



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

CASE NO: 32472/2018

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

15/01/2026

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Date


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ML TWALA

In the matter between:

MHLONGO SIBUYISELWE

PLAINTIFF

And

THE MINISTER OF POLICE

FIRST DEFENDANT

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTION**

SECOND DEFENDANT

JUDGMENT

TWALA J

Introduction

- [1] The plaintiff, Mr Sibuyiselwe Mhlongo, sued the defendants, the Minister of Police and the National Director of Prosecutions, out of this Court for damages arising from his arrest, detention and prosecution from 2 June 2017 until he was released from custody on 7 March 2018. The plaintiff was arrested without a warrant on a charge of armed robbery by members of the South African Police Service after having been pointed out as the person who committed the robbery by the complainant, Mr Abongile Henesi. The plaintiff estimated its damages against the first defendant in the amount of R9,520 000 and the second defendant R1, 500 000.
- [2] The defendants are defending the action and deny that the arrest and detention of the plaintiff was unlawful and that his prosecution was malicious. The defendants were to start as the duty to begin rested with them and three witnesses were called.

Case for the Defendants

- [3] Sergeant Amos Mduduzi Hlabangane (“*Hlabangane*”), a member of the South African Police Service since 2006, testified that he was on duty doing night shift on 2 June 2017. Whilst doing his patrols, he recalls his Commander calling him back to the station so that he could attend to a complaint of armed robbery. At the station he found the complainant who informed him that he was robbed of his cellphone

and a sum of R400 by about five people who pointed a firearm at him, but he can identify one of them and he knows where he stays.

- [4] Hlabangane testified that he took the complainant with him and his colleague, and they drove to Nancefield Hostel as directed by the complainant where the complainant pointed out the room wherein the suspect was living. On entering the room, the complainant pointed out the suspect which he immediately arrested. He explained to the plaintiff that he is arrested for robbing the complainant, read him his rights and took him to the police station where he locked him up. He did not find any of the items of the complainant on the suspect at the time of his arrest.

- [5] Hlabangane testified under cross-examination that he did not interview the plaintiff at the time of his arrest and he last saw him on the day of arrest. He did not recall if the complainant was in the company of someone else when he effected the arrest of the suspect nor did he recall interviewing any other witness to the case. He exercised his discretion in effecting the arrest as he did not doubt that the complainant pointed out the right person immediately on entering the room where the plaintiff was living.

- [6] Hlabangane stated that, although he did not remember everything that happened on that day since this case happened a long time ago, he denied that he acted unlawfully in arresting the plaintiff. He arrested the person who was pointed out by the complainant and had no reason to doubt him since the incident was still fresh in his, the complainant's, mind. He did not know the complainant, the plaintiff and any of the witnesses in this case and had nothing against the plaintiff that would cause him to arrest him except for what was alleged by the complainant.

- [7] Captain John Hlungwane (*"Hlungwane"*) testified that he has been a police officer for the past thirty-three years and is now stationed in Lenasia South Police Station. His duties are to supervise those working under investigators by checking the dockets and statements if they are written in the correct format. He met the plaintiff for the first time in court on 5 June 2017 when a docket relating to the plaintiff's

case was allocated to him and he had to prepare it for the plaintiff's first court appearance which was on Monday, 5 June 2017.

- [8] The plaintiff was arrested on Friday, 2 June 2017 and could only make his first court appearance on Monday, 5 June 2017 since the courts do not sit on weekends. Hlungwane testified that he looked into the docket and found that the statement of rights was completed and signed by the plaintiff and that there was a statement by the complainant and that of a witness, a Mr Ayanda Ngomane ("*Ngomane*"). He placed the docket before the Senior Public Prosecutor ("*the SPP*") for his decision before the plaintiff made his first appearance. The SPP decided to enrol the case and thereafter gave directions on what was outstanding and needed to be done on the docket.
- [9] Hlungwane testified further that he interviewed Ngomane to ascertain what had happened and to ensure that the correct person was arrested. He could not trace the other suspects even after he engaged his informers who were familiar with the Nancefield hostel and its surroundings. He did not conduct an identification parade as requested by the SPP since the complainant pointed out the suspect and the witness Ngomane was also present when the suspect was pointed out and arrested. He discussed the issue with the prosecutor who agreed with him that it was unnecessary to convene an identification parade under the circumstances.
- [10] As the investigating officer, Hlungwane deposed to an affidavit that he was not opposed to the plaintiff being granted bail. But he could not grant bail to the plaintiff for the offence he was charged with is a schedule 6 offence which requires the court to deal with the issues of bail. Bail was refused by the court and the plaintiff remained in custody until he was released in March 2018. The case could not proceed since the complainant disappeared and could not be traced and his family was not co-operating with the police.

- [11] Under cross examination he stated that he did not find it necessary to interview the suspect. He read the statements in the docket and found that a firearm was used in the robbery, and he was satisfied that a correct person was arrested because of the pointing out of the suspect by the complainant and his witness. He did not interview the community member for he refused to talk to the police, nor did he verify the cellphone records if the plaintiff was at the scene at the time of the offence.
- [12] Mr Bradely Chepape (*“Mr Chepape”*), a regional court prosecutor based in Carletonville, testified that his duties entail receiving dockets from members of the South African Police Service, read them and decide if it should be enrolled or not and if enrolled then it goes to court for first appearance. The issue of whether the accused person is released on bail may be determined on that day or postponed to another day pending further investigation.
- [13] Mr Chepape testified that the plaintiff was arrested after 20H00 on Friday, 2 June 2017 and his first court appearance was on Monday, 5 June 2017 since the courts do not normally sit on weekends. The control prosecutor reads the statement of the complainant in the docket to ascertain if there is a prima facie case against the accused and in this instance, there was a prima facie case to answer for the complainant’s statement stated that he was robbed on that day by a person whom he could identify and in fact pointed him out to the police – hence the docket was placed on the roll.
- [14] Mr Chipape testified that he was satisfied with the pointing out of the suspect by the complainant and his witness for it happened only a few hours after the actual robbery was committed – hence there was no need for the investigating officer to conduct an identification parade. The State did not oppose bail when the plaintiff made his first appearance. But bail was refused by the court, the plaintiff having failed to demonstrate exceptional circumstances and that it was in the interest of justice that he be admitted to bail.

- [15] The case proceeded being postponed since the witnesses could not be traced until it was withdrawn in March 2018. There was a prima facie case for the plaintiff to answer since there was a statement by the complainant and his witness in the docket and therefore the prosecution was not malicious. The case was withdrawn not based on the merits, but because, although the prosecution was ready to refer the case to trial, the witnesses could not be traced or were not co-operating with the state.
- [16] Under cross examination he persisted that he discussed the issue of the identification parade with the investigating officer and came to the conclusion that it was not necessary since the plaintiff was pointed out by the complainant in the presence of the witness, Ngomane at the time of his arrest. He did not know why the other prosecutors continued to demand that an identification parade be conducted. The refusal to admit the plaintiff to bail was made by the court for it is the court that decides the issues of bail in relation to schedule 6 offences.
- [17] He testified that he read the complainant's statement and that of the witness and concluded that there was a case for the plaintiff to answer. However, the complainant and the witness disappeared and failed to co-operate with the state – hence the withdrawal of the case and not on the merits – thus the prosecution was not malicious. No wrong information was presented in court, and the plaintiff was legally represented at all times, therefore his rights were not infringed in anyway.
- [18] The defendants closed their case at this stage.

Case for the Plaintiff

- [19] The plaintiff testified that he was arrested on 2 June 2017 at Nancefield Hostel and was told he is arrested for armed robbery he committed with his friends against the complainant, Abongile Hanesi. When he was arrested at the Hostel he was in the company of other people and they were watching movies on a laptop. The police did

not find any of the items alleged to have been robbed from the complainant on him nor the firearm that is alleged to have been used in the robbery.

- [20] It was at this stage of the plaintiff's testimony that the defendants raised objections to the evidence being led since it was never put to the defence witnesses, during their cross-examination, to give them an opportunity to rebut or agree to it. All that the plaintiff did was to criticise the arresting officer for relying on the pointing out of the plaintiff by the complainant and the investigating officer for not using the cellphone records to ascertain whether the plaintiff was at the scene of the crime at the time. Additionally, the plaintiff suggested that, at the time of his arrest, he was in the company of other people watching some movies on a laptop.
- [21] This, galvanised the defendants to object to the line of leading the plaintiff in his examination in chief when an attempt was made to introduce new evidence to the plaintiff's case. Due to the persistence of the defendants' objections, the plaintiff applied for the postponement of the matter in order to bring a substantive application to reopen the case of the defendants and recall all the three witnesses so that it may put its case to the defendants' witnesses. The defendants opposed the application.
- [22] At the hearing of the application, which was set down separately from the main case, I dismissed the application with the plaintiff to pay the costs. I undertook to furnish my reasons therefore in my main judgment and the reasons follow below.
- [23] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹ the Constitutional Court stated the following when dealing with the issue of cross-examination:

“The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by

¹ (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)

questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.²

The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.³

- [24] It is contended by the plaintiff that it was an error or omission on the part of his legal counsel not to put all his version of his evidence that he was going to testify about to the defendants' witnesses during their cross-examination. There was no intention on the part of the legal representative, so the argument went, to withhold such evidence in order to prejudice the defendants. It is the plaintiff who would suffer prejudice in this case if he were not afforded an opportunity to reopen the case of the defendants in order to continue with his cross-examination.
- [25] There is new evidence which the plaintiff would like to adduce which is in line with the amended particulars of claim, which amendment the defendants did not object to. The evidence which the plaintiff intends to lead, so the argument went, is intended to corroborate the evidence on the amended particulars of claim which amendment took effect after the case was postponed for the bringing of this substantive application to reopen the case of the defendants.

² Ibid at para 61

³ Para 63

- [26] The defendants argued that they will suffer prejudice should they be forced to reopen their case. Plaintiff had ample time during the three days of hearing to cross-examine and put his case to the defendants' witnesses to enable them to rebut or agree with it. The plaintiff and his attorney, so it was contended, were seated in court throughout the testimony of the three defendants' witnesses and there is no explanation why they did not remind counsel to put the plaintiff's case to the witnesses. Since plaintiff was in court all the time, he can now fabricate evidence to suit his case to the prejudice of the case of the defendants.
- [27] The plaintiff's reliance on Rule 39 (11) of the Uniform Rules of Court is flawed, so it was contended, for the subrule does not find application in the present case. Rule 39 applies in the determination of who of the parties bears the onus and the duty to begin but not to reopen the case of another party. The plaintiff chose not to lead evidence which was within its knowledge at all times and no cogent reasons have been placed before court why plaintiff did not lead the evidence.
- [28] It is trite that a court may, in exceptional circumstances and in the exercise of its discretion and where it is demonstrated that it is in the interest of justice, grant an order that a party reopen its own case to lead further evidence. The relevant considerations amongst others being:
- (a) The reason why the evidence was not led timeously.
 - (b) The degree of materiality of the evidence.
 - (c) The possibility that it may have been shaped to 'relieve the pinch of the shoe'.
 - (d) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.
 - (e) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been heard and, before judgment is delivered, plaintiff asks for leave to lead further evidence, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the defendant,

the greater need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the Court.

- (f) The 'healing balm' of an appropriate order as to costs.
- (g) The general need for finality in judicial proceedings.
- (h) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client.

[29] In *Liberty Group Limited t/a Liberty Life v K & D Telemarketing and Others*⁴ the Supreme Court of Appeal emphasized that the reopening of a party's case after it has been closed to lead further evidence is not a right but an extraordinary indulgence. Where a litigant has the opportunity to tender evidence but chooses to provide insufficient evidence to sustain its case, it is entirely its own fault, and the reopening of its case cannot be used to tender evidence to patch up the gaps in a weak case.

[30] However, the crux of this case is whether this Court has the power to order a party to reopen its case at the instance of another party. Put differently, can the Court order a party to reopen its case at the instance of the other party against that party's will.

[31] It is well established that the court would grant an order for a party to reopen its own case once certain requirements have been established. But this case is distinguishable from the general rule in that here the plaintiff requests the court to order the defendants to reopen their case against their will. Plaintiff has failed to show any authority it relies upon that the court has the power to order a party, at the instance of another party, to reopen its case. It is my respectful view that, the plaintiff has had ample opportunity to cross-examine the defendants' witnesses and put its case to the witnesses but chose not to and that was at its own peril.

⁴ (1290/18) [2020] ZASCA 41 (20 April 2020)

- [32] It is undisputed that the plaintiff did not fully and fairly put its case to the defendants' witnesses during cross-examination. However, there is no plausible explanation why counsel did not put the case of the plaintiff to the defendants' witnesses during cross-examination except to say that counsel made an error. It is not sufficient to say that counsel made a mistake since that alone does not equate exceptional circumstances. The hearing proceeded for three-days, and three witnesses of the defendants were cross-examined at length, but the case of the plaintiff was never put to any of them.
- [33] Much as the Court is not sitting as a referee to see to it that the rules of procedure are observed and that one side does not take advantage of the other, but it is not empowered to direct the litigants how to execute their individual strategies in the conduct of their respective cases nor to order the litigants when to open or close their cases. It is open to each litigant to present its full case when it is its turn and if it chooses not to lead full and sufficient evidence to sustain in its case, it does so at its own peril.
- [34] As indicated above, ordinarily the reopening of a litigant's case to lead further evidence is not a right but an extraordinary indulgence which the court will accede to under exceptional circumstances. Therefore, the court cannot come to the assistance of a party who seeks an order for the reopening of the case of another, who is unwilling and does not consent thereto. I hold the view therefore that there is no fault that can be imputed against the defendants in the conduct of their case and the plaintiff has failed to demonstrate the existence of any exceptional circumstances in this case.
- [35] In *Salojee and Another NNO v Minister of Community Development*⁵ which was quoted with approval in the unreported case of *Sizwe Calvin Pumlanj Mphati and*

⁵ 1965 (2) SA 135 (A)

*Another v The Minister of Police*⁶, the Appellate Division, as it was then, stated the following:

“I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are.”

- [36] It is not in dispute that the plaintiff was in court throughout the hearing of the evidence of the witnesses for the defendants. However, there is no explanation why he did not remind his counsel to put his case to the witnesses of the defendants. Plaintiff has himself chosen the set of legal representatives to conduct the trial of this matter and he cannot expect to be absolved from the consequences of his relationship with his legal representatives. The unavoidable conclusion is therefore that the plaintiff has failed to establish a case for the reopening of the case of the defendants.

Discussion

- [37] It is trite that the purpose of the pleadings is to define the issues and to ensure that both sides to the litigation know the case they must meet. The evidence presented at the trial must relate to the issues raised in the pleadings. In other words, the pleadings

⁶ Case No: 600/2021 Free State

must contain the material facts relied upon which are to be proven by the evidence to be led at the trial of the matter.

[38] It is common cause that the plaintiff amended its particulars of claim and such amendment was effected without any opposition from the defendants. However, as indicated above, such an amendment does not amount to evidence but remains an allegation of facts which was to be proven by evidence at the trial. Since the plaintiff did not lead evidence on the issues raised in the pleadings because of its counsel's error in not putting the case of the plaintiff to the defendants' witnesses during cross-examination, whatever is pleaded by the plaintiff remained allegations which were not proven by evidence. Put in another way, the plaintiff did not lead full and sufficient evidence to sustain its case.

[39] In *Small v Smith*⁷ the court stated the following when dealing with the issue of a party who fails to put his case to the opposing party's witness during cross examination:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him if he has not been notified thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction in defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

Once a witnesses' evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume, in the absence of a notice to the contrary, that the witness's testimony is accepted as correct. More particular is this the case of the witness is corroborated by several others unless the testimony is so manifestly absurd, fantastic or of so romantic a character that no reasonable person can attach any credence to it whatsoever".

[40] It is undisputed that the plaintiff was arrested by members of the first defendant on the 2 June 2017 without a warrant and was detained until he appeared in court on the 5 June 2017. Further, it is not in dispute that the arresting officer read the plaintiff his rights at the time of arrest and he signed the statement of rights. The evidence of

⁷ [1954] (3) SA 434 (SWA) 438

Hlabangane is that the plaintiff was pointed out by the complainant and his companion, Ngomane. Hlabangane had no reason to disbelieve the complainant and his companion in their pointing of the plaintiff for they informed him that they know him and would be able to point him out if they see him. The plaintiff did not resist the arrest nor protested his innocence at the time of arrest or any other time that day.

[41] The complainant informed Hlabangane that he knew where plaintiff stayed before the police left the station – hence when they reached Nancefield hostel he pointed out the shack wherein the plaintiff was staying and, although the plaintiff was with other people in the shack at the time, on entering he immediately pointed him out to the police as the culprit. The incident was fresh in the mind of the complainant since the incident happened hours before the pointing out and plaintiff admitted that he was wearing an overall jacket which had reflectors.

[42] The version of the police witnesses was never disputed by the plaintiff, nor did the plaintiff tender any alternative evidence of his whereabouts on the day. In my judgment the arresting officer, Hlabangane has exercised his discretion correctly when he arrested the plaintiff for the commission of the crime of robbery as pointed out by the complainant. There was nothing more for the arresting officer to do or to doubt the pointing out of the plaintiff. It is not the case of the plaintiff either that he protested his innocence at the time of his arrest. Plaintiff admitted that he was wearing the overall jacket with reflectors at the time of his arrest.

[43] Since the arresting officer must, in terms of section 40 of the Criminal Procedure Act⁸, have a reasonable suspicion that an offence has been committed and that suspicion be based on reasonable grounds, I hold the view that the arresting officer in this case did have a reasonable suspicion and exercised his discretion properly in arresting the plaintiff based on the complainant's pointing out of the culprit. The arresting officer did not know both the complainant and the plaintiff at the time and

⁸ 51 of 1977

had no reason to punish the plaintiff or to be biassed in favour of the complainant - thus, there was no impropriety or ulterior motive in arresting the plaintiff. Therefore, in my view the arrest was not unlawful as claimed by the plaintiff.

[44] In *Minister of Safety and Security v Tyokwana*⁹ the Supreme Court of Appeal stated the following when it was dealing with the issue of an arrest without a warrant:

“It is common cause that Kani, acting within the course and scope of his employment with the appellant, arrested the respondent on 2 October 2007, without a warrant of arrest. As justification for the arrest the appellant relies on s 40(1)(b) of the CPA, which provides that a peace officer, such as Kani, may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the CPA. The crime of theft is one of the offences listed in Schedule 1. To succeed with this defence the appellant is required to establish that Kani entertained a suspicion based on reasonable grounds that the respondent had committed a Schedule 1 offence¹⁰.

[45] I do not agree with the contentions of the plaintiff that he was denied bail by the court because the police officers charged him with a serious crime and placed evidence before the court that made the court to refuse to admit him to bail. The evidence is clear that captain Hlungwani who was the investigating officer in the case deposed to an affidavit that the state was not opposing that the accused be admitted to bail. He, as a police officer could not grant the plaintiff bail since the offence the plaintiff was charged with requires the court to deal with the issues of bail. However, the plaintiff failed to demonstrate to the court, as required by the law, that it was in the interest of justice that he be admitted to bail – hence bail was refused.

[46] I hold the view therefore that Hlungwane had done nothing wrong in relation to the plaintiff being admitted to bail. He filed an affidavit not opposing bail and it was therefore encumbered upon the plaintiff to convince the court that he is entitled to

⁹ (827/13) [2014] ZASCA 130 (23 September 2014)

¹⁰ Para 10

be released on bail. Additionally, the plaintiff had the right and ample time to appeal the decision of the court refusing him to be admitted to bail or to approach the same court on application if there were any new facts and place them before court to be released on bail.

[47] There is no merit in the argument that the police delayed the release of the plaintiff by not responding to the docket notes raised by the prosecutors that an identity parade be held. The uncontroverted evidence of Hlungwane, which is corroborated by the prosecutor, Mr Chepape, is that the pointing out of the plaintiff was conducted by the complainant in the presence of his witness, Mr Ngomane – thus no purpose would have been served by convening an identification parade for the plaintiff had already been seen by the complainant and his witness. The ineluctable conclusion is therefore that there was no improper conduct on the part of the police which resulted in the plaintiff being detained for unnecessary long period. Thus, the detention of the plaintiff until he was released in March 2018 was not unlawful.

[48] I do not disagree with counsel for the plaintiff's contention that, if the arrest is unlawful, everything that flows from it is unlawful, including the prosecution. However, in this case, the evidence of Hlungwane which is corroborated by Mr Chepape is that there was a statement by the complainant for the robbery committed against him and the pointing out of the plaintiff, and that of the witness Mr Ngomane in the docket. Having all these statements, there was no reason for the prosecutor not to prosecute the case. In fact, Mr Chepape testified that the case was ultimately withdrawn not because of lack of evidence but because the complainant and his witness were not co-operating with the police – otherwise the state was ready to prosecute the case.

[49] The plaintiff has failed to demonstrate that the defendants instituted and continued with his prosecution without reasonable and probable cause, with malice and the prosecution terminated in his favour. The evidence pointed that the termination of the prosecution against the plaintiff was not because of the failure of the prosecution

or lack of evidence to sustain a conviction, but it is because of the non-cooperation with the state by the complainant and its witness. At the time the prosecution was terminated, the evidence is that the state was ready to proceed with the case for there was a *prima facie* case for the plaintiff to answer but for the complainant and his witness.

[50] In *Ledwaba v Minister of Justice and Constitutional Development and Others*¹¹ quoting with approval the case of *Beckenstrater v Rottcher and Theunnissen*¹² the Supreme Court of Appeal stated the following:

“In *Beckenstrater* this Court held that:

‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.’¹³

There would, thus, be reasonable and probable cause for the prosecution where a defendant is of the honest belief that the facts, available at the time of taking the decision to prosecute the plaintiff, constituted an offence which would lead a reasonable person to conclude that the person against whom charges are brought, was probably guilty of such offence. This question must not be confused with whether there is sufficient evidence upon which the accused may be convicted. That question would ultimately be for the court, in the criminal trial, to decide at the conclusion of the evidence.¹⁴

The appellant sought in his testimony, in the malicious prosecution trial (the trial), to justify his actions and prove his innocence. That is not the test for absence of reasonable and probable cause in a malicious prosecution. Whether there was reasonable and probable cause for the prosecution depends on the facts or material which was at the disposal of the prosecutor, at the time that the prosecution was instigated, and the careful assessment of that information. The pertinent date would be that on which the prosecution applied for a warrant of arrest for the plaintiff. In this case, that date is 11 October 2006. If there are

¹¹ (947/2022) [2024] ZASCA 17 (16 February 2024)

¹² 1955 (1) SA 129 (A)

¹³ Ibid at para 136

¹⁴ Para 23

representations along the way, the prosecutor is obliged to carefully assess those representations to decide whether to proceed with the prosecution or to withdraw the charges.”¹⁵

- [51] It is my respectful view therefore that the plaintiff has failed to demonstrate any improper conduct and motive or procedural impropriety by the prosecution or members of the first defendant in the conduct of this case.

Conclusion

- [52] The unavoidable conclusion is that the arrest of the plaintiff was executed based on a reasonable suspicion that an offence of robbery was committed by a person who was known to and was pointed out by the complainant within hours of the commission of the crime. The plaintiff was detained from the date of his arrest until he was released not because there was improper motive or conduct on the part of the members of the first defendant, but because he did not convince the court that there existed exceptional circumstance for him to be admitted to bail or that the interests of justice so demanded. Therefore, the arrest and detention were not unlawful.
- [53] There was no malice in the prosecution of the plaintiff since there were statements in the docket which established a prima facie case against him. Put differently, there was a case for the plaintiff to answer. However, the case was withdrawn and or prosecution terminated against the plaintiff not because there was no evidence to sustain a conviction but because the witnesses, including the complainant, disappeared and failed to co-operate with the state. Thus, the prosecution of the plaintiff was not unlawful.

¹⁵ Para 24

[54] In the result, the following order is made:

1. The application to reopen the case of the defendants is dismissed with costs on Scale A
2. The plaintiff's claim is dismissed with costs on Scale A



TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

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Date of Hearing: 2 – 4 May 2023; 2 December 2024 and 26 November 2025

Date of Judgment: 15 January 2026

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be 15 January 2026.