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

CASE NO: 10702/2016

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: Yes

Date: 20/12/ 2018

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Signature

In the matter between:

WILLIAM JONKERS Plaintiff

and

THE MINISTER OF POLICE First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION Second Defendant

J U D G M E N T

MAIER-FRAWLEY AJ:

Introduction

1. The plaintiff instituted an action for damages against the Minister of Police (first defendant) and the Director of Public Prosecutions (second defendant)[1] for unlawful arrest and detention and malicious prosecution.

2. By agreement between the parties, the trial was confined to the merits of the claim, with the question of quantum standing over for later determination, if necessary.

3. On 8 January 2015 the plaintiff was arrested by a police officer, without warrant, whilst he was at the Johannesburg Family Court. It was not in dispute that the plaintiff had been involved in a custody dispute with the mother of his child, Ms. Lorna Bemand, at the time. The fact that Ms Bemand had on 9 August 2014 laid a complaint of assault against the plaintiff was also not in dispute.

4. The plaintiff's pleaded case is that he was arrested for domestic violence by Detective Segodi,[2] placed in handcuffs, made to walk in the streets from the Family Court to the Johannesburg Central Magistrate Court, where he was detained in the court cells until his first appearance in court on 8 January 2015 at approximately

[1] The *National Director of Public Prosecutions* was substituted as second defendant in the place of the *Director of Public Prosecutions* by way of notice dated 6 November 2018, which I am told, occurred by agreement between the parties.

[2] See: para 9 of the particulars of claim. In support of this averment, the plaintiff relied on a document headed 'Notice of Rights in terms of the Constitution', attached as "WJ1", evidencing that the plaintiff was informed that he was being detained for 'assault under domestic violence as per case 168/08/2014 – SAP 14/44/01/2015'. The plaintiff avers in para 10 of the particulars of claim that he was *unlawfully* arrested [on 8 January 2015].

15h00 that same day.[3] Pursuant to the first appearance in court, he was remanded into custody and the matter was postponed to the 19th January 2015. The State opposed the grant of bail on 8 January 2015, *inter alia,* on the basis of an alleged murder charge that was pending against the plaintiff in Cape Town.

5. The plaintiff avers in paragraphs 12 to 16 of the particulars of claim that *as a result of the alleged pending murder charge*, he was wrongfully and unlawfully detained at the Johannesburg Correctional Centre until the 19th January 2015. When he appeared in court on that occasion, he was 'informed that he was mistaken for a different Mr. Jonkers, who was wanted for murder in Cape Town'. He was released 'on warning with certain bail conditions', *inter alia,* requiring him to report to his local police station on a weekly basis. The matter was further postponed to 24 March 2015, on which date the State withdrew all charges against him.

6. The arrest without warrant and subsequent detention of the plaintiff is not disputed. What is disputed is the alleged unlawfulness thereof. The defendants' pleaded case, as amended, is that the arrest and detention was lawful, reasonable and justified in terms of section 40(1)(b) alternatively, section 40(1)(q)[4] or further alternatively, section 50 of the Criminal procedure Act 51 of 1977 (CPA). Moreover, the defendants pleaded that the date of the plaintiff's first appearance in court was 9 January 2015 and not 8 January 2015, as alleged by the plaintiff.

7. The plaintiff's claim for malicious prosecution (which I might point out was rather ineptly pleaded)[5] is denied in the defendants' plea.[6] *Inter alia,* the defendant avers

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[3] In para 10 of the parties' pre-trial minute dated 2 November 2018 (at p88 of the papers) the plaintiff admitted having appeared in court on the 4th January 2015 but stated that this was not his first appearance in court.

[4] The defendant's amended plea referred to section 40(1)(j) of the CPA but at the commencement of the trial, the defendant sought an amendment thereof to reflect section 40(1)(q) of the CPA, which was not opposed, and which was accordingly granted.

[5] On the pleadings, no distinction was drawn between the two separate and distinct causes of action of wrongful arrest (and detention) and malicious prosecution. (See Tödt v Ipser 1993 (3) SA 577 (A) at 587 A-C.)

As regards the claim for malicious prosecution, there were no allegations in the particulars of claim to the effect that the defendants had acted with 'malice' (or *animo injuriandi),* being one of the four elements required to be alleged (and proved) in a claim for malicious prosecution.

that there were, and still are, reasonable and probable grounds for prosecuting the plaintiff. The defendants admit that the case was withdrawn against the plaintiff on 24 March 2015 but pleads that the matter was mediated upon on such occasion, resulting in the complainant filing a withdrawal statement wherein she requested that the charges against the plaintiff be withdrawn because the plaintiff had apologised, which apology she had accepted, and because the plaintiff had undertaken not to assault her ever again. Thus, it was only by virtue of the complainant's unwillingness to proceed that the case against the plaintiff was withdrawn.

8. It was common cause between the parties that members of the SAPS and prosecutors who dealt with the matter were acting in the course and scope of their employment with the first and second respondents, who are sought to be held vicariously liable for the wrongful and/or unlawful acts of their employees.

9. It is trite that police bear the onus to justify an arrest and detention up to an arrestee's first appearance in court.[7] Justification for the detention after an arrest until a first appearance in court continues to rest on the police.[8] Thereafter, the authority to detain the suspect further is then within the discretion of the court.[9] The parties were in agreement that the plaintiff bore the onus in respect of the

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As regards the claim for unlawful detention, there was no allegation that the detention of the plaintiff, prior to his first appearance in court [on 8 January 2015, on the plaintiff's pleaded version], was unlawful. Indeed, the issue of the unlawfulness of the detention prior to the first appearance in court [on 8 January 2015] did not feature in the plaintiff's pleaded case, assumedly because the plaintiff was averred to have been arraigned in court on the same day as his arrest. No amendment was sought by the plaintiff at the trial in order to bring his claim within the purview of a claim for unlawful detention relating to the period of detention prior to the plaintiff's first appearance in court, or to incorporate the necessary averments as regards the claim for malicious prosecution.

[6] See: para 16.1 at p41 of the papers (as read with paras 12.1 to 13.2 of the plea).

[7] See *Minister of Police v Du Plessis* (666/2012) [2013] ZASCA 119 (20 September 2013) at para [14] with reference to *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) at 589E-F.

[8] Ibid *Du Plessis*, para [17].

[9] See: *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 SCA at 331C [para 42].

claim for malicious prosecution.[10] It was presumably for this reason that the plaintiff assumed the duty to begin at trial.

Evidence at trial

10. Only the plaintiff testified in support of his case. The defendants called three witnesses in support of their case: the arresting officer (Sergeant Segodi); the public prosecutor who mediated in the matter (Mr. Staffa); and the control prosecutor who took the decision to prosecute the plaintiff on charges of assault GBH[11] and who gave directed that bail should be opposed (Ms. Bianca Heunis).

Plaintiff's evidence

11. The plaintiff testified that he had attended a custody case at the Family Court on 8 January 2015. At the conclusion of the custody proceedings, he was approached by Sgt Segodi ('Segodi') who asked if he was William Jonkers and identified himself as a policeman. Segodi was dressed in civilian clothes, wearing a firearm on his waist. Segodi then told the plaintiff that he was arresting him. Segodi did not disclose the reason for the arrest or explain the plaintiff's rights to him in terms of the Constitution. He was hand cuffed and taken on foot to the basement parking at West Gate Magistrate Court, where Segodi's motor vehicle was parked. There the plaintiff found another officer seated in the driver's seat who thereupon drove them to Gold Reef City. Segodi sat in the front passenger seat whilst the plaintiff sat in the rear passenger seat. When the plaintiff enquired why he was arrested, Segodi merely told him that 'yours is a serious matter'.

12. On arrival at Gold Reef City, Segodi un-cuffed him and proceeded to pick up three other suspects at gate 5, whereafter they left for Booysens Police Station. All four suspects sat in the back of the vehicle, behind the policemen who were seated in front.

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[10] See: *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 SCA at 590f [para 8].

[11] Assault with intent to do grievous bodily harm.

13. At Booysens police station, Segodi attended to the other suspects first and decided to release them. When the plaintiff enquired why he was not being released he was again told that 'yours is a serious matter.'

14. He was then taken to the Johannesburg Central Police Station where he was detained overnight. The following morning, on 9 January 2015, he appeared in court.[12] He heard the prosecutor say something about him having committed a murder in Cape Town. He was told that he was not getting bail. The case was remanded to the 19th January 2015 for a formal bail hearing to be held, with the plaintiff being held in custody during the intervening period. When asked by his counsel as to why the case was postponed to the 19th January 2015, the plaintiff testified that '*I just assumed, because you can't always hear, that it was a serious matter and now I am going to Sun City[13] because they say I committed a murder*.'

15. When he appeared in court on the 19th January 2015, the prosecutor told the court that the pending murder charge related to a suspect bearing the same name but a different ID number to that of the accused (plaintiff). When asked by his counsel whether he could recall if the prosecutor had told the court that he (plaintiff) was a threat to the complainant, his response was: '*maybe, I can't recall*.' He testified that he was released on warning, subject to conditions, and the case was again postponed. More pertinently, the plaintiff stated that it was only on 19 January 2015 that he learnt for the first time that he was being charged for assault (relating to the complaint that had been made by Ms Bemand). On this date, he asked for a legal aid lawyer to assist him. It is common cause that the plaintiff was thereafter legally represented by Mr. Morena, as also appears from the Court record.

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[12] According to the Court record of the proceedings on that day, being a public record on which both parties relied at trial, the prosecutor was one, Mr. Sapepa, From the handwritten record, it appears that the prosecutor, in opposing bail, addressed the court with reference to the seriousness of the alleged assault on the complainant as well as the medical evidence contained in the J88, which confirmed injuries such as swelling, and marks consistent with strangulation to the neck of the complainant. In addition, reference was made to a pending case of murder in Cape Town concerning the accused before court (present plaintiff).

[13] Being a reference to the Johannesburg Central prison.

16. During his evidence in-chief, the plaintiff was referred, *inter alia,* to a document headed 'Notice of rights in terms of the Constitution,'[14] being the self-same document annexed to the particulars of claim, which contains a certificate by the detainee confirming that he has been informed of his rights and that he understands the contents thereof.[15] The plaintiff stated that he did not recall being given this document (which recorded the nature of the charge against him) and that he did not 'recognise' the signature of the suspect appearing therein. The plaintiff was referred to a document headed 'Warning Statement by Suspect,'[16] bearing a signature by the suspect and containing (in paragraph 7 thereof) the suspect's statement. After reading the statement in court, the plaintiff confirmed that '*I did tell this statement to the policeman who detained me.'* The statement was exculpatory in nature and reads in relevant part, as follows: 'I deny the allegations against me. Usually *my girlfriend whom I share the child with (Lorna Bemand)* brings the child to me for weekends as we not staying together. I went to her place to fetch our child since she failed to brought her. On my arrival at her place I noticed that my child (one year –five days) had a bruise on her forehead. I then took my child, called the community and I was advised to open a case against *my girlfriend*…' (emphasis added) Again, the plaintiff testified that he did not recognise the signature of the suspect appearing thereon, stating that '*the signature brings doubt*.'

17. In response to a question by his counsel as to whether he recalls being asked to sign documents by the arresting officer, the plaintiff said '*I can't recall. It could have happened.*'

18. During his further testimony, the plaintiff confirmed that the case was withdrawn against him. He denied that he had agreed to mediation or that his lawyer had explained to him what the mediation process was about. According to the plaintiff,

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[14] The document appears at p.43 of the plaintiff's bundle.

[15] As indicated earlier, the plaintiff relied on the contents of this document for his averment that he had been arrested for domestic violence. Paragraph 1 of the notice reads as follows: 'You are being detained for the following reason: Assault under domestic violence as per case 168/08/2014 – SAP 14/44/01/2015.'

[16] The warning statement appears at pp 44 -47 of the papers. The suspect's exculpatory statement recorded therein appears at p.46 of the papers. The warning statement records the reason for the arrest as 'assault under domestic violence.'

'*Before it was withdrawn, the prosecutor called me in and said that I must never hit her* [Lorna Bemand] *again. I said I will never hit her again because I just wanted to get away.'*

19. During cross-examination, the plaintiff denied that Segodi had furnished him with a written notice of rights in terms of the Constitution (referred to earlier in the judgment) or that Segodi took down a warning statement from him or that he made the exculpatory statement recorded in the warning statement at p.46 of the plaintiff's bundle.[17] He also denied that Segodi ever informed him about the charge of assault concerning the case that had been opened by Ms Lorna Bemand against him.

20. The plaintiff admitted the accuracy of his personal information appearing in manuscript handwriting in the 'warning statement by suspect' (at p43 of the plaintiff's bundle), such as his work address, home and work telephone numbers and date of birth. Initially, the plaintiff indicated that he could not recall whether he had provided the information to Segodi, however, he admitted that he was not known to Segodi prior to the arrest and that he may have furnished these details to Segodi. He however denied ever having furnished his identity number to Segodi or the identity number as recorded in the warning statement. [It was common case at the trial that the identity number appearing in the warning statement, being '6**8** […]' was incorrect and that the plaintiff's identity number is in fact '6**4** […]'].

21. When it was put to the plaintiff that the information concerning the identity number of the suspect could only have been supplied by the plaintiff and that Segodi would have had no idea as to whether or not the information supplied by the plaintiff was correct or not, since Segodi had not verified the information supplied at that stage, the plaintiff stated that Segodi never asked him for his ID number and hence he did not supply it to Segodi. The plaintiff later suggested that

[17] This testimony is at variance with his evidence-in-chief which was to the effect that he could not recall having signed any documents, stating that he may have done so, and was also inconsistent with his version that he had relayed the contents of the statement, as recorded therein, to Segodi.

someone else may have given the information to Segodi and even went so far as to state: 'why would I give my fingerprints [to Segodi]?'[18]

22. The plaintiff agreed under cross-examination that a mediation process had taken place but stated that it occurred without him ever agreeing to it. The plaintiff was questioned about the fallacy of his version, having regard to the contents of the written informal settlement agreement concluded between himself and the complainant, Ms. Lorna Bemand, on 24 March 2018.[19] The plaintiff admitted signing the mediation agreement and being represented by Mr. Morena during the mediation process.[20]

Sgt Segodi's evidence

23. Segodi testified that a case docket, which had been opened on 9 August 2014 concerning a case of 'assault under domestic violence' in respect of a complainant by the name of Lorna Bemand, was allocated to him, as investigating officer, for further investigation. He received the docket on 10 August 2018. Both the complainant and the plaintiff were unknown to him at the time.

24. Once he had familiarised himself with the contents of the file, which, *inter alia,* contained the complainant's A1 statement, he conducted further investigations. *Inter alia,* he went to see the complainant, Ms. Lorna Bemand, and discussed details of the alleged assault with her, as per her written statement.[21] She showed

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[18] This evidence was at variance with the plaintiff's admission during pre-trial enquiries, namely, that his fingerprints were uplifted after his arrest, as recorded in para 7 at p.87 of the papers.

[19] The informal settlement agreement appears at p93 of the plaintiff's bundle.

[20] The mediation agreement records, *inter alia*, that the parties *'acknowledge that this agreement is entered into freely, voluntarily and the parties are of sound mind and sober senses. The parties hereby agree that the matter will be withdrawn subject to the following: See withdrawal statement attached. The parties acknowledge that the State may reinstitute a prosecution should there be non-compliance with the terms of the agreement*.' The attached withdrawal statement, which was deposed to by Ms. Lorna Bemand under oath, records that the charge of assault GBH was to be withdrawn for the following reasons: '1.1 *Accused has apologised and I have accepted the apology. 1.2 Accused undertakes not to assault me ever again.*'

[21] According to her sworn statement contained in 'A1' of the docket, , Ms. Bemand stated that she was assaulted by the father of her child [plaintiff] on 9 August 2014 at 29 Water Bok, corner Lindeque drive and Bella vista Road, West Turffontein. The plaintiff allegedly assaulted her with open hands

him what she had looked like after the assault, as depicted on photos that she had taken. He himself observed bruising to her face, which was consistent with the injuries depicted on the photographs.[22] He also had sight of a report that had been prepared by a medical practitioner of a medico-legal examination which he had conducted on the complainant together with an affidavit prepared in terms of section 212 (4) of the CPA that had been deposed to by the examining doctor, dated 13 August 2013[23] and a J88 form depicting sketches of the injuries clinically observed by the doctor during the course of his examination, which depicted bruising and swelling around the left eye and strangulation marks to the neck of the complainant.

25. The information contained in the investigation diary[24] outlined certain other preliminary investigations that Segodi undertook, which among others included attempts at locating the plaintiff on more than one occasion, both at his reported residential address as well as at another address that had been provided by the complainant. He could not find the plaintiff at either one of the addresses. He referred the matter to the SAPS tracing unit for purposes of locating the plaintiff after hours. The tracers were unsuccessful in making contact with the plaintiff after hours. A 'point out note'[25] was completed and handed to the complainant containing Segodi's contact numbers to enable the complainant to contact him telephonically in the event that she sighted the plaintiff.

26. Prior to 8 January 2015, Segodi had interviewed the complainant, had read her sworn statement, had himself observed the injuries she sustained in the alleged assault and had considered the medical evidence on record, including the doctor's

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and fists on the face and pulled her by the hair. He also pulled her by the neck, resulting in injuries to the face and neck and she was also shocked.

[22] A black and white copy of the photographs appears at p. 11 of the plaintiff's bundle.

[23] Segodi testified that after he placed the docket at court, he was instructed by the prosecutor have the examining doctor complete another 212 affidavit on an updated form. The doctor duly did so on 14 January 2015. A copy of the updated s212 affidavit appears at p.38 of the defendant's bundle.

[24] An entry made in the investigation diary on 9 August 2014 records that the complainant was interviewed at the crime scene. A J88 form was issued to the complainant, who promised to bring it back when she returned from the doctor.

[25] A copy of the point out note appears at p35 of the defendant's bundle.

sworn statement, all of which led him to conclude or suspect that the crime of assault (involving domestic violence) had been committed by the plaintiff. Segodi had experienced a lack of success in tracking down or making contact with the plaintiff and he suspected that the plaintiff was 'on the run.'

27. Ms Bemand telephoned Segodi on 8 January 2015 to inform him that she was present with the plaintiff at the Family court in Market Street, Johannesburg. Segodi was at the Johannesburg Magistrates court when he received the call. He drove to the Family court and parked his car in the basement parking of that court. He found Ms Bemand seated together with the plaintiff. Ms Bemand pointed out the plaintiff to Segodi by indicating that he was the person who had assaulted her. Segodi introduced himself to the plaintiff as a police officer and showed the plaintiff his appointment certificate. He thereupon arrested the plaintiff. He informed the plaintiff of his constitutional rights and of the reason for the arrest.

28. The plaintiff was taken to Booysens police station where he was formally processed within the system. The plaintiff was given a written notice of his rights in terms of the Constitution[26] and a warning statement was taken from him,[27] which he signed. The particulars appearing in manuscript handwriting on the forms were furnished by the plaintiff to Segodi, who noted it onto the form. This included the identity number appearing on the warning statement. The plaintiff's fingerprints were also uplifted. Upon completion of the paperwork, the plaintiff was detained at Johannesburg Central holding cells until the following day, so that he could be taken to court.

29. On 9 January 2015, before going to court, a criminal profile was obtained in reference to the plaintiff's name and identity number as supplied by him to Segodi. A suspect's profile will indicate whether or not he is linked to other cases. According to Segodi, the profile was necessary for placement of the docket at court.

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[26] Being the notice annexed to the plaintiff's particulars of claim.
[27] A copy of the warning statement appears at p.46 of the plaintiff's bundle.

30. Segodi had prepared an affidavit in which he indicated that the State could consider the grant of bail to the plaintiff in the matter, i.e., that he would not seek to oppose the grant of bail, mindful however, that the grant of bail lay within the discretion of the court. The affidavit formed part of the docket when the matter was placed before the prosecutor at court. After placing the docket, Segodi left court – he was accordingly not in attendance at court during the plaintiff's first appearance.

31. During cross-examination, Segodi remained adamant that the identity number, which he had recorded in the warning statement, had been supplied to him by the plaintiff. He denied having made a mistake in his recordal thereof therein. Had the plaintiff provided him with his correct ID number, the incorrect profiling of the plaintiff would not have occurred. He conceded knowing that he could detain the plaintiff for 48 hours before taking him to court, but felt it better to do so earlier than later.

32. Segodi denied having taken the plaintiff to Gold Reef City in order to apprehend three other suspects before proceeding to Booysens police station. During cross-examination, Segodi stated that the profiling of the plaintiff was performed by his Captain at Booysens police station, at his request, and not by the SAP crime investigation group (CIG), being the relevant police officers who may have had systems or processes at their disposal with which to verify the identity number of the person whom they were profiling.

Evidence of Zamikhaya Staffa (Mediation prosecutor)

33. Mr Staffa ('Staffa') testified that he was the prosecutor who appeared for the State on 25 February 2018 and 24 March 2015 in the case of assault GBH, which the State had instituted against the plaintiff.

34. He testified about several postponements of the case which had occurred at the behest of the plaintiff. The court record revealed that the matter was trial ready as

early as 19 January 2015, which is when a formal bail hearing took place, pursuant to which the plaintiff was released on warning on condition that the plaintiff was to have no contact, direct or indirect, with Ms. Lorna Bemand. On 19 January 2015, the matter was postponed to 3 February 2015 for possible mediation, alternatively, arrangement of a trial date.

35. On 24 March 2015, Staffa was the prosecutor who facilitated a mediation process between the plaintiff and the complainant. The plaintiff was legally represented at the time whilst Ms. Bemand was represented by Staffa in the matter. To the best of Staffa's recollection, the plaintiff's legal representative approached him in the morning and informed him that the plaintiff wished to attempt mediation to resolve the matter outside of court. Staffa stated that mediation is a process which is dealt with outside of court. It is a way to facilitate communication between the complainant and the accused.

36. He confirmed that the mediation process embarked on by the plaintiff and Ms. Bemand resulted in the withdrawal of the criminal case against the plaintiff. It was a smooth process entered into freely and voluntarily by the parties and no duress or foul play was involved. The parties came to an agreement without anyone forcing them to reach agreement. The State was ready to proceed with the case against the plaintiff and there was overwhelming evidence to proceed with the prosecution at the time.

37. The plaintiff, complainant, plaintiff's legal representative and Staffa all signed the informal mediation agreement appearing at p.93 of the plaintiff's bundle. Staffa disputed that the mediation process was not willingly entered into by the plaintiff. His testimony in this regard was that '*it is incorrect for him* [plaintiff] *to say that he* [plaintiff] *did not want to enter into mediation – he had a lawyer guiding him, to see that his interests are served…what stopped him from insisting on having his day in court and refusing mediation?*'

Evidence of Ms. Bianca Heunis (control prosecutor)

38. Ms. Heunis testified that she was one of the acting control prosecutors at the Johannesburg Magistrate's court on 9 January 2015. She received a docket from Segodi on the day in question. After reading the contents of the docket,[28] she was satisfied that the information contained therein[29] pointed to the commission of the offence of assault GBH (assault with the intention to commit grievous bodily harm), hence she decided to charge the plaintiff with assault GBH as opposed to common assault. The plaintiff could not be charged with an offence under the provisions of section 17 of the Domestic Violence Act 1998, as no protection order had in fact been granted in the matter. She made an entry to this effect in the SAP investigation diary on 9 January 2015. [30] Ms Heunis stated that she had regard to the J88 which corroborated that serious injuries had been sustained by the complainant in the incident.

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[28] Information at her disposal in the docket consisted, *inter alia,* of the complainant's statement (A1); the medical report containing the doctor's clinical diagnoses and opinion concerning the injuries sustained by the complainant, together with the J88; photographs depicting visual images of the injuries sustained by the complainant; and a document headed "Notice to respondent to show cause (submit reasons why a protection order should not be issued (in terms of section 5(4)) of the Domestic Violence Act, 116 of 1998)" issued by the clerk of the Family court, Market Street, on 13 August 2014, together with an application for a protection order in terms of section 4(1) of the Domestic Violence Act, 1998, as well as the court record pertaining to such proceedings. The court record reflects that the parties were absent on 13 November 2014 when the matter was called, resulting in the matter being struck off the roll by the additional Magistrate on that date. The application for a protection order contained the complainant's statement, which was recorded in para 5 thereof and in which she alleged that the plaintiff had hit her with his hands, had put his hands around her neck, had hit her with his fist in her face and had pulled her hair. It was allegedly only when someone knocked on the door that the plaintiff stopped assaulting the complainant.. The complainant also alleged therein that the plaintiff had been threatening and intimidating her to drop the criminal case which had been opened at Booysens SAP. The documents relating to the interim protection order appear at pp.56-67 of the defendant's bundle.

[29] Specifically the infliction of serious injuries. According to Ms. Heunis, she was satisfied that the J88 corroborated the seriousness of the injuries and the allegations of how the plaintiff assaulted the complainant.

[30] The entry appears at p. 71 of the defendant's bundle and reads: '*There is no protection order against the accused. The accused cannot therefore [be] charged with contravening sec 17 of the Domestic Violence Act. The matter was struck off the roll. See copy of the records.'*

39. She also had sight of the plaintiff's profile, obtained using the identity number appearing in the docket. She satisfied herself that the name and identity number of the suspect appearing on the first page of the profile was the same as that which had been recorded in the docket. Under cross-examination, Ms. Heunis indicated that she had read through the profile document and had noticed that different identity numbers were listed for 'William Jonkers.' She took account of entries in the investigation diary in the docket which, *inter alia,* contained an entry to the effect that the suspect could not be located at his residential address and that tracers had attempted to contact him, but without success. She made a decision that bail should be opposed at that juncture so that the plaintiff's address could be verified,[31] with the requisite verification statement thereafter being placed in the docket, and so that the information appearing in the profile could be verified. A profile is obtained by using a person's identity number. The profile in question reflected that there was a pending murder case in Cape Town against the suspect bearing the plaintiff's name and the same identity number as recorded in the docket concerning the plaintiff

40. The relevant SAP69 form was not yet to hand on 9 January 2015. The SAP69 is a document that reflects a suspect's previous convictions, if any, and is obtained by using the fingerprints of a suspect. According to Ms. Heunis, the SAP 69 is therefore regarded as being more accurate than a profiling document. She exercised her discretion when recommending that bail be opposed, for all the reasons mentioned earlier.

41. In making a decision whether or not to prosecute, Ms. Heunis testified that she would ordinarily have regard to the allegations in the docket and determine whether there are outstanding investigations that have to be conducted, for example, if there are witness statements that can be obtained to support the allegations regarding the commission of a crime.

[31] In this regard, Ms Heunis stated that she took account of information in the investigation diary that the police could not trace or find the plaintiff at his residential address as provided by the complainant.

42. During cross-examination Ms. Heunis was questioned about Segodi's statement in the docket that bail could be granted. Ms. Heunis stated that the discretion lies with the prosecution whether or not to oppose bail and that it is the magistrate who ultimately makes the decision to grant or refuse bail.

43. It was put to Ms Heunis that had she properly considered the information appearing in the profile document, she would have noticed that the pending murder charge related to a certain William Jonkers with date of birth being 15/12/1994 as opposed to the plaintiff's birthdate being 4/3/1995, and she therefore ought to have verified the information appearing in the profile before taking the decision to oppose bail. Ms. Heunis responded by stating that it was not her job to perform investigations, hence her instruction to the investigating officer that the information be verified. When asked why Ms. Heunis did not instruct the police to first verify the information before placing the matter on the roll, Ms. Heunis stated that '*We don't usually wait – it was the first appearance. Since it was the weekend, when was he to appear in court?.'*

Evaluation of evidence

44. The plaintiff and the defendants' versions regarding the manner in which the plaintiff was arrested and the events that unfolded thereafter, including those that led to the Plaintiff's continued detention, are inconsistent.

45. To the extent that their evidence gave rise to two mutually conflicting versions of the facts, the proper approach to deciding which to prefer is that described in the oft cited analysis by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie SA and others* 2003 (1) SA 11 (SCA), at para 5.[32] (See also

[32] "*The technique generally employed by courts in resolving factual disputes of this nature [i.e. where there are two irreconcilable versions] may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various*

e.g., *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) para [50]; and *National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440 E-G.)[33]

46. The established principle is therefore that when there are mutually destructive versions before the court, the onus of proof can only be discharged if the party who bears the onus has established his case on a preponderance of probabilities. The corollary principle, also firmly established, namely, that a court has to be satisfied that the version of the party bearing the onus is true and that of the other party false in order for the party who bears the onus to succeed in discharging his onus of proof,[34] is only applicable in cases where there are no probabilities one way or the other (See: *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 324 (W)).

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factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[33] '*…Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'*

[34] Jagers *supra,* quoted in para 45 of the judgment.

47. Applying the above principles to the facts of the present matter it is first necessary to consider the credibility of the plaintiff and the witnesses for the defendants.

48. The plaintiff did not leave a favourable impression upon me. His evidence vacillated between him not being able to recall whether or not he had been given documents by the arresting officer to sign[35] (stating in-chief that it may have happened) to later denying, during cross-examination, that he had been given such documents or that he had signed same. When testifying in-chief, the plaintiff was specifically asked whether he had signed the said documents. His response was rather peculiar. He stated that he did not 'recognise' the signature [of the suspect] appearing thereon. On another occasion he intimated that the signature appearing on the warning statement is 'doubtful.' Doubting something is one thing – doubt implies a measure of uncertainty about something. Not recognising something implies not knowing or not being able to identify something which is unclear. It is a whole other thing to state something with conviction, in certainty of truth. If the plaintiff did not sign those documents, one would have expected a consistent and emphatic or unequivocal statement to that effect. The plaintiff's answer, namely that he doubted or did not recognise the signature is obscure and difficult to understand, particularly in the context of testimony directed at establishing a fact.

49. Aside from the more obvious internal contradiction between the plaintiff's pleaded version, namely, that he appeared in court on the same day as his arrest (thus resting his case for unlawful detention on the commencement thereof after his first appearance in court) and his oral testimony in court, namely, that he was detained by the police overnight and only appeared in court the next day, his suggestion in evidence that the prosecution had failed due to there being insufficient or inadequate evidence to sustain a conviction against him, was shown to be false by the documentary evidence to the contrary. The documentary evidence showed

[35] Being the document appearing at p.43 of the plaintiff's bundle, i.e., the Notice of rights in terms of the Constitution and the document appearing at pp. 44 to 47 of the plaintiff's bundle, i.e., the Warning statement of the arrestee.

that the state was ready to proceed with the prosecution as from 19 February 2018 and that it terminated in favour of the plaintiff only as a result of a successful mediation process. The case was postponed on various occasions at the instance of the plaintiff after that date. The evidence showed clearly that the plaintiff not only participated in a mediation process, but did so freely and willingly, with the assistance of legal advice. In my view, the plaintiff's admitted apology to the complainant and concomitant undertaking never to assault her again, as recorded in the settlement agreement, ultimately lent credence to the strength of the State's case against the plaintiff.

50. The plaintiff's evidence that the mediation process occurred without him ever having agreed to it was also demonstrably false. It was effectively belied by the testimony of Mr. Staffa and the contents of the informal mediation agreement, signed by the plaintiff, which not only signified his agreement therewith but also irrefutably demonstrated his voluntary participation in such process. The document itself recorded an acknowledgement that the State could, at its election, continue with the prosecution in the event that the plaintiff breached the terms of the agreement.

51. The plaintiff conceded that the information pertaining to his work address and work telephone number and date of birth, as recorded by Segodi in the warning statement, was correct. Only the plaintiff's identity number recorded therein was incorrect. Sgt Segodi testified that the plaintiff had furnished all the information recorded in the warning statement to him, including his identity number. The plaintiff denied having provided his identity number to Sgt. Segodi. It was common cause that the plaintiff was unknown to Sgt Segodi at the time. On the probabilities, Segodi would not have known these details, including the plaintiff's identity number, unless they had been supplied to him by the plaintiff. Likewise, the probabilities support a finding that Segodi had no idea that the identity number so supplied, was incorrect. He also had no objective reason to doubt the correctness

thereof. The plaintiff's version was that he had not supplied the identity number recorded in the warning statement to Segodi at all, *not* that Segodi had mistakenly recorded the incorrect number as supplied by the plaintiff therein. The probabilities do not favour the plaintiff's version in this regard.

52. The plaintiff's version, namely that he was only informed of the assault for the first time on 19 February 2015, that is, on the occasion of his second appearance in court, appears to me to be wholly improbable, if not false. Even accepting, for purposes of discussion, the plaintiff's evidence in-chief which was to the effect that he could not recall whether he signed or was given the notice of rights document, (or warning statement), then it remains possible that he did in fact sign or receive the documents wherein he was informed of the reason for his arrest and detention. He would therefore have known of the case of assault under domestic violence that had been opened against him. Although he later denied having signed the documents, he never went as far as to state that he had not read or had sight of such document/s at the time - either way, he would have known of the assault case prior to his appearance in court.

53. On the probabilities, had the correct identity number been supplied by the plaintiff, a correct profile would have been obtained in respect of the plaintiff.[36]

54. Having regard to the numerous inconsistencies[37] and internal and external contradictions in the plaintiff's version, and since the plaintiff's evidence on critical aspects was proven to be false, I conclude that he was not a credible witness. As such, his version falls to be rejected on all material aspects where it differs from that of the defendant's witnesses.

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[36] That an incorrect identity number had been supplied by the plaintiff to Segodi, is not so far-fetched as at first blush may appear – the plaintiff's counsel suggested to Segodi during cross-examination that accused persons sometimes provide incorrect identity numbers to police officers so that they remain unaware of the persons previous

[37] Inconsistencies were *inter alia* pointed out in fns 17 & 18 above.

55. Sgt. Segodi impressed me as an honest witness. He readily made concessions where these were called for[38] and admitted to having made some mistakes during the administrative process that took place prior to his placement of the docket at court. At one stage during cross-examination, he declined to answer a question on a peripheral issue relating to the time at which the complainant had signed a pointing out statement. I do not consider that this factor was of such critical importance that it served to impede his credibility or that it affected the reliability of his remaining testimony. His version was, in my view, neither improbable nor inconsistent in any material respect.

56. Segodi was criticized by the plaintiff's counsel for not having verified the information appearing in the profile document obtained in respect of the plaintiff before taking him to court. In my view, the criticism was rather unfair in the circumstances of the matter. The profile document containing small print was obtained earlier in the morning on 9 January 2015 before Segodi went court. It is not known whether he had the opportunity to study the *minutia* of its contents before leaving Booysens police station in order to collect the plaintiff from the holding cells at Johannesburg Central police station.[39] The first page of the profile document linked a pending murder charge to the identity number that had been provided by the plaintiff, which correlated with the plaintiff's name. The birthdate of the suspect who was linked to the pending murder charge in Cape Town, only

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[38] For example, he admitted that he did not, prior to placing the docket at court, attempt to verify the identity number appearing at page 52 of the defendant's bundle, being page 7 of the profile document obtained in respect of the plaintiff (which, as was common cause, was not the plaintiff's identity number but that which belonged to another person bearing the same name as the plaintiff but having a different date of birth to that of the plaintiff).

[39] No evidence was presented at the trial that demonstrated that Segodi had either the means or the opportunity to verify the information appearing in the profile document before he went to court. On the contrary, Segodi testified that he did not have the means at that stage, to verify the information. This evidence was not gainsayed by any evidence pointing to the contrary. The evidence of Ms. Heunis was to the effect that the information was verified by means of the SAP69 obtained in respect of the plaintiff, which was secured by means of the plaintiff's fingerprints and not by means of any information supplied by the plaintiff.

appeared further down on page 7 of the document, and this may have been a reason as to why such detail may have been overlooked.

57. Mr. Staffa's evidence was not challenged on material aspects, nor was his credibility impugned under cross-examination. His evidence was corroborated in material respects by the documentary evidence on record.

58. Ms. Heunis also impressed me as an honest witness. Her evidence was not gainsayed by means of credible evidence to the contrary, nor was it shown to be either internally or externally inconsistent or implausible in any material respect. Ms Heunis was also criticised by the plaintiff's counsel for not having verified the information appearing in the profile document, considering that she had recommended that bail be opposed on the strength of information contained therein, which purported to link the plaintiff to a pending murder case in Cape Town, which later proved incorrect. On the facts of the matter, I am not persuaded that Ms. Heunis failed to properly consider the contents of the docket, including the profile document, when making the recommendation that bail be opposed. This was not a case where the prosecutor merely placed the matter on the roll to then simply have it postponed for further investigation. I deal with this aspect in greater detail further below.

59. This brings me to a consideration of the relevant legal principles that apply to claims for unlawful arrest and detention, and malicious prosecution. I have already alluded to the law governing the incidence of the onus in paragraph 9 above.

60. As regards the plaintiff's claim for unlawful arrest, the first defendant relies on the provisions of sections 40(1)(b) or 40(1)(q) of the CPA[40] to justify the plaintiff's arrest

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[40] Section 40(1)(a) and (q) of the CPA,1977 provides:

without a warrant on 8 January 2015. The jurisdictional facts required to be established for a successful s40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in schedule 1;[41] and (iv) the suspicion must rest on reasonable grounds. Once these jurisdictional facts are present, a discretion whether or not to arrest arises.[42] As to the question of whether or not the peace officer exercised his discretion properly, all that is required is that he acted in good faith, rationally and not arbitrarily.[43]

Was the arrest in terms of s 40(1)(b) justified?

61. S 40(1)(b) gives a peace officer the power to arrest without warrant where he or she reasonably suspects that a person has committed an offence listed in Schedule 1, which includes '*assault, when a dangerous wound is inflicted*.' On the version of the defendants, the plaintiff was arrested for 'assault under domestic violence' and later charged, at the instance of the prosecution, with assault GBH.

"(1) A peace officer may without a warrant arrest any person-

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

(q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element."

[41] 'A*ssault, when a dangerous wound is inflicted'* is one of the offences listed in schedule 1.

[42] See: *Duncan v Minister of Law and Order* 1986(2) SA 805 (A) at 818g-h; *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) at [6] and [28].

[43] In *Sekhoto supra,* at para 39, harms DP said that peace officers are '*entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached*.'

62. In *De Klerk v Minister of Police*[44] Shongwe JA stated as follows:

> " It is common cause that Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of 'assault when a dangerous wound is inflicted'. Therefore one of the jurisdictional facts is absent. It cannot be said that Ms Ndala entertained a reasonable suspicion that the listed offence had been committed. It is trite that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds (see *Duncan v Minister of Law and Order* 1986 SA (2) 805 (AD) at 818 G-J). The learned Judge in *Duncan* stated further that 'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; ie, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohamed v Duke* [1948] 1 All SA ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed."

63. An enquiry into the legality of an arrest effected without a warrant undertaken in an earlier matter of *R v Jones* [45] came up short despite the fact that an arresting officer had information that an assault with a *sjambok* by a man on a young girl aged 15 years had occurred. He also had information that the girl had an open wound on her face. Although the incident was described as a cruel and savage attack on her and the court recognized that she must have suffered excruciating pain, it held that without more information as to the site or extent of the wound occasioned by the blows, that the information at the arresting officer's disposal (concerning the mere fact that *sjambok* blows had been delivered to her and that she had an open wound on her face) did not afford him reasonable grounds for suspecting that 'an assault in which a dangerous wound is inflicted' within the meaning of Schedule 1 had been committed.[46]

64. In my view, the evidence in the present matter did not reveal that Segodi suspected that an assault involving the infliction of a dangerous wound had been committed.

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[44] De Klerk v Minister of Police 2008(2) SACR 28 (SCA at para [9].
[45] 1952 (1) SA 327 (EDLD).
[46] See *Mnero v Min of Police* (647/2013) [2016] ZAECBHC 15 (14 June 2016) for a more detailed discussion on the subject.

Accordingly, it has not been demonstrated that the arrest without warrant in terms of s 40(1)(b) was justified.

Was the arrest in terms of s 40(1)(q) justified?

65. In the particulars of claim, the plaintiff alleged that he was arrested for [an act of] domestic violence. The first defendant sought to justify the arrest on the basis of s 40(1)(q) of the CPA. In terms of section 1 of the Domestic Violence Act, 1998 domestic violence includes physical abuse of a complainant where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant.[47]

66. Section 40(1)(q) validates an arrest by a peace officer without a warrant of any person 'who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act which constitutes an offence in respect of which violence is an element.' Violence in its ordinary meaning entails behaviour involving physical force intended to hurt, damage or kill. [48] An assault would therefore qualify.

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[47] The definition of 'domestic relationship in terms of s1 the Domestic Violence act, for purposes of the present case, is as follows::

" 'domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:

(a)…

(b)…

(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d)…

(e) they are or were in in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;

(f) they share or recently shared the same residence."

[48] The Oxford Concise English Dictionary.

67. It is clear that there must be physical violence inflicted or imminent before an arrest can be effected. See: *Minister of Safety and Security v M* (CA350/2012) [2014] ZAECGHC 58 (10 July 2014*)* at para [24][49]

68. In *Minister of Safety and Security v Katise* (328/12) [2013] ZASCA 111 (16 September 2013), Lewis JA considered the provisions of s 40(1)(q) of the CPA and found that the conduct of the plaintiff/arrestee in that case had fallen within the ambit of the section. The plaintiff had not been arrested at the scene of the domestic violence incident, but sometime thereafter. The suspect was arrested only after he had been treated in hospital and then brought to the police station.[50] Lewis JA remarked in para [14] that '*But in any event, the conduct of the Katise* [suspect] *falls within the ambit of s 40(1)(q) of the Criminal Procedure Act.'* As pointed out In para [15], this was because Lewis J found that '*the evidence clearly demonstrates that Katise was guilty of committing acts of domestic violence*. *That was enough to make the arrest without warrant lawful under s 40(1)(q) of the Criminal Procedure Act*.'

69. Whether or not an arresting officer has reasonable grounds for the suspicion entertained by him or her is a question which is required to be answered

[49] There the court held as follows:

> "*"[24] One must bear in mind that the requirements of S 40 (1) (q) is not just a suspicion that an act of domestic violence as contemplated in S 1 of the Domestic Violence Act has been committed, but that the act of domestic violence must constitute an offence in respect of which violence is an element. The violence referred to in the subsection must be physical violence. If a suspicion that merely an act of domestic violence as contemplated in S 1 of the Domestic Violence Act has been committed was sufficient, there would be no need for the qualification that the act must constitute an offence of which violence is an element. Bearing in mind that the purpose of arrest is to bring the arrested person before a court, there must be a suspicion that a legally recognised criminal offence has been committed"*

[50] The trial court had found that the police had not acted lawfully in terms of s3 of the Domestic Violence Act, seeing as the section envisaged that the arrest without warrant 'may only occur at the scene of the incident and not sometime thereafter.' Section 3 of the domestic violence Act provides that a peace officer may, at the scene of an incident of domestic violence, without warrant 'arrest any respondent' (defined as a person who is in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant) 'whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.'

objectively. In other words the test is not whether the officer believes that he has reason to suspect, but whether, on an objective approach, he in fact had reasonable grounds for his suspicion at the time he effected the arrest.[51] Jones J in *Mabona and Another v Minister of Law and Order and others* 1988 (2) SA 654 (SE) fashioned the enquiry in the following terms:

> "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?"[52]

70. In my view, the evidence at trial clearly established that that Segodi had good reason to suspect that the plaintiff had used physical force aimed at harming the complainant (which in fact had harmed the complainant, who had sustained serious injuries), and that the plaintiff had thus committed the crime of assault, which itself constituted an act of physical violence as contemplated in s 1 of the Domestic Violence Act. The facts at his disposal at the time of the arrest (which included the complainant's statements as contained in A1 and in the application for an interim protection order to the effect that she had been choked, pulled by the neck and fisted and slapped in the face, as also confirmed by police interviews conducted on 9 August 2014[53] and thereafter by Segodi; the objective medical evidence in the J88 form, which suggested an injury consistent with strangulation; the photographic images depicting the serious nature of the injuries sustained by the complainant and Segodi's own observation of such injuries), in my view all

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[51] *Botha v Lues* 1983 (4) SA 496 (A) at 503D; *Duncan v Minister of Law & Order supra* at 814 D – E.

[52] Mabona *supra* at 658E. At 658G-H,-the court went on to say that: "*The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after 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*."

[53] As per the entry made in the investigating diary of the docket by Constable Mokoeng on 9/8/2014, who stated that he had interviewed the complainant at the crime scene and had attended at the plaintiff's residence but 'he was not there.'

point to the conclusion that the suspicion that the plaintiff had committed an act of domestic violence upon the mother of his child by perpetrating an offence containing an element of violence, namely that of assault, was entertained on reasonable grounds. Although the plaintiff denied in his evidence that he had assaulted the complainant, it was not suggested at trial that Segodi had failed, upon ascertaining the plaintiff's whereabouts, to exercise his discretion to arrest the plaintiff properly.

71. The submission in the plaintiff's written heads of argument that reliance upon the provisions of s 40(1) (q) was misplaced because the complainant was not in a relationship with the plaintiff and because they were not living together (or because they had not lived together for a period of three months, as submitted in oral argument) is not understood, bearing in mind the definition of domestic relationship in section 1 of the domestic Violence Act.[54] The parties share a child and had in any event themselves indicated in their respective statements[55] that they had been involved in a domestic relationship.

72. I thus find that the arrest of the plaintiff was based on a reasonable suspicion that the Plaintiff had committed an act of domestic violence (as contemplated in section 1 of the Domestic Violence Act) as constituted by the offence of assault containing an element of violence, and was accordingly justified and lawful under the provisions of s 40(1)(q) of the CPA.

Was the Plaintiff's detention lawful?

73. The evidence clearly established that the plaintiff was arrested on 8 January 2015 and detained overnight so that he could be taken to court the following day. The plaintiff was unknown to Segodi at the time of his arrest. Segodi had no ulterior

[54] Quoted in fn 46 above.
[55] The complainant had referred to the plaintiff as her boyfriend (in her A1 statement) whilst the plaintiff had referred to the complainant as his girlfriend in his warning statement.

purpose for detaining him on 8 January 2015 - the purpose was to secure his attendance at court.

74. As pointed out in *Naidoo v Minister of Police*[56] 'it is now settled that the purpose of the arrest is to bring the arrestee before the court for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial. (See *Minister of Safety and Security v Sekhotho & Another* 2011 (5) SA 367 paras 30-31).'

75. In *Carmichelle v Minister of Safety* 2001 (10) BCLR 995 (CC) the constitutional court stated that '*a police officer has a clear duty to bring to the attention of the prosecutor any factors known to him relevant to the exercise by the magistrate of his discretion to admit a detainee to bail.'*

76. In written heads of argument presented on behalf of the plaintiff at trial, reliance was placed on the case of *Minister of Police v du Plessis*.[57] There the Supreme Court of Appeal affirmed the legal duties resting on the police and on the prosecuting authorities in respect of detention after arrest, taking into account the pressures under which they operate. In that case, the trial court had found that the docket contained no information that pointed to a commission of an offence by the first plaintiff, yet the prosecutor had decided to proceed against him. The SCA agreed that there had been no basis for proceeding against the first plaintiff. The SCA held (in para 34) that a '*prosecutor's function is not merely to have the matter placed on the roll to then simply be postponed for further investigation. A prosecutor must pay attention to the contents of his docket…A prosecutor must act with objectivity and must protect the public interest…'*

[56] *Naidoo v Minister of Police* (20431/2014) [2015] ZASCA 152 (2 October 2015)
[57] 2014 (1) SACR 217 (SCA) at paras [12] & [34].

77. The facts in Du Plessis *supra* are distinguishable from the facts of the present matter. In that case there was a determination of fact regarding exactly when the prosecution knew that the accused person was not involved in the commission of the offence but was a mere bystander; and therefore had to be released, meaning the persistence with the prosecution of him was therefore unlawful. In the present case, there was clear evidence of the commission by the plaintiff of an act of domestic violence by virtue of the alleged commission of the offence of assault, involving as it did, an element of violence and which resulted in serious injuries having been sustained by the complainant. There was no prospect of mistaken identity, as the plaintiff and the complainant were involved in a domestic relationship and as such were intimately known to each other.

78. In her discretion, the control prosecutor preferred charges of assault GBH against the plaintiff. In my view, the evidence of Ms. Heunis points indelibly to the conclusion that she diligently considered the information placed before her in the docket, including Segodi's statement that he was not opposed to bail being granted. Ms Heunis testified that she had regard to information appearing in the application that was made by the complainant for an interim protection order, wherein Ms Bemand had indicated that the plaintiff had threatened her safety and well-being and had sought to intimidate her to drop the case of assault against him. She also considered the information appearing in the investigating diary in the docket. On 11 August 2014, an entry was made therein by Segodi that the suspect was on the run as per A1 [complainant]. Segodi had interviewed the complainant shortly after the docket was allocated to him when a report was made to him by the complainant. Further entries in the investigating diary showed that the plaintiff could not be located at the residential address that had been provided by the complainant and that further attempts to locate the plaintiff had also proven unsuccessful. On those facts, it would not have been unreasonable for Segodi to have suspected that the plaintiff may have been avoiding arrest. Ms. Heunis considered all such information, and recommended that bail be opposed, pending verification of the plaintiff's residential address as well as the information

appearing in the plaintiff's criminal profile, as mentioned earlier in the judgment. It cannot therefore be said that the control prosecutor failed to conscientiously apply her mind to the docket or to all the information at her disposal when placing the matter on the roll or when recommending that bail be opposed by the State.

79. The prosecutor who appeared on behalf of the State on 9 February 2015, being the date of the plaintiff's first appearance in court, was not called to testify at the trial. He would, on the probabilities, have had regard to the self-same information appearing in the docket when exercising his own discretion in opposing bail at that juncture. He would also have had regard to Ms. Heunis's reasons for recommending that bail be opposed, which were recorded on the docket. The Plaintiff did not suggest in his testimony that the prosecutor had misled the court on this occasion or had withheld pertinent information from the court. The prosecutor was armed with a criminal profile albeit obtained in respect of an incorrect identity number that had been provided by the plaintiff himself, which signified that the plaintiff had a pending murder case in Cape Town. One must bear in mind that neither the investigating officer not the prosecution had knowledge of the incorrect identity number at that stage. The court record reflects that the plaintiff elected to conduct his own defence on 9 January 2015. The case was postponed to the 19th January 2015 for purposes of conducting a formal bail application, which resulted in the plaintiff being detained for a further period of ten days during the intervening period. It is apparent from the court record that both the prosecutor and the plaintiff addressed the court regarding the question of bail and that the magistrate, in the exercise of her discretion, declined to grant bail at that juncture.

80. In the circumstances, I conclude that the second defendant has succeeded in discharging the onus of proving that the continued detention of the plaintiff during the relevant period was lawful.

Claim for malicious prosecution

81. As was held in *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 at para [8], in order to succeed (on the merits) with a claim for malicious prosecution, the plaintiff was required to allege and prove that –

(a) the second defendant set the law in motion (instigated or instituted the proceedings);

(b) the second defendant acted without reasonable and probable cause;[58]

(c) the second defendant acted with 'malice' (or *animo injuriandi);*[59] and

(d) that the prosecution has failed.

82. It was common cause in the evidence that the requirement in (a) was satisfied. The evidence did not establish that the requirement in (b) was proven. The requirement in (c) was not alleged or proven at all and on this score alone, the claim cannot succeed. As to the requirement in (d), although the prosecution terminated in favour of the plaintiff, it did not 'fail' in the sense that it was discontinued for a lack of evidence necessary to sustain a conviction. I have already dealt with the facts relating to the discontinuance of the prosecution and the reasons therefore.

83. In the circumstances, the plaintiff's claim for malicious prosecution cannot succeed.

84. For all the reasons given, I conclude that the defendant is not liable to the plaintiff on the merits of the Plaintiff's claims. The general rule is that costs follow the

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[58] This requirement entails an honest belief, founded on reasonable grounds, that the institution of proceedings was justified (at para [20]).

[59] This requirement entails that it would have to be proven that a defendant was not only aware of what he or she was doing in instituting or initiating a prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but continued, reckless as to the consequences. Negligence, even gross negligence would not suffice. (at para[64])

result. I was not referred to any facts or circumstances that would justify a departure from the general rule, nor do I consider there to be any reason to do so.

85. In the circumstances, I make the following order:

ORDER

The Plaintiff's claims are dismissed with costs.

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MAIER-FRAWLEY AJ

Date of hearing:	15- 16 & 19-21 November 2018
Judgment delivered	20 December 2018

APPEARANCES:

Counsel for Plaintiffs:	Adv. N. Makopo
Attorneys for Plaintiffs:	AF Van Wyk Attorneys
Counsel for Defendant:	Adv. M.W. Dlamini
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