REPUBLIC OF SOUTH AFRICA

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

CASE NO: 27525/14

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

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SIGNATURE **DATE:** 28 June 2022

In the matter between:

ISMAEL MOTLATSI PELLE **PLAINTIFF**

and

MINISTER OF POLICE **FIRST DEFENDANT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTION **SECOND DEFENDANT**

BOY MAKOLA **THIRD DEFENDANT**

JUDGMENT

GREENSTEIN AJ

BACKGROUND

(1) The Plaintiff instituted an action against the First Defendant on 29 July 2014 for his unlawful arrest and detention and sought damages in the amount of R1 240 000. He inter alia also sought damages in the amount of R 1 000 000 from the Second Defendant for malicious prosecution. The Defendant's opposed these claims.

(2) Prior to the commencement of the trial, the Plaintiff brought an application to condone his failure to serve a notice in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of States Act 40 of 2002 within a period of 6 months from date on which the debt became due. The application was not opposed. Having considered the matter, condonation in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of States Act 40 of 2002 is granted.

(3) The Plaintiff was renting accommodation from the Third Defendant on the premises where the Third Defendant resided.

(4) The Plaintiff was tasked with effecting certain renovations to the Third Defendant's home. It emerged during evidence that the cost of the renovation was R 3500, and the payment was to be made partly monetarily and partly as an offset against rental payable.

(5) In the pleadings the Plaintiff averred that after the completion of the renovation, when the Plaintiff and the Third Defendant, were discussing the payment due to the Plaintiff, the Plaintiff was informed about allegations that he allegedly raped the Third Defendant's niece (the pleadings speak of his daughter) and that a case of rape had been opened against the Plaintiff at the Moroka Police Station. As per the case docket, the complainant, TM (I shall

refer to her as TM), deposed to an affidavit on 4 July 2012 detailing her alleged rape by the Plaintiff. On the same day her uncle, the Third Defendant, also deposed to an affidavit. On 4 July 2012 TM underwent a medical examination and a J88 was compiled.

(6) As per the Plaintiff's Particulars of Claim, he was given one month to pay R10 000 in respect of damages suffered by the Third Defendant's "daughter" as a result of the rape. He did not pay this amount.

THE PLAINTIFF'S CLAIM FOR UNLAWFUL ARREST AND DETENTION

(7) It is common cause that the Plaintiff was arrested and detained on 3 September 2012 by members of the South African Police Services at Moroka Police Station. It is further common cause that the Plaintiff was taken to court for his first appearance on 5 September 2012 and on 10 September 2012, pursuant to a bail application, he was released on bail in an amount of R3000.

(8) Although prior to the arrest of the Plaintiff there are diary entries in the case docket referring to a warrant of arrest being issued prior to the arrest of the Plaintiff, the legal representatives of the Plaintiff and the Defendants' both agreed that I am to adjudicate this issue on the basis that the arrest was performed in terms of S 40 (1) (b) of the Criminal Procedure Act which provides for arrests without a warrant. I too am satisfied that the arrest was performed without a warrant of arrest having heard the evidence of the arresting officers and the Plaintiff. As such, the onus rests on the First Defendant to justify the arrest of the Plaintiff/ the lawfulness thereof.

(9) Accordingly, I am called upon to determine in relation to the arrest of the Plaintiff as to whether the jurisdictional facts (the arrestor must be a peace officer who must entertain a suspicion that the arrestee committed a schedule

one offence which suspicion must rest on reasonable grounds) are present as held in Duncan v Minister of Law and Order (1986) (2) SA 805 A. If these jurisdictional facts are satisfied, the peace officer may invoke the power conferred on him to arrest without a warrant.

(10) The Plaintiff in his evidence testified that between the hours of 10h00 and 11h00 on 3 September 2012 he saw four police officers arrive in a marked van and a blue BMW whilst he was with his wife and children. The police officer never introduced themselves. He was inside his rented accommodation. He testified that he did not know why he was arrested. He was not informed of the reason for his arrest and was told that all would be revealed and explained to him at the police station. On his version, his rights were not read to him. When he was arrested the complainant was not present and members of the community witnessed the arrest and were chanting words to the effect *"the rapist must go".*

(11) He was transported to the police station in a police van. It emerged during his evidence that certain police officers were in the police van where the Plaintiff was transported, and other police officers were in a blue BMW.

(12) The Plaintiff testified that after he was taken to the police station, he was still not told why he was arrested and by all accounts the detectives would inform him. After he was booked in, he was taken to his cell. The conditions of the cell were appalling. There were more than ten prisoners in a confined space. The Plaintiff received bread and something to drink. The Plaintiff estimated that he was in the cell for 16 hours and at some point, requested the police officials (one was known to him) to call the station commander as he did not know why he had been arrested and he had not appeared in court. Subsequently two detectives arrived, who took fingerprints. During evidence it emerged that the Plaintiff signed a statement entitled *"Statement Regarding Interview with Suspect*" on 4 September 2012 (on front page says 4 August

2012 and on last page says 4 September 2012). It is obvious that the correct date was 4 September 2012. The Plaintiff admitted he signed it but has never seen this document. The Plaintiff was further advised that he would be taken to court the following day, which he was.

(13) The Plaintiff testified about the ever-increasing number of people in the cell and that he was significantly confined in the cell. On 5 September 2012, the Plaintiff was taken to court in a truck which had more than thirty people. He was not granted bail due to a "*serious allegation*" and was taken to the Johannesburg prison where he was placed in a cell with more than forty people and aggravated a previous injury causing him pain. He was very scared and was not given food. He was aware of gangs in prison and slept with one eye open. It was very hot. The Plaintiff was taken to a doctor where he received pain medication. The Plaintiff further testified that the ride back from the court to the Johannesburg Prison was harrowing. Eventually, on the 10th of September 2012 he was taken to court where bail was fixed in an amount of R 3000, which was subsequently paid.

(14) The First Defendant called two witnesses in relation to the arrest of the Plaintiff:

CONSTABLE MADIMETJA FRANS MANAKA ("Manaka")

Manaka was on patrol in a marked police van on 3 September 2012. He was on duty with Constable Palesa Tshukudu ("Tshukudu"). They received a report from radio control about a suspect in connection with a rape case. The complainant was TM who resided at 959 Mapetla. On arrival, a female approached them. It was enquired from the female where TM could be located. The said female identified herself as TM. TM confirmed that she had called the police in connection with an incident of rape. TM confirmed that the name of the suspect was Mothlatse Pele (I shall refer to him as "Pele" and/or "the Plaintiff"). TM pointed out where Pele resided. Manaka, Tshukudu and

TM thereafter proceeded to the residence. After knocking on the door, a male person answered. TM pointed out Pele, the suspect. She further mentioned that he had disappeared. Manaka asked Pele if his name is Mothlatse, to which he responded in the affirmative. It was the evidence of Manaka that they introduced themselves as the police and explained that Pele was being arrested in connection with a rape. Manaka explained Pele his rights and read them from his pocketbook. Manaka could not remember who was present at the arrest (i.e., members of the community etc), other than Tshukudu and TM. Pele was placed in the police van and was taken to the holding cell. Manaka confirmed that Tshukudu read him his rights at the police station, and he went to the charge office with Pele. It is worthy of mention that the Plaintiff signed on 3 September 2012 at 09h07 a NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION (which rights were read to him by Tshukudu). Manaka also took TM's pointing out statement, signed at 10h38 and confirmed in an affidavit that Pele was arrested by the police after TM pointed him out. On the same day, Manaka also deposed to an affidavit confirming the arrest. All three documents form part of the bundle.

The material discrepancies between the evidence of Manaka and that of Pele was that Pele contended there were two vehicles, that TM was not present, that TM did not travel to the police station, that the police did not introduce themselves, they did not inform him why he was arrested, they did not read him his rights and there were four police officers. As set out, Manaka could not remember if there were community members watching.

CONSTABLE PALESA TSHUKUDU ("Tshukudu")

At the time of the arrest, she was in the employ of SAPS stationed at the Moroka Police Station. On 3 September 2012 she was travelling with Manaka in a patrol car. They received from radio control information from a complaint, TM, that a case of rape had been opened and that the suspect was at a specified address which fell within their territory. Tshukudu and Manaka proceeded to the address. At the gate they were met by TM. The complainant came over to the van and confirmed she had called the police. Tshukudu

advised that they had received a report that TM was a victim of rape. TM confirmed this and confirmed that her name was TM.

Manaka asked TM as to the whereabouts of the suspect. They were pointed to a shack. When they arrived at the shack Manaka knocked on the door. A man appeared. Manaka asked TM if this is the suspect? She answered in the affirmative. Manaka asked the man his name and he answered Ismael. Manaka introduced himself and Tshukudu to Ismael. Manaka informed Ismael that he was being arrested for the rape of TM. Manaka pulled out his pocketbook and informed the suspect of his rights in relation to the arrest. There was no opposition from Ismael. They proceeded to the police van. TM got inside the drivers' section of the van. Whilst they were walking to the van there were less than 5 people in the yard that came out who were witnessing this. When they arrived at the police station, they went directly to the cells. The suspect/Plaintiff was registered and Tshukudu read him his rights from the book of rights. The Plaintiff asked that his rights be explained to him in Sotho, which Tshukudu did. Tshukudu testified that she did not know the rights off hand, hence she read it from a book. After she explained the rights to the suspect, she asked him whether he understood his rights (which he said he did) and requested him to sign, which he duly did. This document has been discovered aforementioned and forms part of the bundle. A copy of the rights were handed to the suspect.

The witness conceded that she possibly made an error in recording the time of the arrest at 09h07. I do not believe that there is any materiality in the time of the arrest.

(15) The witnesses were never challenged as to what TM told them and her various actions.

(16) Based on the evidence of Manaka and Tshukudu, the question to be asked is have the four jurisdictional requirements as prescribed in Duncan v Minister of Law and Order (1986) (2) SA 805 A been fulfilled?

(17) It is common cause that rape is inter alia a schedule one offence. It is further common cause that both Manaka and Tshukudu are peace officers. This leaves two jurisdictional requirements namely whether they entertained a suspicion, and the suspicion must rest on reasonable grounds.

(18) From the evidence it emerges that after having received from radio control a report, Manaka and Tshukudu proceeded to the address where they were met by TM. TM confirmed that she: called the police, was a victim of rape and that the suspect lived on the property. It was TM who further pointed out the suspect to Tshukudu and Manaka.

(19) The investigating officer, Constable (as he then was) Tinyiko Mbayila testified inter alia that the case was opened on 4 July 2012 and was assigned to him on 5 July 2012. The victim's statement was filed in the docket as was the Plaintiff's so-called acknowledgement to pay for damages pursuant to the alleged rape. The witness testified how he tried to trace the suspect/Plaintiff, but to no avail. The witness testified that due to him being unable to trace the Plaintiff, he deposed to an affidavit to apply for a J50 warrant. This warrant was not provided as evidence, as it could not be located. There was however a diary entry recording that it would be cancelled in court. Counsel for the Plaintiff criticised the investigating officer for not using other methods to obtain the whereabouts of the Plaintiff and that if he had been pro-active, there was no need for the Plaintiff to be arrested. Even if this criticism is justified (which I find it is not), this does not detract from a future arrest without a warrant, as in the present case subject to the requirements being present and the discretion being properly exercised.

(20) The test whether a suspicion is reasonably entertained in effecting an arrest without a warrant is an objective test. The standard is not perfection, as long as the choice fell within the range of rationality. There is a measure of flexibility in the exercise of the discretion because the inquiry is fact specific

(Rautenbach v Minister of Safety and Security 2017 (2) SACR 610 WCC). It is hard to imagine what Tshukudu and Manaka could have done differently. TM had identified herself as the caller, the victim of a rape and she pointed out her perpetrator. It does not lie in the mouth of the arresting officer to cross question the complainant or question the perpetrator as to their respective involvement in the matter. Surely this is a task for the investigating officer and not the arresting officer.

(21) I am fully cognisant of the fact that an arrest is an invasive option in bringing a suspect to court. Lest it not be forgotten, however, that rape is a schedule 1 offence, and Section 60 (11) (b) of the Criminal Procedure Act prescribes that unless an accused (having been given a reasonable opportunity to do so) adduces evidence which satisfies the court that the interests of justice permit his or her release on bail, the court is enjoined to order that he be detained in custody.

(22) In Diljan v Minister of Police (Case no 746/2021) [2022] ZASCA 103 (24 June 2022), the Supreme Court of Appeal confirmed the legal position as articulated in the matter of Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141, where the court opined that once the jurisdictional facts are established, the peace officer has the discretion of whether or not to arrest the suspect. However, if the suspect is arrested, a peace officer is vested with a further discretion whether to detain the arrestee or warn him or her to attend court. The arrest and detention of the suspect is but one of the means of securing the suspect's appearance in court.

(23) Having considered the evidence and facts of this matter the suspicion arose when the arresting officers received a report from radio control. TM's presence at the premises and her various confirmations and pointing out constitute reasonable grounds for the police officers entertaining the

suspicion. They properly exercised their discretion in affecting the arrest of the Plaintiff without a warrant of arrest especially bearing in mind the evidence that the suspect had previously disappeared. They further exercised their discretion properly in detaining the Plaintiff.

THE PLAINTIFF'S CLAIM FOR MALICIOUS PROSECUTION

(24) In the pleadings the Plaintiff averred that the Second Defendant wrongfully and maliciously proceeded with his prosecution. It is common cause that after the Plaintiff was granted bail on 10 September 2012, he appeared in court on no fewer than four occasions. The matter never ultimately proceeded to trial due inter alia to the complainant in the rape case relocating to Kwa-Zulu Natal, another state witnesses' presence could also not be secured. The case docket also reveals that subpoenas were defective, and witnesses were not before court.

(25) As per the case docket it appears, confirmed by evidence, that the matter was struck off the roll *("SOR")* on 14 January 2013.

(26) In the Minister of Justice and Constitutional Development v Moloko (131/07) [2008] ZASCA43, the court set out that in order for the Plaintiff to succeed in a claim for malicious prosecution a claimant must allege and prove:

a. That the Defendants set the law in motion by instigating or instituting the proceedings;

b. That the Defendants acted without reasonable and probable cause;

c. That the Defendants acted with malice (or animo inuriandi); and

d. That the prosecution has failed.

(27) The case docket revealed that prior to the enrolling prosecutor entertaining this matter the following documents/affidavits formed part of the docket:

a. The statement of the complainant where she directly implicates the Plaintiff in the alleged rape. Lest it not be forgotten, this is not a case of mistaken identity as the complainant lives on the same premises at the suspect/Plaintiff.

b. The statement of the Third Defendant who confirms the allegations made by the complainant in relation to the rape and the identity of the suspect/Plaintiff.

c. The J88 – there were no genital scars of injuries on a clinical examination as recorded in the J88, however the absence of scars of injuries cannot exclude penetration.

d. The pointing out statement of the complainant.

e. The statement of the arresting officer.

f. The suspects statement.

g. An acknowledgement of debt written by the Plaintiff confirming inter alia that he agrees to pay damages of R 10 000 because of a matter concerning the rape of a child and that in addition he would give a fridge and a stove. This document was signed one month before the Plaintiff was arrested. During evidence the Plaintiff contended he was forced to sign this.

h. Entries in the investigative diary.

i. The SAP69 in relation to a previous conviction of the Plaintiff.

(28) It was stated in Moloko supra that reasonable and probable cause, in a context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of the proceedings is justified. The concept therefore involves a subjective and an objective element – not only

must the Defendant have subjectively had an honest belief in the guilt of the Plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.

(29) The evidence of the Plaintiff in relation to the required elements was very scant. I could find very little evidence, if at all, from the Plaintiff as to the Second Defendant acting without reasonable and probable cause. It is the Plaintiff who bears this onus. Notwithstanding this, the Second Defendant elected, correctly I might add, to call two witnesses in defence of the malicious prosecution claim, notwithstanding that the Plaintiff's evidence was lacking in proving that the prosecution of the Plaintiff was unreasonable, wrongful and malicious in that the information furnished by the South African police was of no merit to sustain a successful prosecution (paragraph 18 of Plaintiff's POC).

MS REDDY – COURT PROSECUTOR

In and during 2012 the witness was a regional prosecutor at the Protea Magistrates Court with seven years' experience at the time. She dealt with the docket on 5 occasions from 12 October 2012. It was the evidence of Ms Reddy that the Plaintiff and the Accused were not known to her. Ms Reddy on 12 October 2012 testified that she made a request for the Investigating Officer to obtain the first witness report statement of the Complainant's aunt. It transpired in evidence that the witness had relocated to Kwa-Zulu Natal. Ms Reddy was satisfied that there were reasonable prospects for a successful prosecution having regard to the contents of the docket as referred to above. Ms Reddy was of the opinion that the matter was dealt with expeditiously bearing in mind the Plaintiff's first appearance was on 5 September 2012 and the matter was struck off the roll, on 14 January 2013. Ms Reddy testified that she was mindful that the complainant was a minor from a rural area living with an uncle and wanted to try and give her an opportunity to be at court (she never appeared once and no subpoena was served on her), as the subpoena had never been served on her. It was the evidence of Ms Reddy that the

matter could not proceed for a variety of reasons such as the writing of exams, short notices for the witnesses to appear and that the victim had also been taken to Kwa-Zulu Natal. On 14 January 2013, a further remand was refused. Ms Reddy testified that in her experience, a conviction could be obtained even in circumstances where there were no genital scars of injuries on a clinical examination as recorded in the J88. It is further noteworthy that the J88 recorded that the absence of scars of injuries cannot exclude penetration. The cross examination of this witness certainly did not reveal any malice. She was a balanced and fair witness and appeared to weigh up the interests of all the parties in the criminal trial, including the Plaintiff and the victim. She cannot be criticised for placing the matter on the roll for trial armed with the contents of the docket, even though one witness statement was outstanding.

MR MDLULI

At the time of the arrest of the Plaintiff, he had five years' experience as a regional court prosecutor and was at that point the control prosecutor. He gave evidence to the effect that having regard to the contents of the docket, he was satisfied, that the elements of the offence were present. It is further common cause that the identity of the accused is not in dispute as the accused was known to the Plaintiff. He was satisfied that there was a prima facie case (the elements of the offence present). Mr Mdluli under cross examination tendered that reasonable and probable cause is part and parcel of the prima facie case. Mr Mdluli testified that the complainant and the Plaintiff were not known to him.

(30) Counsel for the Plaintiff argued that the fact that the J88 recorded that there were no genital scars of injuries on a clinical examination and that there was a witness statement missing from the docket were inter alia grounds for me to conclude that there was an absence of reasonable and probable clause. I do not accept that in every rape conviction in South Africa there is a J88 confirming genital scars of injuries. Besides, the J88 could not exclude

penetration. Can it be said that the fact that the complainant only reported the incident on 4 July 2012 when the incident took place on 5 May 2012 is a reason to decline to prosecute? These are both issues for cross-examination in the trial. These are not reasons why the state must decline to prosecute. There are many reasons why victims of rape may legitimately choose to only report the incident sometime after the event. There are numerous instances in our criminal courts where the state prosecutes where the investigation is not complete, and the matter is postponed from time to time for further investigation and outstanding affidavit's. By the time this matter was enrolled, but for one statement (not the complainant and not a medical practitioner), this matter was trial ready. Lest it not be forgotten the identity of the accused was not in dispute and the accused was known to the complainant.

(31) In S v Lubaxa 2001 (2) SACR 703 (SCA) at par 19, it was held: "*Clearly a person ought not to be prosecuted in the absence of a minimum 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 a minimum evidence, so too should it cease when the evidence finally falls below that threshold*"

(32) One also needs to consider the interests of the community. Gender based violence is a scourge and has reached pandemic proportions. The Law Enforcement Agencies and the National Prosecuting Authority are under pressure to regain the trust of the public and be effective in their pursuit to bring criminals to book. I am not advocating that the rights of the accused must be undermined in anyway whatsoever. There needs to be a balance between the public and all individuals who are involved in the system,

including suspects, the accused, witnesses, and victims of crime. The rule of law must prevail.

(33) There was little to no evidence lead by the Plaintiff on the issue of malice. It was held in Relyant Trading (Pty) Ltd v Shongwe and another 2007 (1) All SA 375 SCA: *"although the expression 'malice' is used, it means, in the context of the actio iniuriarum, amimus iniuriandi".*

(34) On the facts before me and having considered the evidence in totality, I cannot conclude that the Second Defendant did not have an honest belief founded on reasonable grounds that the institution of these proceedings was not justified. That being said, there was further no evidence to suggest that the two witnesses acted with the intention to injure.

(35) In light of the fact that I am not persuaded that the Defendants' acted without reasonable and probable cause and that the Defendants' acted with malice, it is not necessary for me to decide the fourth requirement namely whether the prosecution has failed.

(36) There was much debate in argument as to whether the prosecution has failed or not. Counsel for the Defendant inter alia argued that ten years after the incident that it was highly unlikely and improbable that the Plaintiff would be prosecuted and as such the prosecution had failed. Counsel for the Second Defendant contended that as the matter was struck off the roll, it remained open for the case to be possibly reinstated. Counsel for the Defendant also pointed out that insofar as the offence of rape is concerned, there is no prescription. In my opinion the law needs to be developed when a case is withdrawn or struck off the roll as the argument would always be open to the prosecution that the case is not finalized and as such the fourth requirement for malicious prosecution is not present. Practically speaking, a case that is struck off the roll could not succeed in a malicious prosecution claim when all

the other elements are present. This seems unjust and requires future consideration.

(37) There is no reason to deviate from the usual principle in relation to costs that costs should follow the result.

(38) I make the following order:

a. The action is dismissed with costs.

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GREENSTEIN AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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 hand-down is deemed to be 10h00 on 28 June 2022.

Date of hearing:	25-27 October 2021 and 28 to 31 March 2022.
Date of judgment:	28 June 2022

Appearances:

Counsel for the Plaintiff:	ADV. L TSHIGOMANA
Attorney for the Plaintiff:	TLAWENG LECHABA INC
Counsel for the Defendants':	ADV. E CHABALALA
Attorney for the Defendants':	OFFICE OF THE STATE ATTORNEYS