IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

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

Case No: A392/17

In the matter between:

THE MINISTER OF POLICE **FIRST APPELLANT**

THE NATIONAL DIRECTOR
FOR PUBLIC PROSECUTIONS **SECOND APPELLANT**

AND

INA HOOGENDOORN **RESPONDENT**

JUDGMENT

NQUMSE AJ (R G TOLMAY J et N V KHUMALO J concurring)

Introduction

[1] This is an appeal against the whole of the judgment and order (as per Van Niekerk AJ) delivered on 17 November 2016.

[2] The leave to appeal having been refused by the court a quo was granted by the Supreme Court of Appeal to the full bench of this court.

[3] At the heart of this appeal is the alleged wrongful arrest and detention, as well as the malicious prosecution of Mrs. Ina Hoogendoorn (plaintiff). For sake of convenience, I shall refer to the parties as they were cited in the court a quo. The plaintiff instituted a claim for damages against the first defendant arising out of wrongful arrest and detention and further claimed damages against the second defendant for malicious prosecution. Both claims were granted by the court a quo. Aggrieved thereby, the defendants launched this appeal.

[4] This matter brings into focus the long-standing and generally accepted relationship between the police (arresting officer) and the prosecutorial officers of the National Director of Public Prosecutions (prosecutors), with specific reference to the duties of the police to effect an arrest in accordance with the provisions of Section 40(1)(b) of the Criminal Procedures Act (the Act).[1]

1 Act 51 of 1977

[5] The issue before us is whether the court a quo was correct in its findings that the arrest and detention was unlawful, and whether the plaintiff had proved her claim for malicious prosecution. Put differently, the question is whether the arresting officer acted within the ambit of Section 40(1) (b) when he affected the warrantless arrest on the plaintiff.

Factual Matrix

[6] The material facts of this matter are largely common cause. Prior to the arrest of the plaintiff on 4 November 2010, a certain Mr. De Villiers (De Villiers) approached a senior prosecutor, Mr. Lamprecht (Lamprecht), at the Pretoria Magistrates Court in Soweto. The gist of his complaint related to a business venture in the oil industry, which he had with Mr. Hoogendoorn, the husband of the plaintiff (the husband). He alleged that the husband had defrauded him after he had made payment into a bank account, which turned out to be that of the plaintiff. The amounts that were deposited with the plaintiff's bank account, including amounts allegedly from other complainants, were estimated to be in the amount of R800 000 (eight hundred thousand rands).

[7] Whilst De Villiers was still in the office of Lamprecht, Lt Colonel Maleka (Maleka) who had fortuitously been around the court precinct for errands unrelated to this matter, was summoned to the office of Lamprecht wherein he was introduced to De Villiers and was given the information which De Villiers had handed over to Lamprecht, and was instructed to open a docket to investigate a charge of fraud against the husband. The information he had been given by Lamprecht contained four statements, one of them from De Villiers, all of which implicated the husband.

[8] The investigations following the information from De Villiers revealed that the husband instructed certain parties (with whom he conducted business) to deposit monies into the bank accounts belonging to the plaintiff and their son Du Plooy. Subsequently, Maleka returned to Lamprecht to report the outcome of his investigations. Mrs. Van Schalkwyk, (Van Schalkwyk) an experienced prosecutor became involved in the matter, and she gave an instruction which appears in the investigation diary as follows: "I've read all the relevant documents and I am of the opinion that Hoogendoorn and wife and stepson can be arrested for fraud. Please effect same." (sic)

[9] On the same date of 3 November 2010, when the instruction was made in the diary, Maleka responded in the same diary and wrote the following "your *instructions are noted and shall comply with"* (sic)

[10] It bears mentioning that Maleka in his testimony was initially reluctant to concede that the endorsement by the prosecutor amounted to an instruction, however, he later conceded that it was an instruction.

[11] The evidence of Maleka and Van Schalkwyk is very crucial in the arrest of the plaintiff. Whilst I do not intend to reproduce their entire evidence, I find it necessary to refer to their evidence in great detail to the extent it is relevant to this appeal. According to Maleka, after he had consulted with De Villiers, he attempted to get hold of the husband without success. This caused him to solicit the assistance of De Villiers in tracing him. De Villiers got hold of the husband and lured him to a garage in Florida under the guise of an appointment for a meeting between the two. Maleka, on the other hand arranged for three police members to

accompany him to the purported meeting. Upon their arrival at the garage, they found both De Villiers and the husband.

[12] He introduced himself to the plaintiff's husband and informed him that he was investigating a fraud case against him. At the same time, he asked if he knew Mrs. Hoogendoorn, in whose bank account the monies of De Villiers and other complainants were paid into. The husband informed him that the plaintiff was his wife and Du Plooy his son. He thereafter arrested the husband on a charge of fraud. He contends that the husband, without any difficulty, took him to his house where they found the plaintiff. Maleka further stated that he introduced himself to the plaintiff and informed her that he was investigating a case of fraud. He further showed her statements in which her bank account was listed as having received payments that were made by De Villiers. He asked the plaintiff whether she bears any knowledge of the money deposited into her bank account. The plaintiff refused to proffer any answers as a result of which he arrested her.

[13] From the plaintiff's house, they went to Du Plooy's residence where he was also arrested for the deposit of money into his bank account. When Maleka was asked under cross-examination as to why he had arrested both the plaintiff and Du Plooy, he stated that their arrest is due to the monies that were paid into their banking accounts, otherwise, he is aware that they had not committed any crime. He was further asked as to when did he form an opinion to arrest them. He said that the only opinion he had formed and the person on whom he was to effect an arrest is in respect of the husband and not the other two. His sole purpose for approaching the plaintiff and Du Plooy was to obtain information on their

knowledge about the money deposited into their bank accounts. However, he later changed under cross examination and said when he went to meet the husband at the garage in Florida, he had no intention to arrest him but to solicit information on whether he was aware of the transactions that were reflected in the bank statements. It was the failure of the husband to give an explanation that caused him to effect an arrest on him.

[14] Similarly, all he needed from the plaintiff and the son was for them to provide him with the information he sought and it was their failure to supply that information which led to their arrest. Following the arrest of the trio, he was contacted by their legal representative who indicated his desire to be present when he took down their warning statements.

[15] The following day he took down their statements in the presence of their legal representative. Even then, they maintained their stance not to furnish any information regarding the matter. On Wednesday 8 November 2010, during the following week, he took them to court for their first appearance.

[16] According to Maleka, the accused was asked by the magistrate if they have any knowledge about what had happened. Their legal representative informed the court that Du Plooy was prepared to pay back the R50 000 that he had received from the husband, and which was deposited into his bank account. As a result, thereof the magistrate allowed Du Plooy to pay back the money. It was paid back on the same day of their appearance and that resulted in the state withdrawing the charges against Du Plooy. However, the plaintiff was not so fortunate to be

released as Du Plooy but was only released on bail of R10 000, on 10 November 2010 following a formal bail application. On 19 November 2010, the charges against the plaintiff were withdrawn. Whilst her husband was convicted following a plea of guilty and was given a wholly suspended sentence.

[17] As alluded to above, Maleka was asked on numerous times during cross-examination and by the court for his reasons for arresting the plaintiff. From the record I have gleaned no less than three responses that he gave for his reasons for the arrest.

[18] For sake of completeness and due to the significance of the responses offered that were offered, I refer to the relevant part of the cross-examination and the questions put by the court to Maleka as it appears on page 285 of the record on pages 4-30 as follows:

> Mr. Venter: For what did you arrest Mrs. Hoogendoorn?
>
> Maleka: I arrested her because there was a deposit of an amount into her account and when I requested her to furnish me with an explanation as to does she have any knowledge to where does that comes from and then she indicated to me that he is not going to tell that (sic)
>
> Mr. Venter: So on what?
>
> Maleka: if she had indicated to me that she is aware about the money and the money comes from whomever, then I should not have arrested her.
>
> Mr. Venter: So on what charge did you arrest her?

Maleka: For fraud

[19] The court interjected in seeking more clarification and asked the following questions:

Court: *So you actually arrested her because she failed to give you information that you wanted. That was the catalyst of the arrest.*

Maleka: My , I arrested her because the alleged fraudulent deposit was done in her account.

Court: Does that, in your mind, constitute fraud on her side?

Maleka: Not from her side.

Court: Now the question that begs to be answered, why did you arrest her?

Maleka: The reason why I have arrested her, because I have come to a conclusion that maybe they are working together, with Mr. Hoogendoorn. For me, if an amount is deposited into my account, I will be aware or maybe if one day I am aware that an amount of R100 000(one hundred thousand rand) for example is deposited into my account I will have to ask and say where does this money come from.

Court: Colonel Maleka you just about two minutes said the mere fact that money is paid into her account does not constitute fraud.

Maleka: yes

Court: *Now then, I ask you again then, why did you arrest her?*

Maleka: *I said My Lord, that if the amount is paid into the somebody's account it is not fraud. But if that money was coming from, in the view of this, coming from an alleged fraudulent means, and it is paid into her account and that for me is if she have got a knowledge that this certain money was deposited into her account and it comes to my, it did come to my conclusion that it can happen, that maybe she knows that this money was deposited into her account, she knows where does the money comes from* (sic)

Court: *And Sir, because she did not tell you where, give you the information that you wanted; you arrested her because she did not give you the information you wanted?*

Maleka: *That is correct My Lord.*

Court: *So that is the reason you arrested her because she did not give you the information you wanted?*

Maleka: *That is correct my Lord.*

Court: *But in all the statements people who deposed, who deposed to the statements said Mr. Hoogendoorn committed fraud. Nobody said she committed fraud. There was no complaint against her.*

Maleka: *Yes.*

Court: *You say the fact that the money is paid into her account is not fraud by itself, and then I do not understand why you arrested her.*

Maleka: *My Lord, as I have indicated now that I based my reasons for arresting her is that I thought that she knew or was working with M*r. Hoogendoorn.

[20] The court further asked:

Court: *I understand your evidence to be, forget about Mr. Hoogendoorn senior, forget about him at the time when you arrested Mrs. Ina Hoogendoorn.*

Maleka: *Yes.*

Court: *You arrested her because the money that the complainant complained about was paid into an account, which is in her name.*

Maleka: *Yes.*

Court: *That is why you arrested her?*

Maleka: *Yes.*

Court: *And for no other reason?*

Maleka: *No other reason, yes.*

[21] When he was asked whether anyone from his investigations that commenced in August, until the arrest of the plaintiff, mention the plaintiff's name bar the bank statement that indicated her account details. He said there was no other person who mentioned the plaintiff.

[22] I have to mention that Maleka's testimony under cross-examination was characterized by several inconsistencies and contradictions. He flip-flopped in many of the responses he gave. By way of example, it was put to him that all the individuals testified that when he approached them, he told them that he was investigating a case of fraud, and thereafter arrested them, none of them said he first asked for an explanation or information before effecting the arrest. In his response, he said, "*yes I will take it that way My Lord*". His response is different and at variance with his earlier testimony that he never had the intention to arrest the trio when he went to each of them except to seek information. When directed to his statement in which there is no mention of him seeking information or explanation from the arrestees he conceded that it is not mentioned in his statement though it should have been mentioned as such.

[23] It is also worthy to note that Maleka confirmed that after he had acquired the bank statements he went back to the prosecutor to find out if there was a *prima facie case.* This was contradicted by the prosecutor, Van Schalkwyk, who said in her evidence when Maleka came to her, he had already formed in his mind the opinion that there was a *prima facie* case against the three suspects.

[24] In further cross-examination Maleka was at pains to concede the author of the investigation diary that says, "*I have read all the relevant documents and I am of the opinion that Hoogendoorn, the wife plus the stepson can be arrested for fraud"*. He even suggested that the inscription could have been made by one of his senior officials. However, in re-examination by his counsel, he conceded without any difficulty and confirmed that the entry was made by a prosecutor although he does not know who the prosecutor is. Whilst he conceded earlier to the court that the entry above amounts to an instruction. In re-examination, he said it does not amount to instruction but an opinion.

[25] Another illustration of the many contradictions that came out in Maleka's evidence is that on 8 November 2010 when he took the suspects to court, according to him, he took along the docket which he gave to the prosecutor. When he was asked in cross-examination what he had discussed with the prosecutor at that stage, he told the prosecutor the following "I *have come to submit a case of fraud in which there are three people who had been arrested, who had committed fraud"*.

[26] Maleka's submission to the prosecutor is wholly different from his version, that the deposit of money into the plaintiff's bank account does not amount to fraud. This is also not in sync with his response to the court's questioning in which he said that the only reason for which he arrested the plaintiff is for her failure to furnish the information he needed.

[27] In dealing with his 'decision' not to subpoena but to arrest the plaintiff, Maleka said even though the plaintiff did not pose a flight risk, and was aware of

her residential address, he had nothing to give her to ensure her appearance in court.

[28] Van Schalkwyk, a seasoned prosecutor of many years in the prosecution, dating back to 1991 albeit with intermittent breaks, and who was finally back into the fold of the National Prosecuting Authority in 2010 as a prosecutor in Protea in Soweto under the supervision of Lambrecht said she was placed in the section that handled complicated fraud matters together with a Mr. Fanie Van Vuuren.

[29] During September 2010, De Villiers approached their office to seek help to open a fraud case since he could not be assisted by the police at Florida. She went through the documents that were in the possession of De Villiers and discovered dealings between De Villiers and Hoogendoorn, which were in the petroleum industry. Thereafter she sought advice from Lamprecht who also went through the documents and was satisfied that there was a prima facie case of fraud. Lamprecht referred the docket to Maleka who was steeped in organized crime to register it and to further investigate the case.

[30] Subsequently, she gave Maleka instructions that were indicated in the investigating diary section of the docket to obtain bank statements of the accounts into which the monies were deposited. After Maleka had gathered the information which was ostensibly from banks in terms of section 205 of the Criminal Procedure Act he brought back the docket to her. According to Van Schalkwyk, Maleka was already of the opinion that the docket was ready. I find it necessary to refer to her evidence in which she stated, “Ek *dink dit was die 3de November, het hy na my toe*

gekom, met die dossier. Waar hy vir my te kenne gegee het hy het na my kantoor toe gekom. My kollega was ook daar, 'n Mnr Van Vuuren, Fourie. Hy het vir ons die dossier gebring, na ons kantore toe en vir my gese dat hy is van opinie dat die dossier is gereed vir ter rolle plasing. Hy wou by my 'n opinie he of, as ek deur die docket, deur die dossier gaan, of ek van opinie is dat die saak gereed is, vir verhoor, waarop ek dit deur gegaan het. Ek het dit nog met my kollega, Mnr Van Vuuren, ook bespreek. Ons het dit deur gegaan. Ek het die besluit gemaak. Ek het die opinie vir hom gegee date is van oordeel dat die saak kan ter rolle geplaas word"[2]

[31] Later in her evidence, Van Schalkwyk stated most importantly as follows:

> "*Kolonel Maleka was by my kantoor, op daardie einste datum, 3 November 2010. Hy is van oordeel dat die saak ter rolle geplaas kan word. Da hy 'n arres kan uitvoer. Hy wou net by my 'n opinie weet, is ek tevrede, en wat is my opinie? Is daar nog iets uitstaande, voordat hy hierdie arres uitvoer, of nie? Ek het vir hom gese, Nee. Ek het geen problem gehad, op daardie stadium, met die inhoud van die dossier, dat hierdie dossier verhoor gereed is nie. Wat ek ook net hier wil verduidelik is, die Staat was van plan om die beskuldigdes aan te kla van bedrog en ook diefstal, as 'n Skedule 5 misdryf"*[3]

[32] The statement of Van Schalkwyk above must be read in the context of what Maleka said, that when he went to the prosecutor it was to obtain her opinion and for guidance. He further said when he met with the plaintiff and Du Plooy, even the husband for that matter, he was still in need of information. Even after he had

2 Transcribed record: page 352, line 20[caseline 4-696-697]
3 Transcribed record: Page 356 line 10(caselines 4-701)

arrested the husband he had not yet formed an opinion to arrest the plaintiff and Du Plooy.

[33] A simple understanding of Maleka's evidence is that it is patently clear that he had not concluded his investigations until he was in possession of the information he sought from the suspects. More particularly, the plaintiff, and Du Plooy. With that being the case, I find it difficult to understand the evidence of Van Schalkwyk that Maleka had informed her that the investigation was complete and was ready to effect the arrests. Similarly, how does one who claims that the investigations are complete and that the matter has to be enrolled, but on the other hand seek guidance on how he should proceed with the matter. Van Schalkwyk further testified as follows. "Toe die dossier vir my voorgele is, het hy gevra wat is my opinie? Is dit reg? Ek het gese ja, dit is reg. ek is van oordeel dat vervolging kan ingestel word. Die dossier was vir my gereed vir hof. In die sin dat op daardie stadium het ek al die volledige inligting gehad, op die dossier, wat my oortuig het, hier is 'n *prima facie* saak uitgemaak op die, vir die Staat. Met die document wat voor my was, op daardie stadium, met die eerste oog, opslag, was ek van oordeel, daar is 'n *prima facie* saak". When Van Schalkwyk was asked by the court as to what was connecting the plaintiff as well as Du Plooy to the case, she said they were connected only through their bank statements which showed the monies paid into their bank accounts.

[34] According to Van Schalkwyk's overall testimony, at no stage did Maleka inform her that he was ready to arrest the suspects for fraud, nor theft. Instead, it was Van Schalkwyk who had formed an opinion that fraud or theft had been

committed or that there was a *prima facie* case where either of the crimes had been committed. The ambivalence and uncertainty of Maleka are demonstrated in approaching Van Schalkwyk for her opinion and for guidance as to what to do. I therefore have difficulty in accepting the version of Van Schalkwyk to the effect that Maleka had already formed an opinion when he approached her for an opinion. Neither do I find it in her version that Maleka told her that the investigation was complete and the matter was ready to be enrolled. My view is fortified by Maleka's testimony that he had not yet formed an opinion and a suspicion when he approached the suspects, but only when they failed to furnish him with information.

[35] What I also find curious in the interaction between Maleka and Van Schalkwyk is that nowhere in their discussions did it surface that Maleka had to obtain further information from the suspects. If Maleka was confident that the investigation was complete and ready to affect an arrest and to have the matter enrolled as alleged by Van Schalkwyk, why was it necessary for him to obtain further information from the suspects. This is most surprising if regard is had to Van Schalkwyk's plan to charge them with fraud and theft, something which it is expected she would have discussed with Maleka.

[36] Similarly, it would have been expected that Maleka would have informed or brought to the attention of Van Schalkwyk that he is yet to obtain the information that he needs from the suspects. The difficulty in understanding the evidence of Maleka and Van Schalkwyk is further complicated by Maleka's opinion that the plaintiff and Du Plooy had committed an offence whilst at the same time

conceding that the mere deposit of money into their bank accounts did not constitute fraud.

[37] As alluded above, Van Schalkwyk conceded that her endorsement in the investigation diary to effect the arrest of the three suspects, is an instruction and she did nothing wrong therein. She, however, maintained that Maleka could have, in conjunction with his commander, exercised his discretion not to arrest. It is worth noting that Van Schalkwyk admitted that there are no meaningful investigations that were carried out by Maleka since September to November when the plaintiff was arrested together with her family. The only information they relied on to effect the arrest was the information supplied by De Villiers and the bank statement obtained through a section 205 subpoena.

[38] She also conceded that they never considered other available measures to bring the plaintiff to court except for the drastic measure of effecting an arrest.

[39] I now turn to deal with the question of whether Maleka acted in accordance with Section 40(1)(b) of the Act when arresting the plaintiff.

[40] According to the first defendant's plea, it is admitted that the plaintiff was arrested by a member of the South African Police Service, namely, Maleka without a warrant. In justifying the arrest, it relies on S40(1)(b) and further alleges that the arresting officer formed a reasonable suspicion that the plaintiff committed or attempted to commit an offence listed in schedule 1 of the Criminal Procedure Act.

In amplification of its justification the defendant alleges that the fruits of a fraudulent transaction(s) within which Mr. Hoogendoorn was involved were deposited into the bank account of the plaintiff.

[41] In *Minister of Law and Order v Hurley*[4], Rabie CJ explained that 'the person who arrested or caused the arrest of another should bear the onus of proving that his actions were justified in law'. In order to justify an arrest, the jurisdictional facts, as stated in *Duncan v Minister of Law and Order*[5] are the following:

i) the arrester is a peace officer;

ii) who entertained a suspicion that the plaintiff committed a schedule 1 offence;

iii) the arrester (peace officer) had reasonable grounds that justify the suspicion

(See also *Minister of Safety and Security v Sekhoto*[6] at para 6).

It is only after the jurisdictional facts are present that a decision arises to arrest or not. In Duncan supra, the correct legal approach when dealing with the discretion to arrest pursuant to the establishment of the jurisdictional facts was stated as follows:

> "If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect. In other words, he then has a

4 *Minister of Law and Order v Harley and Another* 1986 3 SA 568 (A) at 589 E-F

5 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-K

6 *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367

discretion as to whether or not to exercise that power… No doubt the discretion must be properly exercised"[7]

[42] Bosielo AJ (as he then was) reaffirming the legal position as enunciated in *Duncan*, he, in *MR v Minister of Safety and Security* [8]commented thus:

"This salutary approach was confirmed in *Sekhoto* as follows:

"Once the jurisdictional facts for an arrest . . . in terms of any paragraph of section 40(1) . . . are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether to arrest or not arises. The officer, it should be emphasised, is not obliged to effect an arrest." [9]

[43] At this stage, I find it apposite to mention that the court a quo made adverse credibility findings against both Maleka and Van Schalkwyk, whilst on the other hand was satisfied with the evidence of the plaintiff and her credibility as a witness. The learned judge's remarks on the plaintiff as reflected in the judgment are that the plaintiff was an impressive witness who was unassuming, non-confrontational, withdrawn and did not contradict herself. The learned Judge concluded by saying, he had made similar observations of the other witnesses of the plaintiff and had no reason to reject any of their evidence. On the other hand, he criticized the defendant's witnesses characterising the evidence of Maleka as being fraught with inconsistencies and was tailored as the trial continued. Most unfortunately, he found Maleka's evidence with numerous factual fabrications. Significantly, he was scathing on the credibility of Van Schalkwyk, in relation to

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7 Duncan (at 818H-J)

8 2016 (2) SACR 540 (CC) at 554 para d-f

9 MR *v Minister of Safety and Security and Another* 2016 (2)SACR 540 (CC) at para 46

the second claim for malicious prosecution. I am unable to falter the findings of the learned judge having had regard to the evidence of the witnesses of the defendants . It is also trite that the trial court's findings of fact and credibility are presumed to be correct unless they are vitiated by an irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong (See *R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705). See also Makata v Vodacom [2016] ZACC 12 at 37-41*. I, therefore, have no reason to differ with the findings of the learned judge in this regard.

[44] The point of departure in this matter is whether the defendant has discharged the onus under s 40(1)(b) and has met the jurisdictional requirements therein. It is common cause that Maleka is a police officer. The question is whether he entertained a suspicion. If so, was it a suspicion that the plaintiff had committed an offence or attempted to commit an offence referred to in Schedule 1 of the Act, and whether his suspicion rested on reasonable grounds.

[45] What is borne out in the objective facts of this matter is that at the time Maleka went back to the prosecutor for guidance and for an opinion he had not yet formed a suspicion. One possibility for his difficulty in forming a suspicion or an opinion is the insufficiency of the evidence that was in his possession. He was only armed with four statements from De Villiers which do not implicate the plaintiff except to implicate her bank account details coupled with the bank statements in which it is confirmed that a deposit was made into her bank account. Maleka could not at the time have formed a suspicion that rests on reasonable grounds. It appears that the person who entertained the suspicion notwithstanding the insufficiency of

the evidence is the prosecutor. This is borne out in the instruction that she penned down in the investigation diary that she is satisfied that an arrest can be effected on the plaintiff and the other suspects.

[46] The prosecutor's instruction propelled Maleka to find the husband, surprisingly only a day after such an instruction whereas he could not make contact with any of the suspects for almost three months since the complaint. His failure to collect any other evidence for the said period bar the documents handed over can be seen as lackluster in pursuing the matter by Maleka. This can be a further confirmation that his inability to form an opinion or suspicion until 3 November 2010 was purely due to a lack of other evidence upon which he could have based such suspicion.

[47] Section 40(1)(b) is very clear that the suspicion has to be entertained by a peace officer. A peace officer in the context of s 40 and as defined in the Criminal Procedure Act, includes any magistrate, justice, police official, correctional official as defined in Section 1 of the Correctional Services Act, 1959 (Act 8 of 1959) or persons that the Minister may by notice in the Gazette declare to be a peace officer for the purpose of exercising, with reference to any provision of the Act or any offence or any class of offences likewise specified the powers defined in the notice.

[48] In all the legal instruments I have consulted, inter alia, the National Prosecuting Authority Act (Act 32 of 1998) and the Prosecution Policy, none of them qualifies a prosecutor as a peace officer. I have no doubt in my mind that a

prosecutor is not a peace officer and her/his opinion or suspicion does not play a role in s 40 of the Act. Consequently, a police officer who purports to act under s 40 cannot rely on a suspicion of a prosecutor as justifying an arrest without a warrant. Maleka contends that he formed a suspicion at the point of arrest at the plaintiff's residence when he did not get the information he wanted from the suspects. As already alluded, I have serious difficulty in accepting that version if regard is had to his evidence that his sole purpose was to obtain information. Even if the view I hold is incorrect, the next hurdle for Maleka is the offence that was committed by the plaintiff for which he had a suspicion.

[49] Maleka in evidence explained that the reason for the arrest was not on the grounds of a commission of an offence referred to in Schedule 1, but for failure by the plaintiff to provide information. Undoubtedly, his reason for the arrest falls short of the requirement that the suspicion must be that the suspect has committed an offence referred to in Schedule 1 of the Act. Put differently, suspicion cannot survive if the conduct of the suspect does not amount to a crime mentioned in schedule 1 of the Act.

[50] In *Ramphal v Minister of Safety and Security* [10], Plasket J(as he then was) vexed with a similar situation as in this matter where Ramphal was a suspect in a case of crimen injuria and was arrested by the investigating officer after he had sought an advice from his superiors on what to do and who in turn referred him to the district prosecutor. The prosecutor in turn issued an instruction for the arrest of the suspect. Two days later the investigating officer went to Ramphal's shop and arrested him. During the arrest, he told him that he was being arrested so that he

10 2009 (1) SACR 211 E

could come and give his explanation by himself. On the understanding by the investigating officer that the prosecutor was giving him instructions, he reported to his superiors that he had been instructed to effect an arrest. Pursuant that arrest Ramphal instituted a damages claim which was dismissed by the magistrate, who had found that although the arrest was not authorised by any statutory provision it was not unreasonable.

[51] Plasket J disagreed with the finding of the magistrate and held as follows, "The magistrate erred in so doing. As I stated at the outset of this judgment our constitutional order is based on the rule of law. That means, at least, that every exercise of public power must, in order to be valid, be authorised by law. No provision of s 40 (1) of the Criminal Procedure Act, 51 of 1977, or any other statute, authorises the arrest of a person on the instruction of a public prosecutor. The arrest of Ramphal was invalid, and hence unlawful, on this account and whether Ndaleni acted reasonably in the circumstances is entirely irrelevant [11].

[52] The matter of Ramphal is on all fours similar to the matter before us. It is clear from the objective facts of this matter that Maleka understood Van Schalkwyk's opinion to be an instruction to arrest the suspects. Hence, the following day he effected the arrests as per that instruction. I tend to agree with respect with Plasket J, that whether it can be said Maleka acted reasonably under the circumstances, that is entirely irrelevant since there is no law, neither is it sanctioned by s 40 of the Criminal Procedure Act for an arrest of an individual to be effected on the instructions of a public prosecutor. I ineluctably find that the arrest was unlawful and invalid.

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11 ibid at para 9

[53] Furthermore, as was the case in Ramphal, the arrest of the plaintiff by Maleka was not for purposes of bringing her to court but was actuated by her failure or refusal to give him the information he sought. As was found by Plasket J in Ramphal, that the purpose for Ramphal's arrest was to force him to abandon his right to silence, a fundamental right enshrined in section 35 of the Constitution. Similarly, in this case, Maleka's arrest of the plaintiff on account that she refused to proffer an answer about the money in her account, is in effect a violation of the plaintiff's constitutional right to silence. Therefore, the arrest has to be unlawful on this ground too.

[54] In light of the facts above, I am of the view that the first defendant has failed to establish the presence of the four jurisdictional facts as required by s40 (1)(b) in order to justify the arrest. It is further my view that the lack of jurisdictional facts obviates the need to deal in great detail with the question of whether Maleka exercised his discretion properly to arrest, save to state the well established principle that an arrest is a drastic interference with an individual's rights to freedom of movement and dignity. An arrest therefore must be justified in terms of the Bill of Rights [12].

[55] In *MR v Minister of Safety and Security* above, Bosielo JA stated the point thus: "In other words, the court should enquire whether, in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in Duncan or as Sekhoto where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's dignity in our constitutional democracy, held that the discretion conferred in s 40(1) must be exercised' in light of the Bill of Rights"[13]. In

12 Sekhoto above fn 9 para [40]
13 Ibid fn 39 para [44]

this matter, the evidence which has been established and confirmed by Maleka is that he did not consider any other means to bring the plaintiff to court save an arrest. Evidently, he did not exercise any discretion before effecting the arrest, which clearly demonstrates his lack of appreciation that he has a discretion to be exercised in a proper manner other than the arrest. It, therefore, follows that his failure to exercise the discretion conferred on him by law, the detention which is the consequence of that arrest is equally unlawful.

[56] This brings me to the cause of action of malicious prosecution based on *actio iniuriarum.* In order to succeed in a claim of malicious prosecution a plaintiff must establish that the defendant-

(a) set the law in motion (instituted or instigated the proceedings)

(b) acted without reasonable and probable cause; and

(c) acted with malice (or animo injuriandi); and

(d) that the prosecution failed [14] .

[57] It is so that in this matter the prosecution failed. After nine days of the release of the plaintiff on bail, the charges against her were withdrawn. The learned judge in the court aquo found that in the absence of any evidence which could not even remotely support the charge against the plaintiff, the conduct of the prosecution, more particularly of Van Schalkwyk was malicious. In further support of his findings, he relied on *S v Lubhaxa*[15] where it was held: "Clearly a person ought not to

14 Minister for Justice and Constitutional Development and Others v Moleko[2008] ZASCA 43 ; 2009 (2) SACR 585 (SCA) and Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) para 33.
15 2001(2) SACR 703 (SCA) at para 19

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—and the constitutional protection afforded to dignity and personal freedom (section 10 and section 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''.

[58] The defendants admitted in their pleadings that the first defendant set the law in motion. Whilst the plaintiff has not been acquitted on the charges they accept that the prosecution was discontinued consequent to the withdrawal of the charges. They further submitted that the first and fourth requirements were established by the plaintiff but dispute that the second and third requirements were established. Mr. de Jager for the appellants, relying on *Prinsloo and Another v Newman* [16] argued that the plaintiff ought to have established the absence of reasonable and probable cause which both involve the subjective and objective elements. This the plaintiff failed to do. He further submitted that the plaintiff has failed to establish *animo iniuriandi*, and to show that the prosecutor acted with malice.

[59] On the other hand, Mr. Mulligan for the respondent, submitted at length the role played by the prosecutor in deciding whether or not to charge a suspect. This the prosecutor does by way of assessing whether there is sufficient evidence to provide a reasonable prospect of a successful prosecution. He further referred to the Prosecution Policy which requires a prosecutor to take care whether to

16 1975 (1) SA 481 (A)

prosecute or not given the profound consequences the decision has for victims, witnesses, accused persons and their families.

[60] Mr. Mulligan further submitted that the prosecutor admitted that she did not have a genuine belief founded on reasonable grounds in the plaintiff's guilt. She should have foreseen, so the argument went, the possibility that she was acting wrongfully, but nevertheless continued to act, which was reckless as to the consequences of her conduct. It was further argued by Mr. Mulligan that the prosecutor failed to pay the necessary attention to the information contained in the docket and should therefore have foreseen that she was acting wrongfully in the absence of sufficient evidence to warrant the prosecution of the plaintiff. It was further argued that if the matter is approached based on malicious prosecution alternatively based on the negligent breach of a duty of care owed by the prosecutor to the plaintiff the court *a quo* was correct in its finding in favour of the plaintiff.

[61] In light of the concession on the two requirements namely, the second defendant set the law in motion and the requirement that the prosecution failed, I shall therefore confine myself only to the remaining requirements, that is, a reasonable and probable cause and that the second defendant was actuated by an improper motive (malice). The test for reasonable and probable cause was set out in *Beckenstrater v Rottcher and Theunissen* [17] " When it is alleged that a defendant had no reasonable cause for prosecuting, I understand it 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 having such information, the defendant is shown not to

17 1955 (1) SA 129 (A) at 136 A-B [also reported at [1955] ALL SA 1467(a-Ed]

have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence for the defendant, or reasonable and probably cause. In Moleko the Supreme Court of Appeal (SCA) explained the requirement as follows "Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element, not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence".

[62] In this matter, the evidence that was at the disposal of the prosecutor are the bank statements of the plaintiff in which it is confirmed that an amount of money was deposited into her bank account. Whilst the plaintiff may not have established or proved that the defendant did not subjectively believe in the guilt of the plaintiff, it has succeeded to show that objectively, based on the evidence that was in the possession of the prosecutor the institution of criminal proceedings against the plaintiff could not have been justified by any imagination. All that was at the disposal of Van Schalkwyk are bank statements and nothing more.

[63] With regard to the requirement that the defendant acted with malice in Moleko, the court found that *animus injuriandi* entails in an action for malicious prosecution that the plaintiff must allege and prove that the defendant acted in awareness that reasonable grounds for prosecution were absent. The net effect of the statement by the court is that the defendant must act absent the good faith required by the National Prosecuting Act which provides in Section 42 as follows: "No person shall be liable in respect of anything done in good faith".

[64] Commenting on this aspect in *Kruger v National Director of Public Prosecutions*[18], Zondo DCJ (as he then was) said the following: "Although the Supreme Court of Appeal did not in Moleko refer to section 42 of the National Prosecuting Authority Act when it held that the plaintiff must allege and prove that the defendant did not honestly believe that the accused or plaintiff was guilty, it in effect held what section 42 of the Act lays down".

[65] Regard being had to the totality of the evidence, and the authorities referred to above I am not convinced that the plaintiff has succeeded to establish that the defendant (second appellant) acted in bad faith and thereby acted in malice when it instituted prosecution against her. I, therefore, come to the conclusion that in the absence of the element of malice it follows that not all the requirements for malicious prosecution have been proved by the plaintiff.

Conclusion

[66] Consequently, the finding of the court *a quo* on this aspect cannot be sustained and therefore the appeal on this claim has to succeed. In view of my conclusions in respect of both claims, that is, for unlawful arrest and detention and the claim for malicious prosecution, the appeal in respect of unlawful arrest and detention ought to be dismissed and the appeal on malicious prosecution ought to succeed.

[67] On the issue of costs, I shall first deal with the costs occasioned by the postponement of the matter on 24 November 2017. At first, parties were in disagreement as to who is to blame for the postponement and who should bear the costs thereof. Mr. Mulligan submitted that it was at the instance of the record that was not in order and the non-availability of the hard copies as well as the failure by

18 2019 (6) bclr 703 (CC) at para [58]

the attorneys of the defendant to upload the records successfully onto caselines. On the other hand, Mr de Jager submitted that costs should be costs in the cause, alternatively, neither party should bear the costs due to the fault of the registrar of this court. He further undertook to provide us with the relevant information that may assist us in understanding the problem that had arisen on the said date.

[68] Following the conclusion of the hearing of the appeal, we were favored with correspondence from the Office of the State Attorney in Pretoria under ref. 10211/2012/Z5, the contents of which are that the parties have agreed that no one is to be blamed for the mishap that led to the unfortunate postponement of the matter. The parties further agreed that subject to the court's decision, no order as to costs be made and that the agreement be made an order of Court. In light of the agreement, the court is of the view that a proper order should be that of no order as to costs.

[69] Finally, regarding the costs of this appeal it is my view that since the costs are interwoven notwithstanding the success of the claim for malicious prosecution the appellant are ordered to pay the costs of the appeal.

Order

The following order will issue:

1. The appeal in respect of unlawful arrest and detention is dismissed;
2. The appeal in respect of malicious prosecution is upheld and the order of the court a quo is set aside to this extent and

3. The appellant are ordered to pay the cost of the appeal jointly and severally, the one paying the other to be absolved.

4. No order as to costs occasioned by the postponement on 24 November 2017

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V M Nqumse

Acting Judge of the High Court

DATE OF HEARING OF THE APPEAL:	26 JANUARY 2022
DATE OF JUDGMENT:	16 May 2022
ATTORNEY FOR APPELLANT:	THE STATE ATTORNEY PRETORIA
ADVOCATE FOR APPELLANT:	Adv P de JAGER SC Adv M BOTMA
ATTORNEY FOR RESPONDENT:	LOUBSER VAN DER WALT INC.
ADVACATE FOR RESPONDENT:	Adv S MULLIGAN SC

Adv P VENTER