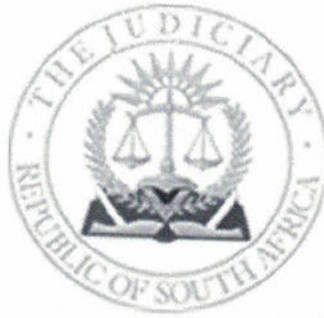




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: Yes/ No
(2)	OF INTEREST TO OTHER JUDGES: Yes/ No
(3)	REVISED.
	
SIGNATURE:	DATE: 02/04/2026

CASE NO.: 27023/2011

In the matter between:

SANET BRUTON

1ST Plaintiff

MIEDER JOHANNES PALM N.O

2nd Plaintiff

obo ESTATE LATE HERMANUS PHILLIPUS
NIEMANN

And

THE MINISTER OF POLICE

Defendant

REASONS FOR JUDGMENT

MOLOPA-SETHOSA J

[1] The plaintiffs in this action, have instituted an action against the defendant for damages for alleged unlawful arrest and detention from 19 July 2008 to 21 July 2008, by members of the South African Police Service (“SAPS”), more specifically by one Inspector Lesetja Jerry Raphela (“Raphela”), (**Claim 1**); as well as for malicious prosecution, same having commenced at the time of arrest of the Plaintiffs on the 19 July 2008 until Criminal Charges against the Plaintiffs were Charges against the Plaintiff was eventually *Nolle prosequi / or withdrawn* on 3 August 2009 before the Criminal Court (**Claim 2**). The 2nd plaintiff, Mr HERMANUS PHILLIPUS NIEMANN, is now deceased, and is substituted by the executor of his estate, MIEDER JOHANNES PALM N.O.

[2] The Plaintiffs were arrested by Raphela, a member of SAPS, on 19 July 2008, without a warrant; they were subsequently taken into police custody at the Polokwane Police Station and eventually charges against the Plaintiffs were withdrawn.

[3] The arrest of the Plaintiffs related to the murder of one Wayne Bruton (“the deceased”), who was the First Plaintiff’s husband and the Second Plaintiff’s son in law.

[4] The Defendant had initially raised a special plea for non-compliance with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of the State, Act 40 of 2002. At the commencement of trial, the court was

informed that the Defendant was no longer persisting with/abandoned such special plea and this was confirmed by Mr Maakane who appeared for the Defendant.

[5] When the trial commenced, the parties by agreement made application for separation of liability and damages, i.e. separation of merits and quantum, in terms of Rule 33 (4) of the Uniform Rules of the Superior Court, which order the Court granted. The matter thus proceeded on the merits only and quantum was postponed *sine die*.

[6] In so far as the merits are concerned, it is common cause that:

[6.1] the Plaintiffs were arrested on 19 July 2008, by Inspector Raphela, a member of (SAPS), without a warrant; and were released on bail of R3000 each, on 21 July 2008;

[6.2] the Plaintiffs were charged with the murder of the deceased;

[6.3] charges were withdrawn against the Plaintiffs on 3 August 2009; and

[6.4] the policeman involved in the matter, Raphela, at all relevant times acted in the course and scope of his employment with the defendant.

[7] Issues in dispute are whether:

[7.1] the arrest of the Plaintiffs was unlawful;

[7.2] the prosecution of the Plaintiffs was malicious.

[8] The defendant admits the arrest and detention and pleaded that the members of SAPS, acted in terms of S40(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended ("The Act") in that they had a reasonable suspicion that the Plaintiffs had committed a schedule 1 offence.

[9] Murder, amongst others, is a schedule 1 offence. Raphela avers that he exercised his discretion in terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended ("The Act"), which provides that a peace officer may without a warrant arrest any person-

'(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 ... ';

[10] It has been held in *Duncan v Minister of Law and Order* **1986 (2) SA 805 (A) at 818G-H** that the jurisdictional facts for a section 40(1)(b) defence are that:

- i. the arrestor must be a peace officer;
- ii. the arrestor must entertain a suspicion;
- iii. the suspicion must be that the suspect (arrestee) [the Plaintiffs in this case] committed an offence referred to.

[11] The first issue to be determined is whether the arrest was lawful as envisaged in section 40(1)(b) of the Act. The Defendant contends that the Plaintiffs were arrested in terms of S40 (1)(b) of the Act.

[12] It is trite that the onus of proving the lawfulness of the arrest and detention rests with the Defendant; refer *Matlou v Makhubedu* 1978 (1) SA 946 (A); *Botha v Lues* 1983 (4) SA 496 (A) at 502. The Defendant seeks to discharge this onus by relying upon the protection afforded by S40(1)(b) of the Act in respect of the arrest. The core of the defendant/Raphela's contention is based on a statement by one Mokete Solomon Shadung ("Shadung"), to the effect that the Plaintiffs murdered and/or conspired with him to kill/eliminate the deceased and promised him payment of R10 000.00.

[13] The Defendant contends that the Plaintiffs were arrested by Raphela, who at that time, was a peace officer as defined in the Act; throughout acting in his official capacity as such. That at the time of the arrest, he, Raphela, had a reasonable suspicion that the Plaintiffs had committed a schedule 1 offence of murder, alternatively conspiracy to murder the deceased. That the information on which Raphela relied on was provided by one Mokete Solomon Shadung ("Shadung"), under circumstances where he (Shadung) had allegedly given his full co-operation. That the physical evidence provided by Shadung was confirmed to be true by his subsequent pointing out.

[14] Raphela testified that he was the Investigating Officer on the case of the murder of the deceased herein. He obtained information from Shadung freely and voluntarily, without any coercion, that the Plaintiffs colluded with him, Shadung, to kill the deceased, 'to eliminate the middle man,' [referring to the deceased], so that they could get a bigger share (70% more) in the Estate Agent business owned by the deceased and the first Plaintiff; and they (Plaintiffs) promised to pay him/Shadung R10 000.00.

[15] Shadung worked with the deceased as a runner/agent for the deceased and 1st Plaintiff's Property Agent business selling and buying properties in and around Seshego and Lebowakgomo in Limpopo]. Shadung informed him that the 2nd Plaintiff was in fact directly involved in the killing of the deceased, his son in law; and helped bury the deceased in a shallow grave at his (Shadung's) place of abode/house.

[16] Raphela testified that he was also prompted by the fact that the 2nd plaintiff had indicated in his statement, that when he learnt that the deceased's bakkie was spotted along a road in Lebowakgomo, he bought 5L diesel, in case he found that the bakkie did not have any fuel. Raphela stated that, that was an indication to him, Raphela, that the 2nd defendant knew that the vehicle did not have fuel because he, 2nd Plaintiff, must have driven the bakkie in the commission of the crime in question herein.

[17] This, in my view cannot be said to be a reasonable suspicion justifying the arrest of any person. Any reasonable prudent person may act exactly as the 2nd plaintiff had allegedly acted when informed that the deceased's vehicle/bakkie was spotted at some road in the middle of nowhere, in case the vehicle had stopped because of shortage of fuel, then one has fuel with one handy.

[18] In so far as the 1st plaintiff was concerned Raphela testified that he did not believe that the 1st Plaintiff could be in both Pretoria and Polokwane on the same day as stated in her statements made to the police. That therefore the 1st Plaintiff must have committed the crime of murder because of these statements. There is no basis from this to form a suspicion leading to an arrest, without much ado.

[19] I take judicial notice of the fact that it is highly possible that a person can travel to and from Pretoria to Polokwane and vice versa on the same day with ease. This cannot be a basis for forming a reasonable suspicion that the 1st Plaintiff must have committed the crime of murder.

[20] Raphela disputed the 1st Plaintiff's evidence that he was instructed by his senior to arrest the Plaintiffs. Superintendent Swanepoel, who was at the relevant time the supervisor of the Detective Branch of the Polokwane Police Station testified that Raphela concluded independently to arrest and charge the 1st and 2nd Plaintiffs; that he, Swanepoel, as Raphela's supervisor, did not instruct him to arrest and charge the 1st and 2nd Plaintiffs; and according to his knowledge no other officer who is superior to Raphela instructed him to arrest and charge the 1st and 2nd Plaintiffs. This evidence does not take the matter any further. I will thus not dwell much in it.

[21] Contrary to the evidence of Raphela that he obtained information from Shadung freely and voluntarily, without any coercion, Shadung testified [on behalf of the defendant] that he was tortured and brutally assaulted by the police after he was arrested, to the extent that he even soiled himself.

[22] He testified that at the time of his arrest, he was threatened by Raphela with assault; he was taken to an office by Raphela where a plastic bag was put over his head; there were two assaults, the first in Raphela's office and the second before the signing of the confession where he was taken out of his cell, taken to an office where tables were shifted and a chair put in the centre with his arms tied and his

face covered with a plastic Checkers bag to the point where he urinated himself.

[23] On 17 July 2008 Raphela and Ntsopi again assaulted him to the degree where they handcuffed his hands and stated to him "*can you see we are here to work*", placed the plastic bag over his head to the point where he urinated and soiled himself; this led to him giving the version on 19 July 2008;

[23] After the above, they went to the police station to tell senior officer Swanepoel in respect of body. He stated that Raphela who states that Shadung's version was truthful and was not obtained by means of assault, was not the truth. When it was put to him that in his statement the suspect confirms that he was never assaulted, that this was a lie.

[24] Unfortunately for the defendant, the evidence of Shadung , who came to testify for the defendant, was unchallenged, and it cannot be ignored.

[25] The Defendant's did not opt to declare Shadung a hostile witness, so that there could cross-examined on this alleged assault.

[26] It is trite that sometimes a witness will give evidence which is unfavourable to the contentions of the party who has called him or her and in such an event, a request can be made to declare the witness hostile and allow cross-examination.

[27] This is an important procedure, especially for the party who bear the onus of proof as without cross-examination the unfavourable evidence will be left before the Court without it having been tested.

[28] The result is that the evidence cannot simply be ignored. In **R v Ratner 1910 TPD 137** a witness gave evidence favourable to the accused (or as herein the Plaintiffs) was not cross-examined or discredited and it was accordingly held on appeal that this evidence should have been sufficient to create reasonable doubt.

[29] Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness' evidence and accordingly the party who calls a witness is entitled to assume that a witness' testimony has been accepted as correct if it has not been challenged.

[30] Can one conclude that what Shadung may have said to Raphela, implicating the Plaintiffs, was cogent and possibly true?

[31] In my considered view it cannot be lawful to admit such evidence. This is akin to the Plaintiffs in *J E Mahlangu and Another v Minister of Police* [2021] ZACC 10, where Mahlangu was tortured and brutally assaulted by police, and amongst others, ended up making a false confession that he had committed a crime of murder, further falsely implicating one Mtsweni as being his co-perpetrator; which resulted in Mtsweni also being unlawfully arrested for the

murder in question. The Constitutional Court emphasized the right to Freedom and dignity. At paragraph 25 onward at the Constitutional Court stated.

“The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person.... These rights, together with the right to human dignity are fundamental rights entrenched in the Bill of Rights.”

[32] The police are accordingly constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by law.

[33] Further, Raphela must have been aware of the varying versions of Shadung in his statements. The first version of Shadung being what has been stated in the affidavit by Raphela, alleging that Shadung admitted to the crime of murder, but alleges that there was a conspiracy and attended to the pointing out. The second version being contained in his statement dated 02 July 2008; wherein he states that he and the deceased went to collect two Zimbabwean Nationals and left him (Shadung) at Zone 8 to look for stands to purchase.

[34] With these varying versions, how can it be said that on a balance of probabilities Raphela formed a reasonable suspicion that the Plaintiffs murdered and/or conspired with Shadung to murder the deceased, as a result of which he/Raphela arrested the Plaintiffs? On the facts, there is in my view no basis for

Raphela to have formed a reasonable suspicion that the Plaintiffs may have murdered the deceased.

[35] The Plaintiffs denied ever having conspired with Shadung to kill the deceased, nor that the 2nd Plaintiff was ever physically involved in the killing and burying of the deceased.

[36] The Plaintiffs testified that the 2nd Plaintiff was not even in Limpopo on 24 June 2008; on the day the deceased was last seen by his wife, the 1st Plaintiff. He had gone to Pretoria, to take his mother in law for an operation.

[37] His wife, Mrs Susana Catharina Niemann corroborated this version; stating that indeed the 2nd plaintiff brought her mother [2nd Plaintiff's mother in law] to Pretoria on 21 June 2008 for an operation and only went back to Polokwane with the deceased's father on 25 June 2008, after the 1st Plaintiff had informed them that her husband, the deceased, was missing. They were going to open a missing person case at the Polokwane Police Station.

[38] Raphela never investigated the veracity of this alibi; and this is important since this in a sense speaks to the veracity of Shadung's statement (on which he/Raphela allegedly relied upon in arresting the plaintiffs), that the 2nd Plaintiff physically took part in the killing of the deceased.

[39] The 1st Plaintiff also testified that on 24 June 2008 in the morning she helped her husband load a generator on his bakkie. He left for work in Seshego, where they were renovating some property.

[40] She spoke to her husband, the deceased around 08H36 on 24 June 2008; she received a text message from the deceased's phone around 12H00, she last spoke to him around 19H20 when he stated that the bakkie was broken and that he would sleep over at Lebowakgomo. He never came back home. She became very worried. she went to Pretoria the next day, on 25 June 2008, and she informed her father and the deceased's father that she does not know the whereabouts of the deceased.

[41] On 02 July 2008 Raphela came to her house; he asked her why had she written a letter to Inspector Coetzee at provincial office complaining that there was no progress in her missing husband's case. Raphela seemed irritated by this.

[42] On 19 July Raphela called them, [Plaintiffs], to his office at the Polokwane Police Station, whereupon, after showing them footage of person who withdrew money from her husband's card, he proceeded to arrest her and her father. At that stage Raphela did not tell them why he was arresting them; she heard him on the phone speaking to someone and telling that person that they were with him and told them that he had instructions from his seniors to arrest them. Raphela disputed this.

[43] the 1st Plaintiff's brother in law, one Joseph Bruton junior, testified that after they learnt that his brother, the deceased was missing, he drove with his father to Polokwane to go help the 1st Plaintiff to search for his brother. The 1st Plaintiff looked worried, as she should be, after they received the news that his

brother was dead. This evidence also does not take the matter any further and I will not dwell much with it.

[44] To sum up, from the evidence of both Plaintiffs, already on [date] prior to their arrest, the plaintiffs respectively informed police that they had their respective alibis. Mrs Bruton said she went to Pretoria to take her baby to pediatrician at Unitas Hospital; her father, 2nd Plaintiff, was also in Pretoria already, having taken his mother in law for an operation. Second plaintiff's wife, Mrs Niemann, corroborated the 2nd Plaintiff in this respect. She testified that from 21 June until 25 June 2008 the 2nd Plaintiff was in Pretoria; meaning that he would not have been in Polokwane on the date the deceased went missing (i.e. 24 June 2008). Raphela did not check out and/or verify this information.

[45] In my considered view, it was prudent that Raphela investigates and verify these alibis before deciding to arrest the plaintiffs; especially since Shadung/suspect had already implicated (plaintiffs) in the murder of Mr. Wayne Bruton (the deceased). By 02 July 2008 Raphela already had the statements of both Plaintiffs stating their whereabouts on 24/25 June 2008.

[46] Also, Raphela shouldn't have ignored the fact that there are three (3) versions by Shadung on what happened to the deceased; and how the Plaintiffs allegedly featured in the scheme of things according to Shadung.

[47] Raphela saying that he arrested the Plaintiffs because he had uncovered physical evidence in the form of the corpse of Mr. Bruton, pointed out to him by Shadung is not sufficient for police to have arrested the plaintiffs merely on the

ipse dixit/say so of Shadung, without having checked/ investigated their respective alibis, since they had (as stated above), stated their whereabouts on the day of murder. On the evidence before Court, I find that on a balance of probabilities, the Defendant has not discharged the onus that the arrest was lawful and reasonable in the circumstances. The Plaintiffs have made out a case for their claim for unlawful arrest and detention by the police.

[48] On the issue of malicious prosecution, the institution of criminal proceedings against the Plaintiffs cannot be said to have been malicious. The Plaintiffs have an onus in respect of proving that the police/Raphela wrongfully and maliciously set the law in motion. The evidence that the defendant is required to give is in rebuttal of the Plaintiffs' evidence suggesting that Inspector Raphela acted maliciously.

[49] The First and Second Plaintiffs gave evidence on their own behalf.

Having regard to the version of the First and Second Plaintiffs' evidence, except for the Plaintiffs contending that Raphela had no grounds to infer that there is a reasonable suspicion that they are each guilty of the offence of murder, alternatively, conspiracy to commit murder; the Plaintiffs adduced no evidence relevant to sustain their claims for malicious prosecution. the Plaintiffs have not proved that Raphela was motivated by malice in arresting them.

[50] Objectively, looking at all the facts and on the totality of the evidence before this court I am satisfied that the Defendant has not discharged the onus of

proving, on a balance of probabilities that the arrest of Plaintiffs was lawful and reasonable under the circumstances. On the other hand, the Plaintiffs also, have not discharged their onus of proving that Raphela acted maliciously in arresting them

[51] Consequently, I find that the Plaintiffs have succeeded in proving on a balance of probabilities, the merits of their claim for unlawful arrest; but have failed to make out a case for malicious prosecution.

[52] In so far as the claim for malicious prosecution is concerned, the Plaintiffs did not adduce any evidence from which the Court can find that Raphela acted maliciously in setting the wheels in motion for the prosecution of the Plaintiffs.

[53] Since the case has been coming for a long time now, I am of a considered view that it is in the interest of justice that I add an order that the parties may approach the Registrar for a preferential date, the matter having commenced as far back as 20 July 2011 and only finalised on the merits about 12 years later. In this regard, reference is made to the numerous Court orders where the action was postponed *sine die* at the request of the Defendant as they wanted to secure the attendance of Shadung as a witness. Shadung at that stage was apparently standing trial for the murder of the deceased. Only after the conclusion of the criminal trial could Shadung come and testify.

[55] I thus make the following order:

1. Claim for unlawful arrest is upheld.
2. Claim for malicious prosecution is dismissed.

3. Defendant is ordered to pay the costs of suit.
4. The parties may approach the Registrar for a preferential date.

L M MOLOPA – SETHOSA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCE:

For the Plaintiffs	: Adv J Gerber
	: Adv PA Venter
Instructed by	: Loubser Van Der Walt INC
For the Respondent	: Adv S Maakane
	: L Vilakazi
Instructed by	: State Attorney
	Pretoria