

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**SOUTH GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 19020/17

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

.....  
DATE

.....  
SIGNATURE

In the matter between:

SIMPHIWE ISAAC JWILI

PLAINTIFF

And

MINISTER POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

SECOND DEFENDANT

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JUDGMENT

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KEKANA AJ

## **INTRODUCTION**

[1] The plaintiff in this case instituted a claim against the Minister of Police and the National Director of Public Prosecution for unlawful arrest and detention, malicious or negligent prosecution, and in the alternative, malicious or negligent arrest and detention in the sum of R2 000 000.

[2] The plaintiff testified and did not call any witnesses. Warrant Officer Wescott; Thamsanqa Manzi, Vincent Kok, Harold Menu, Ellen Lekgetho, Phoka Makibinyane and Phineas Gadebe testified on behalf of the defendants.

[3] It is common cause that the plaintiff was arrested by the police consequently the first defendant bears the onus to justify the arrest. However, since the plaintiff bears the onus in relation to other claims, the plaintiff testified first. What follows is the summary of the evidence that was led.

## **TESTIMONY**

### **SIMPHIWE JWILI**

[4] Simphiwe Jwili (Plaintiff) testified that he was born in Boipatong in 1976. He attended school up to matric and matriculated in 1996 at Tsolo Secondary School. He is currently unemployed and makes approximately R1 500.00 per month from part-time jobs. During 2014 he worked at Ola Supermarket, earning approximately R2 800.00 per month. His cousin, Nonhlahla Jwili (Ms Jwili), also worked at Ola Supermarket as a cashier. She also performed admin work and would sometimes take money to the bank. He was the only driver responsible for transporting the money to the bank.

[5] On the 31<sup>st</sup> March 2014, plaintiff arrived at work at approximately 7h05 but he was supposed to be there at 7h00. He was sent home for being under the influence of alcohol. His explanation was that he drank heavily the previous night. After he was sent home he went to the shebeen where he continued to drink. Later that night, the police came and arrested him, and he was released the following morning only to be rearrested on the 1<sup>st</sup> April 2014 at

approximately 21h00. They arrived at the police station around 01h00 to 2h00 in the early hours of the morning.

[6] Plaintiff learned on Thursday morning when he was being charged that he was being charged with attempted murder and robbery. He first saw Aubrey Moloi, his co-accused, on the 3<sup>rd</sup> April 2014 in the police cells and did not know him prior to that. Plaintiff appeared in court on the 4<sup>th</sup> April 2014, where his case was remanded, and he was taken to Leeuhof Prison where he shared a cell with 40 other people. The cell had 10 beds, two toilets and three basins. The detainees used a 25l barrel which was cut to make a basin. The place was dirty and infested with bedbugs. He was given one dirty blanket to sleep with.

[7] While in prison the plaintiff developed a skin condition, his skin turned grey, was itchy and peeling. He was taken to Baragwanath Hospital, where he received treatment in the form of tablets and a cream. He also suffered from pain in his leg from a previous injury and had to be taken to Sebokeng Hospital, where he received treatment. After some time, he was given crutches to use. He attributed the pain on his leg to the coldness of the cell.

[8] Life in prison was different as plaintiff witnessed other inmates being raped or injured. He was not found guilty at the conclusion of the trial. He lost his job while incarcerated, and his reputation was tarnished by his incarceration. He was perceived as a criminal by the community.

[9] Plaintiff was in prison for approximately two years and six months. He confirmed that during his trial, he was represented by more than one attorney, including Mr Voster, who was supposed to bring a bail application for him but he was not taken to court on the day in question.

[10] During cross-examination, it was put to the plaintiff that his arrest was related to Mr Kok's arrest, who was arrested on the 1<sup>st</sup> April 2014. Plaintiff insisted that he was arrested on the 31<sup>st</sup> March 2014, released on the 1<sup>st</sup> April 2014 in the morning, and rearrested on the 1<sup>st</sup> April 2014 in the evening. He also denied knowing his co-accused Mr Moloi and stated that he met Mr Moloi for the first time in the cells.

[11] Plaintiff denied that Mr Kok knew that plaintiff transported money to the bank from Monday to Friday. He denied that Mr Kok would know that since plaintiff was not at work on the 31<sup>st</sup> March 2014 someone else would be assigned to take the money to the bank. Plaintiff

stated that on the 31<sup>st</sup> March 2014 he had a conversation with Mr Kok at the shebeen regarding his job, Mr Kok enquired why he was not at work. The conversation he had with Mr Kok regarding his employment came about because Mr Kok was looking for employment. Plaintiff and Mr Kok were not sitting together on the 31<sup>st</sup> March 2014.

[12] Plaintiff insisted that he was arrested on the 31<sup>st</sup> March 2014, released on the 1<sup>st</sup> April 2014 in the morning and rearrested later that evening. He denied that he was informed of his rights when he was arrested. Plaintiff persisted that he did not know Mr Moloi prior to meeting him in the police cells.

#### THAMSANQA ELLENBERG MANZI

[13] Mr Manzi testified that he is the owner of Ola Supermarket in Bophelong. He is involved in the day-to-day running of the store. In 2014, Ola Supermarket had approximately thirty employees and faced profitability challenges, with declining sales making it difficult to meet monthly obligations. He consulted labour experts who advised him to consider retrenchment.

[14] Mr Manzi took their advice and initiated the retrenchment process by discussing it with the staff. Various resolutions were made at meetings, including the last-in-first-out criteria. He sent notices to the affected employees, and the plaintiff was one of them. He had individual meetings with those affected. The plaintiff believed that his tardiness and reporting for work under the influence of alcohol influenced the decision to retrench him.

[15] On the 31<sup>st</sup> March 2014, Manzi arrived at Ola Supermarket at around 7h00, carrying money from Saturday, and handed it to the manager. He looked for the plaintiff, as he wanted to give plaintiff instructions before leaving. The plaintiff was supposed to be at work at 7h00, but he was absent. He waited for a while but when the plaintiff failed to show up he left for his appointment in Johannesburg.

[16] While on his way to Johannesburg, he received a phone call from Francina, an employee at Ola Supermarket. He spoke to Francina and then spoke to the plaintiff over the phone and told him to go back home. He then called Ms Jwili, the plaintiff's cousin, who was off work that day, to assist with reconciliations. He also contacted James Lanela and asked him to go

to Ola Supermarket and transport Ms Jwili to Vaal Mall to deposit the money he brought with him from Saturday's sales. He instructed James to park next to the mall entrance. Mr Manzi received a call from Francina and after talking to her he called James. He then rushed to Sebokeng Hospital where Ms Jwili had been admitted before going to Ola Supermarket. (Although Mr Manzi testified about what Francina and James told him, the evidence is inadmissible as both Francina and James were not called to testify).

[17] The next day, a man named Phineas Gadebe (Mr Gadebe) visited Mr Manzi at Ola Supermarket. Mr Gadebe told Mr Manzi that he overheard a conversation between the plaintiff and Mr Kok. The plaintiff allegedly told Mr Kok that the plan went well, Aubrey executed the job and they got the money. Mr Manzi later called Warrant Officer Wescott and met him at the police station. He informed Warrant Officer Wescott about the information from Mr Gadebe. While at the police station, Mr Manzi received a call from Mr Gadebe, who was in Boipatong at a party where Mr Kok was also present. He shared this information with Warrant Officer Wescott, including the party's address.

[18] Warrant Officer Wescott asked if Mr Manzi knew the location of Mr Gadebe and requested Mr Manzi to take them there. Mr Manzi, Warrant Officer Wescott, and Warrant Officer Booyens drove to Boipatong and arrived on the street where Mr Gadebe had indicated. Mr Manzi saw Mr Kok approaching and identified him to Warrant Officer Wescott. The two police officers alighted from the vehicle, drew their firearms, and began talking to Mr Kok. The police later returned to the vehicle and inquired if Mr Manzi knew where the plaintiff lived. Mr Manzi confirmed and after fetching his vehicle he drove to the plaintiff's residence, with the police following. Mr Manzi showed the police the plaintiff's place of residence and left after that.

[19] The following day, Mr Manzi was asked to come to the police station as the police had recovered money from a suspect arrested in Orange Farm. When Mr Manzi arrived at the police station, he was given money to count, totaling R57 300. He was uncertain as to whether the plaintiff was arrested on the 1<sup>st</sup> or 2<sup>nd</sup> April 2014. He confirmed that the plaintiff was acquitted in 2016. During cross examination he confirmed that the money that was recovered was R57 300.

[20] Rakana Menu (Mr Menu) testified that he is a public prosecutor in Vanderbijlpark and has been working there since 2007. On the 4<sup>th</sup> April 2014, he was at work screening the dockets for first appearances at the Vanderbijlpark court. He reviewed several dockets, including the one for the plaintiff and Mr Moloi. While going through the docket of the plaintiff and Mr Moloi, he assessed the evidence it contained. He found a Section 204 statement by Mr Kok and firearm evidence related to Mr Moloi's arrest, Mr Moloi was found with an illegal firearm believed to have been used in the robbery.

[21] Mr Menu read through Mr Kok's Section 204 statement, in which Mr Kok provided details of what happened and the plaintiff and Mr Moloi were implicated. Mr Menu deduced from the Section 204 statement that the plaintiff and Mr Moloi had planned to stage a robbery. However, the plaintiff, who was going to stage the robbery, was sent home by his employer after allegedly going to work under the influence of alcohol. The employer then assigned the plaintiff's responsibility to someone else. Mr Moloi then devised an alternative plan to fetch a firearm for use in the robbery. Mr Menu concluded that since plaintiff and Mr Moloi couldn't stage the robbery, both the plaintiff and Mr Moloi agreed to use force to get the money. He decided to prosecute the case based on that information.

[22] Mr Menu stated that he proceeded with the case because he believed in the probable guilt of the plaintiff, based on the evidence at hand. This, he stated was in accordance with the prosecution policy directive of the National Prosecution Authority (NPA). Mr Menu's involvement ended with the case being enrolled, after which another prosecutor took over in court.

[23] During cross-examination, Mr Menu stated that he did not interview the Section 204 witness, Mr Kok, even though it was recommended to do so. He did not interview Mr Kok because he was satisfied with the statement provided by Mr Kok. Mr Menu confirmed that when one has a Section 204 statement, it would be prudent to conduct an investigation to corroborate the witness's testimony. He agreed that there was no evidence to corroborate Mr Kok's testimony. Mr Menu confirmed that he sought advice when considering the section 204 evidence. He agreed that when a matter has been enrolled the prosecutor constantly reviews his decision and may stop the trial at any time should it transpire that the matter ought not to be proceeded with.

[24] As far as the bail application is concerned Mr Menu recommended schedule 6 because of the charges the plaintiff was facing. Mr Menu admitted that a schedule 1 bail application is very informal. It was put to him that because of his decision regarding the schedule 6 bail application the plaintiff was kept in custody until 16<sup>th</sup> April 2016. Mr Menu stated that the state opposed bail and he further asserted that even if it were a schedule 1 offence the state could still oppose bail. He reasoned that the fact that it is a schedule 1 bail application does not automatically mean that a person will get bail. Mr Menu admitted that the plaintiff had to prove exceptional circumstances to be admitted to bail under schedule 6.

[25] Regarding the statement that Mr Kok signed documents without full awareness as he was eager to go home, Mr Menu stated that he believed the section 204 statement because Mr Kok had signed every page of that statement. Mr Menu agreed that Mr Kok's statement amounted to a confession and an admission. He also confirmed that enrolling a case requires evidence linking the suspect to the offence.

[26] It was put to Mr Menu during cross examination that the procedure was manipulated, and a Section 204 statement was taken instead of obtaining a confession. Mr Menu denied that procedure was manipulated and stated that the Section 204 statement was made in consultation with the senior prosecutor. Mr Menu reiterated that he enrolled the matter because of the statement by Mr Kok which led to the recovery of the money, the firearm and the vehicle.

#### ELLEN LEKGETHO

[27] Ellen Lekgetho (Ms Lekgetho) testified that she is a regional court prosecutor in Vanderbijlpark. On the first appearance of the plaintiff the matter was postponed at the request of the state. On the subsequent date, the 11<sup>th</sup> April 2014, both the plaintiff and Mr Moloï abandoned their formal bail applications. On the 16<sup>th</sup> April 2014, both the plaintiff and Mr Moloï proceeded with their formal bail application which was refused. They appeared in court again on the 29<sup>th</sup> April 2014, and the matter was postponed to the 6<sup>th</sup> May 2014 to allow the state and the defense to arrange trial dates. Both Mr Moloï and the plaintiff were remanded in custody. On the 6<sup>th</sup> May 2014 the matter was postponed to 12<sup>th</sup> May 2014 for trial date. On the 12<sup>th</sup> May 2014 the matter was postponed to the 13<sup>th</sup> August 2014 for trial.

[28] On the 13<sup>th</sup> August 2014, the trial did not start because the plaintiff was sick and admitted at Baragwanath Hospital. The matter was then postponed to the 5<sup>th</sup> November 2014. On the 5<sup>th</sup> November 2014 the matter was postponed to the 13<sup>th</sup> November 2014. On the 13<sup>th</sup> November 2014 the matter was postponed to 17<sup>th</sup> November 2014 as Mr Monareng was not present. On the 17<sup>th</sup> November 2014 the matter was postponed to 16<sup>th</sup> March 2015 for trial. On the 16<sup>th</sup> March 2015 the matter was postponed to the 31<sup>st</sup> March 2015 for Mr Botha for the defense to be placed in funds. On the 31<sup>st</sup> March 2015 the matter was postponed to the 16<sup>th</sup> April 2015 for a formal bail application on new facts.

[29] On the 16<sup>th</sup> April 2015 the matter was postponed to the 17<sup>th</sup> June 2015 for a trial date. On the 17<sup>th</sup> June 2015 the matter was postponed to the 25<sup>th</sup> June 2015 for attorney and trial date. On the 25<sup>th</sup> June 2015 the matter was postponed to 3<sup>rd</sup> July 2015 for legal aid confirmation in respect of Mr Moloi. On the 3<sup>rd</sup> July 2015 Legal Aid mandate was terminated. The matter was postponed to 9<sup>th</sup> and 29<sup>th</sup> September 2015 for trial.

[30] The trial commenced on the 9<sup>th</sup> September 2015 and the matter was postponed to the 29<sup>th</sup> September 2015 for further hearing. The trial proceeded on the 29<sup>th</sup> September 2015. The matter was back in court on the 26<sup>th</sup> November 2015 and was postponed to the 19<sup>th</sup> and 20<sup>th</sup> January 2016 because Mr Monareng was not present. The matter was postponed to the 20<sup>th</sup> January 2016. On the 20<sup>th</sup> January 2016 the matter was postponed to the 15<sup>th</sup> March 2016 because Mr Kok was absent. This postponement was at the request of the state.

[31] The matter was recalled on the 3<sup>rd</sup> February 2016 for a new trial date. The matter was then postponed to 5<sup>th</sup> and 7<sup>th</sup> April 2016. The trial resumed on the 5<sup>th</sup> April 2016, it proceeded on the 7<sup>th</sup> April 2016. The matter was back in court on the 11<sup>th</sup> April 2016, Mr Monareng was not present, therefore the matter was postponed to the 14<sup>th</sup> April 2016.

[32] On the 14<sup>th</sup> April 2016, the matter did not proceed and was postponed to the 14<sup>th</sup> and 19<sup>th</sup> June 2016 for further trial. The matter did not proceed on those dates and was postponed to the 27<sup>th</sup> and 30 June 2016. On the 27<sup>th</sup> June 2016, the matter was postponed to the 30<sup>th</sup> June 2016 due to the illness of a witness. The trial proceeded on the 30<sup>th</sup> June 2016 and was postponed to the 16<sup>th</sup> and 25<sup>th</sup> August 2016.

[33] On the 16<sup>th</sup> August 2016, the legal representatives of the accused were not present, and the matter was postponed to the 25<sup>th</sup> August 2016. On the 25<sup>th</sup> August 2016, advocate Monareng was not present, and the case was postponed to the 28<sup>th</sup> September 2016 for trial.



On the 28<sup>th</sup> September 2016, the trial proceeded, and was postponed to the 13<sup>th</sup> October 2016, on which date advocate Monareng was absent.

[34] The matter was postponed to the 27<sup>th</sup> November 2016 but was recalled earlier at the request of one of the attorneys to arrange a new trial date of the 16<sup>th</sup> November 2016. The trial proceeded on the 16<sup>th</sup> November 2016, with Mr Moloji testifying while the plaintiff chose not to testify. The case was concluded on the 16<sup>th</sup> November 2016, and the magistrate delivered his judgment after being addressed by the defense and the prosecution.

[35] Ms Lekgetho stated that the multiple postponements were not caused by the state but rather the accused changing attorneys and the plaintiff being hospitalized at one point. Regarding the plaintiff's bail application, she agreed that it is more challenging to obtain bail for a Schedule 5 offence compared to a Schedule 1 offence.

[36] Ms Lekgetho stated that she decided to prosecute because the state had a prima facie case against both the plaintiff and Mr Moloji. She believed in Mr Kok's statement, which implicated both the plaintiff and Mr Moloji. She stated that Mr Kok's statement led to the arrest of the plaintiff and Mr Moloji, the recovery of money and firearms. She decided to prosecute because the chain of evidence was complete.

[37] Ms Lekgetho indicated that she deduced from Mr Kok' statement that the plaintiff was the instigator who conspired to commit the robbery with Mr Kok, who in turn arranged for Mr Moloji to carry out the robbery as Mr Kok was unwilling to do it himself. Ms Lekgetho confirmed that the plaintiff was not present at the scene of the robbery.

[38] During cross examination Ms Lekgetho denied that taking down Mr Kok' statement as a section 204 statement instead of obtaining a confession was manipulation of procedure. She stated that Mr Kok was warned in accordance with section 204 of the Criminal Procedure Act. Further that Mr Kok was informed that he would incriminate himself, the plaintiff, and Mr Moloji, and that Mr Kok would need to make a statement voluntarily and testify against the plaintiff and Mr Moloji. Ms Lekgetho stated that Mr Kok made the statement with full awareness of the consequences, and Mr Kok was also informed that the court could have him charged for the same offence, if his evidence was found to be unreliable. Ms Lekgetho was of the opinion that the magistrate concluded that Mr Kok' statement was made under duress due to firearms being present at the time of his arrest.

[39] Ms Lekgetho further denied that the matter took longer than normal, stating that trials in Vanderbijlpark Regional Court often took two to three years or even longer. Ms Lekgetho emphasized that the delay was not caused by the prosecution. She also acknowledged that it is more difficult to obtain bail for a Schedule 5 offence than a Schedule 1 offence.

[40] The following points were also raised with Ms Lekgetho during cross examination: (a) the decision to treat Mr Kok as a section 204 witness instead of obtaining a confession, (b) the decision to continue with the prosecution despite the evidence available, (c) the admissibility of the evidence, (d) the failure of the police to follow the judges' rules, (e) the sufficiency of the evidence, and (f) the reliability of the section 204 witness. It was put to Ms Lekgetho that procedure was manipulated to ensure the plaintiff's prosecution which point she denied.

THOMAS WESCOTT

[41] Thomas Wescott (Mr Wescott) testified that in 2014, he served as a detective warrant officer stationed in Vanderbijlpark. On the 1<sup>st</sup> April 2014, while on duty, he received a docket related to a robbery that occurred on the 31<sup>st</sup> March 2014. The case involved attempted murder and robbery. After receiving the docket, he visited the scene of the robbery where he reviewed video footage of the incident. From the video footage, he recorded the registration numbers of the vehicle used in the robbery, which he later discovered have been reported stolen. This was the primary lead he obtained from the video footage.

[42] Later that evening, around 18h30, he received a call from Mr Manzi, who had received information about the robbery from an informant, Mr Gadebe. Warrant Officer Wescott met with Mr Manzi, and they travelled to Boipatong as directed by Mr Gadebe. Mr. Manzi pointed out a man walking down the street as the person they were searching for. As they approached the man, they had their firearms drawn due to the darkness and uncertainty about whether the man was armed. After confirming that the man was not a threat, they holstered their firearms and identified themselves as the police.

[43] Warrant Officer Wescott further indicated that: The man the police encountered was Mr Kok. Mr Kok informed the police that the plaintiff had approached him with a plan to rob plaintiff's employer. Although Mr Kok refused to participate in the robbery, he arranged Mr Moloï who was interested in taking part in the robbery. The plaintiff, Mr Kok, and Mr Moloï convened on multiple occasions to plan the robbery, discussing the details of when and how it

would take place. Mr Kok also revealed to Warrant Officer Wescott that Mr Moloji had initially wanted to commit the robbery sooner, but the plaintiff had suggested waiting until the end of the month when more money would be available for the taking. Mr Kok provided Warrant Officer Wescott with information about the roles of various individuals involved in the planned robbery after he was arrested.

[44] Warrant Officer Wescott stated further that: After learning of the plaintiff's involvement from Mr Kok, he together with Warrant officer Boysens went to the plaintiff's residence with Mr Manzi, as they needed Mr Manzi to identify the plaintiff's address. They travelled in three separate vehicles. When they reached the plaintiff's residence, a woman opened the door. Warrant Officer Wescott inquired about the plaintiff's whereabouts, and the plaintiff emerged. He introduced himself and asked the plaintiff about his knowledge of the robbery of Ola Supermarket employees. The plaintiff claimed to have heard about it but was not at work when it occurred. Warrant Officer Wescott read the plaintiff his rights and arrested him, making an entry in his pocket book. The plaintiff left with Warrant Officer Booyens, while Warrant officer Wescott left with Mr Kok. Warrant Officer Wescott stated that he is unsure of the pocket book's location as he last handed it to Colonel Oosthuizen, who has since left the police service and subsequently passed away.

[45] Warrant Officer Wescott testified further that: After arresting the plaintiff, the police proceeded to Sharpeville, where they arrested Phoka Makibinyane (Mr Makibinyane), who had been implicated by Mr Kok as the individual who introduced Mr Kok to Mr Moloji. The police took the plaintiff, Mr Kok, and Mr Makibinyane to the police station, where they were detained in the police cells. Prior to their detention, Warrant Officer Wescott read them their rights, and they acknowledged their understanding of those rights.

[46] Warrant Officer Wescott stated that he decided to arrest the plaintiff based on his understanding of Mr Kok' statement that the robbery would not have occurred without the plaintiff's involvement. According to him the plaintiff had inside information about when and how the money was transported, making his role pivotal.

[47] During cross-examination Warrant Officer Wescott stated that when they arrived at plaintiff's place of residence, Mr Manzi did not get out of his vehicle, it was him and Warrant Officer Booyens who went into the plaintiff's yard. It was put to Warrant Officer Wescott that by asking about the robbery he wanted the plaintiff to incriminate himself, which he

denied. Warrant Officer Wescott stated that he asked the plaintiff questions in order to satisfy himself that he was talking to the right person, he denied that he wanted the plaintiff to incriminate himself. Warrant Officer Wescott denied that the question he asked the plaintiff about whether he knew about the robbery was incriminating, he stated that if he had asked what the plaintiff's involvement in the robbery was, that would have been incriminating.

[48] Warrant Officer Wescott admitted that he relied on the statement by Mr Kok to make an arrest. He stated that the statement he took from Mr Kok was an admission and not a confession. He denied that in making a statement and pointing out his co-accused Mr Kok was making a confession. Warrant Officer Wescott further admitted that the plaintiff was taken to court on the 4<sup>th</sup> April 2014 but stated that the 48 hours expired after close of court and therefore he could only be taken to court the following day.

[49] Warrant Officer Wescott agreed that Mr Kok was a single witness and an accomplice also. He stated that he discussed with a prosecutor before taking Mr Kok' section 204 statement. He further admitted that there was an informer and stated that it was Mr Gadebe and not Mr Kok who was paid for the information provided to the police.

#### PHOKA FERDINAND MAKIBINYANE

[50] Mr Makibinyane testified that: On the 1<sup>st</sup> April 2014, around midnight, the police visited his residence in Sharpeville accompanied by Mr Kok. The police wanted Mr Makibinyane to help them locate Mr Moloi. Mr Kok had been introduced to Mr Moloi by Mr Makibinyane and thus did not know Mr Moloi's address. Mr Makibinyane took the police to Mr Moloi's residence at Orange farm but they did not find him. Mr Makibinyane was arrested and released the following day after the police found Mr Moloi at Orange Farm. Mr Makibinyane assisted the police in finding Mr Moloi and played no other role in the matter.

#### PHINEAS GADEBE

[51] Mr Gadebe testified that: On the 31<sup>st</sup> March 2014, around 10h00, he was at Biza's shebeen. He encountered two friends there and joined them and they bought him a soft drink. Mr Gadebe noticed his acquaintance, Mr Kok, sitting alone. Later, he observed the plaintiff providing Mr Kok with two beers and overheard the plaintiff stating that everything had gone

well, and they had obtained the money. He paid minimal attention to this statement and continued chatting with his friends. The plaintiff then brought four more beers, giving two to Mr Kok.

[52] Mr Gadebe testified further that: Late in the afternoon, around 15h00 to 16h00, Mr Gadebe decided to leave the shebeen. When Mr Gadebe informed Mr Kok of his departure, Mr Kok asked why he was leaving, as he, Mr Kok, intended to give Mr Gadebe money. Mr Kok informed Mr Gadebe that Mr Kok and the plaintiff would have money as Mr Moloi and others had robbed Ola Supermarket. Mr Gadebe waited for approximately 45 minutes before departing. Mr Gadebe decided to visit Mr Manzi at Ola Supermarket to confirm whether he had indeed been robbed but did not find Mr Manzi.

[53] Mr Gadebe stated that: The following morning, Mr Gadebe met with Mr Manzi and shared the details of the conversation he overheard between the plaintiff and Mr Kok. He also relayed what Mr Kok had mentioned about Mr Moloi's involvement in the robbery. They exchanged contact information and parted ways. Later that evening, Mr Gadebe attended a party in Boipatong, having been invited by a friend. Upon arrival, Mr Gadebe encountered Mr Kok at the party. He discreetly phoned Mr Manzi from the restroom, informing him that Mr Kok was present at the party and providing a description of Mr Kok's attire. He then re-joined the party, where the host presented him with two bottles of juice. Sometime between 19h00 and 20h00, he received a call from Mr Manzi inquiring about Mr Kok's presence at the party. After searching for Mr Kok and failing to locate him, Mr Gadebe went outside where he saw Mr Kok walking towards the taxi rank and Mr Gadebe relayed that information to Mr Manzi.

[54] During cross-examination, Mr Gadebe confirmed that he received R6000.00 from the police for the information he provided them with. He admitted that he was initially hesitant to make a statement out of fear for his safety. Regarding the absence of his statement in the docket, Mr Gadebe stated that the police officer was writing while he provided his statement orally, as a result he is uncertain why his statement was not in the docket.

SUBMISSIONS

[55] Regarding the claim for malicious or negligent prosecution the plaintiff submitted that the defendants manipulated the procedure by treating Mr Kok as a section 204 witness instead of taking a confession from him. Further that the police used inadmissible and unreliable evidence and ignored the cautionary rules applicable to single witnesses.

[56] Regarding the claim for further detention the plaintiff submitted that when the police arrested the plaintiff, the plaintiff was not warned properly. Further that the police failed to follow the police standing orders which required Warrant Officer Wescott to record the warning process in his pocket book. Further that Warrant officer Wescott failed to find out what the plaintiff's version was, which was that the plaintiff had an alibi. The plaintiff argued that failure to follow these procedural steps creates the inference that they were not deliberately followed.

[57] The plaintiff argued that the defendants are liable for the plaintiff's further detention. Further that the remand by the magistrate does not render the further detention lawful. Relying on the case of *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA) par 8-15 the plaintiff contends that where the performance of the police falls short his/her employer becomes liable for the continued detention of the plaintiff. It was submitted that the police being aware that there are no facts upon which the plaintiff could be convicted on, failed to disclose this information to the prosecutor thus making them liable for the plaintiff's further detention.

[58] The defendants' submission regarding the claim for malicious or negligent prosecution is that: it is not every prosecution that is concluded in favour of an accused person that leads to a successful claim. It was argued that the police did no more than what was expected of them, which was to give a fair statement of the relevant facts to the prosecutor and left the decision of whether to prosecute or not, to the prosecutor.

[59] In relation to the prosecutors, the defendants argued that the prosecutors had probable cause for proceeding with the prosecution. They relied on the statement made by Mr Kok who implicated the plaintiff and Mr Moloji. The information obtained from Mr Kok led to the recovery of the firearm and the vehicle used in the robbery and the money. It was further submitted that the plaintiff did not provide evidence to show that the defendants acted with malice. Further that the prosecutors did not act *animo iniuriandi* and the plaintiff did not provide evidence in that regard. The defendant submitted that the sole reason for arresting the

plaintiff 'as the mastermind of the robbery' was to bring him to court for trial and not to injure his feelings.

[60] Regarding the submissions that the defendants prolonged the plaintiff's detention unnecessarily and were thus liable for the plaintiff's further detention, the defendants submitted that further detention of the plaintiff was at the discretion of the court. Further that the plaintiff's application in terms section 174 of the CPA was refused by the Magistrate and therefore his further detention was lawful.

[61] The defendants' further submissions regarding the plaintiff's detention is that the plaintiff was dealt with in terms of the law, he was afforded an opportunity to apply for bail and his bail was correctly denied by the magistrate. It was argued that Ms Lekgetho, the prosecutor, had probable cause to oppose bail and did not act *animus iniuriandi* but opposed bail after she had acquainted herself with the police docket.

## **CLAIM A**

### **MALICIOUS OR NEGLIGENT PROSECUTION**

[62] The claim for malicious prosecution against the defendants is pleaded as follows:

- "9. On or about Tuesday, 1 April 2014, the first defendant's servants maliciously, alternatively negligently set the law in motion by laying false charges of attempted murder and robbery against the plaintiff at the Vanderbijlpark Police Station as follows:
- 9.1 On the aforesaid date at about 21h00 at or near 2861 Extension 5, Muvhango Section, Bophelong, Gauteng, servants of the first defendant, including one apparently named Westcott, arrested and detained the plaintiff;
- 9.2 At the Vanderbijlpark Police Station, the aforesaid servants of the first defendant (being Westcott and other police officers) opened a criminal docket (or caused one to be opened) wherein the plaintiff was cited as a suspect on charges of attempted murder and robbery;
- 9.3 The plaintiff was thereafter detained at the instance of the aforementioned police officers and other police officers at the Vanderbijlpark Police Station, until on or about 4 April 2014 (the first appearance of the plaintiff);

- 9.4 The conditions of detention of the plaintiff did not comply with the requirements of human dignity and were disgusting;
- 9.5 The servants of the first defendant aforesaid took the plaintiff to the criminal court at the Vanderbijlpark Magistrates' Court to be charged with the aforesaid crimes;
- 9.6 At the first hearing and subsequent hearings of the plaintiff, the servants of the first defendant aforesaid, supplied the prosecutors with unsubstantiated and false information (which they knew or reasonably ought to have known to be false and unsubstantiated) *inter alia*, that the plaintiff allegedly attempted to murder his cousin when he allegedly robbed (hi-jacked) the vehicle belonging to his cousin's employer at the time;
- 9.7 Thereafter, the plaintiff was caused to be further detained as a result of the charges laid at the instance of the aforesaid servants of the first defendant at the Leeuwhof Prison until 16 November 2016, when the plaintiff was released from custody;
- 9.8 The plaintiff's release came about as a result of the criminal proceedings terminating in favour of the plaintiff on the day of his release;
- 9.9 From the date of his arrest until the date of his release, the plaintiff endured deprivation of liberty, inconvenience and discomfort as well as stress and humiliation caused by being arraigned in criminal trial concerning very serious charges;
- 9.10 The police officers involved in the purported investigation of the matter against the plaintiff, maliciously, alternatively negligently:
- 9.10.1 Knew, alternatively ought to have known, that no reasonable or objective grounds or rustication existed for either the arrest of the plaintiff or his subsequent prosecution and further detention
- 9.10.2 Failed to take reasonable investigative steps to ascertain whether such grounds or justification existed, all of which could have been easily ascertained;
- 9.10.3 Failed in his /her/their duty of care to inform the relevant public prosecutor/s dealing with the matter that there was no such grounds or justification and indeed no objective facts reasonably linking the plaintiff to the alleged crime of attempted murder and robbery;
- 9.10.4 Failed in his/her/their duty to ensure that the matter was properly investigated, charging the plaintiff correctly if at all and ensuring the veracity of any evidence collected; and
- 9.10.5 Failed to take any steps whatsoever to ensure the plaintiff was released from detention as soon as possible;



- 9.11 By conducting themselves as aforesaid, the servants of the first defendant converted what appeared to be a lawful act into an unlawful one by manipulating procedure for unlawful purposes, or alternatively were negligent.
- “10. On or about the Friday, 4th April 2014, the second defendant’s servants maliciously or negligently set the law in motion when deciding to prosecute the plaintiff on the said charges of attempted murder and robbery at the Vanderbiljpark Magistrate court in that the servants of the second defendant:
- 10.1 Failed in his / her duty of care to acquaint himself/herself/themselves with the contents of the relevant police investigation docket, from which it would have been apparent there were no reasonable grounds or justification for prosecution and further detention of the plaintiff;
  - 10.2 Failed in his / her duty to timeously withdraw the charges against the plaintiff;
  - 10.3 Failed in his / her duty to inform any of the presiding magistrates/ judges expeditiously that there were no objective facts reasonably linking the plaintiff to the alleged crime of attempted murder;
  - 10.4 Failed in his / her / their duty to ascertain independently that no reasonable grounds or justification existed for the continued detention of the plaintiff;
  - 10.5 Failed to take any step to ensure that the plaintiff was released from detention as soon as possible;
  - 10.6 Including ensuring that the matter was properly investigated, charging the plaintiff correctly, obtaining the evidence to justify the prosecution of the plaintiff and ensure its veracity, ensuring that the matter was enrolled for trial, properly supervising the investigation, ensuring that those things were done without delay;
  - 10.7 By conducting themselves as aforesaid, the servants of the second defendant converted what appeared to be a lawful act into an unlawful one by manipulating procedure for unlawful purposes, or alternatively were negligent.
11. When the servants of the first defendant laid these false charges and the prosecutors prosecuted the plaintiff, neither of them had any reasonable or probable cause for doing so, nor did they have any reasonable belief in the truth of the information given.”

## LAW

[63] In *Heyns v Venter* 2004 (3) SA 200 T 208 B it is stated that malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also

his or her good name and privacy. In order to succeed with a claim for malicious prosecution, a claimant must allege and prove the following elements: (a) that the defendants set the law in motion (instigated or instituted the proceedings); (b) that the defendants acted without reasonable and probable cause; (c) that the defendants acted with 'malice' (or animus iniuriandi); and (d) that the prosecution has failed. See *Mabona v Minister of Law and Order* 1988 (2) SA 654

[64] In *Relyant Trading (Pty) Ltd v Shongwe* [2006] SCA 111 RSA it was stated that: “ The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause’ was explained in *Beckenstrater v Rottcher* and *Theunissen* as follows:

‘When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.’

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff’s guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: ‘For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.’

[65] In *S v Lubaxa* 2001 (2) SACR 703 (SCA) at para 19-20 the court dealing with whether or not the court ought to discharge an accused person said:

“...Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a

prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (*Skeen, supra*, at 293) that need not always be the case."

[66] The plaintiff claims damages against the police and the prosecutors for malicious prosecution and thus bears the onus to prove that the police and the prosecutors instigated or instituted the proceedings against the plaintiff without reasonable and probable cause, further that they acted *animus iniuriandi* and that the prosecution failed. It is common cause that the prosecution against the plaintiff failed as he was acquitted.

*(a) Instigation*

[67] Regarding the police, plaintiff contends that since the police arrested him, the requirement for instigation has been satisfied. The plaintiff pleaded that 'the police supplied the prosecutors with unsubstantiated and false information which they knew or ought to have known to be false and unsubstantiated 'that the plaintiff allegedly attempted to murder his cousin when he allegedly robbed (hijacked) the vehicle belonging to his cousin's employer at the time...'. The abovementioned conduct, if proven, would in my view indicate that the police instigated the proceedings against the plaintiff. The first defendant on the other hand contends that the police did nothing more than to give a fair and honest statement of the relevant facts to the prosecutor and left it to the prosecutor to decide whether to prosecute or not.

[68] In his evidence, the plaintiff testified on how Warrant Officer Wescott came to his residence in the company of Mr Manzi and other police officers and arrested him despite his protestation that he knew nothing about the robbery. The defendants' evidence is that the police were investigating a case of attempted murder and robbery with aggravating circumstances when they received information that plaintiff had conspired with Mr Kok and Mr Moloji to rob his employer. The police arrested the plaintiff based on the statement received from Mr Kok and handed the matter over to the prosecution.

[69] The question whether the defendants instigated the proceedings against the plaintiff is dependent on the circumstances of each case. Instigation will be present if the defendant acted with the purpose of having the plaintiff prosecuted, however the plaintiff will have to show that the defendant did more than just comply with his general obligations. (see *Baker v Christiane* 1920 WLD 14 at 16-17 and *Waterhouse v Shields* 1924 CPD 155 at 160)

[70] In *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130 the court stated that "the duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of relevant facts to the prosecutor leaving it to the latter to decide whether to prosecute or not." The requirement of instigation was found to have been satisfied in *Tyokwana* where the police officer persisted and actively encouraged the prosecution of the accused person while being aware that there was no evidence linking the accused to the crime.

[71] It is not in dispute that the police arrested the plaintiff after receiving information implicating him. The plaintiff's contention that this conduct alone constitutes instigation of proceedings cannot be upheld since the law requires the arresting officer to have done more than his general obligations. Throughout his evidence Warrant Officer Wescott persisted that he believed that the plaintiff had conspired to rob his employer. This belief was based on the statement made by Mr Kok which led to the arrest of Mr Moloji and the recovery of the money, the firearm and the motor vehicle used in the robbery. The docket was handed over to the prosecutors who decided to prosecute based on the information therein.

[72] The plaintiff's basis for this claim against the police is that they provided false evidence to the prosecutors to the effect that the plaintiff committed robbery and attempted to murder his cousin. The undisputed evidence is that the plaintiff was not at the scene of the robbery and therefore could not have committed the robbery. This fact is acknowledged by the

defendants' witnesses, Mr Menu, Ms Lekgetho and Warrant Officer Wescott, who were in agreement that the plaintiff's role was that of conspiring to rob his employer. Evidently the information that the prosecutors had at their disposal, as obtained from the police, was that the plaintiff did not take part in the actual robbery but was guilty of conspiracy.

[73] The plaintiff did not lead any evidence to prove that 'the police supplied the prosecutors with unsubstantiated and false information that the plaintiff allegedly attempted to murder his cousin and robbed his employer. There is also no evidence to prove that the police went beyond their general obligation of investigating the matter and handing over the matter to the prosecution. Therefore, in the absence of evidence to prove that the police actively pursued and encouraged the prosecution of the plaintiff, it cannot be said that the police instigated the proceedings against the plaintiff.

[74] Regarding the prosecutors, it is common cause that the prosecutors instituted the proceedings against the plaintiff and persisted with the prosecution and therefore I find that the requirement of institution of proceedings against the plaintiff is met.

[75] In light of the abovementioned conclusion, the remaining requirements for malicious prosecution will be dealt with in relation to the second defendant only.

*(b) Reasonable and probable cause*

[76] Another requirement that the plaintiff had to prove with regard to the second defendant, is that the prosecutors had no probable and reasonable cause to prosecute the plaintiff. The plaintiff testified that he had nothing to do with the robbery; that on the day of the robbery he spent his day at the shebeen drinking beer after he was sent home from work for being under the influence of alcohol. It was submitted on behalf of the plaintiff that the prosecutors failed to acquaint themselves with the contents of the docket, from which it would have been apparent that there were no reasonable grounds or justification for prosecution and further detention of the plaintiff.

[77] Mr Menu testified that he enrolled the matter after he assessed the evidence contained in the docket which led him to believe that the plaintiff had conspired to rob his employer. The information that was available to the prosecutors when they decided to institute the prosecution of the plaintiff was that: (a) the plaintiff arranged with others to orchestrate the robbery of his employer; (b) the money was supposed to be taken from the plaintiff; (c) on

the morning of the intended robbery the plaintiff was sent home for being under the influence of alcohol; (d) the plaintiff then went to the shebeen where he continued drinking. This information was obtained from Mr Kok who made a statement in terms of section 204 of the CPA to the police.

[78] Both Mr Menu and Ms Lekgetho testified that they deduced from Mr Kok's statement that the plaintiff had conspired to rob his employer. The evidence that plaintiff was not present at the scene of the robbery was not contested by any of the defendants. Even from Mr Kok's statement it is clear that the plaintiff was not at the scene of the robbery. Faced with the abovementioned evidence, one would have expected Mr Menu to ensure that plaintiff is charged properly before enrolling the matter. However, Mr Menu proceeded to enroll the matter and the plaintiff had to appear in court on the charges of attempted murder and robbery with aggravating circumstances, despite the fact that there was no evidence linking the plaintiff to the actual robbery. In my view the prosecutors acted without reasonable and probable cause when they proceeded to prosecute the plaintiff for attempted murder and robbery with aggravating circumstances.

*(c) Animus iniuriandi*

[79] Lastly, the plaintiff must prove that the prosecutor(s) acted *animus iniuriandi*. In the Law of delict 7th edition by Neethling *et al*, page 368, it was stated that '*animus iniuriandi* in this context means that the defendant, while being aware of the absence of reasonable grounds for prosecution, directs his will towards prosecuting the plaintiff. If no reasonable grounds exist, but the defendant honestly believes either that the plaintiff is guilty or that reasonable grounds are present, the second element of *animus iniuriandi* i.e. consciousness of wrongfulness, will be lacking.' However, the absence of reasonable and probable cause does not necessarily imply that the prosecutor acted *animo iniuriandi*, although it may afford evidence of the latter. See *Lederman v Moharal Investments (Pty) Ltd* 1969 1 SA 190 at 192 B-C

[80] In *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 SCA at para 64, the court said the following with regard to the element of *animus iniuriandi*:

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was

acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*).’

[81] The plaintiff has to prove that the prosecutors, aware of the lack of reasonable grounds for prosecution, intentionally pursued his prosecution. The plaintiff submitted that ‘the police and the prosecutors created a spectre that there was sufficient evidence to enroll the matter, when in fact this was not the case’ thus making the detention and the prosecution of the plaintiff malicious. He contends that the defendants manipulated procedure by treating Mr Kok as a section 204 witness instead of taking a confession or an admission from him. Further that the evidence relied upon for his prosecution was inadmissible and unreliable.

[82] The plaintiff further contends that his detention was prolonged by the prosecution under wrong pretext. He testified that his case was postponed on numerous occasions by the prosecutors. Ms Lekgetho testified in detail, regarding the numerous postponements indicating the reason for most of the postponements. The evidence shows that most of the postponements were caused by the defense and not the prosecution, and therefore, the delays in finalizing the matter cannot be attributed to the prosecution.

[83] Ms Lekgetho testified that based on the statement made by Mr Kok, she believed that they had a prima facie case against the plaintiff. She believed that the plaintiff had conspired to rob his employer. It was her opinion, that the robbery would not have taken place, had it not been for the plaintiff. This belief was strengthened by the fact that the statement of Mr Kok led to the arrest of Mr Moloï and the recovery of the money and the firearm. She changed the charges against the plaintiff to conspiracy to commit robbery. She stated that she proceeded to prosecute because the chain of evidence was complete.

[84] The plaintiff sought to demonstrate that the defendants relied on inadmissible evidence, unreliable witnesses, and followed incorrect procedures in an attempt to prove that the prosecutors were malicious in prosecuting him. The cross-examination of the prosecutors showed that they did not follow certain procedures, for example, Mr Menu admitted that he did not interview Mr Kok, even though he should have interviewed him. Although the evidence that the prosecutors had was not satisfactory, the prosecutors are however, not required to have an airtight case before initiating prosecution; it is for the trial court to decide at the conclusion of the matter whether or not there is evidence upon which the accused might reasonably be convicted.

[85] Mr Menu enrolled the matter and handed it over to the next prosecutor to proceed with the case. The evidence that he believed that the plaintiff had conspired to rob his employer is also uncontroverted. It can therefore not be said that he pursued the prosecution of the plaintiff knowing that he had no probable cause.

[86] The plaintiff submitted that Ms Erasmus, the prosecutor who took over the matter from Mr Menu, was supposed to have been called to testify. The plaintiff further submitted that a negative inference should be drawn against the second defendant for failing to call Ms Erasmus.

[87] It is trite that when the court seeks to draw an inference, the inference that is sought to be drawn must be consistent with all the proven facts, if it is not, then the inference cannot be drawn. The above position was summarised in *S A Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35 as follows:

‘The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn and it must be the more natural or plausible, conclusion from among several conceivable ones when measured against the probabilities.’

[88] The proved facts are that the prosecutors and the police believed that the plaintiff was guilty of conspiracy to rob his employer and they proceeded with the case based on that belief. Failure to call Ms Erasmus coupled with all the proved facts must point / lead to a conclusion that the prosecution was proceeded with *animus iniuriandi* for the contended inference to be drawn. The court cannot speculate as to the role played by Ms Erasmus in the absence of any evidence to support the allegations made by the plaintiff. After considering the evidence, I find that there are no facts from which contended inference can be drawn.

[89] The onus is not on the second defendant to show that they did not act *animus iniuriandi*. In my view, the plaintiff has failed to prove that the prosecutors acted *animus iniuriandi*.

In light of the above the plaintiff’s claim for malicious prosecution ought to fail.



## NEGLIGENT PROSECUTION

[90] Regarding the alternative claim based on negligent prosecution the plaintiff argued that the defendants should be held liable for damages for negligent prosecution. Although the court in *Heyns v Venter* 2004 (3) SA 200 (T) limited liability to gross negligence, the plaintiff contends that ordinary negligence should suffice and placed reliance on the matter of *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC). The defendant relying on *Minister of Justice and Constitutional Development v Moleko* [2008] 3 ALL SA 47 (SCA) submitted that negligence is not sufficient to attract liability on the part of the defendant.

[91] The plaintiff argued that common law should be developed to create a delict of negligent prosecution. In *Matshego v Minister of Police Tuchten J* held as follows:

‘This cause of action was not known to our common law, which recognised in this field only the delict of malicious prosecution, a claim which arises, all other things being equal, when the defendant sets the criminal law in motion against a plaintiff while knowing full well that the prosecution cannot succeed... Counsel submitted... that our law had recognised the delict of negligent prosecution... I do not read any of these cases as developing the common law so as to create the delict of negligent prosecution. In the absence of authority binding on me, I view such a development of the common law as undesirable. It would have a harmful effect on the administration of the criminal law if prosecutors ran the risk of being held liable in damages if they honestly applied their minds to the question whether a case should be withdrawn at the first appearance of the accused in court and negligently decided that the case should not be withdrawn. In the vast majority of cases and nearly all, if not all, serious cases, further investigation is required after the first appearance of the accused in court before the case is ready for trial. Recognising the delict of negligent prosecution would require a prosecutor to anticipate the outcome of the investigation. It would also enable an accused person to place pressure on a prosecutor by suggesting personal liability or damage to the prosecutor’s career prospects if the case were allowed to continue past the first appearance in court. In short, a prosecutor who ran the risk of being held liable for negligent prosecution would find it difficult to carry out his duties without fear as required under section 176(4) of the Constitution.’

[92] In finding that a prosecutor can be found liable for the consequences of a negligent failure to bring relevant information to the attention of the court, the court in *Carmichele v*

Minister of Safety and Security 2001 (4) SA 938 (CC) at para 73 stated that each case must ultimately depend on its own facts.

[93] The plaintiff bears the onus to prove the negligence on the part of the prosecution. The plaintiff argued that the prosecutors manipulated procedure by treating Mr Kok as a section 204 witness instead of taking a confession from him, failure to use the evidence from the informer must have been premised on its unreliability. Although the plaintiff presented argument in support of the case pleaded in this regard, there is however insufficient evidence regarding the role played by the prosecutor(s) in his further detention. The plaintiff's evidence centres around the role played by the police in his incarceration. I therefore find that the plaintiff's claim in this regard cannot succeed.

## **CLAIM B**

[94] The plaintiff claims in the alternative to the above claim, damages for unlawful or malicious further detention. The testimony of the plaintiff that he was arrested on the 31<sup>st</sup> March 2014 is contrary to the allegation made in the particulars of claim that the plaintiff was arrested on the 1<sup>st</sup> April 2014. Although the plaintiff persisted with this allegation, same was not supported by evidence and contradicted the case pleaded by him.

[95] It is common cause that the plaintiff's claim for unlawful arrest and initial detention has prescribed. The plaintiff was arrested on the 1<sup>st</sup> April 2014 and brought to court on the 4<sup>th</sup> April 2014. The plaintiff initiated legal proceedings by issuing summons on the 17<sup>th</sup> July 2017. However, the determination thereof is relevant in relation to the plaintiff's claim against the first defendant for further detention which has not prescribed.

## **UNLAWFUL ARREST AND DETENTION**

[96] The plaintiff claims in the alternative damages for unlawful arrest and detention against the first defendant.

[97] The claim is pleaded as follows in the particulars of claim:

“19. On or about Tuesday, 1 April 2014 at or about 21h00 at or near 2861 Extension 5, Muvhango Section, Bophelong, Gauteng, servants of the first defendant, including one apparently named Westcott, arrested the plaintiff maliciously, alternatively without a warrant.

20. Alternatively to paragraph 19, the plaintiff was arrested by aforementioned police officers without intending to bring the plaintiff to justice, further alternatively when unlawfully exercising the discretion to arrest.

21. Thereafter the plaintiff was detained at the instance of the aforementioned police officers and other police officers at the Vanderbijlpark Police Station, until on or about 4 April 2014, then at Leeuwhof Prison, until on or about 16 November 2016, when the plaintiff was released from custody.”

[98] The first defendant's defense is that the plaintiff was lawfully arrested by a peace officer on solid and reasonable grounds in terms of section 40(1)(b) of Act 51 of 1977 on charges of robbery, which were later changed to conspiracy to commit robbery with aggravating circumstances.

## THE LAW

[99] It is trite that the arrest of an individual is prima facie wrongful and once the arrest is admitted, it is for the defendant to allege and prove the lawfulness of such an arrest. see *Minister of Police v Hofmeyer* 1993 (3) SA 131A (153D-E)

[100] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 as amended provides that 'a peace officer may, without a 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 custody.'

[101] In *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SE) at 658 E-H Jones J stated that:

“The test whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Net and Another* 1980 (4) SA 28 (E) at 33H). 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 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.”

[102] In *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 W, the court held that when deciding if an arrestor’s decision to arrest was reasonable, the court must decide each case on its own facts. In relation to the above the court stated that:

“This entails that the adjudicator of facts should look at the prevailing circumstances at the time when the arrest was made and ask himself the question, was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employer, and then residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation.”

[103] The jurisdictional facts for a section 40(1)(b) defense are as follows: (a) The arrestor must be a peace officer; (b) the arrestor must hold a suspicion; (c) the suspicion must pertain to the suspect committing an offence listed in Schedule 1; and (d) the suspicion must be founded on reasonable grounds.

[104] It is common cause that the plaintiff was arrested by Warrant Officer Wescott, a police officer, acting within the course and scope of his employment. Therefore, the first defendant bears the onus of proving that the plaintiff's arrest was justified. See *Minister of Police v Hofmeyr* 1993 (3) SA 131A (153D-E).

[105] Warrant Officer Wescott testified that he arrested the plaintiff on the basis of the statement obtained from Mr Kok. On his own evidence the information at his disposal was that the plaintiff planned and sought people to carry out his plan to rob his employer. Mr Kok, assisted the plaintiff in arranging and facilitating a meeting between the plaintiff and Mr Moloï who was interested in carrying out the plan to rob the plaintiff’s employer. The plan involved the staging of a robbery, where Mr Moloï would take money from the plaintiff as he took it to the bank. However, on the agreed-upon date, the plaintiff was sent home for being

under the influence of alcohol. This turn of events led Mr Moloi to procure a firearm, which was used to rob Ola supermarket employees, Ms Jwili and James, who were transporting money to the bank. The plaintiff's cousin, Ms Jwili, was shot in the process.

[106] This information was provided to Warrant Officer Wescott by Mr Kok at the point of his arrest. Upon receiving this information Warrant Officer Wescott went to the plaintiff's residence where he placed plaintiff under arrest. According to Warrant Officer Wescott the only lead he had at the time of Mr Kok's arrest was video footage from which he obtained the registration numbers of the vehicle that was used in the robbery. He later discovered that the vehicle had been reported stolen. He indicated that at the time of approaching Mr Kok in Boipatang, he did not know what Mr Kok's involvement in the matter was.

[107] It was submitted on behalf of the first defendant that Warrant Officer Wescott did a proper investigation of the allegations made by the complainant, further that he checked the information that he obtained from Mr Kok when he had an opportunity to do so. However, the evidence before this court seems to suggest otherwise. Warrant Officer Wescott arrested the plaintiff immediately after arresting Mr Kok who admitted to being involved in the plan to rob the plaintiff's employer. Any investigation that was done, i.e. the recovery of the firearm, the money and the vehicle all came after the plaintiff had been arrested.

[108] Warrant Officer Wescott did not interview Gadebe who allegedly overheard the conversation between Mr Kok and the plaintiff to the effect that Mr Moloi succeeded in obtaining the money. He did not consider obtaining any corroborating evidence or investigating the exculpatory evidence provided by the plaintiff. He proceeded to arrest the plaintiff on charges of attempted murder and robbery with aggravating circumstances. He accepted the information from Mr Kok without any further investigation.

[109] Furthermore Warrant Officer Wescott stated that he suspected that the plaintiff had conspired to rob his employer. A reasonable man in Warrant Officer Wescott's position would have taken the time to assess and analyse the information obtained from Mr Kok and made sure that the plaintiff faces charges of conspiracy to commit robbery, (which is what Warrant Officer Wescott believed plaintiff to be guilty of) and not attempted murder and robbery.

[110] In my view Warrant Officer Wescott took a hasty decision to arrest the plaintiff without establishing whether there were solid grounds to do so. I therefore find that the arrest of the

plaintiff and the initial detention of the plaintiff (prior to his appearance in court) was unlawful.

[111] As mentioned above this claim has prescribed and consequently no damages will be awarded in respect hereof.

### **CLAIM FOR UNLAWFUL FURTHER DETENTION AGAINST THE FIRST DEFENDANT**

[112] The plaintiff claims damages for further detention against the first defendant. The plaintiff bears the onus in respect of this claim. The claim is pleaded as follows:

“23. The further detention of the plaintiff after his first appearance on 4<sup>th</sup> April 2014 was wrongful in that:

23.1 The police men involved in the purported investigation of the matter against the plaintiff, maliciously, alternatively negligently:

23.1.1 Knew, alternatively ought to have known that no reasonable or objective grounds or justification existed for the subsequent and continued detention of the plaintiff;

23.1.2 Could have easily ascertained by the taking of reasonable investigative steps that no such grounds or justification existed, but failed to take any such steps;

23.1.3 Failed in his/her/their duty of care to inform the relevant public prosecutor/s dealing with the matter that there was no such grounds or justification and indeed no objective facts reasonably linking the plaintiff to the alleged crime of attempted murder and robbery;

23.1.4 Failed in his/her/their duty to ensure that the matter was properly investigated, charging the plaintiff correctly, if at all, and ensuring the veracity of any evidence collected;

23.1.5 Failed to take any steps whatsoever to ensure that the plaintiff was released from detention as soon as possible.”

## SUBMISSIONS

[113] The plaintiff argued that where the police person knows that there are no facts upon which an accused person could be convicted and fails to disclose that to the prosecutor who in turn is not in a position to inform the magistrate of those facts then the Minister of Police would be liable for further detention of that accused person. The plaintiff further submits that in this case the police failed to provide the prosecutors with information which would have led to the release of the plaintiff.

## THE LAW

[114] In *Woji v Minister of police* [2015] 1 ALL SA 68 (SCA) the investigating officer testified at the bail application that Mr Wojji was identified in a video footage as one of the accused, and his bail application was denied as a result. On viewing the video footage, it was later discovered that Mr Wojji could not be depicted from the video footage and charges were subsequently withdrawn. The Minister of police was held liable for the entire period of detention because a reasonable person would have foreseen that his untruthful evidence would lead to the refusal of bail.

[115] In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) the police officer misled the court during the bail hearing. In this case the accused had pleaded guilty after having been assaulted by the police. The Minister of Police was held liable for the entire period.

[116] In *Ndlovu v Minister of Police (GP)* (unreported case number 2014/15210, 9.9.2016) the accused appeared before a reception court where the court remanded the accused in custody without considering bail. The Minister of Police was held liable for the entire period of detention on the basis that the police officer would have foreseen that the accused would be remanded in custody without having his bail considered since it was the practice in that court.

[117] In *De Klerk v Minister of Police* [2019] ZACC 32 at 62, Theron J summarized the principles arising from our jurisprudence regarding subsequent detention as follows:

“[62] the deprivation of the liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was such cause for the later deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the legal principles of legal causation, having regard to the applicable tests and policy consideration. This may include a consideration of whether a post appearance detention was lawful. It is these policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.”

[118] In *Mahlangu and another v Minister of Police* 2021 (7) BCLR 698 (CC) Mr Mahlangu and another were detained after Mr Mahlangu confessed because he had been tortured and coerced by the police to make a false confession. The court held the Minister of police liable for the entire period because the police concealed the information regarding the false confession.

## ANALYSIS

[119] What is clear from the above matters is that the police who wrongfully arrest and detain a person may also be liable for post-hearing detention of that person where there is evidence, on a balance of probability, that the culpable and unlawful conduct of the police was the factual and legal cause of the post-hearing detention. In the current matter factual causation is satisfied because ‘but for’ the unlawful arrest by Warrant Officer Wescott, further detention ordered by the court would not have occurred. See *De Klerk v Minister of police*. What remains to be determined is legal causation.



[120] The finding that the arrest and the initial detention are unlawful does not automatically mean that further detention is unlawful. Policy considerations may in certain circumstances not allow for the Minister of police to be liable, despite the arrest being unlawful. Where the presiding officer ordered further detention of an accused person after considering bail, that may be considered to be an intervening act. See *De Klerk v Minister of Police*. Similarly, the order by the presiding officer to further detain an accused person does not make the further detention lawful. The plaintiff bears the onus to prove that the harm was not too remote from the unlawful conduct of Warrant Officer Wescott.

[121] The court in deciding whether to hold the minister of police liable for further detention considers the following: (a) whether further detention was foreseeable by the arresting officer; (b) whether the further detention was the direct consequence of the unlawful conduct; (c) *novus actus interveniens*; and (d) public policy consideration.

[122] Turning to the traditional tests for legal causation. The requirement whether the further detention was the direct consequence of the unlawful conduct requires the plaintiff to prove that it was the conduct of the arresting officer that caused plaintiff damage post the court appearance. The plaintiff accepts that further detention is within the discretion of the court. Further that the court is duty bound to ensure that the accused is not detained on insubstantial grounds. The question that must then be answered is whether the Minister of police should be held liable despite the intervention of the Magistrate who postponed the matter and subsequently refused the plaintiff bail.

[123] The plaintiff set out to prove that the police manipulated procedure and never intended to bring the plaintiff to justice. Warrant Officer Wescott was criticized for failing to follow the judges' rules, for taking Mr Kok's statement in terms of section 204 of the CPA instead of taking a confession, for failing to investigate the matter properly, for failing to produce the pocket books and the informer's statement, for failing to ensure that the plaintiff was charged properly and for failing to ensure that the plaintiff was released. The plaintiff argued that because of the 'systematic failures' an inference should be drawn that the police never intended to bring the plaintiff to justice.

[124] It is common cause that the plaintiff was arrested by Warrant Officer Wescott. He was taken to court on the 4<sup>th</sup> April 2014 where his matter was postponed to the 11<sup>th</sup> April 2014. The proven evidence is that when the plaintiff was arrested, he was not warned properly at

the point of his arrest and he was not taken to court within the requisite 48 hours. The docket was handed over to the prosecution with all the information collected by the arresting officer during the investigation. The prosecutors decided to enroll the matter and opposed the plaintiff's bail application. The court refused the plaintiff's bail application. The plaintiff subsequently stood trial on a charge of conspiracy to commit robbery and was acquitted.

[125] When all the evidence is considered, the procedures followed when the plaintiff was arrested and detained, subsequently stood trial and acquitted; there is no basis on which a reasonable inference can be drawn that the police never intended to bring the plaintiff to justice. The evidence indicates that Warrant Officer Wescott did nothing more than investigate the matter and handed the matter over to the prosecution and left it to the prosecution to take the matter forward.

[126] The current matter is distinguishable from the matter of Woji, Mahlangu, Tyokwana, and Ndlovu where the court held the Minister of police liable for further detention because of the culpable conduct of the police officers involved in those matters. The conduct of the police officers in those matters was appalling, police officers misled the court and/or the prosecutors and /or concealed certain facts from the court, in some of the matters the accused was assaulted or coerced or tortured by the police. In the current matter the evidence against the police officers is that they failed to read the plaintiff his rights, failed to bring him to court within 48 hours and further that they arrested the plaintiff on the word of a co-accused. There is no evidence on how the police conducted themselves post the plaintiff's arrest or evidence of any other culpable conduct on the part of the police post the plaintiff's arrest. It is therefore my view that the plaintiff failed to prove that the harm was not too remote from the unlawful conduct of the police. As a result, I find that the plaintiff failed to prove that the first defendant ought to be liable for his further detention.

#### **CLAIM FOR FURTHER DETENTION AGAINST THE SECOND DEFENDANT**

[127] The plaintiff's contention is that the prosecutors applied a lower threshold for enrolling the matter which is whether there is a prima facie case instead of a higher threshold of whether there were reasonable prospects of success. The argument is that the prosecutors manipulated procedure by relying on the 'unreliable and inadmissible' statement of Mr Kok.

[128] The plaintiff's further contention is that the prosecutors had no justification to seek postponement of the plaintiff's matter as the plaintiff's address was already known. Further that Mr Menu was supposed to have removed the flaws in the investigation of the matter before enrolling the matter, which he failed to do. However, the plaintiff did not place any evidence before the court to support his claim against the prosecutors. It is not sufficient to only allege and argue when one bears the onus. Consequently, the plaintiff's claim in this regard cannot succeed.

## **CONCLUSION**

[129] The plaintiff bears the burden of proof to establish through evidence all the requisite elements of a prima facie case in respect of each claim brought by him (except his claim for unlawful arrest and initial detention). Only once the burden is met, will the burden of proof shift to the defendant to prove any defense. This fact is acknowledged by the plaintiff. The plaintiff testified in detail about his arrest and detention, the conditions in prison and how his incarceration affected him, he however led no evidence regarding the prosecution of the criminal charges. In my view the plaintiff failed to discharge the burden of proof placed on him.

In the result I make the following order:

### **Claim A**

1. The plaintiff's claim is dismissed with costs.

### **Claim B**

2. The plaintiff's claim is dismissed with costs.

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the plaintiff

G E Kerr-Phillips  
Assisted by A Naidoo  
Instructed by Wits Law Clinic

For the defendant

NG Mhlanga  
Instructed by State Attorney -  
Johannesburg

DATE RESERVED: 10 MAY 2023

DATE DELIVERED: 29 JANUARY 2024