

SOUTH AFRICA / JUDGMENT

Bhekinkosi and Others v Minister of Police and Others (88521/2018) [2024] ZAGPPHC 620 (18 June 2024) [2024] ZAGPPHC 620

COURT

North Gauteng High Court, Pretoria

BEFORE

Flatela

CASE / FILE NUMBER

88521/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 88521/2018

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

18

June 2024

In

the matter between:

MDLETSHE SIPHO
BHEKINKOSI
First Plaintiff
BIGBOY
NCUBE
Second Plaintiff
TSOTETSI GODFERY
THEMBA Third
Plaintiff
And
THE MINISTER OF
POLICE
First Defendant

NATIONAL DIRECTOR:

PUBLIC PROSECUTION Second
Defendant
MINISTER OF JUSTICE &
CONSTITUTIONAL
Third
Defendant
DEVELOPMENT

JUDGMENT

FLATELA J

Introduction

1. The Plaintiffs instituted an action against the Defendants for damages arising from their unlawful arrest and detention (Claim A) and malicious prosecution (Claim B).
2. The plaintiffs were arrested by the members of the South African Police Service (“The SAPS”) without a warrant. The First and Second Plaintiffs were arrested on 23 November 2016, and the Third Plaintiff was arrested on 1 December 2016 on charges of armed robbery, kidnapping, possession of an unlicensed firearm and ammunition and the possession of explosives in contravention of section 6(1) of the Explosive Act 26 of 1956. The Plaintiffs were detained in custody and only released on the 9th of July 2018.
3. At the commencement of the hearing, the parties requested the Court to grant an order declaring that the merits and quantum be separated in terms of Rule 33(4) of the Uniform Rules of Court. The request for such an order was granted and the matter proceeded with respect to the merits only.

4. The Defendants admitted that the Plaintiffs were arrested but averred that the Plaintiffs arrest was legally justified in terms of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("The CPA"), as amended.

Issues

5. This Court was called to consider whether the Plaintiffs arrest was unlawful and whether there was malicious prosecution. In an instance where the Court finds in favor of the Plaintiffs, it follows that the detention is also unlawful.

The common cause facts

6. The following are the common cause facts:
 - 6.1. The First and Second Plaintiffs were arrested and detained on 23 November 2016, while the Third Plaintiff was arrested and detained on 1 December 2016.
 - 6.2. The officers who arrested the Plaintiffs were the members of the South African Police Service and they were acting within the scope of their employment with the First Defendant.
 - 6.3. The First Plaintiff was a peace officer at the time of his arrest; he was a reservist in South African Police Service under the command of the late Colonel Eric Nkosi, based at the Dobsonville Police station.
 - 6.4. The arrest of the plaintiffs was effected without warrants of arrest.

Onus of Proof

7. It is common cause that the defendants justified the arrest, and as such, they assumed such a duty to begin with.

The Legal Principles

8. It is trite that the arrest or detention of the Plaintiffs is prima facie unlawful, and the Defendants had to justify the arrest. When the arrest and detention is admitted, the State has an onus to prove their lawfulness.
9. Section 40(1)(b) of the CPA, permits a peace officer to arrest someone without a warrant where there is reasonable suspicion that a Schedule 1 offense has been committed.
10. It is trite that where a peace officer is acting under section 40(1)(b) entertains a suspicion that it is reasonable that the suspect has committed a Schedule 1 offence, the arrest is lawful.

There are four jurisdictional facts to be proved in justification of section 40(1)(b) defence, namely;

- 10.1. The arrestor must be a peace officer.
- 10.2. The arrestor must entertain a suspicion.

10.3. The suspicion must be that the suspect (the arrestee) committed or is committing an offense referred to in Schedule 1; and

10.4. The suspicion must rest on reasonable grounds.[1]

11. In *Duncan v Minister of Law and Order*[2], Van Heerden JA held that once the jurisdictional requirements of section 40(1)(b) of the CPA are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest a suspect permitted by section 40(1)(b). However, the discretion must be properly exercised in good faith, rationally and not arbitrarily. If not, reliance on section 40(1) will not be available to the peace officer.
12. Having dealt with the principles governing the unlawful arrest, I now deal with the evidence tendered.

The Defendant's evidence

13. The Defendants called upon five witnesses to testify on their behalf: Sergeant Hlongwane, Captain Pienaar- the arresting officer; Colonel Velloen – the Investigating Officer; Captain Pieterse and Warrant Officer Venter. The first witness that was called on behalf of the Defendants was Sergeant Hlongwane.

Sergeant Hlongwane

14. Sergeant Hlongwane testified as follows:

14.1. He is employed as a Sergeant at Roodepoort Police Station with sixteen years of experience. On 23 November 2016, he was on patrol duty with his crew member Sergeant Mamburu in Matholeville area, Roodepoort, he was a driver of the Police Marked Van.

14.2. They were stopped by the community members who reported to them that there was a silver double cab bakkie whose occupants were robbing people at Lindelani Squatter Camp,

14.3. While patrolling, they spotted the van with a similar description to that as described by the community members and they attempted to stop it but the driver did not stop. Sergeant Hlongwane noticed that there were five people inside the bakkie and one of the occupants lifted his hands, showing the handcuffs.

14.4. He followed the bakkie until the driver, who later turned out to be the First Plaintiff, stopped at the corner of Mathew Goniwe and Randfontein Road. The First Plaintiff came out to them and produced an appointment card of a police officer and showed it to them.

14.5. Sergeant Hlongwane testified that the First plaintiff informed them that he was investigating a murder case where one of the suspects was on the run. He showed them an article from the Daily Sun Newspaper regarding the murder case. While Sergeant Hlongwane and the First Plaintiff were still talking, a group of people attacked the plaintiffs by throwing stones at them and at their bakkie. They demanded the release of two man that were in First Plaintiff's bakkie. Due to the commotion, Sergeant Hlongwane and the First Plaintiff reached an agreement that they should all go to the Roodepoort Police Station to resolve the issue between the

First Plaintiff and the two suspects. The two suspects were transferred to Sergeant Hlongwane's car because the angry mob accused the Plaintiffs of robbing them and that the Plaintiffs were personifying police officers.

14.6. The Plaintiffs and Sergeant Hlongwane followed each other to the Roodepoort Police Station. At the police station, they found Captain Pienaar and Captain Pieterse, who inquired about the matter, Sergeant Hlongwane gave a report accordingly. Captain Pienaar and Captain Pieterse advised Sergeant Hlongwane and Sergeant Mamburu to make a statement, which they made under oath; thereafter, they were released to continue with their patrolling duties.

14.7. Sergeant Hlongwane testified that only the First and Second Plaintiffs and two suspects went to the Police Station, the Third Plaintiff did not follow them to the police station. He was left behind to fetch his car, but he never followed them to the police station as agreed.

14.8. Under cross-examination, Sergeant Hlongwane was asked if there were injuries during the mob attack, he testified that there were injuries sustained by the one who went to fetch his car, the Third Plaintiff. He stated further that the Third Plaintiff never came to the Police Station. It was put to him that the Third Plaintiff later went to the police station with the First and Second Plaintiffs, and due to his injuries, Captain Pienaar and Colonel Velloen organized an ambulance to take him to the hospital to be treated.

Sergeant Hlongwane denied that the Third Plaintiff came with the First and Second Plaintiff to the Police Station, testifying that he never saw him at the station. He testified that he left the Police station shortly after writing the statement to continue with his duties.

15. The second witness that was called was an arresting officer, Captain Pienaar who testified as follows;

15.1. That he is a retired Captain with 41 years of experience in the South African Police Service. He testified that on the day of the arrest, he was on standby duty at the Roodepoort Police Station. He testified that Captain Calitz requested him to deal with the matter. He then interviewed Sergeant Hlongwane regarding the background information of the matter. He testified that Sergeant Hlongwane informed him that while they were patrolling, they were stopped by a group of community members who reported to him and his crew member that there was an armed robbery which had been carried on by people driving a double cab bakkie in Matholeville informal settlement wherein a firearm was used, and that the two complainants were forced into a double cab bakkie, he further testified that the community threw stones at the bakkie.

15.2. Captain Pienaar then interviewed the two complainants, Mr. Nponyana and Mr. Sithole, who confirmed that they were robbed at gunpoint, and they pointed out two males, the First and Second Plaintiff as the people who robbed them.

15.3. Captain Pienaar testified that he then interviewed the First Plaintiff and attempted to get information from him, but the First Plaintiff was not co-operative. He testified that he heard from the bystanders at the police station that the First Plaintiff was a Reservist from the Dobsonville police station. He requested the First plaintiff to produce a pocketbook SAPS 206, he further requested him to confirm whether he was legally booked on duty on the day in question and also requested that he produce the log book required to drive the state vehicle.

The First Plaintiff failed to produce those documents. He also asked him to produce a document that authorized him to be in possession of a police officer issued firearm, but he failed to produce such authorization. The First Plaintiff then handed over the issued 9mm Pistol to him, and on inspection, Captain Pienaar realized that some rounds were missing, and the empty cartridges were later found in the Toyota bakkie together with some explosives when the bakkie was searched.

15.4. Captain Pienaar testified that he interviewed the Second Plaintiff regarding the allegations and the second plaintiff failed to provide an explanation. Captain Pienaar testified that he then entertained a reasonable suspicion that the First and Second Plaintiffs had committed a Schedule 1 offence, and he then informed them about their constitutional rights and proceeded to arrest them.

15.5. Captain Pienaar denied the allegation that he organized for the collection of the Third Plaintiff's car from Matholeville, and he also denied the allegation that he arranged for an ambulance to take the Third Plaintiff the hospital.

15.6. Under cross-examination, Captain Pienaar was asked why he arrested the First and the Second Plaintiffs. Captain Pienaar stated that he arrested them on the strength of a report given to him by Sergeant Hlongwane and a document at his disposal. He was asked if he knew how the two suspects/complainants ended up at the police station. Captain Pienaar stated that Sergeant Hlongwane brought the two complainants into the station, but he did not know how they ended up with Sergeant Hlongwane.

15.7. During cross-examination, Captain Pienaar conceded that he arrested the First and Second Plaintiff on the strength of the pointing out made by the complainants.. Furthermore, he stated that he arrested the First Plaintiff because he failed to produce a log book authorizing the use of the state vehicle, adding that the First Plaintiff failed to show him his pocketbook and failed to show that he had authorization documents for the possession of a firearm, and he was not accompanied by a permanent member.

15.8. Captain Pienaar conceded during cross-examination that he did not doubt that the First Plaintiff was a police officer, he saw him completing the docket in the police station but then the suspects he arrested became complainants against the Forst Plaintiff. The First Plaintiff could not explain nor provide the necessary documents that would support his averments nor explain the authority to use police resources at the time and he was not cooperative.

15.9. Captain Pienaar testified that at the time of arrest, it seemed that the First Plaintiff was not on duty and that the standing orders

governing Category B Reservists were not followed, the First Plaintiff failed to produce the logbook, the OB and the occurrence

book. When asked what happened to the suspects who became complainants against the Plaintiffs, he offered no explanation. Counsel for the Plaintiff told him that his client will come and testify that one of the complainants was released while the First Plaintiff was speaking to him. He denied the allegation but confirmed that Colonel Velloen took over the investigation upon the First Plaintiff's arrest.

Colonel Velloen

16. The third witness that the defendants called was Colonel Velloen.

16.1. He testified that he was assigned as the investigating officer in the matter. He had 33 years of service in the South African Police Service. He was stationed at the SAPS provincial office and was assigned the case because it involved a police officer. He testified that his investigation revealed that the Toyota RunX motor vehicle that the Third plaintiff was driving on 23 November 2016, was borrowed from Mr. Dube, who made a statement under oath. Based on this information, which implicated the Third Plaintiff as being part of the Plaintiffs involvement in the robbery, he instructed Warrant Officer Venter to arrest the Third Plaintiff on 1 December

2016. Colonel Velloen asserts that he had a reasonable suspicion to arrest the Third Plaintiff and that section 40(1)(b) of the CPA authorized him to make an arrest without a warrant.

16.2. Colonel Velloen testified that on 9 July 2018, the matter was removed from the trial roll because the two complainants could not be traced. He testified that he made every effort to trace the witnesses but to no avail. He visited their addresses, went to the mortuaries, and attempted to trace them using the Rica data of cell phone companies to no avail. He stated further that the matter would be re-enrolled if the witnesses became available.

16.3. Under cross-examination, it was put to him that he opposed the bail application and one of the grounds for opposing bail was that the Second Plaintiff was suspected to have been sentenced by the High Court, Kwa-Zulu Natal Division to 35 years' imprisonment for murder and that the matter was postponed for further investigations. It later transpired that the Second Plaintiff was not an accused in the Kwa-Zulu Natal matter. It was put to him that it was his ineptitude that caused the Second Plaintiff to remain in detention as the person who was convicted for 35 years who could not have been released from prison.

Captain Pieterse

17. The fourth witness to be called was Captain Pieterse was called as a fourth witness and he testified that he is a Captain in the SAPS with an experience of 30 years and is based at the Roodepoort police station. He testified that on December 1, 2016, he was on duty and standing outside smoking when an unknown Black male waved at him and approached him. The unknown man requested that he must make a plan so that he would not be arrested, it later transpired that the unknown man was the Third Plaintiff.
18. Under cross examination, it was stated to him that the Third Plaintiff was a police informant, and Captain Pieterse was asked why the Third Plaintiff was not charged with an attempt to bribe a police officer. He did not respond. He was told that the allegation was a fabrication as the Third Plaintiff had never been charged for the alleged crime.
19. This was the whole of the evidence presented on behalf of the First Defendant regarding the arrest and detention. I now deal with Plaintiff's evidence.

The Plaintiff's evidence

Tsotetsi Godfrey Themba

20. The Third Plaintiff was the first to testify and testified as follows that:

20.1. He was a trader and an informant working with the First Plaintiff. On the day of his arrest, he went to buy stock for his shop in Sunshine, Roodepoort, when he spotted four men who were standing outside of a silver bakkie; one of them was Thapelo, a murder suspect whom the First Plaintiff was investigating. The First Plaintiff had asked the Third Plaintiff to help him find Thapelo, who was well known to him. Upon spotting Thapelo, The Third Plaintiff called the First Plaintiff to inform him that he had just seen Thapelo. The First Plaintiff told him to watch him as he was making his way to him. He testified that after a few minutes, the occupants of the silver bakkie got into the vehicle and headed to Matholeville, the Second and Third Plaintiffs followed them. Upon arriving at Matholeville, Thapelo and his friends entered an area with a lot of shacks.

20.2. The Third Plaintiff testified that he parked his vehicle far from where Thapelo parked his car and called the First Plaintiff. The First Plaintiff advised that he was on his way and that they must watch Thapelo's movements. Thapelo and the occupants came out of their vehicle and spoke a bit. The First Plaintiff then informed that he would not be able to navigate his way into the informal settlement. The Third plaintiff went on foot to fetch the First Plaintiff. He asked the Second Plaintiff to watch Thapelo and the occupants' movement. The First Plaintiff was walking in front, and he wanted to make sure that he did not lose Thapelo. Thapelo and others entered into one of the shacks, which was L-shaped, and the door remained opened. The First Plaintiff entered the shack where Thapelo entered. The Third Plaintiff stopped in the passage, and he then heard the First Plaintiff and the man arguing inside the shack. The First Plaintiff came out of the shack with two males who were handcuffed together, he also came out carrying a plastic bag. The First Plaintiff took them to his car and when he asked the First Plaintiff why these two males were arrested, the First Plaintiff said that they were naughty. They entered the First Plaintiff's car with the two male suspects.

20.3. The Third Plaintiff testified that they entered a tar road, they saw the police van with two police officers. The Third Plaintiff alighted from the vehicle to fetch his car, the RunX. Before he could reach his vehicle, he saw a group of men approaching them and shouting that they must release the suspects. They threw stones at him, and he subsequently incurred injuries. He then returned to the bakkie driven by the First Plaintiff where the suspects were. The Third Plaintiff testified that a female police officer who was in the police marked van called one of the handcuffed men by his name. The police took the suspects out of the first plaintiffs' vehicle to the police-marked vehicle.

20.4. During the commotion, a marked metro police golf vehicle passed by, made a U-Turn to investigate the commotion. Officer Jacobus assisted the First, Second and Third Plaintiffs by removing them from the crowd and moving them to the other side of the river. The First Plaintiff asked the female cop to follow them to the other side of the river. The Third Plaintiff testified that he went to the police station with the First and Second plaintiff. The police van with the suspects arrived later at the Police Station with only one suspect. Upon their arrival, Sergeant Hlongwane went to Captain Pienaar, and they spoke. The Plaintiffs were told to sit outside.

20.5. The Third Plaintiff testified that he wanted to fetch his vehicle, but the First Plaintiff told Pienaar about the vehicle, and Captain

Pienaar called one of the officers to fetch the car. Captain Pienaar asked him about his injuries. He then called an ambulance to take him to Leratong Hospital to be treated. The Third Plaintiff testified that the ambulance came to the police station and took him to the hospital for treatment. He was admitted and released on the same day. He then went back home and did not return to the police station. He testified that he did not go back to the police station and had no interest in going back to the police station because he had not been arrested. He testified that while he could not explain to the family of the Second Plaintiff where the second Plaintiff was, he could not risk going to the police station when the First and Second Plaintiffs were arrested.

20.6. On 1 December 2018, while accompanying his friend, members of the South African Police stopped their vehicle. He was arrested and taken to the Roodepoort Police Station. When he asked why he was arrested, Colonel Velloen told him that he would know at court. Notice of rights were given to him, but the charge was not written on the notice of rights. He was locked up and placed in a cell. He went to court for his first appearance on 5 December 2016 for a bail application. He attended two bails hearings; however, bail was refused. He appeared many times in court, but the police came up with new issues in court, which caused a delay in the finalization of the matter. On 9 July 2018, on the date of trial, they were released but he could not hear what was said in court, but they were told that the charges were withdrawn.

20.7. The Third Plaintiff testified that at the time of his arrest, he owned three spaza shops. He sold all three shops as his wife could not maintain them while he was detained. The Third Plaintiff maintained that he was not involved in the robbery. He did not speak to the complainantshad no firearm.

20.8. Under cross-examination, it was put to him that Captain Pienaar denied that he arranged to fetch his vehicle and that he had had called an ambulance to take him to the hospital. The Third Plaintiff stated that Captain Pienaar had called the ambulance. He says his details appeared in the hospital computer, but his file was lost, and therefore, there are no records of the file, but the file number is there.

20.9. Under cross-examination, he confirmed that he borrowed the car from one Mr Dube, the owner; he borrowed it from him in order to buy stock. When asked why he referred to the car as his throughout the proceedings, the Third Plaintiff testified that he referred to the car as his because the car was in his possession at the time of the incident. He was asked who fetched the car from Matholeville and dropped it off at the Police Station. He stated that Captain Pienaar fetched the car where he left it and came with it to the police station. It was put to him that Captain Pienaar denied that he had fetched the car. The Third plaintiff stated that Pienaar was not telling the truth. It was put to him that he did not go to the police station, and he disagreed when asked if he had seen the docket regarding the murder case in which Thapelo was the suspect, the Third Plaintiff stated that he was an informant and had never seen a docket.

20.10. He confirmed that when he was discharged from hospital, he did not return to the police station despite the fact that the car he

borrowed was still at the station, for fear that he would be arrested, and his friend was arrested. He stated that that he was not going back to be arrested when he believed he was innocent. The Third Plaintiff denied that he tried to bribe Warrant Officer Venter.

First Plaintiff - Sipho Mdletshe

21. The First Plaintiff, Sipho Bhekinkosi Mdletshe, testified next. He averred that he is self-employed and at times he is called to the Police Station to assist with cases. On 23 November 2016, The First Plaintiff went to work and attended a parade at Dobsonville Police Station, where he was stationed as a police reservist. He received a call from the Third Plaintiff, who was his informant, advising him that he spotted Thapelo, a suspect he was looking for in connection to a murder case he was working on. He then told the Third Plaintiff to follow the suspect. He consulted with his supervisor, the late Colonel Nkosi, who was the branch commander and the head of detectives, regarding the phone call. Colonel Nkosi told him to rush to where the suspect was spotted. He gave him authority to drive a state car, a grey Toyota Double cab, handcuffs and a firearm. He drove to the place where Thapelo was alleged to have been seen. The Third Plaintiff was waiting for him on the road while the Second Plaintiff was watching the suspects.
22. They proceeded to the yard where Thapelo had entered with his group of friends and the yard was filled with many shacks. When the suspect and his friends saw them coming, they ran and went into one of the shacks. He followed the suspect to a shack where he thought they had entered, but he found the two complainants with explosives in their possession. He asked them what they were doing with the explosives, and they told him that they were using them for illegal mining. The First Plaintiff further testified that there were two gas

cylinders that were used to melt the gold. He arrested and handcuffed the two man and took them to the bakkie in order to formally charge them at Roodepoort Police Station.

23. On his way to Roodepoort Police Station to formally charge the suspects, he saw a marked police van which was driven by Sergeant Hlongwane and Sergeant Mamburu. Sergeant Hlongwane greeted him and asked him what was happening, and upon being told about the suspects, Sergeant Hlongwane told him that he was not permitted to arrest people in their area. The First Plaintiff told Sergeant Hlongwane that he could arrest the suspects anywhere. One of the suspects called the police officer by name, and the First Plaintiff

asked them if they knew them. While they were still talking, a group of illegal miners known as Zama-Zama's approached them with the intention to take the suspects away from him; they threw stones at him and at the state vehicle. He asked Sergeant Hlongwane and Sergeant Mampuru to take the suspects to the Roodepoort Police Station. The First Plaintiff then discharged a firearm to disperse the mob. A Captain from Metro Police under K9 came and helped them with the commotion and advised them to get out of Matholeville.

24. The First Plaintiff testified that Mampuru was shouting at them and said they would make sure that he was arrested. He drove to Roodepoort Police Station. He was driving in front and Sergeant Hlongwane and the two suspects were following them. He was with the Second Plaintiff and the Third Plaintiff was bleeding. He entered

through the back gate and waited for Sergeant Hlongwane and the suspects. While waiting, Captain Pienaar called him by his name and position, and when he enquired how he knew him, Captain Pienaar said he knew everyone in that area. Sergeant Hlongwane and his crew member arrived with the suspects and parked next to the vehicle driven by the First Plaintiff. Sergeant Hlongwane and his crew member came to him with one of the suspects while Captain Pienaar continued to speak with him, and he asked him how he arrested the suspects. The First Plaintiff realized that the suspects had disappeared while Pienaar was talking to him.

25. The First Plaintiff testified that he looked for a duty officer and told the officer to bring the suspects to him to formally charge them, the police came with both suspects. Captain Pienaar called Captain Pieterse aside and spoke to him, and the First Plaintiff did not know what they were talking about. Captain Pienaar came back to him and told him that they would hold the two suspects for him.
26. The First Plaintiff testified that he went to the charge office to prepare the docket. Warrant Officer Venter gave him all the stationery to prepare the docket and to open a case. He was busy with the preparation of the docket before he could give it to the data typist for registration. Captain Pienaar asked to see the docket he was preparing and at that stage, the First Plaintiff testified that many cars driven by white people came to the police station, among those white people was Colonel Velloen from the Provincial Office. Colonel Velloen said that he was there as an observer as he was informed that the police were attacked at Matholeville. Captain Pienaar then told him the suspects he came with were now complainants, and he was then placed under arrest with the second plaintiff. He was then

charged with the second plaintiff and Colonel Velloen was an investigating officer in their matter. The First Plaintiff testified that he objected to Colonel Velloen being an investigating officer as he was present during the arrest, but his objection was ignored, and he was told that he knew too much.

27. The Plaintiffs appeared in court on 25 November 2016, and the case was remanded for seven days to allow the State to conduct further investigations. The First Plaintiff testified that during the bail proceedings he testified that he informed the court that he had another docket opened for robbery in Roodepoort and another one for the possession of explosives, cases which had pending trial dates. He further advised that he was a witness in those two matters, but the court refused him bail.

The Plaintiffs spent a month in detention, while the police opposed their bail application and alleged that there was a murder case in Kwa-Zulu Natal which was linked to the Second Plaintiff. It was alleged that the Second Plaintiff was sentenced to 35 years' imprisonment. It would later transpire that the Second Plaintiff was not involved in the aforementioned matter. That resulted in them spending several months in jail until they petitioned the High Court for their release on bail.

28. Under cross-examination, the First Plaintiff was asked how he lost sight of Thapelo, whom he testified that he saw entering the shack, but ended up arresting the two suspects. He was referred to Mpenyana's statement that one of the suspects, that Mdletshe, the Second plaintiff, robbed them of money, gold, and a gold scale. He denied robbing them and stated that there were too many shacks and that the Third Respondent called him when they were already inside the shack and so, he would not know the shack they were in.
29. Under cross-examination, it was put to him that the reason for his arrest was that he failed to produce the necessary authorisation documents for the vehicle and gun. Mdletshe stated that Captain Pienaar was not telling the truth because when he arrived at the police station, there was no need to ask all those questions because he had no reason to suspect that he had committed any crime. The suspects went to the holding cells to wait for him to open the docket, and the first time he saw him was when he opened the docket. He stated that Colonel Velloen took the logbook and pocketbook and denied that he failed to produce the logbook. He further stated that there was no way that one could drive a state vehicle without a logbook as the logbook is always in the car.
30. When asked why he produced a newspaper extract about the murder case he was investigating instead of a docket, he stated that the docket was with the investigating officer. He was on the tracing agents' team and the paper extract had all the information about the case.
31. Under cross-examination, he was asked to explain his statement of arrest. He stated that he arrested both suspects, he intended to acquire an additional state witness, but the suspects instead ran away.

32. Lastly, he was asked a few questions about the reservists and whether they are fully functional police officers with the same power of arrest. He confirmed that the reservists are fully functional police officers.
33. The First Plaintiff was asked if the informer was registered and whether he received payment from the police. The first plaintiff stated that he was not registered, and that informers were not paid.

Testimony of Big Boy Ncube

34. The Second Plaintiff was the last witness to testify. He testified that he was self-employed, and he bought and sold clothing and blankets. On 23 November 2016, he was accompanying the Third Plaintiff to Roodepoort when he noticed the Third Plaintiff reducing

the car's speed as they approached a bakkie with four occupants. The Third plaintiff informed him that one of the occupants

was wanted by the police. The Third Plaintiff then made a call. The car with the suspect drove past them, and they followed it until they reached Matholeville.

35. The suspect and his friends parked their car and went by foot to Matholeville. The Third Plaintiff also parked his car far away from where the suspect and his friends were parked. The Third Plaintiff told him to wait for him as he was collecting the First Plaintiff. When the First and Third plaintiffs arrived, the suspect and his friends ran away and entered a shack. The First and Third plaintiffs came out of the shack with the two suspects who were hand cuffed. The First Plaintiff came out also carrying a black plastic bag.
36. They went to the car and as they entered the tar road, they noticed a police van. The Third Plaintiff alighted from the vehicle to fetch his car, the police van stopped too. The police were speaking with the First Plaintiff when the group of Zama-Zama attacked them with stones and hit the Third Plaintiff, prompting the Third Plaintiff to return to the First Plaintiffs bakkie. Another K9 police officer driving a golf assisted in dispersing the crowd. The two suspects were transferred to the police van. The plaintiffs went together to the police station, while at the police station, the police van arrived with only one suspect.
37. The Second Plaintiff avers that Captain Pienaar called an ambulance to take the Third Plaintiff to the hospital. Captain Pienaar went upstairs with Mdletshe and told him that he was arresting him for armed robbery. The Plaintiffs appeared in court after two days. Captain Pienaar charged them with armed robbery, kidnapping and possession of explosives. They were detained for one year and seven months.
38. Regarding Claim B, he testified that the State opposed his bail application on the basis that he was arrested in 2013 in Pietermaritzburg for murder and armed robbery and was sentenced to 35 years. He testified that as a result, he stayed for 1 year and 7 months in prison, but Colonel Velloen needed a few days, maybe two weeks, to verify the information.

39. Regarding his passport, the Second Plaintiff testified that he was in the country legally at the time of his arrest but due to his arrest he stayed in the country for more than three months, which caused his visa to expire. Under cross-examination, it was suggested that he was tasked with watching Thapelo. He agreed but stated that it was the First and Second Plaintiffs who went inside the shack and came out with the two suspects.
40. Regarding his passport, he was told that the other reason for the postponement of proceedings, the bail was that his visa had expired; he testified that his passport was valid until the end of November 2016.

Discussion

41. The Pleadings were not a model of clarity. Both Plaintiff's and Defendant's pleaded evidence in their amended pleadings, respectively.
42. Captain Pienaar, the arresting officer, testified that he arrested the First and Second Plaintiffs on the strength of Sergeant Hlongwane's report to him and on the information contained in a statement of the two complainants who stated that they were robbed at gunpoint by the First and Second Plaintiffs. The complainants also pointed out the First and Second Plaintiff as the people who robbed him. Therefore, he reasonably suspected that the Plaintiffs committed a Schedule 1 offence.
43. The question that this Court must answer is whether, based on the information that was available to Captain Pienaar at the time of arrest, he could have formed a reasonable suspicion that the Plaintiffs committed a Schedule 1 offence. To answer this question, the Court must look at the information that was available to him at the time of arrest, not after the arrest.
44. When Sergeant Hlongwane spoke the First Plaintiff in Matholeville, he had no suspicion at that stage that the Plaintiff had committed an offence. He was still merely seeking information from the First Plaintiff pertaining to the reports they received from the community members when the mob of illegal miners known as the Zama -Zama attacked the Plaintiff's car with stones. During the commotion, the First Plaintiff discharged a warning shot to disperse the mob who wanted to violently take the suspects from the Plaintiff's vehicle in the presence of the Police Officers. There is nothing in Sergeant Hlongwane's statement suggesting that he and his crew member suspected that the Plaintiffs must have committed an offence. The contention by the arresting officer that he arrested the First and Second Plaintiffs on the strength of Sergeant Hlongwane's report is not supported by Hlongwane's evidence and statement.
45. It is common cause that the mob of Zama-Zama attacked the Plaintiffs and their vehicle and the Police Vehicle while Sergeant Hlongwane was conversing with the First Plaintiff. Sergeant Hlongwane testified that it was agreed between them that due to the violent attacks from the group of the illegal miners who wanted the two suspects to be released by force, that the two suspects that the First Plaintiff arrested should be transferred to a Police

marked vehicle driven by Sergeant Hlongwane and that they must all go to the police station to resolve the issue.

46. The evidence was that the two suspects were held in the holding cells so that the First Plaintiff could formally charge them.
 47. While Captain Pienaar testified that he did not doubt that the First Plaintiff was a police officer, he failed to conduct further investigations to verify the First Plaintiff's credentials and whether the First Plaintiff was on duty and was authorised to use the service pistol, handcuffs and police vehicle which is information that could have been easily secured by contacting the First Plaintiff's supervisor. Captain Pienaar also failed to assess the information given to him by the suspects, who were self-confessed illegal miners who were brought to the Police Station to be charged by the First Plaintiff for possession of illegal explosives and gold.
 48. The other information available to the arresting officer was the complainants' statements. The two suspects made contradictory statements regarding the incident. Captain Pienaar relied on these statements, and these statements were admitted as evidence. I propose to deal with these statements below.
 49. The first statement, deposed under oath by Moses Nponyana, stated that:
 - 49.1. He is a Zimbabwean citizen living in Tshepisoeng who conducts illegal mining by burning/purifying gold. On the day of the incident, he was in the Matholeville squatter camp conducting illegal mining activities; he used gas cylinder to purify gold for customers. While he was busy purifying the gold for a customer, two black men entered his shack, and they brought his friend Meshack with. They introduced themselves as police officers, and one of them took out handcuffs and handcuffed them together. The other one searched him and robbed him of the R4000 that was inside his underpants. They also took 25 grams of gold that had been purified, and they also took his scale used for measuring gold. The two men made a call to the third man who came with the grey bakkie. On arrival, the third man showed them his appointment card and a firearm and told them that he was a police officer. He took them to his vehicle and drove away with them.
 - 49.2. While in the van, Meshack managed to un-cuff himself. The police van stopped the bakkie he was in, and while the driver of the bakkie was talking to them, the other man who stole from them ran towards the street where he parked his RunX. The community chased the man and threw stones at him, and he ran back to the vehicle. The community stoned the First Plaintiff's car as the First Plaintiff drove off.
- The police only took Meshack with them. He followed on foot so that the police could take off the handcuffs off him. When they arrived at a set of robots, the police took off the handcuff off his hands. He stated that the value of gold stolen was R11 000.00.

50. Meshack Sithole stated under oath that on the day of the incident, he was visiting his friend, Moses Sithole, in the Matholeville squatter camp. Moses arrived with a customer who needed gold to be purified. Meshack stated that he entered the shack with the customer to have the gold purified and went and stood outside the shack. While he was busy outside, two black men appeared and asked him where his car was; one of them pushed him into the shack where Moses and his customer were busy burning the gold. They introduced themselves as police officers, and he asked them to show him their appointment card or their guns, but they failed to do so. They took out the handcuffs and handcuffed them. The Third Plaintiff arrived at the shack and introduced himself as a policeman and produced a police card and his firearm. Then they took him and Moses and put them inside the van, leaving the customer behind; the policeman issued a warning to them that they were under arrest for the possession of explosives and possession of illegal gold.
51. While traveling with the Plaintiffs, they came across a police van, and he lifted the handcuffed hand for the police to see him; the marked vehicle made a U-Turn and followed the bakkie, and the driver of the bakkie stopped it and told the police in uniform that he is also a policeman. They were then transferred to the marked police van. The uniform member took him with them, and they followed the bakkie, which drove off when the mob attacked it. They arrived at the police station with the marked van, and that was all the information he provided.
52. In *Mabona and Another v Minister of Law and Order and Another*[3], the court defined reasonable suspicion contemplated in section 40(1)(b) as follows:
- "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 be stolen? It seems to me that in evaluating this 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 assess the quality of the information at his disposal critically, and he will not accept lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest."*
53. The statements by the two suspects, turned complainants, contained contradictory information pertaining to how they were allegedly robbed.
- 53.1. Moses admitted that he is an illegal miner from Zimbabwe and was arrested by the First Plaintiff while purifying some gold;
- 53.2. The complainant's statements do not state that guns were used to threaten them. Instead, they state that the First Plaintiff, upon their request showed them his police appointment card and he then showed them a gun.

53.3. Meshack stated that his friend Moses was with the client when the two black men approached them. They were arrested but the client Moses brought was not arrested, they left the client in the shack.

53.4. When the First Plaintiff arrested them, he informed them that they were under arrest for illegal possession of explosives and possession of illegal gold.

53.5. Moses stated that the Third Plaintiff was attacked by a group of illegal miners when he tried to get to his motor vehicle, and he ran back to the car driven by the First plaintiff.

54. It seems to me that a reasonable man in the position of Captain Pienaar would have given himself time to critically analyze the information received from the two suspects turned complainants while bearing in mind that the complainants were brought to the police station as suspects to be charged and that he would not just accept the information without even attempting to investigate it
55. There was not enough information to justify the Plaintiff's arrest on the defendant's own showing, for example, no one disputed that the First Plaintiff was a Police Reservist and that he had gone to the police station to charge the two suspects. The First Plaintiff showed his appointment card to Sergeant Hlongwane and his crew member. Captain Pienaar testified that he had no doubt that the First Plaintiff was a Police Reservist. He attempted to get certain information from the First plaintiff, but he did not get it. It is clear that when he arrested the plaintiffs, he did not have enough information to arrest them. He did not give himself enough time to gather the information he was looking for, which in my opinion could have been easily established.
56. Captain Pienaar testified that he saw the First Plaintiff when he was opening the docket, in the process of charging the complainants but he did not even wait for the First Plaintiff to complete the process, he simply accepted the allegations made by the suspects turned complainants without investigating them.

Similarly, Colonel Velloen, and Warrant Officer Venter also relied on the complainant's statements to effect the arrest of the Third Respondent. Therefore, I am not satisfied that Captain Pienaar, could have formed a reasonable suspicion to justify the arrest of the Plaintiffs with the information at their disposal at the time of their arrest.

57. Accordingly, the arrest is not justified in terms of section 40(1)(b) and is unlawful, it follows that the detention is also unlawful.

Consequently, the Defendant is liable for Plaintiffs' proven damages for the period spent in detention.

Claim B

58. The Plaintiffs also claims damages for malicious prosecution. The Plaintiff contends that when formulating the charges, the First and Second Defendants had no reasonable and probable cause. The Plaintiffs contends further that the Prosecution was negligent in charging the Plaintiffs with schedule 6 offenses that were not supported by facts, thereby placing the Plaintiffs in a situation where they had to prove that exceptional circumstances existed at the time of their bail proceedings.
59. It is trite that for the Plaintiffs to succeed in a claim for malicious prosecution, the claimants must allege and prove that (i) the Defendants set the law in motion, they instigated and instituted the proceedings, (ii) they acted without reasonable and probable cause; (iii) they acted with malice; and (iv) the prosecution failed.
60. It is common cause that the Defendants have set the law in motion and instituted proceedings against the plaintiffs. The question that this Court must answer is whether the defendants acted without reasonable cause and whether the prosecution was malicious,
61. Schreiner JA in *Beckenstrater v Rottcher and Theunissen* [4] formulated the test for absence of reasonable and probable cause as follows:

“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 offense charged; if,

despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element

comes into play and disproves the existence, for the defendant, of reasonable and probable cause.

It follows that a defendant will not be liable if he or she holds 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 of reasonable and 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.’

62. Simply put, the prosecution must have a prima facie case against the Plaintiffs, which means that if they were to lead the evidence, they would secure a conviction. In order to assess whether the prosecution has probable cause, the State called Mr Shadrack Mahine Temeki whose evidence can be summarised as follows:

62.1. He is a Regional Court Prosecutor with 19 years' experience as an advanced Regional Court interpreter. After stating what his responsibilities were, he testified that he received and considered the Roodepoort CAS617/11/2016 on 25 November 2016. It contained police statements and complainants' statements where the complainants alleged that they were robbed at gunpoint by the Plaintiffs. The complainants pointed out the First and Second Plaintiff.

62.2. Mr. Temeki testified that having read the case docket, he was satisfied that a prima facie case was made against the Plaintiffs. He decided to prosecute them, and he enrolled the matter. All of the Plaintiffs were charged with Schedule 6 offenses, and they needed to prove that exceptional

circumstances existed to satisfy the court for their bail application to be successful.

62.3. Mr Temeki testified that the charges against the Plaintiffs were not withdrawn, but the matter was removed from the roll because the witnesses could not be traced. Once the witnesses become available, the matter will be re-enrolled.

63. Under cross-examination, Mr Temeki was asked what his responsibilities were with upon receiving the docket; he stated that he read the statements and all other information in the docket and then decided to proceed with the prosecution proceedings. He was further asked whether he received the unregistered docket of the First Plaintiff, which the Defendants discovered. Mr Temeki stated that he was not certain if he received it, but if he did, he would have considered it.

64. On the correctness of the charges formulated against the Plaintiffs, Mr Temeki stated that they were properly formulated and that all the elements of the charges were present. He testified that the decision to prosecute was supported by objective facts and that there were reasonable prospects of securing a conviction.

65. The charges against the plaintiffs were formulated as follows:

65.1. Robbery with aggravating circumstances

The plaintiffs assaulted the complainants and forcefully took an amount of R4000 in cash from them. They informed the suspects that they were police officials, and the Second and Third Plaintiffs were in possession of the firearm, which was used to instill fear in them.

65.2. Possession of the firearm

The First Plaintiff unlawfully possessed a firearm.

65.3. Possession of ammunition

The First Plaintiff unlawfully possessed ammunition.

65.4. False representation

Only the Second and Third Plaintiffs pretended to be policemen.

65.5. Kidnapping

The three plaintiffs stole their freedom of movement by cuffing them together, taking them against their will into a vehicle, and driving away.

The three plaintiffs, with each other's help and for a common purpose, unlawfully kept, stored, or possessed explosives or components thereof in a motor vehicle in contravention of section 6(1)(a) read with section 6(2) of the Explosives Act 26 of 1956.

66. A charge of robbery with aggravated circumstances is a Schedule 6 offense. The information provided regarding this offense was false; nowhere in Nponyan's statement does he state that the First Plaintiff's gun was used to threaten them or that they were robbed at gun point.
67. Regarding the charges of possession of a gun and ammunition, there was simply insufficient information to formulate this charge against the First Plaintiff. Captain Pienaar testified that at the time of arrest, the First Plaintiff surrendered his service pistol and ammunition. He also testified that he had no doubt that the First Plaintiff was a police officer. There was simply no basis to charge him with these charges without investigation.
68. Mr Temeki relied on Moses' statement which he read into the record, where Moses states in paragraph 5 that one of the Plaintiffs had a plastic bag with him.
69. The evidence presented by Mr. Temeki on the formulation of schedule 6 offenses was not supported by the complainants' statements contained in the case docket. He failed to point out the witness statements where it was stated that the Plaintiffs had robbed them at gunpoint.
70. On the charges of Kidnapping and being found in possession of explosives, Meshack Sithole, in his statement, stated that "they took Moses and me, left the customer and put us inside the grey bakkie which came with a policeman, they warned us that we were under arrest for possession of explosives and possession of illegal gold".
71. I am satisfied that the Plaintiffs have discharged their onus in proving that there was no probable and reasonable cause to prosecute.
72. In *Patel v National Director of Public Prosecutions* In *Patel v NDPP*
- [5] Ledwaba DJP, dealing with the requirement of malice in cases of malicious prosecution, expressed himself as follows:[6]

"To determine whether there was malice or not, it will be worth recalling what the Supreme Court of Appeal said when it dealt with the duty of the prosecutor in Minister of Police and Another v Du Plessis:

'A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest. In *S v Jija and Others* 1991 (2) SA 52 (E) at 67I-68B, the following appears:

‘I must also mention that the court had an uneasy feeling that state counsel had misconceived his function. It appeared to the court from the nature of his address and attitude that he regarded his role as that of an advocate representing a client. A prosecutor, however, stands in special relation to the court. His paramount duty is not to procure a conviction but to assist the court in ascertaining the truth’

In *Democratic Alliance v President of the Republic of South Africa and Others*, this court, after a discussion concerning prosecutorial independence in democratic societies, quoted, with approval, the following part of a paper presented at an international seminar by Mr James Hamilton, the then substitute member of Venice Commission and Director of Public Prosecution in Ireland:

‘Despite the variety of arrangements in prosecutor’s office, 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 parties involved in the criminal justice system. The prosecutor’s duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects of accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed.’

We should all be concerned about the maintenance and promotion of the rule of law. Given increasing litigating involving the NDPP, these principles cannot be repeated often enough. We ignore them at our peril.

A prosecutor exercises discretion on the basis of the information before him or her. In *S v Lubaxa*, this court said the following:

‘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 (s 10 and s 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.’

[24] Courts are not overly eager to limit or interfere with the legitimate exercise of the prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court, which can intervene where such discretion is improperly exercised. See generally *National Director of Public Prosecutions v Zuma*.

The following was held in *Du Plessis*.

‘Indeed a court should be obliged to and therefore ought to intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.’

The second defendant should have been satisfied that there was reasonable and probable cause, not just a prima facie case against the plaintiff. The prosecutor should interrogate the docket in its entirety and apply his/her mind properly before making a decision. Again, if I accept the version of Ms. Nxele, it implies that Adv Noko was not a credible witness, and she fabricated the evidence. The defence failed to call the officer who commissioned Ms Nxele's statement, so that he could testify if the complainant understood the contents of her statement and confirm the truthfulness thereof." [footnotes omitted]

73. I am satisfied that the Plaintiffs have proven on a balance of probabilities that the Defendants acted with malice when prosecuting

them.

74. Accordingly, the following order is made.

1. The Defendants are liable for the proven damages suffered by the Plaintiffs with respect to the unlawful arrest and detention of the Plaintiffs as well as malicious prosecution.
2. The Defendants shall pay the Plaintiff's costs, including the costs of two counsel.

FLATELA L

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 18 June 2024.

APPEARANCES:

Counsel for the Plaintiff: Adv JSC Nkosi with Adv LJL Mokoape

Attorney for the Plaintiff MWIM & Associates Inc

Counsel for the Defendants: Adv Sape

Attorney for the Defendants: State Attorneys

Date of Hearing:

: May 22,23,24,25 2023 and 2 June 2023

Date of

Judgment:

:18 June 2024

[1] Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818 G-H.

- [2] Ibid.
- [3] 1988 (2) SA 654 at 658F to H
- [4] (1955) 1 SA 129 (A) at 136A-B;
- [5] 2018
- (2) SACR 420 (KZD).
- [6] Patel v National Director of Public Prosecutions and Others at para 21 to 25.
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