IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 18779/2017

(1)	REPORTABLE: YES/NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED	
DATE		SIGNATURE

LUYANDA NKEKE Plaintiff

and

THE NATIONAL PROSECUTING AUTHORITY First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTION Second Defendant

THE MINISTER OF POLICE Third Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 July 2023.

JUDGMENT

CARRIM AJ

Introduction

[1] The plaintiff brought an action for malicious prosecution and unlawful arrest and detention.

[2] It is common cause that the plaintiff was arrested on 20 March 2017 in Westonaria, appeared in court on 23 March 2017, 6 April 2017, 20 April 2017 and on 4 May 2017. He was granted bail on 6 April 2017 but was only released on bail on 4 May 2017.

[3] Summons was issued against the defendants on 30 May 2017, by Mr Sekgatja acting on behalf of the plaintiff.

[4] In the particulars of claim, damages are claimed for R2 500 000 (two million five hundred thousand) for the following:

"*16.1*	*Malicious Prosecution;*		*R 1 000 000.00*
16.2	*Deprivation of Liberty;*		*R 1 000 000.00*
16.3	*Inconvenience and Discomfort;*		*R 200 000.00*
16.4	*Contumelia;*		*R 200 000.00*
16.5	*Defamation of Character*		*R 100 000.00*
TOTAL CLAIM		=	*R 2 500 000.00*"

[5] Before I turn to deal with the merits of the matter, I set out here the events leading up to the hearing of the matter and my decision not to grant a postponement to the plaintiff.

Application for postponement/removal from the roll

[6] The matter was allocated to me. My registrar reached out to the parties on 19 May 2023 enquiring about the status of the matter and whether a clearer copy

of the charge sheet could be provided.

[7] The matter was set down to commence on 23 May 2023 with an estimated duration of 2-3 days. Preparations for trial seem to have been on track. The charge sheet and docket were uploaded on CaseLines.[1]

[8] The joint minute of the pre-trail meeting signed on 6 June 2022[2] reflects that in relation to the unlawful arrest claim, the defendants had the onus to prove the lawfulness of the arrest and detention, and the plaintiff bore the onus to prove the claim of malicious prosecution and quantum of damages.[3]

[9] In the joint practice notice, signed on 10th May 2023,[4] it is recorded that discovery was done with one outstanding transcript which plaintiff was to provide. Significantly it is recorded that plaintiff will lead one witness (himself), the defendants four witnesses and both parties verify and confirm that the matter is ready to proceed to trial.[5]

[10] On Monday morning 22 May 2023 Mr Sekgatja informed me through my registrar that the matter had to be removed from the roll because the plaintiff had been incarcerated and would not be able to attend the hearing. The defendants objected to the matter being removed from the roll on the basis that significant costs had been incurred in preparing for trial, all their witnesses were

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1 Although a better copy was requested by me and uploaded by the defendants.
2 Section 016-1 of CaseLines.
3 Joint minute at section 016-2 of CaseLines.
4 015-5 of CaseLines.
5 015-8 of CaseLines.

ready and available to testify, the matter had been running for six years and that the matter had previously been removed from the roll in 2019 for the same reason, namely that the plaintiff had been incarcerated. The defendants were of the view that the prejudice to the defendants and the interests of justice occasioned by another delay could not be cured by an order of costs.

[11] Mr Sekgatja in response suggested that it was the defendants who had previously removed the matter from the roll. However, defendants submitted a copy of a letter signed by Mr Sekgatja on 7 May 2019, sent to the defendants, in which he requested the matter be removed from the roll due to the plaintiff being incarcerated in Krugersdorp Prison. In that letter he explains that he had attempted to requisition the plaintiff but was advised by Correctional Services that this was only permissible for criminal proceedings. Since the plaintiff would not be able to appear, the matter was postponed at his request.

[12] Given these developments, I convened a virtual pre-trial with the parties on Monday 22 May 2023 at 14h00. At that pre-trial Mr Sekgatja submitted that he had learnt about the plaintiff's incarceration on that day from the plaintiff's sister. She told him that plaintiff had been incarcerated at the Krugersdorp Correctional Facility, then transferred to the Johannesburg Correctional Facility and was due to be released in September 2023. Nothing more was put up by Mr Sekgatja. It was clear to me that he had not made basic enquiries from the sister as to the circumstances of the arrest. The defendants objected to the fact that no facts on affidavits were put up verifying any of this or setting out the circumstances of the plaintiff's arrest.

[13] I decided to provide Mr Sekgatja with an opportunity to ascertain the whereabouts of the plaintiff, find out whether he was eligible for bail and if not whether he could be present for a virtual hearing. I also directed him to place all the steps he had taken to establish the whereabouts of the plaintiff on affidavit. I asked the parties to make submissions to me the next day on whether the matter ought to be postponed. A virtual hearing was set down for this purpose for 10:00 on 23 May 2023 and the trial was stood down for the day.

[14] I mention here that at this pre-trial I also sought clarity from Mr Sekgatja on what basis the malicious prosecution claim was brought given that the plaintiff was released on bail and the criminal matter was still pending according to the particulars of claim. In response Mr Sekgatja submitted that he intended to show that the failure to re-enrol the matter constituted malicious prosecution. In other words, he intended to argue that the *failure* to prosecute his client amounted to malicious prosecution. I return to this issue later when I discuss the merits of the matter and the evidence of Ms Viljoen and Mr Malahlela.

[15] The defendants provided me with written submissions overnight. Mr Sekgatja submitted an incomplete affidavit (it was not commissioned) a few minutes before the hearing on 23 May 2023. In this affidavit he confirms the following-

15.1. The trial had previously been set down for 10 May 2019 but was removed from the roll due to the plaintiff's incarceration.

15.2. He had visited the plaintiff after he had been released in 2019. The date of this visit is not provided.

15.3. He obtained a trial date on 22 November 2022.

15.4. He had been notified of the plaintiff's recent incarceration by the plaintiff's sister. He does not say when and how the sister had communicated this to him.

15.5. He made enquiries at the Krugersdorp Correctional Service Centre (prison) but records of the plaintiff could not be found. The personnel said they could not find any record of the plaintiff being held there as an inmate even though he had previously been held there.

15.6. He made enquiries at the Johannesburg Correctional Service Centre, and they too could find no record of the plaintiff being held there.

15.7. He confirms that the plaintiff could not be traced.

15.8. He requests that the matter be postponed based on the sister's version that the plaintiff will be released in September 2023, despite confirming in the very same affidavit that he could not verify whether plaintiff had indeed been incarcerated.

[16] The postponement hearing proceeded on 23 May 2023. What emerged from Mr Sekgatja's submissions was confirmation that he could not trace the plaintiff at any of these facilities. It also emerged that Mr Sekgatja was last in contact with his client in 2019 (according to him he visited plaintiff in Bekkersdal) and that he had no direct contact with him since then. He submitted that he had attempted to contact plaintiff in February 2023 (no details provided as to how

such contact was attempted) but was unsuccessful. In short, Mr Sekgatja had no idea where his client was and had no instructions.

[17] The defendants' counsel submitted that a postponement ought not to be granted in these circumstances. They had incurred significant costs which costs ultimately would be borne by taxpayers; they had procured all their witnesses who were ready to testify; the matter had been dragging on too long and there was a real risk that witnesses might leave, or memories would fade. They asked that the matter be allowed to proceed in terms of Uniform Rule 39(3), and they be permitted to seek absolution from the instance.

[18] While Ms Masevhe was on her feet, I realised that I could no longer see Mr Sekgatja on the monitor. On enquiry it was confirmed that he had dropped off the Teams link.

[19] I stood the matter down to allow my registrar to locate Mr Sekgatja and facilitate his re-entry into the link. My registrar's efforts to contact him directly on his mobile phone were unsuccessful. His phone was off. She attempted to contact his offices who advised her that he was in court. She was given the number of his associate, Gina, who was apparently in court with him. Efforts to contact her via telephone also were fruitless. My registrar attempted to contact him via email, but no response was received.

[20] Given that Mr Sekgatja had dropped out of the virtual hearing I was unable to provide my ruling. I directed that the matter proceeds the next day in physical court and that the defendants' witnesses should be on standby. My registrar sent an email to Mr Sekgatja to this effect.

[21] Nothing was heard from Mr Sekgatja or his office until later that afternoon when my registrar received an email from him that he would not make it to the hearing on 24 May due to a “Family Commitment” and that he had briefed counsel together with an associate to appear in his stead.

[22] Mr Sekgatja sent another email on the morning of 24 May 2023 in which he apologised for leaving the 23 May hearing due to attending to the family emergency and confirmed that he had no instructions to proceed to trial “due to the plaintiff’s incarceration”, a matter he had been unable to verify.

[23] Mr Nqcaweni appeared on behalf of the plaintiff on 24 May 2023. During introductions in my chambers, he stated that he had been briefed only on the issue of the postponement/removal from the roll and was unaware of any of the other issues.

[24] The proceedings commenced at 10:00. Mr Nqcaweni commenced with an opening statement on the merits of the matter.

[25] At that point Ms Masevhe objected and placed on record the defendants’ objection to the conduct of Mr Sekgatja and Mr Nqcaweni. In her view, given that Mr Sekgatja had no contact whatsoever with his client since 2019, it was questionable whether he had any instructions to proceed with obtaining a trial date, conducting any of the pre-trial meetings and setting the matter down. She was of the view that Mr Sekgatja was in a frolic of his own. It was also not clear on whose instructions Mr Nqcaweni was proceeding.

[26] I clarified the situation with Mr Nqcaweni. He confirmed that he was instructed

by Sekgatja Attorneys on the issue of a seeking a postponement or removal from the roll only and not on the merits of the matter.

[27] I then allowed the parties to make submissions to me on the issue of the postponement.

Postponement application

[28] After considering the submissions of the parties I decided not to grant the postponement application. The reasons for my decision were given *ex tempore* but I reproduce the salient points here.

[29] The applicable legal principles for the granting of a postponement are trite. A postponement is not there for the asking, the applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons. The court has a discretion to grant or refuse a postponement which must be exercised judicially.[6] The balance of convenience or inconvenience to both parties should be considered, the court should weigh the prejudice which will be caused to the applicant if the postponement is not granted and the prejudice to the respondent if the postponement is granted.[7]

[30] Mr Sekgatja last had contact with his client in 2019, seemingly after the plaintiff was released from prison. Despite not hearing from him since then, he proceeded with trial preparation and obtained a trial date in November 2022. He participated in the pre-trial meeting of 6 June 2022 in which he accepted duties for the plaintiff.

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6 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS).
7 Erasmus Superior Court Practice Vol 2 pp D1-552A.

[31] As late as 10 May 2023, in the joint practice note, he undertook that "*plaintiff will lead one witness (himself)"* and "*verified and confirmed that the matter was ready for trial*". He thus led the defendants to believe that the matter was ready for trial and that the plaintiff was available to testify.

[32] By his own account, throughout this time, he had no contact with his client whatsoever and had no instructions to proceed with the matter. Nor had he made efforts to consult with his client prior to taking the aforesaid steps. He says that he tried to contact his client, but this was only in February 2023 and was unsuccessful.

[33] It is only on the morning of 22 May 2023, a day before the trial was set down to commence, that he allegedly received the information from the plaintiff's sister.

[34] But in his incomplete affidavit Mr Sekgatja confirms that he could not verify that the plaintiff had in fact been incarcerated at Krugersdorp and then transferred to the Johannesburg Correctional prison. By the morning of 22 May 2023, he had no idea of the plaintiff's whereabouts, and not had he been able to ascertain the circumstances of his arrest and conviction.

[35] As to whether the plaintiff would be released in September 2023, Mr Sekgatja submitted that this court place reliance on what he says the sister had conveyed to him. Nothing was put before me to explain why any reliance should be placed on this when Mr Sekgatja himself could not verify that the plaintiff had indeed been convicted and incarcerated as alleged by the sister.

[36] The defendants on the other hand continued to prepare for trial on the

assumption that plaintiff was ready to proceed. Witnesses were procured and their availability confirmed, counsel was briefed, and preparations were made.

[37] The matter was already 6 years in the running. Any further delays would cause great inconvenience to the witnesses, and it was likely that as more time elapsed memories would fade or witnesses would become difficult to locate. An important factor to bear in mind is that these witnesses are all public servants. They had been asked to make themselves available for the trial dates, thus removing them from their ordinary duties either at the Westonaria Police Station or at the district court. A postponement would not only prejudice the defendants from a cost perspective, which would ultimately be borne by taxpayers, but would result in police officers' and prosecutors' time being wasted, which could be better used to the benefit of citizens. Were the trial to be postponed again, to an unknown date, it was likely that the prejudice to the defendants, could not be cured by a costs order.

[38] The prejudice to the plaintiff on the other hand would be limited were the postponement be refused. This is because the defendants requested that the matter proceed in terms of rule 39(3) and that they be permitted to seek absolution from the instance.

[39] Accordingly, I found that the balance of convenience favoured the defendant and the application for postponement was dismissed with costs. The defendant was permitted to proceed in terms of rule 39(3).

[40] After my ruling was handed down Mr Nqcaweni elected to remain in court to observe the proceedings. However, neither he nor anyone else from Mr

Sekgatja's office was present in court on the following day.

[41] I now turn to consider the merits of the case.

Merits

[42] The parties had agreed that in relation to the claim of unlawful arrest the defendants had a duty to begin and bore the onus to show that the arrest was lawful. In relation to the malicious prosecution claim, the plaintiff bore the onus.

[43] The plaintiff was not present, and no evidence was led in relation to the malicious prosecution claim. The first and second defendants had asked that I dismiss this claim immediately. However, because of the unusual nature of the proceedings, and the fact that the matter was proceeding in terms of rule 39(3), I declined to grant such an order at that time.

[44] The third defendant proceeded to lead its evidence in relation to the unlawful arrest.

[45] I deal with the Unlawful Arrest claim first and then with the claim of Malicious Prosecution.

[46] A claim for defamation was alleged in paragraph 16.5 of the Particulars of Claim but no facts were put up in support of this. It was not clear whether this was alleged to be a separate claim or simply a head of damages. Accordingly, I do not deal with this in my judgment.

A. Unlawful Arrest

[47] The Defendant's plea states that the arrest and detention was in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 which provides that:

> *"40* ***Arrest by peace officer without warrant***
>
> *(1) A peace officer may without 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;"*

[48] It is trite that in an action for unlawful arrest the defendant bears the onus to show that the arrest was lawful.

[49] In ***Minister of Law & Order & Others v Hurley & Another***[8] , Rabie CJ stated that:

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[50] In ***Duncan v Min of Law & Order***,[9] Van Heerden JA stated that the jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

50.1. The arrestor must be a peace officer.

50.2. He must entertain a suspicion.

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[8] 1986(3) SA 568 (A) at 589E-F.

[9] (38/1985) [1986] ZASCA 24; [1986] 2 All SA 241 (A) (24 March 1986) at 818G-H. See also *Shabangu v Min of Police* (66113/2019) [2022] ZAGPPHC 590 (15 August 2022).

50.3. It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act.

50.4. That suspicion must rest on reasonable grounds.

[51] It is only when all the jurisdictional facts of section 40(1)(b) are present that an arresting officer can exercise a discretion to arrest the suspect.

[52] To discharge the onus, the defendant must show that the arrest was affected by a peace officer, that the peace officer has a reasonable suspicion that the arrestee committed an offence listed on Schedule 1 of the Act ("schedule 1 offence") and that the suspicion was based on reasonable grounds.

[53] In ***Mvu v Min of Safety & Security***, Willis J, stated that the fourth requirement i.e. that the suspicion must rest on reasonable grounds is objectively justiciable.[10]

[54] In other words, *"… the test is not whether the policeman believes that he has reason to suspect, but whether on an objective approach he in fact has reasonable grounds for his suspicion."*[11]

[55] In ***Mabona and another v Minister of Law and Order and others***,[12] Jones J said the following:

> *"Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen. It seems to me that in evaluating this information a*

[10] 66113/2019 at para [9].
[11] *Duncan v Min of Law and Order* (supra) at 814D-E.
[12] 1988 (2) SA 654 (SE) at p. 658E.

reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept 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 ascertain 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."

[56] To this might be added that the facts on which the police officer relies for his suspicion must at least be realistic and well- founded, having regard to the circumstances of the case.[13]

The testimony of the witnesses

[57] Four witnesses were led.

Mr Tsoka

[58] The complainant Mr Kudzai Tsoka testified that he now lives in Krugersdorp (check) but at that time he lived at 52 Gardenia Street Westonaria. On 15 March 2017 he came home to find that his garage door had been broken. He went to look at the footage of his CCTV cameras, which was in the house. The footage revealed that an unknown man had broken into the garage and had stolen his play station and extension cord. At first, he thought this might be an isolated incident.

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[13] *Olivier v Min of Safety & Security* 2009(3) SA 134 (W).

[59] But on 17 March 2017, he came home to find that his hosepipe, copper pipes and his municipal dustbin were missing. His CCTV camera footage revealed that the same man had stolen the items. He then told his wife and neighbours about it.

[60] He started feeling uneasy about this matter and felt that he was being targeted. So, on 20 March 2017, he decided to come home early. When he arrived at his house, he saw a man running towards the backyard of his house. He gave chase but the man jumped over the neighbour's wall. He then decided to go look for him. He drove around the neighbourhood and found him sitting near some "mining houses". He recognised him as the man in the CCTV footage. He confronted him but the suspect (plaintiff) denied breaking into his premises. Mr Tsoka then decided to lure the plaintiff to his home by offering to pay him for a car wash job. The plaintiff got into his car, and he drove him to his house. In the meantime, Mr Tsoka had texted his wife to call the police. He took the plaintiff to his house and the police arrived. It was Sgt van Rensburg and his colleague whose name he couldn't recall. When the police asked him what evidence he had against the plaintiff he showed them the CCTV footage. He and his wife and the two policemen looked at the footage. The plaintiff could be identified because he had an unusual bump on his head. The plaintiff was then arrested by Sgt van Rensburg.

[61] Mr Tsoka testified further that although the police had said that they would send someone to fetch the CCTV footage they never did. Eventually Mr Tsoka copied it on a memory stick and dropped it off for the investigating officer with a woman called Dineo. He didn't hear anything more about the matter until the

time when he met with the prosecutor for preparation for the trial. The prosecutor wanted to know from him whether he still wanted to pursue the matter given that the plaintiff was going to jail for five years on another matter. By this time, he had moved, and it was far for him to drive to Westonaria. He told the prosecutor he was willing to let it go provided the plaintiff went to jail. He didn't know that the CCTV footage was missing.

Sgt van Rensburg

[62] Sgt van Rensburg testified that he has been with SAPS for 18 years. On 15 March 2017 he was stationed at Westonaria Police Station and was doing sector policing. He got a call about a housebreaking at 52 Gardenia Street Westonaria. He and his crew member Sgt Mojela went to the address. When they got there the complainant, Mr Tsoka, told him that plaintiff had broken into his house and stolen the items listed above. The plaintiff was present. He asked the complainant what evidence he had to make this allegation. Mr Tsoka then showed him and his colleague the CCTV footage for 15 and 17 March 2017. The plaintiff could be easily identified in the CCTV footage. He then arrested the plaintiff, detained him at the Westonaria police station and opened a docket. He didn't take a copy of the CCTV footage. The case was then transferred to the investigating officer (IO). He had nothing more to do with the matter. He did attend court proceedings but was not asked to testify. He was only advised that the matter had been postponed.

[63] Sgt Mamogale was the IO. Sgt Mamogale has been off sick since January 2023 and was not available to testify.

[64] The defendants decided not to call Sgt Mojela given that the evidence of the complainant had been corroborated to a large extent by Sgt van Rensburg.

[65] At this point in time, I indicated to the defendants that I required a complete picture of the sequence of events. Given that there was no version from the other side, it wasn't clear to me what the status of the criminal proceedings were and when the complainant had met with the prosecutor.

[66] Ms Viljoen, the senior prosecutor who had handled the matter, and Mr Moses Malahlela the regional prosecutor, were made available by the defendants to testify on the following day.

Ms A C Viljoen

[67] Ms A C Viljoen is a senior public prosecutor at Westonaria since 2006. She testified that she has been a public prosecutor for 29 years. She testified to the history of this case. The case was first enrolled in March 2017 but was struck off on 3 May 2017 for further investigation. The investigation had not been finalised. The docket was then presented to her on 15 August 2017 for a decision whether to re-enrol the matter. She had to review the docket. She wanted to consult with the complainant before deciding on the way forward. She did consult with him, and he gave her facts which were not in his initial statement. She then asked him to make an additional statement. She thereafter took the decision to re-enrol the matter and to prosecute him. The accused (plaintiff) didn't have a fixed address so she couldn't issue summons against him. She then issued a JSI warrant in February 2018. This warrant would allow a police officer to arrest him and bring him to court if they came

upon him. Eventually he was traced and found to be in prison. She requisitioned him and he appeared in the District Court on 21 August 2018. The case was then transferred to the Regional Court (case 176/18). She had nothing to do with the matter thereafter.

Mr Malahlela

[68] Mr Malahlela testified that he has been a public prosecutor since 2006. He has been stationed at Westonaria Regional Court since 2012. He confirmed that the matter was transferred to the Regional Court on 27 August 2018. The matter was postponed several times before he finalised it in April 2019. The accused faced several other charges. He consulted with the complainant about this docket. There was an issue with the CCTV (video) footage. Ms Viljoen had seen the CCTV footage but by the time the matter was transferred to him the footage had gone missing. He told the complainant that the accused faced more serious charges. After he engaged with the accused's lawyers, a plea bargain was concluded. The accused would plead guilty to the more serious charges, and he would drop this one, which is what transpired. The accused was sentenced to 18months for theft, the sentence wholly suspended. He had intended to consolidate the cases – if that had been done then he would've just dropped this count. But as it is the matters were not consolidated so he had to withdraw this one. Formally it amounted to a withdrawal of charges, but it was done in the context of a plea bargain.

Analysis

[69] The arrestor was Sgt van Rensburg, a police officer. The offence the plaintiff

was suspected of committing, namely housebreaking and theft is an offence listed in Schedule 1.

[70] The issue to be determined is whether the arresting officer Sgt Van Rensburg entertained a reasonable suspicion that the plaintiff had committed a schedule 1 offence when arresting the plaintiff.

[71] In order to determine whether the suspicion was objectively reasonable the Court must have regard to the circumstances surrounding the arrest and whether the arresting officers had reasonable grounds.[14]

[72] The circumstances surrounding the plaintiff's arrest were the following. Sgt van Rensburg was on duty when he responded to a call which stated the nature of offence and provided the address at which the offence was allegedly taking place. This was not a random initiative on the part of Sgt van Rensburg.

[73] He arrived at the address with his crew member Sgt Mojela. When they arrived at the address, they listened to the complainant and Sgt van Rensburg asked him what evidence he had for making the allegation. He didn't merely act on the say-so of the complainant. In other words, he made enquiries about the allegations and did not take them lightly.

[74] It was then that the complainant showed Sgt van Rensburg and Sgt Molefe the CCTV footage for the days 15 and 17 March 2017 in which plaintiff was identified as the person who had broken into the complainant's premises. The plaintiff had a distinctive feature on his head (ball) which was visible to all.

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[14] *Olivier v Min of Safety & Security* 2009(3) SA 134 (W).

[75] Thus, Sgt van Rensburg had sight of evidence in the form of the CCTV footage which placed the plaintiff on the premises of the complainant. It was only after that that the plaintiff was arrested and taken to the Westonaria Police station and a docket was opened.

[76] Having regard to all these facts, namely that Sgt van Rensburg a peace officer, had responded to a call while on duty, that he made reasonable enquiries and did not merely act on the say so of the complainant, that he had sight of evidence in the form of the CCTV footage which placed the plaintiff in the premises of the complainant, it is clear that there were objectively reasonable grounds for Sgt van Rensburg to suspect that the plaintiff had committed the alleged Schedule 1 offence.

[77] In ***Shabangu v Minister of Police***,[15] Baqwa J relying on ***Mdlaose v Minister of Police***[16] pointed out that the police official sometimes must effect an arrest under urgent circumstances and strike while the iron is hot.[17]

[78] In the circumstances of this case, where Sgt van Rensburg, was faced with CCTV footage in which he could identify the plaintiff and which revealed that the plaintiff had broken into the complainant's premises, it would be surprising to say the least had Sgt van Rensburg elected not to arrest the plaintiff on suspicion that he had committed a Schedule 1 offence.

[79] In my view the third defendant has discharged its onus and has shown that the arrest was lawful.

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15 (66113/2019) [2022] ZAGPPHC 590 (15 August 2022).
16 2016 (4) All SA 950 (WCC).
17 Para [12].

[80] In normal circumstances, once the defendant has discharged its onus in a claim for unlawful arrest, this would lead to a dismissal of the claim.

[81] However, since the plaintiff was not present, the defendant requested that they be granted absolution from the instance in accordance with rule 39(3).

[82] Uniform Rule 39 deals with the conduct of a trial. Rules 39(1)-(4) apply to circumstances where a party is in default. Rule 39(3) provides that –

"If when a trial is called, the defendant appears and the plaintiff does not appear, the defendants shall be entitled to an order granting absolution from the instance with costs but may lead evidence with a view to satisfying the Court that final judgment should be granted in his favour and the Court if so satisfied, may grant such judgment".

[83] When a trial is called and there is only appearance for the defendant, he is entitled to satisfy the court that final judgment should be granted in his favour. If so, satisfied the court may grant such final judgment in favour of the defendant. However, the right to grant a final judgment should be exercised with caution and only in special circumstances. The usual order is one of absolution from the instance.[18]

[84] In the leading case of ***Sayed v Editor, Cape Times and Another,***[19] which deals with the application of rule 39(3), the plaintiff had instituted a defamation action against the defendants arising out of the publication of two newspaper articles, there was no appearance for the plaintiff at the hearing of the matter.

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[18] Harms *Civil Procedure in the Superior Courts* B39.3, page B-284.
[19] 2004 (1) SA 58 (C)

Counsel for the defendants was allowed to lead evidence and, thereafter, made application for the dismissal of the plaintiff's case in terms of rule 39(3).

[85] Unlike in ***Sayed*** where the plaintiff was known to have fled the country, in this case Mr Nkeke's whereabouts are unknown. It might be of course that at a future date Mr Sekgatja could locate him and obtain fresh instructions. If the trial proceeded and if absolution be granted, the plaintiff could still re-institute the action should further evidence become available.

[86] Accordingly, I make the following order:

86.1. The third defendant is granted absolution from the instance with costs.

B. Malicious Prosecution

[87] As I mentioned earlier, the particulars of claim were very thin on this issue. Mr Sekgatja in response to my query about the status of the criminal proceedings made the submission that he would argue that the failure to prosecute his client amounted to malicious prosecution.

[88] What is clear from the evidence of Ms Viljoen and Mr Malahlela is that the plaintiff had been brought to court, a decision was made to prosecute him, and the matter was transferred to the regional court. The only reason why charges against the plaintiff were withdrawn was because of the plea bargain struck between Mr Malahlela and the plaintiff's representatives in another matter in which plaintiff faced the prospect of a five-year custodial sentence. Thus, the criminal proceedings in this matter had been finalised in favour of the plaintiff.

[89] Mr Sakgatja could of course have obtained these details directly from the plaintiff had he been in contact with him on a regular basis. Alternatively, he could have obtained this information from the first and second defendants, or from Ms Viljoen at the Westonaria District Court or from Mr Malahlela at the Westonaria Regional Court. Clearly, he had made no such efforts, else he would not have made the bizarre submission at the pre-trial on 22 May 2023 that the *failure* to prosecute his client amounted to malicious prosecution.

[90] The plaintiff, who bears the onus in the malicious prosecution claim, was not present, and was unable to testify, or lead any witnesses. Hence, he failed to discharge the onus. In ordinary circumstances this would result in a dismissal of the claim.

[91] But these are not ordinary circumstances. The plaintiff was absent and his whereabouts are uncertain. It may be that Mr Sekgatja may be able to trace him and obtain fresh instructions in future.

[92] I accordingly make the following order:

92.1 First and second defendants are granted absolution from the instance with costs.

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Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

COUNSEL FOR APPLICANT:	Mr M W Sekgatja (22 & 23 May 2023) Adv D M Ngcaweni (24 May 2023)
INSTRUCTED BY:	Sekgatja Attorneys
COUNSEL FOR RESPONDENTS:	Adv T Masevhe
INSTRUCTED BY:	The State Attorney Johannesburg
DATE OF THE HEARING:	22, 23, 24 & 25 May 2023
DATE OF JUDGMENT:	20 July 2023