

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

CASE NO: 33703/2021

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 07/05/2024

SIGNATURE:

In the matter between:

HASANE SAMMY MACHEKE

Plaintiff

And

MINISTER OF POLICE

First Defendant

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS (NPA)**

Second Defendant

JUDGMENT

**MBONGWE, J:
INTRODUCTION**

[1] The plaintiff instituted this action claiming damages against the First and the Second Defendants, respectively, alleging that he was unlawfully arrested by the

police in Atteridgeville without a warrant and detained at the local police station and later at the Kgosi Mampuru Correctional Service Facility during the period 1 August 2018 to 17 August 2018. He subsequently appeared several times in the Atteridgeville Magistrate's Court where he was charged for robbery with aggravating circumstances and possession of suspected stolen property. The plaintiff denied his involvement in the commission of these crimes.

[2] The plaintiff appeared in court with his co-accused, Lehlohonolo, on 3 August 2018 and were remanded in custody when their case was postponed to the 10 August 2018, on which day the date of 17 August 2018 was set for bail application. The plaintiff and his co-accused were released on bail of R5000 each. The charges against both were withdrawn on 29 November 2019.

[3] The plaintiff seeks payment of damages for unlawful arrest and detention against the First Defendant in his capacity as the employer of the members of the police who had arrested and detained him, in the amount of R1 900 000. The plaintiff seeks payment of damages of R1 500 000 against the Second Defendant for alleged malicious prosecution.

[4] The parties have agreed on a separation of the hearing and determination of the aspects of liability (merits) and the quantum of damages in terms of Rule 33(4) of the Uniform Rules of Court. The present hearing will thus be confined to the determination of the issue of liability and the issue of quantum postponed *sine die*.

PLAINTIFF'S EVIDENCE

[5] The plaintiff is an adult male of 44 years of age employed by the Tshwane Metropolitan Police Division (TMPD) as a Traffic Officer since February 2008. He is a married father of seven children. He holds a National Diploma in Traffic Management. The plaintiff testified in these proceedings and had called no other witness.

[6] The plaintiff testified that he woke up at about 06h00 in the morning on Wednesday, 01 August 2018. At 07h00 he drove his children to school. It was

around 08h00 when he received a call from his friend, Khotso Lodi, who advised him that he was going to the Wonder Park Shopping Centre. The plaintiff asked Khotso to wait for him at Sasol filling station so they could drive together.

[7] The plaintiff picked up Khotso approximately 20 minutes later and proceeded to his house to fetch his mother whom he had to take to the clinic before proceeding to the lottery outlet which opened at 09h00 and to place a bet before the draw at 10h00.

[8] From the clinic the plaintiff and Khotso drove to a carwash where the plaintiff left his vehicle, a yellow Audi S3, and the two walked to the Wonder Park Shopping Centre, Pretoria North. While at the shopping centre, Khotso received a call on his cellular phone and subsequently informed the plaintiff that they should drive to Atteridgeville, approximately twenty kilometres away. The plaintiff informed Khotso that he did not have enough petrol in his vehicle, but Khotso had undertaken to fill the plaintiff's vehicle tank with petrol. The two returned to the carwash where the plaintiff stopped the washing of his car and drove to Atteridgeville.

[9] At a four-way stop in Atteridgeville the plaintiff and Khotso met with three men who, according to the plaintiff, were known to Khotso. The men pointed to a house that was about thirty metres away and directed that the plaintiff proceeds to the house and to park behind a white VW Jetta 6 that was parked on the drive way of house number 1[...], M[...], Steet, A[...], ('the scene'). The three men followed on foot.

[10] The plaintiff testified that he did not know the men so he had decided to temporarily stop behind the VW Jetta to drop off Khotso before driving back towards the four-way stop and left his vehicle at a carwash nearby. He then walked to a shop to buy airtime.

[11] As the plaintiff left the shop, he saw Thabang, a man who usually washes the plaintiff's car, driving an 'Uber'. The plaintiff got onto the Uber and they drove towards the carwash. They were about 30 to 40 metres towards the carwash when they were stopped by about 5 to 7 men, some wearing balaclavas, and all were

carrying big guns. The plaintiff could also see police ahead searching his vehicle at the carwash. It turned out that the men with big guns were police officers.

[12] At the carwash the plaintiff was asked if he was the owner of the yellow Audi S3. One officer told the plaintiff that he wanted to search the vehicle. The plaintiff retorted by stating that the police were already searching his car. The police had questioned the plaintiff about a cooler box and groceries worth about R6 000,00 that were in the boot of his car and further told the plaintiff that there had been a robbery at a Spar Supermarket in Pretoria North earlier that morning. The plaintiff testified that he produced receipts as proof of his purchase of the groceries from Makro.

[13] One of the officers allegedly told the plaintiff that there was an issue and then got into the plaintiff's car and sat on the front passenger seat. He directed the plaintiff to drive to the house where the white VW Jetta 6 was parked on the drive way. The other officers had followed them.

[14] Having parked outside the gate at the scene, the plaintiff was ordered to walk into the premises with the police. He observed on the premises that there was the main house and an out-building with two rooms. In front of the outbuilding the plaintiff saw a lady who was handcuffed sitting on the floor. The plaintiff was led to one of the rooms in the out-building where he saw a lot of money (bank notes) on the floor. The police told him that was the money he and his friends had robbed earlier in Pretoria North. The plaintiff testified that he was then handcuffed with his arms behind and the police started suffocating him with a plastic they had placed around his neck. That had continued for about two hours before the police took him to their BMW where he sat on the back seat and had called his friend, Michael Mochocho, and told him that he was under police arrest in Atteridgeville.

[15] More police vehicles were arriving at the scene. At some stage the plaintiff was approached by a police Captain who had dislodged him of his cellular phone before asking him personal details. Having responded to the questions asked, the Captain remarked that the plaintiff was wearing expensive clothing, his children went to expensive schools and that the plaintiff was a robber. At the plaintiff's request, the Captain phoned the plaintiff's wife and enabled him to speak to her.

[16] Around 16h00 the plaintiff, the lady he had seen handcuffed at the scene and another lady were driven to Atteridgeville police station. The plaintiff's vehicle was left at the scene. He was informed that his arrest was in relation to the robbery in Pretoria North.

[17] The plaintiff testified that he spent the Wednesday night in detention at the Atteridgeville police station. During that night the police had brought another man to his cell. The man appeared to have been badly assaulted. He was Lehlohonolo, one of the three men the plaintiff and his friend, Khotso, had allegedly met at the four-way stop and who had directed them to the scene. The two ladies were released and the plaintiff and Lehlohonolo were taken to the cells.

[18] The following day, Thursday, a police officer who introduced himself as Van der Berg from the HAWKS arrived and advised the plaintiff and Lehlohonolo that he needed to take their statements and verify their residential addresses before they could appear in court the following day, being a Friday. The plaintiff had told Van der Berg that he was a police officer himself and requested to write his own statement as he intended to lay charges against the police, but Van der Berg had insisted on interviewing the plaintiff and Lehlohonolo individually and writing their statements himself. The plaintiff stated that his alleged statement was neither read to him nor given to him to read. He had "*signed it merely to finish and go home*".

[19] The plaintiff alleged that he remained in detention for three days before he and his co-accused appeared in court where they faced charges of robbery with aggravating circumstances and possession of suspected stolen property. They were remanded in custody until released on bail of R5000 each on 17 August 2018 and the charges against him withdrawn on 29 November 2019.

BASIS FOR UNLAWFUL ARREST AND DETENTION CLAIM

[20] In response to questions by his counsel in this court, the plaintiff testified that he was not involved in the robbery and knew nothing about it and the VW Jetta 6. In his view, the police had abused their powers in arresting and detaining him and

publishing his name on News 24 with pictures of him holding the stacks of cash that were taken by the victim of the robbery as they counted and packaged the cash. He was never informed whether his service firearm that had been confiscated was ever taken for ballistics testing and what the outcome of police investigations relating to the white VW Jetta 6 was. His arrest and detention had resulted in his suspension from work for 90 days on the ground of suspected misconduct. He ascribed his arrest and detention to an abuse of authority by the police.

EVIDENCE FOR THE FIRST DEFENDANT

(A) Ms SALOME RAMOTLHALE

[21] The First Defendant called Ms Salome Ramotlhale ('Ms Salome') as its first witness. Ms Salome testified that she resides at house number 1[...] M[...] Street, A[...] ('the scene'). The witness testified that the room she lives in used to be a vehicle garage. The garage door which used to face the entrance gate was replaced by a window. It was from this window that she could see the entrance gate. The gate is made of solid steel and, if closed, one cannot see beyond it.

[22] She was in her room on the morning of 1 August 2018 watching television when she noticed the entrance gate opening and a white motor vehicle driving in and parking on the drive way. She saw that the driver was her cousin, Lehlohonolo, who was with his friend, Lebohang and a man she did not know. The three went to the back of the vehicle and took out three boxes and some clothing from the boot which they brought into the outside room opposite hers which was previously occupied by Lehlohonolo. She thought her cousin had come back to live on the premises. She was stepping outside when the door of the room the men were in was shut.

[23] She had returned to her room when Lehlohonolo knocked at her door. He gave her two envelopes - one written 'Petty Cash R1 000' and the other 'Petty Cash R500'. Lehlohonolo told her to hold on to those envelopes and that he will collect them later. She opened the envelopes and noticed that they contained R10 and R20 notes. She then placed the envelopes on her bed and walked to the main house to tell her aunt that she was about to go out.

[24] The witness was on her way to lock her room when she heard the shooting of a firearm. She walked in the direction of the entrance gate to investigate. The gate was open and she saw police jumping out of a police vehicle and entering her premises. The police asked who she was and demanded to know the whereabouts of people who had brought the white VW Jetta onto the premises. She led the police to the room her cousin and his friends had gone into where they found the door ajar, a lot of cash on the floor, but no one in the room. In response to a question, she told the police that she did not know whose money that was, but it had been brought by Lehlohonolo and his two companions. She was ordered to sit down and was handcuffed.

[25] Sgt Bopape walked to the main house where they found the witness' aunt and brought her to where the witness was sitting. The aunt was also arrested after she had told the police that she knew nothing about the money in the room and had not seen the white VW Jetta vehicle arriving on the premises.

[26] The police walked out to search the premises. One of them shortly came back with the man who had come with Lehlohonolo and Lebohang. The officer asked if the man was one of those who had brought the white vehicle to the premises. The witness agreed and the officer told her that he had found the man hiding behind the toilet. He ordered the man to sit down and handcuffed him. The witness learnt that the man's name was Hasane Macheke when the police had asked him who he was. More police vehicles arrived. Later, Sgt Bopape and his colleague took the witness, her aunt and Hasane Macheke to the police station.

[27] The witness, her aunt and Hasane Macheke had been in police detention for two days before Lehlohonolo was also arrested and brought to the police station on the second night. The following morning the witness and her aunt were released from custody before being taken to court. The witness had continued to attend the court as a prospective state witness whenever Lehlohonolo and Hasane Macheke appeared. She was present when the two were granted bail and when the charges against them were ultimately withdrawn in November 2019.

(B) SGT BOPAPE

[28] The facts leading to the arrest of the plaintiff were that the second witness for the First Defendant and arresting officer, Sgt Bopape, and his colleague received information that a robbery had taken place in Pretoria North and that the robbers were at house [...] M[...] Street, A[...], approximately 20 kilometres from where the robbery had occurred. The police proceeded to the said address where they found a yellow Audi S3 vehicle with registration[...], parked outside the gate, but behind a white VW Jetta 6 motor vehicle with registration [...], which was parked on the driveway inside the premises. Sgt Bopape had shortly established over the police radio that the yellow Audi S3 was registered in the plaintiff's name. Bopape had found the key for the Audi left in the ignition. With regard to the VW Jetta 6, Bopape testified that on inspection he had noticed that the vehicle had been broken into and that he had also found a large amount of cash in it. He also established that the white VW Jetta 6 had been reported stolen in Gqeberha and he was given the relevant CAS number.

[29] Prior to his inspection and seeking information on the two vehicles from the SAPS hotline number 10111, Sgt Bopape and his colleague had spoken to the first witness, Ms Salome, who resides at the premises and who led them to the room in the outbuilding on the premises where her cousin, Lehlohonolo, his friend, Lebohang and a man she did not know (the plaintiff) had walked into carrying boxes from the white VW Jetta 6 which they had come in being driven by Lehlohonolo.

[30] Bopape testified that while approaching the outside building, he saw men running out of one of the rooms. On getting to the building, Salome pointed out the room the men had been in. He saw a lot of cash (bank notes) placed in stacks on the floor 'as though it was being shared'. He went outside to pursue the men he had seen running out, leaving his colleague handcuffing Salome. Bopape found the plaintiff hiding behind the outside toilet and brought him to the room. He asked Salome if the plaintiff was the man who had come with her cousin and his friend. It was upon confirmation by Salome that the Sgt knew he had a suspect who identified himself as Hasane Macheke. The plaintiff told Bopape that he knew nothing about the money on the floor and that he had come to the premises with Lehlohonolo. He

tried to call Lehlohonolo on the cell phone in the presence of Bopape, but the call was not answered.

[31] Bopape further testified that there were envelopes also on the floor with amounts written thereon. He assumed the bank notes had been taken out of those envelopes. The plaintiff had wanted to talk when Bopape decided to inform him of his rights and placed him under arrest, handcuffed and sat him down. Bopape proceeded to the other outside room where he found two envelopes similar to those in the first room with money on the floor. The envelopes were on the bed and amounts written thereon. There was corroboration in the evidence of Bopape and Salome whom Bopape also arrested in the end.

[32] Bopape then proceeded to the main house where, according to his evidence, he had found an old man who had denied knowledge of the white VW Jetta and the money in the room, and whom he also arrested. According to Salome, it was in fact her elderly aunt that Sgt Bopape referred to as an elderly man and whom Bopape had arrested together with her and the plaintiff and took them to the police station and detained after processing.

[33] The statements of Salome and Sgt Bopape, inter alia, containing the above evidence on the case against the plaintiff formed part of the docket that was handed over to the office of the Second Defendant for consideration and decision whether criminal proceedings should be instituted.

PLAINTIFF'S EVIDENCE OF EVENTS PRE-DATING THE ROBBERY

[34] In a dilatory response to a question by counsel for the Second Defendant and in an ostensible effort to prove the closeness of his relationship with the complainant, the plaintiff surprisingly gave unsolicited evidence that:

- 34.1 The complainant, Mashilo, owns several filling stations and, inter alia, trucks. The plaintiff accompanied Mashilo to collect money from the filling stations. They would thereafter drive to the complainant's house where they counted and packaged the money;

34.2 The plaintiff also assisted the complainant with ensuring that his trucks were roadworthy;

34.3 On 18 March 2018 the complainant and the plaintiff were counting and packaging money when the plaintiff received a call from his friend, Khotso, informing him that he was drinking in the township;

34.4 The plaintiff suggested that the complainant takes photos of him holding stacked bank notes packaged in amounts of R200 000 each. The plaintiff testified that he subsequently sent the photos to Khotso “just to brag”.

[35] It became apparent from the plaintiff’s responses during cross examination that while he was a friend to the complainant and Khotso, individually, the two did not know each other.

[36] In laying out to the plaintiff the facts that informed his decision to prosecute the plaintiff for robbery, the prosecutor, who was a witness for the Second Defendant stated the following facts he had gathered from contents of the police docket:

36.1 the complainant and victim of the robbery was the plaintiff’s friend;

36.2 the plaintiff was with the complainant at the latter’s place, in Pretoria North, around 09h00 on 1 August 2018, the day the robbery occurred. The thugs entered the complainant’s place shortly after the plaintiff had left around 09h30 and robbed the complainant of a large amount of money;

‘CONNECTING THE DOTS’

36.3 The plaintiff had picked up his friend, Khotso, at around 08h20 on the same day of the robbery at a Sasol filling station and together they drove to the shopping centre in Pretoria North, where the plaintiff wanted to

place a bet at a lottery outlet that opened at 09h00 and the draw was at 10h00.

36.4 Approximately two hours after the robbery, at about 11h20, the plaintiff was arrested on the premises of house 1[...] M[...] Street, A..., approximately 20 kilometres from the scene of the robbery where the plaintiff testified that he had been to drop off Khotso. It is to be noted that this was the house where the money robbed in Pretoria North was found by the police and so was the VW Jetta 6 that had been reported hijacked in Gqeberha and where the plaintiff was found behind the toilet hiding from the police and arrested after Ms Salome had confirmed that the plaintiff was the man who had arrived with her cousin, Lehlohonolo and his friend, Lebohang and offloaded boxes which they carried to the room in which the robbed money was found.

THE PLAINTIFF'S CLAIM 1

UNLAWFUL ARREST AND DETENTION

THE LAW, LEGAL PRINCIPLES AND FRAMEWORK

[37] Every person has a right to liberty and freedom of movement in terms of the Constitution of the Republic of South Africa, 1996, and the Bill of Rights. The arrest and detention of a person is a deprivation of his liberty and a curtailment of freedom of movement. It for this infraction that the arrest of a person is *prima facie* unlawful in our law.¹

[38] The law requires that an arrest be effected on reasonable and justified grounds and not arbitrarily and without just cause. The arrestor bears the onus to justify the arrest and deprivation of a person's liberty in whatever form it may have taken.²

[39] Section 40(1) of the Criminal Procedure Act, 1977, as amended, provides that a peace officer may arrest any person who, in terms of sub-section 40(1)(e) is found

¹ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367

² *Zealand v Minister of Justice and Constitutional Development* 2008 (3) SACR 1 (CC)

in possession of anything which the officer reasonably suspects to be stolen property or property dishonestly obtained and who the peace officer suspects of having committed an offence with respect to the property/thing. It has been held that the suspicion has to be on reasonable and justifiable grounds and that it for the arrestor / defendant to advance justifiable grounds for the arrest and thereby proving that the arrest was lawful.³

ANALYSIS OF THE EVIDENCE

[40] The evidence of both Sgt Bopape and Ms Salome placed the plaintiff at the scene where he was arrested. The presence of the plaintiff's vehicle, the robbed money and the suspected stolen VW Jetta 6 at the scene were sufficient to raise more than a mere suspicion that the plaintiff had committed or had engaged in the commission of the robbery and rendered the arrest of the plaintiff lawful and within the parameters of the law, in particular section 40(1)(e) and set legal principles. In addition, the plaintiff's own evidence that he did drop off Khotso at the entrance gate at the scene, although disputed, is necessary corroboration of his presence at the scene.

[41] Despite maintaining his denial that he was arrested directly on the premises at the scene, the difference of 30 metres between the scene and the point he alleges he was stopped and arrested on by the police, is insignificant in the bigger scheme and crucial considerations of the circumstances relating to the plaintiff in the robbery. He could not, even if he tried, talk himself out of the intricate web he was entangled in: - the occurrence of the robbery in Pretoria North shortly after he had left, his arrest some two hours later at a location approximately 20 kilometres away at or in the vicinity of the premises where the money that was robbed was found and where he had allegedly been to drop off Khotso whom he had been with since 08h20 that morning. The conspectus of his evidence unambiguously, in my view, points to the plaintiff's greater involvement, if not the controlling mind and facilitator of the robbery leveraging on his self-asserted close friendship with the complainant. It will be an

³ *Minister of Law and Order v Hurley* 1986 (3) SA 558 (A)

unreasonable expansion of meaning to find or describe these circumstances and the arrest of the plaintiff as having been coincidental.

[42] Ms Salome testified that the plaintiff was with her cousin, Lehlohonolo and his friend, Lebohang when arriving at the scene. During his testimony the following day of the hearing, the plaintiff referred to the person he had dropped off at the scene as Molao. Questioned on this aspect, the plaintiff testified that Molao and Khotso were names of or referred to the same person. It was put to him that Ms Salome's evidence was confirmed by that of Sgt Bopape who testified that the plaintiff had informed him that he had come to the scene with Lehlohonolo.

[43] In my view, despite the plaintiff's veil attempt to exonerate himself and play victim of an unlawful arrest, his evidence juxtaposed with that of Salome and Sgt Bopape on the material facts and circumstances of the arrest can hardly be described as mutually destructive, requiring a microscopic analysis. As a matter of fact, on his own version, he was present at or in the vicinity of the scene.

[44] Neither of the defence witnesses had prior knowledge of the plaintiff and their evidence to that effect was not countervailed. Ms Salome was seeing the plaintiff, who was in the company of two people she knew well, for the first time. She was in a pole position to observe them from no more than 5 metres away. The period between Sgt Bopape's search and returning with the plaintiff from behind the toilet was too short to have had any impact in Salome's recognition of the plaintiff. Neither Salome nor Sgt Bopape could have had any reason to implicate the plaintiff, nor did the plaintiff suggest otherwise.

[45] Save for the insignificant contradiction in the evidence of Sgt Bopape regarding the gender of the elderly person, Ms Salome's aunt, whom he had also arrested at the scene and the number of men, three according to Ms Salome and more than three according to the Sergeant. The truthfulness of the evidence and the credibility of these witnesses was, in my view, beyond reproach.

[46] I cannot unfortunately say the same with regard to the quality of the evidence and the credibility, or lack thereof, on the part of the plaintiff. He was exposed to be

given to the utterance of untruths and very spontaneous in trying to explain himself out of such untruths; he was exposed to have exaggerated the number of his dependent children when applying for bail in the criminal case; noticing that he was being cornered on his ability as a police officer to afford to make monthly payments of his stated car instalments of R14 000 – the plaintiff denied having earlier referred to the high end Audi S3 as his car and, instead explained the difference between ownership of an item and being the possessor thereof. He denied ownership of the vehicle and mentioned Bola Bola as the name of the company that owned the vehicle – he was not aware that Sgt Bopape had already made inquiries on his police radio about both vehicles found at the scene and was advised that the Audi S3 was registered in the plaintiff's name and that the VW Jetta 6 was reported hijacked in Gqeberha. It is unlikely that the Audi S3 would have been registered in the name of the plaintiff unless he had paid for it in full. The plaintiff gave an elaborate explanation of his additional income streams as a 'Spotter' of high end sought-after vehicles and his earning of a 5% commission on loans of between R1m to R10m when he introduced a qualifying finance seeker to his brother's financing enterprise.

CONCLUSION

[47] With regard to the plaintiff's claim for unlawful arrest and detention, his evidence, to the extent that it portrays his arrest and detention as having been without just cause and therefore unlawful, is rejected and his claim against the First Defendant stands to be dismissed with costs.

THE PLAINTIFF'S CLAIM 2 MALICIOUS PROSECUTION

[48] To succeed in a claim premised on malicious prosecution, the plaintiff must demonstrate that the defendant: set the law in motion, acted without reasonable or probable cause, acted with malice and that the prosecution had failed.⁴

⁴ *Minister of Justice and Constitutional Development & others v Moleko* (2008) All SA 47 (SCA) at para 8

SETTING THE LAW IN MOTION EVIDENCE

[49] The Second Defendant's witness, Mr Mbebe who was the Control Prosecutor who took the decision to prosecute the plaintiff and his accomplice, testified that his decision was informed by the facts that: a criminal charge of robbery had been laid; information of the whereabouts of the suspects was promptly followed by the police who, at the given address, had found the money that had been robbed and arrested the plaintiff who was found hiding behind the toilet and was identified as the unknown man who had arrived at the scene with two people well known to the witness.

[50] In making the decision to prosecute, Mr Mbebe had also considered the statements of the witnesses Ms Salome and Sgt Bopape, whose evidence on behalf of the First Defendant was considered earlier. Upon the contents of the two witnesses' statements being related to him, the plaintiff, while denying the truthfulness of those statements, conceded that the statements did implicate him. The plaintiff, however, took umbrage on the advice of his legal representative that nothing in those statements connected him to the commission of the two offences, hence his assertion that his prosecution was malicious.

ACTED WITHOUT REASONABLE OR PROBABLE CAUSE

[51] The legal principle is that: whether the prosecutor had acted with or without reasonable and probable cause in instituting the prosecution depends on what facts and factors instilled in him the belief that the respondent had committed the offence and that his prosecution had prospects of resulting in a conviction. The belief must be founded on reasonably cogent facts. Any doubt or uncertainty in the accuracy or fullness of the facts should be sufficient ground not to proceed with the prosecution for to proceed will be without reasonable and probable cause. In *Beckenstrater v Rottcher and Theunissen*⁵ the court stated the principle in the following terms:

⁵ 1955 (1) SA 129 (A)

“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 offence 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 of reasonable and probable cause.”

ANALYSIS

[52] It is common cause that the law was set in motion by the Control Prosecutor, Mr Mbebe, after having perused the sworn statements of the complainant and two witnesses, Sgt Bopape and Ms Salome, which combined, linked the plaintiff to the vehicle that he, Lehlohonolo and Lebohang arrived in and from which boxes ostensibly carrying the robbed money, were offloaded. It is to be noted further that the contents of the statements of Ms Salome and Sgt Bopape, were read to the plaintiff, who agreed that the statement did implicate him. It is also common cause that on the second appearance the suspects were released on bail and after approximately 14 months, on 29 November 2019, the charges were withdrawn owing to non-attendance by some police intended witnesses.

[53] A distinction has to be drawn between the failure of a prosecution to yield a conviction and the failure of the prosecution to take off for the reasons that were given in this case. It is the failure to secure a conviction that is referred to in the *Moleko* matter that would favour the plaintiff.

CONCLUSION

[54] It follows, firstly, from the finding, that the plaintiff had been involved one way or the other in the commission of the robbery and his arrest, that a prosecution had to follow. It is logical, therefore, that the prosecution was based on facts from which securing a conviction was a reasonable expectation. The plaintiff’s assertion of malice and unreasonableness of the basis of the prosecution cannot be sustained.

The plaintiff's claim for malicious prosecution consequently stands to be dismissed with costs.

ORDER

[55] Consequent to the findings in this judgment, the following order is made:

1. the plaintiff's claims against the defendants are dismissed with costs, scale C.
2. Counsel for the Second Defendant is directed to deliver a copy of this judgment to the Second Defendant to consider reviewing the withdrawal of the charges against the plaintiff.

MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff:	Adv Mathe-Ndlazi
Instructed by:	T Matu Attorneys

For the First and Second Defendants:	Adv Kalashe
Instructed by:	State Attorney, Pretoria

Date of hearing: 4, 5 and 6 September 2023

Date of delivery: 7 May 2024

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 07 MAY 2024.