IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 3186/12

In the matter between

HENRY JANSEN	First Plaintiff
DANIEL KLAASEN	Second Plaintiff
PETRUS MARTINS	Third Plaintiff
PETRUS GERTSE	Fourth Plaintiff

and

THE MINISTER OF POLICE	First Defendant
THE NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA	Second Defendant

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JUDGMENT

REVELAS J

[1] During the early morning hours of 1 August 2009, at about 03h00 the body of a forty year old man, Xolisile Nqaba ("the deceased"), was discovered in front of Taylor's Tavern in Louterwater, Joubertina by Julene Vaaltyn who called the police. The deceased was murdered and had died from stab wounds. Photographs were taken of the scene where he was found by Constable Henning who arrived on the scene shortly after the deceased was discovered. The photographs reflected the deceased lying in a pool of blood and also blood running away from his body down the side of the street, into a ditch. There was also another smaller isolated

pattern or splatter of blood on the ground between the deceased and the tavern entrance.

[2] The four plaintiffs were arrested by a police officer (also a peace officer), Detective Warrant Officer JP Malan ("Malan"), *allegedly* on suspicion of the murder of the deceased. The first three plaintiffs were arrested on 1 October and the fourth plaintiff was arrested on 7 October 2009. Subsequent to their first appearances, the plaintiffs were incarcerated at St Albans prison. The plaintiffs were charged with murder and later, just before their bail hearing, also with robbery with aggravating circumstances. On 13 November 2009 their formal bail application was dismissed.

[3] Their incarceration continued until 9 September 2010 when they were discharged at the end of the State's case in terms of section 174 of the Criminal Procedure Act 51 of 1997 ("the CPA") on the grounds that the State failed to make out a *prima facie* case against them.

[4] The plaintiffs instituted the present action for damages against the defendants on the grounds that their arrest and continued detention was unlawful and malicious and that the prosecution against them was malicious and effected *animo iniuriandi.* The plaintiffs' failure to serve their notices of demand on the defendants (prior to May 2011) as

required by section 3 of Act 40 of 2002, was condoned pursuant to an application.

[5] In their first claim against the first defendant (Claim A), the plaintiffs allege that their arrest and subsequent detention in the police cells until their first appearance in court was unlawful, wrongful, alternatively, effected *animo iniuriandi*. Each plaintiff claims R250 000.00 from the first defendant under claim A.

[6] Each plaintiff claims damages of R2 000 000.00 (Claim B) against the first and/or second defendants for their continued detention. They aver that during their detention, and on each of their appearances in Court, members of the South African Police Services designated by the first defendant to deal with the matter, and the prosecutors acting on behalf of the second defendant, requested the presiding magistrate to remand them into custody. In doing so, the plaintiffs maintain, they breached their legal duty to property investigate the case and represented to the magistrate that there was sufficient and compelling reasons not to grant them bail. The detention of the plaintiffs at the instance of the police acting through the prosecutors, was therefore wrongful and unlawful, infringing their constitutional rights, and was malicious, without probable cause and effected *animo iniuriandi*. In consequence of having been detained as aforesaid, each plaintiff alleges that he suffered

damages in the amount of R200 000.00 for the unlawful, alternatively, the malicious deprivation of his liberty and privacy and for *contumelia*.

[7] Under their third claim against both defendants (Claim C), the plaintiffs each claim R250 000.00 against both defendants on the grounds that the police and the prosecutors set the law in motion and instituted a prosecution which was without probable or reasonable cause, malicious and effected *animo iniuriandi.*

[8] The plaintiffs therefore claim damages totalling R2.5 million arising from their arrest, detention and prosecution. The plaintiffs closed their case on the morning of the first day of trial without leading *viva voce* evidence on either the merits or the quantum of damages. Thereafter, both defendants' applied for absolution from the instance. Since it is trite that the onus rests on a defendant to justify an arrest, absolution is not available to such a defendant.[1] Accordingly, the first defendant's application for absolution was dismissed.

[9] The second defendant, who did not carry such an onus was, however, absolved from the instance and the matter proceeded against the first defendant only. The reasons for the absolution order appear from this judgment. Briefly these are that the plaintiffs, who did not lead viva

[1] *Schoeman v Moller* [1949] All SA 60 (O) at 66-67; *Minister of Safety and Security v Sekhoto* [2011] 2 All SA 157 (SCA) at 163 c-d.

voce evidence were unable to advance a case that the prosecutors involved in this matter acted with malicious intent or were negligent in prosecuting the plaintiffs and opposing bail. The first defendant then closed its case, also without leading *viva voce* evidence. The evidence before court was therefore the trial bundle which comprised of the docket, the records of both the bail hearing held on 13 September 2009 and the criminal trial which was held and concluded on 10 September 2010.

[10] The parties agreed that all the documents in the trial bundle are what they purport to be, without admitting the correctness of the contents thereof, and may be referred to during argument. It was also agreed that the plaintiffs appeared in court within forty eight hours of their arrest by Malan and that they were initially detained in the police cells (in Joubertina) and then in St Albans Prison from the time of their arrest until their release on 10 September 2010. It was common cause that Malan was a peace officer as envisaged in section 1 of the Criminal Procedure Act, 51 of 1977 ("the Act").

[11] What remained in dispute was (a) Whether Malan entertained a suspicion at all, in terms of section 40(1)(d) of the Act that the plaintiffs committed the crimes of murder and robbery (which are Schedule 1 offences in terms of the Act) at the time of carrying out the arrests; (b) whether Malan indeed entertained such a suspicion, and whether this

suspicion was reasonable and held by himself; and (c) whether he suspected every element of the offence as was required in *Ramphal v Minister of Safety and Security*.[2]

[12] Arrest and detention constitute an interference with the arrestee's right to freedom and is therefore *prima facie* unlawful. In the circumstances the onus rests on the defendants to prove that the arrest and detention was justified.[3] Section 40(1)(b) of the Act provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. The defendant must therefore demonstrate that at the time of the arrest:

(a) the arrestor was a peace officer;

(b) the arrestor must have entertained a suspicion;

(c) the suspicion held was that the suspect had committed an offence referred to in Schedule 1; and

(d) the suspicion rested on reasonable grounds.

<u>The Evidence Obtained By Malan</u>

[2] 2009 (1) SACR 211 (E). See also *Fubesi v Minister of Safety and Security* (680-2009) [2010] ZAECGHC 91 (30 September 2010) para [14].

[3] *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A) at 589 E-F; *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC) paras [24]-[25]; and *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para [14]; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 814 D.

[13] When Malan, who was appointed as the investigating officer in this case of the murder, arrested the plaintiffs, he had the following information at hand:

13.1 The body of the deceased was identified on the same day it was found (1 August 2009).

13.2 The following day Detective Mtembo contacted his informers in connection with this incident and tasked them to make enquiries.

13.3 Detective Sergeant Ramoshaba visited friends of the deceased in an effort to trace the perpetrators.

13.4 On 3 August 2009 Malan received a phone call from a female informer who stated that she knew of a woman who witnessed "people" assaulting the deceased but was afraid of the suspects and would not come forward. He interviewed this person some time after receiving the information.

[14] During the criminal trial Malan testified that he concluded that the deceased had been stabbed where he was found, in front of Taylor's Tavern. Three weeks later, Malan was told that Mrs Doreen Maletta ("Maletta") and Mr Johny September ("September") alleged that they had witnessed an assault on a man and it occurred in the street where Maletta's house was, also in the early hours of 1 August 2009. Maletta lives in the same street as the second plaintiff. Malan interviewed these

Maletta and September and took statements from them on 24 August 2009, sixteen days before the arrest of the plaintiffs. The statements were made in Afrikaans (the relevance hereof is apparent below) and the following accounts were given by them:

September' Statement

[15] On the day in question, between 02h00 and 02h30, September was on his way home from the Pink Tavern. On the way he saw the four plaintiff's busy ("besig") with a man. They had taken his box of wine. He used the word "afgevat", which suggests that the man did not part with his box of wine willingly and it was taken by force. The plaintiffs then threw the man down, kicked him and trampled on him. They also dragged the man towards the second plaintiff's house. September said he went to Maletta's house because he wanted her to see what was taking place in the street outside her house. He stated that he did not see any weapons on the plaintiffs. Even though it was dark, he said he could identify the four plaintiffs as the persons who assaulted the unknown man.

Maletta's Statement

[16] She stated that on Saturday, 1 August 2009, she was woken up by September between 02:00 and 02:30 who was knocking at her front door, calling out that she should open the door for him. She complied and he drew her attention to something going on in the street (outside

and opposite her house). She said she observed people fighting in the street and went outside, near her gate, she said saw four men hitting someone (a man). She went inside her house and watched the scene from her bedroom window. She identified the first three plaintiffs as participants in the assault.

[17] She could not identify the fourth person, who held a box of wine. September informed her that the perpetrators had taken this wine from the person they were assaulting ("want hulle het sy wyn afgevat"). She saw that the second plaintiff had a knife and that she also observed that he made a stabbing movement towards the man who was being assaulted ("hy 'n steek beweging na die man maak"). She said she could not see any weapons in the possession of the first and third plaintiffs but they all hit the man "maar hulle almal het die man geslaan". She also heard them (she did not specify who) saying that they should kill the man, using racist slur (the k-word) in reference to him, which suggest that the man was an african. (The deceased was incidentally also an african man).

[18] Maletta thought at one point that she may have been spotted by the perpetrators and she retreated away from the window, drawing the curtains. Later, when she looked out again she observed them coming down the street ("kom in die straat afgeloop") towards the second plaintiffs' house. They first collected fire wood and then went inside his

house. The person they had assaulted earlier was no longer with them. She then told September that the perpetrators had gone into the second plaintiff's house and he could leave. She went back to bed. The following day (the Sunday), she told a woman called Hettie about the incident and explained that she tried to report the incident to the police, but that the person who answered the phone at the police station did not understand what she was saying. That same afternoon she said, Hettie reported to her that her (Hettie's) mother told her that the man who was assaulted, had fallen ("het geval") at Taylor's Tavern. She stated that she knew the first three plaintiffs well because they all lived in the same neighbourhood.

[19] Malan also obtained a statement from Hettie, who is also known as Marietta Blaauw. Her statement also contained the same hearsay evidence as in Maletta's statement to the effect that Blaauw's mother had reported to her daughter that the person who was stabbed by the plaintiffs, as seen by Maletta, had fallen in front of Taylor's Tavern. The plaintiffs were highly critical of Malan for relying on this hearsay evidence during his investigation.

[20] Doctor Volodia Angelov, the District Surgeon, noted the following "Chief" post-mortem findings" in his report on the medico legal post mortem examination he had conducted on the deceased:

"1.1 Four stab wounds below clavicle, one of which penetrated into left sub-clavian vein and upper vein and upper lobe of left lung.

1.2 Stab wound left posterior back penetrating into left chest cavity between second and third ribs paravertebrally.

1.3 400ml left haemothorax"

He concluded that the cause of death was: "Stab wound to left sub-clavian vein".

[21] Two stab wounds to the left hand and the left shoulder were also noted. The stab wounds were described as superficial whereas the fatal wound was a 3 cm vertical stab wound, which penetrated the left sub-clavian vein.

[22] Based on the aforesaid information, the defendants contend, Malan had formed a reasonable suspicion to justify his arrest of the plaintiffs.

The Plaintiffs' Submissions

[23] The plaintiffs attacked the lawfulness of their arrest by Malan on several grounds. The main thrust of their attack emanates from a theory first voiced by one of the legal representatives (Ms Aucamp) during the criminal trial. This theory was that since the deceased was found lying in a large pool of blood that ran down hill along a ditch from his body where he was found, suggesting profuse bleeding in this area, the deceased must have been assaulted and killed at that spot, which is in front of

Taylor's Tavern. The fourth plaintiff's legal representative, Ms Aucamp, questioned the ability of a fatally wounded man, such as the deceased must have been, to walk from Maletta's house in Rondomskrik, Louterwater to Taylor's Tavern, a kilometre away, in that state. According to her he was not capable of making the journey. The magistrate opined that because Malan did not investigate whether there was a blood trail from the scene described by the two eyewitnesses, leading to Taylor's Tavern, it could not be accepted that it was the deceased who was assaulted by the plaintiffs. The distance between the two points became highly significant during the criminal trial and also in the present proceedings. In my view the high degree of importance accorded to this aspect was misplaced in the circumstances of this case.

[24] On the available evidence, it could not be established with any measure of certainty what the distance was. During the criminal trial Malleta said, when asked about it, that at the brisk pace the distance could be covered in ten minutes. Malan, when he was asked by the prosecutor during the bail hearing, he ventured an estimate of hundred to hundred and fifty metres as the distance between the two points. When giving evidence at criminal trial he was asked whether it could perhaps be more than a kilometre - and for this he was severely criticised by the plaintiffs – he conceded that it could be.

[25] The plaintiffs adopted the magistrate's view, within my view, misplaced enthusiasm. They argue that Malan ought to have visited the scene of the assault and the point where the body was found and, if he did that, he would have established whether there was a blood trail between the two points and could have accurately measured the distance. Such an investigation, it was submitted, would have lead to the inevitable result of Malan concluding that in the assault observed by the eyewitnesses, the deceased was not the victim, but at someone else, a person who did not die and did not report the incident. Malan reported that no such assault was reported. Therefore, an unknown person or persons, and not the plaintiffs, were responsible for the death of the deceased.

[26] The plaintiffs also criticised Malan for not pursuing the discrepancies between the injuries noted on the post mortem report of Doctor Angelov and the assault described in the eyewitness account. The point made was that both eyewitnesses, referred to the plaintiffs' victim being hit, kicked, trampled on and dragged by them. The post mortem report only refers to stab wounds, and no mention was made by Dr Angelov of any bruises and contusions which ought to have been present on the body of the victim after an assault of the kind described by Maletta and September. The plaintiffs submitted that Malan ought to have visited Dr Angelov to enquire about the lack of injuries (contusions and bruises) noted in the

report and whether the deceased could have covered the distance in question given the his physical condition as a result of the attack on him.

[27] In my view, the coincidence of two separate attacks on two different african males in Louterwater, a small, mostly coloured community, on the same day within 30 minutes of each other and within relatively close proximity is not entirely impossible. However, such a coincidence was sufficiently rand unforeseeable at the time, that it certainly could not have been the first thing that Malan, in the position of a reasonable detective, should have foreseen, given the evidence at that point. He could only have realized that the deceased was perhaps not killed at the location where he was found, when he interviewed September and Maletta three weeks later. By then it was too late to look for a blood trail. There was also nothing in the facts to suggest that a fatally stabbed man would not be able to walk from Maletta's house to Taylor's Tavern and collapse there. It would not be the first time that a fatally stabbed person walked a substantial distance before collapsing and dying. In my view, the plaintiffs have set the bar for police investigation too high in this case.

[28] Dr Angelov did not testify. No expert witness testified about blood loss and how far the fally stabbed deceased was able to walk before collapsing. The magistrate's theory is, with respect, not unassailable. In fact, in the absence of any scientific basis therefore, it is somewhat thin.

[29] It must also be remembered that Maletta said in her statement that she closed her curtains and moved away from the window, because she thought she was seen by the plaintiffs. The attack was still in progress then. After an unspecified period she looked again and saw the perpetrators walking down the street, which implies that they had been away from the spot where she had last seen them. The man they assaulted was no longer with them. It was reasonable to assume, as Malan no doubt did, that this man was the deceased and had moved or staggered away.

[30] September also described how they dragged the man. Perhaps they dragged him further away from Maletta's house closer to Taylor's Tavern when Maletta was no longer looking out the window. Perhaps the fatal stab wound was effected elsewhere. There are several possibilities, other than the one opted for by the plaintiffs.

[31] In addition, there appears to have been an incorrect assumption that an artery of the deceased was punctured by the fatal stab wound. That is what the plaintiffs pleaded. However, the post mortem report refers to a vein, from which bleeding would most probably have been of a slower rate. Mr Mouton, on behalf of the second defendant pointed out that the incident occurred during winter and the photographs of the

deceased taken by Constable Henning reflect that the deceased was wearing thick clothing. His jacket appeared to me, to be a windbreaker, when he was stabbed. Perhaps the initial blood flowing from the fatal wound (which was only 3cm deep) would have first drenched his clothes and then when he collapsed, it rankled out, causing the large pool of blood under him. Or he bled out where he was found. One has to concede that there is a strong possibility that this is what occurred. This scenario is no less probable than the one relied upon by the plaintiffs where two persons were assaulted almost at the same time. The inference sought to be drawn by the plaintiffs from the available facts in this matter are speculative at best.

[32] The fact that Malan took Mrs Blaauw's hearsay evidence into account in forming a suspicion is not open to attack. An arresting officer is permitted to take inadmissible evidence, such as hearsay, into account to effect an arrest. The law is clear on that. In *Powell NO and Others v Van der Merwe NO and* Others,[4] the Supreme Court of Appeal deferring to an English decision,[5] in reiterated the principle that suspicion may take into account matters that could not be put in evidence or form part of a

[4] 2005(5) SA 62 (SCA) at 78 A-D.

[5] *Shabaan Bin Hussein and Others v Chong Fook Kam and Another* [1970] AC 942 (PC) ([1969] 3 All ER 1627 at 948 B); *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers Union and Another* 1992 (3) SA 673 (A) at 690 G-H.

prima facie case. Proof beyond reasonable doubt so as to sustain a conviction was not a requirement Malan had to comply with.

[33] As pointed out in *Duncan v Minister of Law and Order*[6], suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. It arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.

[34] The plaintiffs and the defendants relied on a note in the docket, which is undated and presumably written by the prosecutor, referring to the photographs, September's statement, and the identification of the deceased. It reads:

"Genoeg om op aan te kla – Al 4 besks!"

The plaintiffs argued that this note is an indication that Malan was carrying out the prosecutor's instruction to arrest the plaintiffs and did not himself form a suspicion sufficient to arrest the plaintiffs without a warrant and he also did not suspect all the elements of the offences.

[35] The inference sought to be drawn from this note by the plaintiffs, is contradicted by all the other evidence which Malan had obtained himself. The note is the opinion of a prosecutor applying her mind to the evidence in the docket. She had to decide whether she wanted to prosecute or not.

[6] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 819 I; See also *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50 H-I.

Clearly Malan entertained his own suspicion when he arrested the plaintiffs. The fact that Malan initially assumed that the deceased was attacked and died in front of Taylor's Tavern was not exactly a turning point in this case. Malan gathered sufficient evidence to suspect the plaintiffs of the murder of the deceased and the fact that the deceased died on a place other than where the attack on him was observed, was explained by the hearsay evidence.

[36] Malan had found the body, relatively close to where he later heard an attack was witnessed on an african man, approximately one hour to thirty minutes before the body was found. No other assaults were reported to him. The plaintiffs' challenge to the lawfulness of their arrest and detention is premised on the (wrong) assertion that Malan ought to have approached this case as the magistrate had done, namely that it was a sheer coincidence that the plaintiffs allegedly assaulted someone in one spot, more or less at the same time the deceased was attacked and murdered by an unknown person or persons.

[37] At the time Malan had learnt about the assault at Malettas' house, he no reason to entertain the theory that two different assaults had occurred more or less at the same time, and that it was merely a coincidence that the two incidents shared some other commonalities such as the race of the victims. Based on the evidence he had at his disposal at

the time, it was entirely reasonable for Malan to have formed a suspicion that it was the plaintiffs who had murdered the deceased.

Continued Detention

[38] Plaintiffs' counsel submitted that Malan had lied under oath to secure the continued detention and prosecution of the plaintiffs. Malan had told the magistrate during the bail hearing (Malan opposed bail) that he had direct evidence that the plaintiffs had robbed the deceased. (The plaintiffs were at this stage at their formal bail hearing faced with a further charge of robbery with aggravating circumstances).

[39] This, the plaintiffs contended, was a lie because none of the eyewitnesses mentioned a robbery, September said he saw no weapons and Maletta did not see the african man's wine being taken. Malan certainly did not lie. Maletta saw a knife being used and September said that they had taken the man's wine by force, that is what the afrikaans word "afgevat" implies. When this man was found murdered less than an hour later, the assumption that an offence of robbery (of the wine) with aggravating circumstances (a knife was used) had also occurred, was perfectly justifiable. It therefore does not follow that the robbery charge was added maliciously to ensure that the plaintiffs did not get bail.

[40] Since murder was the more serious obvious offence committed, it is not sinister that the plaintiffs were not charged with this offence (robbery) before their formal bail hearing. The accusation that Malan lied about the robbery is unjustified as shown above. Malan's estimation of the distance between Taylor's Tavern and Maletta's house was also not a lie. He could not have known at the time that the plaintiffs would sue the defendants and that this aspect would become of such great moment. He had no reason to measure the distance between the two points when there were eyewitnesses who said they saw the plaintiffs assaulting an african man.

[41] No evidence was lead or to be found in the record, upon which it could be held that the prosecutors who dealt with the case acted maliciously or negligently in prosecuting the plaintiffs on the evidence available and opposing their bail application. Accordingly absolution from the instance was granted. Based on the evidence before me, and for the reasons set out above, I conclude that the arrest of the plaintiffs and their subsequent detention and prosecution was lawful and justified.

[42] Accordingly, the plaintiffs' claims are dismissed with costs.

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E REVELAS
Judge of the High

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