IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51660/2017

51661/2017

51663/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 3 June 2021

SIGNATURE:

In the matter between:

TSHEPO LUCAS PHIRI	1ST PLAINTIFF
JOHANNES MESIA PHIRI	2ND PLAINTIFF
RICHARD BALOYI	3RD PLAINTIFF
And	
MINISTER OF POLICE	1ST DEFENDANT
NATIONAL DIRECTOR OF PUBLIC PROSECUTION	2ND DEFENDANT

JUDGMENT

MUNZHELELE AJ

Introduction

[1] The first plaintiff, Tshepo Lucas Phiri is claiming damages against the Minister of Police arising from arrest and detention by the Hartbeespoort dam police. The second and third plaintiffs, Johannes Mesia Phiri, Richard Baloyi instituted a claim for damages against the Minister of Police and the National Director of Public Prosecution arising from their alleged unlawful arrest and detention as well as malicious prosecution. At all material times, the police and the prosecutor were acting within the course and scope of their employment when they arrested, detained, and prosecute all three plaintiffs.

[2] The crucial questions that call out for answers are; was the arrest and detention of the first plaintiff justified in the circumstances? Secondly, was the arrest and detention and prosecution of the second and third plaintiff based on reasonable and justified grounds? Did the second and third plaintiff possess the unlicensed firearm and lastly, whether they possessed a stolen motor vehicle?

Background facts of the case

[3] On 9 February 2017 at around 8 pm Mesia Phiri and Baloyi Richard were arrested. During that night they had worked overtime until late in the evening at the chicken farm. Mesia Phiri asked his brother Tshepo for a car to drive home. His brother brought the car and left. Mesia took the car and gave Richard a lift because they stayed in the same area. Along the way, the police stopped them and instructed them to get out of the car and lie down. They complied with the instructions of the police.

[4] The police then started to search the car and found a firearm inside the drawer of the driver's seat. Mesia explained to the police that he did not know that there was a firearm in the car. He further said that the firearm and the motor vehicle belonging to his brother Tshepo. They arrested and detained them at Hartebeespoort Dam police station.

[5] The police requested a backup. The backup police went to look for Tshepo, they found him and interrogated him regarding the firearm and the motor vehicle which was found driven by Mesia. He informed the police that the firearm and the motor vehicle are his properties. He even gave the police the firearm license and the motor vehicle documents. They arrested and detained Tshepo for negligent handling of a firearm and possession of a stolen motor vehicle.

[6] All three were detained from Thursday and only taken to court on Monday. Mesia and Richard were released on Friday the 17th day of February 2017 on R500 bail each. Their charge for possession of a stolen motor vehicle was withdrawn. Because it was found that the motor vehicle was bought by Tshepo from Lenasia police station. The charge for possession of an unlicensed firearm was postponed waiting for the ballistic results.

[7] Tshepo Phiri pleaded guilty to negligent handling of a firearm. Regarding the charge that his motor vehicle was stolen, he explained that he bought the motor vehicle from a certain white man who had previously reported it to be stolen. When the police recovered it, this white man was no longer interested in using it. Then he sold the vehicle to Tshepo. Unfortunately, the police at Lenasia police station did not remove the vehicle from circulation as stolen; it was still registered as stolen. He had all the papers for the motor vehicle and he gave them to the police. At that time he had not yet registered it into his name.

[8] Investigating officer, Gregory Kwadi confirmed this explanation because he verified it and found it to be correct. He requested Lenasia police station to remove the motor vehicle from the list of stolen motor vehicles. He further made the court aware that the firearm belongs to Tshepo Phiri and confirmed that they were waiting for ballistic results to check if the firearm was used to commit an offense somewhere.

[9] Nicolene Pretorius is employed by the National Prosecuting Authority and was stationed at Brits Magistrate as a prosecutor. She testified that in the first

appearance of the plaintiffs she was the one who screened the docket and found that there was a prima facie case upon which the prosecution can proceed on.

[10] The defense called police officers Hemelton Matlala and Kekana Thapelo David who testified that they were employed by the South African Police and stationed at Hartebeespoort dam police station. On the 9th February 2017, they were on duty patrolling around Broederstroom when the Plot Wag Neighborhood Watch informed them that there was a Polo VW silver in color with no registration numbers driving around. They traced and found it at Pelindaba Mexa, searched it, and discovered that under the seat of the driver there was a firearm. They checked the license disk of the motor vehicle and found it had expired. This motor vehicle did not have plate numbers. The police officer phoned the station to check if this was not a stolen motor vehicle.

[11] Indeed, they found it having been registered as stolen at Lenasia Police Station. Because of this information, the police decided to arrest Mesia and Richard. A backup was called and police officers Mabe and Mokgorotsi came and traced Tshepo. They found him and arrested him also for negligent handling of a firearm because he was the owner of the firearm and the stolen motor vehicle. The police arrested all the plaintiffs without a warrant of arrest.

Arguments by the parties

[12] Advocate Maluleke on behalf of the first plaintiff argued that the defendant bears the onus of proving that the arrest was fair and justified by the law. He referred the court to a case of Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589 E-F where it was penned that:

> "It, therefore, seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[13] He further argued that Section 40(1) (e) authorizes the Police to arrest without a warrant if they find the suspect in possession of the suspected stolen property. It is worth mentioning that Plaintiff was not found in possession of the so-called suspected stolen property. Further that the offense which Plaintiff was charged with is not a schedule 1 offense and therefore an arrest without a warrant is not justified under the circumstances.

[14] He contended that the arresting officer who effected the arrest does not even know what the Provisions of Section 40(1)(a) and (e) are all about. The only conclusion which may be drawn is that relying on the above sections was an afterthought in that it does not justify why Plaintiff was arrested. He further contended that negligent handling of a firearm is not a serious offense which negated the refusal of bail; the Plaintiff was released on a warning when he appeared before the court. In conclusion, he submitted that the Plaintiffs' claim should succeed with costs.

[15] Advocate Makola argued that the second plaintiff and third plaintiff's claims should succeed with costs.

[16] Advocate Mashele argued that the Plaintiffs were lawfully arrested in terms of Section 40(1) (a) and (e) of the Criminal Procedure Act 51 of 1977. Section 40 (1) (a) provides that:

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

(b) Who commits or attempts to commit any offense in his presence

(c) Who is found in Possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained and whom the peace officer reasonably suspects of such a thing?

[17] She further argued that the first plaintiff was arrested for committing an offense in the presence of a peace officer with negligent handling of a firearm. She contends that in para 39 of the Sekhoto Judgment it was held that the peace officers are entitled to exercise their discretion as they see fit provided that they stay within the bounds of rationality. The standard is not breached because an office exercises the discretion in a manner other than deemed optimal by the Court. The standard is not perfect so long as the discretion is exercised.

[18] She further argued that the second and third plaintiffs were arrested in terms of Section 40 1(b) and (e) after they were found in possession of a suspected stolen

motor vehicle and an unlicensed firearm. Regarding Malicious Prosecution advocate Mashele argued that the jurisdictional facts for a successful prosecution are set out in Minister of Justice and Constitutional Development & Others v Moleko as follows:

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

(b) That the defendant acted without reasonable and probable cause;

(c) That the defendant acted with malice;(d) That the prosecution has failed.

[19] She argued that the prosecutor exercised her discretion based on the information placed before her as contained in the docket. The information before the prosecutor formed the body of evidence upon which the state shall infer whether a prima facie case has been established against an accused. The first and fourth requirements were not in dispute in that the defendant indeed set the law in motion and that the prosecution failed, however, she submits that the Plaintiff failed to prove that the defendant acted without reasonable or probable and probable cause and that the defendant acted with malice and as a result, thereof the claim for malicious prosecution must fail.

Discussion

The arrest and detention of the first plaintiff.

[20] Tshepo testified that he never denied the ownership of the firearm and the motor vehicle when he was questioned by the police. It has been argued by advocate Maluleke that after Tshepo's confrontation with the police and his

cooperation with them he should not have been arrested, the police officers had a discretion whether to arrest him or not. If they chose to arrest him they again had discretion not to detain him. Tshepo did not pose a threat to the investigations by the police. There was no need to arrest or detain him as eluded by the investigating officer in this case. He gave them all the information they required for the investigations regarding the firearm and the motor vehicle.

[21] Section 35 of the Constitution treats arrest and detention differently and in two separate subsections. see *Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24 Bosielo AJ on para 35 said:

> "Everyone who is *arrested* for allegedly committing an offense" has specific rights. Subsection (2), in turn, relates to "everyone who is *detained*, including every sentenced prisoner" and recognizes its own set of rights. Section 35(1) and (2) draws a bright line'

[22] Section 35(1) provides:

"Everyone who is arrested for allegedly committing an offense has the right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as soon as reasonably possible, but not later than-

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

Section 35(2) provides:

'Everyone who is detained, including every sentenced prisoner, has the right(a)

to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material, and medical treatment'

[23] In *Thebus v S* [2003] ZACC 12 Yacob J articulated this distinction clearly as follows:

"The three subsections intersect, complement each other, and demonstrate a logical pattern when viewed from the point of view of the criminal justice process that might unfold about a person who is suspected of having committed an offense. The first step envisaged is the arrest of a person for allegedly having committed an offense. That person is not yet an accused and the arrest itself does not render him a detainee entitled
to the right set out in subsection (2).'

[24] The plaintiffs were arrested without a warrant in terms of section 40 of the criminal procedure act 51 of 1977. This Section 40(1) provides that:

'A police officer "may" arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offenses specified therein.'

[25] *In Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24 Bosielo AJ said that"

'In its ordinary and grammatical use, the word "may" suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific inquiry. As the police officers are confronted with different facts each time they affect an arrest, a

measure of flexibility is necessary in their approach to individual cases.'

[26] The investigating office Gregory Kwadi testified that the first plaintiff should not have been arrested in this case for negligently handling the firearm. They should have secured other means of bringing him to court. I agree with him, especially that he was not found committing any offense. This is an offense that has already occurred. The police cannot say that they found him committing negligent handling of a firearm or in possession of a stolen vehicle. They should have investigated what he had told them and thereafter when they have found it to be false they secure his attendants to court through other means. The police officers Mabe and Mokgorotsie should have reasoned it out whether to effect an arrest or not to exercise their discretion to arrest. If they chose to arrest they should have asked themselves whether they exercised it properly as propounded in the case of *Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H* or as per *Sekhoto Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) where the court, cognizant of the importance which the Constitution attaches to the right to liberty and one's dignity in our constitutional democracy, held that the discretion conferred in section 40(1) must be exercised "in light of the Bill of Rights".

> "Once the jurisdictional facts for an arrest . . . in terms of any paragraph of section 40(1) . . . are present, discretion arises. The question of whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the

discretion of whether to arrest or not arises. The officer, it should be emphasized, is not obliged to effect an arrest."

[27] It is trite that arrests curtail a person's freedom and traumatizes the arrested person. The impact and consequences of arrest on every human being cut deep and have a long-lasting effect. In Minister of Law and Order V Hurley 1986(3)SA 568(A) at 589E-F Rabie CJ explained that:

' an arrest constitutes an interference with the liberty of the individual concerned and therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his actions were justified in law'.

[28] The defendant failed to establish the fairness of the choice to arrest the first plaintiff in the circumstances of this case. The investigating officer also agrees that the arrest of the first plaintiff was not justified. The police could have secured his attendants to court by other means. Because his arrest was not justified it follows that his detention was also not justified in the circumstances of this case.

Arrest and detention of the second and third plaintiff(the plaintiffs)

[29] The second and third plaintiffs (the plaintiffs) were arrested in terms of Section 40 1(b) and (e) of the Criminal Procedure Act 51 of 1977. In Minister of Law and Order v Hurley 1986(3) SA 568(A) at 589E-F Rabie CJ explained that:

'The person who arrested or caused the arrest of another person should bear the onus of proving that his actions were justified in law'.

[30] To justify the arrest and detention of the plaintiffs, the defense must prove that the person who arrested the plaintiffs was a peace officer who entertained a suspicion that the plaintiffs committed a Schedule 1 offense; and that the police had reasonable grounds that justify their suspicion. See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H; *Minister of Safety and Security v*

Sekhoto & Another 2011 (5) SA 367 (SCA) at para 6.

[31] The plaintiffs should have been found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offense concerning such a thing. Therefore the court should decide, firstly, whether the suspicion held by police officers Mr. Hemelton Matlala and Mr. Kekana Thapelo David that the plaintiffs had committed the offense of possession of unlicensed firearm and possession of suspected stolen motor vehicle was based on reasonable grounds.

[32] In *Mabona and Another v Minister of Law and Order And Others* 1988 (2) SA 654 (SE) at 658 E-H Jones J held that:

> "The test of whether a suspicion is reasonably entertained within the meaning of s 40 *(1)(b)* and 40(1)(e) is objective.... Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It

seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of suspicion and without the need to swear out a warrant, i.e something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyze and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion that will justify an arrest. This is not to say that the information at his disposal must be sufficiently high quality and cogency to engender in him a conviction that the suspect is guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not reasonable suspicion."

[33] On consideration of the evidence adduced in this matter, Mr. Hemelton Matlala and Mr. Kekana Thapelo 's decision to effect an arrest, objectively viewed, does not pass muster. Mr. Matlala ought to have conducted further investigations before effecting an arrest. Section 36 of the General Law Amendment Act 62 of 1955 provides as follows:-

> "Any person who is found in possession of any goods, regarding which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offense and liable on conviction to the penalties which may be imposed on a conviction of theft."

[34] Mr. Matlala was informed by Mesia that the firearm and the motor vehicle belonged to Tshepo. Tshepo was confronted by the police officers Mr. Mabe and Mokgorotsi with the explanation given by Mesia and he confirmed the facts on the same night of the arrest that the properties were his. He even produced the license for the firearm and papers for the motor vehicle but the police did not release the two plaintiffs. To show that they believed that the

firearm was indeed belonging to Tshepo they even charged him for negligent handling of a firearm. I find that the explanation which was given by the plaintiffs as required in terms of the definition of the offense of possession was satisfactory to such an extent that the second and third plaintiff should not have been arrested that night. The investigating officer also traced the information mentioned by Tshepo regarding the motor vehicle and found it to be correct. This is the information that could have been obtained also by the police officers before the arrest, but they didn't because all they wanted was an arrest. They forgot that arresting someone who has given a satisfactory explanation is arbitrary and that their suspicion should have been canceled when they found the owner of the firearm and the motor vehicle.

[35] During the arrest, Mesia informed the police that he was not aware of the fact that there was a firearm inside the motor vehicle. This fact was not disputed by the police. This means from the beginning the police were well aware that Mesia did not have the unlicensed firearm when they arrested him. A person cannot own something which they do not know that it exists. This was a clear indication that Mesia did not have the said firearm. The police were also told that he was also not aware that the motor vehicle was stolen. He knew that these were his brother's properties. It is stated in the case of *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA) para 11 that in an objectively doubtful situation, the arresting officer must investigate the circumstances under which the offense was allegedly committed.

[36] Another issue is that Section 36 of the General Law Amendment Act 62 of 1955 does not fall under the schedule 1 offense.

[37] Another important aspect is that the third plaintiff was also arrested for the possession of an unlicensed firearm and possession of a stolen vehicle but no evidence points to the joint possession of these items which was adduced in court at all. Even though there was no evidence of his possession of the firearm and possession of a stolen motor vehicle the police arrested him. The investigating officer should never assume facts but should investigate the facts of the case. In this case, the investigating officer wrongly assumed that the third plaintiff had an unlicensed firearm and possession of a stolen motor vehicle without any facts supporting that belief. There has been no evidence adduced against Richard regarding possession of an unlicensed firearm and possession of a stolen motor vehicle that links him with the commission of these two offenses. I turn to wonder what informed the police's suspicion in the arrest of Richard.

Joint possession of an unlicensed firearm.

[38] In arresting the second and third plaintiffs for group possession of firearms, the court should follow the requirements laid down in the case of S v Nkosi 1998 (1) SACR 284 (W). The test for establishing liability for the possession of firearms and ammunition was established in S v Nkosi 1998 (1) SACR 284 (W): as follows:

> 'The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided concerning the answer to the question whether the State has facts from which it can properly be inferred by a Court that:

(a) The group had the intention (animus) to exercise possession of the guns through the actual detector and

(b) The actual detectors had the intention to hold the guns on behalf of the group

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detectors, or common purpose between the members of the group to possess all the guns.'

[38] In Mbuli 2003 (1) SACR 97 (SCA) ([2002] ZASCA 78 Nugent JA emphasized that a common intention to possess a firearm intentionally can only be inferred when the group had the intention (animus) to exercise possession of the firearm through the actual detector and the actual detector had the intention to hold the firearm on behalf of the group.

[39] The Supreme Court of Appeal followed a similar approach in *Kwanda v State* 2011 ZASCA 50 when it held that:

'The fact that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused.'

[40] If Mesia did not possess the said firearm what then informed the police that Richard had the firearm. Richard was given a lift by Mesia and that fact was never disputed by the defense. The defense failed to prove that there was possession of a firearm by Mesia and Richard in this case. They also failed to

adduce evidence of joint possession of the firearm and the motor vehicle by the plaintiffs. The defense had an onus to prove that the plaintiffs had the necessary mental intention (animus) to possess the firearm. One turns to be puzzled as to what reasonable grounds they had to arrest Mesia and Richard regarding the possession of the unlicensed firearm and the motor vehicle.

[41] It was established that the actual possessor in this regard was Tshepo who was also the owner of the firearm. He had the intention to possess the said firearm wherever it was but it could not be said that he possessed it also for Mesia and Richard in the circumstances of this case. The two plaintiffs should have been aware that Tshepo possesses the said firearm for them. There is also no evidence from which it can be inferred that Tshepo intended to possess the firearm jointly with Mesia and Richard.

[42] When applying the case of Nkosi(*supra*) to the facts of this case at hand, there is no evidence from which it can be inferred that the plaintiffs had the intention to exercise possession of the firearms and also that Tshepo had the intention to possess the firearm jointly with Mesia and Richard.

[43] From the evidence adduced there was no evidence at all that warrant the police to arrest let alone without a warrant. This means the arrest of the plaintiffs was unlawful in the circumstances of this case and it follows that the subsequent detention was therefore unlawful.

Malicious prosecution of the second and third plaintiff

[44] For the plaintiffs to succeed in the claim for malicious prosecution the plaintiffs have an onus to prove through evidence that the requirements for malicious prosecution have been met. (see Gordon Lloyd Page & Associates v Riviera and Another 2001(1) SA 88(SCA) AT 92E 93A. Claude Neon Lights SA LTD v Daniel 1976 (4) SA 403 v(A) at 409G-H

[45] The requirements for malicious prosecution consist of the following:

(a) Defendant setting the law in motion (instigated or instituted the proceedings);

(b) The defendant acting without reasonable and probable cause;

(c) The defendant acting with malice (or *animo iniuriandi*); and

(d) The prosecution failed.

[46] It is common cause that the prosecution proceedings had already commenced in this case at hand. The question now is whether reasonable grounds for such commencement of prosecution existed then. This question can best be answered by the only reference to the facts in this case. (see *Minister of Safety and Security and Another v Schubach* 2015 JOL 32615 (SCA)at Para 13).

[47] The test for reasonable and probable cause contains both a subjective and objective element, which means that there must be both actual beliefs on the part of the

defendant and also that, that belief is reasonable in the circumstances. This Court in *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA129 (AD) at 136A–B [also reported at [1955] 1 All SA 146 (A) – Ed] set out the test for

"absence of reasonable and probable cause" as follows:

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

[48] I, therefore, proceed to consider whether the evidence supports the allegation that the defendant had a reasonable and probable cause when setting the law in motion that indeed the plaintiffs possessed the unlicensed firearm. The defendant was incorrect in believing that there is evidence of possession of an unlicensed firearm by Mesia and Richard as discussed above regarding the possession and joint possession of a firearm.

[49] A prosecutor exercises discretion based on the information before her. In *S v Lubaxa* 2001 (2) SACR 703 (SCA) (2001 (4) SA 1251; [2002] 2 All SA 107) para 19 this court said the following:

> 'Clearly, a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognized by the common-law principle that there should be reasonable and probable cause to

believe that the accused is guilty of an offense before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.'

[50] Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court that can intervene where such discretion is improperly exercised. See generally *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) (2009 (2) SA 277; 2009 (4) BCLR 393; [2008] 1 All SA 197) Para 37. Indeed, a court should be obliged to, and therefore ought to, intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offense before a prosecution is initiated."

[51] In the circumstances, it cannot be said that the defendant had a reasonable and probable cause for the prosecution of the plaintiffs. There was no evidence at all of the possession yet the prosecutor proceeded with the matter hoping that if the matter goes for trial the plaintiffs might incriminate themselves. She did not have evidence of possession nor joint possession. Tshepo had already pleaded guilty to negligent handling of his firearm by leaving it in his car. But with that information, she continues to charge Mesia and Richard. The plaintiff managed to prove that the prosecution had no probable cause when they set the law in motion. The prosecution had failed in this case. Therefore

the prosecution was malicious in proceeding with the matter against the plaintiffs without evidence.

[52] In the results, the following order is made

1. The Minister of Police is liable to Mr. Tshepo Lucas Phiri for damages that may be proved.
2. The Minister of Police must pay Mr. Tshepo Lucas Phiri's costs.
3. The Minister of Police and The National Director of Public Prosecution are liable to Johannes Mesia Phiri and Richard Baloyi for the damages that may be proved.
4. The Minister of Police and The National Director of Public Prosecution must pay Johannes Mesia Phiri, Richard Baloyi 's costs.

M.M. MUZHELELE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

On behalf of the first plaintiff:	Adv. M. T. Maluleke
Instructed by:	Makula Attorneys, Pretoria

On behalf of the second and third plaintiffs:	Adv. O. P. Makola
Instructed by:	Makula Attorneys, Pretoria
On behalf of the defendants:	Adv. V. Mashele
Instructed by:	State Attorney
Date heard:	10 May 2021
Judgment electronically delivered:	03 June 2021