REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 477/2020

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

DATE: 29 December 2023 **SIGNATURE** _____

In the matter between:

KGOTSO LEEUW **PLAINTIFF**

And

MINISTER OF POLICE **FIRST DEFENDANT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND DEFENDANT**

JUDGMENT

N TSHOMBE AJ

[1] Introduction:

1.1 In this case the Plaintiff instituted a claim against the defendants for damages arising from his alleged unlawful arrest on 24 December 2018, detention followed by malicious prosecution until his release on 25 June 2019 when the charges against him were withdrawn. The action continued after a successful condonation application for the applicant's late service of the notice of intention to institute legal proceedings against certain organs of state[1]; as well as failure to comply with the requirements of the State Liability Act[2].

[2] The Dispute

2.1 It is common cause that the plaintiff was arrested on 24 December 2018, detained as a prisoner awaiting trial and faced prosecution until the withdrawal of the case against him on 25 June 2019. The issues in dispute are: (i) whether the plaintiff's arrest and detention were lawful or not, and (ii) whether his prosecution was malicious or not. In his particulars of claim the plaintiff alleged that on 24 December 2018 and at about 04.55am, he was unlawfully arrested by members of the South African Police Service ("SAPS") as a suspect in a crime of murder. The police officers were at all material times acting within the course and scope of their employment and accordingly the First defendant is vicariously liable for their conduct.

2.2 The plaintiff also submitted that: (i) the arrest was without a warrant, thus *prima facie* unlawful, (ii) the plaintiff did not commit the murder, (iii) the arrest was carried out for an ulterior purposes unknown to the plaintiff, and (iv) the police officers acted maliciously.

2.3 The plaintiff further submitted that as a result of the unlawful/wrongful arrest, detention and malicious prosecution he suffered damages in emotional pain, trauma, *contumelia,* being subjected to uncomfortable and unhealthy living conditions and inconvenience. The plaintiff submitted furthermore that even

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1 In terms of Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

2 Section 2(1)(a) and (b) of Act 20 of 1957 as amended and substituted by section 1 of Act 14 of 2011.

after his release this had a negative effect upon his dignity and the right not to be treated in an unfair and inhumane manner.

[3] The Plaintiff's evidence:

3.1 In his evidence the plaintiff testified that he comes from Zone 5 in Meadowlands, from a child-headed household having lost both parents. The plaintiff was the child heading the home and lived in a 3-roomed RDP house with his nephew. The organisation that looked after them took him in to assist with school requirements, nutrition, after-school programs, visits to Damelin to get augmentation of subjects taught at school and tutorial classes between 2007 and 2008. The plaintiff obtained Abet Matric in 2012, after which he became a volunteer at a library as an assistant, at Ikageng and Itireleng Aids Ministry, getting a stipend of R1500 per month. He joined an orchestra – the African Cultural Organisation of South Africa – ACOSA, became a member of the Salvation Army and was required to be at a certain mall on a daily basis where his mentor had performances and he would be required to do some of these including duets at certain churches. During the period surrounding his arrest, there were certain performances planned and he was going to be part of one that was scheduled to take place at the Salvation Army on 24 December 2018, the day of his arrest.

3.2 Around 4am on 24 December 2018, he heard a loud knock on the door and upon answering, he was very surprised to see 2 policemen at the entrance. The police asked for someone called Sibusiso and, having told them that there was no one by that name who lived there, the plaintiff identified himself upon which the police said they were looking for him. When he enquired as to the about turn concerning the name, the police then advised him that they were not looking to make an arrest but wanted to ask a few questions. The plaintiff refused to go with them, citing the fact that he had an important concert to attend at the Salvation army.

3.3 The plaintiff testified that at a certain point during his argument he with the police, his elder brother woke up and persuaded him to go with them (the

police) because if he had done nothing wrong, they would not arrest him. The plaintiff testified that in order to save time when he came back, he decided to put on pants that were part of his Salvation Army uniform and left with the police. He was transported in a double cab police van and along the way he enquired as to why they first asked for Sibusiso and the answer he got was that the police don't always reveal the real name of the person they are looking for because the person might deny their identity. The police drove with him to the police station which was very close to his place. The plaintiff testified that he did not have his ID with him when he was taken to the police station.

3.4 Upon arrival he was ushered into an office where a certain lady asked him whether any violent event had taken place around him recently. The plaintiff answered in the negative, advising her that he had been playing Christmas carols at the Salvation army. The lady asked him if he was sure and simultaneously gave him a piece of paper which she asked him to sign without explaining its contents. The plaintiff, anxious to finish and go attend his concert, signed the piece of paper without reading it; thinking it was just part of routine signifying him having been there. When the lady took the piece of paper back, she wrote the word "MURDER" at the top thereof in RED. This solicited an enquiry from the plaintiff, who wanted to know what that meant on a piece of paper he had just signed and the lady answered that the plaintiff would explain that in court. The plaintiff was taken to a cell where he encountered another lady who introduced herself as a police captain and told the plaintiff that he was going to participate in an Identification parade ("ID Parade"). Upon an inquiry from plaintiff, as to what an ID Parade was, it was explained and the police captain lady advised that she was still looking for people of similar weight and height.

3.5 The plaintiff testified that after this he was taken to a cell where arrested prisoners are held while awaiting trial – all this time with no information as to what was happening. The place was wet with a leaking shower, people urinating in there and an uncovered toilet in the corner where people were

relieving themselves. The plaintiff's brother came to the court cells and they could only speak through the window.

3.6 In the evening of the same day the plaintiff's fingerprints were taken and it was only then that he was advised that he was being arrested for the murder of Samuel Stoffel ("Sampie"), who lived down the road from plaintiff's home. The plaintiff testified that he knew about the stabbing of an acquaintance and neighbour Sampie, which happened on 14 December 2018. The plaintiff had heard about this when he was at the local tavern, around 8pm when someone walked in and advised everyone that Sampie had been stabbed. The plaintiff testified that when this news was delivered, he and everyone around went to the scene, the police were there, an ambulance and a crowd of people shouting to the victim to stay alive, to hold on etc. A police lady was dealing with the victim and when it started to rain, the plaintiff offered his jacket but Sampie's brother stopped him and said they will get him a blanket.

3.7 Coming back to the plaintiff's arrest, he testified that when he was arrested, his hair was at ear length, had been plaited and looked like short dread locks. After being told of his arrest, he awaited the ID parade and the following day he was advised that there wasn't going to be any ID parade because it was a holiday. The plaintiff was thereafter transferred to Section D in Sun City and while travelling there, he was handcuffed to a prisoner called Zuma, who was very scary, feared by everyone and who told plaintiff that he had killed people.

3.8 The ID Parade was eventually held on 10 February 2019, a month and seventeen days after his arrest. The plaintiff testified that, before the ID parade, he was taken from Orlando court to the mall and made to stand alone in the middle of the mall in handcuffs. He did not know why he had to be taken there under those embarrassing circumstances. He furthermore testified that during the ID parade, the people in the parade could see the pointing people. He saw that the pointing person pointed someone else and not him. After the ID parade, he expected to be released but was not – instead one lady police asked him if he had a girlfriend or lady friends and asked for their names. The plaintiff did not cooperate with this enquiry.

3.9 The plaintiff was finally released on 25 June 2019, that is, 6 months from the date of his arrest. He testified that after his release, the community he lives in was very negative towards him, calling him a murderer, a rapist, accusing him of things he had not done and proclaiming that he did not deserve to be among other people. His testimony was thus that the time he spent in prison had a very negative effect on him. He testified that inside he remains very afraid, no longer processes things emotionally the way he used to, he is not empathetic in the way he used to be and sexually his body is no longer responsive in the way that it used to be. He further testified that this experience made him loose respect for authority and especially the police.

3.10 In cross examination, the plaintiff conceded that he was annoyed by the police's knock on the door on the day he was taken away from home because it was loud and he had a busy schedule for that day. He testified that the police never even mentioned the murder before they took him to the police station. He testified further that there were two police men that showed up at his place, not several – this evidence being at variance with the evidence led on behalf of the defendant, which was to the effect that there was a fleet of police cars; the police never entered his home but stood at the door while he was changing – once again this evidence flying in the face of the evidence on behalf of the defendants where it was alleged that the plaintiff's house was searched.

[4] Evidence on behalf of the Defendants

4.1 The first witness to testify on behalf of the First defendant is the Investigating Officer, Tolo David Mogatswe, who had since become Warrant Officer ("the WO"), gave evidence that: (i) on 24 December 2018 he had information from his informer who told him where he could find the person he was looking for regarding the murder, (ii) the WO was even told that this person was a flight risk and he accordingly had to move fast, (iii) the information he had was that the person is short, dark and had dreadlocks, (iv) Armed with the above, the

name and surname as well as the address, he rushed and found someone who, according to him, fitted the description he had been given.

4.2 The WO asked the person to identify himself and upon confirmation of the name he had been given, he asked the person whether he was aware of a murder case that had happened in the particular area. The person responded in the positive. The WO testified that they (the police) were inside the house when all the enquiries took place and at the mention of the case the person started feeling dodgy, looking uncomfortable. The WO testified that he became suspicious because the person was not responding in a free and satisfactory manner and the WO asked that the person show him around the premises looking to see if there were other people and finding none, the WO then informed the person that he was arresting him for the murder of the deceased.

4.3 The WO testified that he advised the person that he was going to explain his constitutional rights to him. The WO further testified that at this point he was sure that he had found the right person because the description was confirmed and the person was not free in responding to the questions that were put to him. The WO testified that he arrested the person and took him to Meadowlands police station. The WO testified that the person was first detained in the police cells, the WO personally handed him the document with his rights but the WO was not sure of the times as to when each of the events took place.

4.4 In cross examination: the WO conceded that: (i) by 24 December 2018 it was already two weeks after the murder, (ii) a knife that was found by a police officer called Kubheka next to the body of the deceased had not been sent for fingerprints – neither did the WO know what happened to that knife; (iii) when he went to the plaintiff's residence, he had already seen the statements of three witnesses and of those it was only one Jabu Hlongwane who said he can identify the culprit but this person did not accompany the police when going to make the arrest.

4.5 In further cross examination, the WO testified that he arrested the plaintiff because: (i) even though he knew that there were two suspects, he had information about the accused; (ii) the minute the person he found fitted the description he felt that he had to arrest; (iii) the manner in which the plaintiff was responding to his questions showed that he had something to hide – the WO could not give an example of how the plaintiff was responding to questions; (iv) the WO felt that he had to interfere with the plaintiff's right to freedom because he (the WO) had a serious case on his hands and had to take it seriously; (v) the WO could not remember when the plaintiff's rights were explained to him. Upon further enquiry as to what gave rise to his suspicion with respect to the manner in which the plaintiff answered questions, the WO could not take this further that to state it was unsatisfactory.

4.6 The second witness was the prosecutor - Ms Inga Vogelpath. She testified that the matter was handed over to her on 14 January 2019, on which date the process was to ensure that the docket is complete, that a post-mortem has been conducted, the charge sheet is in order and to postpone the matter for further investigation. She further testified that while she was the prosecutor in the matter, it was postponed 6 times, one of such postponements being for the Identification Parade which was held on 10 February 2019. It is important to mention that the ID Parade was negative – in that the plaintiff was not pointed out by any of the witnesses but the plaintiff remained in custody.

4.7 After the ID Parade on 10 February 2019, the plaintiff again appeared in court on 12 February 2019. The docket reflects that on this day the matter was postponed to 22 February 2019, *"for copies of docket to be given to the defendant".* Of importance at this stage is the fact that an ID parade in which the plaintiff participated had returned a negative result – there being no other evidence constituting probable cause or a *prima facie* case against the plaintiff and necessitating continued incarceration. In addition, it is not evident why the state needed 10 days to provide copies of the docket to the defendant.

4.8 The above unnecessary period of incarceration was further extended on 22 February to 16 April 2019, the reason on the docket reflected as "*Plea and Trial".* One would have expected that by now the investigation was complete and in addition there was a *prima facie* case against the plaintiff (as accused then). Lo and behold on 16 April 2019 the matter was remanded again, with the docket reflecting *"On the roll for Plea and Trial",* but of course the matter did not proceed because *"the resident magistrate was not around".* The next event in the matter occurred on 25 June 2019 when the charges against the plaintiff were withdrawn. This was exactly 6 months from the day that the plaintiff was deprived of his freedom.

4.9 The last witness to testify was a State Prosecutor from Roodepoort. His testimony was very short and to the effect that he took a decision to prosecute based on the information that was before him at the time, that is, the charge sheet, the docket and witness statements. He however made further comments summarised in the Evaluation of the evidence in Paragraph 6 below.

[5] The Law:

5.1 The plaintiff's arrest was without a warrant and it was for a suspicion that he had committed an offence referred to in Schedule 1. This therefore placed the arrest within the purview of the provisions of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977.[3] The issues in dispute appear from paragraph [2] above. The applicable provisions of Section 40(1)(b) read as follows:

Section 40

(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."

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[3] The CPA.

5.2 The provisions contained in section 40 have been hailed as constituting a very valuable measure for the protection of communities[4] and their properties. However, in a constitutional state a balance has to be struck between the liberty of an individual and the protection of the community. Where the two are evenly balanced, the scales are tipped in favour of individual liberty. Where an arrest without a warrant is effected by a peace officer in breach of section 40, the individual can lawfully resist or flee, and this might form the basis of a civil action for damages as happened in *casu.*

5.3 On the other hand, the law must not unnecessarily hamper the powers of a peace officer by creating unnecessary limitations not intended by the Legislature.

"The test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective …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 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 lightly or arbitrary, and not a reasonable suspicion"[5]

5.4 In order to provide a proper legal background of the law in this area, below I deal with the elements that constitute a basis for the operation of the provisions of section 40.

5.4.1 ***Arrest and Peace Officers:*** 'Peace officers' are defined in section 1 of the CPA as justices of the peace, magistrates, police officials, and members of

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4 *Duncan v Minister of Law and Order* 1984(3) 460 T at 466D.

5 *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 at 658 E- H.

the Prison services[6]. In addition, persons appointed by the Minister in terms of section 34 of the CPA are peace officers for purposes of their work within the territory of each of their jurisdictions.

"Arrest" has the usual meaning for purposes of this section, supplemented by the extension necessitated by the meaning of suspicion and the new wording of section 50. From the above, it follows that for purposes of a lawful arrest, it is sufficient that the person effecting the arrest should do so with the intention of conducting further investigation and depending on the result thereof, to charge or release the arrestee.

5.4.2 ***Section 40(1)(b):*** In order to satisfy the requirements of a lawful arrest under this section, the peace officer must entertain a reasonable suspicion that the person being arrested has committed an offence listed under Schedule 1 and the jurisdictional facts that must exist are: (i) the arrestor must be a peace officer as defined; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the arrestee has committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. Once the above jurisdictional facts exist, the discretion whether to arrest or not arises.

5.4.3 ***Reasonable suspicion:*** In *Minister of Safety and Security v Magagula*[7], the SCA accepted the meaning of suspicion set out in *Shabaan Bin Hussein & Others v Chong Fook Kam and Another*[7] as: *a state of conjecture or surmise where proof is lacking: I suspect but I cannot prove – Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."*[8] The suspicion has to be reasonably held, that is, the arresting officer must have reasonable grounds for his suspicion, and once the required suspicion exists, the arresting officer is *"vested with a discretion to arrest or not and the discretion has to be exercised rationally."*[9]

5.4.4 ***Reasonability of the suspicion:*** The court must be satisfied that the person effecting the arrest actually formed his/her own suspicion – relying on

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6 As defined in section 1 of the Correctional Services Act of 1998.

7 [1969] All ER 1627.

8 Per Lamont AJ in *Minister of Safety and Security v Magagula* 2017 ZASCA 103.

9 *Minister of Safety and Security v Sekhoto and Another* 2011(1) SACR 315 SCA at [16] and [28].

someone else's suspicion would render the suspicion unlawful.[10] The invidious position of police officers when effecting arrest in terms of these provisions has attracted judicial sympathy as appears in the remarks made by Smith J: *"When the lawfulness of arrests is challenged by disgruntled suspects, the conduct of peace officers is critically picked apart by lawyers and pronounced upon by judicial officers and in the sterile environment of a court of law the best intentions count for nothing since their actions are considered objectively and measured against the exacting standard of the mythical reasonable man."*[11]

5.4.5 The question as to whether the suspicion of the person effecting the arrest is reasonable must be approached objectively, that is, the circumstances giving rise to the suspicion must be such as would ordinarily move the reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence. It stands to reason that the information that gave rise to the arresting officer's suspicion must have been in his knowledge prior to the arrest. The reasonable suspicion must be that of the arresting officer and the subsequent withdrawal of charges against the accused does not affect the lawfulness of a preceding arrest.

5.4.6 A court that has to decide whether the suspicion of an arresting officer was reasonable should not ask whether he considered and applied his discretion in establishing a reasonable suspicion, but, rather whether objectively a suspicion existed that a Schedule 1 offence had been committed and whether that suspicion rested on reasonable grounds. Further, discretion is not one of the jurisdictional facts required in terms of section 40(1*)(b)*. Once the jurisdictional facts have been established, the party raising the issue of discretion will have to prove that the arresting officer had not exercised the discretion properly.

5.4.7 ***Discretion of arresting officer and burden of proof:*** The arresting officer's discretion on whether to arrest or not, arises once all the jurisdictional facts

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[10] *Ralekwa v Minister of Safety and Security* 2004(1) SACR 131T [11] – [14].

[11] In *Mkhwanazi and Another v Minister of Police* (unreported case No. EL 259/2016, 17/1/2017 @ [1].

have been established. The decision to arrest must be based on an intention to bring the arrestee to justice – any other purpose will render the arrest unlawful. The discretion to arrest must also be exercised in good faith, rationally and not arbitrarily. The discretion to arrest must further be exercised with due consideration to the Bill of Rights, bearing in mind that the standard is not perfection, which is, in most circumstances judged from the vantage of hindsight. Courts dealing with allegations of an improperly exercised discretion to arrest often have to decide whether the discretion was exercised at all and, if it has, whether it was exercised properly in the light of the Bill of Rights.[12]

5.4.8 Once the jurisdictional fact of the existence of the reasonable suspicion is proved by the defendant, the arrest is brought within the ambit of the enabling legislation and thus justified. Should it be alleged that the suspicion was improperly formed, the party making the allegation would bear the onus of proof. The test on whether the suspicion is reasonable is an objective test. Would a reasonable person in the peace officer's position with the information at his/her disposal have formed the suspicion that the plaintiffs committed the offence of housebreaking and theft or possession of stolen property?

5.4.9 The test whether a peace officer "reasonably suspects" a person having committed an offence within the ambit of section 40 (1) (b) is an objective one. The test is not whether a police believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. The test as set out in *Duncan* was endorsed by Rabie CJ in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579 H and later adopted by Harms DP in *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para 6. See also *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) para 17.

5.4.10 ***Reasonable and probable cause in the law of malicious prosecution:***

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[12] *MR v Minister of Safety and Security* 2016(2) SACR 540 (CC).

The law of wrongful arrest and malicious prosecution been closely linked. However, the principles governing each of the two different causes of action part ways at the point when the arrest and detention translate into prosecution. The different tests must not be conflated in spite of the common requirement of reasonableness. In order to succeed in an action for malicious prosecution, the plaintiff must prove all of these four requirements: (i) that the prosecution was instigated by the defendant; (ii) it was concluded in favour of the plaintiff; (iii) there was no reasonable and probable cause for the prosecution; (iv) the prosecution was actuated by malice. Decided cases have shown that it is challenging to prove both that there is a reasonable and probable cause for prosecuting a person and that the prosecution was activated by malice.

5.4.11 Malan AJA[13] distinguished wrongful arrest from malicious prosecution as consisting in the wrongful deprivation of a person's liberty; while malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable or probable cause and with malice. It is widely accepted in law that reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The courts have also identified another distinguishing factor between reasonable suspicion to arrest and the requirement of reasonable and probable cause in the law of malicious prosecution, that is, the factor of proof. In the malicious prosecution the burden of proof is on the plaintiff, who must show that all four elements developed by the courts over the years are present.[14] On the other hand, in an action for wrongful arrest the burden is always on the defendant to justify the arrest and detention.[15]

5.4.12 ***Quantum:***

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13 *Relyant Trading (Pty) LTD vs P Shongwe & Minister of Safety and Security* [2006] ZASCA 162.

14 As set out in Paragraph 5.4.9 (*Supra.)*

15 As set out in Paragraph 5.4.2 *(Supra).*

With regard to quantum for damages, both Counsel addressed the court with reference to trite law on the subject, that is, damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. In the case of Mahlangu and Another v Minister of Police[16], the court indicated that damages are a gesture of goodwill to the aggrieved and do not rectify the wrong that took place. The court further cited, with approval an extract from the Supreme Court decision of *Minister of Safety and Security v Seymour*[17], which reads as follows:

"Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss."

While noting it as trite that the primary purpose of a damages award is not to enrich the aggrieved party but to offer much needed *solatium* for injured feelings, case law also enlists the courts to make awards that reflect the importance of the right to personal liberty and the seriousness with which arbitrary deprivation thereof is viewed in our law.

While submitting that in deciding the quantum for damages, the correct approach is to have regard to all the facts of a particular case and determine the quantum based on such facts, Counsel for the plaintiff did however refer the court in comparison, to the case of De Klerk vs Minister of Police[18], who was unlawfully deprived of his freedom from 20 December 2012 to 28 December 2012 - eight days and was awarded general damages amounting to R300 000.

[6] Evaluation of the evidence:

6.1 From the facts the basis for the arrest of the plaintiff by Warrant Officer Bogatso is only that the plaintiff had at the time hair that could be mistaken as dreadlocks. Other than that the Warrant Officer could not formulate a basis for a suspicion of the committal of the offence of the murder of Samuel Stoffel by the plaintiff at all. All the Warrant Officer could say was that the plaintiff did not respond in a free and satisfactory manner to his questions. The Warrant

16 [2020] 2 All SA 656 (SCA).
17 2006(6) SA 320 Paragraphs 26-29.
18 [2019] ZACC 32.

Officer did not even have an example of a question which was answered in a suspicious manner or a manner that would cause suspicion. The Warrant Officer's testimony was simply not convincing and did not support the presence of the necessary reasonable suspicion to make the arrest lawful. To simply say "the plaintiff was not responding in a free and satisfactory manner" or "the manner in which he (the plaintiff) was responding showed that he had something to hide", without providing any basis for making those statements cannot succeed to make a so-called suspicion reasonable.

6.2 The plaintiff testified that at the time his hair could be mistaken for dreadlocks. However, even the eye witness who had seen the deceased's assailants had mentioned further features, for instance, "a tall, slender and dark complexioned" individual. The warrant officer did not take into account these features but narrowed himself to the dreadlocks. All the warrant officer focussed on was the dread locks. The question that looms large is how many youths out there have dreadlocks. It must also be taken into account that the warrant officer received this information no less than 10 days after the commission of the crime and he clearly had nothing from an investigation perspective and upon receipt of this poor information he had to make sure that he arrests someone.

6.3 Further, there was evidence of a knife that was found by another police officer, Mr Kubeka next to the deceased's body. This piece of hard evidence did not receive the attention of the Warrant Officer as it was not investigated for finger prints, neither did the warrant officer knew what happened to it. What appears from the Warrant Officer's evidence is that once he was directed to a particular named young man with dreadlocks by an informant whose motives were unknown, he believed that his investigation work was done. His testimony to the effect that "I did not think that I was going to interfere with his freedom because I had a serious case on my hands…" shows that he did not exercise his discretion to arrest properly and with consideration of the jurisdictional facts that are necessary for the kind of arrest in issue.

6.4 All of the above postponements must be seen in the light of Ms Volgepath's testimony in cross-examination to the effect that she was happy to postpone the matter and keep the plaintiff in detention with the hope that there may be a dock identification, the ID parade having failed. Her reasoning flies in the face of the approach adopted in Minister of Police v du Plessis[19] where the court said, "A prosecutor's function is not merely to have the matter placed on the roll and 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."[20]

6.5 Additionally, I find it necessary to refer to part of the testimony of the plaintiff, which is that before the ID parade, he was taken from Orlando court to the mall and made to stand alone in the middle of the mall in handcuffs. None of the parties dealt further with this testimony, and of more importance the defendant did not refute it. The defendant's failure to refute this testimony or at least to challenge its credibility in cross examination, leaves this court with no option but to take cognizance thereof and consider it as enhancing the submission that the plaintiff was subjected to malicious detention and prosecution.

6.6 Before I conclude the matter I must refer to the evidence of the last witness for the Defendant, Mr Mathebula, a State Prosecutor who testified, *inter alia* that: (i) The eye witness was not there when the plaintiff was arrested; (ii) the description of the culprit that was given was that of a person with dreadlocks, tall, slender and dark in complexion. The witness's last comment in his testimony was that if he had been the control prosecutor, and an ID parade had returned a negative result, he would have released the accused.

[7] Conclusions:

[7.1] In the evaluation of the testimony led on behalf of the defendants, certain points need to be made, that is:

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19 (2013) ZASCA 119 (20 September 2013).

20 At Paragraph 12.

(i) WO Bogatswe made a very poor impression as a witness – he did not seem to remember much, with parts of his evidence inconsistent with that of the plaintiff in areas where there was no reason for the two to be at variance, for instance the plaintiff testified that there were two policemen who showed up at his house and the WO testified that there was a fleet of police cars; the plaintiff testified that the house was not searched and the officers stood at the door while he was changing and the WO's lack of recollection whether the plaintiff was read his rights or not in terms of the constitution.

(ii) The WO completely ignored the hard evidence of a knife that was found by another police officer, Mr Kubeka next to the deceased's body, which knife was suspected to have been used to kill the deceased.

(iii) The docket reflecting that there were two assailants that attacked the deceased and no indication as to what investigation took place with regard to the other one.

(iv) The eye-witness Jabu Hlongwane's description of a person with dreadlocks, tall, slender and dark in complexion and the question is whether the plaintiff really fits this description.

(v) The WO's belief of the warning from his informant that the person was a flight risk – this apprehension entertained on the 10th day after the murder poses the question whether the WO exercised his discretion to arrest properly.

(vi) In evidence the WO making reference to a suspicion he had that the plaintiff had committed the crime of murder or that he had something to hide and his failure to share with the court what gave rise to the suspicion or what the plaintiff did that made him to appear dodgy. The WO did not testify to any evidence supporting a reasonable suspicion that the plaintiff had committed an offence.

(vii) There being no evidence that the WO ever gave the plaintiff to make any exculpatory statement with regard to the alleged comital of the murder.

(viii) It is also necessary to mention that the testimony of the prosecutor does not indicate the existence of reasonable and probable cause before commencement of the prosecution, instead in cross examination she testified that she was reliant on a dock identification. She only consulted the three witnesses on 25 June 2019 whereas reasonably this should have been one of

the first things to do in the establishment of reasonable and probable cause. It also does not appear that the prosecutor considered further evidence that reflected in the docket if regard is had to several other indicators that should have alerted the prosecutor to the absence of a connection of the plaintiff to the crime. This indicates that the prosecution was initiated without the existence of a reasonable and honest belief that the plaintiff had committed the crime.

[8] Noting all the above points, this court concludes as follows:

8.1 The first defendant failed to discharge the onus of proving on a balance of probabilities the existence of a reasonable suspicion that the plaintiff had committed an offence as contemplated in section 40(1)(b) of the CPA;

8.2 The arrest and subsequent detention of the plaintiff was accordingly unlawful;

8.3 Based on the evidence of the prosecutors and the contents of the docket there could not have been an honest belief or probable cause on their part founded on reasonable grounds that the institution of proceedings was justified.

8.4 The plaintiff has accordingly discharged the onus that his prosecution was malicious on a balance of probabilities, worse so if regard is had to the negative ID parade.

[9] Order:

Therefore, I make the following order:

9.1 The First and Second defendants are jointly and severally liable, the one paying the other to be absolved, for payment of damages of R2 000 000.00 to Mr Leeuw in respect of his unlawful arrest on 24 December 2018, his subsequent detention and malicious prosecution until 25 June 2019.

9.2 Interest at the prescribed rate from the date of judgment to the date of payment.

9.3 The defendants to pay the plaintiff's costs, once again jointly and severally, the one paying the other to be absolved.

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NL TSHOMBE

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

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COUNSEL FOR THE PLAINTIFF: ADV CHARLES MQUSHULU

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