



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 36032/2019

In the application between:

MANTSHO MAGIC MAKOBE Plaintiff

And

THE MINISTER OF POLICE 1st Defendant

SIPHO MOTAUNG 2nd Defendant

RSM SECURITY AND PROJECTS CC 3rd Defendant

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

(3) JUDGES: NO

REVISED.

DATE 10/04/20234

JUDGMENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14h00 on 10 April 2024.

LENYAI J

- [1] The plaintiff in this matter instituted several claims for damages against the defendants which range as follows:

Claim 1: A claim against the 1st defendant for unlawful arrest and detention in the amount of R 625 000.00.

Claim 2: A claim against the 2nd and 3rd defendants for malicious prosecution in the amount of R 250 000.00.

Claim 3: A claim against the 2nd and 3rd defendants for loss of employment in the amount of R 350 000.00

Claim 4: A claim against the 1st defendant for the loss of his cellphone in the amount of R 850.00.

- [2] The plaintiff and the 1st defendant (the parties) had agreed at the pretrial conference that there should be a separation of issues in terms of Rule 33(4) and the court was requested to only adjudicate on the merits and that the issue of quantum be postponed *sine die* and should only be proceeded with if the

defendants are found to be liable. The parties also agreed at the pretrial conference that the 1st defendant has the onus of proof in respect of the lawfulness of the arrest and detention. At the conference it was also clarified by the 1st defendant that the 2nd and 3rd defendants did not defend the matter and are not represented.

[3] It is noteworthy to mention that at the hearing, the 1st defendant disputed the fact they had the duty to begin, despite having agreed at the pretrial conference. The court ruled that it is trite that in such matters the duty to begin lies with the 1st defendant and the matter proceeded as such.

[4] There were four witnesses who testified at the trial. The plaintiff had two witnesses, he testified in support of his claims and Mr D [REDACTED] M [REDACTED] was the other witness. The 1st defendant led two witnesses, Mr Sipho Motaung, who is the owner of the security company and the former employer of the plaintiff as well as the arresting officer, Captain Matshitsho.

[5] The common cause facts are as follows:

5.1 During the year 2018, the plaintiff and Mr M [REDACTED] were working as security officers in the Company called RMS Capital and Projects CC (the 3rd defendant);

5.2 Mr Sipho Motaung (2nd defendant) is the Managing member of the 3rd defendant and the complainant in this matter;

- 5.3 On 21st March 2018, the plaintiff and Mr M [REDACTED] reported for duty at the construction site situated at Mamelodi at 18:00, for a night duty shift which was to end at 06:00;
- 5.4 On the construction site there were various construction machinery used during the day and kept there overnight. The plaintiff and Mr M [REDACTED] were the security officers on duty looking after and guarding the site and the machinery kept there on the night of 21st March 2018;
- 5.5 The machinery kept on the construction site included amongst other things a floating machine and two generators;
- 5.6 One Fani Thobane who was employed as the TLB driver and worked on the construction site, slept at the construction site on the night of 21st March 2018;
- 5.7 During the early hours of 22nd March 2018, theft of the floating machine and two generators occurred at the construction site;
- 5.8 Early in the morning of the same day the plaintiff, Mr M [REDACTED] and Fani Thobane were arrested for the theft of the floating machine and two generators, and they were detained at the Mamelodi East Police Station;
- 5.9 On 26th March 2018 the three men were taken to the Mamelodi Magistrate Court where they were released at 07:35, the reason being that the Prosecutor declared the case against them as *nolle prosequi*, which means that the Prosecutor declined to prosecute the case against them.

[6] The issues to be determine by the court are the following:

6.1 Whether the arrest and detention of the plaintiff were lawful ?

6.2 Whether the plaintiff is entitled to the damages claimed ?

[7] During the presentation of the opening remarks on 9th October 2023, the 1st defendant confirmed that the cellphones of the plaintiff and Mr M [REDACTED] were in their possession and they were in the condition they received them in. They submitted that they were prepared to hand them over at the end of the trial. There was no opposition from the plaintiff. After considering the submissions made, I ruled that the phones must be brought to court on or before 11th October 2023 to be handed over to the legal representative of the plaintiff. The following day being 10th October 2023 the phones were indeed brought to court, and they were handed over to Ms Sidzumo. The plaintiff and Mr M [REDACTED] also confirmed that the phones brought to court were indeed theirs and accepted them. In my view claim 4 has been satisfactorily dealt with to the satisfaction of all the parties.

[8] It is trite that the onus rests on the 1st Defendant to prove that the plaintiff's arrest and detention were lawful. The first witness for the 1st defendant was Mr Motaung who is the second defendant and also the complainant. He testified that he is the owner and Managing Member of the Security Company (the 3rd defendant), and that during the year of 2018 he was awarded a contract by a Construction Company which goes by the name Faranani, to provide security services on their construction site and other property kept on the site. The

plaintiff and Mr M [REDACTED] were employed by him as Security Officers and they were on night duty on 21st March 2018 to provide security on the Construction site.

- [9] He further testified that during the early hours of the morning of the 22nd March 2018 at 01:05, he received a telephone call from one of his employees, Sape who was working and providing security services on another site that evening. Sape advised him that there was a problem at the construction site where plaintiff and Mr M [REDACTED] were stationed. Mr Motaung stated that within five minutes of the call he arrived at the construction site where plaintiff and Mr M [REDACTED] were on duty as the site was only 200m from his home. He further testified that the distance between the site where Sape worked and the one where the plaintiff was working that night is 100m.

- [10] He testified that when he arrived at the site Mr M [REDACTED] opened the gate for him and he noticed that the gate was not locked. The construction site was secured by a fence that went around the whole site and the gate was attached to the fence. Mr M [REDACTED] explained to him that two men entered the premises and approached the Tractor Loader Backhoes commonly known as a TLB. They pointed a gun at someone who was sleeping in the TLB, woke him up and ordered him out of the TLB. The person who was ordered out of the TLB was the TLB driver and he was taken to the tool room container. They broke the lock and took out two generators and a big blustering machine. The intruders ordered the TLB driver to take out the machines from the container.

- [11] Mr Motaung testified that he questioned Mr M [REDACTED] how come the TLB driver was on site at that time and sleeping in the TLB as he works during the day, and in terms of the rules no one should be on site at night except the security officers on duty. Mr M [REDACTED] did not answer him. Mr Motaung further testified that he asked Mr M [REDACTED] where his co-worker was and he was called to join them in the discussion. The plaintiff then joined them and he (Mr Motaung) asked both of them where they were and what they were doing during the time the theft was in progress. They explained to him that the plaintiff was next to the gate in the toilet and Mr M [REDACTED] was at a secluded corner watching everything happening. Mr Motaung then asked them where did the robbers exit the site and they showed him a hole cut in the fence at the back of the premises and explained that it was the entry and exit the robbers used.
- [12] Mr Motaung further testified that when he inspected the area where the fence was cut, he noted that there was a furrow on the other side of the fence which was about 2m wide as well as 2m deep. It was full of water as it had rained heavily earlier in the night. He then asked them how possible was it for the men to have crossed the furrow that deep, full of rain water with such a heavy blustering machine and two heavy generators. Mr M [REDACTED] said that there was a van that came to the side of the fence to carry the machines away. Mr Motaung testified he told them that where it was alleged that the van drove to pick up the machines, was very muddy and a van could not have driven there and there were also no tire tracks. The two security guards could not answer

him. Mr Motaung further testified that he asked the plaintiff the same questions he had asked Mr M [REDACTED] and he received the same answers as those given to him by Mr M [REDACTED]

[13] Mr Motaung was asked what he expected the two guards to have done under such circumstances. He answered that as trained security guards he expected them to have taken some form of action and they did nothing. He further testified that he asked them why they did not call him as he was only 2m away or call the police for assistance as the police station is 600m away from the site. They answered him by saying that they did not have airtime. He told them that he does not understand their story and he will come back in the morning.

[14] Mr Motaung testified that in the morning he waited for the owner of the construction site and when he arrived he advised him of what had occurred . The owner of the site told him to report the matter with the police and provide him with a case number. Mr Motaung further testified that between 07:00 and 08:00 he went to the police station accompanied by both the plaintiff and Mr M [REDACTED]. On arrival at the police station, he narrated the story to the police as explained to him by the plaintiff and Mr M [REDACTED]. He told the police in their presence that he suspected both plaintiff and Mr M [REDACTED] to be involved in the break-in at the site and the theft of the machines for the following reasons:

14.1 The plaintiff and Mr M [REDACTED] did nothing to protect the property which they were looking after, they should have called him as he was 2m away

from the site or the police who were 600m away from the site or Sape who was 100m away from the site;

14.2 They could have sneaked out and called for help from either him, Sape and the police but instead did nothing;

14.3 They failed to explain what the TLB driver was doing on site against the Rules;

14.4 They failed to explain how did the heavy machinery cross the 2m wide and deep furrow full of rain water;

[15] Mr Motaung further testified that he narrated the story to the police in the presence of both the plaintiff and Mr M [REDACTED] and also stated that he suspected them to be involved in this theft, but the two just stood there and never said anything to deny the allegations against them.

[16] During his evidence in chief it was put to Mr Motaung that at paragraph 6.2 of the particulars of claim it is stated that the plaintiff's employment was terminated because of the arrest and detention, which matter was then settled by the 3rd defendant at the Commission for Conciliation, Mediation and Arbitration, commonly known as the CCMA. Mr Motaung testified that he was there and he was part of the settlement. It was found that the plaintiff and Mr M [REDACTED] were unfairly dismissed and the 3rd defendant must compensate both of them three month's salary. Mr Motaung confirmed that he was present at the CCMA and

he was part of the settlement.

[17] Under cross examination it was put to Mr Motaung that he failed to provide the plaintiff and Mr M [REDACTED] with protective material such as handcuffs, pepper spray, rain coat and baton. He testified that he had provided them with all the mentioned items except for the walkie talkie. He further testified that he had also provided them with a cell phone which has since disappeared and both Plaintiff and Mr M [REDACTED] blamed each other for the said disappearance.

[18] It was put to Mr Motaung during cross examination that the protective gear is supposed to be handed over to the incoming personnel at the change of shift and that would be reported in the occurrence book normally called the OB. It was put to Mr Motaung that the OB did not indicate anything except the time the personnel reported for duty and came off duty as well as what they found on site. Mr Motaung responded that the protective gear was provided and the plaintiff and Mr M [REDACTED] had the right to refuse to work in the absence of the protective gear. He further testified that the construction site where the plaintiff and Mr M [REDACTED] worked guns were not allowed hence he did not provide them with guns.

[19] It was further put to Mr Motaung under cross examination that he did not care for the safety and health of his security guards as he did not provide them with protective gear and yet he expected them to face robbers with guns. It was also put to him that the witnesses for the plaintiff will tell the court that they were

desperate for any work and they would accept any work without conditions. Mr Motaung in turn testified that when he advertised, he clearly stated that he wanted trained security guards. They also presented their identity documents and Security Guard Certificates which he testified, you will not be in possession of if you had previous convictions. It was put to him that it is possible that you can commit the crime after you have been provided with the Certificate. Mr Motaung testified that the Private Security Industry Regulatory Body, PSiRA , makes sure that the certificate is valid for only a year , so that they get an opportunity to check your background and integrity before re-issuing the certificate. He further stated that they in the industry rely on the Certificate.

- [20] Mr Motaung also testified under cross examination that he discovered that the cell phone had gone missing, late on Friday when he checked the OB, the day after the incident, and the plaintiff and Mr M [REDACTED] were blaming each other. He would have expected the plaintiff and Mr M [REDACTED] to have told him about the disappearance of the work cell phone when they reported for duty on the 21st March 2018. He further testified that during the week before the incident occurred there were no walkie talkies however there was a cell phone that he had provided, which had enough airtime. He was pressed to indicate if he had provided airtime to his security guards and he testified that he did not provide them with airtime for their private cell phones as there was a work cell phone that he had provided for work purposes.

[21] It was put to Mr Motaung that his security guards were like sitting ducks, and criminals came in and took things from the site, and they were expected to do something without any protective gear. Mr Motaung reiterated that he had hired trained and professional guards and he gave them the necessary tools. They disappointed him and did nothing and allowed the theft to occur. He further stated that when he arrived at the site, he was told the incident happened around midnight and when he got there it was 01:10. When he arrived at the site he found Mr M [REDACTED] next to the gate which was not locked and the plaintiff was at the back of the building and where he was standing the fence was down. If the two guards were people who wanted to protect the site, they had an opportunity and enough time to have used that part of the fence to get out of the site and seek help or even get out of the gate as they had a key they could have used to unlock the gate.

[22] It was put to Mr Motaung that one of the robbers had a gun and he confirmed that he was told that by Mr M [REDACTED]. It was also put to him that the witnesses for the plaintiff will tell the court that a gun was shot and he testified that he was hearing this for the first time and he was never told about any gunshots. He also stated that he does not believe the story of the gunshot.

[23] It was put to Mr Motaung again that he does not care for the lives of his security guards. He testifies that on the contrary he cares very much for them. He stated that when his security guards are on duty, he would also patrol with them

without them seeing him. That night of the incident he could not patrol as it was raining heavily.

[24] It was also put to Mr Motaung under cross examination that he was called several times around midnight but he only came out to the site around 04:00 or 05:00 and he had his firearm drawn out. Mr Motaung testified that the only call he received was from Sape, another one of his security guards who worked at another site, and he arrived at the site five minutes after the call at 01:05. It was put to Mr Motaung that when he arrived at the site he was topless and he looked tipsy, brandishing his gun and saying where are they. Mr Motaung testified that it was raining that night and could not leave his home not being properly dressed and he also stated that he said that he only wanted to know where the robbers were, how they gained entry into the construction site and how they exited the site.

[25] It was put to Mr Motaung that he did not inspect the site and only did so when he called the police around 06:00. Mr Motaung testified that it is not true that he did not do an inspection. He stated that the two guards showed him the place where the fence was cut and he was told that, that was the entry and exit point used by the robbers. He further stated that he was advised by the two guards that when the robbers were on site and held Fani hostage (the TLB driver), the plaintiff signalled to Mr M [REDACTED] to hide because he could not see the robbers as he had his back to the robbers. The plaintiff was standing by the toilets facing the robbers and he hid in the toilet. Mr Motaung stated that it would be

impossible for Mr M [REDACTED] to see the signals from the plaintiff as plaintiff would be in the dark part of the site and Mr M [REDACTED] would be in the slightly lighted part of the camp according to the explanations they recounted to him.

[26] Mr Motaung was asked under cross examination why he suspected the guards and not Fani as he was not supposed to be sleeping on site. He testified that he was told that when the robbers came they went straight to the TLB. In his experience, normally the robbers will be looking for the guards and wondered how they would have known about the person sleeping in the TLB. The plaintiff and Mr M [REDACTED] knew the rules, that no one must remain on site after 17:00 except the guards. The fact that they allowed Fani to stay behind made him to suspect that they were involved with the robbers and they somehow needed Fani to assist with carrying the heavy machinery.

[27] It was put to Mr Motaung under cross examination that the witnesses for the plaintiff will testify that the TLB driver was allowed to sleep on site as he could not walk home as he had to pass through a notorious bridge where people are either robbed or killed, and it was not the first time that he slept on site. Mr Motaung testified that he was not aware of this and stated that the guards took a decision without letting him know, which was unacceptable.

[28] It was also put to Mr Motaung that the two guards were harassed by the police at the police station and he took advantage of his relationship with the police and encouraged them with his utterances and suspicions to arrest the plaintiff

and Mr M [REDACTED] Mr Motaung testified that the two guards gave him the information that he related to the police and they were there when he gave his statement to the police and they just stood there and never said anything in their defence.

[29] Under cross examination a question was put to Mr Motaung that he went to the CCMA for a claim for unfair dismissal instituted by the plaintiff and Mr M [REDACTED] Mr Motaung testified and confirmed that yes he did attend the CCMA and the matter was settled and the two guards were to be compensated three month's salary. He was further asked about the claim for loss of employment and he responded that it falls under labour law.

[30] It was put to Mr Motaung that it was because of his utterances that the plaintiff and Mr M [REDACTED] were arrested. Mr Motaung testified that he went to the police station together with the plaintiff and Mr M [REDACTED] to report an incident that occurred at the site and the police arrested the two as they did their work as they are trained.

[31] The last question that was put to Mr Motaung was, what would you have done under the circumstances, faced with three robbers with a gun with you having no protective gear ? Mr Motaung denied that there were three robbers as he was told of two robbers with the TLB driver being forced to participate and he reiterated that the guards were provided with all the protective gear. He further indicated that with regard to the plaintiff, he had the key to the gate and as he

was hiding next to the gate, he could have opened the gate and gone to look for help as the police station was only 600m away. With regard to Mr M [REDACTED] where he was hiding, the fence was down and he could have jumped over the fence and looked for help.

[32] Under re-examination Mr Motaung was asked to clarify the issue of the light inside the site. He explained that the light is by the gate when you enter and it lights the right side of the site. The robbers were behind Mr M [REDACTED] and he was at a spot where the light was shining and the plaintiff was at the gate where it was dark. The plaintiff was in the dark and his signals would not be seen by Mr M [REDACTED]. He further stated that is impossible.

[33] Mr Motaung was asked to clarify what happened when they arrived at the police station and he testified that when he arrived at the charge office accompanied by the plaintiff and Mr M [REDACTED] they found an officer there. While he was explaining to the officer the captain came in and took the three of them to an office upstairs where they found another senior officer. They were asked to explain why they were at the police station. Mr Motaung said he explained as is stated in his statement. The statement was taken in that upstairs office with all three of them there. The plaintiff and Mr M [REDACTED] just stood there and said nothing and the captain said that a docket must be opened. He further testified that he did not know the captain or any of the police officers who were with him. He saw them for the first time that day.

- [34] Mr Motaung was further asked to clarify what he meant when he said the gate was not locked. He testified that when he arrived at the site, Mr M [REDACTED] opened the gate for him and he noticed that it was not locked. He stated that to open and unlock are two different things.
- [35] The second witness who testified for the 1st defendant was the arresting officer, Captain Matshitsho (Captain). He testified that on the morning of 22nd March 2018, Mr Motaung came to the police station in the company of the plaintiff and Mr M [REDACTED] and narrated how theft took place according to the explanations he got from the plaintiff and Mr M [REDACTED]
- [36] The captain testified that Mr Motaung explained to him that he suspected that the plaintiff and Mr M [REDACTED] were involved in the theft and gave reasons why he was suspecting them in their presence and also that they did not report the incident to the police. Mr M [REDACTED] and the plaintiff did not deny the allegations against them and did not give any explanation to him, they just kept quiet. He further testified that after the statement was made by Mr Motaung and under circumstances where the plaintiff and Mr M [REDACTED] remained silent despite the allegation made against them, he arrested them. He stated that he arrested them after they were pointed out by Mr Motaung that he suspected them of having been involved in the crime. The captain further testified that he read and explained the notice in terms of the Constitutional rights to Fani Thobane, D [REDACTED] M [REDACTED] and Magic Makobe (the plaintiff).

[37] Under cross examination, it was put to the captain that he did not have reasonable suspicion that the plaintiff and Mr M [REDACTED] had committed the crime of theft. The captain testified that he did have a reasonable suspicion as he relied on what Mr Motaung said in the presence of the plaintiff and Mr M [REDACTED] and the fact that the two did not deny the allegations made against them in their presence. They did not even make or give any explanation instead they kept quiet. The captain also testified that two were pointed out by the complainant as the people he suspected to have committed the crime or to have been involved with the robbers and assisted or enabled them to commit the crime. The captain testified that he looked at the evidence before him and under the circumstances, formulated his own view of a reasonable suspicion because the two security guards did not report the incident to the police, and also when Mr Motaung was reporting the incident at the police station and stating that he suspected them in their presence, they did not dispute anything and just stood there quietly.

[38] It was put to the captain that the plaintiff will tell the court that he was unlawfully arrested. The captain denied that the plaintiff was unlawfully arrested because Mr Motaung made the statement in the presence of the plaintiff and Mr M [REDACTED] and they did not deny the allegations and just kept quiet. He found the statement made by Mr Motaung to be reasonable . They also did not report the incident to the police. He said he acted as a responsible police officer under the circumstances and arrested them.

- [39] It was put to the captain that the witnesses for the plaintiff will tell the court that there was a gun shot that was fired at the site. The captain testified that he did not know anything about that.
- [40] It was put to the captain that the witnesses for the plaintiff will tell the court that their constitutional rights were not explained to them. The captain testified that he did explain their constitutional rights to them and he even went as far as to explain to both the plaintiff and Mr M [REDACTED] in Sepedi.
- [41] It was also put to the captain that the witnesses for the plaintiff will tell the court that they were not there when the statement was made. The captain denied this and reiterated that when Mr Motaung narrated the story and even stated that he suspected them, they were standing there and just kept quiet. He testified that he detained them after the statement was made in their presence clearly stating that they are being suspected of having being involved in the crime and instead of denying the allegations against them they just kept quiet. He admitted that he did not ask the two to explain their version as he was of the view that a person would not stand quietly while they were being accused of theft and not defend themselves.
- [42] It was put to the captain that the witnesses for the plaintiff will tell the court that he had said that they did not look like security guards, and rather looked like suspects and they should be detained. The captain testified that he never said that.

- [43] The captain also testified that the detainees were released on the 26th March 2018 at 07:35 by the investigating officer. It was put to the captain that when the detainees arrived at the court they were told to go home.
- [44] It was put to the captain that the complainant was not the owner of the stolen machines. The captain testified that Mr Motaung was given the responsibility to guard the machines and therefore had the responsibility to report the crime.
- [45] The third witness to testify was the plaintiff and he testified that he was working night duty on 21st March 2018. His shift started at 18:00 but he checked in at 17:50 to relieve the day duty guards and he and Mr M [REDACTED] completed the OB indicating the time they started work and the material they found on site. He further stated that they were not given any protective equipment.
- [46] The plaintiff testified that they took turns patrolling and rotated hourly from 20:00, and Mr M [REDACTED] was the first one to start. At 00:00 it was Mr M [REDACTED] turn to patrol and he also patrolled with him. He was standing outside the guardroom patrolling there and the toilet is also close by. Mr M [REDACTED] was patrolling at the back of the site and when he came back facing him, he saw someone entering the camp and signalled to Mr M [REDACTED] to hide as there was someone behind him. He testified that Mr M [REDACTED] was not far from him, he was 14 paces away. He further testified that there was a lamp

outside the camp and it was shedding some light into the camp, however the light was obscured by the high building in the camp.

[47] The plaintiff testified that he hid in the toilet and Mr M [REDACTED] also took cover. It was around 00:00 when all this was happening and he emerged from his hiding place at 00:45. Before he came out of his hiding place he heard 3 gun shots. He and Mr M [REDACTED] found each other and both of them started to look for the TLB driver (Fani) and found him with his hands and feet tied up with shoe laces and a cloth stuffed in his mouth, and they freed him and went to the guardroom.

[48] The plaintiff further testified that he called Mr Motaung with his cell phone which had R2 airtime and there was no answer. Mr M [REDACTED] then sent a please call to Mr Motaung with the plaintiff's phone and there was no response. Mr M [REDACTED] then went to the second camp also under the control of Mr Motaung to request a colleague to call Mr Motaung. He testified that the distance between the two sites is four minutes' walk. The Colleague (Sapi) had R3 airtime, called Mr Motaung and he answered. Mr Motaung came to the camp and he arrived at 04:00, he was only dressed in pants, had a gun in his hands. He wanted to know what happened and plaintiff testified that they were afraid of the gun and could not answer. He said he will come back at 06:00 and before he left he insulted and swore at them, accusing them of knowing where the stolen goods are and also being in cahoots with the thieves. Plaintiff testified that he and Mr M [REDACTED] did not respond.

- [49] The plaintiff further testified that the reason he allowed Fani to sleep in the TLB is because when he started working at the company, he found that it was a practice that was done and he followed suite. He was told that Fani was allowed to sleep on site because the route he took when he went home was dangerous and he had to pass through a bridge where people were attacked and killed.
- [50] Plaintiff testified that Mr Motaung came back at 11:00 in the company of the police and requested them to show them where the thieves gained access into the camp. They walked to the back of the camp and showed them the hole that was cut in the fence that was surrounding the entire camp. The police never asked any questions and they went back to the guardhouse, thereafter they were taken to the police station. When they arrived at the police station he together with Fani and Mr M[REDACTED] were put in a separate room and Mr Motaung went to meet a senior police officer. Later on they were each given paper (notice of rights in terms of the Constitution) and called individually into a separate room and told to sign without any explanation and he signed. He testified that he signed a document he did not understand. The police even said that they don't see security officers as they only see thugs. Then they were arrested and kept in detention for four days. On Monday they were taken to court in Mamelodi West and put in a holding cell for three hours, and thereafter they were called out individually and were told by a police officer that they are released and they must go home.

- [51] The plaintiff further testified that he did not have a legal representative at the time and he was never advised that he is entitled to one. He was not even given an opportunity to communicate with his next of kin to advise them of his situation.
- [52] It was put to the plaintiff that Mr Motaung testified that there was a van that was used to collect the machines. The plaintiff testified that he did not see a van.
- [53] Under cross examination the plaintiff admitted that when Mr Motaung was telling the police what happened according to their explanations to him, he was there with Mr M [REDACTED]. He admitted that when Mr Motaung told the police that he was suspecting them and giving reasons why he suspected them, he did this in their presence. When he was pressed under cross examination why he did not run to seek help either from the police, Sape or Mr Motaung, he responded that he was afraid. He was asked where was his cell phone when he was hiding in the toilet, his answer was that it was on him but he forgot about it as he was afraid.
- [54] Under cross examination it was put to the plaintiff that in his evidence in chief he had testified that he saw a person entering the site, while his legal representative had put it to Mr Motaung that there were three people who entered the site. The plaintiff testified that he disputes that and he insisted that he saw one person entering the site.

- [55] Under cross examination the plaintiff was asked if it was a coincidence that the pattern of patrolling was changed, as suddenly both of them were patrolling at the time when Mr M [REDACTED] was supposed to be patrolling alone. The plaintiff testified that it was not a coincidence. He explained that they changed because it was midnight and they had to both patrol. He further said between 00:00 and 06:00 they both had to move out of the guardroom and do dual patrolling. The legal representative for the 1st defendant put it to him that he was now fabricating a story because this important evidence was not mentioned in his evidence in chief.
- [56] Under cross examination it was put to the plaintiff that Mr Motaung had testified that it was not possible for Mr M [REDACTED] to have seen his signals as he would have been in a dark place and Mr M [REDACTED] would not have seen him signalling. The plaintiff testified that there was a building obscuring the light, but there was a little light that reached the place where he stood.
- [57] Under cross examination it was put to the plaintiff that he was fabricating a story, as his testimony that Fani's (the TLB driver) hands and feet were tied up was not put to Mr Motaung by his legal representative. The plaintiff could not give a clear answer. It was further put to the plaintiff that his legal representative did not know about this story as he would have put it to Mr Motaung. The plaintiff insisted that he had told his legal representative.

- [58] The plaintiff was also asked to explain why in his evidence in chief he did not mention anything about a gun being pointed at Fani, when this was put to Mr Motaung by his legal representative. The plaintiff testified that he was hiding and he did not see anyone being pointed at with a gun. He confirmed though that he heard three gun shots sometime after midnight. It was again put to him that his legal representative mentioned one gun shot when he was cross examining Mr Motaung. The plaintiff insisted that he heard three gunshots.
- [59] It was put to the plaintiff under cross examination that he saw one person entering the site and he did not have a gun in his hand, there was no reason for him to be scarred as there were two guards against one unarmed person. The plaintiff testified that the manner in which the person entered the site gave him a fright.
- [60] It was put to the plaintiff that he could have refused to accept the work in the event he was not provided with protective equipment and his response was that he was desperate for work .
- [61] During cross examination the plaintiff was asked why he did not take the key and open the gate and go and seek help. The plaintiff testified that he feared for his life and he completely forgot that he was a security guard.

- [62] During cross examination the plaintiff confirmed that there was a furrow and further said that it was dug by the TLB. The plaintiff conceded under cross examination that Fani was not supposed to be on site at that time. He further testified that Mr Motaung came accompanied by two policemen. It was put to the plaintiff that he is now fabricating a story as the question that the police came to the scene of the crime was never put to the arresting officer by his legal practitioner. The plaintiff insisted that the police came to the scene of the crime.
- [63] During cross examination it was put to the plaintiff that there are several discrepancies' between his version and that of his legal representative. The plaintiff reluctantly accepted that he does see the discrepancies'. The plaintiff was asked why he did not testify in his evidence in chief that Mr Motaung was friends with the police as this was put to Mr Motaung by his legal representative. The plaintiff denied that ever said that to his legal representative.
- [64] The last witness to testify was Mr M [REDACTED]. He testified that he together with the plaintiff started their shift at 18:00 on a rainy evening, and that they only got the OB and they were not given any protective material. He testified that he accepted the job without the protective gear because he was destitute and he wanted to provide for his children. He testified that there was a sensor light outside the gate next to the guardhouse and it would turn itself on and off. He further testified that at midnight it was his turn to patrol and when he was coming back from patrolling the back of the site, the plaintiff signalled to him to take cover and the sensor light was off at that time. He was able to see the plaintiff

because there was a beam of light coming from Matimba casting a weak beam towards the gate. He testified that he crept inside a building that was still under construction and hid inside an empty room which had a window. He saw three robbers and Fani (the TLB driver) through the window. He testified that he does not know how they got hold of Fani. While observing he saw Fani carrying a machine together with one of the robbers, who was carrying a gun in his other hand.

[65] Mr M [REDACTED] further testified that he watched the robbers leaving the site through the spot they used to gain entrance into the site.. He further testified that Fani usually slept on site even when he and plaintiff were not on duty. He said that he understood that Mr Motaung did not know that Fani slept on site, but the explanation he received from Fani was that he could not go home as the route he had to take to get home passed through a dangerous bridge where people would be attacked and would sometimes be killed.

[66] Mr M [REDACTED] testified that while he was hiding he heard three gun shots and after some time it was quite and he emerged from his hiding place. He had no phone and his cell phone had no sim card and he used it to check the time and for listening to the radio, and he was very scared. Because he had no phone he could not call the police or Mr Motaung. He could not do anything as he was in a state of shock. He testified that after coming out of his hiding place he and the plaintiff looked for Fani, heard him scream, followed the sound of the scream and found him with his hands and feet tied and a piece of cloth stuffed

in his mouth. They freed him and went to the guard house where they called Sape who then called Mr Motaung.

[67] It was put to Mr M [REDACTED] that Mr Motaung said he employed trained security guards and he expected them to do something instead of watching. Mr M [REDACTED] testified that he had no protective equipment and he was afraid.

[68] It was put to Mr M [REDACTED] that Mr Motaung testified that when he opened the gate for him, it was not locked. Mr M [REDACTED] insisted that the gate was locked and he unlocked it himself to let Mr Motaung in.

[69] Mr M [REDACTED] testified that Mr Motaung came to the site wanting to know what happened, topless and he looked drunk. He had his fire arm drawn out, hurling insults at them and accused them of being thieves. Mr M [REDACTED] testified that they did not respond as they were afraid and did not want to disrespect their boss. He then left and said he will see them in the morning. He returned in the morning at 06:00 accompanied by the police and they all went to inspect the hole cut in the fence and the police never asked them any questions. They were just talking to Mr Motaung. Thereafter he together with the plaintiff and Fani were put in the police van and taken to the police station. It was put to him that Mr Motaung testified that he took them to the police station himself. Mr M [REDACTED] insisted that they were driven to the police station in a police van and Mr Motaung followed in his car.

- [70] Mr M [REDACTED] further testified that on arrival at the police station they were put in one room and called one by one and questioned by the police and he was the last one to be called. He denied that they were there when Mr Motaung narrated the story to the police and also accused them of being involved in the crime.
- [71] Mr M [REDACTED] testified that he thought the police were friends with the police because they were taking instructions from him. He further testified that he thought the robbers were friends of Mr Motaung because he denied that there were gunshots and he was not there when the crime occurred.
- [72] Mr M [REDACTED] denied that the statement of rights was read and explained to him. He testified that he was not given an opportunity to state his side of the story before he was arrested. It was put to him that the captain disputed that he called them thugs as he did not see any security guards before him. Mr M [REDACTED] insisted that, that was said at the police station before they were arrested.
- [73] Mr M [REDACTED] further testified that he together with the plaintiff took their claim for unfair dismissal to the CCMA and Mr Motaung was ordered to compensate them as they lost their jobs because of this incident. He said that Mr Motaung never complied with the order.

[74] Mr M [REDACTED] was asked to state in his own words if he thought that his arrest was lawful. Mr M [REDACTED] further testified that his arrest was unlawful as they were not given an opportunity to state their case. They were scared and he expected the police to have taken them for counselling. He was of the view that the police were harsh with them and also behaved in a manner that was unacceptable.

[75] Under cross examination it was put to Mr M [REDACTED] that the plaintiff admitted that they were all present when Mr Motaung narrated the story to the police and when he was saying that he was suspecting them and even giving the reasons why he was suspecting them and they just stood there silently. Mr M [REDACTED] insisted that he was not there. It was put to him that he was now fabricating a story which he denied.

[76] It was further put to Mr M [REDACTED] under cross examination that it was not put to the captain that they were brought to the police station in a police van and also the plaintiff did not testify that they went to the police station in the police van, even the counsel for the plaintiff did not mention this. Mr M [REDACTED] seemed confused, asked for water and failed to give a clear answer.

[77] It was put to Mr M [REDACTED] that, Counsel for the plaintiff asked him whether he was given a chance to tell his side of the story and he said no, yet earlier he

told the court that they were called one by one to be questioned by the police. It was also put to him that he was fabricating a story which he denied.

[78] Under cross examination when pressed why he did not unlock the gate and run to seek help from Mr Motaung or the police, Mr M [REDACTED] testified that he could not leave the site because he was not sure how many robbers were there and he was scarred. It was put to him that during his evidence in chief he testified that he saw four people, the fourth being Fani (the TLB driver) and now he was telling the court he did not know how many robbers were there. It was put to him that he was fabricating a story which he denied.

[79] Under cross examination it was put to him that, it was not put to Mr Motaung that he was hiding inside a room. Mr M [REDACTED] testified that there is a possibility of having omitted certain information. It was put to him that this information that was very important and he should have told his Counsel about it. Mr M [REDACTED] agreed that this was a discrepancy.

[80] It was put to Mr M [REDACTED] that Mr Motaung cannot be blamed for suspecting them as they did not follow the rules by allowing Fani to sleep on site without his knowledge. He admitted that he can see why Mr Motaung suspected them. He also insisted that he saw the robbers crossing the furrow in the rain with the heavy machines and stated that the furrow was not that deep.

[81] It was put to Mr M [REDACTED] under cross examination that the captain denied ever coming to the site and Mr M [REDACTED] testified that due to his fright he only started to see him at the police station. It was also put to him that his counsel did not tell the captain that he was going to testify that the captain was at the scene of the crime. Mr M [REDACTED] seemed confused and further said that it was like that.

[82] It was put to Mr M [REDACTED] that his counsel mentioned a gunshot when he was cross examining Mr Motaung, and he had testified that he heard three gunshots.

[83] It was put to Mr M [REDACTED] that Mr Motaung testified that he was not told about the gunshots. Mr M [REDACTED] insisted that they told him and he disagreed with them about the gunshots. It was further put to Mr M [REDACTED] that it was not put to Mr Motaung that they tried to tell him about the gunshots and he refused to listen. Mr M [REDACTED] could not give a clear answer, he said that he cannot confirm or deny. It was put to him that he was fabricating a story which he denied.

[84] It was also put to Mr M [REDACTED] that he had testified that they heard Fani scream and they went to him and he confirmed this. It was put to Mr M [REDACTED] that this version was not put to Mr Motaung by his lawyer. The version that was put to him was that Fani's hands and feet were tied up with shoelaces and a cloth was stuffed in his mouth. Mr M [REDACTED] insisted that he remembers telling Mr

Motaung about this and in any event his case is handled by a different lawyer. It was put to Mr M [REDACTED] that the lawyer did not put this version to Mr Motaung and he insisted that he remembers telling the lawyers, perhaps they might have forgotten. It was put to him that this is another fabrication, and he insisted that he was telling the truth.

[85] It was put to Mr M [REDACTED] that some of the insults he testified that were hurled at them by Mr Motaung, were not confirmed by the plaintiff. Mr M [REDACTED] testified that the plaintiff might have forgotten. It was put to Mr M [REDACTED] that the insults he described were different to those described by the plaintiff and it was a fabrication of a story. Plaintiff said Mr Motaung used the word "voetsek" whereas Mr M [REDACTED] said Mr Motaung used the words "you must not be too familiar, you are thieves and don't tell me s..." It was also put to Mr M [REDACTED] that Mr Motaung denied that he insulted them and that is why the description of the insults is different. Mr M [REDACTED] insisted that Mr Motaung did insult them.

[86] It is trite that the onus rests on the 1st defendant to justify an arrest. In the matter of **Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E-F** the court stated that "*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 should bear the onus of proving that his action was justified in law.*"

[87] In the matter of **Relyant Trading (Pty) Ltd v Shongwe [2007] 1 SA 375 (SCA)** at para 6, the Supreme Court of Appeal held that “... *to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as an agent or employee deprived him of his liberty.*”

[88] Section 40(1) of the Criminal Procedure Act 51 of 1977 reads as follows :

(1) A peace officer may without a warrant arrest any person –

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects to have committed a schedule 1 offence other than the offence of escaping from custody.

[89] The section requires that the peace officer must have a reasonable suspicion that a schedule 1 offence had been committed by the suspect when effecting an arrest in terms Section 40(1)(b). The term ‘reasonable grounds to suspect’ has enjoyed considerable attention by our courts. In the matter of **R v Van Heerden 1958 (3) SA 150 T**, Galgut AJ (as he then was) stated that “*these words must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have suspicion.*”

[90] This principle was followed in the matter of **Duncan v Minister of Law and Order (38/1985) [1986] ZASCA 24; [1986] 2 All SA 241 (A) (24 March 1986)** where HJO van Heerden JA said the following, “*The so called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:*

- 1) *The arrestor must be a peace officer.*
- 2) *He must entertain a suspicion.*
- 3) *It must be a suspicion that the arrestee committed an offence referred to Schedule 1 to the Act*
- 4) *The suspicion must rest on reasonable grounds.*

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect."

[91] In the matter of **Minister of Safety and Security v Sekhoto and Another** (2011 (1) SARC 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; 131/10 (19 November 2010), the jurisdictional facts for a section 40(1)(b) defence were confirmed by Harms DP at para 6 where he stated that "*As was held in Duncan v Minister of Law and Order, the jurisdictional facts for a section 40 (1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.*

[92] Turning to the matter before me, regarding the issue of unlawful arrest and detention it is not in dispute that the police arrested the plaintiff and deprived him of his liberty. The 1st defendant however is relying on the defence of section 40(1)(b) of the Criminal Procedure Act. The jurisdictional facts which have been developed through our jurisprudence over many years and crystallised in the

matter **Minister of Safety and Security v Sekhoto** at para [91] *supra* are present and this justified them in invoking the power conferred upon them by section 40(1)(b). These jurisdictional factors are as follows: (i) *the arrestor must be a peace officer*; (ii) *the arrestor must entertain a suspicion*; (iii) *the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1*; and (iv) *the suspicion must rest on reasonable grounds*.

[93] The Supreme Court of Appeal in the matter of **Biyela v Minister of Police (1017/202) [2022] ZASCA 36 (01 April 2022)** stated that

"[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unpopularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offense has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of the arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a suspicion because he or she has a discretion. The discretion to arrest must be exercised properly"

[94] In terms of the four established jurisdictional factors, in the matter before me, the following may be said:

- 94.1 the 1st defendant's witness (captain) is a peace officer within the definition and meaning of peace officer in terms of section 40(1)(b) of the Act;
- 94.2 the peace officer entertained a suspicion that a crime of theft had been committed by the plaintiff;
- 94.3 the peace officer's suspicion was that the plaintiff's offense of theft, is incorporated in schedule 1 offences of act 51 of 1977;
- 94.4 the peace officer's suspicion rested on reasonable grounds that the plaintiff had committed the crime of theft due to the explanation that was given to him by Mr Motaung in the presence of the plaintiff and Mr M [REDACTED] and the two just stood there quietly and never said anything to contradict the accusations leveled against them or give an explanation to the police when they were called one by one to be questioned by the police as testified by Mr M [REDACTED]
- 94.5 the peace officer acted like a reasonable police man and arrested plaintiff and Mr M [REDACTED] upon hearing the reasons why Mr Motaung suspected them of being involved in the theft being that :
 - (a) Fani was on site after 17:00 contrary to the rules;
 - (b) The robbers would not have been able to cross the 2m deep furrow full of rainwater carrying the three heavy machines;

- (c) The failure of the plaintiff and Mr M [REDACTED] to call the police or Mr Motaung;
- (d) The failure of plaintiff and Mr M [REDACTED] to run and seek help in order to protect the property on site;
- (e) Despite Mr Motaung accusing the plaintiff and Mr M [REDACTED] of being in cahoots with the robbers, instead of saying something to deny the accusation against them and explain their side of the story to the police, they chose to remain silent;
- (f) The plaintiff and Mr M [REDACTED] were pointed out to him as the suspects by Mr Motaung.

[95] I find that both the plaintiff and Mr M [REDACTED] were not credible witnesses, they were evasive and were hesitant and took time when responding to questions.

[96] I find that the court could not rely on the evidence of both the plaintiff and Mr M [REDACTED]. They contradicted each other on several material facts:

- (a) They contradicted each other on whether or not they were present when Mr Motaung narrated the story to the captain and especially when he accused them of being involved in the crime and being in cahoots with the robbers. The plaintiff admitted during cross examination that they were all present when Mr Motaung narrated the story and accused them of being involved in the crime. Mr M [REDACTED] denied that he was present and said he was not there.

- (b) They contradicted each other on whether they were taken to the police in a police van. The plaintiff did not testify that they were brought to the police station in a police van, however Mr M [REDACTED] insisted that they were brought to the police station in a police van.
- (c) They contradicted each other on how they contacted Sape. The plaintiff said Mr M [REDACTED] went to Sape whereas Mr M [REDACTED] said they called him.
- (d) They contradicted each other in regard to the insults they allege were hurled at them by Mr Motaung. The court will not repeat what was said and same can be found at paragraph [85].

[97] I find that the witnesses for the 1st defendant were reliable, prompt in answering questions and corroborated each other in all material facts. I find the version of the witnesses for the 1st defendant to be more probable than that of the plaintiff and Mr M [REDACTED]

[98] The jurisdictional facts for a section 40(1)(b) defence were satisfied and the arrest by the captain was necessary and lawful.

[99] The plaintiff contends that he was held in detention for an unreasonably long time before he was released. Normally after an arrest, in terms of section 50 the accused person must be brought before court within 48 hours of the arrest. The exception will be if the 48 hours fall outside the ordinary court hours, or if

the suspect because of his or her physical condition or illness could not be brought before a court or if the suspect was arrested outside the area of jurisdiction of the court. *In casu*, the plaintiff was arrested on 22nd March 2018 just after 08:00 and released on 26th March 2018 at 07:45. I am of the view that under the circumstances there was no unreasonable delay in bringing the plaintiff to court as he was brought to court within 48 hours of the arrest. In my view the claim for unlawful detention stand to be rejected by the court.

[100] The plaintiff brought a claim for malicious prosecution against the 2nd and 3rd defendants and it is noteworthy to mention that this claim was not defended. The plaintiff had indicated in the joint practice note that they intend to move for a default judgement against the 2nd and 3rd defendants.

[101] The plaintiff testified that the proceedings against him were instituted by Mr Motaung who instigated them. The plaintiff alleges that Mr Motaung's actions of giving instructions to the police to arrest the him and his utterances made the captain to arrest him. The plaintiff further states that it is written on the docket that the matter is *nolle prosequi*. He further alleges that a prosecutor was not even called to confirm this and to state his/her reasons. He further alleges that this shows that indeed there was no evidence from the onset that the plaintiff could be prosecuted on. Plaintiff states that from the inception of this matter the 1st defendant and Mr Motaung were malicious, they were friends and doing each other favours.

[102] Section 179 of the Constitution of the Republic of South Africa, 1996 states as follows:

- (1) *There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –*
 - (a) *a National Director of Public Prosecutions, who is the head of the prosecution authority, and is appointed by the President, as head of the national executive; and*
 - (b) *Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.*
- (2) *The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.*

[103] Section 20(1) of the National Prosecuting Authority Act 32 of 1988 states as follows: *The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to -*

- (a) *institute and conduct criminal proceedings on behalf of the State;*
- (b) *carry out any necessary functions incidental to instituting and conducting such criminal proceedings,*

Vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

[104] In my view the Section 179 Constitution and section 20(1) of the NPA are crystal clear and not difficult to understand. It is unfortunate and regrettable that the plaintiff duly represented chose to disregard the Constitution and bring a claim for malicious prosecution against the 2nd and 3rd defendants. The role of the Court is to protect and uphold the Constitution and this claim is bad in law and stands to be dismissed with costs.

[104] To add salt to injury, the plaintiff brings this claim in circumstances wherein the matter was declared *nolle prosequi* by the prosecutor. This means that the Prosecutor declined to prosecute the plaintiff and Mr M [REDACTED]. In my view this claim should not have been brought at all as the plaintiff and Mr M [REDACTED] were not prosecuted.

[105] The plaintiff also brought a claim for loss of employment against the 2nd and 3rd defendants and it is noteworthy to mention that this claim was not defended. The plaintiff pleaded at paragraph 6.2 of his amended particulars of claim that the matter in regard to his unlawful termination of his employment was dealt with by the CCMA and the 3rd defendant settled the matter. The 2nd defendant testified that the plaintiff and Mr M [REDACTED] brought a claim for unfair dismissal and the matter was settled at the CCMA and he was ordered to compensate them with three month's salary, which he did.

[106] The plaintiff during his evidence in chief testified and confirmed that the unfair dismissal claim was settled and the 2nd defendant did pay him in instalments and he is not sure if he was paid all the money due to him.

[107] Section 142A of the Labour Relations Act No 66 of 1995, (LRA) provides that:

- (1) *"the Commission may, by agreement between the parties or on application by a party, make any settlement in respect of any dispute that has been referred to the Commission, an arbitration award.*
- (2) *for purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7)."*

[108] Section 143 (1) of the LRA provides that :

"An arbitration award by a Commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory award."

[109] Section 145 (1) of the LRA provides that :

“Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) within six months of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.”

[110] In the matter of **Molaudzi v S (CCT42/15) ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015)** at paragraphs 14-16, where the principle of *Res Judicata* was explained as follows:

“[14] Res judicata is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties.

Claassen defines res judicata as –

[a] a case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgement, even if it is erroneous. In regard to res judicata the enquiry is not whether the judgement is right or wrong, but simply whether there is a judgement.

[15] In **Bertram, the Supreme Court of the Cape of Good Hope** traced the doctrine back to the *Digest* (50.17.207), which provided that – as a rule

of law – once a matter is adjudged it is accepted as the truth:

"The meaning of the rule is that the authority of res judicata includes a presumption that the judgment upon any claim submitted to a competent court is correct and this presumption being juris et de jure, excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius, does not permit of the same thing being demanded more than once. On the other hand, a presumption of this nature, unless carefully circumscribed, is capable of producing great hardship and even positive injustice to individuals. It is in order to prevent such injustice that the Roman law laid down the exact conditions giving rise to the exception rei judicatae."

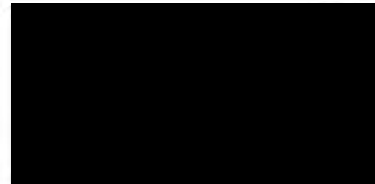
[16] *The underlying rationale of the doctrine of res judicata is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts."*

[111] Turning to the matter before me, it is common cause between the parties that there is an award that was issued by the Commissioner of the CCMA and the matter was settled. Taking into account the provisions of section 143(1) of the

LRA which state that an arbitration award issued by the Commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, it is my view that the dispute between the parties was brought to finality. Furthermore taking into consideration the principle of *res judicata* as defined in by the Constitutional Court in the **Molaudzi** matter, the dispute was settled and finalised by the CCMA and the plaintiff should not have brought a claim for loss of employment as same was dealt with and finalised at the CCMA. The plaintiff should approach the labour court if he wishes to challenge the award of the commissioner and therefore this claim for loss of employment stands to be dismissed with costs.

[112] In the premises, the following order is made:

- (a) The plaintiff's claims for unlawful arrest and detention, malicious prosecution and loss of employment are dismissed with costs.



M.M.D. LENYAI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF: ADV. N Sidzumo

INSTRUCTED BY: Makhafola & Verster Inc Attorneys, Pretoria

FOR THE DEFENDANTS: ADV L Liphoto

INSTRUCTED BY : State Attorney, Pretoria

HEARD ON: 09- 13 October 2023,

Heads of Argument submitted on 20 October 2023

DATE OF JUDGMENT: 10 April 2024