IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

11/11/2016

DATE SIGNATURE

CASE NO: 58534/2017

DATE DELIVERED: 17/11/16.

IN THE MATTER BETWEEN

INA HOOGENDOORN Plaintiff

and

MINISTER OF POLICE First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTION Second Defendant

JUDGMENT

VAN NIEKERK, AJ

INTRODUCTION:

[1] Plaintiff is an adult female and housewife, who was born on the 13th of March 1961 and who was arrested and detained on a charge of fraud which was later withdrawn

against the Plaintiff, and as a result of which the Plaintiff instituted action against the First Defendant as well as the Second Defendant pursuant to an alleged unlawful arrest and detention as well as an alleged malicious prosecution. The First Defendant is the Minister of Police in his official capacity, who is vicariously liable for the conduct of members of the South African Police Service and the Second Defendant is the National Director of Public Prosecution, in his official capacity, who is vicariously liable for acts and omissions by prosecutors in the scope and course of their duties.

[2] The action stems from an incident where the Plaintiff, her husband Mr Kryn Hoogendoorn, and the Plaintiff's son, Mr Juan du Plooy (who is the stepson of the Plaintiff's husband) was arrested by Lieutenant Colonel Maleka of the West Rand Organised Crime Unit of the South African Police Service on Thursday the 4th of November 2010 on charges of fraud, which resulted in the Plaintiff's detention until the 12th of November 2010 when the Plaintiff was released on bail, and whereafter the charge of fraud was withdrawn against the Plaintiff.

[3] In essence, the Plaintiff's claims consist of the following:

[3.1] A claim for damages based on an averment that the arrest of the Plaintiff on the 4th of November 2010 without a warrant of arrest by members of the Special Commercial Unit and subsequent detention until the 12th of November 2010 was unlawful and in respect of which the Plaintiff pleaded in the Plaintiff's amended particulars of claim as follows:

> *"On or about 4 November 2010 the Plaintiff was arrested without a warrant of arrest by members of the Special Commercial Crime Unit who failed in effecting the arrest to have formed an opinion as to the*

commission of a crime alternatively, if such opinion had been formed it was improperly formed."

[3.2] A claim for damages based on an averment that the First and Second Defendants wrongly and maliciously set the law in motion by arresting the Plaintiff for alleged fraud, without a reasonable or probable cause for doing so, nor having any reasonable belief in the truth of the information at their disposal, as a result of which the Plaintiff was charged and detained for alleged fraud from the 4th of November 2010 until the 12th of November 2010 whereafter the case against the Plaintiff was withdrawn.

[4] The Defendants' plea admits the facts relating to the arrest and detention of the Plaintiff, but denies that the arrest and detention was unlawful and in respect of which the following is pleaded:

"8.4 The basis of this suspicion at the time of arrest was, inter alia, that the fruits of a fraudulent transaction or transactions in which a certain Mr Kryn Hoogendoorn was involved with, was deposited into the personal bank account of the Plaintiff."

[5] In terms of an agreement between the parties the issue relating to the merits of the Plaintiff's claims was decided first and separately in terms of the provisions of Rule 33(4) from the issue relating to the *quantum* of damages, and an order to that effect was made during the course of the trial. This judgement therefore deals with the merits of the Plaintiff's claims for damages against the First and Second Defendants on the issues as defined in the pleadings.

EVIDENCE BEFORE THE COURT:

[6] The Plaintiff testified during the trial, and called as supporting witnesses her husband to whom she was married at the time of the arrest, her son, as well as Mrs Christie du Plooy who is the wife of her son who testified. On behalf of the Defendants the investigating officer Lieutenant Colonel Maleka was called as a witness and thereafter the prosecutor of the Protea Magistrate's Court, Soweto, Mrs Danette van Schalkwyk, testified.

[7] For purposes of this judgement, it is necessary that certain factual findings must be made. Whereas the Plaintiff and the three witnesses called on her behalf materially collaborated each other's evidence, the versions offered on various issues by the two witnesses called on behalf of the Defendants differed, not only from the evidence adduced on behalf of the Plaintiff but also from each other. It is therefore necessary to make a credibility finding as far as the witnesses are concerned.

[8] The Plaintiff was an impressive witness and I have no hesitation in accepting the version of the facts as testified by the Plaintiff. My impression of the Plaintiff in the witness box was that of an unassuming, non-confrontational and rather withdrawn kind of person, and at no stage during her evidence in chief or cross-examination did the Plaintiff contradict herself, nor did she attempt to avoid any questions, and where she was unsure of an answer she indicated same. I was similarly impressed by the evidence of Mrs Christie du Plooy, in respect of whom I made similar observations in the witness box than that of the Plaintiff, and I have no reason to reject any of the evidence of this witness. The evidence of Plaintiff's husband as well as the evidence of Plaintiff's son, Mr du Plooy, similarly cannot be rejected as it

stood the test of cross-examination and in all material respects these four witnesses supported each other's versions of the events.

[9] Unfortunately, the same cannot be found regarding the witnesses called on behalf of the First and Second Defendants. Lieutenant Colonel Maleka's evidence was fraught with inconsistencies and during cross-examination it was put to Lieutenant Colonel Maleka by Counsel acting on behalf of the Plaintiff that he "*tailored*" his evidence, which, in my opinion, is a most appropriate description of this witness's evidence. Lieutenant Colonel Maleka ***inter alia*** confidently testified that in his presence the attorney acting on behalf of Plaintiff and her other two co-accused, during the proceedings in the Protea Regional Court on 8 November 2010, offered that Mr du Plooy would repay an amount of R50 000.00 to the complainant in the fraud case, and that proof of a transfer of funds on behalf of Mr du Plooy to the complainant was handed in to the presiding Magistrate in Court, whereas this evidence was clearly fabricated and also rejected as being untrue by the prosecutor involved in this transaction (which will be referred to morefully ***infra***) as having taken place in the office of the Chief Prosecutor, without Lieutenant Colonel Maleka being present. This is but one example of numerous snippets of factual fabrications on the side of Lieutenant Colonel Maleka, with which the second witness called on behalf of the Defendants did not agree when it was put to her in cross-examination that such evidence of Lieutenant Colonel Maleka was led. Apart from the aforesaid, Lieutenant Colonel Maleka gave a version regarding material issues which was never put to either the Plaintiff or any of the witnesses called on her behalf, and when questioned about the fact whether or not he gave such instructions to Counsel acting on behalf of the Defendants, he affirmed that he in fact did so. Having regard

to the importance of those issues, it is highly improbable that Counsel acting on behalf of the Defendants would not have put that version to the Plaintiff and the only inference to be drawn is that, also in this respect, Lieutenant Colonel Maleka blatantly attempted to mislead the Court.

[10] I further have no hesitation in dismissing any evidence by the second witness called on behalf of the Defendants, being the prosecutor referred to ***supra***, insofar as it differs from the evidence of the Plaintiff and the witnesses called on her behalf. This witness failed to answer questions directly, but rather resorted to provide elaborate detail as to the reason for an answer, often failing to answer the pertinent question, and constantly attempted to qualify answers so as to present herself in a more favourable light. Even when this witness was eventually constrained during cross-examination as well as questions from the Court to make a concession, she would refuse to do so and attempted to argue her way out of the predicament. Evidence of the Plaintiff relating to the conduct of this witness during her interaction with the Plaintiff during the Plaintiff's court appearances exhibits a highhanded approach tantamount to bullying tactics and my impression of this witness in the witness box confirmed this.

[11] Bearing the aforesaid in mind, the factual evidence can be summarised as follows:

[11.1] A certain Mr de Villiers ["*the complainant*"] and Plaintiff's husband was involved in business transactions regarding the sale and resale of fuel and gas. At the same time, during or about 2009, the Plaintiff's husband entered into an adulterous relationship with a family member of Mr de Villiers, and towards the middle of 2010 this relationship proverbially turned sour, resulting in the mistress making an anonymous telephone call to the Plaintiff

who then discovered the existence of the relationship. Plaintiff's husband confessed to her, and they decided to proceed with the marriage relationship as before, having being married for in excess of 20 years at that stage. According to the evidence of the Plaintiff's husband, the mistress did not take kindly to the fact that the relationship between her and the Plaintiff's husband was terminated. This then led to a strained relationship between the Plaintiff's husband and De Villiers;

[11.2] The Plaintiff's husband, who is a qualified Chartered Accountant, resigned from his employment at Nedbank approximately 17 years ago and in order to curtail banking fees, suggested to the Plaintiff that they continue to operate a banking account of the Plaintiff. This led to a situation where a cheque account at First National Bank opened while Plaintiff was still employed in the name of the Plaintiff, was utilised solely by the Plaintiff's husband for his personal and business transactions, and a savings account which was coupled to this cheque account, also at First National Bank, was operated by the Plaintiff. The Plaintiff, being a housewife, had no need for a cheque account any longer, was in possession of a bank card, and monies were deposited into the savings account from time to time by the Plaintiff's husband being the sole breadwinner from the cheque account to the savings account which the Plaintiff then utilised for household necessities. The Plaintiff had no access to the bank statements of the cheque account, as this was sent per e-mail to the computer of the Plaintiff's husband, and Plaintiff further testified that she at all relevant times trusted her husband and that there was no need to question his ***modus*** of operation of this cheque account. Into this cheque

account an amount of approximately 7000 US Dollars were deposited on a monthly basis at a certain time, being income earned by the Plaintiff's husband from a foreign company. The Plaintiff was telephonically contacted by the Reserve Bank prior to these deposits and that is the end all of her involvement with this cheque account. From this cheque account certain of the parties' household expenses were paid, including rental of their accommodation and personal expenses of the Plaintiff's husband;

[11.3] The Plaintiff's son conducts business as a financial adviser and entered into an agreement with the Plaintiff's husband in terms whereof commission earned by Plaintiff's son on referrals by Plaintiff's husband would be shared between them and for which purpose Plaintiff's son paid an amount of R50 000.00 into the account operated by Plaintiff's husband. The policy in respect of which this commission transaction took place was shortly thereafter cancelled by the client, resulting in Plaintiff's son having to repay commission earned by him, and whereafter at the request of Plaintiff's son, Plaintiff's husband deposited the amount of R50 000.00 into the account of the Plaintiff's son, being repayment of the commission referred to ***supra***;

[11.4] On Thursday, the 4th of November 2010, the Plaintiff's husband received a telephonic call from the son of the erstwhile mistress, who requested the Plaintiff's husband to assist him with certain VAT issues and requested to meet the Plaintiff's husband at a filling station in Broadacres, West Rand. The Plaintiff's husband proceeded to meet this person, a certain Mr Nichols, at the filling station and upon arrival there, after entering the shop to purchase something and returning from the shop, Lieutenant Colonel Maleka and

another member of the SAPD approached the Plaintiff's husband and informed him that he was being arrested for fraud. Mr Nichols simply lured Plaintiff's husband to this filling station on a pretext in order to facilitate the arrest by Lieutenant Colonel Maleka. The Plaintiff's husband was handcuffed and then requested to indicate where the Plaintiff could be found. Plaintiff's husband complied and Lieutenant Colonel Maleka and his colleague drove Plaintiff's husband to the residence which Plaintiff occupies with her husband, followed by another police car;

[11.5] At the Plaintiff's residence she was informed by Lieutenant Colonel Maleka that she was arrested for fraud, and Lieutenant Colonel Maleka then requested the Plaintiff and her husband to indicate where their son Juan du Plooy could be found. Again they complied with this request. Arriving at the residence of Plaintiff's son, he was similarly informed that he was being arrested for fraud. At the time of his arrest his wife, his wife Christie was attending a choir practice and she rushed home. She was shocked and at that stage 8 months pregnant. Mr du Plooy requested Maleka if he had a warrant, whereupon Maleka replied that he did not "*need*" a warrant;

[11.6] All three witnesses testified that they were informed by Lieutenant Colonel Maleka that they were being arrested for fraud and notwithstanding their requests, no further information relating to the charges were given by any of the policemen involved. All the witnesses confirmed that there were four police officers present, with two police vehicles, and this was also confirmed by Lieutenant Colonel Maleka. It is also common cause that all these arrests were effected without a warrant of arrest;

[11.7] The arrests were effected in the late afternoon and all three suspects were held in a police cell at the Krugersdorp Station of the South African Police Services overnight. The next day, approximately midday, warning statements were obtained from them and they were required to sign documentation that their rights were explained to them. In the meantime, an attorney was instructed by a family member of Mrs Christie du Plooy, and upon request by this attorney he was informed that it was not possible to proceed to the Magistrate's Court for purposes of a bail application in the light of the fact that there was some or other function at the Magistrate's Court that afternoon being the Friday afternoon of 5 November 2010;

[11.8] The three accused were then held at the Krugersdorp holding cells and on Monday, the 8th of November 2010 transported to the Protea Regional Court by Lieutenant Colonel Maleka. The Plaintiff was placed separately from her husband and son in a trial awaiting facility at this Court, and the lawyer previously instructed consulted ***inter alia*** with Plaintiff's husband and son, and had discussions with the State Prosecutor referred to ***supra***, but not with Plaintiff. Plaintiff testified that all relevant times she was completely in the dark as to the reason for her arrest, but that she was assured by her husband that *"everything will be sorted out"* and Plaintiff's husband testified that he suspected that his arrest was as a result of the involvement of Mr de Villiers and his erstwhile mistress and that he informed all parties that the issue involved himself and Mr de Villiers, that his wife and son had nothing to do with the issue, and that he would sort it out;

[11.9] Shortly before the lunch adjournment of the Court on 8 November 2010 the three accused were fetched from their respective holding cells and taken to the Court. Their interaction with the prosecutor, Mrs van Schalkwyk was, to say the least, unpleasant. She accused the Plaintiff's husband of being involved in a "*syndicate*", she indicated she had a thick file compiled on them, that she was investigating them for fraud in excess of R3 million, and threatened that she would have them locked up in the Diepkloof Prison for a long time. Shortly after they were brought to Court, the Court adjourned for lunch and the attorney then informed them that the prosecutor informed the attorney that, if monies allegedly owing to Mr de Villiers is repaid to Mr de Villiers, the charges will be withdrawn. An amount of R175 000.00 was mentioned. Plaintiff's husband testified that he simply did not have that amount of money readily available;

[11.10] The Plaintiff's daughter in law, who was 8 months pregnant, was present at Court and in a severe emotional state. Plaintiff's son requested the prosecutor whether he could be released and thereafter a "*deal*" was made in the office of the Chief Prosecutor, Mr Lambrechts, brokered by the prosecutor Mrs van Schalkwyk, to the effect that the Plaintiff's son pay to Mr de Villiers an amount of R50 000.00 whereafter the charges against Plaintiff's son would be dropped. During these "*negotiations*", Mrs van Schalkwyk was in telephonic contact with the complainant, Mr de Villiers. The brother of Plaintiff's husband then proceeded to a bank in Krugersdorp and effected a transfer of funds to the account of Mr de Villiers, the account particulars of which was supplied to the parties by Mrs van Schalkwyk, and

rushed back to Court with the documentary proof of transfer into the account of Mr de Villiers. Upon inspecting this document, the prosecutor Mrs van Schalkwyk dropped the charges against Plaintiff's son. Prior to the time when this *"agreement"* was entered into, Mrs van Schalkwyk was informed of the commission transaction between the Plaintiff's son and the Plaintiff's husband in terms whereof the R50 000.00 was paid into the account of the Plaintiff's son by the Plaintiff's husband and she was therefore aware of the fact that it was the version of Mr du Plooy that he is not guilty of any fraud;

[11.11] Unfortunately, the same fate did not befall the Plaintiff who was then detained at the Diepkloof Sun City prison from the 8th of November 2010 until the 12th of November 2010 when a bail application was launched on her behalf and she was released on bail of R10 000.00 and other conditions. The bail application was launched on the 10th of November 2010 in the light of the fact that a date for such bail hearing had to be arranged between the prosecutor and the attorney acting on behalf of the Plaintiff. Although Mrs van Schalkwyk conceded during cross-examination that she, at all relevant times, believed that the Plaintiff did not pose a flight risk, that she had no other evidence against the Plaintiff save for the bank statements of the account in the name of Plaintiff where the funds were paid in, no investigation or effort was made by her or by the Magistrate to determine whether or not it would be in the interest of justice that the Plaintiff be released in terms of the provisions of Section 60(11)(1)(b) of the Criminal Procedure Act. It was clearly the attitude of Mrs van Schalkwyk that the

onus rested squarely on the Plaintiff to apply for bail and, failing such an application by the Plaintiff or an attorney acting on her behalf, that the Plaintiff should remain under arrest in prison;

[11.12] On the 19th of November 2010 the charge against the Plaintiff was withdrawn. After numerous appearances over a protracted period of time, the Plaintiff's husband eventually pleaded guilty to fraud and received a suspended sentence. He explained that he simply ran out of funds as each appearance cost him R20 000.00 in legal fees, and insisted that, given a fair and reasonable opportunity, he would have been able to prove his innocence. Whether that is so or not, is irrelevant for purposes of this action;

[11.13] Lieutenant Colonel Maleka testified that his involvement was as a result of the fact that, during or about September 2010, and whilst at the same Court, he was called into the office of the Chief Prosecutor, Mr Lambrechts, and introduced to a certain Mr de Villiers (the complainant) who was sitting in the office with Mr Lambrechts. Lieutenant Colonel Maleka testified that it was explained to him by the Chief Prosecutor that he should investigate a charge of fraud against the Plaintiff's husband and was handed four statements deposed to by four different persons, one of them being De Villiers, which implicated the Plaintiff's husband in fraud. In each of these statements it was stated that the Plaintiff's husband instructed certain parties to deposit monies into two different account numbers, and on a follow up it was discovered that these account numbers belongs to the Plaintiff and her son respectively. The one account is the cheque account in

Plaintiff's name which her husband utilised, and the other account is that of her son where the commission transaction funds were paid in;

[11.14] Lieutenant Colonel Maleka obtained copies of the account statements and returned to the Court whereupon the prosecutor Mrs van Schalkwyk made an inscription in the investigation diary on the 3rd of November 2010 which reads: *"I've read all the relevant documents and am of the opinion that Hoogendoorn + the wife + stepson can be arrested for fraud. Please effect same."* Underneath this, in the investigation diary, Lieutenant Colonel Maleka on the 3rd of November 2010 wrote *"Your instructions are noted and shall comply with."* Although he reluctantly did so, Lieutenant Colonel Maleka eventually conceded that he regarded same as an instruction to arrest and acted on such instruction and as a result thereof effected the arrest of the three accused the following day;

[11.15] During cross-examination Lieutenant Colonel Maleka conceded that, in his opinion, the mere fact that the bank accounts where the funds were deposited in were in the names of the Plaintiff and her son respectively, such fact did not constitute fraud by the Plaintiff or her son. On the other hand, Mrs van Schalkwyk who, according to her evidence is an experienced prosecutor of long standing, insisted that those facts alone constituted adequate grounds for an arrest on a charge of fraud. When asked whether, in her opinion, those facts if proven at the trial without any other facts, would lead to a finding that the Plaintiff and her son would be found guilty of the charge of fraud, she answered that it would constitute a ***prima facie*** case of fraud against them which they would have had to answer. This

reasoning by a self-acclaimed experienced and seasoned State Prosecutor is, to say the least, astounding;

[11.16] When asked why a less drastic measure of obtaining the presence of the Plaintiff at Court than an arrest without a warrant could not have been effected, Mrs van Schalkwyk answered that the provisions of Section 60(11) of the Criminal Procedure Act provides no discretion and that the procedure of arrest had to be followed. She proceeded to attempt to convince the Court that, because of Section 60(11), there is no discretion afforded to the arresting officer. Again, this is a clear misstatement of the law and authorities in relation thereto, and the only inference that can be drawn therefrom is that either Mrs van Schalkwyk is wholly incompetent to be employed in the responsible position of State Prosecutor with it's constitutional responsibilities or simply attempted to mislead the Court;

[11.17] When asked about the "*agreement*" regarding the payment by the Plaintiff's son to Mr de Villiers, and after it was pointed out to Mrs van Schalkwyk that she was aware of the fact that the Plaintiff's son relied on a legally enforceable contractual obligation by his stepfather to repay to him the amount of R50 000.00 and that he was, through the procedure employed, in an extremely precarious situation and repaid monies which he believed was due and owing to him over to a third party to whom he had no legal obligation, she responded by saying that it is "*sy weergawe*" (his version) thereby clearly implicating that she does not understand the gravity of the injustice to Mr du Plooy nor does she believe his version, although she was constraint to admit that she had no reason not to believe him;

[11.18] In the evidence in chief of Mrs van Schalkwyk she testified that she attempted to broker a situation where so-called *"restorative justice"* could be effected to the complainant. It is however clear that the *"agreement"* regarding the payment of the R50 000.00 referred to ***supra***, was not effected in terms of Section 300 of the Criminal Procedure Act 51 of 1997, nor was it done in terms of the guidelines by the Department of Justice regarding *"restorative justice"*. Mrs van Schalkwyk, pointed out that the Department of Justice introduced various measures to control the procedure known as *"restorative justice"* including the requirement of a proper documentatory recordal of these transactions in order to curtail abuses which have taken place in this respect. ***In casu***, there was no recordal of this "**transaction**" anywhere and especially not in Court.

[11.19] I regard the ***modus operandi*** of the parties concerned on behalf of the State to engineer a situation where an accused, who has a ***bona fide*** defence, to the knowledge of the State, is literally blackmailed into paying over to a third party in respect of whom he has no legal obligation to do so, an amount of money relating to a transaction between that party and someone else in order to procure his release from detention after having spent 4 nights and 5 days in detention, in the presence of his wife who is 8 months pregnant and extremely emotional and shocked, without proper adherence to the provisions of Section 35(1)(f) of the Constitution as pronounced upon in various Constitutional Court judgements which places an obligation on those officials in this respect, as a blatant dereliction of duty. This factor will

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be considered ***infra*** when dealing with the issue of malice regarding the prosecution.

UNLAWFUL ARREST – LEGAL REQUIREMENTS:

[12] In ***Minister of Safety and Security v Sekhoto & Another 2011(1) SA CR 315 (SCA)*** at paragraphs [6] and [21] it was held that the jurisdictional facts which must exist before the power to arrest a suspect without a warrant in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 may be invoked are:

[12.1] The arrestor must be a police officer;

[12.2] The arrestor must entertain a suspicion that the arrestee committed an offence referred to in schedule 1 of the Criminal Procedure Act;

[12.3] The suspicion must rest on reasonable grounds.

[13] In ***Louw & Another v Minister of Safety and Security & Others 2006(2) SA CR 178 (T)*** at 183 J to 184 D it was held that, for a reasonable suspicion for purposes of a lawful arrest without a warrant, the arresting officer must investigate any exculpatory explanation offered by the suspect.

[14] The test whether or not reasonable grounds exist for a suspicion, is an objective test and was formulated as follows:

> *"In evaluating this information any reasonable man would bear in mind that the section authorises drastic police action .... The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest ..... the section requires suspicion*

but not certainty. However, the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion."

[Vide: Minister of Safety and Security v Sekhoto & Another 2011(1) SA CR 315 (SCA)]

[15] ***In casu***, it was the evidence of Lieutenant Colonel Maleka that he effected the arrests on the instruction of Mrs van Schalkwyk. He therefore did not apply his mind to the issue as set out in the ***Sekhoto*** judgement and the passage therein quoted ***supra***. Apart from this, on his own evidence he did not believe that the simple fact that the monies were paid into the account of the Plaintiff constituted fraud. This evidence of Lieutenant Colonel Maleka clearly extinguishes any defence which the First Defendant may have had to the Plaintiff's case in this regard. Bearing in mind that it is trite law that the ***onus*** rests on the Defendant to prove lawfulness once it is established that the Plaintiff was arrested, on the evidence of Lieutenant Colonel Maleka the First Defendant dismally failed in this respect.

MALICIOUS PROCEEDINGS:

[16] The requirements for a successful claim for malicious proceedings as set out in the ***Minister of Police v Schubach 2015 (JOL) 32615 (SCA)*** are:

[16.1] The law was set in motion;

[16.2] In setting the law into motion the party acted without a reasonable and/or probable cause;

[16.3] There was malice;

[16.4] The prosecution failed.

[17] From the available facts it is clear that the law was set in motion by employees of both the First Defendant and Second Defendant. The Plaintiff was formally charged with fraud pursuant to her arrest for fraud.

[18] A prosecutor has a duty not to act arbitrarily but with objectivity and in protection of the public interest.

Vide: Carmichael v Minister of Safety and Security & Another, Centre for Applied Legal Studies Intervening, 2002 (1) SA CR 79 (CC) par. 72

In ***Democratic Alliance v President of the RSA & Others 2002(1) ALL SA 243 (SCA)*** it was held:

> *"Despite the variety of arrangements in prosecutors' offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutors' duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether suspects or accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed."*

[19] Mrs van Schalkwyk, when confronted with the issue that she had only available the bank statements of the Plaintiff into which funds were paid, was quick to respond that this created by a *"suspicion"* in her and therefore she proceeded with the charge of fraud, due to the fact that it may later have transpired that the Plaintiff may also had been involved in the fraudulent dealings. She speculated as to whether or not the Plaintiff may have been involved in the business of her husband, without having any factual basis to do so. The cogent answer to this reasoning of Mrs van

Schalkwyk is to be found in ***State v Lubaxa 2001(2) SA CR 703 (SCA)*** at paragraph 19 where it was held that:

> *"Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated ..... and the constitutional protection afforded to dignity and personal freedom (section 10 and section 12) seems to reinforce it.*
>
> *It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold."*

[20] Nine days after the release of the Plaintiff on bail, the charge against her was dropped. Between the time that she was initially arrested on the 4th of November 2010 until the time that the charge was dropped on the 19th of November 2010, no facts transpired which even remotely could have been construed as supporting evidence that the Plaintiff had any dealings with the complainant or made any false representation to the complainant. Once again, the conduct of Mrs van Schalkwyk does not stand up to proper legal scrutiny. There simply was no reasonable ground to charge the Plaintiff with fraud.

[21] Malice can only be inferred from the available facts. Towards the end of the evidence of Mrs van Schalkwyk, she made an emotional plea to the Court stating that she never had any *"kwade gevoelens"* and simply acted in the scope of her duty.

On the available evidence I have no hesitation in rejecting this plea of Mrs van Schalkwyk, for the following reasons:

[21.1] A prosecutor with many years of experience such that of Mrs van Schalkwyk, in a system which is overburdened with cases to such an extent that the rolls of the Courts are congested to a stage where this problem is in the public domain and regularly addressed as an issue for concern on a political and administrative level renders it simply unexplainable why a prosecutor would assist a member of the public as speedily and efficiently as Mr Lambrechts and Mrs van Schalkwyk did assist the complainant by employing the State mechanism and the provisions of the Criminal Procedure Act to achieve nothing more than debt collection, resorting to the blackmail techniques referred to ***supra***. The only inference which can be made from this, is one of malice;

[21.2] The fact that Mrs van Schalkwyk failed to comply with her duty towards the Plaintiff as pronounced in the judgements referred to ***supra***, failed to respect the constitutionally enshrined rights of the Plaintiff in terms of Section 12(1) of the Constitution, but was prepared to allow a middle aged lady and her son to be locked up on request of a member of the public on charges in respect of which no evidence existed can only infer malice;

[21.3] However, the evidence of the Plaintiff, her husband and her son to the effect that Mrs van Schalkwyk initially threatened them and then made it known that they will be released on paying the amount of R175 000.00 to Mr de Villiers, as well as the "*transaction*" conducted in the office of Mr Lambrechts referred to ***supra***, is a clear indication of the abuse of the process of the

Criminal Procedure Act to achieve a result in favour of someone else and not that for which purpose the State machinery and especially the Criminal Procedure Act should be employed for namely the bringing to justice of criminals. This is clearly malicious.

[22] As far as the requirement that the prosecution must fail is concerned, I hold that this does not require that the trial against the Plaintiff should have proceeded and that a finding of not guilty should have been recorded but includes the withdrawal of a charge which was unreasonable brought. To argue otherwise, would be illogical.

COSTS:

[23] I cannot find any reason why the Defendants should not be ordered to pay the Plaintiff's costs. Although the conduct of the officials in the employ of the First and Second Defendants warrant a punitive order for costs, this was not sought by the Plaintiff. I have considered ordering the two officials referred to ***supra*** to pay the costs of the Plaintiff in their personal capacities, in line with the principles as set out in ***Coetzee v National Commissioner of Police & Others 2011(2) SA| 227 GNP, para. 60 – 101***. The two officials concerned were however not party to this litigation and not represented herein and to order them to pay the costs would negate the ***audi alteram partem*** rule. The Registrar of this Court will be requested to forward this judgement to the Defendants cited in this action for their respective consideration and application of any internal or disciplinary measures which they deem fit.

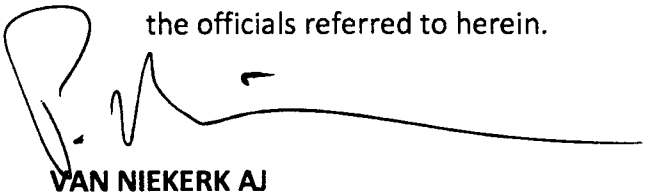
WHEREFORE I MAKE AN ORDER IN THE FOLLOWING TERMS:

[1] It is declared that the arrest and detention of the Plaintiff from 4 November 2010 until 10 November 2010 was unlawful and Plaintiff is entitled to claim damages from the First Defendant in consequence;

[2] It is declared that the prosecution instituted against the Plaintiff in terms whereof the Plaintiff was charged with fraud was malicious and Plaintiff is entitled to claim damages from First- and Second Defendants, jointly, in consequence;

[3] It is ordered that the First and Second Defendants pay the Plaintiff's costs of the separated issue in respect of the merits on the scale as between party and party;

[4] The Registrar is requested to forward this judgement to the First Defendant and the Second Defendant for consideration of any disciplinary or other measures against the officials referred to herein.



VAN NIEKERK AJ

11 November 2016