THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

CASE NO.: 805/2019

Reportable: yes/no
Circulate to other Judges: yes/no
Circulate to Magistrates: yes/no

In the matter between:

EDWARD DITSELE	First Applicant
FREDDY SELLO MOHLALA	Second Applicant
TSHEPO HOPE MASHAMAITE	Third Applicant

and

THE MINISTER OF POLICE	First Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent

As consolidated with:

CASE NO.: 3131/2019

In the matter between:

ANDREW THAPELO HESIE	Applicant
and	
THE MINISTER OF POLICE	First Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent

Coram: Opperman, J

Hearing: 14 April 2023

Delivered: 21 April 2023. The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 21 April 2023. The date and time for hand-down is deemed to be 21 April 2023 at 15h00

Judgment: Opperman, J

Summary: Application for leave to appeal – civil trial – claims for illegal arrest in terms of section 40 of the Criminal Procedure Act 51 of 1977 and malicious prosecution by the State

Order: 21 April 2023

1. The applications for leave to appeal are dismissed in regard to all the applicants and in total.

2. The applicants to carry the costs of the applications for leave to appeal.

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

[1] The judgment *a quo* was introduced with emphasis of the fact that our legal system sets great store by the liberty of an individual. The decision to arrest must be reasonable and rational. In addition; that our constitutional reality is the same when prosecution is instituted in a criminal court of law. Liberty is not only physical freedom; it is to be free and protected from malignant, harmful and defamatory persecution. It is the atmosphere in which this application will also be adjudicated.

[2] The application for leave to appeal is ostensibly[1] based on the notion that the applicants were illegally arrested and prosecuted on the facts of the case; this should have been the finding of the court *a quo*.

[3] During the oral argument for leave to appeal counsel for the applicants conceded that there is not any evidence before court as to the factors that existed on which the senior of Ms. Smith (the prosecutor that conducted the trial on behalf of the second

[1] In his Heads of Argument counsel for the respondents in paragraph 1.1 correctly noted that: "Neither the application for leave to appeal nor the heads of argument set out the causes of complaints in a lucid and logic manner."

respondent) instructed her to proceed with prosecution. The respondents carried the onus to show the malice in the decision to prosecute; they did not adduce any evidence except for the version of Ms Smith that she was instructed to proceed. This only leaves the issue of arrest. I will nonetheless address the issue of prosecution as well.

[4] It is imperative that the principles applicable for successful prosecution, conviction and the admissibility of evidence during trial are not conflated or confused with the principles that prevail when arrest is brought about.

[5] If the police may not arrest on the facts that prevailed in this case, that are common cause and on occasion undisputed; then law and order will fail. These are the facts:

1. The four plaintiffs[2] were found in possession of thousands of rands worth of alcohol at a Sechaba Chisa Nyama, a popular drinking and party venue in Bloemfontein.

2. The place was packed with people and it was even more so because of the Macufe Festival that was on that weekend when the plaintiffs were there and before their arrest.

3. The alcohol was on the back of a bakkie whereupon the plaintiffs were sitting with the flap open. This, according to the testimony of Hesie, the fourth plaintiff in the trial, and the evidence of the arresting officers; Moloi and Haarmeier. Hesie testified that they sat on the back of the vehicle at Sechaba. The wind and rain caused them to move into the cabin of the bakkie.

4. Three of the plaintiffs came from Soweto and one of the plaintiffs was from Bloemfontein. The alcohol belonged to two of the plaintiffs; the one a tavern owner and the other a whiskey collector. They produced receipts on different occasions to

[2] The applicants in this application for leave to appeal are also referred to as the plaintiffs.

prove their ownership but it did not take the alleged sale of the liquor any further. It proved their ownership.

5. The version of the plaintiffs on why they brought the copious amount of alcohol to Bloemfontein is vague. The one version is that they were going to meet some more friends and intended to distribute it among them. The other is that it was for a family gathering. It is improbable that the two plaintiffs were going to hand out the valuable and substantial amount of alcohol free of charge; specifically, the expensive alcohol such as the whiskey. In addition to the alcohol, a substantial number of drinking glasses were on the bakkie.

6. The bakkie, a double cab Volkswagen Amarok, belonged to Mashamaite, the third plaintiff.

7. Strangely and against the version of the plaintiffs that they did not engage in any retail or sale of the liquor; it is an undisputed fact that a cash float was found in the cabin of the bakkie. It is, among others, depicted on page 114 of Exhibit A in a photo taken by the police. It consisted of:

14x R10.00 notes,
R345.00 worth of R5.00 coins,
1x torn in half R10.00 note,
3x R100.00 notes,
8x R20.00 notes,
4x R200.00 notes,
6x R50.00 notes, there were some torn R20.00 notes also confiscated.

8. The inventory of the alcohol is the following:

18x Smirnoff 1818 Citrus Flavour 750ml bottles,
12x Smirnoff 1818 Original 750ml bottles,

10x SKYY Vodka 750ml bottles,
12x Absolute Vodka 750ml bottles,
12x Singleton Whiskey 750ml bottles,
12x Amarula 750ml bottles,
12x Henessy Cognac 750ml bottles,
7x Krone Borealis Vintage 750ml bottles,
2x Courvoisier Cognac 750ml bottles,
1x Remy Martin Cognac 750ml bottle,
1x J & B 12 years Whiskey 750ml bottle,
1x Johnnie Walker Blue Label 750ml bottle,
1x Glenfiddich 15 years old Whiskey 750ml bottle,
1x Glenfiddich 18 years old Whiskey 750ml bottle,
1x box with 12 Johnny Walker drinking glasses and 9 Bell's drinking glasses,
25 white and 46 coloured drinking glasses.

9. The cash slips entered into evidence by agreement between the parties show alcohol to the value of R1299.00, R4299.35 and R12391.60. (Exhibit M)

10. Hesie testified that he saw the "hawkers' bag" depicted at page 107 of the photo album Exhibit A (the "Blue Everest" bag wherein the dagga was found), with the alcohol on the back of the bakkie at the time he joined the other three plaintiffs at Sechaba.

11. In the meanwhile, Moloi, a police official in the South African Police Service received a call at 12pm, on the day of the arrest, from an informant that liquor was sold from the bakkie of the plaintiffs.

12. The informant has become deceased before this trial commenced. In terms of the Biyela - case hearsay evidence is admissible for the arrestor to form a reasonable suspicion. Moloi also did not want to disclose the identity of the informant to the prosecutor; this to protect the informant.

13. Moloi immediately requested the Crime Intelligence Unit (CIU) to put the bakkie at Sechaba under surveillance. The information from them was that it seemed as if there was liquor being sold from the vehicle. He accepted the suspicion and observations of the unidentified member of the CIU unit and acted according to that information.

14. The CIU unit of the police were not willing to expose the identity of the undercover agent or let her testify in the trial. This was to protect her safety and their projects.

15. Moloi compared the information from the informant to that of the undercover unit and it was similar. They observed the plaintiffs sitting on the back of the bakkie with the alcohol. He called “10111” for backup and they converged on the scene.

16. There were approximately 7 police officers. It was around 16h00. It is the evidence of both Moloi and Haarmeier that the back flap of the bakkie was open, the alcohol displayed and the plaintiffs were seated on the back. This is disputed by the plaintiffs but was the evidence on which the prosecuting authority had to make their decision and the veracity of which had to be tested in court.

17. The bakkie was indeed loaded with alcohol and a later search produced dagga, money in different denominations and some torn notes, and drinking glasses.

18. One of the police officers on the scene indicated that the situation at Sechaba were becoming volatile. There were many people gathering around the scene and for the safety of everybody; the public, police and plaintiffs they decided to move the plaintiffs and the vehicle to the police station. It is also known protocol among police that suspects must be cuffed for their own safety and that of the police when taken into custody.

19. The police officers testified that there is a difference between taking a person into custody and arresting the person. They did not arrest the plaintiffs there and then because they wanted to search the bakkie and make further inquiries. They did not arrest on a whim but took care to gather information.

20. At the police station the female officer located dagga packed in “bankies” in the bakkie. The officer testified that in her many years of experience with the arrest of perpetrators for dagga she came to know that “bankies” are used for the sale of dagga. This elevated the suspicion of illegal activities by the plaintiffs. Crucial is that not one of the plaintiffs wanted to declare to whom the bag belongs that the dagga was found in. At the time of the arrest and when the decision was taken to prosecute this issue was unexplained.

21. The search of the bakkie occurred with the permission of the owner and in his presence.

22. The dagga was later weighted in the presence of Mashamaite and it was found to be 96 grams. He personally signed the “Dagga Certificate” on 8 October 2016 (Exhibit B).

23. The plaintiffs were arrested and their constitutional rights were explained and certificates in terms of section 35 of the Constitution were handed to them which they signed. (Exhibits C, D, E and G)

24. It is common cause that the plaintiffs were incarcerated until their first appearance and that the conditions in the police cells were not good. They were traumatised by the experience. The plaintiffs were detained from the 8th of October 2016 until the 11th of October 2016, whereafter they were granted bail of R400.00. The 48-hour incarceration limit was adhered to.

25. Counsel for the defendants is correct where he pointed out in their heads of argument that Mashamaite stated during cross examination in the trial:

> 15.1.26. When defendant's version put to him(sic), he stated that he understands the position the police took. He further stated it is the job of the police to do law and order.
> 15.1.27. When the process of arrest, investigation and prosecution was put to him he agreed with it.
> 15.1.28. He signed the dagga certificate and gave the alcohol slips to Cst Raboroko.

26. He is also correct that Mohlala made the same concession that the police must do their work:

In re-examination he testified the following:

> 25.1. He understands that the police should investigate and they were supposed to arrest him to investigate a suspect.

27. It is common cause, as the plaintiffs pleaded and testified, that they were detained until 11 October 2016, when they were released on bail. Plaintiffs pleaded that they were prosecuted until 16 March 2017.

28. The evidence is that the Court struck the matter from the roll due to unreasonable delays. According to the evidence recorded the witnesses were not at court. Numerous appearances occurred. It is incorrect that the prosecutor withdrew the charges on 16 March 2017. The J15 Charge Sheet (Exhibit T) indicates the matter was struck from the roll.

29. The plaintiffs were summoned to again appear in Court on 13 July 2017. This, on account of the second defendant's decision to re-institute prosecution. After five

more appearances, the plaintiffs were discharged on 6 December 2017 in terms of Section 174 of the Criminal Procedure Act, 51 of 1977.

30. The prosecutor that testified did not want to continue with prosecution but her senior instructed prosecution after they re-evaluated the evidence. They have a statutory right and obligation to do so. The reason for the prosecutor's hesitance to prosecute is that there were no eyewitnesses to the crimes.

31. None of the witnesses for the defendants witnessed the sale of liquor or dagga.

32. The plaintiffs did not possess a licence to deal in liquor and could, consequently, not produce one at the scene or when they were formally arrested or during the trial.

33. The legal process of arrest and detention was complied with.

34. The plaintiffs were represented by Legal Aid: South Africa and later by privately mandated counsel.

35. The statements of Captain Haarmeier, Sergeant Moloi and Constable Raboroko depict a *prima facie* case. Their evidence during the trial *in casu* caused *a prima facie* case for arrest. If they did not act, they might have been accused of neglecting their duties in the circumstances of the case.

36. The dagga was found in the bakkie and the four plaintiffs arrested in the bakkie was *prima facie* in possession of the dagga. They denied knowledge of the dagga and the evidence had to be tested by way of a trial. It is not probable that not one of the plaintiffs had knowledge of the dagga. It would not have been prudent for a Prosecuting Authority to accept the word of the accused in the circumstances of the case and without a trial.

37. The sale or not of the liquor also had to be tried and tested by way of a criminal trial. The word of the plaintiffs could not just be accepted in the face of the amount of liquor, the dagga, the circumstances prevailing at the scene, the drinking glasses and money float that were indicative of distribution of the alcohol, the information of the informer, the information from the Central Intelligence Unit and the nonsensical denial of the knowledge of the dagga.

38. The one plaintiff was a tavern owner and it was his business to sell liquor. The likelihood that the owners of the liquor will give thousands of rands worth of liquor away free of charge seems highly improbable and implausible. The plaintiff kept the fact that he was a tavern owner from the police.

39. Vital is the pleadings of the first defendant dated 23 September 2019 in the case with which the prosecuting authority went on trial and represented the case against all the plaintiffs.

AD PARAGRAPH 8.1

7.1 The contents hereof is denied. The plaintiffs were requested to accompany the police officers to the nearest police station, being the Mangaung Police Station, as it was too risky and dangerous to conduct a search of the plaintiff's co-accused's vehicle where it was parked.

7.2 The plaintiffs were not placed under arrest at the scene, but were placed under arrest once a thorough search of the vehicle, with the consent of the plaintiff's co-accused, was conducted. Dagga and copious amounts of alcohol were found in the plaintiff's co-accused's vehicle.

7.3 the plaintiff's co-accused admitted that the vehicle with registration number DZ[....] belonged to him and, after the voluntary search was conducted, the plaintiff's co-accused admitted that the bag in which the dagga was found was his.

He thereafter signed a certificate acknowledging that the dagga was weighed in front of him and that it was 96 grams.

7.4 One of the plaintiff's co-accused admitted to selling of the liquor without a license.

7.5 The plaintiff and his co-accused acted with common purpose in that they all had a hand in the illegal sale of liquor and dagga.

40. The judgment of the Court *a quo* that caused the finding in terms of section 174 of the Criminal Procedure Act was not placed before this Court. The reason(s) for the finding was depicted in the entrance by the prosecutor in the diary of the docket and addressed to the investigating officer (Exhibit L in this case).

2017/12/6
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174 on both counts for al 4 Accused.
Reasons

1. SN1 Mr. Moloi conceded that he did not see the exchange.
2. There were a lot of people around that had interaction with the bakkie.
3. Conceded that for it could be for own (sic); we arrested him solely due to the fact that accused made admissions, but this was not in his statement.
4. Court found trial (sic) there was no evidence on which to convict ito the dealing in liquor case.
5. Possession of dagga

- Could not prove anyone had control due to the fact that witnesses conceded that a lot of people were there and only assumes it belonged to the accused and was on the bakkie.

- Capt Haarmeyer was consulted for the trial but her version was also different from that of the first witness & different from which she wrote in her statement. She would not have assisted the state's case.
- Other eye witnesses were not provided to state to aid the case even though such was requested. Matter was finalised.

41. To issue summonses or notices on 8 October 2016 would have been risky because three of the plaintiffs resided in Soweto and their addresses were not confirmed. One of the plaintiffs misrepresented the fact that he is the owner of a tavern. The alcohol and dagga seized were of substantial value and amounts.

42. To conclude: In order to prove that the arrest was lawful, the defendants had to and did prove that:

(i) the arresting officer was a peace officer;
(ii) the arresting officer entertained a suspicion;
(iii) that the suspect to be arrested committed an offence referred to in Schedule 1 (or in this instance; in terms of section 40(1)(h), who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs, …);
(iv) the suspicion rested on reasonable grounds.

43. The case against the plaintiffs was not without merit on paper. The evidence against the plaintiffs were legally sufficient to justify prosecution.

THE LAW

[6] I restate the prevailing law that was depicted *a quo*. In *Biyela v Minister of Police* (1017/2020) [2022] (1 April 2022) ZASCA 36 noted that the standard of a reasonable suspicion for arrest is very low.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly…

[7] Section 38 of the Criminal Procedure Act 51 of 1977 (CPA) prescribes the methods of securing attendance of accused in court:

(1) Subject to section 4 (2) of the Child Justice Act, 2008 (Act No. 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act. [Sub-s. (1) substituted by s. 4 of Act No. 42 of 2013.]

[8] Section 39 of the CPA prescribes the manner and effect of arrest:

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

[9] Section 40 of the CPA prescribe arrest without a warrant as is relevant to this case; and it is clear that:

40. Arrest by peace officer without warrant.

(1) A peace officer may without warrant arrest any person—
(a) who commits or attempts to commit any offence in his presence;
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition; …

[10] Before now and as far back as on 19 November 2010, Harms JP, Nugent JA, Lewis JA, Bosielo JA and K Pillay AJA in the matter of *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) concluded that section 40 of the Criminal Procedure Act 51 of 1977 is not unconstitutional.

[11] The parameters or “jurisdiction” for a lawful arrest are:

[31] In order to prove that the arrest was lawful, it must be proven that:

(i) the arresting officer was a peace officer;
(ii) the arresting officer entertained a suspicion;
(iii) that the suspect to be arrested committed an offence referred to in schedule 1;[3]
(iv) the suspicion rested on reasonable grounds.[4]

[12] The Sekhoto - case categorically denounced a fifth jurisdictional requirement that arrest will be unlawful if a less invasive option exists such as summons or written notice:

[21] The four express jurisdictional facts for a defence based on s 40(1)(b) have been set out earlier, but to repeat the salient wording: 'a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1'. Schedule 1 offences are serious offences.

[22] With all due respect to the different High Court judgments referred to, applying all the interpretational skills at my disposal and taking the words of Langa CJ in *Hyundai* seriously, I am unable to find anything in the provision which leads to the conclusion that there is, somewhere in the words, a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.

[13] In defending a claim for unlawful arrest, the four jurisdictional facts set out in section 40(1)(b) or, here also, 40(1)(h) of the CPA must be pleaded. It was done in the instance as will be pointed out hereunder.

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[3] Or in this instance; read with the terms of section 40(1)(h): "… who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs, …"

[4] Biyela *supra* and also see *Duncan v Minister of Law-and-Order* 1986 (2) SA 805 (A) at 818G – H.

[14] The Sekhoto - case ruled that once the required jurisdictional facts were present the discretion whether or not to arrest arose. Harms, JP set some margins; not a *numerus clausus*, to the reasonable suspicion - discretion:

1. Peace officers are entitled to exercise this discretion as they see fit, provided they stayed within the bounds of rationality.
2. This standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court.
3. The standard is not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard is not breached.[5]
4. It is clear that the power to arrest is to be exercised only for the purpose of bringing the suspect to justice; however, the arrest is but one step in that process.
5. The arrestee is to be brought to court as soon as reasonably possible, and the authority to detain the suspect further is then within the discretion of the court.
6. This discretion is subject to a wide-ranging statutory structure and, if a peace officer were to be permitted to arrest only when he or she was satisfied that the suspect might not otherwise attend the trial, then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.
7. The arrestor is not called upon to determine whether or not a suspect ought to be detained pending trial; that is for the court to determine, and the purpose of an arrest is simply to bring the suspect before court so as to enable it to make that determination.
8. The enquiry to be made by the peace officer is not how best to bring the suspect to trial, but only whether the case is one in which that decision ought properly to be made by the court. The rationality of the arrestor's decision on that question depended upon the particular facts of the case, but it is clear that in cases of serious

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5 Sekhoto *supra* at paragraphs [28] and [39] at 327b–c and 330e.

crimes, such as those listed in Schedule 1, an arrestor could seldom be criticised for arresting a suspect in order to bring him or her before court.[6]

[15] The Biyela - case confirmed the above and ruled that the evidence or suspicion considered by the officer need *not* be based on information that would subsequently be admissible in a court of law.[7] Information regarded by the arresting officer may be hearsay evidence.

[16] Malicious prosecution is characterized by malice or intend to do harm. Whether a prosecution is wrongful or unlawful depends on whether there was a reasonable and probable cause coupled with the *animus iniuriandi* of the defendant in instigating, initiating or continuing it.[8]

[17] Under Section 179 of the Constitution, 1996 and the National Prosecuting Authority Act, 1998, the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions' incidental to institution of criminal proceedings. Section 179 of the Constitution places the decision to prosecute within the sole power of the Prosecuting Authority.

[18] The Directives or Code of Conduct[9] promulgated in terms of the National Prosecuting Act, 1998, demand that prosecutors shall, among others:

1. Perform their duties fairly, consistently and expeditiously.
2. Perform their duties fearlessly and vigorously in accordance with the highest standards of the legal profession.
3. They shall give due consideration to declining to prosecute, discontinuing criminal proceedings conditionally or unconditionally or diverting criminal cases from

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6 Sekhoto *supra* at paragraphs [42] to [44] at 331*c*–332*a*.
7 Biyela *supra* at paragraphs [33] and [35].
8 Okpaluba, C., *Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decision,* PERIPELJ 2013 (16)1 241- 279 at 241.
9 https://www.npa.gov.za/npa-code-conduct accessed on 21 January 2023.

the formal justice system; particularly those involving young persons, with due respect for the rights of suspects and victims, where such action is appropriate.

4. In the institution of criminal proceedings; proceed when a case is well-founded upon evidence believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence.

5. They must ensure that, throughout the course of the proceedings, the case shall be firmly but fairly and objectively prosecuted.

6. They must consider the views, legitimate interests, and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavor to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility, if any, of victim compensation and witness protection.

7. They shall safeguard the rights of accused persons, in line with the law and applicable international instruments as required in a fair trial.

8. A prosecutor must examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained and shall refuse to use evidence which is reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the accused person's human rights and particularly methods which constitute torture or cruel treatment.

[19] In *Kubeka v The Minister of Police and Another* (63675/2016) [2022] ZAGPPHC 298 (4 May 2022) Collis, J ruled and confirmed that:

[30] … To succeed with a claim for malicious prosecution a claimant must allege and prove that (i) the defendants set the law in motion, they instigated and instituted the proceedings; (ii) they acted without reasonable and probable cause; (iii) they acted with malice, and (iv) the prosecution failed.

[20] Okpaluba,[10] after scrutiny of the South African law, case law and international principles, emphasized that:

> … the requirement of reasonable and probable cause plays such a central role in an action for malicious prosecution that the success of such an action depends largely on there being a lack of reasonable and probable cause for the prosecution among the other three requirements. The presence or absence of reasonable and probable cause more or less dictates whether or not there is any basis for the prosecution and leads the way to the inquiry as to whether there was malice or improper purpose on the part of the prosecutor. Again, whether or not the defendant lacked reasonable and probable cause to instigate, initiate or continue the prosecution depends ultimately on the facts and information carefully collected and objectively assessed, on which the prosecutor based his/her belief that the plaintiff was guilty; it is *not* the probability that those facts would secure a conviction. Yet the prosecutor is faced with the difficulty in that his/her conduct in this regard is subject to both the subjective and objective tests. In evaluating the material that is available to him/her arising from the investigations, the objective sufficiency of the material must be considered by the prosecutor and assessed in the light of all the facts of the particular case. In effect, his/her belief must be honestly held and founded on reasonable grounds, such that would lead a reasonable person in his/her position to hold a similar belief. It essentially requires the plaintiff to establish a negative, rather than for the defendant to prove the existence of reasonable and probable cause. (Accentuation added)

THE CLAIMS

[21] The cases of the first three plaintiffs were consolidated with that of the fourth plaintiff. In this case the litigation instituted against the Minister of Police and the

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[10] *Supra* at 279. Also see *Mdhlovu v National Director of Public Prosecutions* (677/2018) [2022] ZAMPMBHC 36 (24 May 2022).

National Director of Public Prosecutions, as per the amended claim dated 25 October 2022, is based on the following:

6.

The First and Second Defendants' offices and principle place of business are situated in the jurisdiction of the above-mentioned Honourable Court.

AD CLAIM 1 – AD UNLAWFULL ARREST AND DETENTION

7.

7.1 On the 8th of October 2016 at Manguang Township the Plaintiffs were wrongfully and unlawfully arrested by unknown Police members who at the time of the arrest was in service of the Manguang SAPS.

7.2 The aforementioned arrest was effected at Manguang without a Warrant of Arrest.

8.

8.1 The Plaintiffs was thereafter transported to the Manguang Police Station and detained at the instance of the arresting and investigating police officers at Manguang SAPS holding cells without a Warrant of Detention.

8.2 The Plaintiffs was charged under Manguang Police Case Docket under CAS 111/10/2016 on alleged charges of dealing in Dagga and dealing of alcohol without a license.

8.3 On the 11th of October 2016 the Plaintiff's appeared in the Manguang Magistrate's Court and was released on bail of R400.00 each.

8.4 The Plaintiffs was thus detained at the Manguang Police Station holding cells from the 8th of October 2016 until the 11th of October 2016.

9.

At all relevant times the aforesaid members of the First Defendant were acting within the cause and scope of their employment as employees of the First Defendant.

10.

The arrest of the Plaintiff was unlawful in the fact that:

10.1 The members of the Manguang SAPS respectively did not take into account the Plaintiffs' rights in terms of article 12 of the Constitution, Act 106 of 1996, (herein after called "the Constitution")

10.2 The Plaintiffs was arbitrarily and without good cause deprived from his freedom.

10.3 That the members of the Manguang SAPS had no grounds to interfere with the Plaintiff's Constitutional rights, by that:

10.3.1 The Plaintiffs did not pose any risk to the community.

10.3.2 The Plaintiffs would not have evaded the court hearing.

10.3.3 That the members of the Manguang SAPS had no grounds to believe that the Plaintiff would harm himself or any other person of the public.

10.3.4 That the Plaintiffs was in condition and/or had the will to refute the allegations against them and/or did explain to the members of the Manguang SAPS that they did not deal with Dagga and selling alcohol without a license but the members did not take it into consideration;

10.3.5 That the members of the Manguang SAPS had no urgency towards the arrest of the Plaintiffs.

10.3.6 That the members of the Manguang SAPS did not take into consideration whether the Plaintiffs had a known and fixed residence.

AND/OR ALTERNATIVE:

11.

The arrest of the Plaintiffs was unlawful due to the fact that the members of the Manguang SAPS had no *prima facie* and/or reasonable grounds to arrest the Plaintiffs.

AND/OR ALTERNATIVE:

12.

The arrest of the Plaintiffs was unlawful due to the fact that the members of the Mangaung SAPS did not exercise their discretion and/or did not exercise their discretion properly by:

12.1 There was no obligation on the members of the Manguang SAPS to arrest the Plaintiff as there were no evidence confirming that they were selling either Dagga or alcohol to members of the public.

12.2 That the members of the Manguang SAPS did not investigate the matter properly and did not follow up the Plaintiffs' explanation and proof that all these items found in their possession relating to alcohol was purchased by them and all purchase orders were given to the arresting officers.

12.3 That there were no grounds to suspect that the Plaintiffs had committed an offence.

12.4 That the members of the Manguang SAPS did not exercise their discretion properly and *bona fide*.

13.

As a result of the unlawful arrest and detention, the Plaintiffs suffered general and special damages in the sum of R450 000.00 each for:

13.1 Depriving of the Plaintiff's freedom;

13.2 *Contumelia;*

13.3 Emotional stress and psychological trauma;

13.4 Embarrassment suffered by the Plaintiff by keeping him in holding cells and being arrested in front of members of the public and colleagues;

13.5 Legal fees.

The amount of R450 000.00 each is a global amount for the Plaintiffs' general and special damages.

AD CLAIM 2 – AD MALICIOUS PROCEEDINGS

14.

14.1 On the 11th of October 2016 at or near Manguang, the members of the Manguang SAPS wrongfully and maliciously set the law in motion by arresting and charging the Plaintiffs on the charge of possession of Dagga and dealing in alcohol.

14.2 The Plaintiffs on the 11th of October 2016 appeared in the Manguang Magistrate's Court on the abovementioned charges whereafter the Plaintiff were released on bail of R400.00 each after the matter was remanded for further investigation.

14.3 The unknown member of the Second Defendant alternatively the Public Prosecutor continued to prosecute the Plaintiffs on the aforementioned charges and the Plaintiffs appeared in Court on six different occasions regarding this particular matter.

14.4 On the 16th of March 2017 the Public Prosecutor decided to withdraw the charges against the Plaintiffs due to a lack of evidence and possible successful prosecution.

14.5 The Plaintiffs were then again Summons to appear in Court on the 13th of July 2017 as the unknown member of the Second Defendant decided to re-institute the prosecution.

14.6 After five more appearances the matter was set down for trial the 6th of December 2017 against the Plaintiffs but was subsequently discharged in terms of Section 174.

15.

When laying these charges against the Plaintiffs the members of the Manguang SAPS and members of the National Prosecuting Authority had no reasonable and/or probable cause for doing so nor did they have any reasonable belief in the truth and

information and charges initiated, but the arrest and prosecution who were rather acuted by malice and/or *animo iniuriandi*.

16.
At all relevant times the aforementioned members were acting within the course and scope of their employment as employees of the First Defendant as members of the Mangaung SAPS and the Second Defendant as members of the National Prosecution Authority.

17.
As a result of the foregoing the Plaintiffs suffered general and special damages in the sum of R400 000.00 each for:

17.1 *Contumelia;*
17.2 Emotional stress and psychological trauma;
17.3 Loss of amenities of life;
17.4 Legal fees;
17.5 Travelling and hotel expenses.

The amount of R400 000.00 each is a global amount for the Plaintiff's damages.

STATUTORY REQUIREMENTS:

16.(sic)
Notices in terms of Section 3 of Act 40 2002 was forwarded to the 1st and 2nd Defendants by the Plaintiffs, which Notice is annexed hereto and marked **Annexure "A".** Notwithstanding demand, the Defendants have refused and/or neglected to pay the amount.

WHEREFORE the Plaintiffs prays for judgment against the First and Second Defendants for:

AD CLAIM 1:

1. Payment of the sum of R450 000.00 each;
2. Mora interest at the rate of 10,25% per annum in terms of the Prescribed Rate of Interest Act, No 55 of 1975, calculated from date of summons until date of payment;
3. Cost of suit;

WHEREFORE the Plaintiffs pray for judgment against the First and Second Defendants, jointly and severally for:

AD CLAIM 2:

1. Payment of the sum of R400 000.00 each;
2. Mora interest at the rate of 10,25% per annum in terms of the Prescribed Rate of Interest Act, No 55 of 1975, calculated from date of summons until date of payment;
3. Cost of suit;

[22] The charges against the plaintiffs were for the illegal sale of liquor and the illegal possession of dagga.

THE LAW: APPLICATION FOR LEAVE TO APPEAL

[23] The above brings me to the test that must be applied when an application for leave to appeal is considered:

1. I do not agree that the bar was raised with the promulgation of the Superior Courts Act 10 of 2013.[11]

2. The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.

3. The words "would" and "only" in the current legislation caused some to view that the bar for granting leave to appeal has been raised.[12] All it in reality articulates is that the matter must be pondered in depth and with careful judicial introspection and care. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another Court would come to another conclusion.[13]

4. The final word was spoken in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021:

> [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the

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11 *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021).

12 *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021), *Hans Seuntjie Matoto v Free State Gambling and Liquor Authority* 4629/2017[ZAFSHC] 8 June 2017, *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency (SOC) Ltd* 2021 JDR 0273 (FB).

13 17. Leave to appeal. —
(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

5. The fact remains that *the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.*[14]

CONCLUSION

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[14] *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC*).*

[24] There does not exist a reasonable prospect of success on appeal, that another court would come to another conclusion on the facts of this case or some other compelling reason why the appeal should be heard.

[25] **ORDER**

1. The applications for leave to appeal are dismissed in regard to all the applicants and in total.

2. The applicants to carry the costs of the applications for leave to appeal.

M OPPERMAN, J

APPEARANCES:

For the applicants:	**ADVOCATE C ZIETSMAN** Magnolia Chambers, Pretoria
Instructed by:	Jacobs Fourie Attorneys, Bloemfontein.
For respondents:	**ADVOCATE K NAIDOO** Chambers, Free State, Bloemfontein
Instructed by:	State Attorney, Free State, Bloemfontein