IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, BHISHO)

CASE NO: 527/2011

In the matter between:

KANYA LANGLEY SIBUQASHE Plaintiff

and

MINISTER OF POLICE First Defendant

DIRECTOR OF PUBLIC PROSECUTION Second Defendant

JUDGMENT

MBENENGE J:

Background

[1] In the afternoon of 5 June 2009, at about 17h00, Mr Lwazola Christopher Macklein (Macklein), a resident of NU 17, Mdantsane, fell victim to an armed robbery. On this fateful day, he had been visiting his girlfriend at NU1, Mdantsane, driving an Avis hired car. He alighted from the car after parking in front of the yard to his girlfriend's place. Whilst knocking at the door to his girlfriend's flat three suspicious looking men, wielding firearms, appeared in the scene ostensibly enquiring about the whereabouts of "*Alfred.*" Macklein was still engaging them on the purpose of their visit when these men suddenly demanded the keys to the car he was driving, which he surrendered. He was thereupon subjected to a search, with the strangers

finding out where his firearm was. He had none in his possession. His wallet and cellphone were taken away from him. A fourth strange man appeared in and joined the scene.

[2] Macklein was caused to board the car, which his captors drove to the outskirts of Berlin, a small town outside of Mdantsane Township. As the car was being driven, the captors were openly discussing, in Macklein's hearing, how he was to be killed. One of the captors, referred to as "*Maximum*," volunteered to execute the plan. They drove till they reached an open area in the vicinity of Mqongweni Locality, just beyond Berlin. He was directed to alight from the car, and to crawl on his knees, which he did. He observed that the spot they were on was a bridge. The captors told him to say his last prayer. When he was preparing for that, *Maximum*, who had all the while been pointing a firearm at him, was distracted whilst requesting his companions to supply him with hand gloves. Macklein took advantage of the distraction and dived over the bridge. Upon landing on hard ground below the bridge he initially felt dizzy. After he had regained composure, and with the aid of a passerby, Macklein resorted to nearby houses and eventually got to be at Berlin police station. The police at Berlin took him to Mdantsane NU1 police station. That, in a nutshell, is the doleful tale of how Macklein got to be in but escaped the jaws of death.

[3] In no time, thereafter, the tentacles of the law had engulfed at least one of the captors, who got to be arrested and detained at Cambridge police station in connection with the robbery, after Macklein had laid a robbery complainant. The Avis hired car was also recovered. The robbery became the subject of investigations by members of the South African Police Service (the Service), with Constable Bhenguza (Bhenguza) taking the lead in the investigations. It was during the course of those investigations that the plaintiff was arrested in the afternoon of Saturday, 6 June 2009 and subsequently detained at NU1 police station holding cells. The plaintiff ended up facing charges of robbery and kidnapping, which were, in the course of time and after the plaintiff had appeared in court on diverse occasions, withdrawn.

Introduction

[4] The plaintiff now seeks to recover damages from the defendants, sued in their official capacities. The particulars of the plaintiff's claim is not a model of clarity. Claim A is predicated on the allegation that the police "*had no reasonable or probable cause to arrest the plaintiff*", which classifies that part of the action as one for malicious arrest and detention, a cause of action clearly distinct from unlawful arrest and detention.[1] Claim B has been couched as being for loss of income, whilst claim C is for malicious prosecution.

[5] During his address, at the commencement of the trial, Mr Simoyi, who appeared for the plaintiff, referred to claim A as being for "*unlawful arrest and detention."* The incongruity emerging from what is alleged in the pleadings and what was stated in the opening address made me enquire from Mr Simoyi as to precisely what the nature of claim A is.[2] The plaintiff, through Mr Simoyi, committed himself to a claim for unlawful arrest and detention, adding that the detention claim was being pursued in consequence of the Court finding that the arrest was unlawful. On further debating the matter with Counsel, consensus was reached that the claim for loss of earnings was more a matter to enquire into at quantum stage.

[6] At the instance of both parties, the issues of liability and quantum were separated, with liability falling to be dealt with first and the issue of quantum standing over for determination at a later stage, in terms of rule 33 (4) of the Rules of Superior Court Practice.

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1 As to the difference between these two delicts, see Joubert *LAWSA* (first reissue) Vol 15 para 479 at 297.

2 The following remarks by Nugent JA in *Makahanya v University of Zululand* (2010)(1) SA 62 (SCA) para [31] at p72 B-C are Apt:

> "Sometimes the right that is being asserted might be identified expressly. At other times it might be discoverable by inference from the facts that are alleged and the relief that is claimed. And if there is any doubt a court might simply ask the litigant to commit himself or herself to what the claim is before the court embarks upon the case."

[7] The defendant is resisting the action. It has been pleaded that the arrest of the plaintiff without a warrant occurred in terms of section 40(1)(b) of the Criminal Procedure Act[3] in that the plaintiff had been reasonably suspected of having committed Schedule 1[4] offences namely, robbery and kidnapping. The resulting detention, so it has been pleaded, was lawful, having been a sequel to a lawful arrest and, on subsequent occasions, by virtue of a court order. It has further been pleaded that the members of the Service concerned did not set the law in motion in that the decision to arraign the plaintiff on charges of robbery and kidnapping was taken by a member of the National Prosecuting Authority based on documents enclosed in the docket, acting in good faith, with the police having played no role at all in taking that decision.

[8] It is to the evidence tendered by the parties and their witnesses that one must now turn before a pronouncement on the issues at hand can be made.

Evidence

[9] The plaintiff testified that on Saturday, 6 June 2009, between 15h30 and 16h00, he just parked his motor vehicle, a BMW, outside of Spar Supermarket at NU 1, Mdantsane. He went into the supermarket to transact, and in no time emerged therefrom and returned to his car. When about to start his car, two armed policemen hurriedly approached him after blockading his way. The police were in civilian gear, but drove a marked vehicle. They ordered the plaintiff to get out of his car and board the rear of the van they were driving. At this point members of the public rallied around the scene, curious and looking on to see what was happening. The crowd did not seem friendly towards the police. The police uttered no word and drove to NU1 police station with the plaintiff put into the back of the van.

[10] Upon arrival at the police station Bhenguza informed the plaintiff that he was under arrest for an armed robbery that was said to have taken place at NU 3, Mdantsane, involving the hijacking of a car on the previous day, 5 June 2009, at

[3] 51 of 1977 (the CPA).

[4] Schedule 1 of the CPA.

around 17h00 and 18h00. The plaintiff immediately denied involvement in the alleged robbery, stating that at the time the alleged robbery occurred he had been at Pullins Store, King William's Town, where he worked. He testified that he informed Bhenguza that he had knocked off duty at around 18h00. According to the plaintiff Bhenguza said there was no need for the plaintiff to give a long explanation as he (Bhenguza) was in possession of information sufficiently pointing to his involvement in the robbery. Bhenguza said he had been informed that the plaintiff, referred to as "*Ma-Gents*", had been involved in the robbery. The information was said to have been sourced out by a certain young man, Athenkosi Faltein (Faltein), who had already been arrested and detained for his involvement in the robbery. The plaintiff's request that arrangements be made for Athenkosi to see him, lest there was mistaken identity, was not heeded by Bhenguza. Another policeman, whose name turned out to be Maja, also tried persuading the plaintiff to own up the robbery, to no avail.

[11] Maja left the police station bent on verifying some information relative to the robbery and indicating that if, in the interim, he satisfied himself about the plaintiff's involvement in the offence the plaintiff would be incarcerated. On his return, Maja said there was no need for them to take him to Faltein for the verification sought by the plaintiff as he (Maja) had gained sufficient information of the plaintiff's involvement in the robbery. The plaintiff said Maja had called him by name ("*Khaya*") during their interaction. The plaintiff later established that Maja knew him as they used to drive similar BMW cars, which they used to take to the same service station for fixing. Before being locked up, the plaintiff requested the police to arrange for the safe keeping of his car, which was done.

[12] On the following morning, testified the plaintiff, he overheard a voice calling him out by name from outside the cells where he had been detained. He went to the cell door, which was unlocked. He saw three people, two in civilian attire and the other in police gear conversing among themselves. He was the subject of the conversation. One of these men required to know from the other whether the plaintiff was the one who had robbed him, which was answered in the negative, with the man

to which the question was directed stating that he knew the persons who robbed him and that the one that had been pointed to him (the plaintiff) was not the one.

[13] The plaintiff appeared in court on the following day, Monday 8 June 2009. He made means to meet Faltein. During that meeting, which occurred in the court's holding cells, Faltein, upon seeing the plaintiff, denied that he had told the police that the plaintiff was Ma-Gents and that he (the plaintiff) had been involved in the robbery. The plaintiff urged Faltein to inform the Magistrate accordingly when the matter was being dealt with. When the matter was called the accused (at that stage the plaintiff and Faltein) was informed that the case would be postponed for a bail hearing. The plaintiff said he raised his hand and informed the Magistrate that he had been arrested together with persons who mistook him for a "*Ma-Gents*". He was stopped from advancing this contention, with the Magistrate indicating that the contention raised was a matter for another day.

[14] Approximately a week thereafter, Faltein and the plaintiff appeared in court. This time a further co-accused, Andisiwe Mgweshe, had been added. According to the plaintiff, Mgweshe, too, denied that the plaintiff had been involved in the robbery. The plaintiff urged both Mgweshe and Faltein to inform the court that he had no complicity in the robbery. The matter was once again postponed for a bail hearing, with the plaintiff having since secured the services of a legal representative.

[15] Subsequent thereto, the plaintiff met Bhenguza and informed him that his co-accused were exculpating him from involvement in the robbery. Bhenguza responded that he would arrange for an identification parade to be held. The outcome of the parade would determine the fate or fortune of the plaintiff.

[16] The identification parade was eventually conducted at Wesbank Correctional Centre on 26 June 2009. Faltein and the plaintiff were part of the parade. Macklein entered the parade room and pointed at Faltein and the plaintiff as having been the persons that robbed him.

[17] In the interim, a fourth person affectionately known as "*Maximum*" was arrested in connection with the robbery. The plaintiff made means to see Maximum.

Upon seeing the plaintiff, Maximum, too, denied that the plaintiff had been involved in the robbery, saying he knew who the real culprit was. Maximum pledged to inform the court that the plaintiff had not been involved in the robbery. The plaintiff conveyed this information to Bhenguza, but that, too, fell on deaf ears.

[18] After the bail proceedings had been conducted and concluded, charges that the plaintiff had faced were withdrawn, due to insufficiency of evidence.

[19] When the plaintiff was being cross examined it was put to him that Faltein had told Bhenguza that he did not know Ma-gents, but that Ma-Gents was the owner of a white BMW that had been burnt and got to be parked at Yako's garage in Mdantsane. The plaintiff conceded that it might be possible for one referring to Ma-Gents as having been the owner of a BMW that was burnt and parked at Yako's garage to be understood as referring to him.

[20] It was further put to the plaintiff under cross examination that Faltein had told Bhenguza that he (Faltein) together with a person known as Ma-Gents, another known as Andisiwe and another known as Maximum had committed the robbery and hijacking. Faltein had described Ma-Gents as being the owner of the white BMW that had been burnt and parked at Yako's garage. It was further put to the plaintiff that Bhenguza had told Faltein that he knew the owner of the BMW that had been burnt and parked at Yako's garage. On 6 June 2009, Bhenguza saw the person he believed to be Ma-Gents and whose car had been burnt and parked at Yako's garage. That was the upshot of the version of the police on the strength of which the plaintiff was suspected of committing the subject robbery.

[21] Macklein was the next to be on the witness stand. He testified to how he suffered at the hands of his captors, who robbed him of the car he had hired from Avis. The encounter with the captors is dealt with more fully in the background part of this judgment. After Macklein had reported the robbery to the police at NU1 police station Constable Maja (Maja) accompanied him homeward on the same night of the incident.

[22] In the morning of 6 June Maja returned to Mackein's place and picked him up to NU1 police station to pursue further investigations in connection with the robbery. Macklein said he next interacted with the police on Sunday 7 June, after Maja picked him up in the same morning. They drove to NU1 police station. On arrival there he was led to the back of the holding cells. Whilst he stood not far from the door leading to the cells a policeman who had been talking to Bhenguza called out the plaintiff. He did not know the plaintiff's name, but knew him by sight as he used to see him driving his BMW. He was asked if he could point out the person who had robbed him. This was answered in the affirmative. Meanwhile the plaintiff had been caused to be within view. He was asked what he had seen from where he had been standing. He said he had seen a person that had been caused to appear whom he did not know.

[23] Macklein's testimony also related to an identification parade held with a view to affording him the opportunity to identify his captors. Macklein said on that day he was picked up by Mazitshana and Kwenene from his workplace at 13h00 having been invited to the parade which was scheduled for 14h00. He was taken to Westbank Correctional Centre. On arrival there he was handed over to a certain prison warder. The parade proceeded. He first identified Faltein. He thereafter also pointed out the plaintiff. He said during discussions he had with Bhenguza he had been instructed to point out the plaintiff so as to link him to the name Ma-Gents. He said he had not agreed to doing that, but eventually succumbed to doing it due also to a mysterious call he had received from a certain lady who claimed to be the plaintiff's girl friend who had gotten to be in possession of his (Macklein's) cell phone number. He had requested Bhenguza to investigate this, but at the time the parade was being conducted nothing had been unleashed regarding how she got to be in possession of Macklein's cellphone number.

[24] Macklein further testified that after he had pointed out the plaintiff he raised his hand, turned towards Mr Mdalana who was conducting the parade, and informed him that he had erred in pointing out the plaintiff as having been Ma-Gents. He told Mdalana he had been instructed by Bhenguza to point out the plaintiff.

[25] Under cross examination, Macklein was not able to explain why his version and that of the plaintiff regarding what occurred at the parade differed. Macklein's evidence that he informed Mdalana that he erred in pointing out the plaintiff as having been one of the robbers did not accord well with that of the plaintiff. He was hard put to explain this incongruity.

[26] It was further put to Macklein that the parade had taken place in the morning, and not in the afternoon, but Macklein maintained that it had taken place in the afternoon, yet there was ample documentary evidence pointing to the parade as having been conducted in the morning.

[27] Upon the closure of the plaintiff's case, Bhenguza was called to testify. He was the investigating officer in the related criminal case. He resigned from the Service and is now pursuing a career in business. The relevant docket was allocated to him on 6 June 2009. He thereafter received information that there were suspects who had already been incarcerated in connection with the subject robbery at Cambridge police station. He was also informed that the car of which the complainant had been robbed had also been recovered.

[28] When the docket was received the only statement that had been enclosed therein was that of Macklein who recounted how he had fallen into the hands of robbers. Bhenguza said he proceeded to Cambridge police station. One of the persons he interviewed there was Faltein. Faltein owned up the robbery and implicated "*Ma-Gents*", "*Maximum*" and a certain Mayende (Mgweshe) as having been involved in the commission of the robbery. Faltein further said Ma-Gents was owner of a BMW that was burnt and got to be parked at Yako's garage. Bhenguza said he told Faltein that he knew the owner of that BMW by sight, but did not know who his name was. Faltein was booked off the cells and went along with Bhenguza to point out where Mgweshe stayed. As they drove past Yako's garage in Mdantsane, Faltein pointed to the garage saying Ma-Gent's burnt BMW had been parked there. Later on, the same day, so Bhenguza testified, he spotted the person he knew to be the owner of the BMW that had been burnt and parked at Yako's garage at the Highway taxi rank near Spar. The person spotted was the plaintiff. Bhenguza ordered the

plaintiff to get out of the car. At that stage, a mob attended upon the scene. The police felt unsafe. They drove away with the plaintiff in the van to the police station.

[29] On arrival at the NU1 police station Bhenguza informed the plaintiff that he was being arrested for alleged involvement in a robbery that was said to have taken place at NU3, Mdantsane. Bhenguza warned the plaintiff of his constitutional and legal rights. According to Bhenguza, the plaintiff denied involvement in the robbery, and sought permission to contact his legal representative. Bhenguza got to know the plaintiff's real name when a police docket was being opened. Bhenguza further asked if it would be correct for one to describe him as having been the owner of a BMW that was burnt and parked at Yako's garage. The plaintiff answered this in the affirmative. After Bhenguza had informed the plaintiff that there was information to the effect that the plaintiff had been one of the culprits involved in the robbery, the plaintiff did not say much. Bhenguza said he asked the plaintiff further questions but could not recall what those questions were about.

[30] Bhenguza denied that he ever interacted with the plaintiff on Sunday 7 June 2009. The plaintiff appeared in court on diverse occasions thereafter. The decision to oppose bail was taken by the public prosecutor. He played no role in taking the decision. He also testified that Maja played no role in conducting investigations relative to the criminal case. The person described as having been the owner of the burnt BMW was said to be "*Ma-Gents*". The plaintiff denied being "*Ma-Gents*".

[31] After the parade had been conducted, Bhenguza enclosed the statement embodying the parade results in the docket which he handed over to the prosecutor.

[32] During the ensuing bail proceedings one of the co-accused testified that "*Ma-Gents*" had similar features with the plaintiff, but the two were not the same person. When Bhenguza confronted Macklein with this information, Macklein said he was doubtful that the plaintiff had been one of the culprits. Bhenguza informed the prosecutor of this.

[33] The only time that the plaintiff mentioned that he had been at his place of employment at Pullins when the robbery occurred was, according to Bhenguza, when

the plaintiff gave testimony during the bail proceedings. On the strength of this information, Bhenguza proceeded to Pullins Store and spoke to the store Manager, who confirmed that the plaintiff had infact been an employee there. The Manager could, however, not assist regarding the time at which the plaintiff had knocked off on the day of the robbery. When Bhenguza was called to testify during the bail proceedings he stated that in light of these revelations it would not be safe to continue detaining the plaintiff, pending the finalisation of the case, but despite that stance the Magistrate refused to grant the plaintiff's bail application. When further investigations were being conducted, it emerged that there was a person who actually knew who "*Ma-Gents*" was. A statement was obtained from this person. The plaintiff and Magents turned out to have been two different persons all together. This resulted in charges being withdrawn against the plaintiff.

[34] Constable Maja was the next to testify. He is stationed at the East London Vehicle Investigation Section, and is a member of the Service. During the time in question he was stationed at the East London (Fleet Street) police station. He got information that a hired vehicle had been the subject of hijacking. Having been furnished with the details of the driver of the hired vehicle he called the driver and fixed an appointment to see him. They met and he eventually interviewed the driver who was the complainant in the robbery case. On a subsequent occasion he went to pick up the complainant from his home arranging for the complainant to meet Bhenguza.

[35] Maja was present when Faltein was being interviewed by Bhenguza. He testified that Faltein provided names of three persons with whom he committed the robbery. "*Ma-Gents*" was mentioned as having been one of the culprits, described as "*a person who was tall in height*" and "*white in complexion.*" He was said to have "*a beard*" that is "*black and white*", and referred to as "*the owner or driver of that BMW which was burnt down and parked at Yako's garage."* Maja said he knew the driver of the BMW by sight only. He however denied ever interacting with the plaintiff in any significant way. He also denied having been part of the police who were at the holding cells on 7 June.

[36] Mdalana also testified. He is a member of the Service stationed at NU1 police station. He conducted the identification parade at which Faltein and the plaintiff were pointed out by Macklein. All the processes preceding the holding of the parade were followed and, according to Mdalana, the parade was regular and proper for all intents and purposes. The parade was held at 09h00 on the day in question, and not in the afternoon. According to him parades are not held after 12h00. He denied that Macklein ever brought to his attention that he had erred when pointing out the plaintiff as one of the culprits.

[37] Ms Cikizwa Grace Maqhiza, a prosecutor and member of the National Prosecuting Authority, was another of the defendants' witnesses who testified. She is stationed at the Regional Court, Mdantsane. She conducted the related bail proceedings wherein the State opposed the plaintiff's application for bail. The bail application commenced on 9 June 2009. She associated herself with the decision of the Regional Court Control prosecutor that bail be opposed. The decision was based on the statement of Macklein pointing to the robbery having been committed and the circumstances surrounding the same. Macklein had alleged, in the statement, that he could identify his captors, and did infact identify the plaintiff during an identification parade subsequently conducted. She said she was also influenced by the content of Faltein's confession, in so far as it implicated a "*Ma-Gents*" as one of the culprits. Ma-Gents had been described as a person who owned a BMW that was burnt and parked at Yako's garage. She also took into account the statement deposed to by Bhenguza wherein it was mentioned that the plaintiff, according to Bhenguza, fitted that description.

[38] Notwithstanding the fact that Bhenguza testified that the case of the State against the plaintiff was weak because Macklein was no longer certain about the plaintiff's identity, Ms Maqhiza pursued the opposition to the bail application. She did not agree with Bhenguza regarding the weakness of the State case, this so because there was no stage at which Macklein had said he erred when identifying the plaintiff at the parade. She last dealt with the matter at bail proceedings stage.

[39] Even though Ms Maqhiza did not take the decision to prosecute, made by Ms Khukhula on 8 June 2009, she nevertheless associated hersely therewith, on 17 June 2009 when she postponed the case for a formal bail hearing.

[40] Ms Maqhiza conceded that as on 8 June 2004 there was nothing linking "*Ma-Gents*" to the plaintiff's name, Khanya Sibhuqashe. She, however, believed that there was a *prima facie* case against the plaintiff when the case fell on her hands namely, Faltein's confession mentioning the bodily features of the person who was with him when he committed the robbery; the fact that the person described was said to have been the owner of the BMW that was burnt and parked at Yako's garage and Bhenguza's statement that he knew the person fitting that description

[41] The last person to testify in these proceedings was Sabelo Kwayimani. He, too, is a prosecutor. He postponed the plaintiff's case when the matter was dealt with for the first time in Court, on 8 June 2009. The case was postponed because the State had not been ready at the time to entertain the plaintiff's bail application. Beyond that, Mr Kwayimani had no involvement in the case.

[42] At the conclusion of the trial the parties reached agreement that when the decision to prosecute was taken the information serving before the prosecutor was that contained in the docket as on 8 June 2009 (A1, A8 and A9 statements in the docket).

The issues defined

[43] The plaintiff elected not to augment and pursue his claim for the period during which he was detained by virtue of a court order on the basis of the existence and breach of a duty of care on the part of the members of the Service concerned and those of the National Prosecuting Authoring who were involved in deciding to prosecute him.[5] The relevant portion of the plaintiff's particulars of claim reads:

[5] Such a claim would have been based on decisions like *Woji Minister of Police* [2014] ZASCA 108, *Minister of Safety and Security v Du Plessis* [2013] ZASCA 128 and *Singatha and Another v Minister of Police and Another* [2015] ZAECBHC 19, wherein it was found that the existence of a detention order does not preclude a determination of the legality of the manner in which the court exercised its discretion in granting that order, and that on conduct, including an omission, which constitutes a breach of a public law duty may render the plaintiff's detention unlawful for purposes of a delectial claim for damages.

"7. The aforesaid Constable Benguza and the unknown policemen referred to in paragraph 6 above, had no reasonable or probable cause to arrest and detain the plaintiff, in particular:

7.1 They failed to investigate and obtain relevant information from relevant sources regarding the Plaintiff's explanation that he was not at the scene of crime at the time of the commission of the offence of robbery and kidnapping, alternatively they were negligent in the conduct of such investigation;

7.2 They had a legal duty to investigate the Plaintiff's alibi before arresting and detaining him;

7.3 Had they performed their duties in accordance with their legal duty, they would have established that the Plaintiff was not involved in the commission of the offence in question;

7.4 Their failure to perform their duty in terms of their legal duty, alternatively, their negligent performance of such duty resulted in the arrest and detention of the Plaintiff; and

7.5 Their conduct was wrongful and unlawful in the circumstances.

8. The Plaintiff remained in custody until 28 September 2009 when all the charges against him were withdrawn."

[44] The allegations made by the plaintiff, quoted above, make it plain that the plaintiff's challenge to the alleged failure on the part of the police to exercise a duty of care was made in pursuit of the claim founded on malicious arrest and detention, which, as already pointed out, was abandoned.

[45] As already pointed out above, the plaintiff was content to pursue his claim for unlawful detention based purely on the contention that, in the event of it being found that the arrest was unlawful, it should follow that the resulting detention was unlawful.

[46] The issues thus falling to be determined are whether the arrest of the plaintiff without a warrant was justified; whether the resulting detention was unlawful; and whether the plaintiff has made out a case for malicious prosecution against the first

defendant. As against the second defendant, the claim for malicious prosecution was pursued in the alternative only.

Arrest and detention

[47] The plaintiff was arrested whilst occupying the driver's seat of his car, before setting out to leave the NU1 shopping complex. He was informed of the cause of his arrest. Bhenguza testified that the mob that rallied around at the scene of the arrest was not friendly towards the police, with the result that the police felt unsafe. It is common cause that, upon arrival at NU1 police station, the plaintiff was informed of the cause of his arrest. The issue I raised *mero motu* regarding whether in those circumstances the arrest had complied with section 39 (2) of the CPA was therefore allayed.

[48] Because it is common cause that the robbery and kidnapping are Schedule 1 offences and that the plaintiff's arrest had been without a warrant, the crucial question falling to be determined is whether the suspecion harboured by Bhenguza before effecting the arrest rested on reasonable grounds. The answer to that question calls for a scrutiny of the facts surrounding the arrest.

[49] According to the plaintiff, when he was being informed of the reason for his arrest, he immediately denied having been involved in the commission of the offence and raised an *alibi*, pointing to the fact that he had been at his place of work and knocked off at 18:00 on the day in question. He also said he had requested Bhenguza to facilitate a meeting whereby Faltein would be caused to see him, being hopeful that, upon seeing him, Faltein would tell Bhenguza that he (the plaintiff) was not *Ma-Gents.*

[50] Bhenguza's version, on the other hand, was that he only got to know that the plaintiff had been at work on the day in question, much later, during the related bail proceedings.

[51] Ms Da Silva, who appeared for the defendants, argued that the plaintiff's version should be rejected in its entirety as he was not a trustworthy witness. According to her, the version of Bhenguza that no *alibi* was raised at arrest stage should be preferred. That approach does not find support from the juridical approach to contradictions between two witnesses. The aim is not always to prove that the one version is truthful and the other not. Even in a detailed version there may be portions of evidence blurred by error or loss of memory, or even dishonesty. In any event, nothing requires me to reject a witnesses' evidence in its entirety because he has been shown not to be truthful in some other respect.[6]

[52] The probabilities overwhelmingly favour the plaintiff's version regarding how Bhenguza interacted with the plaintiff when the latter was being arrested. The plaintiff was eventually proven as having been at his place of work in King William's Town on the day of the robbery committed at Mdantsane. He had no reason to conceal that when he was being arrested. On the contrary, it was important, and indeed the logical thing for him to exculpate himself at the outset.

[53] Bhenguza's evidence on this aspect is plagued by fragility. He was questioned regarding whether he ever established the real name of Ma-Gents. His answer was woefully lacking. The relevant portion of the record reads:

> "Mr Simoyi Lets look at what happened on the day of your arrest. You had the name of the person only known by Athenkosi as Magents? --- Yes.
>
> And you had the information that the BMW of his Magents was burnt and was parked at the garage? --- Yes
>
> Okay the question I am putting to you Mr. Benguza is that you did not establish the information or the real name of this Magents?
>
> Court Do you understand the question? --- Yes I did try to establish from him who this Magents was.
>
> Mr Simoyi What name did you get? --- He said he did not know the real names.

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[6] See *S v Oosthuizen* 1982 (3) SA 571 (T) at 249, where the court held:

> "The argument on behalf of the accused would seem to be this: the evidence of Broodryk is contradicted (whether by other witnesses, or by himself in this trial, or by himself in previous statements); *ergo* his evidence should be rejected. The conclusion is a *non sequitur*. There is no reason in logic why the mere fact of a contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness."

> You did not get information where this Magents was staying? --- He did not know where he stayed."

[54] The version of Bhenguza with regards to how he interacted with the plaintiff at arrest stage reveals further shortcomings:

> "Did he tell you where he was at the point when the offence in question was be committed? Did he tell you? --- He did not tell me M'Lord.
>
> Did you ask him? --- I did ask him.
>
> What did he tell you? --- He said he did not say where he was. He simply said to me he wanted to have his own attorney and this thing, he does not know about this thing that there...
>
> You see I want to be sure here again. The question is did you ask him and the answer is yes I did. When you asked him, what did he tell you? Where did he say he was? --- He said he did not recall where he was otherwise he wanted his own attorney."

[55] The plaintiff's testimony that he had requested to be linked up with Faltein, lest Faltein had been mistaken as to the identity of the person he had referred to as Ma-Gents and who was involved in the commission of the offence, was not challenged.

[56] I am, in the circumstances, satisfied that at the time of his arrest, the plaintiff did inform Bhenguza of where he (the plaintiff) had been on the day the robbery was committed, but Bhenguza did nothing to investigate the facts surrounding the alibi, having merely satisfied himself that the plaintiff had been the same person as the Ma-Gents who was allegedly involved in the robbery.

[57] It is trite law that police officers who purport to act in terms of section 40(1)(b) of the CPA should investigate exculpating explanations offered by a suspect before they can form a reasonable suspicion for the purposes of a lawful arrest.[7] It is expected of a reasonable man to analyse and assess the quality of the information at his disposal critically and not to 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.[8]

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7 *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T); *Liebenberg v Minster of Safety and Security* [2009] ZAGPPHC 88 (18 June 2009).

8 *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE).

[58] Bhenguza testified that he received information from Faltein who was the plaintiff's co-accused in the related criminal case that a *Ma-Gents* was involved in the robbery and kidnapping. Faltein described this person to Bhenguza as having been the person who used to drive a white BMW which had been burnt and get to be parked at Yako's garage in Mdantsane. Bhenguza said he knew the person who used to own the burnt BMW by sight, not by name. When Bhenguza met the person he believed to be the owner of the BMW on 6 June 2009 he arrested him. That person was the plaintiff.

[59] Bhenguza did nothing to find out about the residential address of Ma-gents from any source. He never established the real name of Ma-gents. He did not know the name of the plaintiff, but only knew a person whose BMW was said to have been burnt and parked at Yako garage. He also never established the residential address of the plaintiff. Therefore, the true identity of who Ma-gents is, was not adequately investigated.

[60] Had Bhenguza entertained the plaintiff's version and conducted the necessary investigation he would have realised that the plaintiff had not committed any crime and that, therefore, he was not liable to be arrested.

[61] The information Bhenguza possessed prior to the arrest of the plaintiff ought not, objectively viewed, to have culminated in the harbouring of a reasonable suspicion. In any event, the information had been sourced out by a co-accused who had confessed to committing the robbery. On the facts of this case it was not available to Bhenguza to rely on the confession to form a reasonable suspicion on the strength of which the plaintiff was arrested and detained. The very person who is said to have implicated the plaintiff in a confession is the one whom the police refused to let the plaintiff meet at a very crucial stage of the investigations.

[62] In the circumstances, the plaintiff's arrest and resulting detention were not justified. On the authority of *Isaacs v Minister van Wet en Ander* [9] the unlawfulness of the plaintiff's detention ceased when he appeared for the first time in court and the Magistrate issued an order for his continued detention.

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[9] 1996 (1) SACR 314 (A) at 321I – 322C.

[63] I am mindful of *Minister of Safety & Security v Tyokwana*,[10] where it was held:

> "[W]hat was decided in *Isaacs* is that the prior lawful arrest of a person is not a prerequisite to the provisions of s50 (1) of the CPA coming into effect. Put differently, it was held that the fact, that the person may have been arrested unlawfully does not preclude him or her from being remanded lawfully in terms of s 50(1) of the CPA. However, what was not held in *Isaacs* is that an arrested person's continued detention, by virtue of an order of court remanding him or her in custody in terms of s 50 (1) of the CPA , will automatically render such continued detention unlawful. This was not the issue that the court in *Isaacs* was called upon to adjudicate."[11]

[64] The Supreme Court of Appeal went on to pronounce that whether the orders of the Magistrate remanding an accused in custody and refusing him bail rendered his subsequent detention lawful or not has to be answered with regard to the perculiar facts of each case. After highlighting the duty resting on a policeman, who has arrested a person for the purpose of having him or her prosecuted, to give a fair and honest statement of the relevant facts to the prosecutor, the court concluded:

> "In my view the respondent has shown that the circumstances in which the appellant's employees instigated and persisted with his prosecution amounted to an unjustifiable breach of s 12(1)(a) of the Constitution. This is sufficient to establish delictual liability on the part of the appellant for the full period of the respondent's detention from 2 October 2007 to 20 July 2009."[12]

[65] The first defendant was not called upon to meet a case of delictual liability founded in the manner pleaded in the *Tyokwana* case. In any event, the facts of the instant case differ remarkably from those in the *Tyokwana* case.

Malicious prosecution

[66] In *Minister for Justice & Constitutional Development v Moleko* [13] the requirements for the successful launch for a malicious prosecution claim were set out as being−

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[10] 2015 (1) SACR 597 (SCA).

[11] *Ibid* at [38].

[12] *Ibid* at [44].

[13] [2008] 3 All SA 47 (SCA).

(a) that the defendants set the law in motion (instigated or instituted the proceedings;

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with "*malice*" (or *animo injuriandi*); and

(d) that the prosecution has failed.[14]

[67] The criminal charges the plaintiff had been facing were withdrawn due to insufficiency of evidence on 28 September 2009. It is on that day that the plaintiff was released from custody, after bail had been refused by the Magistrate on a previous occasion.

[68] Therefore, on the facts of this case, the last requisite that must be proven in a malicious prosecution claim ought not to present any difficulty. It is trite law that the proceedings terminate in the plaintiff's favour where the plaintiff is acquitted or the Director of Public Prosecutions declines to prosecute.

[69] It now remains to consider whether the plaintiff has established the rest of the requisites of malicious prosecution against first defendants. This issue is dealt with under various sub-topics.

Was the law set in motion?

[70] Upon the arrest and detention of the plaintiff, Bhenguza opened the relevant police docket. He was not present in court when the plaintiff appeared for the first time on 8 June 2009. He was also not present in court when the matter was dealt with for the second time. Nor did Bhenguza ever interact with the public prosecutor when the decision to prosecute the plaintiff was being taken. Beyond this point, other than arranging for the identification parade to be held, Bhenguza next featured in the matter during the bail proceedings.

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[14] Ibid at 50d-f.

[71] It has been contended on behalf of the Service that Bhenguza merely gave a fair and honest statement of the facts to the prosecutor leaving it to the prosecutor to decide whether to prosecute or not and that, therefore, Bhenguza did not instigate the proceedings. There is indeed clear judicial authority for the proposition that where a policeman gives a fair and honest statement of the facts to the prosecutor to decide whether to prosecute or not the policeman does not in so doing instigate the proceedings.[15]

[72] In my view, given the dereliction of duty on the part of Bhenguza as pointed out above,[16] this case cannot be classified as one involving a policeman who has given a fair and honest statement of the facts to the prosecutor. Withholding crucial information does not constitute a fair and honest statement. Had he informed the prosecutor that the plaintiff had proposed that further investigations supportive of his alibi be conducted and the possibility of a mistaken identity ruled out by causing Faltein to meet the plaintiff, the plaintiff would, in all probability, not have been charged by the prosecution.

Without reasonable and probable cause

[73] From the above synopsis, can it be said that Bhenguza acted with reasonable and probable cause? It is expected of the defendant to possess sufficient facts known to the defendant from which a reasonable man could have concluded that the plaintiff had committed the offence in question.[17] The defendant is expected to have taken reasonable measures to discover the facts upon which he based his conclusion that the plaintiff was guilty of the offence. Where, as here, the defence is an alibi, and there was a risk of mistaken identity, it was incumbent on the investigating officer to have taken reasonable measures to discover the facts as proposed by the plaintiff and to have informed the prosecutor of those measures when passing on the docket for the

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15 *Waterhouse v Shields* 1924 CPD 155 at 160; see also *Funda v The Minister of Safety and Security* [2010] ZAECMHC 5.

16 See above paras [56] – [58].

17 *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 858.

taking of a decision. In my view, Bhenguza's failure to engage the prosecutor who took the decision that the plaintiff should be prosecuted constituted an instigation of criminal proceedings against the plaintiff without reasonable and probable cause.

Malice

[74] It is trite law that a person who acts in a grossly negligent and reckless manner, and does so in the furtherance of his own interest without due regard to the rights of others and careless as to whether he interferes with the liberty of another, will be regarded as having been influenced by improper motives equivalent to malice.[18] The conduct of Bhenguza already dealt with above points to him as having been actuated by malice when he failed to investigate exculpating explanations offered by the plaintiff and did not inform the prosecutor of those explanations. In light of this finding, and regard being had to the fact that the second defendant is an alternative defendant in the malicious prosecution claim, I need not enquire into second defendant's liability or otherwise for this claim.

[75] In light of the aforegoing, the first defendant is also liable in damages to the plaintiff for malicious prosecution.

Costs

[76] The plaintiff has been victorious against first defendant. In the circumstances of this case it is reasonable that the unsuccessful defendant should bear the costs of the action. The plaintiff's step of suing both defendants in one action was reasonable, having been informed by rule 10(3) of the Uniform Rules of Court.[19] Had the plaintiff not sued both defendants there might have been a risk of a multiplicity of actions. In any event, to a large degree, both defendants made common cause of the defence to the action; there was no conflict of interest between these defendants, hence they were represented by the same counsel.

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[18] *Hooper v Moore and Varty* 1921 NPD 105; *RL Weir and Co v De Lange* 1970 (4) SA 25 (E) at 29 and *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 845.

[19] *Harrington v Transnet Limited* 2010 (2) SA 479 at 496H – 497A; *Rabinowitz and Another NNO v Ned-Equity Insurance* 1980 (3) SA 415 (W) at 419G – 420A; and *Parity Insurance Co. Ltd v Van den Bergh* 1966 (4) SA (A) 461 at 481F – H.

Order

[77] In the result, the following order is made:

(a) The first defendant is held liable to the plaintiff in proven or agreed damages consequent upon the plaintiff's-

(i) arrest by members of the South African Police Service on 06 June 2009 and the plaintiff's resulting detention from 06 June 2009 to 08 June 2009; and

(ii) malicious prosecution from 08 June 2009 to 28 September 2009.

(b) The quantum of damages to which the plaintiff is entitled shall be determined on a date to be arranged with the Registrar of this Court.

(c) The first defendant shall pay the costs of the action incurred thus far.

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JUDGE OF THE HIGH COURT

Plaintiff's Counsel: Mr Simoyi (instructed by Messrs Msesiwe Vapi Inc.)

Defendant's Counsel: Ms Da Silva (instructed by the Bhisho State Attorney)

Heard on: 13 August 2015

Delivered on: 22 October 2015