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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 6753/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE 11/12/2024

SIGNATURE:

In the matter between:

B[...] M[...]

1ST PLAINTIFF

TYRE KHOSA

2ND PLAINTIFF

S[...] M[...]

3RD PLAINTIFF

TEMBANI BALOYI

4TH PLAINTIFF

KINGSLEY MKHARI

5TH PLAINTIFF

And

MINISTER OF POLICE

1ST DEFENDANT

NATIONAL COMMISSIONER OF POLICE

2ND DEFENDANT

PROVINCIAL COMMISSIONER OF POLICE

3RD DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

4TH DEFENDANT

JUDGEMENT

MASHAMBA AJ

INTRODUCTION

[1] This is the matter whereby the first, second, third, fourth and fifth plaintiff (“the plaintiffs”), together instituted an action in this court against the Minister of Police, National Commissioner of Police, Provincial Commissioners of Police, and National Director of Public Prosecution (*“the defendants”*). As set out in their Combined Summons the plaintiffs, at the commencement of their action, claimed delictual damages from the defendants based on the same cause of actions, namely, unlawful arrest and detention, together with malicious prosecution against the fourth defendant. This matter was consolidated by an order granted on the 19th April 2022.

[2] The matter was enrolled to be heard for both merits and quantum on the 02nd September 2024. The matter was rolled over to the 04th September 2024. The issues to be decided was whether the arrest of the plaintiffs by members of the South African

Police Services and the subsequent detention thereafter was unlawful and, if so, the determination of the plaintiff's damages as a result thereof.

[3] The plaintiffs claim the amount of R 1 000 000.00 each, for unlawful arrest and detention and further claim in the amount of R 1 000 000.00 each, for malicious prosecution. Total amount claimed is R 10 000 000.00 (Ten million) for both plaintiffs' claims.

[4] The matter was heard for two days the 04th-05th September 2024 and at the end of the trial, the plaintiffs were directed to serve and file their heads of argument on or before the 27th September 2024 and the defendants to serve their reply heads of argument on or before the 21 October 2024. The plaintiffs' heads of argument were received in time but the defendants' heads of argument were delayed but court considered both heads of arguments when drafting this judgment.

THE COMMON CAUSE

[5] It is common cause or not disputed in this matter that: -

5.1 the arrests of the plaintiffs were effected without warrants;

5.2 the arrest was effected by members of the South African Police Services and they acted within the course and scope of their employment with the first, second and third defendant;

5.3 the plaintiffs were charged with murder which is a Schedule 1 Offence in terms of the Criminal Procedure Act¹ (hereinafter referred as "the Act");

¹ 51 of 1977

5.4 The first plaintiff, B[...] M[...] was arrested on the 08th March 2017, he was detained in custody until his release on the 07th February 2018 after the fourth defendant declined to prosecute;

5.5 The second plaintiff, Tyre Khosa was arrested on the 18th February 2017, he was detained in custody until his release on the 02nd February 2018, the charge against him was withdrawn;

5.6 The third plaintiff, S[...] M[...] was arrested on the 08th March 201, he was detained in custody until his release on the 18th February 2018, the charge against him was withdrawn;

5.7 The fourth plaintiff, Tembani Baloyi was arrested on the 15th February 2017, he was detained in custody until his release on or about February 2018, after the charge was withdrawn.

5.8 The fifth plaintiff, Kingsley Mkhari was arrested on the 17th February 2017, he was detained in custody until his release on the 02nd February 2024.

5.9 the defendant bore the duty to begin and the onus of proof to show, on a balance of probabilities, that the arrest of the plaintiffs was lawful in terms of section 40(1)(b) of the Act.

DEFENDANTS' EVIDENCE

[6] The defendants elected to rely on the oral evidence of a single witness only, namely that of Captain Ngobeni ("the captain"). This witness is presently stationed at Ritavi Police Station and has been a policeman for the past 33 years.

[7] The captain testified that there were two gang groups at Dan and Lusaka Village. The first group was called Bokoharam and the second was called Sankina. The two

groups were fighting against one another. On or about February 2017, the captain arrived at work and he was informed that the two gang groups were fighting and that as a result one man by the name of Fire was murdered. The captain further heard that Fire was murdered by Sankina group.

[8] The captain later on, was further informed that the Bokoharam group had revenged by murdering a man by the name of Freeman and also known as Figo.

[9] As a result of the complains from community members, the branch commander at Ritavi Police Station, Lieutenant Smith (hereinafter referred as “the commander”) prepared a list of suspects in connection with murder case of Fire and Figo of the respective gang groups. The captain further testified that the list contained the names of both group members and the list was posted on the notice board of the Police Station charge office.

[10] On the 18th March 2017, at around 3h00 am, the captain received a call from his reliable source or informant, he was informed that one of the suspects by the name of S[...] M[...], the third plaintiff was at his residential place. The captain immediately after the call, drove to the Police Station and found Constable Mangulwana. The captain and Constable Mangulwana went to the residential place of the third plaintiff at Rhulani Village. On arrival at the third plaintiff's place, the captain knocked and a certain male opened the door. The captain produced his appointment certificate and explained that he is a police officer. The captain indicated that he is looking for S[...] M[...] in relation to the murder case. The third plaintiff confirmed his names as S[...] M[...], the captain informed him of his constitutional rights. The third plaintiff was arrested and taken to the police station. The captain confirmed that he had no warrant of arrest.

[11] On the 28th March 2024, the captain arrested the first plaintiff, B[...] M[...], the same way he arrested the third plaintiff. The captain was called by the informant and he was informed that B[...] M[...] was at his residential place. The captain drove and met him at his residential place, he confirmed that his name is B[...] M[...]. The captain

showed B[...] M[...] his appointment certificate, and that he is arrested in connection with the murder case. The captain informed him of his constitutional rights and thereafter detained him.

[12] The captain testified that he believes that the arrest of the second, fourth and fifth was arrested as per the list of suspects which was on the notice board at the charge office.

[13] In cross examination the captain confirmed that he was not part of officers who compiled the list of suspects and that he did not consult or interview anyone who compiled such list. The captain did not produce the list which he used to arrest the first and third plaintiff.

PLAINTIFFS' EVIDENCE

[14] In support of the plaintiff's case, all five plaintiffs took a stand and gave their *viva voce* evidence.

[15] The third plaintiff, **S[...] M[...]**, testified that he was 16 years old when arrested on the 08th March 2017 at round 9h00 evening. He further testified that after the arrest he was taken to the grave yard where he was assaulted by the members of the South African Policies Services. The third plaintiff testified that the police officers indicated that I should inform them where were Class and Mdu and where was the gun that they shot. The police officer continued to assault him. He recognised Captain Ngoben and Constable Mangulwana and he does not know other police officers who were with them.

[16] The third plaintiff indicated that as a result of his assault by the police, he had a swollen face. They took him to the cell and the following day he appeared in court. He made a bail application but it was denied because police officer opposed his bail application and informed the court that his life will be at risk if he may be release on bail and further that the community will not be safe if he may be released on bail.

[17] The third plaintiff further testified that he was taken to Mavambe Youth Development Centre where he spent three months and later transferred to Polokwane Youth Development Centre. He was detained with other inmates and went through sessions. He indicated that the living condition at Mavambe and Polokwane Youth Development Centre was good. He was at Polokwane until his release on the 18th February 2018, after the prosecution declined to prosecute, the case against him was withdrawn.

[18] He tried returning back to school in 2018 but he was told that due to his age he cannot be admitted. He has a heart sore because his arrest affected his studies.

[19] The first plaintiff, **B[...]** **M[...]**, was also called to give his *viva voce* evidence. He testified that he was arrested on the 28th March 2017 by members of South African police. He was taken to Ritavi police station. He was informed that he is charged of murder of Figo. The unknown members of South African Police took him to the garage where police vans pour petrol which is closeby the police station and the police assaulted him and asking him questions regarding the murder case. He fainted as a result of the assault and he woke up in the police cells.

[20] The first plaintiff further testified that in the police cells, he was raped by other inmates. He requested the police to change his cells and they did. He applied for bail but it was denied. He was detained at Ritavi police for few days and further detained in Polokwane and even in modimolle prison, while he was awaiting trial. He testified that life in prison was hard, as they were fighting against each other. He was arrested with gang star or people arrested as gang star and they would gather in groups and fight against each other.

[21] The first plaintiff further testified that he was released on the 07th February 2018 after being informed that charges against him were withdrawn.

[22] After the release the first plaintiff felt unsafe as he was called murderer and he could not go to other nearby communities where they know him because he was known as a person who murdered someone.

[23] In cross examination he indicated that he was arrested by Captain Ngobeni in presence of other police officers.

[24] The fifth plaintiff, **Kingsley Mkhari**, an adult male person, 26 years old of age and at the time of the arrest he was 18 years old, doing grade 10. On the 16th February 2017 at around 16h30, the fifth plaintiff returned home from school when informed by his mother that members of South African Police were looking for him in relation to a murder case.

[25] On the 19th February 2017, the fifth plaintiff together with his mother went to Ritavi Police. He was informed by a man known as Mkhabinini that he is arrested for a murder case. The police officer known as Eric Mathebula charged him of murder, but indicated that he was not informed about a list of suspects. He was taken to police cell at Ritavi Police Station and the following day appeared in court. He applied for bail and his bail was denied. He was taken to Polokwane prison where he also attended some wellness programs.

[26] The fifth plaintiff indicated that his detention affected him, particularly his school progress was diminished, therefore, he lost faith of life. He denied being part of gang stars but he heard about the two-gang group of Sankila and Bokoharam.

[27] On the 02 February 2018, He was released from prison and informed that the case of murder against him was withdrawn. After the release he did not return to school, he got sick and was admitted to hospital.

[28] The fourth plaintiff, **Temba Baloyi**, an adult male and he was arrested at the age of 19 and currently 35 years old. He was doing grade 10. On the 15th February 2017 he

was arrested by members of South African Police while he was coming from Ritavi Clinic to his home, police officers arrived at his home. The police arrested him together with his friend by the name Tholi and he was not informed about the reason of his arrest. They were put at the police van and drove to Tzaneen where they were assaulted. The police officers while assaulting them asked the whereabouts of others and he did not know who were these persons the police were referring to. The fourth plaintiff further testified that he was later taken to Ritavi Police station and kept in the police cell for two to three hours before a police officer known as Kabini came to charge him. He was informed that he was arrested for a murder case. The following day he appeared in court. He applied for a bail but the application for bail was denied.

[29] He was taken to Polokwane prison and he does not remember how long he was detained in Polokwane and he was also detained at Modimolle Prison for three months. He indicated that being in prison is not good. He testified that the arrest affected his chances of proceeding with his school and he therefore, dropout from school.

[30] The second plaintiff, **Tyre Khosa**, an adult male, 29th years old, the time he was arrested he was 21 years old. Before his arrest he was working at Maizemeal Demo company. He was arrested at his home on the 18th February 2017 by members of South African Police. The police informed him that he is naughty and they slapped him. He was hand cuffed and taken to the marked van. The police officers drove with him around Lusaka village, and looking for other suspects. He was arrested at 16h00 and arrived at Ritavi police station around 19h00. They did not say anything but just took off the hand cuff and locked him in the police cell. He was given a paper to sign which had his names and charges on it. He testified that he was assaulted.

[31] The second plaintiff further testified that the police officer took him to court the following day and his case was reminded for seven days for the bail application. He made bail application but it was denied. He was taken to Polokwane prison. When at Polokwane prison, he remembered slapped by another police officer only because he wore a hat and he was rebuked not to wear a hat. He stayed at Polokwane prison for

three weeks and thereafter, transferred to Modimolle Prison. He testified that things were not easy at the prison, there was no nice food. He indicated together with other inmates they would be woken up early in the morning at around 3h00 and told to go to bath.

[32] The second plaintiff further testified that the case against him was reminded several times and only to be released on the 02 February 2018. He was informed that charges against him were withdrawn. His arrest affected him so much and he even lost his employment because he was detained for long time.

PLAINTIFFS' SUBMISSIONS

[33] The plaintiffs submitted that the suspicion rested on unreasonable grounds and that the captain failed to apply the law in arresting the first and the third plaintiff without a warrant. The captain did not himself compile the list of suspects; the alleged list of suspects was compiled by Lieutenant Smith, the branch commander. The captain proceeded to arrest without interviewing Lieutenant Smith nor investigating the case. The plaintiff further submitted that the purported list of suspects was not discovered before the court and the plaintiff submitted that the aforementioned alleged list of suspects never existed.

[34] The plaintiffs further submitted that in respect of the second, fourth and fifth plaintiff, were arrested by unknown police officers who were not called to give their evidence. The evidence of the captain could not assist to confirm whether the arresting police officers who arrested the second, fourth and fifth plaintiff, without warrant of arrest was justified in terms of the Act. The lack of arresting officers to adduce evidence to prove the lawfulness of the arrest and detention of three plaintiffs left the defendant's defence void.

[35] The plaintiffs submitted that the defendants must be held liable for the entire period of their detention and referred to the case of *De Klerk v Minister of Police* [2019] ZACC 32.

[36] The plaintiffs' counsel further submitted that the first plaintiff was detained for 311 days, second plaintiff was detained for 349 days, the third plaintiff was detained for 331 days, the fourth plaintiff was detained for 352 days and the fifth plaintiff was detained for 351 days. It was further submitted that the court should award each day the amount of R 37 500.00 and the plaintiff referred to several cases, among others reference was made to the case of *Mvu v Minister of Safety and Security and Others* 2009 (2) SACR 291 (GSJ) where the court awarded the plaintiff the amount of R 30 000.00 of being arrested and detained for a day. The reference was also made to the case of *Msongelwa v Minister of police* (112/2012) [2020] ZAECHMHC 10; 2020 (2) SACR 664 (ECM), where the plaintiff was detained for a period of 158 days and released without being charged of any offence, the court awarded the amount of R 5 000 000.00 (five million Rand).

[37] The plaintiffs submitted that the amount of R 63 525 000.00 will be fair and reasonable to compensate the plaintiffs.

DEFENDANTS' SUBMISSIONS

[38] The defendants submitted that the arrest was done as per the list of suspects and the arrest complied with jurisdictional facts appears in section 40 (1)(b) of the Act. The defendants indicated that the captain arrested the first and third plaintiff as they have appeared on the list of suspects compiled by the branch commander, same as the second, fourth and fifth plaintiff who were arrested and detained by members of South African Police as they appeared on the referred list of suspects.

[39] The defendants referred to the matter of *Minister of Safety and Security v Magagula* [2017] ZASCA 103, where it was held that a suspicion in its ordinary meaning

is a state of conjecture or surmise where proof is lacking. The court continued to say suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end.

[40] The defendants submitted that the captain and other police officers who arrested the plaintiffs had a reasonable suspicion to arrest since the plaintiffs had been appearing on the list of suspects.

[41] On issued of quantum the defendants submitted that if the plaintiff may succeed in proving their case of unlawful arrest and detention, the reasonable amount to compensate each plaintiff should be the amount of R 100 000.00. The defendants referred to the case of *Minister of Safety and Security v Tyulu* and indicates that in the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings.

[42] The defendants further referred to the case of *JE Mahlangu and Another v Minister of Police*, 2021 ZACC 10, in this case the Constitutional Court awarded R 550 000.00 to the plaintiff who was tortured and detained for approximately eight months. The defendants further referred to several cases where the amount of R 10 000.00 for the plaintiff who was detained for 16 days and R 12 000.00 for the plaintiff who was detained for 18 days.

[43] The defendants submitted that the plaintiffs failed to prove their claim for malicious prosecution against the fourth defendant, therefore, the claim should not succeed.

THE APPLICABLE LAW

[44] In terms of the Constitution of the Republic of South Africa² (“the constitution”), in terms of section 12 of the constitution, everyone is conferred with the right to freedom which includes among others, not to be deprived of freedom arbitrarily or without just cause, not to be detained without trial nor to be tortured in any way.

[45] Subsection 40(1)(b) of the Act 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.”

[46] The jurisdictional facts for a subsection 40(1)(b) of the Act defence are that: -

- (a) the arrestor must be a peace officer;
- (b) the arrestor must entertain a suspicion;
- (c) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and
- (d) the suspicion must rest on reasonable grounds.³

[47] It is fairly trite that these grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.⁴

[48] The arrestor’s grounds must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests.

² Act 108 of 1996

³ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 467 (SCA).

⁴ *R v Van Heerden* 1958 (3) SA 150 (TPD). *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 814D.

Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order*.⁵

[49] In the matter of *Olivier v Minister of Safety and Security and Another*,⁶ the court held that:

“When deciding if an arrestor’s decision to arrest was reasonable, each case must be decided on its own facts.”

[50] Further, the court stated,⁷ the following, namely: -

“This entails that the adjudicator of facts should look at the prevailing circumstances at the time when the arrest was made and ask himself the question, was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employer, and then residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation. The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court’s view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort.”

[51] The discretion to arrest must be properly exercised and authority for this proposition is once again found in the matter of *Duncan v Minister of Law and Order*⁸ (*supra*). The test for the legality of the exercise of discretion to arrest is objective. The exercise of public power by the executive and other functionaries should not be

⁵ 1993 (1) SACR 434 (TPD); *Heimstra (supra)* at 5-8.

⁶ 2009 (3) SA 434 (WLD).

⁷ at 445D to F.

⁸ at 818H-I.

arbitrary. Decisions must be rationally related for the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement. The question of whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry.⁹

[52] In objectively determining when an arrestor has acted arbitrarily the court should consider whether or not he (1) applied his mind to the matter or exercised his discretion at all; and/or (2) disregarded the express provisions of the statute. The authority for this has long been held.¹⁰

[53] The onus rests upon the arrestor to prove that the arrest was objectively lawful.¹¹

[54] If the arrest is unlawful, it follows that the subsequent detention must also be unlawful.¹²

[55] In the interesting decision of the Supreme Court of Appeal in the matter of *Minister of Police and Another v Erasmus*¹³ is illustrative of the more recent developments in our law pertaining to unlawful arrest and detention. the Court held: -

*“When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, and (b) was the factual and legal cause of the post-hearing detention. In *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA), the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty. Similarly, in *Minister of Safety and Security v**

⁹ *Pharmaceutical Manufacturers Association of SA and Another v Imray Ex Parte President of the republic of South Africa and Others* 2000 (2) SA 678 (CC) para 85-86, at page 708D-F.

¹⁰ *Shidiack v Union Government (Minister of the Interior)* 1912 (AD) 642 at 651-652.

¹¹ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (AD) at 589 E-F, *Mabasa v Felix* 1981 (3) SA 865 (AD) and *Minister of Law and Order v Matshoba* 1990 (1) SA 280 (AD) at 284.

¹² *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at 600G.

¹³ (366/2021) [2022] ZASCA 57 (22 April 2022). Para 12

Tyokwana [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime. In De Klerk v Minister of Police [2019] ZACC 32; 2020 (1) SACR (CC) paras 58 and 76, the decisive consideration in both the judgments that held in favour of the appellant was that the investigating officer knew that the appellant would appear in a 'reception court' where the matter would be remanded without the consideration of bail. Finally, in Mahlangu and Another v Minister of Police [2021] ZACC 10; 2021 (2) SACR 595 (CC), the investigating officer deliberately suppressed the fact that a confession which constituted the only evidence against the appellants, had been extracted by torture and thus caused their continued detention."

[56] Of course the *locus classicus* in respect of the principles applicable to the delictual liability of the Minister of Police for detention is the Constitutional Court decision in the matter of *Mahlangu and Another v Minister of Police*.¹⁴

[57] Firstly, the Court cited, with approval, the matter of *Relyant Trading (Pty) LTD v Shongwe*¹⁵ where the Supreme Court of Appeal held, *inter alia*, the following: -

"....to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty".

[58] Importantly, the Constitutional Court also cited with approval the matters of *Woji* (*supra*) and *Zealand v Minister of Justice and Constitutional Development and Another*¹⁶ noting that *Woji* had followed *Zealand* in holding that the Minister of Police was liable for

¹⁴ *Supra* [2021] ZACC 10.

¹⁵ [2007] 1 All SA 375 (SCA) at paragraph 6; at paragraph [29] of *Mahlangu* (*supra*).

¹⁶ 2008 (2) SACR 1 (CC).

post-appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. Following thereon, the Constitutional Court noted that this reasoning “... *effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor*”.¹⁷

[59] Finally, the Constitutional Court cited,¹⁸ once again with approval, the matter of *Tyokwana (supra)*¹⁹ where it was held: -

“(T)he duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.”

[60] In the matter of *Minister of Safety and Security v Tyulu*²⁰

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have

¹⁷ At para [33].

¹⁸ At para 41.

¹⁹ At para 40.

²⁰ 2008 JDRJ 582 (E) at para 26

regard to all the facts of the particular case and to determine the quantum of damages on such facts...”

[61] In order to prove the claim for malicious prosecution, the requirements are well-articulated in the case between *Minister of Safety and Security v Lincoln*²¹, in order to succeed with a malicious prosecution claim, the plaintiff must allege and prove that; (i) the defendants set the law in motion (instituted or instigated the proceedings); (ii) the defendant acted without reasonable and probable cause; (iii) the defendant acted with malice (or *animo inuriarum*); and (iv) that the prosecution failed. In this instance, the plaintiff bears the *onus* of proof to establish each, as alluded.

COURT’S FINDINGS

[62] One of the common issues between parties is that the plaintiffs were arrested as a result of the similar charges of murder. The plaintiffs were arrested in different locations and some by unknown police officers, who did not adduce evidence before this court.

[63] The defendants called only one witness, the captain, who arrested only two suspects, the first and third plaintiff. According to the captain, he arrested the first and third plaintiff because their names were on the alleged list of suspects which was posted in the charge office notice board. The captain evidence was that he does not know how the branch commander prepared the list of suspects and further that he did not interview the author of the alleged list of suspects

[64] In assessing the captain’s testimony, the court has to examine whether the arrest without a warrant was justifiable at the circumstances. As the law precisely mentioned that the only moment the police officer or the peace officer can arrest without a warrant of arrest should be in terms of subsection 40 (1) (b) of the Act, the police officer should have a reasonable suspicion that a suspect committed an offence referred in Schedule

²¹ (682/19) [2020] 3 All SA 341 (SCA); 2020 (2) SACR 262 (SCA) (5 June 2020).

1 of the Act. One may pose a question whether the names in the alleged list of suspects justified an arrest without a warrant, specially, when the list was prepared by a different person who did not personally arrest the suspects and did not disclose how the list was prepared.

[65] For the defendants to prove that the arrest without warrant pass the jurisdictional facts, the defendants should comply with subsection 40 (1)(b) of the Act. The branch commander who prepared the list of suspects should have given his evidence and prove how did he prepare such list of suspects, in order to assess whether the suspicion was objective to warrant an arrest without a warrant. The court is of the view that since the branch commander has not been called to give his evidence before this court and the alleged list of suspects was not discovered, such evidence remains hearsay evidence in nature and unless corroborated, such evidence remains inadmissible.

[66] The reasonable suspicion cannot be created by a name being on the list of suspects, and arresting the plaintiffs based on the unfounded and undiscovered list of suspects is to be deemed unreasonable and in contravention of the plaintiffs' constitutional rights to freedom as conferred by section 12 of the Constitution. The captain did not do enough to persuade this court in believing that the arrest without a warrant was justified. Even if one may suggest that the list of suspects was posted on the notice board but it was not proven that all names of the plaintiffs were in the alleged list of suspects, especially, for the second, fourth and fifth plaintiff who were arrested by the unknown police officers who did not adduce their evidence.

[67] When it comes to the second, fourth and fifth plaintiff, no evidence adduced to prove that the arrest without a warrant was fair and reasonable, as such the plaintiff's version becomes the only version to be considered. The defendants did not give the court any existing information that led to arrest the plaintiffs without warrant of arrest, even the alleged list of suspects was not discovered before this court.

[68] The court finds that the arrest and detention of the plaintiffs without a warrant of arrest was unreasonable and unlawful. The post hearing detention was as a result of the unlawful arrest and detention against the plaintiffs as a result of the incorrect information the police officers used to oppose the plaintiff's bail application. If the police would have thoroughly investigated the case of murder, the plaintiffs would not have been arrested and detained for such lengthy period.

[69] The first, second and third defendant should be held liable for the unlawful arrest and detention of the plaintiffs. The plaintiffs did not in their evidence prove the claim for malicious prosecution against the fourth defendant, therefore, the claim for malicious prosecution should not succeed. The plaintiffs have a duty to prove their claim for malicious prosecution against the fourth defendant but in their entire evidence they failed to indicate why the fourth defendant should be held liable for malicious prosecution.

[70] When considering the quantum of damages as a result of the unlawful arrest and detention, the court noted the plaintiffs' circumstances, which were well-articulated in paragraph 14 to 32 *supra*, this court will not repeat the same. The court considered the submissions made by the defendant's counsel who indicated that the plaintiffs did not put to the captain during their cross examination the claim of assault against the members of the South African Police Services and the claim for assault was also not pleaded. The court is of the view that the plaintiffs' claim for assault should not be considered as such was not part of their claim against the defendants.

[71] This court considered the case laws referred by the plaintiffs in support of their claim and reasonable compensation for their damages. The defendant's counsel also referred to several case laws with regard to reasonable amount the court should consider when assessing the fair compensation for the plaintiffs' unlawful arrest and detention. The plaintiff was arrested for approximately 11 months plus, and the period of detention is not in dispute.

[72] The court did not consider the submissions made by the plaintiffs' Counsel that the plaintiffs should be compensated the amount of R 63 525 000.00 for unlawful arrest and detention, as this amount was not in line with the amount claimed in the particulars of claim and the plaintiffs did not request to amend their particulars of claim until at the end of this trial. The amount was mentioned only in the heads of argument submitted. The defendants raised their objection in their heads of argument and the court is of the view that such unjustifiable amount should be rejected.

[73] The court in exercising his discretion to award a reasonable compensation for the plaintiffs' unlawful arrest and detention, comprehends that compensation is not made to enrich the plaintiffs but to compensate them for the damages they have suffered. The court finds that the reasonable amount to compensate for each of the plaintiff is in the amount of **R 1 000 000.00** (One Million Rand) for unlawful arrest and detention, which the total amount is equal to **R 5 000 000.00** (Five Million Rand) for five plaintiffs.

COSTS

[74] What stands over is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle. The plaintiffs succeeded in proving their case for unlawful arrest and detention against the defendants, although, the plaintiff did not prove their claim for malicious prosecution against the fourth defendant, this court is of the view that the first, second and third defendant should bear cost in this matter. The court considered the efforts the plaintiffs have taken and resources utilised in order to pursue their claim against the defendants.

[75] In the result, the court makes the following orders;

1. The first, second and third defendant are ordered to pay an amount of **R 1 000 000.00** (One Million Rand) to each plaintiff, for unlawful arrest and detention, jointly and severally the one paying the other to be absolved. The total

amount to be paid to all five (5) plaintiffs is equal to **R 5 000 000.00** (Five Million Rand);

2. The first, second and third defendant shall be liable to pay interest on the aforesaid amounts *tempore morae* at the rate of 11.25 % per annum from the date of judgment to date of the payment;

3. The first, second and third defendant shall pay the plaintiffs' taxed or agreed party and party costs, including costs of a counsel scale B,

3. The claim for malicious prosecution against the fourth defendant is dismissed with no order as to cost.

E MASHAMBA E
THE ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

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POLOKWANE HIGH COURT