom. It was further held that a warrant issued in terms of section 43 of the CPA is required to reflect the offence in respect of which it had been issued, if it does not, it is invalid. The consequence of an invalid warrant is that the arrest and subsequent detention are unlawful.²⁴

[58] In *Msimango v Minister of Police*²⁵ the court followed *Kruger* in respect of an invalid warrant of arrest for non-compliance with section 43(1)(a) of the CPA. It held that the question of the validity of a warrant is a matter of law and where it does not comply with the section, it is invalid. In consequence, the arrest and detention of a plaintiff are “...*wrongful and unlawful*.” Our courts have held that a J 50 warrant of arrest is unlawful if it is improperly sought and obtained.²⁶

²² 2005 (1) SACR 317 (SCA) 62 at [59]

²³ 2011 (1) SACR 529 (SCA) at [12]

²⁴ Above at [11] read with [20]

²⁵ 2023 JDR 3685 (ECM) at [58]. The judgment was delivered on 14 September 2023, prior to the Groves judgment. The findings in respect of the arresting officer having a discretion not to execute a warrant thus is unsafe. The balance of the judgment in my view is safe.

²⁶ *Mahlangu v Minister of Safety and Security* [2012] ZAGPPHC 12 (9 February 2012) at [15] followed in *Maphoza v Minister of Police* [2022] JOL 54726 GJ at [38]

[59] It was submitted on behalf of the defendants that the plaintiff's arrest was executed upon a warrant issued by a magistrate as provided for and in accordance with the requirements of section 43 of the CPA on a reasonable suspicion based on evidence collected and on reasonable grounds. In my view, these submissions are not only contrary to the testimony presented by the defendants' witnesses and concessions made by them, but also bad in law. In Mr Mpete's mind the only connection of the plaintiff relative to the matter is the fact that he was a director of Lekoa. In his affidavit setting out his complaint prior to the application for the warrant of arrest and the issue of the warrant, no mention is made of either the plaintiff or Vuma or, for that matter, Lekoa. Detailed allegations are made against all the other accused whom are accused of having committed fraud, theft, forgery, money laundering and uttering of documents. In the event Lekoa was never charged with any of these offences.

[60] In the affidavit supporting the application for the warrant of arrest deposed to by W.O Brijlall, no reference whatsoever is made of Vuma. The only reference to the plaintiff by name is as follows: "*9. Thomas Stanley v/d Heever, Sieghart Ernest Duvel and Johannes Mohale were Directosr [sic] and a [sic] Shareholders of Lekoa...*" It continues as follows: "*10. Thomas Stanley v/d Heever awarded a tender Bid contract ES-5/2000: TSHEPISO BULK WATER SUPPLY for an amount of R3.5m to Lekoa...*"

[61] Significantly, no mention is made in this paragraph concerning the plaintiff. The underlining appears in the text of the affidavit in the court bundle. It was referred to during the trial by the parties. According to Mr Mpete this statement is false. No tender was awarded to Lekoa.

[62] In paragraph 14 of his affidavit, W.O Brijlall states:

"It is my view, and as advised, the suspects acted in furtherance of a common purpose and that the state will allege that in the light of the above evidence discloses that there is a prima facie case against the above-mentioned individuals for the commission of the offences of fraud, corruption and theft."

[63] I note that the suspects are typified as individuals which seem to be exclusive of juristic persons. Be that as it may, no allegations are contained in the

affidavit by virtue of which it could be inferred that the plaintiff had any common purpose with any of the other accused charged.

[64] From the testimony and the affidavits referred to, it is clear there simply was no evidence upon which any reasonable suspicion could be formed of the plaintiff and Vuma having committed any crime, be it fraud or any of the crimes they were charged with. According to the warrant of arrest, the application for the arrest was upon the written application of the senior public prosecutor.²⁷ The application offends against the express provisions of section 43(1)(c) of the CPA. Not only does the supporting affidavit omit stating that from information taken upon oath there is a reasonable suspicion the plaintiff and/or Vuma committed the alleged offences, there in fact did not exist any such information taken on oath at that time.

[65] With reference to the pre-constitutional judgments in *Divisional Commissioner of SA Police Witwatersrand Area v SA Associated Newspapers Ltd*²⁸ and *Prinsloo and Another v Newman*²⁹ the argument offered on behalf of the defendants is that W.O Brijlall was obliged to execute the warrant in terms of section 43(2) of the CPA. As I understand the defendants' submission, the first defendant and W.O Brijlall are not liable because the latter executed the warrant which it is alleged was in the proper form and issued by a duly authorised official. It appears the argument is that as the arresting officer has a defence, the first defendant is not vicariously liable. I disagree on both counts. I do not understand these cases to be authority for the proposition that an arresting officer is excused from liability in all and any circumstances.

[66] It makes sense that an arresting officer who was not involved in the investigation of a matter and the process of obtaining the issue of the warrant of arrest, ought to be at liberty to assume that all had been validly and regularly done. The indemnification of such an officer from liability is justified in the event of the warrant in fact having been irregularly obtained and invalid. I am not persuaded that an arresting officer who also is the investigating officer and the deponent to an affidavit in support of an application for the issue of a warrant is

²⁷ CL19-39

²⁸ [1966] 3 All SA 1 (A)

²⁹ 1975 (1) SA 481 (A)

in a similar position. To the contrary, such an arresting officer should not escape the consequences of any intentional or grossly negligent, if not mere negligent, omission resulting in non-compliance with formal and substantive requirements for the issue of a valid and lawful warrant of arrest. To hold otherwise would detract from the obligations of police officers generally and in particular the constitutional imperative that the State is compelled to respect, protect, promote and fulfil the rights contained in the Bill of Rights. In my view, it would offend against the public interest.

[67] In *Divisional Commissioner* the court was concerned with the validity of a search warrant and which of the parties bears the onus to show that reasonable grounds exist for a search. In the absence of a warrant, a police officer has to show that he or she believes reasonable grounds exist. Where there is a warrant, the position is different. The court held:

“The warrant has been issued to him by a responsible person to whom it has been made to appear on oath that reasonable grounds exist for believing certain things. In my opinion the opening words of sec. 42-

“If it appears to a judge of a superior court, a magistrate or a justice on complaint made on oath”

-were intended to govern all that follows, including not only the existence of reasonable grounds for suspecting that a certain article is to be found at a certain place, but also that there are, e.g., reasonable grounds for believing that the article in question will afford evidence as to the commission of an offence... I am persuaded that an objective approach to the matter by the courts is excluded because of the following considerations: The persons who are entrusted with the important duty of issuing search warrants are responsible officers. I cannot think that it was intended that the discretion allowed to them should be justiciable in a court of law, save in very exceptional circumstances. Furthermore, they will in many cases be acting upon information of a confidential nature which it might be unwise to disclose in court.

I come to the conclusion therefore that there was no onus on the appellants to show that reasonable grounds in fact existed for believing that the documents mentioned in the search warrant would afford evidence as to the commission of an

offence in terms of sec. 44 (f) of Act 8 of 1959.”⁸⁰

[68] In *Prinsloo* it was alleged by the plaintiff that the warrant and his arrest pursuant thereto were unlawful and without reasonable and probable cause. The offence concerned an alleged contravention of the section 79(1) of the Companies Act 46 of 1926. Whether or not the section was contravened was subject to interpretation. On facts known, the state prosecutors held the view that the section had been contravened. A warrant was applied for by one of the prosecutors and issued. The court found that viewing the matter objectively their decision, although it may have been incorrect, was understandable and not unreasonable.³¹ It held there was reasonable and probable cause on the part of the prosecutors as to the commission of an offence, and that the warrant was not defective in any other respect. With reference to *Divisional Commissioner*³² the court held that as far as the arresting officer was concerned, the warrant “...is in itself a complete defence.”³³

[69] Contrary to *Prinsloo*, in the matter I am ceased with the warrant was invalid. It was erroneously sought and obtained in that there was no evidence under oath at the time it was applied for implicating either the plaintiff or Vuma in having committed any offence. It follows that there was no reasonable or probable cause on the part of W.O Brijlall and the prosecuting authority of the plaintiff and/or Vuma having committed an offence. W.O Brijlall's affidavit in support of the application omitted stating that from information taken upon oath there is a reasonable suspicion of the plaintiff and/or Vuma having committed the offences mentioned therein. In addition, the allegation that Lekoa was awarded a tender was incorrect with the result that the magistrate was brought under a misapprehension. In the result, the warrant of arrest was erroneously issued. W.O Brijlall, an experienced police officer, in the circumstances prevailing, reasonably should have known the application for the warrant was fatally defective and that there were no statements under oath implicating either the plaintiff or Vuma. In the circumstances he reasonably should not and could not have used his affidavit in support of an application for the issue of a warrant

³⁰ *Divisional Commissioner* at 511ff

³¹ *Prinsloo* above at 497C

³² 1973 (3) SA 877 (AD) at 883-884.

³³ Above at 500A-B.

against the plaintiff and a warrant for the arrest of the plaintiff should not have been obtained. I find the conduct of the W.O Brijlall, regard being had to the prevailing circumstances, to have been an extreme departure from what one would have expected from a reasonable person in his shoes at the time. In short, he was grossly negligent.³⁴

[70] Should I be wrong in this respect and an arresting officer is excused from liability in all and any circumstances, it is my view that it does not absolve the first defendant from liability. It cannot render what is unlawful and invalid to be lawful and valid. In this regard the judgment in *Kruger* is instructive where the warrant of arrest was found to be invalid for not recording the offences for which the arrest was to be executed. The principal ground called upon by the Minister was section 55(1) of the *South African Police Service Act*³⁵ which reads:

“55 Non-liability for acts under irregular warrant

(1) Any member who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he or she has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were valid in law.”

The court held that it does not exempt the State from civil liability for the unlawful act:

“A police officer — or anyone else, for that matter — who deprives a person of his or her liberty without legal justification commits a delict, and is ordinarily liable for the damage that is caused by the delictual act. The section does not purport to render the act lawful. In its terms it does no more than to relieve the police officer of the consequences of the delictual act. The act remains unlawful and, in accordance with ordinary principles, the employer is vicariously liable for its consequences.”³⁶

I can find no reason why it would be different in the circumstances of the matter

³⁴ *MV Stella Tingas; Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and another* 2003 (2) SA 473 at [7]

³⁵ 68 of 1995

³⁶ *Kruger* at [15] and [16]

before me.

[71] Further submissions made on behalf of the defendants are that the matter might have been different if the lawfulness of the warrant was challenged in a different court before the plaintiff made any appearance in respect of the charges on the grounds of the inappropriate exercise by the magistrate of his / her discretion to issue the warrant of arrest. I find no merit in these submissions.

[72] The first, second and fifth defendants are not absolved from liability because of the magistrate having exercised his/her discretion to issue the warrant incorrectly. What is unlawful, invalid and irregular, cannot be made valid, lawful and regular. In addition, the plaintiff was unaware of the warrant until he was arrested and detained before being brought before court on the same day. There was no opportunity to approach a court for the setting aside of the warrant prior to his arrest.

[73] I find that W.O Brijlall, acting within the course and scope of his employment with the first defendant, as well as employees of the fifth defendant, caused the warrant for the arrest of the plaintiff to be pursued and obtained, without due consideration and investigation of the facts and circumstances prevailing and in the absence of justification to do so. The application for the warrant was fatally flawed and the warrant in consequence was invalid. It follows the arrest of the plaintiff was unlawful and wrongful.

Malicious prosecution

[74] In the particulars of claim it is alleged that the third, fourth and fifth defendants maliciously set the law in motion by commencing with prosecution after the third and fourth defendants lay false charges of theft, money laundering and fraud against the plaintiff by giving members of the SAPS false information (“*the disinformation*”), namely that Vuma was awarded a contract for the Tshepiso Bulk Sewer Project whereas it was awarded to another firm.³⁷ The nature of the false information as pleaded is not supported by the evidence: Vuma was not

³⁷ Particulars of Claim [29] at CL04-12

mentioned at all and the plaintiff was mentioned only in his capacity as one of the directors of Lekoa, which was incorrectly alleged to have been awarded the tender for the Tshepiso Bulk Sewer Supply.

[75] In brief summary, it is further alleged that as a result of the third, fourth and fifth defendants' conduct as aforesaid, the plaintiff was arrested, detained and maliciously prosecuted.³⁸ It is alleged W.O Brijlall and representatives of the fifth defendant namely Adv. Nkuna, alternatively Adv. De Kock, conducted no alternatively grossly inadequate investigations as to the truth of the disinformation, pursued no alternative means of procuring the plaintiff's attendance at court and had no reasonable or probable cause to arrest, detain and prosecute the plaintiff.³⁹

[76] It is also alleged that in prosecuting the plaintiff, Adv Nkuna alternatively Adv. De Kock acted recklessly by disregarding the fact that available evidence did not meet the requisite threshold justifying criminal prosecution and/or together with W.O Brijhlall and the fourth defendant wrongfully, maliciously and without just cause prosecuted the plaintiff, alternatively, notwithstanding available evidence, negligently insisted on prosecuting the plaintiff,⁴⁰ further alternatively *"The fifth defendant paid no regard to the contents of the docket and evidence therein at all alternatively paid insufficient regard thereto and notwithstanding the aforesaid, prosecuted the plaintiff..."*⁴¹

[77] Initially, the claim for malicious prosecution was against the third, fourth and fifth defendants.⁴² The claim remains against the fifth defendant only as the plaintiff withdrew all its claims against the third and fourth defendants.

[78] It is common cause between the parties that the onus rests on the plaintiff to prove all the elements required to succeed with a claim for malicious prosecution.⁴³ The plaintiff is required to prove the fifth defendant's employees and/or members set the law in motion by instigating or instituting the charges

³⁸ Above [30] at CL04-12 to 13

³⁹ Above [32] at CL04-13

⁴⁰ Above [34] at CL04-13 to 14

⁴¹ Above [35] at CL04-14

⁴² Plaintiff's Heads of Argument, CL27-63

⁴³ In any event, see *Rudolph and others v Minister of Safety and Security* [2009] 3 All SA 323 (SCA) at [16] with reference to *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at [8]

against him and in doing so, acted without reasonable and probable cause with the intention to injure the plaintiff. Lastly, it needs to be proved the prosecution failed. In the heads of argument presented on behalf of the fifth defendant, it is not disputed the prosecution has failed in the context of its termination in terms of section 342A of the CPA.

[79] The first hurdle to be cleared by the plaintiff is proving on a balance of probability the fifth defendant's employees and/or members had set the law in motion by instituting or instigating the proceedings. On behalf of the fifth defendant, it was submitted that all they did was to act on the statement given by Mr Mpete. Members of SAPS followed on the information given "*...which revealed more that necessitated the inclusion of other people including the Plaintiff, therefore, it cannot be said that they set the law in motion.*"

[80] To establish the setting in motion of the law requires the plaintiff to prove that the fifth defendant was actively instrumental in causing the prosecution of the charges. A person who provides a fair statement of facts to the police and/or the prosecuting authorities leaving it up to them to take such action as they deem fit is regarded as not having set the law in motion and is not liable, unless he/she goes further and identifies himself/herself with the prosecution. In this regard the test is whether such person did more than tell the facts to the relevant authorities and did not leave the decision as to what steps should be taken to the discretion of the relevant authorities. If the information given to the relevant authorities is known by the giver to be false in a material respect but for which the prosecution would not have followed, such person is considered to have instigated the prosecution which followed. Causation of the prosecution is inherent to the concepts of 'setting the law in motion' or instigating' or 'instituting' the prosecution of the plaintiff.⁴⁴

[81] Determining whether the conduct of the fifth defendant caused the plaintiff's loss entails two distinct enquiries respectively referred to as factual causation and legal causation. In *International Shipping Co (Pty) Ltd v Bentley*⁴⁵ it was framed as follows:

⁴⁴ *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 197ff

⁴⁵ 1990 (1) SA 680 (A) at 700ff. See *Heyns v Venter* 2004 (3) SA 200 (T) at [9] to [11]

“The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part...”

[82] The court approvingly quotes from *Law of Torts*⁴⁶ the following:

“The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.”

[83] The manner in which legal causation is to be adjudicated, seems controversial. On the one hand is the so-called “direct consequences theory” which holds that a wrongdoer be held liable for all direct consequences following upon his/her conduct, limited to the direct and physical consequences following upon a wrongdoer's conduct. On the other hand stands the “foreseeability” or “natural

⁴⁶ Fleming, 7th Edition at 173

and probable consequences” theory which holds that a person should not be held liable for the consequences of his/her conduct that could not reasonably have been foreseen.

[84] In essence the issue is the extent to which liability might be limited for conduct which factually resulted in the loss suffered particularly with regard to remoteness. A compromise is to place emphasis on whether a sufficiently close connection exists between the harmful conduct and its factual result having regard to the circumstances of the case, and policy considerations such as fairness, reasonableness and justice.⁴⁷ In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*⁴⁸ it was held that such a compromise is not a substantive test as what is fair, reasonable and just which may be too dependent on a judge’s subjective idiosyncrasies and should be limited in its application.⁴⁹ The court held as follows:

*“...the existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result, which is so unfair or unjust that it is regarded as untenable. If the foreseeability test, for example, leads to a result which will be acceptable to most right-minded people, that is the end of the matter.”*⁵⁰

[85] The court applied both the direct consequence approach and the foreseeability approach to the facts and found that in either case the harm was not too remote. Imposing liability to the wrongdoer was not in any way untenable. In doing so, considerations of fairness and equity *“...were not used as a means to determine whether liability should be imposed, but rather to assess whether the application of the tests produced an acceptable result.”*⁵¹ Various factors may be taken into account such as directness, reasonable foreseeability; fairness, justice, reasonability, legal policy and the absence or presence of a *novus actus interveniens*.⁵² In *Minister for Safety and Security v Scott and Another* the

⁴⁷ *S v Mokgethi* 1990 (1) SA 32 (A) at 40Iff

⁴⁸ [2009] (1) All SA 525 (SCA) at [31]

⁴⁹ Above at [33]

⁵⁰ Above at [34]

⁵¹ Van der Walt & Midgley *Principles of Delict* Fourth Edition par 181 and the judgments there cited as well as their valued interpretation

⁵² *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994] 2 All SA 524 (A) at 537

court held as follows regarding legal causation:⁵³

"This is an enquiry into whether the wrongful act is linked sufficiently closely to the loss concerned for legal liability to ensue. Generally, a wrongdoer is not liable for harm which is "too remote" from the conduct concerned, or harm which was not foreseeable. Thus the purpose of legal causation is to ensure that any liability on the part of the wrongdoer does not extend indeterminately without limitation. In this way, remoteness operates as a further limitation on liability, and thus the enquiry necessarily overlaps with that into wrongfulness",

and, with reference to *Fourways*:

"This Court has expressed a preference for the "flexible approach" in determining legal causation. The traditional tests for legal causation ("reasonable foreseeability", "direct consequences" and "adequate causation"⁵⁴) may nevertheless still be relevant as subsidiary determinants."

[86] With the above in mind, I now turn to the evidence presented to court relevant to the alleged instigation or institution of the prosecution against the plaintiff by the fifth defendant.

[87] I disagree Mr Mpete was the factual cause of the plaintiff's prosecution. In my view, upon an analysis of his testimony, his admission that he set the law in motion does not equate with an admission he instituted or instigated the plaintiff's prosecution. In his affidavit setting out the complaint, neither the plaintiff nor Vuma is mentioned. It is the other accused that is mentioned and in respect of whom allegations are made implicating them in the commission of possible offences. He set the wheels in motion in respect of the other accused, not the plaintiff and Vuma. In my view, it is not Mr Mpete's affidavit and his conduct which was the *causa sine qua non* for the institution of proceedings against the plaintiff.

[88] According to W.O Brijlall, contrary to what is stated in the warrant of arrest namely that there was a reasonable suspicion of the plaintiff having committed

⁵³ [2014] JOL 31945 (SCA) at [37] to [38]

⁵⁴ See *Principles of Delict* above at par 186. The adequate causation test is when, according to human experience an act has, in the normal course of events the tendency to bring about the consequence complained of. It is not generally applied in practice.

fraud, the additional charges of theft and money laundering was added by a senior advocate of the fifth defendant. It is recorded in W.O Brijlall's affidavit, which was used in support of the application for the warrant to arrest, that in his view and as advised, the suspects in the matter had acted in furtherance of a common purpose for the commission of fraud, corruption and theft. He further testified that the charge sheet had been drawn by members of the fifth defendant. In addition, the warrant records that "...*from the written application by the SENIOR STATE PROSECUTOR...*" there is a reasonable suspicion the plaintiff had committed fraud on 20 October 2000.⁵⁵

[89] Having regard to the evidence presented, I am of the view that the factual *causa sine qua non* for the institution of the proceedings against the plaintiff was the conduct of the fifth defendant's members and/or employees. To my mind the fifth defendant and/or its employees' conduct meet the requirements to establish legal causation in that, amongst others, the institution of the charges and pursuit of proceedings is a direct consequence of conduct of the members or employees of the fifth defendant. It was foreseeable. The result in my view is not so unfair or unjust that it may be regarded as untenable.

[90] Absence of reasonable and probable cause is when the instigator of the prosecution did not have such information as would lead a reasonable person to conclude the plaintiff had probably been guilty of the offence charged. If such information was available a subjective element comes into play- if the instigator did not believe in the plaintiff's guilt, reasonable and probable cause is absent.⁵⁶

[91] On the evidence put before me, it is clear there was no evidence upon which the employees or members of the fifth defendant may reasonably have concluded the plaintiff was probably guilty of the offences with which he was charged.

[92] To establish *animus iniuriandi* the plaintiff needs to show the fifth defendant not to have had an honest belief in the guilt of the plaintiff, or that its members or employees had acted in a reckless manner without regard to the plaintiff and

⁵⁵ CL 19-39

⁵⁶ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A – B

careless of the effect in so doing upon the plaintiff's rights and freedoms, or with an improper motive.

[93] In *Minister of Justice & Constitutional Development v Moleko*⁵⁷ the court definitively dealt with the meaning⁵⁸ of *animus iniuriandi* thus:

“[63] *Animus iniuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

*'In this regard animus iniuriandi (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 iniuriandi, will be lacking. His mistake therefore excludes the existence of animus iniuriandi.'*⁵⁹

[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.*”⁶⁰

[94] In instituting the prosecution against the plaintiff, the fifth defendant's members or employees clearly directed their will to prosecuting the plaintiff which in consequence infringed upon his rights. As there was no reasonable and probable cause to do so their conduct was wrongful. What remains to be

⁵⁷ 2008 3 All SA 47 (SCA). See also *Relyant* at [5]: “...although the expression “malice” is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*”

⁵⁸ See also *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at [15]: “...*animus iniuriandi* means that the defendant, while being aware of the absence of reasonable grounds for the prosecution, directs his or her will to prosecuting the plaintiff. If no reasonable grounds exist, but the defendant honestly believes either that the plaintiff is guilty, or that reasonable grounds are present, the second element of *animus iniuriandi*, namely consciousness of wrongfulness, will be lacking”

⁵⁹ Quoted from J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) p 181

⁶⁰ Gross negligence is confirmed not to be a suitable requirement in determining fault. See *Relyant* at [5] and *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) at [36]ff

established is whether or not they were aware of the wrongfulness of their conduct or foresaw the probability that their conduct was wrongful but pursued the prosecution of the plaintiff regardless and recklessly.

[95] There is no evidence before court as to whether or not the defendant's members or employees had *dolus directus* or *indirectus* in acting as they did. It is for the plaintiff to prove that their conduct amounts to *dolus eventualis*. To do so requires an inference to be drawn from all the available evidence put before court. In *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer*⁶¹ it was held that it is not necessary for a plaintiff to prove the inference sought to be drawn is the only reasonable inference - it will suffice if it is the most readily apparent and acceptable inference from a number of possible inferences. An equally probable inference from the evidence available would be that the focus of the investigation and formulation of the charges was on all the other accused and that the issues in respect of the plaintiff and Vuma got lost in the wash. They were, after all, the last two accused of 11. As the plaintiff bears the onus, I am not persuaded that *dolus eventualis* is indicated on the evidence before me. The evidence points to them having acted with gross negligence, but that does not suffice.

Past and future loss of earnings

[96] Apart from claiming general damages under the *actio iniuriarum*, the *Aquilian* action is also available in respect of any patrimonial loss that might have arisen.⁶²

[97] The plaintiff and Ms Callow were reliable witnesses and stood their ground well during cross examination. Their testimonies were cogent and not seriously challenged. Attempts to do so were cursory and ineffective. It is clear that the plaintiff's arrest and detention directly led to the demise of his businesses and damage to his patrimonium in respect thereof. According to

⁶¹ 1982 (2) SA 603 (A) at 614G-A. See as applied in *Meyers v MEC, Department of Health*. EC 2020 (3) SA 337 (SCA) at [82]

⁶² *Minister of Safety & Security v Schubach* [2015] JOL 32615 (SCA) at [21]: "With regard to damages, there is no doubt that the respondent was entitled to damages for both injury to personality and pecuniary loss suffered (*Law v Kin* [1966] 3 All SA 84 (W), 1966 (3) SA 480 (W) at 483), but the question is whether the amount of damages awarded to him was justified. The former are awarded as a solatium under the *actio iniuriarum*, while the latter constitute compensation under the *actio legis aquilia*."

the evidence, he suffered a loss of both past and future earnings. The first defendant and W.O Brijlall and the members/employers of the fifth defendant were the factual cause thereof. As regards legal causation I am of the view that W.O Brijlall's conduct as well as that of the members/employees of the fifth defendant were a direct cause of the loss suffered by the plaintiff of past and future earnings. In addition, it was foreseeable, particularly by an officer of some 27 years' experience as well as by the legally trained and experienced members of the fifth defendant. It is not too remote and does not detract from right-minded people's expectations in this respect, nor is it unjust or unfair to the extent it may be untenable.

Conclusion

[98] Having regard to all of the above, I find the first, second and fifth defendants liable for the loss and damage suffered by the plaintiff as a result of his unlawful arrest and detention claimed by way of the *action iniuriarum*, as well as the past and future loss of earnings claimed in terms of the Aquilian action, as particularised above.

Order

[99] For the reasons set out above, I make an order as set out below:

1. Judgment is granted against the first, second and fifth defendants jointly and severally on the merits in respect of Claim A based on the *actio iniuriarum* for payment of damages, the quantum of which to be determined in a separate trial, resulting from the wrongful and unlawful arrest and detention of the plaintiff, in particular in respect of *contumelia*, deprivation of bodily freedom, liberty and discomfort as well as damage caused to the plaintiff's good name, dignity, reputation and standing in the community;
2. Judgment is granted against the first, second and fifth defendants jointly and severally on the merits in respect of the *Aquilian* claims set out in Claims C and D for:

- 2.1 payment of damages, the quantum of which to be determined at a separate trial, for past loss of earnings suffered by the plaintiff from loss of income of the plaintiff's restaurant, pub and museum as a consequence of his unlawful arrest and detention;
 - 2.2 payment of damages, the quantum of which to be determined at a separate trial, for future loss of earnings (loss of profit) suffered by the plaintiff from the plaintiff's businesses, including the restaurant, pub and museum, as a consequence of his unlawful arrest and detention;
3. Costs of suit for the claims for unlawful arrest and detention resulting from the *actio iniuriarum* as well as the *Aquilian* claim for past and future loss of earnings to be paid by the first, second and fifth defendants jointly and severally, payment by the one to absolve the other.
4. The plaintiff's claim in respect of Claim B against the fifth defendant for malicious prosecution is dismissed.



N.S. KRÜGER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **9 September 2024**.

For the Plaintiff:	Adv WF Wannenburg instructed by Esthé Muller Attorneys
For the 1 st , 2 nd , and 5 th Defendants:	Adv AT Raselebana instructed by the State Attorney
For the 3 rd Defendant:	Appeared in person
For the 4 th Defendant:	Adv M Steenkamp instructed by Legal Aid South Africa
Date of Hearing:	27 May 2024 – 4 June 2024, heads of argument filed by the plaintiff and 1 st , 2 nd and 5 th defendants respectively on 18 June 2024 and 1 July 2024
Date of Judgment:	9 September 2024

