

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 59227/17

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

NICODEMUS THIBE MAMPANE

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

DE VOS AJ

1. The plaintiff, Mr Mampane claims delictual damages for his arrest, detention and prosecution on a charge of attempted robbery.
2. Mr. Mampane was arrested on 11 January 2016 by Constable Mokwana at

the Villieria Police Station. He was arrested because he had been apprehended by private security after he allegedly attempted to rob Mr Eksteen at knife point.

3. The incident occurred on the side of the road, whilst Mr Eksteen was alighting from his vehicle. The incident was witnessed by an independent person, Mr Mostert. Mr Mostert, was sitting in his car waiting for his wife to finish some errands, saw Mr Mampane draw a knife on Mr Eksteen.
4. Mr Eksteen called in assistance from a private security company, who sent out Mr van Wyk to assist. Mr van Wyk, with the assistance of Mr Eksteen and Mr Mostert, apprehended Mr Mampane a short distance from the scene and a knife was found amongst his possessions. Mr van Wyk, accompanied by the complainant and the independent witness, presented Mr Mampane to Cst Mokwana at the Villieria Police station.
5. The true nature of the events that occurred during the actual incident have not been presented to the Court with clarity or consistency. However, that is not the focus of the inquiry. Rather, as Mr Mampane claims that Cst Mokwana had no lawful basis to arrest him, the Court's attention must settle on the circumstances and information that underpinned Mr Mampane's arrest.

ARREST

6. Mr Mampane pleaded that he had been unlawfully arrested without a warrant. The defendants accepted the onus to prove the lawfulness of the arrest¹ and rely on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act").

¹ Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E-F; Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) at para [7].

7. Four jurisdictional facts² must exist before the power to arrest a suspect without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act may be invoked.³ The parties agree that the determinative jurisdictional fact is whether Cst Mokwana had a reasonable suspicion that Mr Mampane committed attempted robbery.
8. Suspicion is, by definition, "a state of conjecture".⁴ Certainty is not required.⁵ A suspicion might be reasonable, even if there is insufficient evidence for a prima facie case against an arrestee.⁶ A suspicion must rest on reasonable grounds. In arriving at the existence of reasonable grounds, a reasonable person will analyse and assess the quality of the information at their disposal critically, and will not accept it lightly or without checking it where it can be checked.⁷ It is only after an examination of this kind that a suspicion can justify an arrest. This is not to say that the information at their disposal must be of "sufficiently high quality and cogency" to engender in them a conviction that the suspect "is in fact guilty". However, the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion.⁸
9. Cst Mokwana arrested Mr Mampane based on five pieces of information.
 - i. The sworn statement by the complainant, Mr Eksteen. Mr Eksteen stated that Mr Mampane had attempted to rob him. Mr Eksteen was alighting from his vehicle when Mr Mampane, at knife point,

² The four facts are: the arrestor must be a peace officer; the arrestor must entertain a suspicion; the suspicion must be that the arrestee committed an offence referred to in Schedule 1 of the Criminal Procedure Act; the suspicion must rest on reasonable grounds.

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security v Sekhoto and Another*, supra, at paras [6] and [21].

⁴ *Duncan v Minister of Law and Order*, supra, at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H.

⁵ *Liebenberg v Minister of Safety and Security and Another* (case no. 18352/07) [2009] ZAGPPHC 88 (18 June 2009) at para 19.22.

⁶ *Liebenberg v Minister of Safety and Security and Another* (case no. 18352/07) [2009] ZAGPPHC 88 (18 June 2009) at para 19.22.

⁷ *Mabona v Minister of Law and Order*, 1988 (2) SA 654 (SE) at 658E-H

⁸ *Mabona v Minister of Law and Order*, 1988 (2) SA 654 (SE) at 658E-H; *Minister of Police and Another v Muller* 2020 (1) SACR 432 at para [20].

demanded Mr Eksteen hand over all his possessions to Mr Mampane.

- ii. Corroboration of the complainant's version by an eye witness, Mr Mostert. Mr Mostert was waiting in his stationary car when he witnessed, from across the road, Mr Mampane pull a knife on Mr Eksteen. Mr Mostert knew neither of the parties before the incident.
- iii. The sworn statement of Mr van Wyk, a security guard who assisted in the apprehension of Mr Mampane, shortly after the attempted robbery. Mr van Wyk, also, knew neither of the parties.
- iv. The knife believed to have been used in the attempted robbery. Mr van Wyk presented Cst Mokwana with a knife found amongst Mr Mampane's possessions.
- v. Mr Mampane was identified and apprehended shortly after the incident, close to the scene and brought to the Villieria Police station, by these three witnesses.

10. Cst Mokwana's suspicion rested on these five pieces of information summarised above. Cst Mokwana had objective evidence in the form of the weapon, a sworn statement by the complainant, corroboration by an independent eye witness, corroboration of the apprehension of the suspect by another independent eye witness and the identification of the suspect by the complainant. This information was of a sufficiently high quality and cogency, it was based on solid grounds and was not flighty or arbitrary. Cst Mokwana's suspicion, in this context, was reasonable.

11. The defendants have discharged their onus to prove Mr Mampane's arrest was lawful.

12. Mr Mampane invited the Court to consider that his arrest was unlawful on two specific grounds, the first that there was insufficient information and Cst Mokwana failed to obtain an exculpatory statement.

Lack of information

13. Mr Mampane invited the Court to consider whether his arrest was lawful as Cst Mokwana did not have sufficient information to draw a reasonable suspicion.
14. The case law acknowledges the very nature of a suspicion assumes the proof is lacking and arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.⁹ The legislature contemplated "further investigation subsequent to the arrest of a suspect" and that such "investigation could lead either to the arrestee's release from detention or his prosecution on a criminal charge".¹⁰
15. Mr Mampane's challenge, that information was lacking, demands a higher standard of certainty than what the test of a reasonable suspicion requires.
16. In addition, Mr Mampane claims that the information lacking was the description of the knife and the proximity of Mr Mampane to Mr Eksteen at the time of the attempted robbery. Factually, both these pieces of information appear in the statements. Mr van Wyk describes the knife as an okapi knife and Mr Eksteen's sworn statement provides that Mr Mampane was "on" Mr Eksteen's car door at the time he drew the knife.
17. Cst Mokwana had sufficient grounds, viewed objectively, to arrest Mr Mampane. The challenge that Cst Mokwana had insufficient information falters, at both the level of fact and law.

Failure to obtain an exculpatory statement

18. Mr Mampane further challenged the lawfulness of his arrest on the basis that Cst Mokwana ought to have obtained an exculpatory statement from Mr Mampane prior to his arrest. Mr Mampane was in the charge office

⁹ Duncan v Minister of Law and Order, supra, at 819I; Minister of Law and Order v Kader 1991 (1) SA 41 (A) at 50H.

¹⁰ Duncan v Minister of Law and Order, supra, at 819G-H.

whilst Cst Mokwana (and other officers) were obtaining statements. Despite his presence, Cst Mokwana did not seek an exculpatory statement from Mr Mampane.

19. The case law's trajectory on the need to obtain an exculpatory statement has been summarised in the judgment of *Noemdoe v Minister of Police*.¹¹ *Noemdoe*, identifies the determinative test as set out in *Wani v Minister of Police and one Other*.¹² In *Wani* the Court rejected the notion of an absolute requirement to obtain an exculpatory statement. The Court held that the core issue was the "quality of the information at the disposal of the police officer in the particular case".¹³ Only if information is "so tenuous and/or conflicting that objectively it cannot sustain a suspicion" in terms of section 40(1)(b) then the police officer must first make further enquiries before effecting the arrest.¹⁴

20. Mr Mampane provided no legal or factual basis that convinced the Court the evidence was so tenuous that it required Cst Mokwana to obtain an exculpatory statement. The information at Cst Mokwana's disposal at the time of arrest, in the form of the five pieces of evidence, were not tenuous or conflicting. To the contrary, the information was generally corroborated, by independent witnesses and objective evidence.

21. The Court rejects the contention, based on the quality of the information at the disposal of Cst Mokwana at the time of the arrest, that the failure to first obtain and investigate an exculpatory explanation, without more, renders the arrest in terms of section 40(1)(b) unlawful.¹⁵

¹¹ *Noemdoe v Minister of Police* (2987/2018) (handed down on 3 May 2022)

¹² *Wani v Minister of Police and Another* (case no 149/2015 EC Bhisho 20 March 2018)

¹³ *Wani* above para [30]

¹⁴ *Wani* above para [30]

¹⁵ *Wani v Minister of Police and Another*, supra, at para [30]; *Noemdoe v Minister of Police*, supra, at para [35].

22. The defendants have discharged their onus to prove Mr Mampane's arrest was lawful.

23. Mr Mampane invited the Court to consider that his arrest was unlawful on two specific grounds, the first that there was insufficient information and Cst Mokwana failed to obtain an exculpatory statement.

24. Mr Mampane's unlawful arrest claim fails.

Detention

25. Mr Mampane contends as his arrest was unlawful, consequently, his detention must be unlawful. Mr Mampane raised no stand-alone ground for the unlawfulness of his detention other than it came about as a result of an unlawful arrest. As the Court has already held that his arrest was lawful, the premise for the unlawful detention claim dissipates.

Malicious prosecution

26. Mr Mampane pleads he was maliciously prosecuted as the decision to prosecute was taken without any reasonable and just cause. Mr Mampane bears the onus to prove¹⁶ that the second defendant acted without reasonable and probable cause and acted with 'malice' (*animo iniuriandi*).

27. The test, in relation to reasonable and probable cause, is whether the prosecutor had a honest subjective belief in the guilt of Mr Mampane. The prosecutor's belief must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.¹⁷ The concept of reasonable and probable cause (which involves both a subjective and an objective element) has been formulated as the absence

¹⁶ Minister of Justice and Constitutional Development & Others v Moleko [2008] 3 All SA 47 (SCA) at para [8]; Rudolph and Others v Minister of Safety and Security and Another [2009] 3 All SA 323 (SCA) at para [16]. The other two requirements for malicious prosecution, being law in motion (instituted the proceedings); and that the prosecution failed, are not in dispute.

¹⁷ Minister of Justice and Constitutional Development & Others v Moleko, *supra*, at para [20].

of information that would lead a reasonable person to conclude that the suspect had probably been guilty of the offence charged.¹⁸

28. Mr Sefike a regional prosecutor, charged Mr Mampane with attempted robbery. Mr Sefike testified at the hearing. Mr Sefike testified that he made the decision to prosecute based on the three sworn statements and the objective evidence of the knife. Mr Sefike believed he had a strong case, so strong that it was his duty to commence the prosecution of Mr Mampane. Mr Sefike relied on the fact that there was an independent eye witness "a neutral person - who was just minding his business" who corroborated the complainant's version.

29. It also weighed with Mr Sefike that Mr Mampane had, despite the opportunity being granted, provided to statement to the police after his arrest and preferred to make his statement in court. Mr Sefike considered that Mr Mampane had a constitutional right to remain silent, however, this left Mr Sefike with only one version of events.

30. In *Boesak* the Court held that where there is compelling evidence indicating the commission of a crime and the suspect exercises the right to remain silent, that is the risk which the suspect takes and he or she has to live with the consequences of the decision not to make a warning statement for purposes of a prosecutor deciding whether or not to prosecute the suspect.¹⁹ In this context, Mr Sefike, properly took into account the absence of any exculpatory version on the part of Mr Mampane.

31. Mr Hlangwane, counsel for Mr Mampane, directed his cross-examination at certain deficiencies in the sworn statements. The tenor of Mr Hlangwane's

¹⁸ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at para [14].

¹⁹ *S v Boesak* 2001 (1) SACR 1 (CC) at para [224].

line of questions was that Mr Sefike, in light of these deficiencies, could not have believed that he had sufficient information to decide to prosecute. These deficiencies included how far Mr Mampane was from Mr Eksteen; the description of the knife, a description of Mr Mampane; a gap in the timeline; contradictions in the manner in which Mr Mampane was apprehended and where the knife was found.

32. Mr Sefike readily conceded where there were small differences and deficiencies in the statements. However, these did not disturb his decision that there was probable cause to charge Mr Mampane. As for any lacking details, Mr Sefike believed these would come out at the trial.

33. Mr Sefike's evidence is accepted by the Court. The cause for prosecution rested on the allegations contained in the sworn statements and the real evidence of the knife found in Mr Mampane's possessions. The information was of such a nature that if proved in a court of law, the court would convict Mr Mampane. There was accordingly a duty on the State to prosecute Mr Mampane in the circumstances of the case.

34. The Court finds that there existed a reasonable and probable cause for the institution of the prosecution.

35. There is a second way in which Mr Mampane fails to meet the onus in relation to malicious prosecution. Mr Mampane failed to make out a case in relation to *animus iniuriandi*.²⁰ *Animus iniuriandi* includes not only the intention to injure, but also consciousness of wrongfulness.²¹ Mr Mampane has to show that the second defendant must at least have foreseen the possibility that they were acting wrongfully, but nevertheless continued to

²⁰ *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 103G-104E; *Relyant Trading (Pty) Ltd v Shongwe*, supra, at para [5]; *Minister of Justice and Constitutional Development & Others v Moleko*, supra, at para [61].

²¹ *Minister of Justice and Constitutional Development & Others v Moleko*, supra, at para [63].

act, reckless as to the consequences of their conduct (*dolus eventualis*).²²

36. Mr Sefike denied such an intention when asked during cross-examination and stated that he was motivated by the strength of the case. Mr Sefike testified that he did not act out malice or any other reason other than he believed he "had a strong case, a winnable case" and that he based his decision to prosecute on the "four corners" of what was contained in the docket.

37. Mr Mampane presented no evidence to counter Mr Sefike's evidence.

38. The complaints raised by Mr Mampane against Mr Sefike's decision to prosecute are without basis. Mr Mampane has failed to establish two requirements for malicious prosecution as he did not prove the absence of a reasonable and probable cause for the prosecution nor the presence of the *animo iniuriandi* in instituting the prosecution against Mr Mampane.²³

Conclusion

39. Mr Mampane received a section 174 discharge at his criminal trial as the Presiding Officer concluded that the evidence presented by the state witnesses, at the trial, were contradictory. The section 174 discharge was therefore premised on evidence which surfaced at the trial. The considerations and factual matrix that informed the discharge are wholly different to that which served before Cst Mokwana and Mr Sefike.

40. The Court is grateful for the submissions from counsel and the manner they conducted the trial.

²² Minister of Justice and Constitutional Development & Others v Moleko, supra, at para [64].

²³ Minister of Justice and Constitutional Development & Others v Moleko, supra, at para [63].


41. The Court holds that -

- i. Mr Mampane was lawfully arrested in terms of section 40(1)(b) of the Criminal Procedure Act;
- ii. Mr Mampane was lawfully detained;
- iii. There was reasonable and probable cause for the prosecution of Mr Mampane; and
- iv. Mr Mampane's prosecution was not instituted *animo iniuriandi*.

42. The defendants invited the Court to grant a costs order, including the costs of two counsel against Mr Mampane. Mr Mampane's counsel submitted that a costs order would not be enforceable against Mr Mampane as his earnings as a car guard would be insufficient to cover a costs order. In addition, the matter on behalf of Mr Mampane has been accepted on a contingency basis. On this basis, the Court declines to grant a costs order against Mr Mampane.

ORDER

43. The action is dismissed.



JUDGE DE VOS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 JULY 2022.

Case number : **59227/17**

Matter heard on : 6, 7, 8 and 10 June 2022

For the Applicant : BK HLANGWANE
MC MAVUNDA

Instructed by : R Loselo Inc, Ruth Loselo

For the Respondent : TWG BESTER SC
CGVO SEVENSTER

Instructed by : The State Attorney Pretoria, JH NEL

Date of Judgment : 18 July 2022