REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 87563/2016
DOH: 23/08/2019

1. REPORTABLE: **NO** / YES
2. OF INTEREST TO OTHER JUDGES: **NO** / YES
3. REVISED.

..... 30/10/2019
SIGNATURE **DATE**

In the matter of:

REBAONE L MODISAGAOREKWE **PLAINTIFF**

AND

THE MINISTER OF POLICE **FIRST DEFENDANT**

THE NATIONAL DIRECTOR OF PULIC PROSECUTIONS **SECOND RESPONDENT**

JUDGEMENT

N N Bam AJ

A. INTRODUCTION

1. On 10 November 2016 plaintiff issued a summons against the defendants in which he claimed that members of the first defendant, without reasonable or probable cause had wrongfully and unlawfully arrested him, without a warrant, and detained him. They also caused his further detention as a result of failing to uphold their constitutional duty and together with members of the second defendant, maliciously prosecuted him. Damages sought comprise, *inter alia*, general damages for psychological pain and suffering, *contumelia* and embarrassment, loss of earnings, past and estimated future medical expenses, and legal expenses. The defendants have steadfastly denied plaintiff's claims. In the main, they argue that the arresting officer had incriminating information against the plaintiff and the investigating officer carried out his duty by providing information to court; that it was for the plaintiff to discharge the onus that exceptional circumstances exist, which in the interest of justice, justified his release. He failed.

2. To rebut plaintiff's claims, the defendants led the evidence of the arresting officer, Lieutenant Colonel Phemelo (Mr Phemelo) then Captain Phemelo; the prosecutor Mr Tshipo, and investigating officer, Mr Moses Masoge. Masoge resigned from the force in March 2016. Plaintiff testified in his own case and called one witness, his mother.

3. Before going any further, it needs to be mentioned that the defendants had raised a special plea that the matter was pending before the North West High Court. It appears that the parties settled that issue as it did not arise during the trial. By agreement then, the matter proceeded only on the question of liability, with the issue of quantum being held over for determination at a later stage.

B. BACKGROUND

4. To place matters into perspective, a brief summary of the background facts is necessary. On 25 September 2014, an incident was reported to the police to the effect that a robbery had taken place at a tavern known as Choki B, in LoKaleng, North West province. A cash amount of R5000 was allegedly stolen from the tavern, and R60 000 from a delivery truck. The victims' mobile phones to the value of R8000 were also allegedly stolen. Plaintiff was arrested on Saturday 27 September 2014, at around 10h00, while walking to a place called Calabash. His account of the arrest went thus:
While on his way to the Calabash, plaintiff noted a vehicle driving along the same road. The vehicle suddenly stopped and a window rolled down.

Thinking that the occupants were in need of directions, plaintiff slowed down. A voice from the vehicle asked whether his name was Dia and as soon as he responded in the affirmative, all four doors opened; plaintiff was grabbed and pulled inside the vehicle by one of the occupants, all of whom were in casual clothes. He was immediately searched and his mobile phone and cash of about R600[1] confiscated. He related feeling petrified, thinking he was about to be killed by what he thought were kidnappers. The arresting officer was later identified as Mr Phemelo. With him was a W/O Motsamai and others. Plaintiff was taken to the Taung police station in LuKalong were he was asked to sign some papers before he was placed in the cells. In the cells, his cellmates asked him for the reason for his arrest; because he did not know why he had been arested, he replied that he was drunk but the cellmates informed him after looking at his papers that he had been arrested in connection with a robbery. Later on, an officer by the name of Mr Masoge took him to court for his first appearance on 30 September 2014. He was informed that he could only apply for bail after a period of seven days. Plaintiff was incarcerated for 108 days in total.

C. UNLAWFUL ARREST

Suspicion to be based on reasonable grounds

5. The main attack leveled against the arrest was, *inter alia,* that Phemelo could not have entertained a suspicion based on reasonable grounds

[1] The correct amount is R570 according to the police

that the plaintiff had committed a Schedule 1 offence. It was further submitted that Phemelo did not exercise his discretion in good faith, rationally, and not arbitrarily.

6. First defendant bore the onus[2] to justify the arrests and so Mr Phemelo took to the witness stand. Although the first defendant's plea suggested that it relied on section 40 (1) (a), its narrative suggested that it relied on section 40 (1) (b)[3] of the Criminal Procedure Act (CPA[4]).

7. Dealing with the question of how he effected the arrest, Mr Phemelo testified that on the day of arrest, he alighted the vehicle, identified himself using his appointment card, and informed the plaintiff that he was being arrested in connection with the robbery at Choki B. He explained to the plaintiff his constitutional rights and then brought him into the vehicle. As to his reasons for arresting the plaintiff, he testified that he had been tasked with tracing and arresting the plaintiff and he did so after reading two statements made by the complainant, A1, and the witness, A2 *'because he is mentioned in the statement'*.

8. During cross examination, he was asked to read A1 and state what plaintiff had allegedly done according to the statement. He displayed difficulty as the

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[2] *Minister of Safety & Security v N Ndlovu* (788/11) [2012] ZASCA 189 (30 November 2012) at para 10; *Minister of Safety and Security v Sekhoto* (131/10) [2010] ZASCA 141 (19 November 2010), at para 7; *Relyant Trading (Pty) Ltd v Shongwe* [2006] SCA 111 RSA, para 4

[3] In terms of the section: 'A peace officer may without warrant arrest any person-

(a) .....

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

[4] 51 of 1977

statement by A1 is illegible. He was asked whether there was any pressing need or hurry to have plaintiff arrested, he confirmed that there was none. I consider it appropriate to reproduce the relevant, and most importantly, legible parts of the two statements here below. A1 is a statement by the complainant and A2, that of the witness.

A1[5]: **Motheo Ontlatleng Sebeso, a 23 year old male: the complainant**

'*On Thursday 25 September, I was officially on duty at Choki bar from 10h00…I suddenly seen the driver and the two passengers… one male also assaulted me and two males in possession of firearms pointing…Two can be identified if seen and one also known to me as Dia Modisagaorekwe. The one with firearm was searching us and demanded cash while one was just pointing and unarmed and one search us all…I then handed the cash amount R5000… the driver then informed the robbers …cash is…at the back of the truck… they then [threw] the keys of the tavern through a broken window inside the tavern…*' [the parts left out are illegible].

A2[6]: **Chiko Rosi, a male and truck driver and a Zimbabwean national, the witness:**

'On Thursday at 11h45 I went to deliver the alcohol at Chokibi Pub of Mr Thato … Ntikang at Ditshilang Village. At the time, after offloading the beers while I, my two assistants, Talent and Tafadzwa from Kimberly, and the tavern cashier Mr Motheo Sebese and Didimalang Setlaboshane of Dithilang were inside the Tavern and there were no customers in the tavern there came three males persons two having

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[5] page 74-48 -Index Bundle C2- discovered documents

[6] page 71-72 ..

firearms in their hands pointed at us and demanding cash and thoroughly forcing Metheo Sebeso to give them money and they find it. While other one of them also went into the truck and search for money and when he could not find it, he returned back to the tavern and forcefully demanding the truck keys and money and from there they went to search from the back of my front driver's seat where they found a money bag containing of about R55 000 and they forced all of us inside the tavern and locked us inside and when they feel good, they [threw] it back inside the tavern through the door screen. They also took six cell phones from us and the keys of the truck but did not take any liquor from the tavern or the truck.'

9. Three succinct issues emerged during Mr Phemelo's cross examination. He arrested the plaintiff because: (i) he was mentioned in the statement of A1; (ii) his task was to trace and arrest him; and, (iii) he arrests people so that they can come to court and clear their names. This extract from Phemelo's cross examination will go a long way in explaining the conclusions I draw about plaintiff's arrest:

10. As an officer exercising their discretion, what did the Plaintiff do from A1? - **He searched the complainants.**

Where does it say that? - **Page 76 para 2.**

Please read page 76 para 2. - [***Witness cannot find any reference to such information in the statement, because the statement does not say so.***] - **It is in statement A2.** [***Again, witness is directed to A2 to find what the Plaintiff did and then concedes he cannot find such reference.***]

Did you consult with the Plaintiff prior to arresting him?- **No, I only read the statement.**

You know as an officer of law that people do not always tell the truth? - **Yes, that is why we arrest people so they can tell the truth.**

So you only arrested the PF because he is mentioned in statement A1? - **No, I read a statement by Didimalang.**

But Didi's statement was produced in January 2015. It cannot not be the reason for the arrest [*at that time*] - **Yes.**

You never ascertained whether a robbery had in fact taken place? - **No I did not go.**

Did you look out for all relevant aspects that could talk to the guilt or innocence of the plaintiff? - **Yes**

So, you only saw that he had been mentioned in the statement and arrested him? - **No, there is somewhere where it says he came to the tavern before the robbery. [*This information is not in either statement.]***

You see in A2 that the witness describes a tall person wearing a shirt. How difficult was it for you to search the home of the complainant? - **No, I just followed the task I was given, to trace and arrest him.**

So, you will not exercise a discretion as to whether you must or must not arrest him? - **My job was to arrest him. He must come to court and answer.**

So, your job was to simply arrest and not exercise your discretion or decide on the information you had at hand whether to arrest or not arrest him? - **Well, I arrested him. He must come to court and answer.**

Did you not have a discretion to exercise prior to arresting him? - **Well, looking at the seriousness of the offence...**

Was your duty to only arrest or you had a discretion to apply as to whether to or not arrest? - **So, I took a decision to arrest him because he is suspected in this matter.**

Analysis

11. The jurisdictional facts for a section 40 (1) (b) defence as espoused in

Minister of Safety and Security v Sekhoto[7] are: (i) The arrestor must be a peace officer; (ii) The arrestor must entertain a suspicion; (iii) The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) The suspicion must rest on reasonable grounds. To these jurisdictional facts must be added the question of the officer's discretion and whether such discretion was exercised judiciously. (See also *Minister of Safety and Security v Magagula*[8]).

12. The first defendant argued that the mention of plaintiff's name by the complainant gave the arresting officer reasonable suspicion that he had committed an offence as specified in schedule 1. First defendant further suggested that plaintiff could not satisfactorily account for the money found in his possession. This refers to the amount of R570 confiscated by Phemelo on the day of plaintiff's arrest. It is true that this area of plaintiff's testimony was not the best. First, the money was to be paid to someone called Happy at the Calabash. According to the affidavit handed in court on the day of the bail proceedings it was to assist plaintiff to purchase chicken feet and gizzards to sell at the Calabash. When confronted with this contradiction, plaintiff suggested his lawyer may not have understood him. He explained in court that his brother had provided him with the money. His aim was to purchase chicken feet and gizzards and some drinks for the Calabash. He had informed his attorney that in the event she wanted to

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[7] see note 2 supra

[8](991/2016) [2017] ZASCA 103 (6 September 2017), para 10

confirm, his brother could be found in the company of Happy. However weak this area of plaintiff's testimony was, first defendant had no evidence to counter it, and no major damage was done to the plaintiff during cross examination. In fact, the rest of his testimony, from his account of the arrest to his emphatic denial of being involved in the robbery, was left unimpeached. Overall plaintiff evidence was consistent and coherent.

13. Citing the dictum in *Sekhoto*[9], first defendant argued that a lawful arrest could hardly be said to be arbitrary. Respectfully, this conclusion of law does nothing to assist the defendants. The facts of this case speak for themselves. Mr Phemelo could not even tell what the plaintiff had done. He merely claimed he had read the two statements. Even when read together, the two statements cannot be said to have provided Mr Phemelo with reasonable grounds from which he could suspect that the plaintiff had committed an offence. The following justifies this conclusion:

    (i) There is no mention of plaintiff's name in A2. From A1, he could not tell what plaintiff's role was.

    (ii) The two statements contradict each other in material respects. A few examples to illustrate the point are listed below:

        - According to A2, three males walked in with guns whereas in A1 two males had guns;
        - A2 places a person by the name of Didimalang on the scene while

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[9] Note 2 supra

A1 makes no reference to such person being on the scene;

- A1 suggests that many people were searched. See in this regard reference to '*the one with firearm was searching us...*' whereas according to A2, firearms were pointed at the victims with no mention of searching;
- The keys were thrown through a broken window in A1 while in A2 they were thrown through a door screen.

(iii) The arresting officer never even went to the scene to establish whether a robbery had indeed taken place.

(iv) Massage had neither consulted with the complainant nor the witness.

(v) Lastly, given the statement that the complainant knew the plaintiff, Phemelo took no steps to verify whether the plaintiff is the person the complainant saw on the day of the alleged robbery.

11. All the points mentioned in paragraph 13 were questions crying out for answers to which Mr Phemelo paid no attention. Given his own testimony that there was no rush to have the plaintiff arrested, more was expected of Mr Phemelo to obtain information to corroborate complainant's allegations, especially given the seriousness of the charge, robbery with aggravating circumstances (a schedule 6 offence). There was simply not enough information on which he could have rationally formed a reasonable suspicion that plaintiff had committed an offence. Phemelo's own evidence suggests that he neither analyzed nor assessed the quality of information at

his disposal. In *Kotswana v Minister of Safety and Security*[10], the court, referring to *Mabona and Another v Minister of Law and Order and O*[11], noted:

> "The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1) (b) is objective (*S v Nel and another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information, a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant; i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and critically assess the quality of the information at his disposal, and he will not accept it lightly or without checking it where it is possible to check the facts. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion." (See also *Minister of*

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[10](3587/09) [2012] ZAECGHC 10 (1 March 2012) at para 12

[11]1988 (2) SA 654 (SE) at 658 E-G

Safety & Security v N Ndlovu[12]; *Minister of Safety and Security v Tyokwana*[13]; *Minister of Safety and Security v Magagula*[14]).

Discretion

12. From the answers provided by Mr Phemelo, there is no question whether he exercised discretion prior to effecting the arrest. When confronted with the question of what the plaintiff did during the robbery in his cross examination, he had no answer. When confronted with the stark inconsistencies between the two statements, it appeared he had neither weighed nor considered the two statements. He effected the arrest in execution of his task, to trace and arrest the plaintiff, so he can come to court and clear his name. In *Raduvha v Minister of Safety and Security and Another*[15] it was said that:

> "Section 40(1) of the CPA states that a police officer "may" and not "must" or "shall" arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word "may" suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry...In other words the courts should enquire whether in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in *Duncan* or as per *Sekhoto* where the court, cognisant of the importance which the Constitution

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[12] note 2 supra

[13] Minister of Safety and Security v Tyokwana (827/13) [2014] ZASCA 130 (23 September 2014)

[14] note 8 supra

[15] 2016] ZACC 24 Minister of Safety and Security 2016 (2) SACR 540 (CC) para 42 and 43

attaches to the right to liberty and one's own dignity in our constitutional democracy, held that the discretion conferred in section 40(1) must be exercised "in light of the Bill of Rights" [citation omitted].

13. Counsel for the plaintiff suggested in argument that Mr Phemelo's evidence, as it emerged during cross examination, was a text book example of an unlawful arrest. I could not agree more. It is appropriate to draw the conclusion that arrest of the plaintiff was neither premised on a suspicion based on reasonable grounds nor did the arresting officer properly exercise his discretion. It follows that the defendants have failed to discharge the onus placed on them to succeed on their defence in terms of section 40 (1) (b) which makes the arrest of the plaintiff wrongful and unlawful[16]. There is however, no room in the circumstances of this case to draw the conclusion that the plaintiff's arrest was malicious[17].

D. WRONGFUL AND UNLAWFUL DETENTION

14. The investigating officer, according to the plaintiff, failed to uphold his constitutional duty of informing the prosecutor and placing before court an honest account of the material facts surrounding the case[18]. Plaintiff charges that the investigating officer was aware of the absence of reasonable and probable ground for prosecution, but he withheld that

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[16] Kotswana v Minister of Safety and Security, note 10 supra

[17] Relyant Trading (Pty) Ltd v Shongwe, note 2

[18] Carmichele v Minister of Safety and Security and another (Centre of Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) at para 44; Minister of Safety and Security v Tyokwana note 13 supra, at para 39 (d)

information from the court. On the contrary, he the investigating officer, as shall be shown, misled the court, leading to the magistrate exercising her discretion against admitting plaintiff to bail. Plaintiff added that, in ordering his remand in custody, the magistrate had been denied the benefit of the correct information about the state's case. To refute these claims, the defence led the evidence of two witnesses, the prosecutor who prosecuted the case, Mr Steven Tshipo (Tshipo) and Mr Moses Masoge, the investigating officer.

15. Tshipo, testifying for the second defendant, confirmed that he has been stationed at the Magistrates Court in Taung Court since 2012. He began prosecuting in 2013. On 30 Sept 2014, he was in Taung. According to him, the state had decided to prosecute after a screening team comprising senior and control prosecutors had satisfied itself that the matter could be enrolled. The state had a strong case against the plaintiff and it was ready to reinstate the charges, he said. With regard to his decision to oppose bail, he confirmed that he had discussed the state's case with the investigating officer and the latter had recommended that the state oppose bail. During cross examination, he was asked and he confirmed that all that the state had when it made the decision to prosecute were the following, A1, A2, A3 and A4[19]. He was asked to explain the decision to withdraw the charges. He said that the state withdrew because they had decided to first arrest the two outstanding suspects. He was asked whether the two suspects had been

[19] A1 and A2 have already been explained. A3 is a list of the stolen items and A4 is a document titled, Interview with Suspect, which was completed and signed by the investigating officer.

identified and the answer was no. It was put to him that until the two suspects are arrested the state would not proceed with the case. He refuted the statement. On the question of a strong case, he was asked to state what the plaintiff did during the robbery with reference to the two statements, A1 and A2. He said the plaintiff had searched the victims. On being asked to find such reference from the two statements, he conceded that there was no such information in both statements but remained adamant that the state had a strong case against the plaintiff.

16. On the question of the strength of the state's case, he was confronted with his own notes[20] which appear from the investigation diary where he continually asked the investigating officer to, *inter alia:*

(i) provide a report identifying the mobile phone confiscated from the plaintiff;

(ii) verify the plaintiff's statement that the amount of R570 confiscated from him had come from his brother's account; and

(iii) send the firearm/s used in the offence for ballistics; and speed up the investigation.

Later, the notes called for:

(iv) information to clarify what plaintiff did during the robbery.

17. He conceded that the state withdrew the case because it required information on the role played by the plaintiff since it was not clear what the

[20] The notes in the investigation diary began as early as September 2014 until January 2015, pages 139-149 Index Bundle C2 - discovered documents

plaintiff had done during the robbery. He further conceded that the investigation could not be characterized as finalized. It was suggested to him that all that occurred in January 2015 - when the case was withdrawn - is that someone finally applied their mind to the information which had all along been in the state's possession, and concluded that there was no information on the basis of which a successful prosecution can be achieved; thus the charges were withdrawn. He vigorously rejected the suggestion but later conceded that there was not even an identification parade carried out. He conceded that a lot more could have been done by way of investigation. When it was put to him that his failure to be candid with the court about the several difficulties facing the state's case - which he knew as early as the beginning of the bail proceedings on 20 October or before - amounted to recklessness. He denied being reckless stating that according to section 204, the court can convict on the evidence of a single witness. He went further and said that it was for the plaintiff to adduce evidence pointing to exceptional circumstances which, in the interest of justice, demanded that he be admitted to bail and plaintiff failed to do so. It was put to him that he knew that it would be extremely difficult for the plaintiff to be admitted to bail given his assertions in court about a strong case against the plaintiff. He simply stated that that was the law. I understood the last statement as, plaintiff was up against the stringent requirements of the law, given that the offence was a schedule 6.

18. The last witness for the defence was Mr Moses Masoge (Mr Masoge), the

investigating officer. In his examination in chief, he confirmed having interviewed the plaintiff. He explained that when he asked the plaintiff for his name and address, plaintiff refused to provide details. As a consequence, he could not verify his address. He made notes in this regard in the record marked 'Interview with Suspect', A4. He confirmed that he advocated for the refusal of bail because the plaintiff refused to cooperate with the investigation. During cross examination he was asked whether he had spoken to the arresting officer, he said he had not spoken to the arresting officer prior to attending bail proceedings on 20 October. He had no idea that Phemelo knew the plaintiff. He did not know that they had been staying in the same area for five years. He mentioned that he had been informed of number 1005B as plaintiff's home address as opposed to 1004. When it was put to him that the arresting officer was more likely to have had the plaintiff's correct address as he had been responsible for tracing and arresting him, and that on this basis, he (Masoge) could have easily verified plaintiff's address, he conceded that he could have done so.

19. He was then referred to the bail transcript[21] and asked to state what plaintiff had done during the robbery. He said he searched the victims. When asked to find information to that effect from the statements A1 and A2, he demonstrated great difficulty in reading but ultimately conceded that such information was not in the statements. He was asked whether he had procured photographs and/or fingerprints; he said he had tried to obtain the

[21] pages 82 -127 Index bundle C2 - discovered documents

photographs and fingerprints until the day he left the force in March 2016. Asked whether he knows whether they had been taken, he said they had been taken but he could not find them. He further confirmed that the suspects were neither identified nor apprehended at the time of his departure from the force. He had not applied for a search warrant and had not interviewed the complainant nor the witness. He could not say whether the plaintiff's arrest was lawful. Asked whether he carried out the prosecutor's requests as contained in the investigation diary, he explained that he could not take the firearm to ballistics as the suspects had fled with it. The mobile phone confiscated from the plaintiff was his and he had not been able to trace any of the mobile phones allegedly stolen. The question was asked whether, in light of his testimony, he was correct in advising the magistrate that the state had a strong case; he said he was happy with what he had read from A1 and A2. He was asked about his testimony that the state's case was being finalized during bail proceedings. He again referred to A1 and A2.

20. On the question of the 'witnesses' who were repeatedly calling because they were concerned about their safety, he conceded that the only person who said he knew the plaintiff was A1 and A2 lived far away. With regard to his basis for opposing bail, namely, the plaintiff's refusal to cooperate he conceded that plaintiff had a constitutional right to remain silent. He was asked to explain why the state withdrew the charges. He said it was the decision of the prosecutor. He conceded that the basis for the withdrawal of

the case was the same information that had been in the state's hands from September 2014 and that the prosecutor should have withdrawn the case from long ago.

Analysis

21. In *Minister of Safety and Security v Tyokwana*[22] the court noted:

> "It has often been stressed by our courts, that the duty of a policeman who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. See *Prinsloo and another v Newman* 1975 (1) SA 481 (A) at 492G and 495A and *Minister for Justice and Constitutional Development v Moleko*, supra, at para 11. In *Carmichele v Minister of Safety and Security and another 2001 (4) SA 938 (CC)* para 63, it was held that the police have a clear duty to bring to the attention of the prosecutor any factors known to them relevant to the exercise by the magistrate of his discretion to admit a detainee to bail.'

22. It is plain from the investigating officer's cross examination that he misled the court. He avoided several questions by making reference to A1 and A2 after conceding that A1 and A2 contained no reference of plaintiff's role during the robbery. In their submission, the defence simply stated that the investigating officer had informed the court that the plaintiff was arrested for, and charged with, robbery with aggravating circumstances. He went on to state the amount stolen and the fact that a firearm had been stolen. He noted that the complainant had mentioned plaintiff's name. Counsel for the

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[22] Note 13 supra paras 39-40

plaintiff suggested that Masoge had lied to both the prosecutor and the court. Indeed, the objective evidence confirms this conclusion. Below is an illustration of his untruths: First, he informed the court that the investigation was being completed yet he knew that:

(i) he had no idea of what plaintiff had done during the robbery;

(ii) he had not even visited the scene;

(iii) he had neither fingerprints nor photographs relating to the scene;

(iv) neither of the two remaining suspects had been identified nor traced;

(v) he had no corroborating information of A1's account of the robbery, given the material conflicts between the two statements of A1 and A2;

(vi) he demonstrated that he could not read A1, the only statement that mentioned Plaintiff's name;

(vii) He had not even carried out an identification parade to confirm the identity of the person seen by the complainant on the day of the robbery, given plaintiff's denial that he was there; and, most importantly,

(viii) he knew he had no information on the basis of which plaintiff could have been successfully prosecuted.

24. To this must be added his vociferous charging in court that the plaintiff had refused to cooperate with the investigation only to concede during cross examination that plaintiff was exercising his constitutional rights in remaining silent. He embellished the case by suggesting that the witnesses were calling every day when only one person had said he knows a Dia Modisakgaorekwe. He knew that he had never even held an identification

parade to confirm the plaintiff's identity in light of the denial by plaintiff that he was present at the robbery scene. He further denied having spoken to the arresting officer, yet he had recorded in his investigation diary as early as 30 September that Phemelo and Motsamai informed him that they had arrested the plaintiff but when he asked them to provide an arrest and recovering statement they refused. He repeatedly requested them to provide the arrest and recovery statement in vain and had to resort to reporting their failure to a superior. He had noted in the investigation diary that as a consequence of the failure of the two (Phemelo and Motsamai) to provide him with the statement, he could not take plaintiff to court on Monday 29 September 2014.

25. Mr Tshipo began by stating that the state had a case against the plaintiff, and a strong one. The objective facts of the case however, meant that those assertions had to fail. Both he and the investigating officer failed in their duty to bring material information relevant to the exercise of the magistrate's discretion as to whether or not to admit plaintiff to bail. They further opposed bail, relying on the so-called strong case even though they knew that the information in their possession could not objectively support their contentions. On the part of the prosecutor, a single but striking illustration will suffice. The numerous notes he had made in the investigation diary simply tell the story that he knew that there was no information on the basis of which the state could successfully prosecute the plaintiff. Yet he opposed bail on the basis of a strong case against the plaintiff. After conceding that

the state withdrew the charges because it needed information on what the plaintiff did during the robbery, he conceded that a lot could have been done in terms of investigation and that as matters were during the bail proceedings, the investigation could not be characterized as being finalised. None of this was brought to the attention of the court.

26. Having observed the three witnesses in court during the trial, one could not help but come to the ineluctable conclusion that to them, plaintiff was guilty of the offence of robbery with aggravating circumstances until proven otherwise. It is this perversion of the plaintiff's constitutional right to be presumed innocent until his guilt had been established that led to both the prosecutor and the investigating officer opposing bail. In the circumstances, the continued detention of the plaintiff was factually caused by their failure to uphold their constitutional duty. The magistrate's decision to remand plaintiff in custody cannot be an intervening event as it was exercised without relevant information. Thus, their conduct was both the factual and legal cause of plaintiff's detention. Plaintiff's detention was without just cause and was unlawful. (See in this regard *Minister of Safety and Security and another v Carmichele*[23]; *Woji v The Minister of Police*[24]; *Zealand v Minister for Justice and Constitutional Development and Another*[25]; *Relyant*

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[23] note 18 supra

[24] Neutral citation: Woji v The Minister of Police (92/2012) [2014] ZASCA 108 (20 August 2014)

[25] (CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC) ; 2008 (2) SACR 1 (CC) ; 2008 (4) SA 458 (CC) (11 March 2008)

Trading (Pty) Ltd v Shongwe[26]. Without digressing from the subject matter, the implications for those charged with schedule 6 offences when it comes to applying for bail were canvassed at length in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[27] where the legislature's intention to make it extremely onerous on those person seeking bail was confirmed. Both the prosecutor and the investigating officer knew that it would be extremely difficult for the plaintiff to be admitted to bail, especially in light of their opposition.

E. MALICIOUS PROSECUTION

27. In order to succeed in a claim for malicious prosecution, a claimant must allege and prove[28] –

    (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.

28. Element (d) need not be established. The state withdrew the charges in 2015 and four years later; despite Mr Tshipo's insistence in court, the state

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[26] Note 2 supra

[27] 1999 (4) SA 623 (CC) paras 61 to 65

[28] *Minister of Safety and Security v Tyokwana, note 13 supra*; *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) para 8

had made no effort to reinstate the charges. Mr Phemelo set the law in motion when he charged the plaintiff without reasonable cause. The absence of a reasonable cause has already been established.

Animus injuriandi

29. In terms of the dictum in *Minister for Justice and Constitutional Development v Moleko*[29], 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 – "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." '

30. Something quite striking about the conduct of the defendants, from the arresting officer, the investigating officer to the prosecutor, needs to be mentioned. They all had a version of what the plaintiff allegedly did during the robbery which could not be supported by a single shred of evidence. Mr Tshipo's own writing in the investigation diary with which he was confronted during cross examination, simply showed that the state had no probable nor reasonable cause for perpetuating the prosecution of the plaintiff and, that unless the state achieved the information sought, its case was doomed to fail as it did in January 2015, yet he persisted with the prosecution.

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[29] note 27 supra

31. Although the facts suggest that both the investigating officer and the prosecutor knew they had no credible information on which the state could rely on for the successful prosecution of the plaintiff, they both informed the court about the 'strong case', knowing full well that the information was incorrect. They both knew that basic information regarding this investigation was outstanding. (See in this regard paragraph 22.) They violated their duty as already stated, reliance being placed on *Minister of Safety and Security and another v Carmichele; Woji v The Minister of Police*. In *Relyant Trading (Pty) Ltd v Shongwe*[30] this was said of malicious prosecution:

> 'Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with 'malice' or *animo iniuriarum*. Although the expression 'malice' is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:
>
> 'Where relief is claimed by this action 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.'

32. Although vigorously denied by Mr Tshipo, the objective evidence points to a conclusion of recklessness. Both Tshipo and Masoge must have foreseen the wrongfulness of their conduct in withholding relevant information from

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[30] note 2 supra

the court while exchanging notes in the investigation diary which were sufficient to conclude that the state had no credible evidence on which it could successfully prosecute the plaintiff. They both must have foreseen the harm to the dignity and person of the plaintiff, yet they continued with the prosecution regardless. Tshipo conceded in the end when he said that the state withdrew the case because it lacked details of what plaintiff did during the robbery. This was the case in September 2014. The answers he received from the investigating officer pursuant to his own requests made it plain that the state had no case against the plaintiff. Yet they both informed the court of a strong case yet they both conceded that their assertions were incorrect. Surely, they both appreciated the wrongfulness of their conduct be carried on regardless. In *Minister for Justice & Constitutional Development v Moleko*[31]*, it was said that:*

> 'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.'

33. They (both the investigating officer and the prosecutor) had no regard for the plaintiff's constitutional rights and the injury that their conduct would visit upon the plaintiff's dignity. The plaintiff has succeeded in discharging the onus that the duo acted with *animus injuriandi.*

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[31] Note 27 supra paragraph 64-65

F. CAUSATION

34. The facts of this case, in totality, leave no room for debate that the conduct of the first defendant caused the unlawful and wrongful detention of the plaintiff including the detention. But for the conduct of the first defendant, the plaintiff would not have suffered the indignity of being arrested unlawfully. Both defendants' conduct was the factual and legal cause of the plaintiff's continued detention as they both failed to uphold their constitutional duty of placing before the magistrate an honest account of the state's case (See *Woji*[32]*; Tyokwana*[33]*; and De Klerk v Minister of Police*[34]). The conduct of both first and second defendants caused the malicious prosecution of the plaintiff. I am satisfied that the plaintiff has succeeded in establishing that he has been a victim of an unlawful arrest, unlawful and wrongful detention and malicious prosecution as a result of the conduct of both the first and second defendants in the respects already mentioned. Both defendants must accordingly be held liable for the plaintiff's costs, taxed or agreed.

G. ORDER

35. The following order is made:

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[32] supra

[33] supra

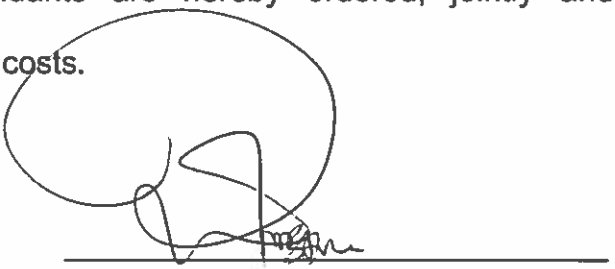
[34] (CCT 95/18) [2019] ZACC 32 (22 August 2019)

(i) Plaintiff's case is upheld.

(ii) The defendants' conduct infracted plaintiff's constitutional rights without just cause, in the respects articulated in this judgement;

(iii) The defendants are to be held liable to compensate plaintiff's proven damages;

(iv) First and second defendants are hereby ordered, jointly and severally, to pay plaintiff's costs.



NN BAM

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

APPEARANCES

DATE OF HEARING	:	**23 AUGUST 2019**
DATE OF JUDGMENT	:	**OCTOBER 2019**

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