IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: **D4845/2015**

In the matter between:

PHIKISILE ALVINA DLAMINI	**PLAINTIFF**
and	
DETECTIVE INSPECTOR NTULI	**FIRST DEFENDANT**
MINISTER OF POLICE	**SECOND DEFENDANT**
E M NXUMALO	**THIRD DEFENDANT**
DIRECTOR OF PUBLIC PROSECUTIONS	**FOURTH DEFENDANT**
MINISTER OF JUSTICE	**FIFTH DEFENDANT**

Coram: Mossop J

Heard: 20, 21, 22 May 2024, 14 June 2024

Delivered: 19 July 2024

ORDER

The following order is granted:

Claim A

1. The second defendant is found liable for:

(a) The wrongful arrest of the plaintiff; and

(b) The unlawful detention of the plaintiff over the period:

(i) 28 to 29 January 2008; and

(ii) 27 August 2008 to 21 June 2013,

and shall pay to her any damages arising therefrom that she is able to prove at a further hearing in due course.

Claim B

2. The fourth defendant is found liable for the malicious prosecution of the plaintiff and shall pay to her any damages arising therefrom that she is able to prove at a further hearing in due course.

3. The second and fourth defendants shall each pay fifty percent of the plaintiff's costs of suit, such to include the costs of two counsel where so employed, on scale C.

4. The issue of quantum is adjourned sine die.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an action by the plaintiff against the five defendants for damages arising out of her arrest, detention and prosecution for the murder of her husband, Thamsanqa Gumede (the deceased). The parties agreed to separate the issues in terms of Uniform rule 33(4) and I am accordingly required only to consider the issue of liability, having made an order of separation of liability from quantum at the commencement of the trial.

Opening observation

[2] The facts of the matter are lengthy but vitally relevant. They must, of necessity, be considered in some detail. Virtually all that is stated hereafter is common cause and was not disputed in the limited evidence that was called before me.

[3] However, not all the facts relevant to the matter were testified to before me. The plaintiff was criminally prosecuted prior to this trial commencing (the criminal trial) and certain evidence was led at that trial that was not led before me. Instead, I was given a transcript of the criminal trial (the transcript) and was urged by the legal representatives for all the parties to regard the evidence recorded therein as if it had been given before me. I shall do so where necessary, but I have some reservations about this methodology, for the issues are somewhat different in the trial before me and I did not have the benefit of observing certain witnesses who were called at the criminal trial but who did not testify before me.

The facts

[4] The facts of this matter could have been taken from a popular television series, such as ‘CSI’. They have the hallmarks of a work of fiction that have been brought into existence by the creative mind of a screenplay writer. But they are entirely true.

[5] The plaintiff is a school teacher and resided in a rural area close to Nkandla, KwaZulu-Natal with the deceased at their matrimonial home (the matrimonial home). On the evening of 27/28 January 2008, the plaintiff had spent the night at her

mother's homestead located close to the matrimonial home, but had returned to the matrimonial home early in the morning at around 05h00 in order to prepare herself for school. She found the deceased at the matrimonial home, allegedly threatening to shoot himself with a firearm. She returned to her mother's homestead and sought help there and also telephoned one of the deceased's sisters to report to her what was happening. Help was at hand in the form of a Mr Hlonipheni Ntanzi (Mr Ntanzi). Mr Ntanzi was in a relationship with the plaintiff's sister and the plaintiff's mother asked him to assist the plaintiff and to go to the matrimonial home. I point out that Mr Ntanzi, a most critical witness, was not called to testify before me. I am only able to recount what Mr Ntanzi did and said by making reference to the transcript and to the affidavits that he made to the South African Police Services (the SAPS) and which formed part of the SAPS docket, which was also handed in with the consent of all the parties.

[6] After being told what was allegedly happening at the matrimonial home, Mr Ntanzi hastened there and was followed moments later by the plaintiff. He found the deceased lying on a bed in a bedroom, drinking a quart of beer. Upon inquiry by Mr Ntanzi, the deceased denied that he intended to kill himself and permitted the upper part of his body to be searched for a firearm, which Mr Ntanzi was not able to find. Upon the arrival of the plaintiff at the matrimonial home, and whose arrival was allegedly seen by Mr Ntanzi from the bedroom window, the deceased arose from the bed and went out of the bedroom, ostensibly to urinate. Mr Ntanzi then heard two shots and found the deceased mortally wounded near the front door to the matrimonial home.

[7] Mr Ntanzi, on his own version, did not see who fired the shots that ended the deceased's life but as he entered the room where he found the deceased, he heard the plaintiff exclaim aloud that the deceased had shot himself. The deceased crumpled to the floor and died. A large number of community members then descended upon the matrimonial home. The SAPS were summoned and a Constable Hlase (Cst Hlase) responded and drove to the scene. He, too, did not testify before me. He, however, deposed to an affidavit on the day of the deceased's death in which he recorded the following:

‘On Monday 2008-01-28 at about 07:00 I was on duty posted as van driver. I received a complaint from my relief commander Inspector [illegible] that somebody has shot himself at Thulani area Nkandla.’

[8] Cst Hlase testified in accordance with that affidavit at the criminal trial. He went on to elaborate that at the scene he had spoken to Mr Ntanzi. The following emerged in an interaction between the prosecutor and Cst Hlase:

‘Proceed. You say you asked Ntanzi. What did you ask Ntanzi --- I asked Ntanzi and said to him “Ntanzi, how did this person shoot himself? Were you present when this person shot himself?”

Did he answer your question? --- He did answer me but he was shaking.

What did he say? --- He said he had shot himself.’

[9] Mr Ntanzi testified at the plaintiff’s criminal trial. He testified that on the day in question, and after the shooting, he had informed the deceased’s family, via a cellular telephone call that he made to a sister of the deceased, that the deceased had committed suicide. He also testified further as follows:

‘After Gumede family arrived, the police arrived. When the Gumede people asked what had happened, it was explained to them in a manner that was explained to them that Gumede had killed himself.

Yes proceed. --- The police also arrived and they were also told that Gumede had killed himself.’

Lest it appear that this was what others had said to the SAPS and not what he himself had said, Mr Ntanzi gave the following response to the following question put to him by the prosecutor:

'PROSECUTOR Did you talk to the police? --- The police arrived and found me when I was sitting together with people near a vehicle. He asked me what had happened. I looked at the people and I told him that Gumede had killed himself.'

[10] As to what he had apparently witnessed, Mr Ntanzi explained as follows on being questioned by the plaintiff's legal representative in the criminal trial:

'Okay. Now, let's analyse this putting. How was the accused putting this firearm down? He (sic) was putting slowly, not throwing it down? --- Well, I cannot explain that, whether she was putting it down slowly or whether she was throwing it on the floor, I did not see, but she did put it on the floor.'

His answer appears to demonstrate a conclusion and not an observation that he made.

[11] A sister of the deceased, Ms Nokuthula Magubane, who also did not testify before me, made an affidavit in which she confirmed that on the morning of the deceased's death, prior to his death, her sister had indeed received a telephone call from the plaintiff in which she reported that the deceased:

'… was pointing himself with a firearm.'

[12] In attendance at the scene on the day of the deceased's death was the first defendant, Detective Inspector Ntuli (D/Insp Ntuli), who testified before me but not at the criminal trial. He testified that he had attended the scene, apparently out of curiosity and not out of any necessity. He had no official function at the scene that day but stood around observing. Later that day, he was appointed as the investigating officer and served as such only for a few weeks before being transferred from SAPS Nkandla to SAPS Babanango. He last worked on the plaintiff's matter on 18 February 2008. He did not testify about why the plaintiff was arrested, for he was not involved in it in any way: he merely stated that he saw her being arrested. He also observed an SAPS crime scene investigator, Inspector Ngobese (Insp Ngobese), in attendance at the scene and noted the presence of

several SAPS officers and many members of the community, estimating that there were between 45 and 60 persons present.

[13] Insp Ngobese testified both at the criminal trial and before me. He was stationed at the Local Criminal Records Centre at Nqutu and was not a member of SAPS Nkandla. At the criminal trial, he testified that he had received a telephone call from SAPS Nkandla at about 07h25 on 28 January 2008 and:

'[t]hey informed me that there is a suicide case at Thulani area in Nkonise'.

[14] Insp Ngobese testified before me that he performed several duties at the scene: he spoke briefly with the witnesses, he took photographs and he searched for, and found, physical exhibits. He drew a plan of the scene and, importantly, he took specimens from both hands of the deceased, the plaintiff, and Mr Ntanzi for later testing for the presence of gunshot residue (GSR).

[15] As to what he did with the specimens that he took, Insp Ngobese testified before me that they were sent to the Forensic Science Laboratory (FSL) in Pretoria. He drafted a letter that was signed by his superior officer and which accompanied the specimens sent to the FSL. While the FSL was its primary destination, the letter was also addressed to the Commander of SAPS Nkandla. It was dated 18 February 2008 and it read, in part, as follows:

'4. On 2008-02-19 a parcel sealed in the forensic bag with serial No.FSB992896 is sent to you by Couriers.

5. The parcel contains the following exhibits

5.1 Deceased left and right hand primier[1] (sic) residue test.

5.2 Phikisile Dlamini's left and right hand premier (sic) residue test.

[1] Throughout this matter, the phrase 'primer residue' has been misspelt by witnesses (and by counsel). 'Primier' and 'premier', as used in this extract, are two such examples.

5.3 Mhlonipheni Ntanzi's left and right hand premier residue test.

6. Examination required:

6.1 Determine if premier (sic) is testing positive on any of the 5.1 to 5.3 mentioned above.'

[16] Insp Ngobese testified before me that it was his habit to put a copy of letters such as the one referred to above in the photograph album that he prepared. He knew that the photograph album would be needed at trial, and he knew that the investigating officer would have to come to fetch it from him at some stage. That he prepared a photograph album is beyond question: it was used at the criminal trial,[2] and it was handed in before me. It appears to be safe to assume therefore that the letter was placed in the photograph album as testified to by Insp Ngobese, for the letter, as does the photo album, physically exists. Insp Ngobese had proof of when the photograph album was picked up from him by the investigating officer: it happened on 6 March 2008, a month and a half before the plaintiff's criminal trial commenced.

[17] In locating physical exhibits at the scene, the three most important exhibits seized by Insp Ngobese were the firearm and two spent cartridge cases (the cartridge cases). The cartridge cases were located at disparate locations outside the matrimonial home. Standing outside the matrimonial home and facing its front door, one cartridge case was located to the left of the entrance to the matrimonial home and at the extreme left hand corner of the building itself and the other was found to the right of that entrance.

[18] How the spent cartridges came to be in such diverse positions is not easily explicable. Nor, indeed, was any attempt at an explanation proffered by the first and second defendants. An explanation for the wildly varying locations of the cartridge cases, however, may be found in the possibility of crime scene contamination, which

[2] The following extract from the transcript demonstrates the presence of the photograph album at the criminal trial:
'PROSECUTOR Mr Ntanzi, I'm in possession of the photo album. Can you please have a look at photo 5 of the photo album…'.

Insp Ngobese, at the criminal trial, acknowledged may explain their position. On everyone's version, there were an inordinate number of people at the scene by the time that the SAPS arrived. It cannot be ruled out that the final resting places of the cartridges cases are as a consequence of them being inadvertently moved by the throng of people drawn to the scene.

[19] There were several SAPS members at the scene, but it appears that a D/Insp Kunene (the arresting officer) was the SAPS officer in charge, and it was he who arrested the plaintiff on a charge of murder on the day that the deceased died. He did not testify before me because he had passed away. I was not advised of the date of his death, but I note from the transcript that he did not testify at the criminal trial either, presumably for the same reason. The plaintiff denied before me that she was formally arrested but it appears certain that she was. The following entry appears in the Nkandla SAPS occurrence book, dated 28 January 2008:

'14:50 ARREST: D/Insp Kunene arrested a/female Philisile Dlamini …'

In addition, an entry in the investigating diary forming part of the SAPS docket confirms the fact of the plaintiff's arrest and the reason therefore:

'ARREST: Phikisile Alvinah Dlamini has been arrested due to the information given by witness.'

The witness referred to can only be a reference to Mr Ntanzi, for there were no other witnesses who possessed any information about what had occurred.

[20] The evidence that the arresting officer relied upon to make the arrest would not have been the first version advanced by Mr Ntanzi, namely that the deceased had committed suicide. It would have been a slightly different version that Mr Ntanzi mentioned later the same day. After stating that the deceased had committed suicide, he appears to have provided a slightly different version to the SAPS in an affidavit made on the same day as the deceased's death, in which he stated the following:

‘I then notice the wife of the deceased B/W Bulaleni Gumede entered in the gate deceased stood up and they meet each other on the doorway without any talk. I heard the firing of a firearm twice. I quickly proceeded to where they was. I notice the deceased wife putting down the fire-arm next to the doorway inside.’

[21] Apparently, as a consequence of this version, the arresting officer determined that the plaintiff should be arrested and taken into custody where she was to remain for the next five and a half years. After her arrest, and on 4 March 2008, the plaintiff applied for bail, which was opposed by the State, and she was ultimately denied bail by the court and remained in custody.

[22] The plaintiff was formally charged with the murder of the deceased and, rather quickly, her trial commenced before the Eshowe Regional Court on 24 April 2008, less than three months after the deceased had died. Insp Ngobese was the second State witness called to testify on the first day of the criminal trial. Curiously, he never mentioned in his evidence in chief that he had harvested any GSR specimens at the scene. Reference to that fact was conspicuously absent from his evidence in chief. Following the completion of his cross-examination by the plaintiff’s legal representative, the regional magistrate presiding asked Insp Ngobese a few questions in clarification of his evidence and the plaintiff’s legal representative was, correctly, then permitted to ask further questions arising out of the court’s questions. The legal representative asked whether Insp Ngobese was qualified to take GSR specimens. Insp Ngobese said that he was. He was then asked the following question and gave the following response:

‘Did you do any test on the accused or anybody on the scene for gunpowder? --- Yes, I did. I did tests on three of them, the accused before court, Mr Ntanzi and the deceased.’

[23] After a trial that was adjourned on several occasions,[3] the plaintiff was ultimately convicted of the murder of the deceased during February 2009 and was

[3] From the transcript, it appears that the criminal trial, having commenced on 24 April 2008, was thereafter adjourned to 12 June 2008. On 12 June 2008, the matter did not proceed, and no evidence was led. On 7 August 2008, evidence was led, and the matter was adjourned to 11 September 2008.

sentenced to 20 years' imprisonment a month later. The plaintiff thereafter, through her attorneys, brought an application for leave to appeal against both her conviction and sentence. The application was granted, but the regional magistrate declined to release the plaintiff on bail while her appeal was being prepared.

[24] While the plaintiff, the deceased, and Mr Ntanzi had specimens taken from their hands for GSR testing, the results of none of these tests had been presented at the criminal trial. As already noted, Insp Ngobese ultimately disclosed at the criminal trial that he took the GSR specimens. But there was also a further, more disturbing, reference to them at the criminal trial. Just before the State closed its case, the following interaction occurred between the regional magistrate and the public prosecutor, who is the third defendant in the trial before me:

'COURT Then you also led evidence in regard to residues that were taken, I believe from the deceased, the accused as well as Mr Ntanzi. The witness who was here, who took the residue evidence, informed court that he won't know about the results. The results will be sent to the investigating officer or the prosecutor.

PROSECUTOR Your Worship I have not received the… [intervention].

COURT Not received any … [intervention].

PROSECUTOR Anything, yes.

COURT So, there were no tests made?

PROSECUTOR No.

STATE CASE'

On 11 September 2008, further evidence was led, and the matter was then adjourned to 30 October 2008. On 30 October 2008, evidence was led, and the matter then adjourned to 8 December 2008. Further evidence was taken that day and the matter then stood adjourned to 15 December 2008. On that day, evidence was led, and the matter was then adjourned to 26 February 2009 for judgment. Judgment was duly delivered, and the matter was finally adjourned to 16 March for sentence. Nothing appears to have occurred on that date for sentence was imposed on 20 March 2009.

[25] Unbeknown to the plaintiff and, allegedly, the third defendant, an analysis had, in fact, been performed on the GSR specimen taken from the deceased's right hand. It was analysed by a Captain van Hamm (Capt van Hamm) at the FSL in Pretoria on 19 August 2008. Capt van Hamm made an affidavit confirming her analysis of the specimen on 26 August 2008. The test result was thus extant approximately six months before the plaintiff had been found guilty at her criminal trial. The GSR test result revealed that the deceased tested positive for GSR on his right hand. The test result was forwarded to SAPS Nkandla by Capt van Hamm.

[26] The plaintiff remained oblivious to this, for the receipt of the GSR test result was not disclosed to her. However, as she awaited her appeal, she sought, and obtained, it from SAPS Nkandla, believing that it should have been disclosed at the criminal trial. All that it took was a single telephone call from her to the then investigating officer. The result was received by her in February 2013, long after her conviction but before her appeal was heard.

[27] On 21 June 2013, the plaintiff approached the Eshowe Regional Court and applied to be released on bail pending her appeal, based upon the GSR test result pertaining to the sample taken from the deceased's right hand. Her application was successful, and she was released.

[28] The plaintiff's appeal was enrolled for hearing in the KwaZulu-Natal Division of the High Court, Pietermaritzburg in March 2015. But there was a problem. The GSR test result on the deceased's right hand was not part of the appeal record: it could not have been because it was not disclosed at the criminal trial and it was only received by the plaintiff several years after her conviction. The appeal was accordingly adjourned to November 2015 and the plaintiff filed an application to lead new evidence before the regional magistrate who had convicted her, but on the date that it was to be heard, it was struck from the roll as the regional magistrate believed he was now functus officio.

[29] Prior to the hearing of the plaintiff's appeal, the plaintiff insisted on receiving the results of the GSR tests performed on the deceased's left hand and on her and Mr Ntanzi's hands. These tests had for some reason not previously been done but

were finally done in May 2013, approximately five years after the death of the deceased. Capt van Hamm established that there was no GSR on the left hand of the deceased and that neither the plaintiff nor Mr Ntanzi had GSR on their hands either.

[30] The objective evidence, therefore, was that only the deceased had discharged a firearm on the day that he died. Just as the plaintiff had said from the outset.

[31] On the adjourned date of the plaintiff's appeal in November 2015, the appeal court in Pietermaritzburg set aside her conviction and sentence and the matter was remitted back to the Eshowe Regional Court with a directive that the new evidence relating to the GSR test result on the deceased's right hand be received by it and considered.

[32] In January 2016, in compliance with that order, the new evidence was received by the regional court in the sense that Capt van Hamm's analysis reports on the GSR specimens were handed in consensually. No other oral evidence was called, but another affidavit prepared by Capt van Hamm in terms of s 212 of the Criminal Procedure Act 51 of 1977 (the Act) was also handed in. It explained, in general terms, how GSR was deposited on a person's hands and how GSR could be removed from hands. It did not, and could not, deal with any of the facts specific to the death of the deceased. It appears to me that this affidavit was improperly received by the regional court for it contained opinion evidence and not confirmation of any fact ascertained by, or any act performed by, Capt van Hamm.

[33] Having considered the GSR analysis reports and Capt van Hamm's further affidavit, the regional magistrate again convicted the plaintiff of murdering the deceased. As she had already served five years of the sentence of 20 years' imprisonment initially imposed by him, he simply deducted that period from the original sentence and sentenced the plaintiff to a further 15 years' imprisonment.

[34] On being convicted again, the plaintiff immediately sought leave to appeal against both her conviction and sentence and sought an extension of her bail pending the further appeal. All of these applications were granted in January 2016.

[35] In light of what she had discovered and exposed, the State regarded her conviction as unsafe and therefore no longer supported it and conceded the appeal. The plaintiff's conviction and sentence were consequently set aside and she was, at last, finally freed from the torment of her conviction and imprisonment. It had devoured five and a half years of her life.

[36] This then is the factual matrix against which the plaintiff's claims against the defendants must be determined.

The particulars of claim

[37] The plaintiff now seeks compensation for her torment. She has directed her gaze in this regard, principally, to the Minister of Police, the second defendant, and the Director of Public Prosecutions, the fourth defendant.

[38] The plaintiff's particulars of claim are comprised of two claims. The first claim is made against the second defendant, alternatively the fourth defendant, and relates to the plaintiff's alleged unlawful arrest and detention. The second claim is likewise against the second defendant, alternatively the fourth defendant, and relates to the alleged malicious prosecution and further detention of the plaintiff.

[39] The plaintiff's particulars of claim are not an example of how such a crucial document should be drawn: no heed was taken by the drafter thereof to the distinction between facta probanda and facta probantia. Evidence is pleaded freely and abundantly in an unsatisfactory manner throughout. The shortcomings in the initiating documents must have been recognised at some stage, for both the summons and the particulars of claim were amended in an attempt to render them more sensible but this effort barely succeeded.

[40] In argument, the particulars of claim attracted criticism from Mr Govindasamy SC, who appears for the third to fifth defendants. He correctly identified areas of weakness. He further submitted that the particulars of claim failed to disclose a cause of action against his clients. In response to Mr Govindasamy's argument, Mr Pretorius SC, who appears together with Mr Nkomo for the plaintiff, correctly pointed

out that this is an old matter,[4] and yet, despite its age, none of the defendants had thought it necessary at any stage to except to the particulars of claim. There is merit in Mr Pretorius' submission. Not only did the particulars of claim not attract an exception in terms of Uniform rule 23, the defendants apparently experienced no difficulty in pleading to them, for twice pleas have been tendered without any complaint. The content of the pleas will be considered shortly.

[41] I am not satisfied that no cause of action has been pleaded against Mr Govindasamy's clients. While the particulars of claim are undoubtedly open to criticism, they are not fatally flawed and it is possible to determine therefrom that the plaintiff alleges that:

(a) her arrest and detention were unlawful as there was no basis in law for that to have occurred nor was there any evidence to justify it or her continued detention while awaiting her trial; and

(b) her prosecution was conducted maliciously without there being any reasonable or probable cause for it to occur. Specifically, the plaintiff pleaded that the GSR test results had been concealed by the prosecution.

[42] With regard to the alleged concealment of the GSR test results, it must be acknowledged that Mr Pretorius, correctly in my opinion, conceded that the plaintiff had led no evidence to establish that pleaded proposition of concealment. Instead, the plaintiff appeared to now contend for a variation of the principle arising out of the application of Hanlon's Razor.[5]

The defences raised

[43] All five defendants, initially, delivered a joint plea to the particulars of claim as originally framed. Subsequent to the amendments to the summons and particulars of claim referred to previously, the second and fourth defendants effected consequential adjustments to the original plea and did so by delivering a further joint

[4] The action bears a 2015 case number.
[5] Hanlon's Razor: Never ascribe to malice that which is adequately explained by incompetence (https://simple.wikipedia.org/wiki/Hanlon%27s_razor).

plea. Both pleas must therefore be considered to determine what defences have been raised by the defendants.

[44] The original plea was simply comprised of a few admissions and a multitude of denials. No competing facts were pleaded to allow an understanding of what the actual defence was. The adjusted plea of the second and fourth defendants set about remedying this. That plea now made the following clear:

(a) It was denied that the deceased had committed suicide;

(b) It was denied that Mr Ntanzi had been present at the time of the shooting and it was asserted that he had made an affidavit in which he stated that he had arrived at the scene after the shooting had occurred;

(c) It was averred that the incident had been thoroughly investigated, evidence had been collected in a manner that would secure its admissibility at trial and all available witnesses had been interviewed to determine whether an arrest should be made;

(d) The second defendant's servants reasonably believed that the plaintiff had committed murder after carefully considering the facts;

(e) That when the trial of the plaintiff commenced, there was sufficient evidence to justify the plaintiff's prosecution; and

(f) It was not necessary for the fourth defendant to obtain the GSR test results because the second and fourth defendants already had sufficient other evidence to enable the plaintiff to be successfully prosecuted. And, it was denied that the GSR test results had been concealed.

[45] The adjusted plea did not fare well once all the evidence was in. While the particulars of claim were rightly criticised, the adjusted plea was no better on a factual level and certainly did not accord with the known facts or the evidence tendered by the parties. This will become clearer during the analysis of the plaintiff's

claims, to which I now turn. In doing so, while acknowledging that there are only two claims, I intend to consider separately the three essential components of those two claims.

The arrest of the plaintiff

[46] The purpose of an arrest is to ensure that the person arrested stands trial. It is not a form of anticipatory punishment for an alleged crime, but it is effected to ensure the proper administration of justice.[6] Our Constitution protects individual liberty and security of the person,[7] which, given our sorry past, is now a cherished right applicable to all citizens. This includes the right not to be arbitrarily deprived of that guaranteed freedom without just cause. Accordingly, depriving a person of his or her liberty by an arrest is prima facie wrongful[8] and the person who purports to do so must, therefore, justify the arrest.[9]

[47] The facts reveal that the plaintiff was arrested at the matrimonial home on the day that the deceased died. It is not in dispute that the arresting officer was not in possession of a warrant for her arrest.

[48] Section 40(1) of the Act permits an arrest without a warrant to occur under certain circumstances. That section reads, in part, as follows:

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

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody…'

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[6] *MacDonald v Kumalo* 1927 EDL 293 at 301.
[7] Section 12(1) of the Constitution reads:
'Everyone has the right to freedom and security of the person, which includes the right -
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.'
[8] *C v C and others* [2021] ZASCA 12 para 87.
[9] *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) at 589E-F.

[49] There is no suggestion of the applicability of s 40(1)*(a)* in this matter: The SAPS arrived at the matrimonial home after the death of the deceased and no criminal conduct therefore occurred in the presence of any of its members. The applicable subsection relied upon by the SAPS to justify the arrest of the plaintiff would thus be s 40(1)*(b)* of the Act.

[50] The jurisdictional requirements for an SAPS officer effecting an arrest without being in possession of a warrant of arrest were confirmed in *S v Sekhoto*[10] to be the following:

(a) the arresting officer must be a peace officer;

(b) he must entertain a suspicion;

(c) the suspicion must be that the suspect has committed a Schedule 1 offence; and

(d) such suspicion must be based on reasonable grounds.

[51] Van Heerden JA said the following in *Duncan v Minister of Law and Order*:[11]

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohammed v Duke*). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case.' (Citation omitted)

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[10] *Minister of Safety and Security v Sekhoto and another* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA) para 6, referring, with approval, to the judgment of Van Heerden JA in *Duncan v Minister of Law and Order* referenced in the footnote below.
[11] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818H-J.

[52] Each of the four jurisdictional requirements must be present before an arrest without a warrant is attempted.[12] When considering whether they were present, the test to be applied is an objective one.[13] A court is required to consider the matter from the point of view of the arresting officer and to take cognisance of the information that such person had at his or her disposal at the time that the decision to effect the arrest was taken.

[53] The arresting officer, D/Insp Kunene, would have been a peace officer, thus satisfying the first jurisdictional requirement.[14] I can only assume that he possessed a suspicion that the plaintiff had committed the offence of murder for he arrested her on that charge. Suspicion, by definition, means an absence of certainty. As was explained in *Minister of Law and Order v Kader*:[15]

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'

Schedule 1 to the Act deals with serious offences, including murder.

[54] Assuming therefore that the first three jurisdictional grounds were present, that leaves only the fourth, and more contentious, ground, namely whether there were reasonable grounds upon which the suspicion of the arresting officer was based.

[55] The information received by the arresting officer must be critically assessed by the court to allow a considered opinion to be formed as to whether a reasonable

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[12] Ibid at 818G-H.
[13] *S v Nel and another* 1980 (4) SA 28 (E) at 33H; *Biyela v Minister of Police* [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) paras 34-35.
[14] Section 1 of the Act defines a peace officer as: '… any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section.'
[15] *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H-I, quoting with approval the dicta first enunciated in *Shaaban Bin Hussien and others v Chong Fook Kam and another* [1969] 3 All ER 1626 (PC) at 1630C.

person in his position would have considered that there were good and sufficient grounds for suspecting that the suspect had committed a Schedule 1 offence. The arresting officer is not permitted to unthinkingly exercise his powers of arrest merely because he possesses them. The arresting officer must actively analyse and assess the information received and, if possible, should attempt to verify that information.

[56] These may appear to be onerous obligations but, in truth, they are not, for the arresting officer does not have to be absolutely certain that the person to be arrested has committed a Schedule 1 offence: it must simply be suspected that this is the case, based upon reasonable grounds which, in turn, must be based upon credible and trustworthy information.[16] The arresting officer's judgment does not have to be exact or true but must be founded on the objective standard of a reasonable police officer. This is a relatively low threshold for the arresting officer to meet.

[57] In *Mabona and another v Minister of Law and Order and others*,[17] Jones J, when considering the conduct of the reasonable person, concluded that:

'[A] reasonable man would bear in mind that [section 40 (1)] 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.'

Thus, so the learned judge reasoned, a reasonable man would:

'… 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

[16] *Biyela v Minister of Police* [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) para 35.
[17] *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SE) at 658F-G.

suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'[18]

[58] It is not possible to know what the arresting officer's thought processes were when considering the information available to him. Only his evidence could reveal that. I was advised by Ms Bisseru, who appears for the first and second defendants, that the evidence of D/Insp Ntuli was led to overcome this difficulty that the second defendant had in being unable to call the evidence of the arresting officer. In truth, the evidence of D/Insp Ntuli, as submitted by Mr Pretorius, advanced the case of the second defendant not even by a millimetre.

[59] While this court cannot know the thought processes of the arresting officer, it does know what the evidence was that he had to consider. The outcome of his deliberations, whatever they were, was the arrest of the plaintiff. The only issue to thus be determined, insofar as the arrest of the plaintiff is concerned, is whether the arresting officer could have had a reasonable suspicion and whether the decision he took to arrest her was reasonable in the circumstances.

[60] The information that the arresting officer had before him on the morning of 28 January 2008 was the following:

(a) Earlier that morning, and prior to his death, the plaintiff's family, as well as the deceased's family, had been informed that the deceased was threatening to shoot himself with a firearm. The respective families were advised of this by the plaintiff. Mr Ntanzi had confirmed that this was what he was told by her and was the reason why he went to the matrimonial home;

(b) The deceased had, according to the plaintiff, thereafter committed suicide;

(c) Mr Ntanzi, who was present at the scene at the critical moment, but who did not witness the death of the deceased, told the SAPS that the deceased had committed suicide;

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[18] Ibid at 658G-H.

(d) Mr Ntanzi agreed that he had telephoned the deceased's family after being urged by the plaintiff to report on his death and had said that he had committed suicide;

(e) Mr Ntanzi told the deceased's family who arrived at the scene that the deceased had committed suicide;

(f) The deceased had been killed by a firearm that belonged to the plaintiff;

(g) Mr Ntanzi had seen the deceased drinking a quart of beer at approximately 05h00 on the morning that he passed away;

(h) The wound to the deceased's head was to the side of the head, entering from the right temple and exiting on the left;

(i) Mr Ntanzi said the deceased and the plaintiff had met near the doorway to the matrimonial home and would thus have been facing each other as the plaintiff moved to enter the matrimonial home and the deceased tried to exit it, ostensibly to urinate;

(j) Mr Ntanzi later indicated that he had seen the plaintiff put down the firearm a short while after the shooting occurred;

(k) Mr Ntanzi never said that he had seen the plaintiff shoot the deceased;

(l) Two shots may have been fired from the firearm;

(m) Two spent cartridge cases were later found outside the matrimonial home and not within it;

(n) A large group of citizens had gathered at the matrimonial home before the SAPS arrived;

(o) A crime scene expert had been called to attend the scene by the SAPS; and

(p) GSR specimens had been taken by the expert from the deceased, the plaintiff, and Mr Ntanzi.

[61] From this evidence, it would have been obvious to the arresting officer that there was no direct evidence that the deceased had been murdered but there was evidence that he had committed suicide. The additional, critical evidence from Mr Ntanzi did not establish that the plaintiff had shot her husband, notwithstanding that he now claimed that the plaintiff had, indeed, done so.

[62] Any careful consideration of Mr Ntanzi's evidence that the plaintiff and the deceased were face to face with each other immediately before the deceased died would make it difficult to explain the plaintiff administering a gunshot wound to the right of the deceased's head, exiting on the left hand side. It would have appeared difficult for the plaintiff to have inflicted it, considering her position in front of the deceased and she would have had to fire the firearm with her left hand. A prudent SAPS officer would also have considered that the subsequent version advanced by Mr Ntanzi conflicted directly with his earlier version that he had previously communicated, both to the deceased's family and to the SAPS, that the deceased had taken his own life.

[63] Thus, the plea that Mr Ntanzi had not been at the scene prior to the firearm being discharged was palpably incorrect.

[64] Which is not to say that there was no evidence that a crime had been committed. There was some evidence that might have caused the SAPS to consider that a murder and not a suicide had occurred. That was the presence of the two spent cartridge cases near the scene. Why there should be two spent cartridge cases is not immediately clear. One would expect a single cartridge case in the event of a suicide. But it is, however, notionally possible that the deceased, if he committed suicide, may have missed, whether designedly or accidentally, when he fired for the first time and had then fired the weapon for a second time, this time finding his target. Or he may have wildly discharged the first round and then purposefully shot himself. Or he may have been shot at twice by someone from

outside the dwelling. A further possibility may have been that only one bullet had been fired and one of the cartridge cases was there from an earlier date. There are a number of possibilities. What the correct one was could not immediately have been clear. The factual matrix then available cried out for caution to be exercised by the arresting officer.

[65] That the death of a fellow human being is a serious and lamentable occurrence is not to be denied. But, as was stated in *C v C and others,*[19] the seriousness of the crime is not conclusive when it comes to the decision to arrest. This is even more so when the evidence available does not clearly point to the arrested person being the perpetrator of the serious crime.

[66] From the evidence already mentioned, it is safe to infer that the arresting officer, at the very least, was aware of the plaintiff's version that the deceased had not been murdered but had killed himself. The plaintiff said as much, as did Mr Ntanzi, at least initially. The arresting officer would therefore have to have considered that as a possibility and ought to have sought any corroborating evidence that this may be what had occurred and weighed it up against any evidence, such as there was, that the deceased had been murdered.

[67] There was, however, a mechanism that would potentially have resolved any uncertainty that existed over what had occurred. That was the GSR test results. A reasonable arresting officer would also have considered the desirability of not effecting an arrest until there was some degree of certainty as to who had fired the fatal shot. The arresting officer knew that a crime scene expert had been summoned to the scene, had attended and had taken GSR specimens.

[68] On a general objective conspectus of the evidence, in my view, it could not have been certain to the arresting officer that, in fact, a crime had been committed. The oral evidence pointed to suicide and the physical evidence did not tell a coherent story that disproved that possibility but simply served to introduce more uncertainty.

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[19] *C v C and others* [2021] ZASCA 12 para 86.

[69] It appears to me that there was a rush to judgment by the arresting officer and, unfortunately, an incorrect answer was arrived at, namely that there was evidence that the plaintiff had shot the deceased. Objectively, there was no such evidence. The evidence which did exist was not sufficiently strong enough to identify the plaintiff as a murderess. It follows, in my view, that the arresting officer could not have harboured a reasonable suspicion that the plaintiff had murdered the deceased. Her arrest, in the circumstances, was unlawful.

[70] The fourth defendant was not involved in the arrest of the plaintiff and cannot be held liable for it. The arresting officer was acting in furtherance of his duties as a servant of the second defendant and the second defendant is accordingly vicariously liable for his wrongful conduct.[20]

The detention of the plaintiff

[71] The plaintiff alleges that the second, alternatively, the fourth defendant is liable for her detention.

[72] The physical act of detaining someone against their will is an exercise of public power[21] and may only occur in terms of lawful authority.[22] The party who detains another accordingly bears the onus of establishing that such conduct is permitted in law.[23]

[73] The court in *Mvu v Minister of Safety and Security and another*[24] observed as follows on the issue of the detention of suspects by an arresting officer:

'In *Hofmeyr v Minister of Justice and Another* King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and that the failure by a police officer properly to do so is unlawful. The minister's appeal was unanimously

[20] *Brits v Minister of Police and another* [2021] ZASCA 161 para 32.
[21] *Groves NO v Minister of Police and another* [2023] ZACC 36; 2024 (1) SACR 286 (CC) para 60.
[22] *Zealand v Minister of Justice and Constitutional Development and another* [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC) para 24.
[23] Ibid.
[24] *Mvu v Minister of Safety and Security and another* 2009 (2) SACR 291 (GSJ) para 10.

dismissed by what was then known as the Appellate Division of the Supreme Court. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all.' (Footnotes omitted.)

[74] It seems to me that the principle isolated by this extract is that the detention of the arrested person is a separate consideration that must be reasonably justifiable. I, again, have no idea what thought processes the arresting officer engaged in when considering the detention of the plaintiff as I never heard his evidence.

[75] A person may only be detained lawfully if he or she was lawfully arrested. In *Minister of Safety and Security v Tyokwana*,[25] the Supreme Court of Appeal observed that:

'The authority of the police to detain a person is inherent in the power of arrest. Therefore, if the arrest is unlawful, the resultant detention is similarly unlawful.'[26]

I agree with that reasoning.

[76] I have already found the arrest to be unlawful: the plaintiff's detention was accordingly also unlawful pending her first appearance before a court. The second defendant's servant caused the plaintiff's detention, and the second defendant is accordingly vicariously liable for her detention until the date of her first appearance before the lower court, when her continued detention became a matter for the presiding magistrate to determine. That occurred on 29 January 2008. The plaintiff's application for bail was later heard on 4 March 2008.

[77] However, it is so that the SAPS may also be liable for the post-appearance detention of an accused person in certain circumstances. Whether this should occur is to be determined by the application of the principles relating to legal causation,

[25] *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA).
[26] Ibid para 31.

together with the applicable tests and policy considerations.[27] In *De Klerk v Minister of Police*, Theron J, writing for the majority, stated as follows:

'It is these public-policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.'[28] (Footnote omitted).

[78] This liability will arise where there is proof on a balance of probabilities that the unlawful conduct of the SAPS was the factual and legal cause of the post-appearance detention.[29] There are numerous examples of this type of conduct to be found in the law reports. Ms Bisseru referred me to several in her heads of argument. Thus, where an SAPS officer gave false evidence during a bail application, causing bail to be denied to the arrested person, the SAPS were held liable for the continued detention.[30] Where an SAPS officer failed to tell the prosecutor that the statements that implicated the arrested person had been obtained under duress and had been recanted, thereby eliminating any evidence linking the arrested person to the crime for which he was arrested, the SAPS were held liable for the further detention of the arrested person.[31] And where the investigating officer knowingly suppressed the fact that a confession, which was the only evidence implicating the arrested persons, had been extracted using torture, it was held that such conduct had caused their detention to continue, and the SAPS were held liable for that detention.[32]

[79] It seems to me that the existence of the GSR specimens and the awaited results from their analysis per se did not contribute to the plaintiff's detention. It did not initially cause her period in custody to become longer. She remained in custody

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[27] *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) para 63.
[28] Ibid.
[29] *Minister of Police and another v Erasmus* [2022] ZASCA 57 para 12.
[30] *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).
[31] *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA).
[32] *Mahlangu and another v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC).

because her bail application failed. I have no evidence on what happened at the bail application and the evidence adduced at those proceedings does not form part of the transcript. I can consequently make no finding on this period of detention.

[80] However, the position changed once the test result of the specimen harvested from the right hand of the deceased was received by the SAPS. The affidavit confirming the analysis result was dated 26 August 2008. I assume that it would have been received electronically by the next day. The investigating officer would have known of the plaintiff's version that she had not fired the fatal shot and that the deceased had committed suicide. The test result would have confirmed the fact that the deceased had fired the firearm and the investigating officer was under a duty to inform the third defendant of this development, as it may have had a material effect upon the prosecution, and therefore the detention, of the plaintiff.

[81] The SAPS did nothing with the test result for nearly four and a half years and permitted the prosecution and subsequent imprisonment of the plaintiff to continue, knowing that the deceased had fired the firearm that took his life. Where the GSR test report was between the date of analysis and the date that the plaintiff received it is not accounted for. No attempt was made before me by the SAPS to explain where it was for that extended period of time.

[82] The tragedy of this is that the plaintiff had not been convicted by the time that the GSR test result on the deceased's right hand was completed and received. Had this been brought to the attention of the prosecuting authority timeously, it is probable that there would have been a different outcome to this unhappy episode.

[83] I can discern no difference between not telling the prosecution of the fact that statements that implicated an arrested person had been agreed to only after torture and not telling the prosecution that a test result that had the potential to exonerate the plaintiff had been received. The omission was wrongful in both instances and the effects were the same: the detained persons were subjected to further unnecessary detention.

[84] It seems to me that the second defendant is therefore liable for two periods of the plaintiff's detention: from the date of her arrest on 28 January 2008 until the date of her first appearance on 29 January 2008, and from the day after receipt of the GSR test results report on the deceased's right hand, 27 August 2008, until the plaintiff was released on bail pending her appeal on 21 June 2013. The fourth defendant is consequently not liable for these periods of detention.

The prosecution of the plaintiff

[85] To succeed on a claim for malicious prosecution, a plaintiff is required to establish that:

(a) the defendant set the law in motion in the sense that they instigated or instituted the proceedings;

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

(c) the defendant acted with malice or *animo injuriandi*; and

(d) the prosecution failed.[33]

[86] Each of these elements must accordingly enjoy some attention.

Set the law in motion

[87] The plaintiff's pleaded case seeks to hold the second, alternatively, the fourth defendant liable for her prosecution. As regards the fourth defendant, the plaintiff contends that the prosecution was instituted by the third defendant, a servant of the fourth defendant, who permitted the prosecution to commence, and continue, without there being any reasonable and probable cause for her prosecution. In *Lederman v Moharal Investments (Pty) Ltd*,[34] Jansen JA held that the concepts of setting the law in motion or instigating the proceedings meant:

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[33] *Minister for Justice and Constitutional Development and others v Moleko* [2008] ZASCA 43; 2009 (2) SACR 585 (SCA) para 8 ('*Moleko*').
[34] *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 197A.

'… the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution.'

The third defendant testified before me that he considered the docket and that it was his function to determine whether a prosecution was appropriate in the circumstances. He decided that it was, and accordingly, I conclude that it was he who set the law in motion and commenced the prosecution of the plaintiff.

No reasonable and probable cause

[88] The second requirement is that the person who set the law in motion had no reasonable and probable cause to commence that prosecution. In *Beckenstrater v Rottcher and Theunissen*,[35] Schreiner JA discussed the meaning of reasonable and probable cause and found that:

'[w]hen 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.'

[89] A prosecutor need not, therefore, have a prima facie case or even proof beyond a reasonable doubt when considering whether to prosecute an accused person. All that is required is suspicion of guilt founded upon reasonable grounds. As was stated in *Minister of Justice and Constitutional Development and others v Moleko*:[36]

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[35] *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B.
[36] *Moleko* para 20, quoting with approval from 15 *Lawsa* (1999) para 449 (now 28(1) *Lawsa* 3 ed (2020)).

‘Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.’

[90] As to whether reasonable grounds existed for the prosecution of the plaintiff, that question is to be answered by reference to the facts of the case. The facts must then reasonably indicate that the plaintiff probably committed the crime.

[91] From the information available in the docket, the third defendant must have taken cognisance of the fact that he had no direct evidence whatsoever that the plaintiff had shot the deceased. The only evidence came from a witness, Mr Ntanzi, who had openly stated, both to the deceased’s family and to the SAPS, that the deceased had, in fact, committed suicide. If the prosecution of the plaintiff was to succeed, the third defendant would have to prove beyond reasonable doubt that she was the person who had shot the deceased and that the deceased had not committed suicide. He surely must have considered whether there was any way of determining who had fired the shot that killed the deceased. Had he done so, he must have considered whether there was any forensic evidence that would assist in determining this vexed issue. It appears that he did not. At least not before taking the decision to commence the prosecution of the plaintiff.

[92] I have already come to the view that the evidence at hand on the day of the plaintiff’s arrest was insufficient to justify her arrest. The further investigation of the matter does not appear to have made the case against her any more certain. In fact, on 23 April 2008, another of the deceased’s sisters, a Ms Maureen Gumede, made an affidavit in which she confirmed that she had been contacted by the plaintiff early on the morning of the deceased’s death and was informed that the deceased:

‘… was pointing a firearm to himself.’

[93] There was, furthermore, the evidence from the doctor who performed the post-mortem on the deceased. The doctor had concluded that the deceased had suffered a close-range wound to the head, established by the presence of GSR around the entry wound. The entry wound was to the right side of the deceased’s

temple. This would appear to dovetail with the positive GSR test result on the deceased's right hand.

[94] This evidence was not available at the time of the plaintiff's arrest, it was only obtained after her arrest and detention. Rather than provide persuasive proof of a murder, in my view, it strengthened the prospect of suicide. I thus find that there was insufficient cause to prosecute the plaintiff.

Animus injuriandi

[95] To demonstrate the presence of *animus injuriandi*, the plaintiff had to establish that the third defendant 'foresaw the possibility that initiating the prosecution was wrongful in that reasonable grounds for it were lacking [and] acted recklessly as to that consequence'.[37] The issue to be determined is thus what a reasonable prosecutor would have done with the information available to him or her at the time the decision to prosecute is taken.

[96] The third respondent testified before me that he had no knowledge of the GSR specimens being taken when he started the prosecution. That is a difficult proposition to accept, because it does not account for the letter drafted by Insp Ngobese on 18 February 2008. That document existed in as much as the photograph album existed. There was a similar letter, dated 13 February 2008, which served as a cover letter for the firearm and the cartridge cases discovered at the scene and accompanied those exhibits to the FSL in Amanzimtoti. It, too, went into the photograph album for delivery to the investigating officer. The presence of that letter in the docket was never doubted and evidence on the firearm was led at the criminal trial. I cannot therefore conceive of why the letter of 18 February 2008 would not be in the docket. If it was not in the docket, the SAPS has led no evidence to establish where it was for several years, for it is now in the docket and is before me. It seems more probable to me that it was in the docket but for some reason it excited no interest in the third defendant who either overlooked it or ignored it. I do not accept the third defendant's evidence that it was not in the docket.

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[37] *National Director of Public Prosecutions v Mdhlovu* [2024] ZASCA 85 para 32.

[97] But even if I am incorrect in that conclusion, it is so that on the first day of the criminal trial, being 24 April 2008, the third defendant came to know of the GSR specimens. As previously mentioned, that knowledge came from the evidence of Insp Ngobese. Apparently mortified at learning of the existence of the GSR specimens, the third defendant testified before me that he went to the office of the branch commander of SAPS Nkandla, which was located about 200m from the courthouse. There he met with a Captain Ntombela (Capt Ntombela) and complained that he had been embarrassed to find out about the existence of the GSR specimens when there had been no mention of them at all in the docket. He demanded the results urgently. He was told that he would get them. But he never did.

[98] The alleged confrontation with the branch commander is an indication of how important the third defendant considered the GSR test results to be. They were the key to unlocking what had occurred. He must then have realised that the test results were crucial to the just determination of the criminal trial: they would either confirm that the plaintiff had fired the firearm and stood to be condemned for murder, or they would show her to be an innocent woman falsely accused. Having, on his version, acquired this knowledge for the first time on 24 April 2008, the third defendant had nothing to lose by seeking an adjournment of the matter pending the arrival of the GSR test results: the plaintiff had, after all, been denied bail and was in custody.

[99] Yet, the third defendant did not seek this. He permitted the trial to continue for a further ten months until the plaintiff was ultimately convicted without the GSR test results ever being before the court. He appears to have made no further inquiries about the GSR test results after apparently confronting Capt Ntombela. Certainly, he made no entries in the investigating diary and he gave no written instructions to the investigating officer to obtain the test results. He did not record his visit to Capt Ntombela or his undertaking that he would get the results for the third defendant.

[100] It will be recalled that during his interaction with the regional magistrate shortly before closing the State's case, the regional magistrate stated that Insp Ngobese had indicated in his evidence that the test results would be sent either to the investigating officer or to the prosecutor. To that, the third defendant said that he had not received those results. But he never said that the investigating officer had not

received them either. There is no record in the docket that he ever asked the investigating officer this important question. It would seem that he never asked that question for if he had, the investigating officer would have told him, as he told the plaintiff, that the GSR test results on the deceased's right hand had been received in August 2008. This interaction between the regional magistrate and the third defendant occurred on 30 October 2008, because the transcript shows that the State closed its case on that date. By this date, the GSR test results on the deceased's right hand had already been sent to SAPS Nkandla by Capt van Hamm of the FSL in Pretoria.

[101] In *S v Lubaxa*,[38] the Supreme Court of Appeal 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 recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence 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.'

The third defendant ought to have sought a pause in the prosecution when, on his own version, he first ascertained the existence of the GSR specimens, for the results may have led to the evidence falling below the threshold referred to in *Lubaxa*. Common sense dictates that this is what should have occurred. But common sense, regrettably, is not that common.

[102] Before me, the third defendant indicated that had he known about the GSR specimens before the criminal trial commenced, he would have immediately set about securing the necessary evidence to establish the chain of evidence to permit the acceptance of this evidence. On the first day of the criminal trial, he became

[38] *S v Lubaxa* 2001 (2) SACR 703 (SCA) para 19.

aware of the existence of the GSR specimens. Yet he did nothing to obtain the necessary evidence to permit its reception into evidence, contrary to what was pleaded in the matter before me.

[103] Instead, having heard through his own witness that GSR specimens had been taken, the third defendant told the regional magistrate that no tests had in fact been done. That was manifestly untrue. An attempt was made before me to put a spin on what the third defendant said to the regional magistrate. The transcript reveals what was said and I decline, respectfully, to accept the interpretation advanced by Mr Govindasamy that the third defendant could not be understood to mean that no tests had been carried out but that no test results had been received. The questions and answers between the regional magistrate and the third defendant were clear and call for no interpretation.

[104] The task of a prosecutor is not, as commonly considered, simply to secure the conviction of a person charged with an offence. Prosecutors are the gatekeepers of the criminal justice system, and they stand in a special relationship towards the court.[39] Their task is to assist the court in the quest for truth and justice. They may not act arbitrarily.[40] They must act fearlessly, but objectively. They may not withhold evidence from the court, nor may they mislead the court regarding the existence of evidence. Where evidence is believed to exist, it must be ruthlessly pursued and obtained irrespective of whether it favours or harms the prosecution's case, for the ultimate quest is justice not a conviction. In *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)*,[41] Ackermann et Goldstone JJ held that:

'… prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.'

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[39] *R v Riekert* 1954 (4) SA 254 (SWA) at 261C-F; *R v Berens* [1865] EngR 42; [1865] 176 ER 815 at 822. See also D W M Broughton 'The South African Prosecutor in the Face of Adverse Pre-Trial Publicity' (2020) 23 *PER/PELJ* 1 at 4.
[40] *Minister of Police and another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 28.
[41] *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2002 (1) SACR 79 (CC) para 72.

The interests of the public would include the interests of persons who are accused of a crime.

[105] Unfortunately, the conduct of the third defendant appears to fall short of these standards. The interaction between the third defendant and the presiding magistrate over the fact that tests were not done is disturbing. At best, the third defendant's answer to the regional magistrate's question was reckless, at worst, it was untruthful. It may have persuaded the regional magistrate not to take the issue any further. It certainly was a pivotal moment in the criminal trial.

[106] Where a prosecutor is reckless as to the consequences of his conduct, that may amount to dolus eventualis, for as was stated in *Moleko*:[42]

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.' (Footnotes omitted.)

In my view, the third defendant knew of the existence of the GSR specimens and recklessly pursued the prosecution of the plaintiff. In doing so, he possessed the necessary animus.

The prosecution failed

[107] The final requirement is that the prosecution of the plaintiff must have failed. It initially succeeded. Twice. But ultimately, it failed when the State conceded the plaintiff's final appeal and did not oppose the setting aside of her conviction and sentence.

[108] I am therefore satisfied that the plaintiff must succeed in her claim for malicious prosecution.

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[42] *Moleko* para 64. See also *Patel v National Director of Public Prosecutions and others* [2018] ZAKZDHC 17; 2018 (2) SACR 420 (KZD) para 5.

[109] As regards who is liable for such damages as the plaintiff may in due course prove arising out of her malicious prosecution, it can only be the fourth defendant. The third defendant was its servant and was always acting in the course and scope of his employment with it. Moreover, as was stated in *Moleko*:[43]

'As far as the first appellant, the Minister for Justice and Constitutional Development, is concerned, the National Prosecuting Authority Act 32 of 1998 provides that the Minister exercises final responsibility over the national prosecuting authority established in terms of s 179 of the Constitution, but only in accordance with the provisions of that Act (s 33(1)). Thus, the National Director of Public Prosecutions (NDPP) must, at the request of the Minister, inter alia furnish her with information in respect of any matter dealt with by the NDPP or a DPP, and with reasons for any decision taken by a DPP, "in the exercise of their powers, the carrying out of their duties and the performance of their functions" (ss 33(2)*(a)* and *(b)*). Furthermore, the NDPP must furnish the Minister, at her request, with information regarding the prosecution policy and the policy directives determined and issued by the NDPP (ss 33(2)*(c)* and *(d)*). However, the prosecuting authority is "accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions" (s 35(1)). It is therefore clear that the Minister (the first appellant) is not responsible for the decision to prosecute Mr Moleko and the appeal must also succeed as far as the first appellant is concerned.'

Costs

[110] The plaintiff has succeeded in her claims and there is no reason why she should not have her costs. The matter was deceptively complex and was undoubtedly of great importance to the plaintiff. In my assessment, it was a reasonable and prudent precaution for her to engage the services of two counsel and that her costs should be on scale C. It seems to me to be fair that the second and fourth defendants should jointly pay the plaintiff's costs, including the costs of two counsel where so employed, on scale C.

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[43] *Moleko* para 18.

Order

[111] I accordingly make the following order:

Claim A

1. The second defendant is found liable for:

(a) The wrongful arrest of the plaintiff; and

(b) The unlawful detention of the plaintiff over the period:

(i) 28 to 29 January 2008; and

(ii) 27 August 2008 to 21 June 2013,

and shall pay to her any damages arising therefrom that she is able to prove at a further hearing in due course.

Claim B

2. The fourth defendant is found liable for the malicious prosecution of the plaintiff and shall pay to her any damages arising therefrom that she is able to prove at a further hearing in due course.

3. The second and fourth defendants shall each pay fifty percent of the plaintiff's costs of suit, such to include the costs of two counsel where so employed, on scale C.

4. The issue of quantum is adjourned sine die.

MOSSOP J

APPEARANCES

Counsel for the plaintiff	:	Mr C Pretorius SC and Mr M M Nkomo
Instructed by:	:	Ndwandwe Attorneys Suite 505, 5th Floor Metropolitan Life Building 391 Anton Lembede Street Durban
Counsel for the first and second defendants	:	Ms B Bisseru
Instructed by	:	The State Attorney 6th Floor Metropolitan Life Building 391 Anton Lembede Street Durban
Counsel for the third, fourth and fifth defendants	:	Mr M G Govindasamy SC
Instructed by	:	The State Attorney 6th Floor Metropolitan Life Building 391 Anton Lembede Street Durban