REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED	
04 September 2020	**C.J. COLLIS**
DATE	SIGNATURE

CASE NO:15853/17 & 15851/17

Consolidated

In the matter between:

TOTA SIMON SEBOTSA **FIRST PLAINTIFF**

KENNETH TSHABALALA **SECOND PLAINTIFF**

and

THE MINISTER OF POLICE **FIRST DEFENDANT**

THE NATIONAL PROSECUTING AUTHORITY **SECOND DEFENDANT**

JUDGMENT

COLLIS J

INTRODUCTION

1. The plaintiff's action against the first and second defendants is premised as against the first defendant on their alleged conduct of unlawful arrest and detention and as against the second defendant on their alleged conduct of malicious prosecution.

ISSUES TO BE DETERMINED

2. The issues this court was called upon to determine, in the first instance is whether the arrest was justified and thus lawful in terms of the provisions of Section 40(1) of the Criminal Procedure Act 51 of 1977 ("the Act"). In the present instance the arrest took place without a warrant in terms of the provisions of Section 40(1)(b) of the Act.

3. Secondly, this court was called upon to determine the circumstances of the prosecution which was instituted and terminated in favour of the plaintiffs, whether such prosecution was unreasonable and without probable cause, and further whether same was malicious.

4. At the commencement of the proceedings, the parties requested the court to separate the issues of merits from that of the quantum and upon such application being made to the court such separation was ordered by the court.

BACKGROUND

5. On 2 April 2014, the plaintiffs were accused in a rape matter after being arrested by members of the South African Police Service, Captain Selaelo Ramabala alongside two other colleagues as a result of a pointing out made by the complainant who identified the plaintiffs as two of the three men who had kidnapped, gang raped and robbed her of certain valuables.

6. Subsequent to their arrest, the plaintiffs were detained at the Lyttleton Police Station and appeared before court the following day. They never applied for bail awaiting trial and were subsequently acquitted on 7 December 2016. The plaintiffs have now instituted a damages claim arising from the alleged unlawful arrest and detention and malicious prosecution.

7. In respect of the lawfulness of the arrest, the defendant bears the *onus* and duty to begin.

8. In respect of the malicious prosecution, the plaintiff bears the *onus* to prove that the prosecution was malicious.

9. It is common cause between the parties that the policemen who were involved in the arrest were acting within the course and scope of their employment with the South African Police Services.

EVIDENCE

10. As the defendant carried the *onus* to prove the lawfulness of the arrest, it also had the duty to begin. The defendant called four witnesses, namely, Captain Ramabala, Constable Letseitsa, Ms Mokome and Ms Monyoko - Emeana.

11. Captain Ramabala in brief testified as follows: He was a retired Captain of the South African Police Service having retired during 2017 with 37 years' experience as a police officer. At the time of his service as a police officer he had gained extensive experience in dealing with rape and domestic violence cases. As to the matter at hand, he became involved in the matter when he was assigned the investigating officer of a serial rapist one, Peter Dashboy Khoza. During this investigation, the suspect therein was found to be linked to a number of matters including the rape in Lyttleton. It is this very rape of the complainant which brought about the arrest of the plaintiffs' in the matter before this court. As he was also later assigned the investigating officer of the complainant's case, he called upon her to attend an identification parade. At this identification

parade Mr Khoza was positively identified by the complainant as one of the three men who had raped her.

12. On the day that she attended the identity parade, Ms Maphala, the complainant, informed him that there were two other men who had repeatedly raped her on the day of the incident. She indicated that she had seen them clearly and was able to identify them. He informed her that if she ever saw the two men, she should contact him and he would arrest those men. The complainant called him some eight (8) months after the identity parade was first held and informed him that she saw the other two suspects at the Centurion Taxi Rank and that he should come to the taxi rank. He asked her if she was certain and she indicated that she was. Captain Ramabala, who was at home at the time, told her to make sure and if she was very certain, to call him back the next day and he would accompany her to arrest the suspects.

13. The next day the complainant called to say that she was certain that it was them. He picked up the complainant. They drove to Lyttleton Police Station to get some back up assistance to carry out the arrest. Upon arrival at the police station he spoke to the Station Commander who then called two police officers who also questioned to the complainant. Once they were satisfied that the complainant was certain, they proceeded to the Centurion Taxi Rank to identify and arrest the suspects. Captain Ramabala further testified that when they arrived at the taxi rank, the complainant alighted from his vehicle and joined the other two police officers. Captain Ramabala went on to park his vehicle. After he parked, the two police officers came back with one of the suspects who turned out to be Kenneth Tshabalala, the second plaintiff. At that stagem the second plaintiff did not dispute this account but sought to demonstrate unconvincingly that this was indicative of an improper motive. Captain Ramabala informed Mr Tshabalala that he was under arrest for rape and read his rights to him.

14. A short while later, the two officers came back with the complainant and another suspect, later identified as Mr Tota Sebotsa. Captain Ramabala also informed him that he was arresting him for rape and informed him of his rights.

15. Constable Mulungela Letsietsa testified that he was a Constable in the South African Police Station with 11 years' experience and based at the Lyttleton Police Station. It was his testimony that he became involved in this matter when Captain Ramabala came to their station to ask for assistance in effecting an arrest. He was with Constable Mabunda when they were called by their Station Commander Brigadier Munganyi and asked to assist with an arrest. They were given an opportunity to speak to the complainant. She told them that she was raped by three men. The one was arrested and she saw the other two suspects at the taxi rank near Centurion Mall. She gave a description of the two suspects i.e. the other one being tall and dark skinned and the other short and a little lighter skinned. They asked the complainant if she could point them out and if she was sure that it was them. The complainant confirmed that she was.

16. Upon their arrival at the Centurion Taxi Rank, the complainant alighted from Captain Ramabala's car and stood with them. She immediately pointed out one of the suspects who was in a group of men who were playing dice. They went to the man (later known as Mr Kenneth Tshabalala, the second plaintiff) and proceeded to arrest him. They took him to Captain Ramabala's car where Captain Ramabala explained to Tshabalala that he is being arrested for rape.

17. They then proceeded to look for the second suspect with the complainant. The complainant pointed out a man who was washing a taxi. He was later identified as Mr Tota Sebotsa. They arrested him and took him to Captain Ramabala's car where Captain Ramabala told him that he was being arrested for rape and informed him of his rights. As they left the taxi rank, they then drove back to the Lyttleton Police Station where Captain Ramabala formally charged both of them.

18. Ms Mokome was the third witness for the defendant. She testified that she was appointed as a Prosecutor in 2003 and since her appointment she almost exclusively deals with the prosecution of rape cases. In respect of the present matter she testified that she was assigned the case docket in question and upon

studying same she was satisfied that the evidence in the case docket established a *prima facie* case of rape.

19. As to the evidence at the disposal of the State, she testified that there was DNA evidence linking one Peter Khoza as one of the assailants and that the other two assailants were pointed out by the complainant during their arrests. In relation to the latter, she was able to give a description of the other two assailants which fitted the description of the plaintiffs before court. Premised on this she was satisfied that a prosecution can be embarked upon even in the absence of DNA evidence linking the plaintiffs before court.

20. Ms Monyoko-Emeana, was the last witness called by the defendant. It was her testimony that she had twenty years' experience as a prosecutor in the Regional Court and that she had experience prosecuting thousands of rape cases. In respect of the criminal trial she conducted the prosecution. Prior to doing so, she studied the docket and concluded that there was a *prima facie* case against the plaintiffs. She premised this upon the pointing out of the plaintiffs resulting in their arrests, and the J88 completed following the sexual assault on the complainant. In addition to this, the complainant was able to give a description of her assailants and that she had pointed out the plaintiffs on the day of their arrests.

21. The two plaintiffs were the only witnesses who testified on their own behalf.

22. The evidence of the first plaintiff can be summarised as follows: It was Mr Sebotsa's testimony that he was indeed arrested at a taxi rank as testified to by the defendant's witnesses, but he denied that his arrest came about as a result of him having been pointed out by the complainant who was present at the scene. Instead it was his testimony that Captain Ramabala had promised him a reward of R100 000, 00 for his assistance in facilitating the arrest of Peter Khoza who was known to him and at whose parental home he was residing at some stage. He however never testified how he went about in assisting the police to secure the arrest of Mr. Khoza. On the day of his arrest he denied that the complainant was present and that the latter had pointed him out to the

arresting officers. The day following his arrest he made his first appearance in court and it was on this occasion that he had made an election not to apply for bail.

23. The evidence of the second plaintiff, Mr. Kenneth Tshabalala can be summarised as follows: He testified that on the day of his arrest, he was at the Centurion taxi rank when he was confronted by two police officers, one pointing a firearm at him and he was then arrested and taken to the vehicle of Captain Ramabala, whereafter he was taken to the Lyttleton Police Station. He testified that Captain Ramabala was known to him as he in the past used to visit the first plaintiff, making enquiries about the whereabouts of Mr Khoza. Upon his arrival at the police station he was read his Constitutional rights as an arrested person and the following day he was taken to court for his first appearance. He never exercised his right to apply for bail as he testified that he did not have a permanent home address. He denied any involvement in the perpetration of these crimes against the complainant. He also denied that the complainant was present on the day of his arrest but could not exclude this possibility.

24. The witnesses who testified on behalf of the defendants although not without any criticism cannot be found to have tendered unreliable evidence before this court, specifically not in relation to how the arrest of the plaintiffs were carried out. At no point prior to the day of their arrest did the arresting officers carry out any steps to affect an arrest, more so if regard is had to at least the version of the first plaintiff, that he was known to Captain Ramabala.

25. The defendants' witnesses, I also cannot conclude displayed any improper motive that resulted in them carrying out these arrests. If they wanted to falsely implicate the plaintiffs before court, they would have secured their arrest much earlier than only approximately eight (8) months after the allege incident. On the first plaintiffs' own evidence, Captain Ramabala was aware that he found himself at the Centurion Mall Taxi Rank, and that he had visited the taxi rank quite frequently in the past. I also cannot conclude that the prosecutors who testified before this court, had any reason to falsely tender evidence before this

court. In all I am satisfied that the defendant's witnesses made favourable impressions on the Court.

26. In contrast the same good attributes could not be attributed to the plaintiffs before Court. Mr Sebotsa was an entirely unsatisfactory witness. He contradicted himself in many respects including on whether or not he was informed of the charges facing him as well as his Constitutional rights. He also denied that the complainant was present during the arrest and testified that the policemen identified him as Tota Sebotsa. This evidence was patently false since it had not been put to Captain Ramabala or Colonel Letseitsa during their cross-examination. It was also inherently improbable because, on being questioned by the Court, Mr Sebotsa was unable to explain how the policemen (and complainant) would have been aware of his name.

27. Mr Tshabalala albeit not necessarily within his knowledge was adamant that during his arrest the complainant was not present and that she had pointed him out. If not certain about this fact, he could merely have conceded that it cannot be excluded that he was pointed out by the complainant. When asked by the Court as to whether his Constitutional rights were explained to him on the day of his arrest, he confirmed that his rights were indeed explained to him at the police station following his arrest. As for the evidence of Mr. Tshabalala, this Court could not conclude that he was evasive or not able to make concessions when necessary.

ANALYSIS AND FINDINGS

28. An arrest without a warrant is lawful if it is shown that the arrest meets the requirements in Section 40 of the Act. This principle was pronounced in Minister of Law and Order v Hurley[1], where it was held:

[1] 1986 (2) ALL SA 428 (A); 1986 (3) SA 568(A) p587 – 589.

"Arrest without a warrant by peace officers acting under the powers of arrest conferred upon them by the Criminal Procedure Act 51 of 1977 and its predecessors (Act 31 of 1917 and Act 56 of 1955) have on many occasions given rise to disputes in which the lawfulness of an arrest was in issue, and in cases of this kind the question of onus may be of vital importance. It has been held or assumed, in a number of cases decided in the Provincial and Local Divisions of the Supreme Court that the onus lies on the peace officer who made the arrest in issue to prove that he acted lawfully i.e. that he acted within the powers of arrest conferred upon him by statute."

29. Section 40 of the Act reads as follows:

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

……..

(b) Whom he reasonable suspects of having committed an offence referred to in schedule 1

…….

30. In Duncan Minister of Law and Order [2], the court established that jurisdictional facts must exist before such power can be exercised to Section 40(1)(b), namely:

(a) the arrestor must be a peace officer;
(b) the arrestor must entertain a suspicion;
(c) the suspicion must be that the suspect committed an offence referred to in schedule 1; and
(d) the suspicion must rest on reasonable grounds.

31. Once the above jurisdictional facts are present a discretion arises whether to arrest or not. Such discretion must be exercised in good faith, rationally and not

[2] 1986 (2) SA 805 (A) at 818G-H.

arbitrarily. This is an objective enquiry in relation to the facts of a particular case[3].

32. Furthermore, the question as to whether the suspicion formed by the arrestor, is reasonable must also be approached objectively[4]. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee has committed a schedule 1 offence.

33. The purpose of affecting an arrest is that the arrestor must have the intention of bringing the arrestee before court[5]. Furthermore, it is important to take cognisance that an arrest can take place lawfully where the arrestor objectively speaking, has a reasonable suspicion against the suspect but has to conduct further investigation after the arrest before finally deciding to charge the arrestee.

34. Arrest can therefore take place even if the arrestor realised that at the time of the arrest that he does not have sufficient proof for a conviction.[6] Willis J, in Mvu v Minister of Safety and Security 2009 (2) SACR 291(GSJ) held that even where an arrest had been lawful, a police officer had to apply his mind as to whether the detention of a suspect was necessary at all.

35. In Sekhoto *(supra)* the court quoted from Mahlangwana v Kwatinidubu Town Committee 1991(1) SACR 669(E) and concluded that the lawfulness (or not) of the detention was dependent on a finding with regard to the lawfulness (or not) of the arrest in those cases where the detention had been a result of the arrest and therefore interlinked with each other.

[3] Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 SCA.
[4] 2012 (2) SACR 226 (SCA) at [20].
[5] Tsose v Minister of Justice 1951 (3) SA 10A.
[6] Songano v Minister of Law and Order 1996 (4) SA 384 SEC

36. In deciding whether the Minister of Police was liable for the Appellants further detention after he was remanded in custody, the court applied the following principles in Sekhoto at paragraphs [42], [43] and part of paragraph [44]:

> "[42] While it is clearly 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 as soon as reasonably possible and at least within 48 hours depending on court hours. Once this has been done, the authority to detain, that is inherent to the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.
>
> [43] The discretion of a court to order the release or further detention of the suspect is subject to wide ranging, and in some cases stringent statutory directions. I need not elaborate for present purposes, save to mention that the Act requires a judicial evaluation to determine whether it is in the interest of justice to grant bail; that in some instances a special onus rests on a suspect before bail may be granted; and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that, if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial, then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.
>
> [44] While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process he or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one

in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crimes – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect for that purpose."

37. In the present instance, the arrest of the plaintiffs came about upon a pointing out having been made by the complainant to the arresting officers on the day of their arrest. The issue, in relation to the unlawful arrest and detention that this court was called upon to determine is whether the arresting officers in effecting the arrest had satisfied objectively speaking the jurisdictional requirements as set out in section 40(1) (b) of the Criminal Procedure Act. In the present instance, the arrest of the plaintiffs came about after the complainant had laid a charge of rape, robbery and kidnapping against her perpetrators, where one of the arrested persons, namely Mr Sebotsa was known to be a friend to Mr Khoza whose DNA was found in a swab taken from the complainant. Furthermore, the arrest albeit, that same was affected some eight months after the sexual assault on the complainant, the arrests were effected in the same vicinity where the complainant was sexually violated.

38. An arresting officer, before effecting an arrest is not required to investigate the merits or demerits of a case, prior to effecting an arrest. All that the arrestor is to establish before effecting an arrest, is whether the jurisdictional requirements to make an arrest are present and in the present instance, there can be no doubt that the arresting officers acted not only upon a reasonable suspicion before effecting the arrest, but that the arrests were carried out upon questioning of the complainant at the police station and upon a pointing out having been made by the complainant who was present when the arrests were effected.

39. In *casu* and bearing in mind the purpose of an arrest i.e. to secure the attendance of an arrestee before a court and further bearing in mind the location as to where the arrest was carried out, being a taxi rank and further the time

lapse between the commission of the offence and the carrying out of the arrests, it simply cannot convincingly be argued, that the arresting officers had any other option available to them but to effect the arrests of the plaintiffs.

40. Every so often, the police are being criticized for not acting with the necessary diligence when charges of these serious nature are made against alleged perpetrators. More so in circumstances where violations of a sexual assault have occurred against women. If they act complacently and do nothing they are often heavily criticised. Where they do act, they often run the risks of facing a civil suit in the end.

41. Objectively speaking I could not find that they acted unreasonably under the circumstances.

42. As for the plaintiffs' claim of malicious prosecution the plaintiffs must allege and prove that the prosecution:

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

    (b) acted without reasonable and probable cause;

    (c) acted with malice (or *animo iniuriandi*); and

    (d) the prosecution has failed.[7]

43. In the decision Beckenstrater v Rottcher and Theunissen (1955) 1 SA 129 (A) at 136A-B; Schreiner JA formulated the test for absence of reasonable and probable cause as follows:

    "When it is alleged that a defendant had no reasonable cause for prosecuting……this [means] that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such

[7] Minister of Justice and Constitutional Development and Others v Maleko [2008] 3 ALL SA 47 (SCA); 2009 (2) SACR 585 (SCA).

information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."

44. As to the plaintiff's claim of malicious prosecution, having assessed the evidence tendered in this regard of Ms Mokome and Ms Monyoko-Emeana on behalf of the National Prosecuting Authority; this Court is not persuaded that the prosecution embarked on a prosecution without reasonable or probable cause. In the present instance, the prosecution studied the police case docket and concluded that a *prima facie* case had been established against both plaintiffs. The evidence tendered on behalf of the prosecution, not only consisted of a positive identification by the complainant of both plaintiffs, but also consisted of medical evidence which could not exclude forceful penetration of the complainant. It therefore cannot be contended that the prosecution acted with any malice.

CONCLUSION

45. For the reasons set out above, I cannot but conclude that the defendants have discharged their onus to prove a justification for the arrests of the plaintiffs and that their subsequent detention was consequently rendered lawful.

46. Furthermore, that the plaintiffs' have failed to discharge their respective *onus* that their subsequent prosecution was malicious.

47. Consequently, the plaintiff's claims are dismissed with costs, including costs consequent upon the employment of two counsel.

C.J. COLLIS
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Appearances as follows:

For the Plaintiffs:	Adv. Maswanganye
Attorney for Plaintiffs:	Makula Attorneys
For the Defendants:	Adv K. Pillay SC & Adv A. Masombuka
Attorney for Defendants:	The Office of the State Attorneys Pretoria
Date of Hearing:	5 August 2019, 12 December 2019 and 5 March 2020
Date of Judgment:	4 September 2020

Judgment electronically transmitted.