

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 86694/14

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 4 October 2021

E van der Schyff

In the matter between:

TSHEKO JAPHTA MARULE

PLAINTIFF

and

THE MINISTER OF POLICE

1ST DEFENDANT

THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

2ND DEFENDANT

JUDGMENT

Van der Schyff J

Background

- [1] It is common cause that on 22 October 2012, whilst being transported from Randburg Magistrate's Court, prisoners detonated explosives in an attempt to escape from custody. As a result of the explosion, certain prisoners who were in the vehicle were injured, others died. The docket contains several statements that are reflected below as it was referred to by the parties.
- [2] A prisoner Mr. Khalimani Mpofu (Mpofu) deposed to a statement on the same day that the incident occurred wherein he stated the following:
- 'One of the 6 prisoners left the court cells just after 12h00 with a policeman, the same that is working at court 9, because I saw him before at court 9 and he was dressed in a police uniform. After about 10 minutes the policeman and the prisoner returned, and the policeman locked him back in our cell. Then the six of them sat together and ate roasted chicken and drank coke out of a 2l bottle. The same prisoner that went with the policeman then put muti on their hands and after the muti was put they blew it off.'
- [3] Another inmate, Mr. Loyiso Maqungu (Loyiso) deposed to a statement on the same day. He stated:
- 'I was in the holding cell with other prisoners that were transported with me in the morning. While in the holding cells I noticed an African policeman came into the holding cell and he gave one of the prisoners in the same cell as me a brown bag. I do not know the policeman's name, but I can recognise him if I see him again. The policeman left. The prisoner who received the bag is not known to me but I think his name is Amos ... The prisoner who received the bag (Amos) took the bag to a few other prisoners at the back of the cell. There were 6 of them around the bag. After approx. 5 minutes the same policeman came back and took Amos out of the cell. They returned after approx. an hour. Amos

came back and he went back to the cell and opened the bag. The same 6 guys were around the bag again ...

I was curious to see as to what was in the bag. I thought it was dagga, so I walked to the back of the cell to see what was in the bag. I noticed the prisoners removed approx. 6 boxes (small) that brown in colour and wrapped in plastic. It was the size of a match box. I also noticed lots of silver wire. The prisoners were busy wrapping the boxes in plastic and were connecting the wires to it. I left them and went to the front of the cell.'

[4] A team, consisting of Warrant Officer Ntsheno from the Investigative Police Directorate and Captain Naidoo, was assembled to investigate the matter.

[5] The docket reflects that Mpofu appeared again at the Randburg Magistrates Court on 29 October 2012. He was accompanied by, amongst others, Constable Mpethe (Mpethe). Mpethe deposed to an affidavit that Mpofu, after appearing in court, and while they were waiting in the cells, told her that:

'the policeman who is involved in the bombing explosion that happened on the way to Johannesburg Correctional Service Centre on 2012/10/22 was there at court 9 where he appeared. He told me that he is going to show me the policeman who gave one of the prisoners a bag in the cells.

Suddenly the policeman walked past where we were standing and Khalimani Mpofu nudged me pointing in the direction of where the policeman was standing and pointed out to me a policeman who was wearing a police jersey and he looked chubby and fat.

I saw the face of the policeman he is (unclear) darker in complexion and not that tall. I can be able to point out the policeman who Khalimani Mpofu pointed out to me. ... I can identify him if I see him again"

[6] Mpofu also deposed to a statement regarding the pointing out to Mpethe. He stated:

'I was standing with her in the cells. I saw the policeman in uniform that took us out of the cells on 2012-10-22 at Randburg Court.

I then pointed out to her, Constable Mpethe, that there is a policeman who took us out of the cells. I told her that he is a policeman who took out Amos from the cells and went with him for a long time. That policeman was wearing a jersey, was dark in complexion ... I can still be able to point him out and identify him positively when I see him again. I remember him very well.'

Mpethe later pointed out the plaintiff at an identity parade.

- [7] On 1 November 2012 a further statement was obtained from Loyiso. He stated:

'I wish to state that on 2012/10/22 whilst waiting at the grills waiting for transport to JHB Prison, I noticed that Amos was already in the grills. An African Policeman in uniform came to the grills and opened the gate. I was standing at the gate and moved aside. I noticed this policeman gave Amos a bang and left.

After a few minutes the same policeman came back and called Amos to the gate and they were chatting. I could not hear the details of the conversation but I was standing facing them. It is at this stage that I noticed his nametag is MAHASHE / MAHASHA, I am not sure of the last letter of the name. After a short while this policeman left. I will be able to point out this policeman if seen again.'

- [8] On 5 November 2012 Warrant Officer Ntsheno (Ntsheno) accompanied by Captain Naidoo (Naidoo) attended the Randburg Magistrate's Court with Mpofu. Mpofu was to appear again. At court Mpofu pointed out the plaintiff to the two policemen. Ntsheno, who did not testify in this matter, deposed to a statement and stated, amongst other that he was called by Captain Naidoo who informed him that Mpofu pointed out the policeman works at court 9 as the 'one who participated by bringing a bag to the cells and gave it to the other prisoners, to Mpethe. He stated further:

'On Monday 2012/11/05 I went with Captain Naidoo together with the witness awaiting trial, Khalimani Mpofu, who was going to

appear at Randburg Court no 9. After he appeared his case was further postponed. We went down to the cells and waited for his J7. The at about 12:30 the witness came to the cells and he pointed out to me a policeman whom he gave description on his statement.

I then called the said policeman and introduced myself to him and informed him the reason for me to be there. ... I informed him that the witness has pointed him out to me as the one who brought the bag to the cell for the other prisoners. ... During the arrest he said or asked me if he is the only one working at that court.'

- [9] After the pointing out Mpofu attested to another statement taken by Naidoo. Mpofu stated:

'While being escorted out of the cells, I point out to the policemen Mr. Mpho Ntsheno as the same policemen who had taken out another prisoner Amos out of the cell for a long period of time and later brought him back. I recognised the policeman by his face and saw him previously. He is the same policeman that works at Court 9.'

- [10] The plaintiff was arrested on 5 November 2012 without a warrant and charged with murder, attempted murder, contravention of ss 5 and 27(1)(c) (read with the provisions of s 1) of the Explosives Act, 26 of 1956, and contravention of s 115 of the Correctional Services Act 111 of 1998. The plaintiff was detained at the Mondeor Police Station. The plaintiff appeared in court on 7 November 2012. On this date, the court directed that an identity parade was to be held. An identity parade was arranged for 7 November 2012. Loyiso, who indicated in his statement of 22 October 2012 that he saw the policeman who handed over a package to the prisoner and took the prisoner out of the holding cell, indicated that he did not see that policeman in the line-up, despite the plaintiff being in the line-up. The plaintiff appeared in court again on 12 November 2012. He applied for bail but the application was opposed and postponed in order to enable the prosecution to produce video footage of the

cells. Nothing was availed and the plaintiff continued appearing in court until he was ultimately granted bail on 16 December 2012.

- [11] The case was then transferred to the Palm Ridge Circuit Court. The plaintiff continued to appear and the matter continued to be postponed on account of the state not being ready to proceed with trial. During February 2013 Adv. Dikana, together with Advocate Brits were appointed to handle the case. The plaintiff was indicted on the charges. During February or March 2014 Advocate Brits was replaced by Advocate Barnard. Advocate Barnard consulted with Mpofu who indicated that he was not prepared to come to court to testify. She also consulted with Loyiso who was not able to confirm that the plaintiff was the police officer who brought the bag to the cell and in July 2014 the charges against the plaintiff were withdrawn.

- [12] The plaintiff claims that his arrest and detention for the period 5 November 2012 to 6 December 2012 were unlawful and that the first defendant should be held liable for the damages he suffered as a result thereof. He claims that his prosecution from 7 November 2014 was malicious and that both the first and the second defendants should be held liable for the damages he suffered as a result thereof until the charges were withdrawn in July 2014.

- [13] The defendants averred that the plaintiff's arrest and detention were lawful and justified in terms of ss 40(1)(a), 40(1) (b), and 40(1) (c) of the Criminal Procedure Act, 51 of 1977 (CPA). They claim that there was enough evidence to sustain a reasonable suspicion that the plaintiff committed an offence, and that the prosecutors had *prima facie* evidence that justified the prosecution and that there was no malice in doing so. The defendants contend that the plaintiff's detention was justified and necessary in that there was a likelihood that would have interfered with witnesses, and would have discarded the evidence against him. He was a police officer who broke the law, not a law abiding citizen and positively identified as the person who gave the prisoners the explosives or bombs.

Evidence before the court

- [14] The defence requested to lead their witnesses first, because the prosecutors had to return back to their own work as soon as possible. The parties agreed that neither would be prejudiced by such an arrangement. Three witnesses, advocate Brits, advocate Badenhorst and Captain Naidoo testified on behalf of the defendants. The plaintiff testified and did not call any other witness.
- [15] Advocates Brits and Barnard testified that they both considered all the statements filed in the docket and made the decision that there was a case for the plaintiff to answer to because witnesses indicated that they saw him handing a brown paper bag to the prisoners. They thought they had a strong case because neither Mpofu nor Loyiso was coerced in giving information but volunteered the information. Based on the commissioned statements filed in the docket advocate Brits and her superior were convinced that there was sufficient evidence to substantiate a reasonable chance of success for the prosecution. Advocate Brits indicated they had to be careful not to project that there was any favouritism because the plaintiff was a police officer. He was implicated and had to be indicted. She added that he would always had a cloud hanging over him that he is a corrupt police official, but if he stood trial and was acquitted his dignity would not be impugned. Advocate Brits testified that she only became involved in the matter after the plaintiff was already granted bail and she was not able to testify as to why bail was initially opposed. She emphasised that police statements are notoriously badly drafted and does not comprise the totality of the state's case. As prosecutor she considers whether a case is made out for the accused to come and answer to. Advocate Barnard reiterated that a prosecutor's discretion is informed by the statements in the docket. She started to contact witnesses to arrange consultation and then became aware of the problem facing the state because neither Mpofu or Loyiso could (or was willing) to testify and to identify the plaintiff positively.
- [16] Advocate Mtsweni took both the advocates to task about the ethical duty that rests on their shoulders. Both confirmed that they are aware of the profound consequences that their decision to continue with the prosecution had, and would

have, on the plaintiff. Advocate Mtsweni analysed the statements of both Mpofu and Loyiso. He put it to both witnesses that it was the plaintiff's duty to escort prisoners from the holding cell to court and back, and Mpofu's statement that the plaintiff escorted Amos from the cell and returned him later, does not indicate any untoward behaviour. He also pointed out that the 'grills', the holding cells— where the prisoners are dropped off when they arrive from the prison and gather before they are transported back to prison, and the court cells are two distinct places. Neither of the witnesses considered the relevance of this fact when they analysed Mpofu and Loyiso's statements. Advocate Mtsweni also pointed out to the prosecutors that Mpofu never made a statement that the plaintiff had a bag or handed over a bag to the prisoners. Mpofu's statements are consistent in that they all reflect that he identified the plaintiff as the policeman who took the prisoner (Amos) from the cell. It is Mpethe's statement that placed the issue of the plaintiff handing over a paper bag to the prisoners on the table. But Mpethe only conveys what she interpreted Mpofu's pointing out of the plaintiff to her, to relate to. On each occasion that Mpofu confirmed the pointing out in a written statement, he did not confirm that he pointed out the person who handed a brown paper bag to the prisoners, he stated that he pointed out the policeman who took them ('us') out of the cell, and who took Amos out of the cell.

- [17] It is evident that both advocate Brits and advocate Barnard relied on the fact that the plaintiff was pointed out by Mpethe and again later by Mpofu when the latter pointed him out to Warrant Officer Ntsheno. Of importance again is the fact that Mpofu confirms under oath that he pointed the plaintiff out to Warrant Officer Ntsheno as the police officer working at court 9 who took Amos from the cell. Warrant Officer Ntsheno interpreted that pointing out to include that the plaintiff was pointed out by Mpofu as the policeman who brought the brown paper bag. Warrant Officer Ntsheno was not called to testify, but from the content of his statement it can be deduced that he regarded the plaintiff as the person who handed the brown paper bag, that assumedly contained the explosives, to the prisoners because he was telephonically informed of this 'fact' by Captain Naidoo who was in turn informed about this by Mpethe who said that Mpofu relayed this evidence to her – a 'fact' that is not supported by Mpofu's' statements.

- [18] Loyiso, in turn, never mentioned the policeman from court 9. He said the policeman's name was "Mahasha or Mahashe", and more importantly, Loyiso failed to identify the plaintiff at an identification parade although he did not hesitate to point out prisoners involved in the incident during a previous identity parade. Mpofu was never requested to identify the plaintiff at an identity-parade. It was put to both advocates Brits and Barnard that their failure to note and fill in the missing gaps in the state case, and to proceed with the prosecution notwithstanding, was malicious.
- [19] Captain Naidoo's evidence indicates that he relied heavily on Mpethe's evidence that she was told by Mpofu that the plaintiff is the one who brought the bag in to the cells. He testified that he and Warrant Officer Ntsheno asked Mpofu whether he would be able to point out the policeman who handed over the parcel to the prisoners. Mpofu confirmed he could and pointed out the plaintiff to them. This evidence does not correlate by what is stated by Mpofu in the statement directly linked to this pointing-out. Once again Mpofu stated that he pointed out the policeman who removed Amos from the cell.
- [20] Captain Naidoo testified that he and Warrant Officer Ntsheno did not see the need to obtain a warrant before arresting the plaintiff. He testified that the seriousness of the offence empowered a police officer to arrest without a warrant. Captain Naidoo testified that the arrest was effected by Warrant Officer Ntsheno. During cross-examination it was put to Captain Naidoo that he arrested the plaintiff despite knowing his force-number, and with the knowledge that the plaintiff's personal and residential details were captured on the SAPS's Human Resources System. Captain Naidoo could not explain why he never took Loyiso to Randburg Magistrate's Court to identify the policeman he saw whom he indicated was Mahashe or Mahasha, or why bail was still opposed after Loyiso was not able to point the plaintiff out at an identity parade held on the court's instructions, other than to fall back to Mpethe's statement.
- [21] After the defendants closed their case the plaintiff testified. He explained that when prisoners arrive at the court they are kept at the main holding cell. From there they

are taken to the court cell, beneath the court where they will appear. He disputed that he ever brought any bag to either the main holding cell or the court cell. When he was arrested and in view of the prisoner's and colleagues his rank-flashes and appointment card were taken by Warrant Officer Ntsheno. He was put in the vehicle with Mpofu. The plaintiff became very emotional at this point. He testified that all his details, including his residential address and the information of his next of kin are on the SAPS's Human Resources System. He confirmed during cross examination that he had a colleague at court 9 whose surname was Mahashe. It is evident from Warrant Officer Ntsheno's statement that the issue of the plaintiff being identified because he was the policeman from court 9 was canvassed with him although Warrant Officer Ntsheno did not relate it in his statement – Warrant Officer Ntsheno stated in the arresting statement that the plaintiff said during his arrest that 'he is not the only one working at that court'. This response logically relates to a conversation where you are informed that you were identified as the policeman from court 9.

Legal principles applicable¹

[22] It is trite that an arrest or detention is *prima facie* wrongful. It is for the defendant to allege and prove the lawfulness of the arrest or detention.² When the arrest and detention is admitted, the onus of proving lawfulness is on the State. Where the arrest was effected in accordance with a warrant in the proper form and issued by a duly authorised official, it would provide the arresting officer with a complete defence,³ and the onus of proving the wrongfulness of the arrest by showing that the warrant was irregular rests on the plaintiff.⁴ The Criminal Procedure Act, 51 of 1977, provides for the arrest of any person without a warrant in a number of clearly circumscribed circumstances. Although the first defendant pleaded an entitlement to arrest the plaintiff in terms of ss 40(1)(a), 40(1)(b), and 40(1)(c), it is evident in light

¹ See Harms, LCT. 'Ambler's Precedents of Pleadings', 8th ed, LexisNexis, 43 for an exposition of the legal principles and supporting case law.

² *Lombo v African National Congress* 2002 (5) SA 668 (SCA).

³ *Prinsloo v Newman* 1975 (1) SA 481 (A).

⁴ *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A).

of the evidence led that only s 40(1)(b) can find application – at the time that the plaintiff was arrested he did not attempt to commit any offence in the arresting officer's presence (s 40(1)(a)), or escaped or attempted to escape from lawful custody (40(1)(c)).

[23] Section 40(1)(b) provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1. The jurisdictional facts for successful reliance on s 40(1)(b) as clearly set out in *Duncan v Minister of Law and Order*⁵ 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 has committed an offence referred to in Schedule 1; and the suspicion must rest on reasonable grounds. The main issue for determination in the present matter is whether the arresting officer entertained a reasonable suspicion based on reasonable grounds.

[24] It must be noted that Captain Naidoo, when testifying, said that he only accompanied Warrant Officer Naidoo but that Warrant Officer Naidoo effected the arrest, and is by definition the arresting officer. Warrant Officer Naidoo did not testify in these proceedings.

[25] It was stated in *Minister of Safety and Security and Another v Swart*,⁶ that:

'It is furthermore trite that a reasonableness of suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same facts, would form a suspicion that a person has committed a schedule 1 offence.'

[26] In *Mabona and Another v Minister of Law and Order and Others*,⁷ Jones J stated:

⁵ 1986 (2) SA 805 (A) at 818G-H.

⁶ 2012 (2) SACR 266 (SCA).

⁷ 1988 (2) SA 654 (SE) at 658E-H.

'The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). 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 authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse 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 which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact 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 a reasonable suspicion.'

- [27] It is drastic to arrest a person without a warrant. In light of the objective fact that no witness identified the plaintiff under oath as the policeman who handed a brown paper bag to any prisoner, Mpethe's evidence is nothing more than inadmissible and unsubstantiated hearsay evidence. And yet, it was the catalyst that set Captain Naidoo and Warrant Officer Ntsheno into action. A reasonable man would have assessed the quality of Mpethe's statement against the reality that Mpofu, when dealing with this pointing-out explains who he pointed out – the man who took "us" and "Amos" from the cell. This policeman whose job it was to take inmates from the cell to escort them to court or to the holding cell. Captain Naidoo testified that Mpofu

was asked to identify the policeman who brought the brown bag before he, for a second time, pointed the plaintiff out. Yet, soon after this pointing-out, in a statement taken by Captain Naidoo, Mpofu again stated he pointed out the man who took Amos from the cell. No mention is made of the handing over of a brown paper bag. This begs the question, if Captain Naidoo indeed asked Mpofu to point out the policeman who handed the paper bag to the prisoner, why did he not prompt Mpofu to make a correct statement wherein he indicated that he pointed out the man who handed the paper bag to the prisoner. The reasonable person would have considered that Mpofu indicated that the plaintiff took Amos from the court cell and returned him, while Loyiso informed about a police officer with the name Mahashe or Mahasha who handed over a paper bag to a prisoner in the holding cell. The reasonable man would have provided Loyiso with an opportunity to identify the person he saw handing over the brown bag to a prisoner before summarily arresting the plaintiff. Although section 40(1)(b) requires suspicion and not certainty, the suspicion must be based on solid grounds, it must be 'checked where it can be checked'. The evidence presented regarding the plaintiff's arrest does not prove on a balance of probabilities that the suspicion was based on reasonable grounds and that it was thoroughly checked. There is no indication that any investigation was conducted regarding the 'Mahashe' identified by Loyiso, despite evidence before this court indicating that a Mr. Mahashe was also a policeman working at Randburg Magistrate's Court at the time.

- [28] The first defendant did not discharge the onus of proof that rested on it to prove that the arrest without a warrant was lawful. Despite the fact that no evidence shows that the investigating officers feared that the plaintiff may become suspicious of being a suspect and flee, they did not attempt to obtain a warrant for his arrest. The consequence of that decision and their rash action to arrest the plaintiff without a warrant, is that they deprived themselves of a complete defence against the plaintiff's claim. In addition, the evidence indicates that the police opposed bail even after it became evident that Loyiso was not able to identify the plaintiff at the identity parade. The plaintiff was well-known to them. There is no evidence that he posed a flight risk. The contention that he had to be detained to prevent him from interfering with state witnesses does not hold any water if it is considered that he was detained in the same facility with the only two witnesses who, according to the investigating

officer, identified him as the perpetrator. In my view, this case meets the criteria set out in by the Constitutional Court in *De Klerk v Minister of Police*⁸ to hold the defendant liable for damages suffered for the whole period for which the plaintiff was detained.

- [29] This is, however, not the end of the matter. The plaintiff alleged that the prosecution was malicious. To succeed with a claim for malicious prosecution a claimant must allege and prove that (i) the defendants set the law in motion, they instigated and instituted the proceedings; (ii) they acted without reasonable and probable cause; (iii) they acted with malice, and (iv) the prosecution failed.
- [30] It is not every prosecution that is concluded in the favour of the accused person that necessarily leads to a successful claim for malicious prosecution. Professor MC Okpaluba warned that:

‘the requirement of reasonable and probable cause in proving malicious prosecution tends sometimes to be confused with the requirement of reasonable ground to suspect that an offence has been committed in order for a peace officer to arrest a person without a warrant.’⁹

- [31] It is common cause that the criminal charges against the were withdrawn. The plaintiff pleaded in his particulars of claim that the prosecutor prosecuting the matter set the law in motion by unreasonably deciding to prosecute the plaintiff for the aforementioned charges. The evidence does not indicate that the prosecuting authority acted with malice, or that they failed to perform their duty, powers and function in good faith. Both advocates Brits and Barnard testified they were of the view, after considering the content of the docket, that the plaintiff had a case to answer. When advocate Barnard started to consult with potential witnesses she realised that the state would not be able to procure the necessary evidence to prove

⁸ 2020 (1) SACR 1 (CC).

⁹ Okpaluba, C. ‘Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions’ *PER/PELJ* 2013 (16)1 241- 279.

their case because Mpofu indicated that he was afraid to testify. She exercised her discretion and took the decision to withdraw the charges.

- [32] To succeed with a claim for malicious prosecution, a plaintiff must prove all four elements listed in paragraph 29 above. The plaintiff did not succeed in proving malice or the *animus iniuriandi* on the part of the prosecuting authority. There is a nuanced but very important difference between negligence and *dolus eventualis*, and the two are not to be confused. The evidence does not prove that the prosecutors acted with intent, even in the form of *dolus eventualis* when they proceeded with the prosecution. The court held in *Minister of Justice and Constitutional Development v Moleko*¹⁰ that negligence on the part of the defendant, even gross negligence, will not suffice. There is no indication in the evidence that the prosecution was moved by any intention other than to have the plaintiff stand trial for the charges raised against him and to bring him to justice. A prosecutor's failure to sift meticulously as if with a magnifying glass through the facts placed before it in circumstances that do not indicate that the information provided is to be regarded with suspicion, cannot on its own be proof of malice. Both advocates Brits and Barnard stated that in their experience statements obtained from witnesses are often inaccurate, incomplete, and lacking in detail. They did not regard the discrepancy between Mpethe and Ntsheno's statements respectively and Mpofu's statements as rendering the case without reasonable and probable cause because they were of the view that the gaps would be filled in by the witnesses' *viva voce* evidence. I have to consider advocate Barnard's evidence that Mpofu informed her that he was afraid to testify because he was threatened.

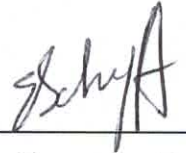
- [33] The plaintiff did not discharge the onus resting on it regarding the claim for malicious prosecution against the second defendant.

ORDER

¹⁰ [2008] 3 All SA 47 (SCA) at para [64]. See also *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA) at para [5]; *Hash v Minister of Safety & Security* [2011] ZAECPEHC 34 (2 August 2011) at paras [78-80] and [85].

In the result, the following order is made:

1. The issues of merits and quantum are separated;
2. The plaintiff's arrest and detention from 5 November 2012 until 6 December 2012 were unlawful;
3. The first defendant is liable for the Plaintiff's agreed on or proven damages suffered as a result of his arrest and detention from 5 November 2012 until 6 December 2012;
4. The first defendant is to pay the plaintiff's costs regarding the claim relating to the plaintiff's unlawful arrest and detention, which costs include the costs of two counsel;
5. The claim for malicious prosecution is dismissed, with costs.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 4 October 2021.

Counsel for the applicant:	Adv. D. Mtsweni
Instructed by:	Gildenhuys Malatji Inc.
Counsel for the respondent:	Adv. M Thabang
Instructed by:	State Attorney, Pretoria
Date of the hearing:	20-23 July 2021; 27 August 2021
Date of judgment:	4 October 2021