



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 347/16

In the matter between:

SEETSENG TSHEPISO CLIFFORD

PLAINTIFF

And

**MINISTER OF POLICE
THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

**1st DEFENDANT
2ND DEFENDANT**

JUDGMENT

DJAJE J

Introduction

- [1] The Plaintiff instituted an action for damages against the Defendants in the amount of Eight million rand (R8 000 000-00) for unlawful arrest against the first Defendant and malicious prosecution against the second Defendant. The matter proceeded on merits only as agreed between the parties. It was further agreed that the Defendants had a duty to begin.

Evidence for the Defendants

Claim 2- Malicious Prosecution

- [2] The first witness called for the second Defendant was Dalton Tshinyane ("Tshinyane") who is a Senior Public Prosecutor employed by the second Defendant at Vryburg Magistrate Court. During **December 2013** he was employed as an Advanced Regional Court Prosecutor at the Mmabatho Regional Court. He outlined his duties then as giving guidance to prosecutors, reading first appearance matters and if the accused is charged decide when the matter could be placed on the roll. He testified that on **9 December 2013** he received a docket of **CAS 139/12/13** which contained statements on allegations of rape, robbery and housebreaking. He read through the docket and the accused was the Plaintiff. In the statement of the complainant she alleged that she was raped by one of the two people who broke into her house and that although she did not know the person who raped her she could identify him. She described the person to her neighbour and that is how the name of the Plaintiff came up.

- [3] In the arrest statement the arresting officer stated that after getting the description of the suspect he went with the complainant to the Plaintiff's house and on arrival the complainant pointed at the Plaintiff as the person who raped her and the Plaintiff was arrested. It was on the strength of that information that Tshinyane decided to have the matter placed on the roll for further investigations as he was of the view that there was a *prima facie* case. In the docket there was also a medical report form known as "J88" confirming forceful penetration of the complainant. It was his testimony that he acted fairly and having applied his mind to the matter.
- [4] The other prosecutor who dealt with the matter of the Plaintiff in the Regional Court was Tshepo Benedict Kalakgosi ("Kalakgosi"). He testified that Plaintiff appeared in the Regional Court on **20 November 2014** and the case was first postponed to **27 January 2015** and thereafter to **9 February 2015**. On **9 February 2015** the Plaintiff through his legal representative refused to proceed with trial without DNA results. When the results came they excluded the Plaintiff and on **12 February 2015** the case against the Plaintiff was withdrawn. However when he consulted with the complainant she insisted that the Plaintiff is the person who raped her but he had to explain to her that because of the DNA results excluding him it was going to be difficult to prove his guilt. Kalakgosi testified that prosecution was terminated in the interest of justice in favour of the Plaintiff and that there was no malice on the part of the prosecution.

Claim 1- Unlawful arrest and detention

- [5] The arresting officer, Constable Pitso Kgetsane (“Kgetsane”) testified that on **7 December 2013** he attended a complaint at the complainant’s house and found the burglar door broken. The complainant explained that she was raped and her plasma television stolen. She further informed him that she can identify the perpetrator as she usually sees him in Unit 14 where she resides and that the person was recently in prison. Kgetsane testified that with the description and information received from the complainant he was able to get information from a police informant that led them to the Plaintiff’s house. On arrival at the Plaintiff’s house, he opened the door and the complainant immediately pointed him out as the person who raped her. That is how the Plaintiff was arrested and detained.
- [6] The next witness to testify for the first Defendant in respect of claim one was the investigating officer, Warrant Officer Kingsley Mogwasanyane (“Mogwasanyane”). He testified that he received the docket where the Plaintiff was the accused in **2013**. He investigated the case and the complainant told him that she could point out the person who raped her if she saw him. He denied assaulting the Plaintiff at any stage.
- [7] Pako Lucas Molema testified that on **8 December 2013** he was on duty at Mmabatho Police Station and he booked out the Plaintiff to be charged so he could appear in court the following day. That was his only interaction with the Plaintiff.

Plaintiff's Evidence

- [8] Plaintiff testified that he was arrested on **7 December 2013** in the morning at home. According to him the police came to his home on that day and they were first greeted by his mother and not him as testified by Kgetsane. Thereafter his mother came to inform him that the police were looking for him. He went outside and the police told him they had a few questions for him and took him into their vehicle and eventually took him to Mmabatho Police Station. He stated that the complainant was not with the police when they came to his home and as a result denied that the complainant identified him as the person who raped her. He was placed in a waiting cell without being informed why he was arrested. A few days later he was booked out by Mogwasanyane and assaulted. He was detained and on **16 January 2014** to **May 2014** he was taken to Lichtenburg Correctional Service to finish his sentence for which he was released on parole on **4 September 2013**.
- [9] During cross examination Plaintiff testified that at the time of his arrest at the police station he was assaulted by the officers who went to fetch him at home with batons. He tried to report the assault to the Magistrate but he oppressed him. It was not clear what he meant by being oppressed. As a result of the arrest and detention he developed high blood pressure for which he is still taking medication. He confirmed that he had been residing in unit 14 since 1997 and that on **3 May 2013** he was convicted and sentenced to twelve months imprisonment. It was his case that on the night of the incident of rape and housebreaking he was at home with his parents and denied being at the complainant's house raping her.

- [10] The Plaintiff's mother, Gloria Seetseng testified that on **7 December 2013** she opened for the police at her house and they asked for the Plaintiff. She called him and he left with the police. The police came back to fetch his clothes and informed her that the Plaintiff was a suspect for rape and robbery. She testified that when the police came to her house she did not see the complainant. It was her evidence that the Plaintiff informed her of the assaults by the police but refused that she reports to the station commander. She confirmed that on **6 December 2013** the Plaintiff was home and she left him watching television in the evening when she went to sleep around 21h00.
- [11] Mr Jackson Seetseng, the father to the Plaintiff testified that on **6 December 2013** in the evening the Plaintiff was at home and he slept around 20h00 or 21h00 leaving him and the mother in the sitting room. In the morning of **7 December 2013** his wife opened for the police and she went to call the Plaintiff. The Plaintiff left with the police. When he visited the Plaintiff in the police cells he informed him of the assaults by the police but the injuries he complained of were not visible.
- [12] The last witness called for the Plaintiff was his younger brother, Kutlwano Seetseng. He testified that he saw the police at his home on **7 December 2013** asking to see the Plaintiff. He did not see the complainant or anyone in the company of the police.
- [13] The issues to be determined in this matter are whether the Plaintiff was arrested and detained unlawfully and as a result maliciously prosecuted.

Submissions

[14] It was argued on behalf of the Plaintiff that not all the jurisdictional facts are present in this matter. The fourth fact that the suspicion must rest on reasonable grounds is absent as envisaged in terms of section 40(1) (b) of the Criminal Procedure Act 51 of 1977. It was submitted that the investigation officer Mokgwasanyane during the bail application proceedings admitted that the complainant told him that during the night of the incident she only saw one person and in her statement she stated that she was raped by an unknown man that she was seeing for the first time. Therefore the Plaintiff could not have been that person if she used to see him in unit 14. The Plaintiff's argument was therefore that the arresting officer should have noted that the identity of the perpetrator was not certain and considered holding an identification parade for the complainant to point out the person who raped her. It was further argued that the Plaintiff's version that the complainant did not point him out was corroborated by his parents and brother. Therefore the evidence of the arresting officer should be rejected as false. On the claim of unlawful arrest and detention it is the Plaintiff's case that the arresting officer had no reasonable ground for the suspicion and therefore the arrest and detention were unlawful.

[15] In relation to claim two of malicious prosecution the argument for the Plaintiff was that Tshinyane in deciding to have the matter placed on the roll did not pay attention to the contradiction between the statement of the complainant that she was raped by an unknown person and that of Kgetsane that complainant said she always saw the person who raped her in unit 14. This could have been an

indication to Tshiyane that the identity of the perpetrator was not certain and he should have advised the investigating officer to conduct more investigations and not set the law in motion. It was submitted further that there was no evidence linking the Plaintiff to the commission of the other counts of robbery and housebreaking except the incorrect identification which was unfounded. Further that the evidence of Kalakgosi that he could have proceeded with the case against the Plaintiff on the doctrine of common purpose cannot stand as Mokgwasanyane's testimony was that the complainant informed him that she saw one person. On this basis the Plaintiff's case was that the institution of prosecution against him was malicious

[16] In contention the Defendants' argument in relation to the claim of unlawful arrest was that Kgetsane as the arresting officer formed an opinion about what was unfolding before his eyes when the complainant appeared certain that it was the Plaintiff who raped her. He answered all questions frankly and remained consistent in his testimony unlike the Plaintiff and his witnesses who contradicted each other about whether the Plaintiff was asleep when the police arrived at his home or not. Further that the Plaintiff testified that the police came to his house with a small boy but none of his witnesses saw that boy. It is the Defendants' case that the arresting officer exercised his discretion reasonably with the intent of bringing the Plaintiff before court.

[17] In relation to malicious prosecution the second Defendant pleaded a defence based on section 42 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act") that the prosecutors who dealt with the

case of the Plaintiff acted in good faith. Further that both Tshinyane and Kalakgosi had no malice when they decided to place the matter on the roll and deciding to proceed with prosecution.

Law

[18] Section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 provides as follows:

“40. Arrest by peace officer without warrant

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

(a)

(b) whom he reasonably suspect of having committed an offence referred to in Schedule 1 (other than the offence of escaping from lawful custody).”

[19] As to whether the discretion is exercised properly the following was stated in **Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA)** :

“[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.”

[20] In par 28 of **Minister of Safety and Security v Sekhoto and Another (supra)** the following was stated:

“Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s40 (1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest.”

- [21] It is trite that the onus rests on a defendant to justify an arrest. In **Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)** Rabie AJ explained :

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

- [22] In **Zealand v Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (CC)** par 24, the court stated that:

“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

- [23] The following was laid down by Bertelsmann J in **Louw v Minister of Safety and Security 2006 (2) SACR 178 (T)** at 186a – 187e,

about an arrest where an offence listed in schedule 1 has been committed:

“I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith. An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. . . . [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.”

- [24] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle. See: **Pharmaceutical Manufacturers Association of South Africa: in re Ex parte Application of President of the RSA [2000] ZACC 1; 2000 2 SA 674, 2000(3) BCLR 241 (CC)** paragraphs [85] to [86].

- [25] Malicious prosecution consists of wrongful and intentional assault on the dignity of a person encompassing his good name and privacy. See: **Relyant Trading (Pty) Ltd v Shongwe & another [2006] ZASCA 162 [2007] 1 ALL SA 375 (SCA) paragraph 5.**
- [26] The requirements for malicious prosecution were set out in **Minister of Justice and Constitutional Development & others v Moleko [2008] ZASCA 43, [2008] 3 ALL SA 47 (SCA) paragraph 8** as follows:
- (i) the defendant set the law in motion;
 - (ii) the defendant acted without reasonable and probable cause;
 - (iii) the defendant acted with malice, and that
 - (iv) the prosecution failed.
- [27] In the case of **Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (AD) at 136 A-B** the test for ‘absence of reasonable and probable cause’ was set out as follows:
- “When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the 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.”*
- [28] In evaluating evidence the following was stated in the case of **Stellenbosch Farmers’ Winery Group Ltd & Another v Martell ET Cie and Others 2003 (1) SA 11 (SCA) Nienaber JA 14I-J – 15A-D** (two irreconcilable versions)

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on

(a) the credibility of the various factual witnesses;

(b) their reliability; and

(c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness’ candour and demeanour in the witness-box,

(ii) his bias, latent and blatant,

(iii) internal contradictions in his evidence,

(iv) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extra curial statements or actions,

(v) the probability or improbability of particular aspects of his own version,

(vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to

(b), a witness’ reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to

(c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”

Unlawful Arrest

[29] It is not disputed that the Plaintiff was arrested on **7 December 2013** on charges of rape, housebreaking and robbery by Kgetsane at his home without a warrant of arrest. The Plaintiff's case is that the said arrest was unlawful as the arresting officer's suspicion was not based on reasonable ground. This is based on the issue of identity and the contradictions in the statements of the complainant and the investigating officer. It is important to look at the statement of the complainant in relation to the issue of identity. In her statement the complainant stated that she heard the noise of people in the house whilst she was sleeping. That means that it was not one person who entered the complainant's house on that day. Further on in her statement she states that she described the one who raped her to her neighbours and they told her that person she is describing looks like Action (Plaintiff).

[30] The arresting officer in his statement stated that the complainant told him that if she see the suspects she can identify them as she used to see the other one at unit 14 and alleged that the guy has been arrested before. Further that on their arrival at the Plaintiff's home the complainant before they could speak to the Plaintiff, pointed him out as the one who raped her. During cross examination by counsel for the Plaintiff his version did not change about how the Plaintiff was arrested. He stated that what made him to have a reasonable suspicion was that the Plaintiff did not respond when he was pointed out and the complainant showed certainty. He was a credible witness and I cannot find his evidence to be improbable. There is consistency in his evidence and that of the complainant in

her statement that she could identify the perpetrator if she saw him and that is exactly what she did.

[31] The Plaintiff came with a version that the complainant never pointed him out and instead the police came to his home with a small boy. This is not corroborated by any of the witnesses called by him who were present at all material times when the police were at the Plaintiff's home. There was also inconsistencies regarding whether the Plaintiff was awake when the police arrived at his home or not. This is an indication that the evidence of the Plaintiff and his witnesses could have been rehearsed so as to corroborate each other on the issue of the door being opened by the mother and not the Plaintiff. The contradictions are material and that makes their evidence inconsistent and stands to be rejected.

[32] The decision to arrest by Kgetsane cannot be said to have been irrational. He was present when the complainant pointed out the person who raped her. Rape is a serious offence and he was justified to arrest the Plaintiff and not just warn him to appear at the police station. At that time the arresting officer had information that the Plaintiff was once arrested and that he was not dealing with a first offender. In my view the arrest and subsequent detention of the Plaintiff was lawful and the Plaintiff's claim cannot be sustained.

Malicious Prosecution

[33] The first requirement is not in dispute as the law was indeed set in motion. Tshinyane testified and explained why he decided to have the case against the Plaintiff enrolled. His evidence was that he was

of the view that there was a *prima facie* case against the Plaintiff. The information that he had was the statement of the complainant that she was raped and could identify her assailant if she saw him. On the other hand it was the medical report that there was indeed forceful penetration of the complainant. Further to that, was the statement of the arresting officer that he was present when the complainant pointed out the Plaintiff as the person who raped her. This information was the basis of reasonable grounds and could lead anyone to believe that the Plaintiff is guilty of the offence charged with and does not in any way display any malice.

- [34] The same applies to the actions of Kalakgosi. He decided to withdraw the case against the Plaintiff on the basis that the DNA results excluded him. However, he testified that the results only excluded the Plaintiff as a donor and not from the commission of the offence and he could have proceeded on the principle of common purpose. His explanation for the withdrawal was that as the results excluded the Plaintiff and the complainant was insisting that it was him, it was going to be a problem and cause contradictions in the state case as it is possible that the other person who was at her place could have been the one who raped her. He further explained that prosecution was terminated in the interests of justice and in favour of the Plaintiff. This explanation does not display any malice and is based on reasonable ground and probable cause. On this claim of malicious prosecution the Plaintiff has not succeeded to establish that the second Defendant acted without reasonable cause, thus his claim stands to be dismissed.

Costs

[35] The Plaintiff has not succeeded to prove his claim on unlawful arrest and detention and malicious prosecution. There is no plausible reason why costs should not follow the event.

Order

[36] Consequently, I make the following order:

1. The Plaintiff's claim on unlawful arrest and detention is dismissed;
2. The Plaintiff's claim on malicious prosecution is dismissed;
3. The Plaintiff is ordered to pay costs of suit.

DJAJE J T
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 7 & 8 NOVEMBER 2017

DATE OF JUDGMENT : 14 DECEMBER 2017

COUNSEL FOR PLAINTIFF : ADV T.B. MONTSHIWA

COUNSEL FOR DEFENDANTS : ADV M. D.MOHLAMONYANE