IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE SIGNATURE

CASE NO: 33154/21

In the matter between:-

NGAPANE MOSES MPHAHLELE	Plaintiff

VS

MINISTER OF POLICE	First Defendant
DIRECTOR OF NATIONAL PUBLIC PROSECUTION	Second Defendant
SERGEANT TSHIKE CONSTANCE MPHAHLELE	Third Defendant
CONSTABLE KUBJANA	Fourth Defendant
CONSTABLE MALATJI	Fifth Defendant
MR NAIDOO	Sixth Defendant

Coram: Kooverjie J

Heard on: 4-5 September 2023

Delivered: 11 October 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 11 October 2023.

SUMMARY: The jurisdictional requirements in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 have been met. The requirements for malicious prosecution have not been met. Consequently the plaintiff's claims are dismissed with costs.

ORDER

It is ordered:-

1. The plaintiff's claims are dismissed with costs.

JUDGMENT

KOOVERJIE J

[1] In this action proceedings, the plaintiff claims damages against the defendants, which comprises of the six claims as set out in the particulars of claim, namely:

Claim 1 – assault, failure to investigate and gross negligence;

Claim 2 – wrongful, unlawful arrest, detention and further detention;

Claim 3 – wrongful, unlawful arrest, detention and further detention;

Claim 4 – malicious prosecution;

Claim 5 – loss of income and future loss of income; and

Claim 6 – legal costs.

[2] I am however only seized with a determination on the merits. The parties have agreed to separate the issue of quantum.

ISSUES FOR DETERMINATION

[3] The issues for determination are the following:

3.1 Whether the respective arrests and detentions were unlawful and wrongful;

3.2 whether the police officials were negligent in their investigation relating to the charge laid by the plaintiff against his stepson;

3.3 whether the plaintiff was maliciously prosecuted.

[4] In this matter, I have been referred to three police dockets, namely:

4.1 the first docket related to criminal charges of assault laid against the plaintiff under docket number 193/06/2020;

4.2 the second docket related to the assault charges instituted by the plaintiff against his stepson, Ivern, under docket number 530/06/2020;

4.3 the third docket related to the criminal charges laid against the plaintiff for malicious damage to property under docket number 536/06/2020.

BACKGROUND

[5] The events that transpired in this matter emanated from a domestic dispute between the plaintiff and the third defendant. The defendant, married to the plaintiff, is also a police officer with her official title: Sergeant Tsike Constance Mphahlele. For the purposes of this judgment the third defendant will be referred to as the “defendant”. The first defendant will be referred to as “the SAPS”[1].

[6] The plain facts are as follows:

6.1 on 7 June 2020 the plaintiff and the defendant were embroiled in a heated argument in their bedroom which resulted in a physical altercation between them. Both parties sustained injuries. The defendant particularly sustained an injury on her right cheek. In this time, the defendant’s son, Ivern[2], walked into the bedroom. According to the defendant, Ivern tried to stop the plaintiff from assaulting the defendant. According to the plaintiff, Ivern assaulted him. The plaintiff contacted the Mamelodi-East Police Station (“police station”) and shortly thereafter officials arrived at the couple’s home. The plaintiff was requested by the police officials to leave the couple’s home;

6.2 on 8 June 2020 the defendant laid criminal charges against the plaintiff under case number 193/06/2020 for domestic violence (assault) and further obtained an interim protection order from the magistrate’s court;

[1] South African Police Service
[2] Ivern as spelt in the docket and statements

6.3 on 10 June 2020 the plaintiff was served with the protection order at the couple's home. He was thereafter detained and arrested;

6.4 on 11 June 2020 the defendant withdrew the charges and the plaintiff was released from the police station;

6.5 on 26 June 2020 the plaintiff laid assault charges against his stepson, Ivern, under case number 530/06/2020. The plaintiff's version was that Ivern, his stepson, assaulted him on 10 June 2020;

6.6 on 26 June 2020 the defendant laid criminal charges for malicious damage to property against the plaintiff under case number 536/06/2020 on the basis that the plaintiff had burnt Ivern's clothes;

6.7 on 28 June 2020 the plaintiff was arrested again. It was alleged that he was arrested in respect of the said malicious damage to property charge. The plaintiff's version is different;

6.8 on 1 July 2020 the plaintiff was released;

6.9 the charge relating to malicious damage to property was referred to mediation between the parties and was subsequently settled.

ANALYSIS

[7] On the evidence before me it is evident that the versions of the plaintiff and defendants are conflicting. It is settled law that a court is required to make findings on the credibility, the reliability of the witnesses and the probability of their versions.[3]

3 The Supreme Court of Appeal in the seminal judgment in **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others** 2003 (1) SA 11 (SCA) at 14J - 15E, set out on how to

[8] Particularly, on the aspect of conflicting versions, the court in **National Employers General Insurance Co Ltd v Jagers** 1984 (4) SA 437 (E) at 440E - 441A said:

"*… where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the*

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approach such a situation. It was stated:

"*To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it… But when all factors are equipoised probabilities prevail*". (My emphasis)

probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if <u>the Court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false</u>." (My emphasis)

[9] In this judgment, I deem it appropriate to deal with each of the claims separately.

A <u>CLAIM 1 – ASSAULT, FAILURE TO INVESTIGATE AND GROSS NEGLIGENCE</u>

(i) <u>Pleadings</u>

[10] At paragraph 4 of the particulars of claim, the plaintiff pleaded that the SAPS officials failed to obtain and submit the relevant J88 (medical records) as well as the statements from Ivern (his stepson).

[11] In particular it was pleaded at paragraph [4.5] that members of SAPS were grossly negligent in the execution of their investigation duties in one or more of the following respects:

"4.5.1 they failed to obtain necessary medical records from a district and/or any medical practitioner that the third defendant was referred to for medical assessment;

4.5.2 failed to refer the third defendant to a district surgeon for medical assessment, more particularly, where a charge of assault GBH has been laid;

4.5.3 failed to provide the third defendant and/or her son with J88 for medical assessment; and

4.5.4 failed to obtain necessary statements from the third defendant and her son in relation to the assault."

(ii) <u>The plaintiff's testimony</u>

[12] I have noted that the plaintiff's testimony focused largely on the conduct of the SAPS officials in respect of the assault charge laid against Ivern (docket 530/06/2020). The plaintiff testified that the case against his stepson, Ivern, who was charged for assault, had not been properly and conclusively investigated by the SAPS. He testified that no proper investigation was conducted and that the police officers dealing with his complaint were biased against him. He holds the view that the defendant was influential in deflecting the police officials from carrying out their duties. He is of the view that his son's case had to be investigated and the necessary steps should have been taken.

(iii) <u>Testimony of Colonel Pillay</u>

[13] On this aspect, Colonel Pillay was called by the plaintiff as a witness. He testified that in July 2020 a complaint was received from the plaintiff wherein he expressed

that he was not happy with the manner in which the case against his son was dealt with. The complaint was indeed registered and it was referred to the Mamelodi-East Police Station for investigation. The plaintiff however laid a further complaint as that he was not satisfied with the conduct of the police officer seized with his complaint at the Mamelodi-East Police Station. The matter was then referred to Brigadier Pieterse, stationed at the Soshanguve Police Station. Colonel Pillay testified that Brigadier Pieterse had issued a recommendation that the police official dealing with the plaintiff's complaint be investigated.

[14] Under cross-examination Colonel Pillay further testified that Brigadier Pieterse recommended that disciplinary investigations should be conducted against the said police officials.

[15] This was the essence of Colonel Pillay's testimony. I, however, need to emphasize that the contents of Brigadiers recommendation and findings were not availed to this court, neither was Brigadier Pieterse called to corroborate Colonel Pillay's testimony. In my view, this evidence was crucial in determining whether there was gross negligence on the part of the police officials. I have also not been advised of the disciplinary outcome, if any.

[16] I have noted further that on 9 November 2020 a recordal in the investigation diary was indeed made, indicating that a complaint against SAPS was instituted for "poor investigation". It was further recorded that Colonel Tshebe is to *"reopen CAS 530/6/2020 and take CAS 193, 536/6/2020 to SAP Colonel Tshebe is to*

interview the complainant because he has more information and documents to proof his case".

[17] No evidence was led to whether the aforesaid was done. The evidence that I have been furnished with reflected that in respect of case 193/06/2020, the charges were withdrawn by the defendant a day after the arrest. In respect of case 530/6/2020 the parties had settled the matter through mediation, hence the case was withdrawn.

[18] Further the evidence pertaining to the assault charge against Ivern, as recorded in the investigation diary, was: on 27 June 2023 that matter is referred for further investigation and witness statement had to be obtained. On 7 July, the receipt of the J88 was noted and that a required decision is to be made. On 15 July 2020, the Investigating officer noted that the accused was defending his mother, even on an accused's version. The matter was considered *nolle prosequi*. Such was the evidence presented in court.

[19] Regarding the assault charge laid by the defendant against the plaintiff, I have noted that the J88 was completed on 8 June 2020, a day after the assault. In this regard, on a balance of probabilities, I find the version of the defendants more probable. Hence the plaintiff failed to prove gross negligence on the part of the SAPS.

B CLAIM 2 – WRONGFUL, UNLAWFUL ARREST, DETENTION AND FURTHER DETENTION

(i) Effecting an arrest without a warrant

[20] Our courts have over time enunciated the test in circumstances when arrests are effected without a warrant. Section 39 of the Criminal Procedure Act[4] makes provision for a police officer to arrest a person without a warrant. In such circumstances the police officer effecting the arrest is required to inform the arrested person of the cause of the arrest. The effect of such arrest is to ensure that the person arrested remain in lawful custody until he is lawfully discharged or released from custody. The onus therefore rests on the defendant to justify the arrest.[5]

[21] 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. When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own facts.

[22] It was submitted that Schedule 1 includes malicious injury to property. Furthermore Section 40(1)(q) makes provision for a peace officer to arrest without a warrant in the case of domestic violence:

[4] Act 51 of 1977

[5] In ***Minister of Law and Order v Hurley 1986 (3) 568 A at 589 E-F*** the court stated:
"An arrest constitutes an interference with the liberty of the individual concerned and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

"Any person who is reasonably suspected of having committed an act of domestic violence, as contemplated in Section 1 of the Domestic Violence Act, 1998, which constitutes an offence in terms of the law."

[23] Once the statutory justification for the arrest exists, in other words, the jurisdictional grounds have been established, then the party who alleges unlawful arrest, is required to prove the absence of reasonable grounds for the relevant suspicion. The jurisdictional grounds are those set out in Section 40(1)(b) of the Criminal Procedure Act.

[24] The enquiry would be:

24.1 did the arresting officer suspect that the person arrested was guilty of the offence;

24.2 were there reasonable grounds for such suspicion;

24.3 did the officer exercise his discretion to make the arrest?

[25] In ***Duncan***[6] ***at 818 H-J*** the court said:

"If the jurisdictional requirements are satisfied, the peace officer may invoke the power confirmed by the subsection i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power. No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed."

[6] *Duncan v Minister of Law and Order* **1986 (2) SA 805** (A)
See also Minister of Safety and Security v Sekhoto and Another 2011(1) SACR 315 (SCA)

[26] ***Duncan*** is further authority for the proposition that the exercise of the discretion will be unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature. The purpose should be to bring the arrested person to justice.

[27] In ***Shidiack***[7] the court held:

"There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

[28] Thus if an arrest as envisaged in Section 40(1)(b) is lawful, it would not impede on the plaintiff's constitutional right of freedom. As Harms J set out in ***Sekhoto***[8] that:

"It remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily."

He goes on to state at paragraph [39] and [40]:

"[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a

[7] *Shidiack v Union Government (Minister of the Interior)* **1912 AD 642** at 651 – 652
[8] Minister of Safety and Security v Sekhoto and Another 2011 (1) SCR 315 (SCA)

manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached.

[40] This does not tell one what factors a peace officer must weigh in exercising the discretion. An official who has discretionary powers must … naturally exercise them within the limits of the authorizing statute read in the light of the Bill of Rights ….”

[29] At paragraph [42], the court further expressed that while it is established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court. Thereafter, the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect is then within the discretion of the court.

(i) The pleadings

[30] The second claim (claim 2) deals with the arrest and detention of the plaintiff on 10 June 2020. It was pleaded at paragraph [7.1] and [7.2] of the particulars of claim, that the plaintiff was unlawfully arrested on 10 June 2020, under case number 193/06/2020 (common assault and domestic violence) and was released on 11 June 2020:

30.1 At paragraph [7.2] the plaintiff pleaded:

"On the 11th day of June 2020, the fifth defendant questioned the plaintiff about the assault and informed the plaintiff that he cannot allow the plaintiff to abuse his members, specifically referring to the third defendant, which questioning and/or statement were not objective and only made in order to further detaining the plaintiff and/or subject to the plaintiff to further detention, violation of the plaintiff's constitutional rights."

30.2 At paragraph [7.3] it was pleaded that:

"The comments by the fifth defendant were not made in vain and/or followed by the specific conduct as the plaintiff was further detained as all accused persons were taken to court immediately after their arrest and the plaintiff was not taken, instead he was detained there until after 12h00 where he was released without being charged or appearance before a magistrate with competent jurisdiction."

30.3 At paragraph [7.4] the plaintiff pleaded that:

"The first, third, fourth, fifth and sixth defendants owe the plaintiff the legal duty to investigate, verify any alleged claims and/or any allegations of commission of a criminal offence in a rational and objective manner and not to be biased and/or abuse the criminal justice system for their own benefit and to the detriment of the plaintiff".

30.4 At paragraph [7.6] it was concluded that:

"due to the conduct of the first, third, fourth, fifth and sixth defendants and/or members of the first defendant the plaintiff was wrongfully unlawfully detained and further detained for a period of 1 day".

[31] In their amended plea, the defendants deny that the arrest and detention were unlawful. They pleaded that they had acted in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977. At paragraph [7.1] it was alleged:

"7.1 the arresting officer was a peace officer as defined in the Criminal Procedure Act 51 of 1977;

7.2 there was a reasonable suspicion that the plaintiff committed an act of domestic violence as contemplated in Section 1 of the Domestic Violence Act 116 of 1998;

7.3 The arresting officer exercised his discretion to arrest properly in the circumstances;

7.4 The plaintiff was arrested following a case opened by his wife in relation to domestic violence. The plaintiff assaulted the third defendant (his wife) to an extent that she obtained an interim protection order against him. The plaintiff admitted in his affidavit dated 26 June 2020 that he slapped his wife after exchange of unpleasant words and in turn she fought back. Furthermore, the assault was confirmed by his son Ivern.

7.5 Following the assault, the wife opened a case of domestic violence against the plaintiff. The injuries of the wife were documented on the J88 completed on the 8th of June 2020 by Dr MJ Kganakga, prior to the plaintiff's arrest."

(ii) <u>The plaintiff's testimony</u>

[32] The plaintiff testified that he had "slapped" the defendant on her cheek. His explanation was that an argument broke out between them and he merely touched her cheek. He had in no way assaulted her. He further confirmed that the defendant called the police and he was eventually asked to leave their common home.

[33] He also testified that he was bleeding at the time and was given an opportunity to explain to the police official who arrived at their home as to what had transpired between the parties. He confirmed that it was explained that since this was a domestic violence issue he should not be under the same roof with his wife. He then agreed to leave the home and was accompanied by such police officials to an alternative accommodation.

[34] He further expressed that he was informed that his wife would not press any charges against him. On 9 June 2020 he was at his sister's place. On 10 June 2020 he returned to their common home and also visited a doctor. The injuries he sustained was a laceration on his lip and bruises on both arms, left wrist as well as a tender knee. This information was evident from the J88 form completed by the doctor who examined him.

[35] On the evening of 10 June 2020, police officials arrived at the house and served the plaintiff with the protection order. He was arrested and thereafter taken to the police station. The plaintiff particularly testified that upon his arrest he was not

informed of his constitutional rights and neither was he given an opportunity to explain himself. He was only informed of such rights at the police station.

[36] Further under cross-examination he maintained that his understanding of the word "slap" meant that he touched his wife with an open hand. It cannot be disputed that the defendant sustained injuries on 6 June 2020. The J88 is evidence of this fact.

(iii) <u>The defendant's testimony</u>

[37] The defendants' version in respect of the incident of 7 June 2020 was that the plaintiff assaulted her to the extent that he kicked her and continued threatening her in their bedroom. At the time their minor daughter left the room upset. Ivern, her elder son, then barged in and witnessed that she was being throttled by the plaintiff. He put his arm around the plaintiff's throat and pulled him away. The plaintiff fell to the floor. The plaintiff then punched Ivern and she tried to stop them.

[38] Thereafter the plaintiff attempted to contact his sister. She also made a call to the police station. The police officials arrived at their home and the plaintiff was taken away to an alternative address.

[39] The next day, 8 June 2020, she went to work and opened a case for assault and domestic violence against the plaintiff. She thereafter went to the Mamelodi

Magistrate Court where she applied for the protection order. On the same day she visited a doctor who completed the J88 form.

[40] When she returned home, she saw a note from her son, Ivern, that was placed next to a black refuse bag with some clothes in her bedroom. Ivern later explained to her that the plaintiff had demanded the clothes he had purchased for him.

[41] She confirmed that on 10 June 2020 the plaintiff was arrested. On the evening of 10 June 2020, Constable Kubjana contacted her and requested the whereabouts of the plaintiff. She informed them that he was at home.

[42] Constable Kubjana then arrived at their home and arrested the plaintiff. On 11 June 2020 she withdrew the charges against him. The reason therefore was that the plaintiff's brother came to the police station and requested her to withdraw the charges. She was advised that it is a family issue and should be settled privately. She also testified that she had spoken to the plaintiff who was, at the time, in the cells.

(iv) <u>Testimony of Constable Kubjana</u>

[43] Constable Kubjana testified on behalf of the defendants. She explained that on the said day of 10 June 2020, she was stationed at the police station and she "received a complaint from the controller"[9] requesting for her to serve a protection

[9] "call by radio"

order at the parties' common home. She proceeded to do so on the evening of 10 June 2020. She testified that. upon her arrival, the defendant had informed her that she had laid a charge for assault and domestic violence against the plaintiff at the police station.

[44] She testified that she had informed the plaintiff of his constitutional rights when effecting the arrest and further that he had been informed that he was arrested on the assault charge.

[45] Under cross-examination she testified that her scope of duty was only to effect an arrest and that she had done so lawfully. She confirmed that initially she was only required to serve the protection order. However, upon being informed of the assault charge, and after verifying the charge with the police station records, she arrested the plaintiff.

[46] Under cross-examination, it was put to her that the plaintiff was not informed of the reason for his arrest and neither was he given an opportunity to respond. She denied this version and testified that he was well aware of the reason for his arrest.

[47] Further under cross-examination, she was questioned on the issue of the stamp date, 8 May 2020, that appeared on the protection order. It was put to her that the arrest was planned and orchestrated together with the defendant and the protection order was obtained prior to the 7 June 2020 incident. She was referred

to the date, 8 May 2020, on the protection order. In response, she testified that the protection order recorded the assault of 7 June 2020 and further it would be irregular for the magistrate court to grant a protection order prior to the assault. She concluded that it was probable that the stamp date of the magistrate court may have been incorrect, however, she could not take the issue any further.

[48] Further under cross-examination, it was put to her that her version had been fabricated to suit the defendant's version as she should have attested to the fact that she had verified the assault charge. She denied same.

[49] In this regard, I have noted that the statement to the assault charge as well as the protection order records the assault of 7 June 2020 and the evidence that the arrest was effected in terms of the assault reported by the defendant on 8 June 2020.

[50] The defendant testified that she obtained the protection order on 8 June 2020 and she further reported the domestic violence matter to the magistrate court on that same day. In fact, the J88 form, dated 8 June 2020, confirmed the injuries sustained by the defendant and particularly the injury to her upper cheek. The version of the defendant is more probable. The evidence reflects that the arrest was effected in terms of the assault charge which had been reported under case number 193/06/2020.

[51] Captain Kubjana also testified that although she was instructed to serve the protection order, she arrested the plaintiff on the assault charge. She maintained that before effecting the arrest, she verified the assault charge telephonically with the records of the police station.

[52] I have also noted that Constable Kubjana, in her affidavit of 10 June 2020, stated that the SAPS had received a complaint from the defendant on the said day. The constitutional rights were read to the plaintiff at the couple's home before the arrest and his constitutional rights were read to him one more time after the arrest. This is evident from her statement and her testimony.

[53] The plaintiff, under cross-examination, attempted to raise various discrepancies in order to discredit the testimony of Captain Kubjana. For instance, much was made about the court stamp date, appearing on the protection order, as 8 May 2020. It should be noted that the protection order was issued by the magistrate court. The protection order further detailed the assault of 6 June 2020 and no other act of violence prior thereto. By alleging that the protection order was obtained prior to the incident of 6 June 2020, the plaintiff was required to at least verify same with the records of the magistrate court. It is also noted that the defendant was not called to elaborate on the aspect of the 8 May 2020 date in her evidence before court. In any event, the plaintiff was in fact arrested in terms of docket 193/06/2020.

[54] I find that the arrest effected on 10 June 2020 was not unlawful. Even if I were to accept the plaintiff's version, namely: the SAPS officials appeared at the parties' home on 10 June 2020, at the behest of the defendant, the arrest was effected on a lawful basis. The plaintiff was arrested in terms of docket 193/06/2020, for assault and domestic violence. The defendant sustained various injuries, particularly injury to her cheek.

[55] I particularly find it surprising that nowhere in the plaintiff's statement relating to this docket, does he allege that the arrest was unlawful or neither did he state that his constitutional rights were not read to him. In my view, the requirements of Section 40(1)(b) have been met. Such statement was attested to on 11 June 2020, a day after his arrest.

C CLAIM 3 – WRONGFUL, UNLAWFUL ARREST, DETENTION AND FURTHER DETENTION

(i) The pleadings

[56] This claim relates to the events of 28 June 2020. In paragraph [8] of the particulars of claim the plaintiff pleads as follows:

"8.1 On the 28th day of June 2020, the plaintiff was further wrongfully, unlawfully arrested, detained, and further detained for a period of four (4) days for alleged offence of malicious damage to property, common assault

and domestic violence under Cas No. 536/06/2020, OB No. 1396/06/2020 with cell number 269/06/2020 with Serial No. S0178982.

8.2 As a result of the wrongful, unlawful arrest, detention and further detention, the plaintiff suffered damages under the following heads of damages; wrongful, unlawful arrest, detention, further detention, severe psychological shock, trauma, deprivation of freedom, discomfort, which distress will persist, loss of income and contumelia."

[57] The defendants, in paragraph 8 of their plea, denied that the arrest and detention were unlawful. They pleaded that same were lawful in terms of Section 40(1)(b) of the Criminal Procedure Act.

(ii) <u>The plaintiff's testimony</u>

[58] Notably the plaintiff, in his evidence, admitted to the conduct for which he was charged. He testified that he burnt the clothes in the presence of his wife and his stepson in the backyard. He however explained that the arrest was not justified as the parties had mediated and resolved the matter, causing the charges to be withdrawn.

[59] He further maintained that no explanation was given for his arrest and neither was he informed of the reason for his arrest. He also made much about the fact that his detention was extensive due to the negligence on the part of the arresting

officer as he should have confirmed an alternative address for the plaintiff on the day of the arrest. This was not done. He specifically testified that he was arrested in respect of the charge he laid against his stepson, Ivern. This could not be since he was the complainant in the matter.

(iii) <u>The defendant's testimony</u>

[60] The defendant testified that she was entitled to lay the charge for malicious damage to property and that the plaintiff was lawfully arrested therefor. She also indicated that the matter relating to this charge was eventually referred to mediation where the parties agreed to settle. On this basis, the charge for malicious damage to property was withdrawn.

[61] When questioned on the plaintiff's extensive detention, she responded that she has no control of the events that transpired after the arrest. Moreover she had not instigated the arrest of the plaintiff.

[62] The defendant further testified that she only reported the malicious damage of property on 26 June 2020 at the police station. She pointed out that the said date accords with the arrest statement, Ivern's statement, as well as the contents in the investigation diary.

(iv) <u>The testimony of Constable Malatji</u>

[63] The police official who arrested the plaintiff on 28 June 2020 was Constable Malatji. He testified that the plaintiff was arrested on the charge of malicious damage to property. He said that on the said day he was working in the Tracing Unit of SAPS and was instructed to effect the arrest on the plaintiff.

[64] Prior to him leaving the police station, he perused the docket in respect of the charge relating to malicious damage to property. He made a call to the complainant (being the defendant), enquiring whether the plaintiff was home. The defendant confirmed the plaintiff's presence. He testified that upon his arrival he had firstly identified himself as an officer and informed the plaintiff that there was a case opened against him. He also read his constitutional rights to the plaintiff and thereafter effected the arrest.

[65] Under cross-examination Constable Malatji confirmed that when he arrived at work he read the statement and the details of the complaint. It was filed under docket number 536/06/2020. He also confirmed that he contacted the complainant (being the defendant), who confirmed that the plaintiff was at home.

[66] He further persisted with his version that when he arrived at the house he identified himself as a police officer and gave the reason for his attendance at the home. He read the constitutional rights to the plaintiff, arrested the plaintiff, and took him to the police station. He further testified that he was not a personal friend of the defendant. He only realised who the third defendant was when he arrived at the parties' home. He also testified that he was not influenced by her.

He testified that the arrest was only effected in terms of the malicious injury to property charge under docket 536/06/2020.

[67] It was put to him, under cross-examination, that the detention was planned and purposefully extended and that he failed to record an alternative address for the plaintiff. His response was that he confirmed the address of the plaintiff which was the couple's home. There was no reason for him to confirm an alternative address at the time of the arrest as the plaintiff was detained at the SAPS police station. The alternative address enquiry was ordered by the court after the arrest at the instance of the presiding officer. The investigating officer was tasked to verify the alternative address. Constable Malatji was not part of these proceedings.

[68] In this regard, Constable Malatji further referred the court to the entry on the investigation diary that illustrated that it was in fact the investigating officer who indicated that an alternative address had to be verified as the defendant does not want the plaintiff to retain to their common home. Consequently the plaintiff was only released after the verification of the alternative address.

[69] Under cross-examination extensive time was spent questioning Constable Malatji on the "charges" that the plaintiff was arrested for. It was put to him that he had effected an arrest in terms of a charge where he was in fact the complainant, i.e. under docket 530/06/2020 – the plaintiff's charge of assault against Ivern.

[70] Constable Malatji explained that the arrest was only effected in terms of 536/06/2020. Although the docket reference of the former charge (530/06/2020) appeared on the top of his copy of the docket, he had deleted this reference when effecting the arrest. He also indicated that he did not follow through by deleting the said docket reference with the other copies of the docket at the SAPS offices and the copy held at the cells. Under cross-examination, he persisted in his evidence that the plaintiff was informed of the reason for his arrest.

[71] Once again, the defendants maintained the view that they had acted in accordance with Section 40(1)(b) of the Criminal Procedure Act. It was submitted on behalf of the defendants that the jurisdictional requirements were met, namely: that both arresting officers are peace officers, there was a reasonable suspicion that the plaintiff had assaulted his wife, and furthermore that the plaintiff had burnt the clothes of his stepson.

[72] As already alluded to above, it is common cause that the charge of the malicious damage to property was referred to mediation and the case was withdrawn against the plaintiff and he was not charged.

[73] Section 40(1) of the Criminal Procedure Act permits a police officer to make an arrest without a warrant where he or she (reasonably suspects) that the arrestee had committed a schedule 1 offence and/or offences stipulated under Section 40(1). The test involves an objective inquiry, not a subjective one.

[74] The question is "would a reasonable man in the arresting officer's position and possessed of the same information, have considered that there were good and sufficient grounds for suspecting that the arrestee may have committed the offence for which he or she is sought to be arrested?[10]

[75] Having considered the evidence of all the parties, I find that the probabilities favour the defendants' case. The respective evidence of the defendant and Captain Malatji has been corroborated by the contents of the docket and the investigation diary. The arrest of 28 June 2020 was effected in respect of docket reference 536/06/2020 on the charge of malicious damage to property. The defendant was entitled in law to lay a complaint with the SAPS. In the premises, the arrest was not unlawful and/or wrongful.

D <u>CLAIM 4 – MALICIOUS PROSECUTION</u>

[76] The plaintiff's fourth claim was alleged as follows in paragraph [9.1]:

"9.1 The third, fourth and fifth defendants and other member of the South African Police Service who were acting within their course and scope of their employment with the first defendant instigate and/or alternatively instituted false criminal proceedings and charges against the plaintiff.[11]

9.2 The third, fourth and fifth defendants set the law in motion by instituting malicious and false criminal charges and proceedings against the plaintiff for alleged assault GBH, which was laid as common assault under Cas

[10] Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 at paragraph 23, 45, 53 and 54

[11] The extract of these paragraphs have been quoted *ad verbatim*. The grammatical errors are evident.

No.: 193/06/2020 [first arrest] and malicious damage to property, common assault and domestic violence under Cas No. 536/06/2020 [second arrest].

9.3 The third, fourth and fifth defendants wrongfully and maliciously set the law in motion by laying a false criminal charge of assault, malicious damage to property, common assault and domestic violence with members of the South African Police Service at Mamelodi-East Police Station and by giving the following disinformation:

9.3.1 that the plaintiff has committed the alleged offences of assault GBH;

9.3.2 that the plaintiff has damaged the third defendant's property and committed an offence for domestic violence, which criminal offences the third defendant could not successfully prove and/or prosecute;

9.3.3 the second, third and fourth defendants knew and/or ought to have known that the information was false and was designed to ensure that the plaintiff is arrested, detained and further detained in order to force the plaintiff to vacate the common property and/or joint property;

9.3.4 that when the plaintiff had been detained and further detained the third defendant would approach court to obtain a protection order, under application number 1/4/29-1018/20, which was dismissed, and the second being 1/29/1602/20 which order was granted;

9.3.5 the third defendant used the domestic violence proceedings to effectively evict the plaintiff from lawful occupation of the matrimonial property, as the third defendant would lay false charges of transgression of the protection order and/or call her colleagues with false and malicious accusations to effect the unlawful, wrongful eviction of the plaintiff from the matrimonial property, which was effected on the 20th day of November 2020;

9.3.6 on the said day the plaintiff was evicted by the members of the first defendant under the direct command of the sixth defendant, without just and proper cause ….

9.5 As a result of the said disinformation the third, fourth and fifth defendants' conduct led to the plaintiff's wrongful, unlawful arrest, detention, further detention and malicious prosecution and eviction from the matrimonial property, which prosecution failed when the charges brought against the plaintiff were withdrawn and/or the second defendant declined to prosecute…."

[77] The defendants in their amended plea deny that there was any claim for malicious prosecution and submitted that they acted lawfully. At paragraph 9.1 it was pleaded that:

"9.1 The defendants did not institute any false claims against the plaintiff. The plaintiff admitted in his own statement that he assaulted his wife by slapping her. As a result, the wife opened a case for domestic violence.

Subsequently, the plaintiff burnt Ivern's clothes and the second case was opened relating to malicious injury to property;

9.2 Accordingly, the defendants acted with reasonable and probable cause and did not act with any malice in the prosecution of the plaintiff;

9.3 The prosecution is now fail, both cases were withdrawn against the plaintiff following the successful mediation by the plaintiff and his wife."

[78] Once again, in evaluating the evidence of both parties, I find the defendant's version to be probable. In my view, the prosecution was not malicious in any way. In respect of the first arrest of 10 June 2020, the plaintiff was arrested in respect of the charge of assault, instituted by the defendant under docket 193/06/2020. It cannot be disputed that the charge was later withdrawn after the plaintiff's brother persuaded her to drop the charges.

[79] With regard to docket number 536/06/2020, the plaintiff admitted that he burnt the clothes of Ivern. The defendant, in law, was entitled to lay a complaint for malicious damage to property. The fact that the matter was resolved by way of mediation and the charges were withdrawn, is evidence of the fact that the prosecutions were not malicious.

[80] In ***Minister of Justice and Constitutional Development and Others v Maleko 2009 (2) SACR 585 (SCA)*** the Supreme Court of Appeal held that in order to succeed with a claim for malicious prosecution the plaintiff has to allege and prove, firstly that:

(a) the defendants set the law in motion (instigated and instituted the proceedings);

(b) the defendants acted without reasonable and probable cause;

(c) the defendants acted with malice; and

(d) the prosecution has failed.

[81] Clearly none of these requirements have been met. In summary, in respect of the assault charge against the plaintiff, and the arrest of 10 June 2020:

81.1 the defendant was entitled to lay a charge of assault and domestic violence, if one has regard to the facts, particularly the injuries she sustained;

81.2 the arrest was effected in terms of this charge;

81.3 there was no evidence of malice. The arresting police official testified that the plaintiff was arrested on the assault charge;

81.4 this was not a case where the prosecution failed. The defendant withdrew the charge of assault against the plaintiff.

[82] Similarly, in respect of the malicious damage to property charge and the arrest of 28 June 2020:

82.1 on the plaintiff's own version, he admitted to burning the clothes. The defendant was, in law, entitled to lay a charge;

82.2 the police official arrested the plaintiff in respect of this charge;

82.3 his conduct was not unlawful and he did not act with malice;

82.4 the parties resolved the matter through mediation.

[83] In order to show that there was malice, it is settled law that *animus injuriandi* must be proved before the defendant can be held liable for malicious prosecution as *injuria*.[12] *Animus injriandi* includes not only the intention to *injure* but also the consciousness of wrongfulness.

[84] Hence the SAPS officials must 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 ws acting wrongfully, but nevertheless continued to act reckless as to the consequences of his or her conduct. Negligence on their part, even gross negligence would not suffice.

[85] In the premises, the plaintiff does not succeed on any of the claims. Hence the action proceedings are dismissed with costs.

COSTS

[86] This court, in exercising its judicial discretion, is of the view that the unsuccessful party should pay the costs. In this instance, the plaintiff has not succeeded in proving his case on a balance of probabilities and therefore is ordered to pay the costs on a party and party scale.

[12] Minister of Justice and Constitutional Development and Others v Moleko 62 to 64

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H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Instructed by:	*Makhafola & Verster Incorporated*
Counsel for the Defendant:	*Adv M Vimbi*
Instructed by:	*The Office of the State Attorney*
Date heard:	*4-5 September 2023*
Date of Judgment:	*11 October 2023*