REPUBLIC OF SOUTH AFRICA

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

CASE NO: 12876/2018

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

31 January 2020 ……
DATE SIGNATURE

In the matter of:

GABA MANDLENKOSI MAHLABA	First Plaintiff
VUSIMUZI DERRICK MBULI	Second Plaintiff
and	
MINISTER OF POLICE	First Defendant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Defendant

JUDGMENT

BESTER AJ

[1] The plaintiffs sued the first defendant for damages flowing from an alleged unlawful arrest and subsequent unlawful detention, and the first and second

defendants, jointly and severally, for damages flowing from alleged malicious prosecution.

[2] On 10 July 2016 the plaintiffs were arrested by members of the South African Police Services ("the SAPS") without a warrant. They remained in custody after their first court appearance until they were granted bail, on 26 August 2016 and 22 August 2016 respectively.

[3] The plaintiffs were charged with robbery with aggravating circumstances, but on 4 August 2017 they were both found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA").

[4] The first defendant bears the onus to show that the arrest was lawful. It pleaded that the arrests were lawful in that they were made in compliance with section 40(1)(b), alternatively section 40(1)(e), of the CPA. The plaintiffs bore the onus on the balance of the issues. Despite the provisions of rule 39(13)[1], the parties agreed that the defendants would present their evidence first.

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[1] Uniform Rule of Court 39(13) provides that:

> *"Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him."*

The defendants' evidence

[5] Sergeant Seipone Archibold Thutlwa testified that he is, and in July 2016 was, employed as a member of the SAPS at the Soweto Flying Squad (the Police Emergency Services) in Protea, Soweto. He was one of the two arresting officers. The other arresting officer, Constable Thoja George Motumo, has passed away since the arrest.

[6] Sergeant Thutlwa testified that he and Constable Motumo were patrolling the area of White City, Jabavu, Soweto on Sunday, 10 July 2016, in a marked police vehicle. They received a telephone call from the SAPS Crime Intelligence Unit ("Crime Intelligence") around 17:45, advising them that information had been received that two African males were in the process of stripping a stolen motor vehicle at a property situated at 763A Mlangeni Street, White City. They were patrolling nearby at the time and they reached the property within a few minutes.

[7] Upon their arrival, Constable Motumo entered the property through a gate, ahead of Sergeant Thutlwa, and ran around the building, out of Sergeant Thutlwa's sight. He heard Constable Motumo shout 'stop!'. Immediately thereafter an African male came running from where Constable Motumo had disappeared, and Sergeant Thutlwa arrested him as he tried to exit the property at the gate. Another African male ran in the direction of an outside

toilet on the premises, but he was arrested by Constable Motumo. Once they had handcuffed the two plaintiffs, they reported the arrest.

[8] At the back of the house on the property was a partly disassembled red Isuzu KB 250 bakkie. The arresting officers made enquiries as to the status of the motor vehicle from Crime Intelligence. They were informed that the vehicle had been reported stolen four days earlier, and that a case docket had been registered at Lenasia Police Station. Sergeant Thutlwa testified that he had not seen the plaintiffs at or near the motor vehicle parts, but he was told by Constable Motumo, immediately upon the arrest of the two plaintiffs, that he had seen the two plaintiffs busy stripping the motor vehicle when he came around the building. This was also the evidence of Constable Motumo in his affidavit contained in the docket.

[9] The plaintiffs did not offer any explanation for their attempt to run away, or for the presence of the motor vehicle parts on the property. The first plaintiff told Sergeant Thutlwa that he resided at the property. There was nobody else at the property at the time.

[10] The plaintiffs were arrested on suspicion of being in possession of a stolen vehicle, on the basis that Constable Motumo saw them stripping the motor vehicle. They did not have time to obtain a warrant, because they had to act immediately upon the information received from Crime Intelligence. Sergeant

Thutlwa was of the view that the opportunity to catch the plaintiffs in the act of stripping the vehicle would have been lost if they had tried to obtain a warrant first.

[11] After more police officers and a breakdown recovery vehicle were called to the property, in order to procure the removal and storage of the motor vehicle, Sergeant Thutlwa and Constable Motumo took the plaintiffs to Moroka Police Station.

[12] On the way to the police station sergeant Thutlwa asked who the owner of the vehicle is. The first plaintiff told him that the vehicle was brought to the property by "boys from Zola". At Moroka Police Station the plaintiffs were processed and detained.

[13] Sergeant Martin Johnson Molokwane testified that he was the initial investigating officer of the case against the plaintiffs. At the time he held the rank of constable and was stationed at Moroka Police Station. He was no longer the investigating officer by the time that the case went to trial.

[14] Sergeant Molokwane testified that he received the docket on Monday, 11 July 2016, that is, the day after the arrest. He interviewed the plaintiffs, then completed and had them sign Statements Regarding Interview with Suspect. It seems that the two plaintiffs signed one another's statement.

[15] The plaintiffs refused to provide an explanation for having been at the premises with the stolen vehicle, and told Sergeant Molokwane that they will provide their explanations to a court. This is also what was recorded in the statements regarding his interviews of the plaintiffs.

[16] Sergeant Molokwane obtained details of the case regarding the stolen vehicle, and learned that the docket, at Lenasia Police Station, was one for armed robbery with aggravating circumstances, a firearm having been used in the robbery of the vehicle. He obtained the details of the docket, contacted the complainant and accompanied him to the police pound, where the complainant identified the parts as being from his stolen vehicle.

[17] Later that day the plaintiffs also agreed to have DNA samples taken, although this was not done by Sergeant Molokwane.

[18] The next morning, on Tuesday, 12 July 2016, Sergeant Molokwane took the plaintiffs to court, where he handed over the docket to the prosecutor.

[19] It appears from the investigation diary that the investigation was a meagre exercise. Sergeant Molokwane's primary focus was on obtaining details of possible previous offences committed by the plaintiffs, in order to consider whether they should be granted bail. These records only became available by 22 August 2016. Sergeant Molokwane was unable to explain why this took

more than a month. This seems to be the only reason why the plaintiffs were continuously remanded without bail.

[20] There being no record of pending cases against or previous convictions of the second plaintiff, he was released on R4 000,00 bail on 22 August 2016. However, there was a pending case against the first plaintiff for robbery of a motor vehicle. His bail application was postponed to 26 August 2017, when Sergeant Molokwane informed the prosecutor that the pending case had been withdrawn, and the first plaintiff was also released on R4 000,00 bail.

[21] Apart from the attempt to obtain records of previous convictions and pending cases against the plaintiffs, the only other effort to move the investigation forward evident from the investigation diary, was the prosecutor's requests that an identification parade be held. However, as was evident from his statement in the docket, the complainant was adamant that he was unable to identify his assailants. As a result, no identification parade was held.

[22] When prompted, Sergeant Molokwane testified that he had not visited the scene of the robbery or the property where the stolen vehicle was recovered. He also did not attempt to obtain fingerprints from the motor vehicle parts, and none were taken at the time when the vehicle was impounded.

[23] The defendants' third witness was the prosecutor, Mr Themba Trevor Tshabalala. He testified that he had been preceded by other prosecutors in

the matter, and that he only started dealing with the case once it had been enrolled for trial. Mr Tshabalala did not decide whether the plaintiffs should be prosecuted. This was the duty of the senior prosecutor who, he testified, had to do so at hand of the contents of the docket.

[24] It was decided that the case was prosecutable, on the basis that the plaintiffs were found in possession of the motor vehicle four days after the complainant had been robbed at gun point.

The first plaintiff's evidence

[25] The first plaintiff testified that, at the time of his arrest, he resided in Lawley, at his girlfriend's parental home. No one was occupying the house at 763A Mlangeni Street, which was his parental home. However, two tenants resided in the yard in two shacks. They were both single males. The one was a motor mechanic by the name of Carlos, and the other, whose name he could not recall, repaired computers.

[26] On Sunday, 10 July 2016, he went to his parental home in the late afternoon to check on the property and the tenants, as was his habit. Upon his arrival, he found vehicle parts strewn over the back yard of the property. This surprised him, because there is insufficient space there to work on a motor vehicle.

[27] At that time, the second plaintiff, a friend with whom he grew up on that same street, arrived at the property. The second plaintiff knocked at the shack occupied by the man who repaired computers, but there was no answer. The second plaintiff left, and the first plaintiff went to the outside toilet. Afterwards, on his way to a tap to wash his hands, the first plaintff heard that the second plaintiff was talking to people, and he then saw the second plaintiff with a male and a female police officer. The male officer told him not to run away, and then handcuffed both of them. The officers made a call to enquire about the vehicle parts, and then told the plaintiffs that the parts belonged to a motor vehicle that had been stolen a few days earlier. The police officers did not search the house or the shacks, and they did not ask the plaintiffs any questions.

[28] After they had been arrested, two more police officers arrived on the scene. Sergeant Thutlwa was one of the new arrivals. The first plaintiff testified that he overheard the arresting officers telling the newcomers that they were about to 'knock off' and that they were handing the plaintiffs over to the newly arrived officers. The plaintiffs were asked whether they wanted to go to the police station before a vehicle arrived to pick up the parts, but they told the officers that they did not know the law and did not know whether they should do so.

[29] The plaintiffs thought it was best to keep quiet as to who the vehicle might belong to, because whatever they told the police officers made the officers angry.

[30] The second crew of officers took the plaintiffs to a police station before the the motor vehicle parts were removed from the property. However, first the police officers forced them to move all the motor vehicle parts to the gate. On arrival at the police station, they were locked up in a cell, and the police officers told them that they can give their explanations to the court. Later he said that the officers asked them what they were doing at the property, and they said that they were not doing anything.

[31] When asked whether there was any reason not to tell the police that the car may belong to Carlos, he responded that the plaintiffs were not given a chance to talk to the police officers; at another point he said the reason was that he had not been sure that Carlos brought the vehicle to the property. It 'came to his mind' that, because Carlos was a mechanic, he may know why this vehicle was at the premises.

[32] Upon being asked during cross-examination whether he told the police that the vehicle could belong to Carlos, he answered in the affirmative, stating that he did so after they were arrested. He then reconsidered and said that he did not tell the police officers but that he told his lawyer. It was unclear whether

this was a reference to the lawyer who represented him in the criminal trial, or in these proceedings.

[33] Also during cross-examination, the first plaintiff offered that when the second crew of police officers arrived, he told them that there was a mechanic living at the property and "a computer man". However, he says he could not say to whom the motor vehicle belong, it could have been either of them.

[34] When asked why he had provided his home address as the Mlangeni address, whilst he was residing in Lawley, the plaintiff said that he informed the police officers that he was residing in Lawley. When he pointed out that the Mlangeni street address was recorded as his residential address, he stated that he would always provide that address as his residential address, even when he opens a bank account, because he did not regard the Lawley address as his home.

[35] The first plaintiff testified that three police officers arrived to take their fingerprints, take photographs and otherwise process them. No one identified themselves as the investigating officer, and he does not recall that he was given a warning statement. The officers told them that whatever they wanted to say, they should say in court.

[36] He denied that he told any of the officers that the vehicle was brought to the property by "boys from Zola". He also denied that he ever told the police officers that he will only give his explanations in court.

[37] The plaintiffs spent two nights in the holding cells and were taken to court on Tuesday, 12 July 2019. They did not say anything during the hearing and were remanded. Nothing was said about bail, and they were taken to Johannesburg prison. Thereafter they had several court appearances, some of them by video conference from the prison, and each time they were remanded again.

[38] The plaintiffs asked the Magistrate on the second appearance for an identity parade, but the Magistrate told them that they did not have the right to ask, because they were criminals. At one of their appearances, the plaintiffs asked for a lawyer, and they were again remanded, pending the appointment of a lawyer by Legal Aid.

[39] Ultimately, the second plaintiff was granted bail. The first plaintiff was told that he had to remain in custody because he had another pending case. However, a few days later, when the investigating officer could not bring proof of the other case, he was also released on bail.

The second plaintiff's evidence

[40] The second plaintiff testified that on the day of the arrest, he went to the property, which he referred to as "Gaba's place" (a reference to the first plaintiff), to look for his friend Hector, who repairs computers and stayed in a shack in the yard. He bumped into the first plaintiff at the property. They were not close friends. He did not know whether the first plaintiff lived at the property.

[41] As there was no answer at Hector's shack, he left. As he was opening the gate to leave the property, he met a male and a female police officer. The female officer told him to turn back with them. Upon his question what they were doing there, she told him that they were going to check the yard. He explained to her that he was not staying at the property and that he was just there looking for his friend.

[42] As they entered the backyard, they saw the first plaintiff coming from the direction of the toilet. The male police officer told the plaintiffs that they were under arrest. When the second plaintiff asked the reason for the arrest, he was told that the plaintiffs knew the reason. He informed the police officers that he had to go home because he had to give his mother's medication to her. However, this request was refused. He insisted that he was not given a reason why he could not leave.

[43] The police officers asked the first plaintiff to whom the vehicle parts belong, and the he pointed a finger towards the shacks. The second plaintiff again asked the female police officer to accompany him to his house so that he can give his keys to his parents and tell them what was happening, because his mother was sick. The male officer, however, refused and told him that he had to first explain the presence of the vehicle parts, which they could not do. They were then told to move the parts to the gate, after which they were handcuffed.

[44] They were then taken to Moroka Police Station, where he gave his address and keys to one of the female volunteers at the police station, with the request to take the keys home to his parents and tell them what had happened, which she apparently did. The plaintiffs were thereafter locked up in a cell.

[45] He also testified that Sergeant Thutlwa only arrived on the scene after the plaintiffs had already been handcuffed. He said that he never heard any of the officers who arrived at the scene calling for anyone to 'stop'.

[46] Several police officers arrived on the Tuesday and took DNA samples. Subsequently they called the first plaintiff out a few times and spoke with him alone. The second plaintiff does not know what they discussed. He asked the first plaintiff what the police spoke to him about, but the first plaintiff told him that he only knows that the whole matter pertained to the motor vehicle parts

that were found at the property. When he asked the first plaintiff who the motor vehicle parts belonged to, he said they belonged to the motor mechanic. When asked why he did not insist that the first plaintiff tell this to the police officers, he explained that they were told that they should only give their explanation once they have a lawyer.

[47] The second plaintiff was adamant that the police officers did not speak to him at all. He testified that, if he had been asked, he would have told them that he only went to the property to see Hector, and that he had not been involved with the vehicle.

[48] They were then taken to court, where they for the first time met the investigating officer, Constable Molokwane. Thereafter they were remanded on various occasions. They were refused bail on each occasion because the investigating officer had not finished the investigation.

[49] By their fourth appearance, Legal Aid had made an attorney available to them.

[50] When confronted with why the plaintiffs did not explain to the police officers that they were not in possession of the motor vehicle parts, he explained that the male police officer who arrested them told them that whatever they had to say they could say at the police station. When pointed out to him that he did not tell his side of the story at the police station, he said the lady who made an inventory of personal property handed in by them (such as their belts) told

him that it was only her duty to write down the property and nothing else. He says there was no other opportunity to tell their story. The police officers at the police station told them that they had to give their explanation in court.

[51] He denied that he was ever interviewed by the investigating officer and reiterated that the investigating officer only came to them for the first time when they made their first court appearance, where he told them that he would investigate the matter.

Assessing the evidence

[52] The plaintiffs' versions and the defendants' version of events are irreconcilable in material respects, including:

a) The plaintiffs insist that they were not arrested by Sergeant Thutlwa and Constable Motumo, but by a male officer called Vusi and an unidentified female officer.

b) The plaintiffs insist that they were not caught in the act of disassembling the vehicle by Constable Motumo.

c) The first plaintiff denies that they were asked whose vehicle it was, and both plaintiffs deny that the first plaintiff offered the explanation to the police officers that the vehicle was brought to the property by "boys from Zola".

d) The plaintiffs insist that they only met the investigating officer, Sergeant Molokwane, at court, and not the day before, as he testified.

[53] The technique generally employed by courts faced with irreconcilable versions has been set out in *Stellenbosch Farmers' Winery Group*.[2] It requires a court to make findings on the credibility and reliability of the factual witnesses, and the probabilities.

[54] The plaintiffs' denial that Sergeant Thutlwa and Constable Motumo were the arresting officers requires particular scrutiny. Several factors throw serious doubt on the credibility of the plaintiffs' version on this issue.

[55] The identity of the arresting officers was placed in dispute for the first time when the plaintiffs gave evidence. There was no suggestion of this during the cross-examination of any of the defendants' witnesses. At the very least, this version ought to have been put to Sergeant Thutlwa.

[56] In *President of the RSA*[3] the Constitutional Court emphasised the need to provide a witness with an opportunity to answer to any challenges to the truthfulness of his evidence. A witness is entitled to deny the challenge, to call corroborative evidence, to qualify the evidence or to explain the

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[2] *Stellenbosch Farmers' Winery Group Limited & Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) in [11].

[3] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) in [61] to [65].

contradictions relied upon. If a point in dispute is left unchallenged in cross-examination, the Constitutional Court remarked, the party calling the witness is entitled to assume that the unchallenged witnesses' testimony is accepted as correct.

[57] The cross-examination of Sergeant Thutlwa's implicitly accepted the truth of his evidence that he and Constable Motumo were the arresting officers. He was challenged on matters such as that he could not reasonably have formed the view that an offence was committed by the plaintiffs. There was no *caveat* that any line of questioning assumed the truth of his evidence only for purposes of the questioning.

[58] This is not a case where counsel omitted to put a version to a witness. The plaintiffs' version that was put to Sergeant Thutlwa included matters such as the nature of the entrance to the property. It was put to Sergeant Thutlwa that a roller shutter door gave access to the property, and not a gate as he testified. He denied this version.

[59] The parties agreed at the outset that the bundle of documents handed in was to be accepted into evidence, with no challenge to the contents thereof. Essentially, the bundle contained the docket in the criminal matter against the plaintiffs.

[60] The parties further also agreed that the affidavits forming part of the case docket against the plaintiffs in the withdrawn criminal matter (and included in the documents bundle), shall be accepted as evidence in the trial.[4] Again, this was done without any reservation as to the truthfulness of any part of that evidence.

[61] When the plaintiffs were challenged with the fact that their counsel did not put this version to the defendants' witnesses, they both responded that they would not know what the reason was for that omission.

[62] In *De Lacy*[5] the Supreme Court of Appeal explained:

> "[35] The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts: if it is not, then the inference cannot be drawn'[6] and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones'[7] when measured against the probabilities."

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[4] Uniform Rule of Court 38(2) provides that:

> *"The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."*

Uniform Rule of Court 37(6)(i) makes it clear that the parties may agree on the production of proof by way of an affidavit in terms of Rule 38(2).

[5] *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) in [35].

[6] *R v Blom* 1939 AD 188 at 202 – 203.

[7] *Ocean Accident and Guarantee Corporation Limited v Koch* 1963 (4) SA 147 (A) at 159 B – D.

[63] It seems to me that the more natural or plausible conclusion is that the plaintiffs fabricated substantial elements of their evidence, especially the version that two unidentified police offers were the arresting officers. In the result, I find that the plaintiffs are not credible and reliable witnesses.

[64] Although counsel for the plaintiffs submitted that the defendants' witnesses should not be believed, he was unable to establish a basis for the argument. I am satisfied that the defendants' witnesses testified frankly and honestly. There is also no reason to doubt the credibility of their evidence, which corresponds with the documentary evidence.

[65] I therefore proceed to assess the validity of the plaintiffs' claims as measured against the evidence presented by the defendants' witnesses.

Was the arrest unlawful?

[66] The Constitutional Court confirmed the requirements for a claim for unlawful arrest and detention in *De Klerk*[8]:

> "A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements:
>
> (a) the plaintiff must establish that their liberty has been interfered with;

[8] *De Klerk v Minister of Police* [2019] ZASCA 32 in [14] (footnotes omitted).

(b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;

(c) the depravation of liberty must be wrongful, with the onus falling on the defendants to show why it is not; and

(d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought."

[67] It is common cause between the parties that the requirements set out in (a) and (b) were met.

[68] The plaintiffs' claim for unlawful arrest was premised on them having been arrested for "hijacking and robbery". The first defendant pleaded that the arresting officers had reasonable suspicion that the plaintiffs had committed the offences of robbery, theft or possession of stolen property, and that the arrest was lawful in terms of section 40(1)(b), alternatively section 40(1)(e), of the CPA.

[69] The relevant portions of section 40 of the CPA provide that:

"(1) A peace officer[9] may without warrant arrest any person –

…

[9] Section 1 of the CPA provides that 'peace officer' includes any police official.

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

…

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

…"

[70] Sergeant Thutlwa testified that the plaintiffs were arrested on suspicion of being in possession of a stolen vehicle. This aligns with the late Constable Motumo's statement, the entry in the Occurrence Book (SAPS10, also known as the "OB") for the Moroka Police Station on the night of the arrest, and the entry on the cover of the case docket.

[71] Schedule 1 to the CPA includes the offence of receiving stolen property knowing it to have been stolen. This crime is committed when a person unlawfully (thus without lawful cause) and intentionally (which requires knowledge that the goods are stolen property) receives stolen property into his possession.[10]

[72] The plaintiffs did not challenge the evidence that the partly disassembled motor vehicle found at the property by the arresting officers had been stolen a few days earlier. Sergeant Thutlwa verified this information on the scene of

[10] See *inter alia* CR Snyman *Criminal Law* 6th ed. p 512 para 1.

the arrest. In the statement by the late Constable Motumo, he had confirmed that he found the arrestees busy stripping the motor vehicle. There is no evidence that any other person was at the property at the time.

[73] In my view it was reasonable for the arresting officers to conclude that the plaintiffs had direct personal control over the motor vehicle and could therefore be considered in possession of the vehicle.[11] The further evidence by sergeant Thutlwa that the plaintiffs attempted to run away, and the fact that they did not give a reasonable explanation for being in possession of the vehicle, established reasonable grounds[12] for the suspicion that the plaintiffs were in possession of the vehicle knowing it to be stolen.

[74] I therefore conclude that the arresting officers were entitled to act in terms of section 40(1) of the CPA.

[75] Once the jurisdictional requirements of section 40 were satisfied, the arresting officers had a discretion as to whether or not to exercise the power to arrest, which must be properly exercised. The exercise of the discretion was however not an issue on the pleadings. The plaintiffs, who had to raise the issue either in their summons or in a replication,[13] did not do so.

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[11] *S v Essack* 1963 (1) SA 922 (T) at 924 A – B.

[12] *Duncan v Minister of Law and Order* 1986 (2) 805 (A) at 818 F/G – H.

[13] *Minister of Safety & Security v Sekhoto* 2011 (1) SACR 315 (SCA) in [57].

[76] The issue was briefly touched upon when the plaintiffs' counsel posed the proposition to Sergeant Thutlwa that it had not been necessary to arrest the plaintiffs in order to bring them before court. However, the issue was not fully ventilated at the hearing of the matter. In the result, it cannot be said that the issue was canvassed to the extent that it amounted to an agreement to include it as one of the issues to be decided between the two parties.[14]

[77] In the result, the plaintiffs' claim for unlawful arrest should be dismissed.[15]

[78] If the exercising of the discretion was an issue to be decided between the parties, I conclude that it was properly exercised. In this regard, I keep in mind that the onus to establish that the discretion was not properly exercised, rests on the plaintiffs.[16]

[79] The decision to arrest must be based on the intention to bring the arrested person to justice.[17] In *Sekhoto*[18] the Supreme Court of Appeal explained as follows:

> " This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises their discretion in a

[14] *Mastlite (Pty) Ltd v Stavracopoulos* 1978 (3) SA 296 (T) at 299 D – E; *EC Chenia & Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA) in [13] to [15].

[15] *Sekhoto supra* in [57].

[16] *Duncan supra* at 819 A – B; *Sekhoto supra* in [45] to [57].

[17] *Sekhoto supra* in [30].

[18] *Sekhoto supra* in [39].

> manner other than that deemed optimal by the Court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached."

[80] The plaintiffs suggested that there were less onerous ways in which to procure their attendance at trial, and it was thus not necessary to arrest them. In this regard, the Supreme Court of Appeal said the following in *Sekotho*[19]:

> "While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the inquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends on the particular facts, but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect for that purpose."

[81] When asked if there was a less invasive manner in which to have brought the plaintiffs before court, Sergeant Thutlwa responded that it was the Flying Squad's duty to arrest a person who committed a crime, and that it was for the detectives to decide whether suspects should be released or not. He was

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[19] *Supra* in [44].

not sure in which schedule to the CPA the offence of being in possession of stolen goods appears. However, he held firm in his view that an arrest without a warrant may be made in the circumstances he described. On the evidence of Sergeant Thutlwa, the plaintiffs attempted to escape arrest. On the first plaintiff's own evidence, he did not reside at the address that he gave to the police officers as his residential address.

[82] In the circumstances the arresting officers have acted within reason when they arrested the plaintiffs. The plaintiffs have not put up any evidence to show why the exercise of the discretion by the arresting officers was not properly exercised.

[83] In the result, the plaintiffs' claim for unlawful arrest should also for this reason be dismissed.

Was the detention unlawful?

[84] The plaintiffs pleaded the arrest and detention as two separate claims. They pleaded that the detention of the plaintiffs at the instance of the police officials was wrongful on several grounds. Firstly, they contended that it followed upon an unlawful arrest. I have already found that the arrest was lawful.

[85] They further pleaded that the police officers took longer than necessary to process them administratively. On the evidence, that contention cannot withstand scrutiny, and was not pressed by the plaintiffs' counsel in closing argument. It is clear that the plaintiffs were arrested late afternoon on the Sunday, that the investigating officer and other officers took all the required steps to process the arrestees during the course of the Monday, and that they were taken to court on Tuesday morning, which was the earliest opportunity in the circumstances.

[86] The plaintiffs further claimed that senior police officials should have exercised their discretion to release the plaintiffs on warning or on bail in terms of sections 56 or 59 of the CPA respectively, but, prudently, did not persist with these arguments. Section 56 allows for a written notice to appear in court in lieu of an arrest only in the case of offences that will lead on conviction to a sanction of no more than a fine up to R1000. Section 59 allows for a senior police officer to grant bail for offences other than those appearing in Part II and Part III of Schedule 2 to the CPA, which includes the offences of robbery, theft, receiving stolen property knowing it to have been stolen. The offences of which the plaintiffs were suspected, did thus not allow for the application of either section 56 or 59.

[87] As pointed out above, with reference to *Sekotho*[20], the police officers do not play a role once they have caused the plaintiffs to appear before a court. Their detention after the first appearance is therefore not an aspect to be considered with regard to the first defendant's conduct. In any event, no such allegations have been made. This case is distinguishable from the matter of *De Klerk*[21], where the Constitutional Court found that the arrest was unlawful, and that it was foreseeable by the police officer who made the unlawful arrest that the arrestee will be merely remanded for seven days without further inquiry, so that the seven day detention after the first court appearance was causally linked to the unlawful arrest.

[88] In the result, the plaintiffs' claim for unlawful detention should be dismissed.

[89] Although it seems to me that much could be said about the delay in granting bail to the plaintiffs, no claim was pleaded against the second defendant for unlawful detention.

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[20] *Supra* in [44].

[21] *De Klerk v Minister of Police* [2019] ZACC32.

Was the prosecution malicious?

[90] In *Kruger*[22] the Constitutional Court approved of the formulation of the elements for an action for malicious prosecution by the Supreme Court of Appeal in *Moleko*[23]:

> "In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –
>
> (a) that the defendants set the law in motion (instigated or instituted the proceedings);
>
> (b) that the defendants acted without reasonable and probable cause;
>
> (c) that the defendants acted with 'malice' (or *animo injuriandi*); and
>
> (d) that the prosecution has failed."

[91] The plaintiffs pursued a claim for malicious prosecution against both defendants. It is necessary to consider these claims separately.

[92] The first question that must be considered is whether the police officials set the law in motion against the plaintiffs, in the sense of having instigated or instituted the proceedings. Evidently, they did not institute the proceedings. As to whether they instigated the proceedings *"the question is whether they did anything more than one would expect from a police officer in the*

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[22] *Kruger v National Director of Public Prosecutions* [2018] ZACC 13 in [48].

[23] *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) at [8].

circumstances, namely 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".[24]

[93] The arresting officers were not involved in the matter beyond the arrest. Sergeant Molokwane, the investigating officer, presented the available evidence to the prosecutor, and pointed out to the prosecutor that the complainant could not identify his assailants. There is no evidence that any of the police officers did anything other than what was expected of them.

[94] The plaintiffs' claim for malicious prosecution against the first defendant must therefore fail on the first leg of the test, namely they did not instigate the prosecution.

[95] The second defendant instituted the proceedings, and the plaintiffs were unsuccessfully prosecuted. It must thus be considered whether the second defendant acted without reasonable and probable cause, and whether it acted with *animo injuriandi*.

[96] In *Moleko*[25] the Supreme Court of Appeal explained the concept of reasonable and probable cause as follows:

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[24] *Minister of Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) in [11].

[25] *Supra* in [20].

> "[20] Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element –
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> > 'not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'"[26]

[97] The requirement to show that the prosecution was instituted '*in the absence of reasonable and probable cause*' was explained by the Supreme Court of Appeal on several occasions, including in *Beckenstrater*[27]:

> "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 probably cause."

[98] In *Relyant*[28] the Supreme Court of Appeal added:

> "It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement for reasonable and

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[26] Quoting from LAWSA Volume 15 para 449.

[27] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136 A – B, quoted with approval in *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) in [14] and *Moleko supra* in [57].

[28] *Relyant supra* in [14], quoting from *Beckenstrater supra* at 135 D – E.

> probable cause is a sensible one: 'for it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.'"

[99] The plaintiffs were prosecuted for robbery of a motor vehicle with aggravating circumstances, in that a firearm was used. Robbery consists of the theft of property, by unlawfully and intentionally using violence to take the property from another, or threats of violence to induce the possessor of the property to submit to the taking of the property.[29]

[100] The senior prosecutor had the following available upon which to decide whether or not to prosecute the plaintiffs, and for which crimes:

a) Constable Motumo's evidence that he found the plaintiffs stripping the motor vehicle;

b) Sergeant Thutlwa's evidence, that the two plaintiffs were found on the same property as the disassembled motor vehicle, that they tried to flee when the police officers arrived on the scene, and that they did not give a reasonable explanation for their possession of the vehicle; and

[29] See *inter alia* CR Snyman *Criminal Law* 6th ed. p 508 para 1.

c) the complainant's evidence, that the stripped vehicle belonged to him, that he was robbed of the motor vehicle at gunpoint, but that he could not identify his assailants.

[101] The only evidence that linked the plaintiffs with the robbery were thus that they were found in possession of the stolen motor vehicle four days after the robbery, and that they are African males, as were the assailants.

[102] The prosecutor, Mr Tshabalala, testified that the prosecution was based on the plaintiffs having been found in possession of the stolen motor vehicle four days after it had been hijacked. The prosecution thus exclusively relied upon what is often referred to as the 'doctrine of recent possession'. The inference that a person found to be in possession of recently stolen property is the thief or the robber can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the robbery and the discovery of the goods in that person's possession lend themselves to such a finding.[30]

[103] The Supreme Court of Appeal explained in *Mothwa*:[31]

> "Courts have repeatedly emphasised that the doctrine of recent possession must not be used to undermine the onus of proof which always remains with

[30] *S v Mavinini* 2009 (1) SACR 523 (SCA) in [6]; *Zwane and Another v S* [2013] ZASCA 165 (27 November 2013) in [11].

[31] *Mothwa v S* (124/15) [2015] ZASCA 143 (1 October 2015) in [10].

> the state. It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that having been found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession."

[104] When a court considers whether or not to draw the inference, it must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, and the ease with which the property can or is likely to pass to another person.[32] Common place property such as motor vehicles are easy to trade and can change hands easily.[33]

[105] In *Mothwa*,[34] the appellant was arrested at the Skilpadsnek border post with Botswana, three days after the vehicle that he intended to cross the border with had been robbed at gunpoint in Soshanguve. The Court found that the inference that the appellant was one of the robbers was not the only reasonable inference that could be drawn. However, the fact that the appellant gave a plausible explanation, and registration papers in line with his explanation, weighed heavily with the Court. Each matter must be determined on its own facts.

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[32] *S v Skweyiya* 1984 (4) SA 712 (A) at 715 C – G; *Mothwa supra* in [8].

[33] *Mothwa supra* in [9].

[34] *Supra*.

[106] In my view, the sparse evidence available to the prosecution could not lead the reasonable person to conclude that the plaintiffs were probably guilty of the armed robbery.

[107] Mr Tshabalala testified that it is usual to charge an accused with robbery where a complainant cannot identify his assailant, if the accused was found in possession of the stolen vehicle within a short period after the robbery, because a charge for possession of a stolen vehicle is a competent verdict under a robbery charge in terms of section 36 of the CPA.

[108] Section 260 of the CPA provides that, if the evidence on a charge of robbery does not prove the offence of robbery, but the offence of receiving stolen property knowing it to have been stolen, or an offence under section 36 or section 37 of the General Law Amendment Act 62 of 1955, the accused may be found guilty of that offence. Section 264 of the CPA has similar a provision in respect of a charge of theft.

[109] On a charge of receiving stolen property knowing it to have been stolen, section 265 similarly provides that if an offense under section 37 of the General Law Amendment Act is proven, the accused may be so found guilty.

[110] Section 36 of the General Law Amendment Act provides that:

> "Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of

1959), in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

[111] Section 37 of the same Act provides that:

"(1)(a) any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession, from any other person stolen goods, other than stock or produce as defined in section 1 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorised by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except insofar as the imposition of any such penalty may be compulsory.

(b) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause."

[112] In my view, the evidence available to the prosecution could lead the reasonable person to conclude that the plaintiffs were probably guilty of one of these offences. However, it remained unlawful to have charged them with the more serious crime of robbery, for which the prosecution did not have reasonable grounds.

[113] What remains is the question of whether the prosecution for robbery took place with *animus injuriandi*. In *Relyant*[35] the Supreme Court of Appeal approved of the concept as set out in *Moaki*[36]:

> "Although the expression 'malice' is used, it means, in the context of the *actio iniuriarum*, *animus injuriandi*. In Moaki v Reckitt & Coleman (Africa) Limited and Another Wessels JA said:
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> 'Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance.'"

[114] In *Moleko*[37] the Court approved of the concept of *animus injuriandi* as explained in Neethling *et al*[38] :

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

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35 *Supra* in [5].

36 *Moaki v Reckitt & Coleman (Africa) Ltd* 1968 (3) SA 98 (A).

37 *Supra* in [63].

38 J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2nd ed. (2005) p 181.

> wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*."

[115] Thus a defendant must at least have foreseen the possibility that he or she is acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct – negligence would not suffice, *dolus eventualis,* at a minimum, is required.[39] Indeed, the National Prosecuting Authority Act[40], which authorises the powers and duties of prosecutors, specifically provides in section 42 that no person shall be liable in respect of anything done in good faith under that Act.

[116] The senior prosecutor who made the decision to prosecute did not testify. From the evidence of Mr Tshabalala, I am satisfied that the prosecution did not appreciate that the "catch all" approach of proceeding with the robbery charge, because it encompasses the lesser charges for which there were reasonable grounds to believe the plaintiffs are guilty, was wrongful. It intended to prosecute for all the possible offences in one trial, with the same evidence. I conclude that the prosecution did not prosecute the plaintiffs for robbery with the intention (*dolus eventualis*) to injure them.

[117] In the circumstances I find that the plaintiffs did not prove that the second defendant acted with *animus injuriandi*.

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[39] *Moleko supra* in [64].

[40] Act 32 of 1998.

Order

[118] The plaintiffs' claims are dismissed, and the plaintiffs are ordered to pay the defendants' costs, jointly and severally.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:	8, 9, 10 and 11 October 2019
Judgment:	31 January 2020
Counsel for the Plaintiffs:	Adv Thole
Instructed by:	MG Mali Attorneys Incorporated
Counsel for the Defendants:	Adv Bokako
Instructed by:	The State Attorney, Johannesburg