

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 28 MARCH 2024

SIGNATURE
—

Case no. 16407 / 2022

THEMBINKOSI SEDNEY NKOZI

First Plaintiff

LIFA ZAING ZONDO

Second Plaintiff

and

MINISTER OF POLICE

First Defendant

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

JUDGMENT

The judgment and order are published and distributed electronically.

P A VAN NIEKERK, AJ

INTRODUCTION:

- [1] First- and Second Plaintiffs instituted separate claims in one action found on the *causae* of action of unlawful arrest and malicious prosecution. In the Plaintiffs' Particulars of Claim the First Plaintiff is cited as a 27 year old unemployed male residing at Plot [...], B[...], W[...], Gauteng Province, and the Second Plaintiff is cited as a 26 year old male, unemployed and residing at the same address. The three Defendants are joined in their official capacities.
- [2] In an amended Particulars of Claim dated the 12th day of "Seprember" (sic) 2022, the *causae* of action in respect of each of the two Plaintiffs are framed in exactly the same terms, and claims the exact same quantum of damages. For sake of brevity only that part of the amended Particulars of Claim relating to the First Plaintiff's Particulars of Claim is quoted herein, and it is noted that the Particulars of Claim framed on behalf of the Second Plaintiff differs only insofar as that part of the Particulars of Claim refers to "Second Plaintiff" instead of "First Plaintiff".
- [3] The Particulars of Claim frames the First Plaintiffs claims as follows:
- "6. On 30 March 2018 and at Walkerville the first plaintiff was arrested, without a warrant and through a demonstration of force by a contingent of many police officers the identities of whom are unknown to the first plaintiff for alleged offence of theft of motor (sic) vehicle.*

7. *A case docket with reference number: Mondeor 558/03/18 was opened post factum.*
8. *The said police officers were at the time in the employ of the South African Police Service and acting within the course and scope of their employment.*
9. *The first plaintiff was then handcuffed and arrested in the presence of community members, which incident left the first plaintiff humiliated.*
10. *The first plaintiff was transported in a blue light motor vehicle travelling at excessive speed, ranging from between 160 km/h to 180 km/h and detained at Mondoer Police Station in sub-human and degrading conditions which included:*
 - 10.1. *Raw sewerage on the floors;*
 - 10.2. *Large rats running around in numbers;*
 - 10.3. *Inoperative ablutions;*
 - 10.4. *Dried and caked human excrement on the walls near the toilets due to the absence of toilet paper; and*
 - 10.5. *Putrid smells emanating from the blocked and overflowed toilets.*
11. *The first plaintiff was detained at the Mondeor Police Station in these conditions for a period of four days.*
12. *The first plaintiff was further detained at Johannesburg (Sun City) Prison from 03 April 2018 and ultimately released on bail of R1000.00 on 10 April 2018.*
13. *During the first plaintiff's detention at Johannesburg (Sun City) Prison:*
 - 13.1. *The first plaintiff suffered hardship during his incarceration;*
 - 13.2. *The conditions in prison were shocking;*
 - 13.3. *The quality of food was poor;*

- 13.4. *The bedding was atrocious;*
- 13.5. *The first plaintiff was not permitted to use a phone to contact his family members and legal representative;*
- 13.6. *The first plaintiff had problems with obtaining medication;*
- 13.7. *The first plaintiffs children suffered as he was the only one earning an income as the mother of his children was not employed;*
- 13.8. *As a result of his incarceration the first plaintiff lost his job.*
14. *The arrest and subsequent detention was unlawful and was intended to torture, harass, intimidate and harm the first plaintiff, alternatively was wrongful.*
15. *As a result of the foregoing the first plaintiff was unlawfully deprived of his liberty, suffered impairment to his dignity, suffered psychological trauma and harm.*
16. *As a result of the foregoing, the first plaintiff has suffered damages in the amount of R 3 000 000.00, which is calculated as follows:*
- 16.1. *General damages: For unlawful arrest impairment of dignity, loss of freedom, deprivation of his freedom of movement, pain, suffering and psychological trauma: - R 3 000 000.00.*
17. *Proper notice of the proceedings was given to the First and Second Defendants in terms of Section 3(1) of the Institution of legal proceedings against certain Organs of State Act, 40 of 2002.*
18. *Notwithstanding lawful demand the said defendants have failed, refused and/or neglected to make payment to the first plaintiff.*
19. *WHEREFORE the first plaintiff claims from the first and second defendants, jointly and severally, the one paying the other to absolved:*

19.1. Payment in the amount of R 3 000 000.00;

19.2. Mora interest from date of demand being to date of payment, alternatively from date of service of summons to date of payment;

19.3. Costs of suit;

19.4. Further or alternative relief.

SECOND CLAIM:

20. Following the arrest referred to above, one or more of the said police officers referred to above, in collaboration with members of the NPA unknown to the first plaintiff instigated or caused to be instituted malicious criminal proceedings during the period 03 April 2018 to 04 July 2019 against the first plaintiff without reasonable and probable cause in the Johannesburg Magistrates Court under case number 41/521/18 and case docket with reference number Mondeor CAS 558/03/18 for alleged offence of theft of motor vehicle.

21. The prosecution was instituted without reasonable and probable cause.

22. The first plaintiff was charged with theft of motor vehicle, which charge was brought with an ulterior motive to harass, humiliate and intimidate the first plaintiff.

23. When proceeding with the prosecution of the charge against the first plaintiff, the third defendant had no reasonable or probable cause for so doing.

24. As a result of the defendants' conduct, the first plaintiff was prosecuted under case number 41/452/18 in the Johannesburg Magistrate Court, which trial continued for a period of 12 court days over a period of 10 months.

25. On 04 July 2019 the first plaintiff was acquitted of the charges following his unlawful arrest and prosecution and the prosecution failed.

26. The said prosecutors were acting within the course and scope of their employment with the NPA and third defendant and/or the second defendant, and the said policemen were

acting within the course and scope of their employment as officers in the employ of the South African Police Service and the first defendant.

27. *As a result of the foregoing, the first plaintiff suffered damages in the total amount of R 2 000 000.00, comprising of:*

27.1 *costs reasonably expended to defend the prosecution and make application for bail in the amount of R 500 000.00 (apportioned estimate);*

27.2 *damages for contumelia, deprivation of freedom, trauma, impairment of dignity in the amount of R 1 500 000.00.*

28. *Proper notice of the proceedings was given to the first, second and third defendants in terms of Section 3(1) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002.*

29. *Notwithstanding lawful demand the first, second and third defendants have failed, refused and/or neglected to make payment to the first plaintiff.*

30. *WHEREFORE the first plaintiff claims from the first defendant, second defendant and third defendant jointly and severally, the one paying the other to absolved.*

30.1 *Payment in the amount of R 2 000 000.00;*

30.2 *Mora interest from date of demand to date of payment, alternatively from date of service of summons to date of payment;*

30.3 *Costs of suit;*

30.4 *Further and/or alternative relief.*

THIRD CLAIM:

31. *During the unlawful arrest and detention of the first plaintiff and malicious prosecution, the first plaintiff was gainfully employed.*

32. *As a result of the foregoing, the first plaintiff lost his job.*

33. *In the result, the first plaintiff suffered damages in the total amount of*

R 1 000 000.00, comprising of:

33.1 Past loss of income/earnings capacity, R 200 000.00 and;

33.2 Future loss of income/earnings capacity, R 800 000.00.

34. Proper notice of the proceedings was given to the first, second and third defendants in terms of Section 3(1) of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002.

35. Notwithstanding lawful demand the first, second and third defendants have failed, refused and/or neglected to make payment to the first plaintiff.

36. WHEREFORE the first plaintiff claims from the first defendant, second defendant and third defendant jointly and severally, the one paying the other to absolved:

36.1 Payment in the amount of R 1 000 000.00;

36.2 Mora interest from date of demand to date of payment, alternatively from date of service of summons to date of payment;

36.3 Costs of suit;

36.4 Further and/or alternative relief."

[4] On an analysis of the Particulars of Claim of the two Plaintiffs, the factual averments on which the respective *causae* of action of the two Plaintiffs are framed in the Particulars of Claim can be conveniently summarised as follows:

[i] They were arrested on 30 March 2018 at Walkerville;

[ii] They were arrested on a charge of the theft of a motor vehicle;

[iii] They were detained, first at the Mondeor Police Station and then at the Johannesburg Central Prison until 10 April 2018 when they were released on bail;

[iv] Their arrest and subsequent detention was unlawful;

- [v] They were found not guilty of charges of theft of a motor vehicle;
- [vi] The institution and prosecution of the charges by Third Defendant was malicious, without just cause and therefore constitutes malicious prosecution;
- [vii] Both Plaintiffs were employed at the time of their arrest, lost their employment by virtue of the arrests, and both suffered a loss of income in the amount of R200 000.00, and a future loss of income in the amount of R800 000.00.

[5] At the commencement of the trial Counsel who acted on behalf of both the Plaintiffs abandoned the claim for a loss of income in respect of both Plaintiffs.

PLAINTIFFS' EVIDENCE:

[6] First Plaintiff was called to testify first. The evidence of First Plaintiff is summarised as follows:

- [i] On 30 March 2018 First Plaintiff and a number of other individuals, most of whom who were not identified during the evidence, were engaged in consuming alcoholic drinks at the plot of a neighbour being plot [...], B[...], W[...]. During these proceedings one of the individuals, described by First Plaintiff as "one of our friends" was stabbed with a knife by another individual and sustained injuries to his arm;
- [ii] First Plaintiff and other attending individuals took the injured individual to plot no. 18, with the intention to assist him to obtain transport to hospital. While they were in the process of doing so, First Plaintiff's uncle, one Tshwarelo Tshabalala ("Tshabalala") arrived, driving a grey colour Toyota Etios motor vehicle and proceeded through the gate of plot no. 3 (which is adjacent to the plot where the alcoholic beverages were being consumed). First Plaintiff and his assistants then requested Tshabalala to assist in transporting the injured individual to hospital, but Tshabalala declined, stating that he was "busy";

- [iii] Shortly thereafter another individual, described by First Plaintiff as a friend of Tshabalala, arrived driving a Hyundai H100 vehicle. This person was then requested to transport the injured individual to hospital. This individual obliged resulting in Tshabalala and this individual driving off with the injured individual to hospital in the Hyundai vehicle;
- [iv] First Plaintiff and his associates returned to plot no. 2 to continue drinking, and then the Second Plaintiff received a call on his cellular phone from Tshabalala, who instructed Second Plaintiff to proceed to plot 3 and remove the motor vehicle in which Tshabalala arrived with earlier (the Toyota Etios) and to park such vehicle outside the garage as there would be a person coming to remove the vehicle. According to First Plaintiff, this was what Second Plaintiff conveyed to him;
- [v] First Plaintiff proceeded to testify that he and the Second Plaintiff then proceeded to the garage on plot 3 to execute the instructions of Tshabalala, and when he looked through the windows of the vehicle inside the garage First Plaintiff could see wires hanging from the dashboard. First Plaintiff testified that, when noticing the wires hanging from the dashboard, he thought that "something was not right" and he then exited the garage. As he was exiting the garage, two policemen in plain clothes appeared, who pointed firearms at him and instructed him to lie down. One of the policeman was a white male, and the other policeman was a black male. Both First and Second Plaintiffs were arrested by these two officers, and handcuffed with cable ties;
- [vi] Shortly thereafter further police members arrived and "came in numbers". Amongst them were police in uniform and the two Plaintiffs were then accused of "stripping" the motor vehicle and accused of being in possession of a stolen motor vehicle;

- [vii] From the alleged place of arrest being plot [...], B[...], W[...], the two Plaintiffs were taken to the Mondeor Police Station where they were required to make statements. First Plaintiff testified that, while at the Mondeor Police Station, Second Plaintiff received a further telephonic call from Tshabalala and then and there First Plaintiff and Second Plaintiff informed the police that the person who was calling was in fact the person who brought the specific vehicle to the premises where they were arrested, but the police members refused to listen to them, and terminated the call;
- [viii] First Plaintiff further testified that, while on their way to the Mondeor Police Station, both the First Plaintiff and Second Plaintiff informed the members of the police who the owner of the vehicle was (referring to Tshabalala) but that the members of the South African Police who effected the arrest did not take them serious;
- [ix] After statements were taken from the two Plaintiffs, they were locked up in cells at the Mondeor Police Station, in bad conditions described as “terrible” blankets, smelly ablution facilities and lice infested
- [x] On 3 April 2018 the Plaintiffs were taken to the Westgate Court where they were informed that they would be charged with theft of a motor vehicle;
- [xi] First Plaintiff further testified that they were detained at the Johannesburg Prison (“Sun City”) in conditions which he described as “very bad”, with broken windows, having to sleep on the floor, and it being a “scary place”. First Plaintiff further testified that they were released on the 12th or the 13th of April 2018 (he was not sure) after being released on bail, and that they were eventually found not guilty on the eventual charge of theft of a motor vehicle.
- [7] During cross-examination of the First Plaintiff he was extensively cross-examined on the statement which he made at the Mondeor Police Station on 30 March 2018. It was

pointed out to him by Defendant's counsel that he had made no mention in the statement of the events which led up to the arrest of the two Plaintiffs, and specifically he did not mention the injured person whom the Plaintiffs allegedly attempted to assist after the alleged incident of assault with the knife. It was further pointed out to the First Plaintiff, that in his evidence in chief he referred to the fact that he saw wires hanging out of the dashboard of the motor vehicle, whereas in the written statement he stated that he found the windows of the vehicle open and that there was no radio or ignition in the motor vehicle.

[8] It was further put to the First Plaintiff in cross-examination that a police officer will testify that the two Plaintiffs and a third person, one Ussef Ghadani ("Ghadani") were apprehended by two plain-clothes police officers next to the R28 road, near the Jackson informal settlement, Eikenhof, while both Plaintiffs and Ghadani were inside the vehicle parked next to the road, busy with "stripping" the vehicle. The full version of the evidence that was later given by this officer was put to First Plaintiff, and First Plaintiff conceded that the vehicle was in fact a stolen vehicle but persisted with his version regarding the place of the arrest and the description of the arresting officers.

[9] When First Plaintiff was required to explain why he made no mention of the involvement of Ghadani in his evidence in chief, who was also arrested with the First- and Second Plaintiffs, First Plaintiff failed to provide any proper explanation. First Plaintiff however accepted that Ghadani was arrested at the same time when First and Second Plaintiffs were arrested, and thereafter charged and prosecuted together with the First- and Second Plaintiffs.

[10] It was pertinently put to the First Plaintiff that the arresting officers accused the Plaintiffs and Ghadani at the time of the arrest of "stripping" the motor vehicle, which he then denied. This was in contradiction to the First Plaintiff's evidence in chief where he

pertinently testified that they were accused of “stripping” the vehicle when they were allegedly apprehended at plot [...], B[...] as referred to *supra*.

[11] First Plaintiff further conceded that the Control Prosecutor acted on the information contained in the police docket when the Control Prosecutor decided to proceed on charges of theft of a motor vehicle against the Plaintiffs, and that no other consideration played a role in the decision of the Control Prosecutor.

[12] After the finalisation of the First Plaintiff’s evidence, Counsel acting on behalf of the Plaintiffs informed the Court that he intended to close the case for the Plaintiffs. The Court was informed that the evidence upon which both Plaintiffs would rely is exactly the same, was provided by the First Plaintiff, and that the Court will be required to rely on such evidence also in support of the *causae* of action of the Second Plaintiff.

[13] I deemed it prudent to caution Plaintiffs’ Counsel that the failure to call the Second Plaintiff may draw a negative inference of the First Plaintiff’s evidence should it transpire that there are material discrepancies between the case advanced by the Defendants, and the evidence of First Plaintiff. Plaintiffs’ Counsel then called the Second Plaintiff as a witness. Second Plaintiff corroborated the First Plaintiff’s version of the events insofar as the place of the arrest was concerned, allegedly being plot [...], B[...], W[...], and testified that Tshabalala telephonically contacted him and informed him that he was “irritated” by the fact that a helicopter was flying around the area and for that reason instructed the Second Plaintiff to remove the motor vehicle from his garage at plot [...], B[...], W[...], and to park it outside the premises.

[14] Second Plaintiff stated during cross-examination that he “lied” to First Plaintiff regarding the reason why they had to move the motor vehicle. Second Plaintiff, in his evidence in chief, referred to the presence of Ghadani, testified that Ghadani accompanied the First and Second Plaintiffs to the motor vehicle in order to assist in moving the motor vehicle, and confirmed that Ghadani was arrested together with the First and Second Plaintiffs.

- [15] During cross-examination the Second Plaintiff was also referred to the fact that the arresting officer would testify that the Plaintiffs and Ghadani was arrested next to the R28 road while they were inside the vehicle, busy stripping the vehicle, when they were arrested.
- [16] Considering the fact that the Plaintiffs both relied on exactly the same averments relating to the date, circumstances and place of the arrest in the Particulars of Claim, and both Plaintiffs testified that they were arrested together, the following significant discrepancies transpired between the evidence of the First and the Second Plaintiffs namely:
- [i] First Plaintiff never introduced Ghadani in his narration of the events preceding the arrests, and only when he was cross-examined on this topic did he concede that Ghadani was also present and arrested. The Second Plaintiff confirmed and narrated the involvement of Ghadani prior to the arrest;
 - [ii] First Plaintiff testified that they were arrested by a white police officer accompanied by a black police officer, whereas the Second Plaintiff testified that they were arrested by two white police officers.
 - [iii] First Plaintiff testified that Tshabalala called on the cellphone of Second Plaintiff while they were being detained at the Mondeor police station after their arrest, whereas Second Plaintiff testified that such call was received while they were in the police vehicle and on their way to the police station.

APPLICATIONS FOR ABSOLUTION AND RECUSAL

- [17] At no stage during the evidence of either the First Plaintiff or the Second Plaintiff was any attempt made to introduce any direct evidence to substantiate the claim that the institution and prosecution of the criminal charges against the Plaintiffs were malicious, and on no rational interpretation of the evidence of any of the Plaintiffs can malice be inferred. When Counsel for Plaintiffs closed Plaintiffs' case, Counsel acting on behalf of Defendants applied for absolution on the basis that there are insufficient evidence to find

that the arrests were unlawful and furthermore that there was no evidence placed before Court in terms whereof it could be found that the institution of the criminal proceedings against the Plaintiffs were malicious. Counsel for the Defendants argued that it was common cause that the Plaintiffs were apprehended by the members of the South African Police whilst they were in possession of a vehicle that was stolen and considering the absence of evidence to indicate malice in the prosecution of the Plaintiffs, argued that the Plaintiffs failed to prove their respective *causae* of action.

[18] I informed the Defendants' Counsel that, *prima facie* I agreed that no evidence was led to substantiate a finding of malice in relation to the prosecution of the Plaintiffs, but that I was of the view that I could not grant absolution at that stage. I referred to the legal position in relation to unlawful arrest namely that where it is common cause that an arrest was effected and it is alleged that such arrest was unlawful, the Defendants are required to show justification for the arrests. I informed Defendants' counsel that, in my view, evidence would have to be led to confirm the propositions put to the plaintiffs during their cross examination by Defendants' counsel regarding the Defendants' evidence, and failing any evidence by the Defendants to confirm the version that was already put to the Plaintiffs during cross-examination, absolution from the instance could not be granted in such circumstances. Defendants' counsel graciously accepted the ruling.

[19] During argument of the aforesaid application for absolution, I addressed the Plaintiffs' Counsel and repeated to Plaintiffs' Counsel that I held a *prima facie* view that there was no evidence presented by the Plaintiffs to substantiate any finding of malice in the institution of the criminal prosecution against the Plaintiffs, and requested Plaintiffs' Counsel to consider the position of the Plaintiffs in regard to the claims based on malicious prosecution. I further cautioned the Plaintiffs' Counsel that the Court has a discretion to make a punitive order for costs against the legal representatives should the

Court at the end of the trial find that the institution of any of the claims were frivolous and/or amounted to an abuse of the process and results in waste of resources. These comments were made in the light of the fact that the impression was gained that Plaintiffs are not in a position to satisfy any order for costs, should any such order be made against Plaintiffs at the end of the trial, which would result in waste of public funds. I reminded Plaintiffs' counsel that legal representatives are officers of the court who are duty bound to advise their clients not to pursue hopeless cases. Plaintiffs' counsel undertook to reconsider their position and obtain instructions and then, after an adjournment, returned to Court and informed me that he was now instructed to apply for my recusal based on the consideration that the Plaintiffs now harboured a reasonable belief that I have made up my mind and would make an adverse finding against them. Plaintiffs' Counsel then further referred to the "threat" of punitive order for costs against the legal representatives referred to *supra*.

[20] After hearing argument from both counsel, I dismissed the application for recusal and informed the Plaintiffs' Counsel that reasons therefore would be provided for in the judgment, and such reasons follow hereafter.

[21] The test for recusal on grounds of perceived bias is whether the reasonable objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial. It is an objective test and the onus rests on the applicant to establish apprehended bias.¹

[22] The basis upon which Counsel acting on behalf of Plaintiffs applied for recusal was namely that I expressed a *prima facie* view resulting in the Plaintiffs' believing that such expression of a *prima facie* view exhibits bias. The mere fact that a court expresses a *prima facie* view does not indicate bias.² The mere apprehension on the part of a litigant

¹ *Coop and Others v South African Broadcasting Corporation and Others* 2006 (2) SA 212 (W) and authorities referred to therein.

² *Sager v Smith* 2001 (3) SA 1004 (SCA) at paras. [16] to [25]

that a Judge will be bias, on a strongly and honestly felt anxiety, is not enough grounds for recusal.³

[23] As was pointed out by Counsel acting on behalf of the Defendants during argument of the application for recusal, I conveyed to the Defendants' Counsel during the application for absolution that, notwithstanding the fact that I held a *prima facie* view that there was no evidence led in support of the claim for malicious prosecution at the close of the Plaintiffs' case, I declined to grant absolution on the basis that it would be necessary for the Defendants to give evidence. It was impossible at that stage to foresee in advance what concessions, if any, the Plaintiffs' Counsel may elicit from the Defendants' witnesses which may potentially have had a material effect on the issues in question. In my view, this fact is contra indicative of bias, and is indicative of the fact that I held the proverbial "open mind" in relation to the future development of the case through the evidence and cross-examination of the Defendants' witnesses.

[24] In the circumstances, the mere fact that I expressed a *prima facie* view on the issue of malicious prosecution at the close of the Plaintiffs' case, did not indicate bias and the application for my recusal was refused.

DEFENDANTS' EVIDENCE:

[25] Two witnesses testified on behalf of the Defendants, namely one of the arresting officers, being Sergeant Tloti ("the arresting officer"), and Warrant Officer Botha ("the investigating officer"). The material evidence of both the investigating officer and the arresting officer referred to *infra* was put to both Plaintiffs during their respective cross-examination.

[26] The evidence of the arresting officer can be summarised as follows:

[i] Sergeant Tloti has 18 years' experience within the SAPS, and is a member of the Johannesburg Flying Squad situate in Brixton, Johannesburg;

³ *Sager v Smith 2001 supra.*

- [ii] On 30 March 2018 he and a certain Sergeant Malebane were patrolling in the Eikenhof area, when they received a report from a vehicle tracking company named Rentrek, to be on the lookout for a charcoal coloured Toyota Etios with registration no. [...]FS and the coordinates of the vehicle which were being tracked was provided to them;
- [iii] They noticed the vehicle along the R28 Old Vereeniging road, on the opposite side and direction of the road which they were driving, next to the Jackson informal settlement. They executed an u-turn to inspect the vehicle. Both of them were wearing plain clothes and they were driving an unmarked police motor vehicle;
- [iv] When they arrived, they found three African male persons inside the vehicle, busy stripping the vehicle. The inside-compartments, dashboard and ignition of the vehicle had already been stripped. They informed the suspects that they were members of the police, ordered them to lie down and informed them that they were being arrested for possession of a stolen motor vehicle. Sergeant Tloti provided cover for his colleague, while Sergeant Malebane handcuffed the suspects. Thereafter they called their commanding officer, a certain Govender, for back-up;
- [v] Commander Govender and another member of the South African Police Force later arrived at the scene and the Plaintiffs were then taken to the Mondeor Police Station where Sergeant Tloti opened a case docket and statements were taken at the crime office from the suspects;
- [vi] During relatively short and uneventful cross-examination, the arresting officer persisted in his version and the cross-examination did not expose any inconsistencies, discrepancies or improbabilities in the evidence of this witness.

- [vii] During his evidence-in-chief, the arresting officer was referred to a statement which he deposed to on the day of the arrest, which confirmed in all material respects with the evidence which he gave. This statement was discovered four weeks before the trial, was in the possession of Plaintiffs before the trial, and Plaintiff's therefore were aware of the fact that the arresting officer would testify relating to the date and place of the arrest, and on the identity of the officers who were involved with the arrest. Plaintiffs' counsel did not attempt to discredit the statement at all during cross examination.
- [viii] Importantly, from the evidence of the arresting officer there were no white policemen involved at all in the arrest, and the arrest took place under completely different circumstances than testified by the First Plaintiff and the Second Plaintiff in relation to the place of the arrest, where the Plaintiffs were found at the time of the arrest, and what they were doing at that time.
- [ix] The arresting officer pertinently denied that either of the Plaintiffs informed him or his colleague at any stage of the alleged involvement of Tshabalala as testified by the two Plaintiffs.
- [27] Warrant Officer Botha testified that she has 30 years' experience in the police service and is stationed at the Mondeor Police Station. She also deposed to a statement for purposes of the police enquiry, which also formed part of the police docket which was discovered, and which was also available to the Plaintiffs prior to the trial. The written statement contained in the police docket of Warrant Officer Botha also conformed in all material respects with the evidence which she presented in Court.
- [28] Warrant Officer Botha presented evidence regarding her role as an investigating officer in the matter, and her evidence can be summarised as follows:
- [i] She received the Plaintiffs' docket on Tuesday, 3 April 2018, perused it and took it to the Control Prosecutor, Mr Kosmos Mbele;

- [ii] Control Prosecutor Mbele considered the contents of the docket and then decided to enrol the matter for trial. Warrant Officer Botha was instructed by the Control Prosecutor to verify the residential address of the suspects, the crime scene, and the suspects' criminal records, which she executed and from which the following transpired:
- [a] She could not find the alleged residential address being Plot [...], B[...], E[...]. She testified that she knows the area well, knows people who live in the area, and that the numbers of the plots in B[...], E[...], does not contain either a plot 2 or a plot 3. The numbering of plots in B[...] commence at much higher numbers. Notwithstanding a diligent search Plot [...], B[...], E[...], could not be found, nor could she verify the whereabouts or existence of Tshabalala.
- [b] She was accompanied by Commander Govender who pointed out to her the area where the arresting officers arrested the Plaintiffs, being along the R28 road close to the entrance to the Jackson Informal Settlement. She took photographs of the area which forms part of the police docket and which was also discovered to the Plaintiffs, which shows the entrance to the informal settlement and the exact place where the Plaintiffs were arrested;
- [c] She further established that the First Plaintiff was found guilty of possession of drugs in 2017 and therefore has a criminal record, and that the Second Plaintiff was charged in 2017 on a count of possession of stolen property by the De Deur SAPS. This aspect was dealt with in cross-examination of the Second Plaintiff by Defendants' Counsel and elicited an admission by the Second Plaintiff that he was previously found in possession of stolen goods which included a stolen motor vehicle. He

then testified that it was in fact his uncle (Tshabalala) who brought that vehicle to the premises where he (the Second Plaintiff) was apprehended with the vehicle. I must mention that I find it remarkable that the Second Plaintiff was arrested twice namely in 2017 and 2018, both times in possession of a stolen motor vehicle, and both times insisting that it was his uncle (Tshabalala) who brought the vehicle to the premises where he was arrested in possession thereof. The probabilities thereof are clearly questionable.

[29] In summary, the two witnesses called on behalf of the Defendants both served to confirm the arrest of the Plaintiffs at a completely different premise than that which the Plaintiffs testified about, and in circumstances where there was clearly a strong suspicion that the Plaintiffs and Ghadani, whom they found inside the motor vehicle, committed the crime of being in possession of a stolen motor vehicle. It was never put to either of these two witnesses that they fabricated their version of the events, nor did any of the Plaintiffs attempt in their evidence in chief or during cross-examination to attribute any motive why the two witnesses for the Defendants would fabricate evidence against them.

EVALUATION OF THE EVIDENCE:

[30] During the trial it became evident that the Plaintiffs' version regarding the events surrounding their arrests and especially the circumstances under which they were arrested differs materially from the Defendants' version in terms of the place of the arrest, whether or not they were found inside the vehicle immediately prior to the arrest under the circumstances as testified by the arresting officer, and whether or not they informed the members of the South African Police who arrested them of the fact that their uncle allegedly brought the vehicle there. It was clear that the Plaintiffs narrated an event which attempts to portray them as executing the instructions of Tshabalala to

remove the vehicle from the garage of plot [...], B[...], E[...], leading to their arrest when found by members of the South African Police in proximity of this vehicle. It is also clear that the introduction of Tshabalala into the narrative is intended to lay the foundation of a case that their subsequent prosecution was malicious, the prosecutor having been aware of their exculpatory explanation how they came to be in possession of the vehicle at the time of their arrest.

[31] Defendants' Counsel submitted that, in the event that the Court should find that the Plaintiffs were in fact arrested next to the R28 road, Eikenhof, as testified by the Defendants' witnesses, and not at plot [...], B[...], E[...] as testified by the Plaintiffs, that the totality of the Plaintiffs' evidence insofar as it contradicts the Defendants' case, should be rejected. Although at first glance this may appear to be an over simplistic approach to the matter, *in casu* I agree with this submission.

[32] As stated *supra*, the introduction of Tshabalala into the narration of the events by both Plaintiffs is clearly an exculpatory attempt designed to establish grounds that the initiation of the criminal charges and the prosecution thereof was without just cause and malicious.

[33] It is therefore necessary to make a credibility finding and accept either the Plaintiffs' version of the arrests and surrounding evidence, or reject their version and accept the version of Defendants' witnesses. I have no hesitation in rejecting the Plaintiffs' version for the following reasons:

[i] On a close analysis of the evidence presented by both Plaintiffs' it does not accord with the pleadings. In the pleadings it is alleged that the Plaintiffs were arrested and charged with the theft of a motor vehicle, whereas in their own evidence it appears that they were arrested for being in possession of a stolen motor vehicle. This charge was only later escalated to a charge of theft of a motor vehicle. The pleadings were clearly drawn on the instructions of the

Plaintiffs, resulting in the inference that, on this factual issue, the instructions of the Plaintiffs initially provided to their legal representatives do not accord with the evidence of Plaintiffs;

- [ii] The fact that the First Plaintiff testified that they were arrested by one black police officer accompanied by one white police officer whereas the Second Plaintiff testified that they were arrested by two white police officers, while the complete police docket which was timeously discovered makes no mention of the involvement of any white police officers, was never explained. These factual discrepancies, in my view, are indicative of a fabricated narrative;
- [iii] Whereas the First Plaintiff testified that Tshabalala telephonically contacted the Second Plaintiff while they were at the Mondeor Police Station, and during which telephonic call the Plaintiffs informed the police officers that it was in fact Tshabalala who brought the vehicle onto the premises, the Second Plaintiff testified that this telephonic call was received by him while they were busy travelling to the Mondeor Police Station in a police vehicle. The introduction of Tshabalala into the Plaintiffs' version is an important element of their case, and more so the evidence that he called Second Plaintiff after the arrests whereupon Plaintiffs informed the arresting officers that it was in fact Tshabalala who brought the vehicle to the premises and they were merely executing his instructions at the time of arrest. In my view this discrepancy between the evidence of the Plaintiffs is a material discrepancy.
- [iv] Significantly, before the commencement of the trial the Plaintiffs were aware of the fact that the arresting officer and the investigating officer will testify and would have been aware of the nature of their evidence, in the light of the fact that their respective statements forms part of the police docket which was discovered and included the photographs referred to by Warrant Officer Botha. In anticipation of

the fact that the Plaintiffs would have realised that there would be a material discrepancy between their version of the place and circumstances leading to the arrests compared to the contents of the police docket, it would have been expected that the Plaintiffs would have attempted to procure evidence in corroboration of their version. At no stage during the trial did either of the Plaintiffs testify regarding the present whereabouts of Tshabalala, why he did not testify as a witness to corroborate their version of the events, nor did they attempt to call any of the other persons who were allegedly present at the time of their arrests and who witnessed their arrests as referred to in the evidence in chief of the First Plaintiff as well as the pleadings;

[v] The arresting officer and investigating officer are long standing members of the South African Police Service, who duly recorded the facts relating to the arrests as well as the investigation and which is contained in the police docket. The statements of both officers were deposed to in 2018, before the institution of the action, and without knowledge that this action would be instituted by the Plaintiffs. There is no apparent reason why either of the Defendants' witnesses would have recorded false information in the police docket, and as already referred to *supra*, nothing in this regard was put to them by the Plaintiffs' Counsel during their respective cross-examination. Apart from the aforesaid, the arresting officer as well as the investigating officer presented as responsible and credible members of the South African Police Services, were impressive witnesses who answered the questions candidly, never attempted to evade any of the questions put to them either during cross-examination or during the evidence in chief, and both of them impressed me as witnesses;

[vi] Unfortunately, the same cannot be said regarding the Plaintiffs. The evidence of both Plaintiffs in chief lacked particularity, failed to address many issues which

should have been anticipated insofar as the versions of the Defendants discovered in the police docket are concerned, and when confronted with the Defendants' version put to them during cross examination, both Plaintiffs resorted to instances where it was clear that they adjusted their evidence in an attempt to escape inevitable conclusions based on their answers or to suit their version. Both Plaintiffs were evasive during cross-examination, failed to make reasonable concessions when it was patently obvious that they should have done so, and generally did not impress me as honest and credible witnesses.

[34] Considering the aforesaid, I conclude that the evidence, considered as a whole, disclosed the following facts:

- [i] The two Plaintiffs, accompanied by one Ussef Ghadani, were apprehended by two members of the police service, warrant officer Tloti accompanied by Sergeant Malebane, on 30 March 2018 next to the R28 road, Eikenhof, near the Jackson informal settlement, while they were inside a stolen motor vehicle, busy stripping the vehicle;
- [ii] The vehicle was a reported stolen vehicle and the police officers were on the lookout for this vehicle when the Plaintiffs and Ghadani was apprehended in the vehicle.
- [iii] All three such persons were there and then arrested on suspicion of being in possession of a stolen motor vehicle, and thereafter duly processed at the Mondeor Police Station;
- [iv] After investigation to establish whether or not their alleged residential address and involvement of Tshabalala (who allegedly stays at that address) proved to return no results, the charge was escalated to a charge of vehicle theft;

LEGAL REQUIREMENTS:

[35] In terms of Section 40(1)(b) of the Criminal Procedure Act⁴ (“the Act”) a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. In terms of Section 40(1)(e) of the Act, a peace officer may without warrant arrest any person who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspect of having committed an offence with respect to such thing.

[36] *In casu*, it is common cause that:

- [i] The arresting officers were “peace officers” as envisaged in the Act;
- [ii] That the charcoal grey Toyota Etios motor vehicle was stolen;
- [ii] That the two Plaintiffs as well as Ghadani were at or near the motor vehicle at the time when they were arrested;
- [iv] That theft of a motor vehicle is an offence referred to in Schedule 1 of the Act.

[37] During argument Counsel for the Plaintiffs conceded that the circumstances under which the Plaintiffs were apprehended with the motor vehicle (relying on the Plaintiffs’ evidence relating to the place of the arrest) would have constituted reasonable grounds for the arresting officers to suspect that the Plaintiffs’ were in possession of stolen property. However, from submissions made on behalf of the Plaintiffs by Plaintiffs’ Counsel it seemed that Plaintiffs’ Counsel suggested that the mere fact that the two Plaintiffs (according to their own evidence) at the time of their arrest informed the arresting officers that the vehicle was brought onto the premises by Tshabalala should there and then have had the effect that the arresting officers should have accepted the Plaintiffs’ version of how they came to be in the vicinity of the stolen vehicle and should have released Plaintiffs. I pertinently mention that it seemed to be the case of the Plaintiffs’,

⁴ *Criminal Procedure Act 51 of 1977*

as it was not clear exactly what the Plaintiffs' Counsel argued in this regard, the argument being somewhat incoherent.

[38] Given the fact that the Plaintiffs were apprehended with a vehicle which they, on their own version, intended to move from the garage of Plot [...], B[...], to a different location and were apprehended while the First Plaintiff was in the process of exiting the garage whilst the Second Plaintiff and Ghadani were still inside the garage, clearly establish possession of the vehicle by the Plaintiffs. On the Plaintiffs own version, the Plaintiffs were therefore in possession of a stolen vehicle. On the version of the arresting officer (which version I have accepted as set out *supra*) the Plaintiffs were also in possession of a stolen vehicle which they were in the process of stripping at the time when they were apprehended.

[39] The issue whether or not the arresting officers formed a reasonable suspicion that the Plaintiffs committed an offence referred to in Schedule 1 or reasonably suspected Plaintiffs of having committed an offence with respect to the possession of stolen property, as is required in terms of Section 40(1)(a) and (e) of the Act, in the context of the Plaintiffs' evidence that they there and then informed the arresting officers that it was in fact Tshabalala who brought the vehicle there, needs to be addressed. In this regard I have accepted the version of the arresting officer as set out *supra*. However, even accepting the Plaintiffs' version in this regard, the arresting officer is not required to conduct a hearing before effecting an arrest. Whether an arrested person should be released, and if so, subject to what conditions, arises for later decision by another person and that is the safeguard to the arrestee's constitutional rights.⁵

[40] *In casu*, to hold that the arresting officers should have immediately released the Plaintiffs after being informed that it was in fact Tshabalala who brought the vehicle to the premises (accepting the Plaintiffs' versions) would be absurd in the context of the

⁵ *National Commissioner of Police & Another v Coetzee* 2013 (1) SACR 358 (SCA) at par. [14]

evidence as a whole. It was not unreasonable for the arresting officers to suspect the Plaintiffs and Ghadani to have committed an offence under Schedule 1 or to be in possession of stolen property at the time when they were apprehended. The evidence of the arresting officer clearly justified the arrests and notwithstanding cross-examination by Plaintiffs' Counsel nothing was elicited to illustrate that such arrest was not justified.

[41] In the premises, I hold that the arrests of both the Plaintiffs were lawful as the evidence of Defendants' witnesses clearly established justification for the arrests.

[42] The Plaintiffs were subsequently detained and released on bail on 10 April 2018. It was not the case of the Plaintiffs that they were unreasonably detained for such period, or that there was any irregularity in their detention and subsequent release on bail.

[43] Insofar as the claim for malicious prosecution is concerned, the requirements of such cause of action had been the subject of numerous judgements, and it is established law that the Plaintiffs have to prove the following:

- [i] That the Defendants instituted or instigated proceedings;
- [ii] That the Defendants acted without reasonable and probable cause;
- [iv] That the Defendants were actuated by an improper motive or malice;
- [v] That the proceedings terminated in the Plaintiffs favour;⁶

[44] *In casu* it is common cause that the Second and Third Defendants instituted or instigated criminal proceedings, and that the Plaintiffs were found not guilty of the charge of theft of a motor vehicle. However, no evidence was led whatsoever on which it can be found that the Second or Third Defendants were actuated by an improper motive or malice, nor can malice be inferred from the available evidence even if the Plaintiffs' version were to be accepted. On the objective evidence it is clear that the procedure of the prosecution of Plaintiffs took its proverbial course after the Plaintiffs were arrested in the sense that the Control Prosecutor required further information from the investigating officer,

⁶ *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) par. [33] and authorities referred to therein.

considered the available evidence, and thereafter enrolled the matter for trial. There was no suggestion in the evidence of the Plaintiffs nor elicited through cross-examination of Defendants' witnesses that the Prosecutor or Police were actuated by an improper motive or malice. This was in fact conceded by First Plaintiff in his cross-examination.

[45] Insofar as the requirement for the Plaintiffs to show that the Defendants acted without reasonable and probable cause is concerned, I am of the view that the same facts underlying the considerations as set out in paragraphs [37] to [39] *supra*, applies. The prosecutor in charge of the prosecution of the matter was provided with a docket containing evidence clearly establishing at least *prima facie* grounds for a prosecution.

[46] In the premises, the Plaintiffs' claim based on malicious prosecution stands to be dismissed.

COSTS:

[47] Counsel acting for Defendants argued that a punitive order for costs should be granted, based on the submission that Plaintiffs presented a hopelessly fabricated and baseless case, based on evidence replete with contradictions and improbabilities, aimed at misleading the court. In support of this argument it was submitted that the case docket, containing the statements of both witnesses called on behalf of the Defendants, were in the possession of Plaintiffs' legal representatives four weeks before the trial as a result of which the inference to be drawn is namely that Defendants' version was known to Plaintiffs and their legal representatives at that time. Notwithstanding, Plaintiffs ignored Defendants version and presented their case without any attempt to deal with the Defendants' version. With reference to a judgment of Sethene AJ,⁷ it was argued that Plaintiffs' legal representatives failed in their fiduciary duty to this court and advanced a hopeless case by persisting with the claim for malicious prosecution in circumstances

⁷ *University of SA v Sotikwa & Others; Department of Justice and Constitutional Development, Limpopo v General Public Services Settoral Bargaining Council & Others (2023) 44ILJ 1785 (LC)*

where no evidence whatsoever was presented on behalf of Plaintiffs to support that claim.

[48] I agree with the submissions of Defendants' counsel. The manner in which the trial was conducted leaves an impression that the institution of the action was opportunistic, resulting in a substantial waste of resources in terms of court time, public funds, and the police members having to spend time in the witness box instead of doing their duties. I am therefore of the view that a punitive order for costs would be appropriate.

[49] In the premises, I make an order in the following terms:

1. All claims of First Plaintiff and Second Plaintiff against the Defendants are dismissed;
2. First Plaintiff and Second Plaintiff are ordered to pay the costs of the action, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

P A VAN NIEKERK
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the Plaintiff:

Adv. Z. Nabela
Instructed by Njuze Attorneys

For the Defendant:

Adv. N.E Nwedo
Instructed by State Attorney

Heard: 12, 14 & 15 March 2024

Delivered: 28 March 2024