



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. EL 444/2020

In the matter between:

LUNGA MGUDLWA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS (NPA)**

Second Defendant

JUDGMENT

HARTLE J

Introduction:

[1] The plaintiff was arrested in East London on 11 January 2018 by a local police officer, one Cst. José Royston Fredericks, and charged with fraud. He

appeared on the charge at the magistrate's court on 15 January 2018 and was remanded in custody pursuant to several further court appearances until his release on bail on 29 March 2018. On 30 September 2018 he was acquitted on the charge and subsequently sued the first defendant for damages in respect of a claim for unlawful arrest and detention on claim 1, and both defendants in respect of a claim for malicious prosecution on claim 2. The claims are collectively in the sum of six million rand.

The pleadings:

[2] Whilst admitting the fact of the plaintiff's arrest, detention, and prosecution respectively (pursuant to a charge of fraud having been laid against him), the defendants denied that the personality infringements were unlawful or that there had not been a reasonable basis to bring him to court.¹ It was asserted that not only had the police been looking for him to charge him with fraud under a docket that had already been opened under EL CAS 68/12/2017, but there was also a warrant out for his arrest at the time in respect of an earlier case against him under Midrand CAS 618/09/2012 ("the Midrand warrant"). The defendants pleaded that by virtue of the fraud charge (concerning which offence there was a reasonable and probable indication appearing from the docket he had committed), and the outstanding warrant of arrest, they were authorized in law to arrest him; had exercised their discretion properly in this respect; and were further lawfully justified in detaining him.

[3] Any suggestion that the prosecution was malicious or lacking a reasonable and probable cause, or otherwise in breach of the plaintiff's constitutional rights or police standing orders, was also roundly refuted.

¹ A single plea was filed on behalf of both defendants by the State Attorney. Closer to trial the second defendant appointed its own legal representative and conducted its defence separately from the first defendant.

[4] I point out that there was some misconception regarding the defendants' plea that suggested that the primary justification for the Plaintiff's arrest and detention rested on the Midrand warrant, but a closer reading of the pleading - side by side with the corresponding paragraphs of the plaintiff's particulars of claim, makes it plain that the existence of the warrant was merely co-incidental and, as the evidence ultimately revealed, an unlucky co-incidence for the plaintiff. The referencing of it in the particulars of claim recorded its existence as an objective fact and that it just so happened to have served as a further basis to justify the plaintiff's arrest and detention.

[5] The misapprehension regarding the defendants' pleaded case was probably due to an absence in it of any reference to the provisions of section 40 (1) (b) of the Criminal Procedure Act, No. 51 of 1977 ("the CPA") as a justification for the arrest, but it emerges from facets of the pleading making up the whole that the plaintiff's arrest and subsequent detention followed upon a complaint of fraud having been laid against him in the first instance (the defendants were astute to note that the value involved in the fraud case opened against him was R85 000,00, underscoring its significance as a Schedule 1 offence), that there were "reasonable grounds" to arrest him, and a reasonable and probable indication in the docket that he had committed the offence, all of which bring their case within the ambit of the statutory justification contemplated by section 40 (1) (b) of the CPA.

[6] The submission by Mr. Mpakane who appeared on behalf of the plaintiff that "their defence is warrant of arrest. Section 40 is not part of their defence" is in my view therefore fallacious or a misconception. Indeed, the evidence adduced by the defendants clearly evinces a reliance on the statutory

justification with the primary offence of fraud (being a Schedule 1 offence) being top of mind.

The plaintiff's testimony:

[7] The plaintiff testified that he had been present at his home at 22 Nederberg Crescent, Vergenoeg, East London at about 2pm on 11 January 2018 whilst sitting in the garage with his cousin. His aunt and two little girls were present.

[8] The events which unfolded at home were, on his version, as follows: Whilst chatting to his cousin two unknown men arrived in a motor vehicle and came to the open gate of the premises.² They asked for him by name. He identified himself. One of the men told him to sit down and pushed him to the corner. The other man made a phone call. Five minutes later a police vehicle stopped behind the visitors' motor vehicle. A male and a female police officer, in uniform, approached him. One of the first duo confirmed to the approaching officer, concerning him, that "here is the suspect".

[9] The male police officer took out his handcuffs, cuffed him and took him to the police vehicle, aided by one of the other two men pushing him, where he was put in the back of the van together with a dog that was in the vehicle. He was driven directly to the Fleet Street Police Station where he arrived, still handcuffed.

[10] No communication had preceded this turn of events except him overhearing one of the first pair of men announce that they had found the

² It became clearer during cross examination that one of these two men was the complainant himself, Mr. David Benge, and the other a private investigator, Mr. Louw, although the plaintiff did not refer to the latter by his name at all.

suspect, and him being told by the officer who cuffed him that he was going to be taken to the Fleet Street police station.

[11] At the police station he was taken to a room where statements are taken. There a police officer grabbed hold of his neck (“choked him”) and held his face for a photo of him to be taken which they threatened to put on Facebook to show him out to be a fraudster.

[12] His personal belongings including his cell phone were taken from him. A statement was written, and he was given a document concerning his rights. He was informed at the police station that he was being arrested (although not told for what according to him) and that he should await the arrival of the investigating officer to charge him.³

[13] He was taken by another officer to a cell where he waited until Friday night at 10pm (12 January 2017) when he was charged by the “arresting officer” (Sic) who he identified as “Mtanda.”⁴ Then for the first time he claims he was told that he was being charged for fraud concerning monies owed to Mr. David Bengé and that he needed to pay him.⁵

[14] He gave the impression in his evidence in chief that Mr. Bengé was not someone he knew although he had a faint recollection of him as a supplier of air conditioners.⁶ He claimed instead to know a Mr. Randell Williams who he explained is the person he approached to organize air conditioners for him to do

³ The plaintiff spontaneously related that he was told he was being arrested at the police station, but later sought to make out a different case that he had rather been arrested earlier at his home. He also suggested that the telling was done by someone different than one of the two officers who came to his home.

⁴ He appeared to confuse the investigation officer with the officer who he says arrested him.

⁵ The plaintiff created the impression that this charge had come out of the blue and that he was surprised by the allegations of fraud and even by the mere suggestion that Mr. Bengé had claimed he owed him R85 000,00.

⁶ Under cross examination he relented that he knew Mr. Bengé and had in fact met him. He was resolute however that this was only after the aircon installation and not before.

a tender installation at Buffalo City College. He professed ignorance regarding what the fraud charge related to or why he would be owing Mr. Bengé any monies at all. (Unless something was lost in translation and he meant to suggest that he had no inkling of the existence of the complainant or the basis for the charges *at the time of the arrest*, his ignorance in the present proceedings was hard to reconcile even with his own version since he alleged that Mr. Bengé surfaced after the installation claiming that he (the plaintiff) had not paid him for the air conditioners that he (Mr. Bengé) had supplied to him. I will say more about this later.)

[15] On Monday, 15 January 2017, he appeared in A Court at the Magistrate's Court in East London and was transferred to the bail court. He was assisted at his request by a legal aid attorney.

[16] Bail was denied and he was taken to the West Bank Prison. A further appearance ensued on 18 January 2017. Bail was again denied, and this stance continued at several further appearances. He was granted bail on 28 March 2017 which he paid the following day. He understood from what the magistrate stated on the last occasion that there was not a "sufficient" reason why his request for bail should not be entertained and bail was set at "not less than R1 000.00".⁷

⁷ What he failed to disclose in this regard further, according to the bail transcript that was put up by the defendants, is that the magistrate recorded (a) that the defence had informed the court that he had no previous convictions (he was obliged to concede in this court under cross examination by Ms. Brauns who appeared on behalf of the second defendant that he in fact had two) and (b) that his attorney had submitted that the investigating officer had caused delays and had filed a statement to the effect that he was not opposed to bail. All the indications were however that there had until then been good reason, in the existence of the Midrand warrant, to oppose bail but once the police from Midrand were not forthcoming in cooperating, and the investigating officer and prosecutor had correctly relented on this ground, his chances of being released on bail (on the assumption that he indeed had no previous convictions) were substantially improved.

[17] He continued to appear in court on several subsequent dates until he was told on 30 September 2019 that he was being found “not guilty”.⁸

[18] The rest of his testimony in chief bore upon his experience of his arrest and detention, which I need not relate, given the approach I take herein.

[19] According to him what he had told the court upon trial (by way of his defence) is that this was a private matter between him and Mr. Williams and did not concern the complainant. Indeed, in relating his side of the critical events underpinning and preceding his arrest, he recorded surprise that Mr. Bengé had called him after the installation to tell him that he had not been paid for his air conditioners.

[20] He claims that he had communicated his astonishment to Mr. Bengé that he had not been paid at a “progress payment meeting”⁹ to which the latter had called him and Mr. Williams after the installation and had enquired from him at the meeting how he thought he got the air conditioners out of his warehouse if not by having paid for them, albeit through Mr. Williams with whom he had privity of contract. He averred that this same narrative (including his after-the-fact realization that Mr. Williams had not paid Mr. Bengé for the hardware supplied) formed the basis for his successful defence at the criminal trial.

[21] Asked why he then still gave an undertaking to pay Mr. Bengé if on his version no monies were owed to him, he explained that he had found out that Mr. Williams had not paid Mr. Bengé for the air conditioners and because the latter had begun to threaten him. He added that he even threatened his children,

⁸ The parties were agreed that this was the verdict given upon the plaintiff’s guilt. No judgment was however produced in the present trial.

⁹ His reference to such a meeting as a progress payment meeting on his version is bizarre, especially since he maintained that he owed nothing to anyone at this stage.

indicating that he knew where they were going to school. He stated that he would find him and make an example out of him.

[22] His bizarre explanation why he relented and agreed to pay Mr. Bengé something was explained thus:

“I’m not saying I did not owe Dave. I owed him for the aircons that I know. I did not say I don’t owe for the aircons. I did owe for the aircons because I was supposed to have paid for the aircons. And that I did pay R20 000 and again R25 000 towards the aircons. All my proof of payments were saying towards aircons, towards aircons.”

[23] He further accepted that he was indeed paid by the College (R165 000.00 on his version) for the job.¹⁰

[24] In response to the comment put to him that he had not demurred or proffered any such excuse to Mr. Bengé when he met him on 11 January 2018 at his home, he claimed that it would have been to no good because every time before when he had insisted that Mr. Williams had been paid for the both of them so to speak, Mr. Bengé had intimated that he was unconcerned with the personal dealings between himself and Mr. Williams.

[25] He denied that Mr. Bengé (who for the first time under cross examination he acknowledged as being the second person who accompanied the private investigator to his home on 11 January 2018) had purportedly pulled him out from under the bed or that he had hidden away from him and Mr. Louw when they came to look for him at 22 Nederberg Crescent. He refuted that any cellphone calls had been made in his presence to discuss the Midrand warrant or having any other knowledge about such a warrant. He dismissed the assertion

¹⁰ Evidently he, or rather the company through which he conducted his business, Ikhona-Nayo, was paid on 24 July 2017 in the sum of R175 862.78. This appears from a payment advice that served as exhibit A5 before the criminal court.

put to him that Sgt Fredericks would say (as he did when he ultimately testified) that he had not been arrested until he got to the police station. He also refuted Sgt Fredericks' anticipated denial that he was handcuffed, adding a further string to his bow that in fact he had been cuffed to the back of the van using the wrist restraints.

[26] Despite at first having volunteered that he was arrested at the station and not earlier at his home, he reneged on his testimony in this respect, preferring to argue that the fact of arrest had to be inferred from the moment the handcuffs were purportedly placed on him at his home. Later he at least conceded that he had been told why he had been arrested, although on his version, this only happened at the police station contemporaneously with him being formally charged.

[27] In short, he gave the impression that he had been spirited away under a haze of secrecy and silence by officers who didn't even ask him to identify himself until later at the police station.

[28] He insisted that he had been unaware until after bail had been granted to him that there was an outstanding warrant for his arrest emanating from Midrand. He further insisted, despite the Notice of Rights which he signed indicating this and the fraud charge as the basis for his arrest, that he was just told to sign the document. Asked how he could have signed the notice without being aware that he was being charged under the heading fraud and warrant of arrest as the document plainly indicated, he offered a different reason, namely that he assumed that the warrant of arrest alluded to therein was for the fraud case he was being arrested for. He relented ultimately that it was improbable that he could not have been aware of the reference to the Midrand warrant when informed of his rights, but now claimed that it was because he had signed the

document under duress and without reading what the notice conveyed that he had no knowledge thereof.

[29] Contrary to the impression given in his testimony in chief he pinned it on Mr. Bengé that he was the one who had insisted at the police station that a picture had to be taken of him and put on Facebook and added this as a further reason why he felt constrained and under threat by the latter to sign the notice of rights. He suggested that these shenanigans on the latter's part had probably also conduced to him being distracted from seeing the SAPS circulation system enquiry report that suggested that he was a wanted person if this had purportedly been shown to him.¹¹

[30] Regarding the bail proceedings he claimed to have been resolute in his attempts to obtain bail and denied abandoning his application or having thrown in the towel on the basis of an acceptance on his part, or by his legal representative on his behalf, that there was this outstanding warrant for his arrest. His answer in the present trial, when pressed, was deliberately meant to avoid any responsibility for this happenstance or any knowledge of the warrant for his arrest at all:

MR COLE: Well, let us deal with it. The defence, you are represented by somebody, a legal representative who informs the Court that you, the applicant abandon the bail, because you have got an outstanding warrant in Johannesburg.

MR MGUDLWA: I could not do that. I could not abandon bail, because I have got a warrant of arrest in Johannesburg. I believe when I have got a warrant of arrest it is either you are, they look for you and they get you and they arrest you. I do not need to abandon bail because of that. I did not abandon any bail."

¹¹ He stated in this regard that: "I believe I would not have seen it because what the private investigator and Dave (Mr. Bengé) were doing, they wanted to take my pictures."

[31] Whilst acknowledging that he had been charged in Midrand by his ex-wife in respect of a domestic violence incident (and that he had failed to appear in 2013 albeit he had submitted a doctor's note), he could offer no explanation why his name appeared on the police system of wanted persons.

The arresting officer's testimony:

[32] Mr. José Royston Fredericks at the time of trial was a sergeant in the South African Police Service attached to the East London Canine Unit. His responsibilities entail *inter alia* the handling of dogs and patrolling the streets.

[33] On 11 January 2018 he was on patrol duty in the East London area together with a female colleague, one Cst. Bheqezi. He received a call from a private investigator by the name of Mr. Stefan Louw. Mr. Louw informed him that he had at the request of the complainant in respect of the fraud charge traced the plaintiff who was a wanted suspect in that matter to a house at 22 Nederberg Crescent in Vergenoeg.¹² Mr. Louw furnished him with the docket reference number as well as the contact details of the responsible investigating officer, one Cst. Ngqwazana, who he called to enquire about the matter. Cst. Ngqwazana confirmed to him that the person who Mr. Louw had traced was indeed wanted as a suspect by the South African Police Service ("SAPS") but since he was busy with something urgent at the time he asked if he could assist him by going there to confirm that the claimed suspect was the real person. At his request he thus proceeded to where Mr. Louw was present with the plaintiff in an outbuilding adjoining the main house at 22 Nederberg Crescent.

¹² Upon being asked by the court to account for the private investigator's presence at 22 Nederberg Crescent, he explained that the investigator had related to him that the complainant had requested him to investigate the matter privately since the police had never gotten back to him with any results or information. He had traced the plaintiff himself using his own resources.

[34] He identified himself to the plaintiff as a police officer and explained the reason for his presence there. At his request the latter made his identity card available to him.

[35] He called Cst. Ngqwazana again and spoke to him in the plaintiff's presence on speakerphone. He related the particulars of the plaintiff to him. The latter confirmed that the plaintiff was indeed the person the SAPS were looking for still to be charged on the fraud case.

[36] Additionally, he revealed to him that according to the South African Police circulation system ("the circulation system") the plaintiff's details were reflected there as a wanted person concerning a Midrand case, the details of which he related over the phone to him.

[37] The plaintiff did not argue against or resist these facts stated concerning himself, but notably dropped his head at the mention of the Midrand case.

[38] Against this background he informed the plaintiff that it was necessary to proceed with him to the Fleet Street Police Station to confirm the information that was at his disposal. The plaintiff was not handcuffed or placed under arrest at that stage although he was put in the police van and taken to the station.

[39] Once at the station he verified with reference to the circulation system enquiry report that the plaintiff was listed as a wanted person since 2013. The fact that the information appeared on the SAPS' circulation system confirmed to him that a warrant issued way back then was still alive.¹³

¹³ The enquiry report was ostensibly generated on 11 January 2018 at 13h14. It appears in the bundle marked Exhibit A at page 79.

[40] He called for the docket in respect of the fraud case and established from the complainant's statement (without a doubt as far as he was concerned), that the plaintiff had committed such offence.

[41] It was only after taking these preliminary steps that he in fact formally informed the plaintiff that he was being placed under arrest. These formalities were attended to in his absence by Cst. Bheqezi who read and translated the plaintiff's rights to him as a detainee with reference to both the fraud case and the outstanding Midrand case which he asked her to add. (That the plaintiff was so warned at 13h25 on 11 January 2018 appears from the face of the SAP 14A itself.)

[42] He was clear that the plaintiff could not have been under any misapprehension as to why he had been arrested, or as to the existence of the Midrand warrant of arrest.

[43] He explained that he had managed to obtain a hard copy of the Midrand warrant of arrest on the day of the commencement of the present trial and was satisfied that it conformed in all respects to the information reflected in the circulation system enquiry report.¹⁴ Although an original warrant was not to hand at the time, he had however requested a senior officer present at the station, one Captain Alexander, to place a copy of the enquiry report in the fraud docket and he himself informed the investigating officer of this detail. (The enquiry report, printed off the system at 13h14 on 11 January 2018 is included in the fraud docket marked A4, following after his own arrest statement in the docket which is marked A3.)

¹⁴ Against the express objection of the plaintiff that the bench warrant had not been discovered, it was not admitted into evidence.

[44] Under cross examination by Ms. Brauns for the second defendant he confirmed it to be his reasonable belief (based on what was in the docket at the time) that the plaintiff's arrest had been justified. Since he was not the investigating officer, he could not elaborate on why the plaintiff had not been granted immediate police bail.

[45] Under cross examination by Mr. Mpakane for the plaintiff he refuted that it would have been essential to have had the original Midrand warrant of arrest to hand before effecting his arrest. He explained however that it was more than sufficient to have relied on the circulation system enquiry report as a reliable indicator that the old warrant was still alive. He agreed without hesitation that he had been unaware of the terms of the warrant itself.

[46] He readily conceded that when he had explained to the plaintiff why he needed to accompany him to the police station that he had not exactly given him a choice in the matter. He agreed that it was perhaps not appropriate to have driven him in the back of the van (where the police dog was located in the closed off dog compartment). He added however that the plaintiff had willingly climbed in at the back of the van himself after explaining to him why it would be necessary to go to the station and he had opened the door for him. (It seemed clear that this was the only seat in the van he could have occupied given that his colleague occupied the front passenger seat with him.)

[47] He conceded that his arrest statement gives the impression that the plaintiff was arrested at 22 Nederberg Crescent already, but he maintained his standpoint that the arrest was not formalized until he was able later at the station to confirm and verify the details that had been revealed to him. He had however indicated to the plaintiff at his home that he might have to arrest him, thus he

suggested to him that he leave his motor vehicle keys and personal belongings behind.

[48] As an aside, the time indicated on the enquiry report (ostensibly when it was generated off the SAPS IT system) preceded the plaintiff having been informed of his constitutional rights by a few minutes, eleven to be exact, giving objective credence to the sequence of events claimed by Sgt Fredericks.

[49] As for the insinuation that he had not *investigated* the matter before arresting the plaintiff, he pointed out that he had relied on the “A1” statement in the fraud docket (together with the oral information furnished to him by the investigating officer) and was satisfied that his finding of the plaintiff was consistent with and part of standard police investigation. Although he met Cst. Ngqwazana at the station, he assured the court that he had “physically read” through the statement of the complainant himself before taking the decision to arrest the plaintiff and that he had felt personally constrained to detain him, even if the investigating officer elected to release him later on. The imperative in this regard was based on his understanding that the plaintiff had been at large. The complainant had indicated in his statement that he had struggled to get hold of him and the investigating officer also informed him that it was a long time that he had been unsuccessfully looking for him. The further reason was that there was an active warrant against the plaintiff which confirmed that he had been a wanted person since 2012.

[50] The A1 statement of Mr. Bengé that informed him that there was a case made out against the plaintiff of fraud and therefore reasonable cause to arrest him was ostensibly deposed to on 4 December 2017. He confirmed its contents as follows:

“On Friday 2017.07.07 @ 10:00 I was in my office and Lunga Mgodlwa with the ID number He came to purchase five air-conditioners. I then made an invoice of R85 000.

Our deal was he will pay me when he got paid from the Buffalo City Campus. I called him and he told me that he hadn't got paid yet. I decided to go to BCC to check and I was given the records that he had been paid on 24 July 2017. I then called him again and I informed him that I know he has been paid. He promised me on 14 September 2017. He doesn't answer my phone calls anymore.

On the 14 September he sent me the proof of payment via WhatsApp and it shows the name of his company and the money that he owes, R85 000. When I check the details it was mine, and correct as I am using Nedbank. As we are not using the same bank so it approximately takes three working days to appear. On the 18 September I used online banking and to my surprise there was no money, it did not went through. I then called him, informing him about this matter and he said to me he does not know what could be the problem.

On the 21 September 2017 @ 20 6:20am he sent me a letter by email apologising about the whole situation. He then promised to pay on 2.10.2017. When the date he promised to pay on had passed I called him and started to ignore my phone calls. He then sent me a message via WhatsApp promising to pay R70 000 on the 24 November and the balance after a week. (R15 000). I started a conversation after that day and he ignored me and he blocked on WhatsApp.

This all happened so far. I did not give anyone a permission to defraud me so I am requesting the police to investigate this matter.”

[51] Its bears mentioning that the entries in the investigation diary, from the time the complaint was lodged up to the moment of the plaintiff's arrest, reflect that Mr. Bengé was interviewed at the crime centre simultaneously with the lodgment of the FIC (First information of the crime) and again the following day when the SAP429 (b) (Status of Investigation) was provided to him and that he was ostensibly involved in finding the plaintiff using the agency of a private

investigation firm.¹⁵ An entry on 5 December 2017 records that he “told (the investigating officer) that he has triggered the sources that are going to inform him when the suspect arrives at home.”¹⁶ The prevailing instruction from the supervising Captain is to trace and arrest the suspect. Ostensibly on 3 January 2018 a trace report generated at the behest of Christian Botha Investigations CC was placed on the docket by the investigating officer (marked B1) who noted: “suspect to be traced as he is still at large.” The last entry by the supervising officer prior to the plaintiff’s arrest repeated the same instruction, namely “Trace suspect.”

The testimony of the complainant:

[52] The complainant, Mr. David Bengé, testified regarding his interaction with the plaintiff. In 2017 one Mr. Randell Williams had asked him on the plaintiff’s behalf if he could supply air conditioners to the latter. Mr. Williams and the plaintiff himself had approached him at his business premises a month later when the plaintiff confirmed to him that he had a tender to install five air conditioners at the Buffalo City College campus. It was understood that Mr. Williams would be doing the installation. The plaintiff promised that as soon as he was paid by Buffalo City College (which was anticipated within a month), he would pay the witness for the air conditioners that were valued at R85 000.00 and they were invoiced to him contemporaneously with their delivery on site.

[53] The misrepresentation that he sought to emphasize (and which formed the basis for the fraud charge in A1) is that the plaintiff would pay him as soon as

¹⁵ The parties to the litigation agreed that the docket be admitted as evidence, without the requirement of formal proof, and that it was considered as true and correct save insofar as any document might be expressly disputed. There was no suggestion that any document in the docket fell to be challenged.

¹⁶ Home was noted in the first entry in the investigation diary to be at 22 Nederberg Crescent in Buffalo Flats, East London. Mr. Bengé confirmed in his testimony later on that the plaintiff’s address was known but that the plaintiff had made himself scarce at home. He related further that he had in fact visited the premises and had asked the plaintiff’s aunt to call him when he was home, but evidently to no avail.

he was paid by the Buffalo City College which on everyone's expectation would be more or less in a month's time. He relied on this misrepresentation to his prejudice by making the air conditioners available to him in the meantime without payment having been first been received for them. The plaintiff's criminal intent, and the actual or potential prejudice caused to him was to be inferred from the fact that he did not in fact pay him the invoiced amount even though he established independently from the dean of Buffalo City College that the plaintiff had been paid for the job on 24 July 2017 already and quite ostensibly had had no intention of paying him for them. That indication, so Mr. Bengé testified, was to be gathered from the fact that the plaintiff did not keep him in the loop regarding when he was paid by the college or had concealed from him the fact that he had in fact been paid for the job. He further avoided his phone calls. Then, after he was ultimately cornered and the lie exposed that he was still waiting on the College to pay him, he made an undertaking to pay him on 14 September 2017.

[54] On this date the plaintiff purported to send him proof of payment via WhatsApp as if he had settled his liability to him in full (a deposit slip reflecting payment of R85 000,00 into his banking account was put up by him) and feigned surprise when the witness informed him that the transaction had instead actually entailed payment of only R85.00 to him. In his opinion the proof of payment consciously put up by the plaintiff to absolve him of liability was a deliberate falsehood. The plaintiff purported to pass off as a clerical error the fact that only a sum of R85,00 had ultimately been transferred. This was followed up by him apologizing for the "whole situation" and making a further tender to pay him on 21 September 2017.

[55] As far as he was concerned there had never been an agreement that monies paid by the plaintiff to Mr. Williams would conduce to the payment of

the amount invoiced by him to the plaintiff. Indeed, the plaintiff's arrangement concerning the installation of the units supplied by him had nothing to do with Mr Williams at all.

[56] He pointed to his bank statement as proof that on 20 September 2017 there had been a payment by Ikhona-Nayo (the plaintiff's business) to him of only R85.00.

[57] The matter ended where the plaintiff blocked him on WhatsApp. The balance owing after the supposed payment of R85.00 still remained outstanding.

[58] He explained that although he would have been keen to recover what was owing to him by way of civil proceedings, he ultimately elected (as he was entitled) to initiate the criminal complaint against the plaintiff. He employed Mr. Louw to find him, which culminated in him being traced to 22 Nederberg Crescent.

[59] He confirmed that he himself was present when Mr. Louw went to the plaintiff's home and pulled him out from under the bed in an outbuilding on the premises where he was hiding. They had been pointed to the room by the plaintiff's aunt.

[60] Sgt. Fredericks arrived directly after that and took matters further.

[61] A prosecution ensued. He went to court five or six times and ultimately related the same story to the magistrate upon trial. He was told after the fact that the plaintiff had been acquitted on the charge of fraud.

[62] Ironically the impression created about the witness by the plaintiff, significantly that he had threatened him and his family and tried to extort money from him that was not entitled to on the plaintiff's version, was never put to him to deal with or to refute.

The testimony of Mr Randell Williams:

[63] Mr. Randell Williams confirmed his involvement in the installation of the air conditioners at the Buffalo City College campus and the fact that he had introduced Mr. Bengé to the plaintiff as being someone who could facilitate the provision of the units for the job. Mr. Bengé was fairly well known to him, and they had a prior relationship.

[64] Mr. Bengé informed him after the installation that the plaintiff had not paid him for the air conditioners. This surprised him especially since he established independently from a Mr. Klaas at the College that the plaintiff had already been paid for the job. Indeed, Mr. Klaas confirmed to him that he had personally expedited the payment for the tender immediately after the installation.

[65] He confirmed that he, the plaintiff, and Mr. Bengé had met at the latter's office when the matter was first discussed. This was before the installation. Once he had appraised himself of the documentation that evidenced the order, that the job was for real and that the Buffalo City College was on board for the payment, Mr. Bengé agreed to supply the units and was happy to defer payment for them until after the job was complete based on the plaintiff's undertaking given to him that he would be paid within the month.

[66] For his part, the plaintiff agreed separately to pay him for his labour for the installation. He paid a deposit of R18 000.00 towards this end (this was received on the same day that the units were delivered) from which he paid Mr. Benge for the piping, consumables and other ancillary materials also acquired from him to enable him to carry out the installation. Later he received a further payment of R20 000.00 from the plaintiff which extinguished the latter's liability to him in full.

[67] When the deal went awry, he helped Mr. Benge to contact the plaintiff through the latter's brother who he knew. He heard later that the plaintiff had given him an undertaking to pay him from the proceeds of another job that he was busy with, and that he had left his driver's licence card with him as security. Mr. Benge also related to him how the plaintiff had led him a merry dance or had spun him a yarn to the effect that he had paid him by way of a deposit into his banking account, only to find out three days later after the anticipated deposit had cleared that the amount transferred to him was instead in the paltry sum of R85.00 only.

[68] He had challenged the plaintiff about this transaction who offered as an excuse that a clerk at the bank had made a mistake by failing to add a nought or two, or by not reflecting the proper amount. He instantly discounted this as a ruse.

[69] As an aside, the most important feature of the plaintiff's version, namely that Mr. Williams had caused all the trouble by not paying Mr Benge for the air conditioners from the R45 000.00 he had paid him, was not out to him to deal with.

The testimony of Ms. Totyi:

[70] The second defendant adduced the testimony firstly of Ms. Lindelwa Totyi who was the district court prosecutor of D Court at the Magistrate's Court, East London, at the time of one of the plaintiff's early appearances in court. Her role, so she explained, was to assist the court to assess the trial readiness of the matter at the pre-trial conference and to put the charge to the plaintiff. She identified the pre-trial record document completed by her for submission to the court on 23 March 2018 as also an extract from the court record reflecting the plaintiff's appearance before court on that date and the fact that he had pleaded not guilty to the charge without giving any plea explanation. She referred the court to the J15 (the face of the charge sheet) which evidences his plea of not guilty.¹⁷

[71] She explained that at that stage of the proceedings the pool prosecutors would have advanced the matter along to A Court after screening it and considering it prosecution worthy. By then the complainant would have been consulted with to make sure he wished to proceed with the case, the charge sheet would already have been compiled, and the defence team would also have indicated their readiness to go on trial. The plaintiff would at that point have been asked to plead and have been invited to provide an explanation for his plea.

[72] All the indications from the court record confirmed to her mind that these processes had been properly undertaken.

¹⁷ The parties agreed that the court record too be admitted into evidence without the requirement of formal proof. The plaintiff never really challenged its correctness.

[73] With reference to the court record she identified an earlier appearance by the plaintiff on 27 February 2018 when she acted as public prosecutor. She explained that this would have been the first date when she received the docket from A Court from where she would have been responsible as the trial roll prosecutor to move it further along on its trajectory.

[74] As far as she was concerned the pool prosecutors would already have applied their minds to whether the prosecution was justified, and she added her opinion that at the time she believed that there were “reasonable grounds to ensure that there was going to be a prosecution of the ... accused at that stage”. She assured the court that she was never motivated by malice in bringing her bit.

[75] Under cross examination she acknowledged that at the times when she appeared as public prosecutor, she would have applied her mind to the question whether there were reasonable prospects of a successful prosecution. She added in this respect that she was satisfied that she had all the elements of fraud before her, namely the date, the place, the victim, the misrepresentation, and the loss (prejudice).

[76] She could not agree with the assertion put to her by Mr. Mpakane that the complainant’s request for further investigation recorded in the final paragraph of his police statement meant that there should have been a tangible investigation report filed before the police could have proceeded on the premise that the investigation was complete. She opined that it was necessarily implied from what was contained in the docket as a whole (including the police investigation diary) that the investigation requested by the complainant was duly undertaken.

[77] As for the plaintiff's status at the time, she asserted that he would have been in custody principally on the basis of the fraud charge because he had not yet been granted bail. The fact that the Midrand warrant was outstanding played a secondary role to indicate or substantiate that he was a flight risk.

The testimony of Ms. Shakira Fourie:

[78] The last witness for the second defendant was Shakira Fourie who in 2018 was employed at the East London Magistrate's court as a district court prosecutor based in A Court, also known as "the inception court".

[79] She explained the institutional processes applicable to new cases coming to the inception court. Dockets brought in from SAPS are screened by prosecutors in the pool who decide based on primary documents contained in the docket whether to enroll the matter or not. If the decision is taken that there is a *prima facie* case for enrolment, the case makes its way to the inception court.

[80] The pool is comprised of three or four prosecutors who apply their minds to whether cases have merit and decide on related issues such as bail etc.

[81] The primary documents aforesaid would have included the constitutional warning of the accused, the complainant's statement outlining the offence, witness statements, where applicable, and bail information.

[82] Given the institutional machinery in place, it can be accepted, so she explained, that when the docket got to the inception court the screening prosecutors in the pool would have already satisfied themselves as to the existence of an honest belief that the institution of the proceedings was justified.

[83] The A Court prosecutor's role would have been to place the matter before court and then to deal with the issues of legal representation and bail.

[84] She confirmed with reference to the court record that the plaintiff had appeared for the first time on 15 January 2018 when he made an election to apply for legal aid. She had informed the court at that juncture that his release on bail was being opposed. By cross referencing the bail information sheet and documentation in the docket she pointed the court to the circulation enquiry report showing that the plaintiff had a pending case against him. The fact of the outstanding Midrand warrant would in her view in itself have given her a reason to oppose bail.

[85] She referred the court to his list of previous convictions recorded on the standard SAP 69's which indicate that he had two of these albeit this seemed to have missed the magistrate's attention on 28 March 2018, no doubt because he was informed by the plaintiff's attorney that he had none.¹⁸

[86] Other negative indicators appearing from the investigating officer's information form also persuaded her (against the red flags suggested by section 60 (4) of the CPA) that there was a basis to oppose bail. These entail entries made by the investigating officer to the effect that the plaintiff had no fixed employment; could easily evade arrest if released (this based on the SAPS circulation enquiry report); would be difficult to trace; would interfere with the investigation or intimidate witnesses; might commit further offences; and should be kept in custody for his own safety.

¹⁸ The plaintiff's SAP69 were generated on 24 January 2018 and reflect two previous convictions. (See A8 in the docket). This information obviously post-dated the Bail Information Form which is dated 13 January 2018.

[87] In her view and upon a consideration of all the relevant indicators she reached the decision that there was a *prima facie* case for enrolment of the case in the first place. She also expressed the opinion that based on the detail recorded in the bail information sheet and the fact that the plaintiff has previous convictions, that this elevated it to a Schedule 5 offence for bail purposes. (This observation was self-evidently made with hindsight. It had not occurred to the second defendant, or at least it appears it was not drawn to the attention of the prosecutor at the time of the bail application that the plaintiff had previous convictions).¹⁹

[88] Further she was satisfied that there were reasonable grounds to conclude that “there was guilt on the part of the (plaintiff)” in relation to the offence with which he had been charged.

[89] She pointed in the criminal court record to two appearances by the plaintiff in the magistrate’s court on 15 January 2018, the first to ensure that he was apprised of his fair trial rights with regard to bail, and the second in the bail court itself, to which he was immediately transferred on the first day.

[90] On 22 January 2018, which is indicated in the court record as a bail court hearing date, she referred the court to a significant entry made by the magistrate to the following effect:

“The accused is present, bail is abandoned, and accused has a warrant in Jo-Burg and the accused is in custody, remanded in custody till the 27th of February 2018 for further investigation.”

¹⁹ Schedule 5 refers to “an offence referred to in Schedule 1 – (a) and the accused has previously been convicted of an offence referred to in Schedule 1”. The plaintiff had ostensibly been convicted before of culpable homicide, an offence which resorts under Schedule 1.

[91] A further related entry appears on 7 March 2018 in the charge sheet to the following effect:

“The applicant is before court, the defence informs the court that the applicant abandons bail, as applicant has outstanding warrant in Johannesburg. Applies for a remand, matter until tomorrow for docket, as applicant was requisitioned, matter is remanded to the 8th of March 2018 for docket, and investigating officer. Accused in custody.”

[92] It is apparent that at both appearances aforesaid the plaintiff was legally represented.

[93] She played no role in the second bail application, but referred the court to an affidavit filed by Cst. Zukile Mtanda in which he attests as follows:

“I hereby refer to E/L CAS 68/12/2017²⁰ where I opposed bail based on the W/A of Midrand case against the accused. I then informed the Midrand branch commander but, he failed to co-operate. The decision lies upon the court to grant bail as Midrand detective failed to execute the W/A so I don’t have ground to oppose.”

[94] As an aside It appears from the record on 23 March 2018 that the prosecutor contemporaneously with the handing in the affidavit of Cst. Mtanda indicated to the magistrate that bail was not being opposed. The magistrate noted his submissions to the effect that: “it is not in the interest of justice that (the plaintiff) be kept in custody and that the police did not execute the warrant as (the plaintiff) was ill when warrant was issued and handed sick note to the clerk of the court.” All of this notwithstanding, the magistrate was “not satisfied” with Mr. Mtanda’s affidavit and remanded the plaintiff for a bail application

²⁰ This is the fraud case docket reference.

[95] Ms. Fourie added her view that despite the affidavit of Cst. Mtanda, this would have had no bearing on the fraud case which still had to be prosecuted.

[96] She concluded by confirming that her role as prosecutor would have been to ensure that there was a reasonable and probable outcome of a conviction on the fraud charge. She further assured the court that in carrying out her responsibilities in this regard she harboured no malice toward the plaintiff.

[97] She maintained her view as to a reasonable case against the plaintiff when Mr. Cole held out to her that the strength of the State's case ostensibly rested on Mr. Bengé's statement, the further interview with him (confirmed by an entry in the police diary to the effect that "complainant interviewed thoroughly") and documents cross referenced in his statement entailing SMS's, WhatsApp's, proof of payment to the plaintiff's company by the college, the contentious deposit slip, and banking statements etc.

[98] Under cross examination she noted that she would also have had regard to the plaintiff's constitutional warning statement from which it would have been apparent that he had not put up his own side of the story so to speak, since he had exercised an election to remain silent. In any event, so she explained, she did not consider any obligation to rely on information supplied by him in making the significant decisions which she did.

[99] She agreed that she would not have seen the Midrand warrant but confirmed under re-examination that it was permissible for her to rely on the SAPS circulation enquiry report because it is an official police document.

Evaluation:

[100] When there are irreconcilable versions before the trial court it must draw conclusions on disputed issues based on findings in respect of the credibility and reliability of the various witnesses, considered together with the probabilities.²¹

[101] Such a difference exists regarding the circumstances of the plaintiff's arrest which impacts on Sgt Frederick's claimed justification for the arrest. In this regard the plaintiff sought to create the impression by his testimony that his personality rights had been infringed without any justification and in flagrant disregard of his constitutional rights in almost every respect, obliging him to challenge the legality thereof.

[102] There is a further dispute concerning what the plaintiff says happened between himself, Mr. Bengé and Mr. Williams. This goes generally to the plaintiff's credibility and reliability as a witness but also impacts on the question whether there was an absence of reasonable and probable cause for the prosecution and whether the prosecuting parties were actuated by malice. Regarding the prequel to the complaint of fraud, the evidence of Mr. Bengé was corroborated by the testimony of Mr. Williams and further aligns in every respect with the objective evidence, namely what is in the docket (especially the A1 statement and supporting documentation). Further of significance in this respect is the fact that the plaintiff's version (which suggests to the contrary that there was an absence of reasonable grounds for the prosecution of which Mr Bengé and those initiating the prosecution were or should have been aware) was not even hinted to these two witnesses under cross examination.

²¹ *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 - 441; *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14 H - J.

[103] The third issue concerns whether the plaintiff abandoned his application for bail on the basis of the outstanding Midrand warrant. This aspect too goes to his credibility generally but also concerns the question whether there was a lawful basis to justify his continued detention after his first appearance in court. His claimed nescience even of the existence of the warrant is so obviously at odds with what the criminal court record indicates, yet he equivocated in condemning the record out of hand as not being a true representation of those proceedings. He also claimed not to have been told upon his arrest that the existence of the Midrand warrant, or the fact at least that he was listed on the SAPS circulation system as a wanted person since 2012, constituted one of the reasons for being detained, which flies in the face of what the SAP14A notice self-evidently records. In these respects, it is just so inherently improbable that the plaintiff could have been blissfully ignorant of the warrant's existence or its impact. The ineluctable inference to be drawn from his absolute rejection of any knowledge of either is that he hoped to make capital of his complaint that he had unreasonably been denied bail and that the defendants had had no justification in prolonging his detention after his first appearance in court on the bases upon which they claim his fate was determined.

[104] The investigation diary, the SAPS circulation enquiry report, and the relevant Notice of Rights plainly speak for themselves and provide an objective reference point. The docket and court record also evince on their own how the plaintiff was dealt with as a detainee and accused. The plaintiff not having suggested any basis to challenge their authenticity, they must in my view be taken to represent true and accurate records of the docket and J15 respectively.

[105] On the subject of records and what they reveal, what was notably absent in the present trial was a transcript of the trial proceedings in the criminal court which one would have expected the plaintiff to have provided in order to prove

the malicious prosecution contended for. A transcript may also have provided a point of reference to compare what the plaintiff says happened (and what he claims he told the magistrate) and what Messrs. Bengé and Williams alleged in their testimony to the contrary. It might also have indicated why the magistrate was swayed to acquit the plaintiff on the fraud charge although the verdict on its own provides no proof of malice.²²

[106] The court record which the plaintiff did not seem intent on introducing into evidence (despite the fact that this would obviously have provided the necessary insight into the question why bail was denied to him until 28 March 2018) indicates that a transcript was made available whilst the criminal trial was underway, yet such a transcript was conspicuous by its absence before this court. It is notable in my view that the plaintiff did not even discover the J15 and annexures and Mr. Mpakane placed it firmly on record when he was leading the plaintiff that the bail transcript was not going to be entered into evidence.²³ This is to my mind another demonstration of the plaintiff's chicanery or obfuscation of the real truth.

[107] The object of the evidence placed before this court by the first defendant was not to prove the plaintiff's guilt, but to place into context what the charge against the plaintiff was about and to justify that, as far as Sgt Fredericks was concerned, a reasonable suspicion existed when he arrested the plaintiff that he had committed a Schedule 1 offence and, insofar as the second defendant is

²² The answer that suggests itself is that Mr. Williams did not testify in the criminal court to refute the plaintiff's accusation (repeated in the civil trial) that he had purportedly failed to pay over the monies paid to him to Mr. Bengé. Mr. Williams was unfortunately not drawn on whether he testified in the criminal trial or not, but the docket reflects that he may have been subpoenaed for court on 12 August 2019 for the defence case. Given that he filed a statement on 15 July 2019 (A13) that supports Mr. Bengé's version rather than his own, it seems improbable that the plaintiff would have persisted in calling him.

²³ See Page 35 of the transcript of the plaintiff's evidence. Mr. Cole however interjected that the criminal record would certainly be placed before the court when he commenced his cross examination of the plaintiff.

concerned, why an honest belief in his guilt fell to be construed from all the evidence.

[108] The foundation of the plaintiff's defence to the criminal charge of fraud is that Mr. Williams embarrassed him by not paying Mr. Bengé (who he claimed he had never met before the installation) so it is fatal in my view that this was never put to Mr. Williams when he testified, neither any proposition to the effect that the fraud charge against him must then have been entirely trumped up. (If it were so on the plaintiff's version that he had had no dealings with Mr. Bengé before the transaction then self-evidently this would mean that the latter fabricated the purported misrepresentation on his part and that the charge had to be contrived.) One would have expected some engagement with Mr. Williams when he testified about the charge being false on this basis, but instead it was opportunistically suggested to him that since the plaintiff had met his obligations to *him*, it was more natural to treat the absence of the plaintiff's payment in all the circumstances as a debt owing which could be recovered pursuant to civil processes rather than justifying it as a criminal deception.

[109] I indicated above that strangely the plaintiff appeared to accept, before Mr. Williams had adduced his testimony, that he must have owed the complainant something, but the reason given for his resignation in this respect had its basis in the fact, according to him, that Mr. Bengé had threatened him and his children. This was more reason than anything to say to the police when he was arrested that Mr. Bengé was unlawfully purporting to extort money from him under the guise that he has misrepresented that he would pay him R85 000,00 but instead he kept his silence. It was also necessary in my view, if the plaintiff hoped that this court would believe him, that Mr. Bengé should have been challenged under cross examination in this critical respect. The plaintiff's failure to have done so is to my mind another indication that his version of the

events preceding the arrest is a concoction which he hoped to pass off to this court as a basis to say that there was never a reasonable or probable basis to have charged him at all.

[110] The plaintiff simply failed to impress this court as a reliable witness. He had the gumption to assert in this court too, contrary to what is clearly indicated by his SAPS69 records, that he has no previous convictions, a misrepresentation first made to the magistrate who granted him bail.²⁴

[111] The plaintiff adapted his testimony as the matter went along and similarly developed hypotheses that were different than when the case started. For example, Mr. Mpakane from the bar and in his closing, argument proposed a theory of a collusion between Mr. Fredericks and Mr. Louw arguing that they “deliberately made sure that the plaintiff is arrested for no good reason” whereas such as a case was neither pleaded nor put to the first defendants’ witnesses when they testified.

[112] Indeed, several features of the plaintiff’s exaggerated case were not put to any of the witnesses to crucially afford them an opportunity to counter the plaintiff’s version of the relevant facts, especially Mr. Bengé concerning the supposed threats he made to him.²⁵

[113] He spared no drama in asserting that he had been handcuffed and arrested at home and had been seen by neighbours living on his circle getting into the police van. This was in contradiction to his evidence in chief that he was in fact only arrested at the police station as testified to by Sgt Fredericks, which on its

²⁴ As was noted by Ms. Fourie, if attention had been drawn to the true state of affairs, it would have been extremely difficult for the plaintiff to have met the threshold posed by the provisions of section 60 (11) (b) of the Criminal Procedure Act to secure his release on bail.

²⁵ See *Small v Smith* 1952 (3) SA 434 at 438 E – F.

own would have rendered his claim to have been cuffed entirely implausible because there would have been no need to have restrained him at all. Not only did he go back on his own testimony given in chief, but he opportunistically resorted to argue in the end instead that his arrest at home had to be inferred from the moment when he was handcuffed and placed in the back of the van.

[114] He failed to call his aunt to vouch for him despite confirming her availability to testify. She was the person who he suggested would support his version that he had been unceremoniously handcuffed and arrested at home without regard to his rights as a suspect and a detainee and forced into the van. (She would also have been able to shed some light on whether he hid from Messrs. Bengé and Louw and regarding Mr. Bengé's prior interaction with her to trace him.) The several persons on the circle where he lives who allegedly saw him being manhandled and forced into the van might also have given credence to his implausible version that his rights were so egregiously violated. The absence of such testimony however points ineluctably to the conclusion that they would not support his case.

[115] The defendants' witnesses to the contrary made a favourable impression upon this court. Mr. Fredericks especially impressed me as an honest witness who did not hesitate to make concessions that were unfavourable to him. His account was further quite plausible, corroborated by Mr Bengé's testimony regarding the circumstances of his arrest, and supported by the objective evidence.

[116] I am inclined to agree with Mr. Cole's submission that the plaintiff cannot be believed on any issue of fact where he is contradicted by another witness testifying to another version.

The arrest claim:

[117] I turn to the question whether Sgt Frederick's suspicion was reasonable. The onus in this regard rests on the first defendant to establish the statutory justification impliedly relied upon.

[118] The test whether a suspicion is reasonably entertained within the meaning of s 40 (1)(b) of the CPA is objective.²⁶ In this instance, would a reasonable man in his position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff had committed fraud, a Schedule 1 offence.²⁷

[119] In *Mabona and Another v Minister of Law and Order and Others*²⁸ the court expounded upon the expectation of such a reasonable man effecting an arrest without a warrant.

“It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. *The reasonable man will therefore analyze and assess the quality of the information at his disposal critically, and he will not accept it lightly 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.*”

(Emphasis added)

[120] The court went on to state what the threshold of such an examination is:

²⁶ *Minister of Safety and Security & Another v Swart* 2012 (2) SA SACR 226 (SCA) at [20]; *S v Nel & Another* 1980 (4) SA 28 (E) at 33H.

²⁷ *R v Van Heerden* 1958 (3) SA 150 (T) at 152; *S v Reabow* 2007 (2) SACR 292 (E) at 297 c - e.

²⁸ 1988 (2) SA 654 (E).

“This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[121] Indeed, in *Duncan v Minister of Law and Order*²⁹ the court found that the word “suspicion” implied an absence of certainty or adequate proof.

[122] There is no question that Sgt Fredericks formed his own suspicion. Despite the criticism that he responded to the call of an outsider (Mr. Louw) who he happened to know as a prior colleague, he called the officer indicated by him as the investigating officer. Mr. Mpakane’s challenge that something was amiss in this because the docket reflected Cst. Mtanda as the assigned investigating officer was not put to Sgt Fredericks to deal with in cross examination, but he says this is the person he called and who happened to be at the station at the time to check what the police had on the plaintiff. As it transpired, what Sgt Fredericks says he was told effortlessly aligns with what is in the docket and what the SAPS circulation system confirmed at the time. It might have caused concern if Mr. Louw had known about the Midrand warrant before, but it appears that he had no knowledge of it, neither Mr. Benge. It was, just as I suggested above, an unlucky co-incidence for the plaintiff that the SAPS intel system revealed an added fact about the plaintiff that Sgt Fredericks was obliged to keep in mind in responding to the complaint.

[123] It is plain that when he arrived at 22 Nederberg Crescent, Sgt. Fredericks cautiously adopted police protocol by explaining who he was and asking for identification. He called Cst. Ngqwazana again in the presence of the plaintiff and spoke with him over the speaker phone (I assume for the benefit of the plaintiff which those alleged to be present, including his aunt according to the

²⁹ 1984 (3) SA 560 (T).

testimony of Mr. Benghe ought to have heard) once he had the identify card of the plaintiff available and was able to glean his particulars. Even then he did not leap in and make the arrest although the complainant and an ex-colleague were present and from their perspective must have been keen to ensure that the plaintiff did not evade capture. The wanted person enquiry report reveal on the SAPS circulation system seems to have been entirely unexpected.

[124] He explained to the plaintiff what needed to happen at the police station but also warned him that from what he knew he might be arrested so should leave his personal belongings behind at home. It is unfortunate, as he explained, that he transported the plaintiff in the back of the police van (but he was not restrained, neither under arrest at the time) but delayed his decision to arrest until he was able to see for himself and verify the information at his disposal at the police station which was a mere ten minutes away.

[125] When he arrived there, he was able to confirm that the plaintiff was a wanted person since 2012, an objective fact appearing from the police system which the defendant's witnesses all confirmed as an accurate source. He also spoke to Cst Ngqwazana and personally read the complainant's statement in the docket which confirmed to him that an offence of fraud had been committed. This is a known schedule 1 offence. Indeed, the impression he formed from Mr Benghe's statement was not merely a *prima facie* view that he had committed the offence, but, as far as he was concerned, a positive, definite one. This is not surprising since an independent read of the complainant's A1 statement suggests all the elements of the offence of fraud. The docket further confirmed to him that the plaintiff had been evading detection and arrest on the fraud charge for a while, coupled with the indication on the SAPS circulation system that he was wanted as a fugitive from justice and had been on the lam since 2012.

[126] There was much criticism from Mr. Mpakane that there was no obvious indication that the matter had progressed from a request for police investigation from Mr. Bengé to a case ready for prosecution. Apart from the fact that almost every A1 statement deposed by a police officer in this country concludes with such an expression consonant with a complainant's desire to commence a criminal prosecution, it is obvious that the A1 statement read with the supporting documentation objectively makes out a complete case of fraud replete with the classic elements of the offence. The missing puzzle was the whereabouts of the plaintiff who had now been found. It is not a co-incidence that the second defendant's prosecutors similarly found all that was needed in the pages of the docket to conclude the same fact, namely that there was a reasonable indication that the plaintiff had committed fraud and that there was a reasonable prospect that he would be convicted of such offence.

[127] Mr. Bengé was also co-incidentally on hand and his presence and willingness to pursue a prosecution self-evident from his personal pursuit of the plaintiff through the agency of a private investigator, the summoning of the police to the plaintiff's home, and his abiding presence at the station afterwards.

[128] Was it essential for Sgt Fredericks to have detained the plaintiff for the offence?

[129] The answer to that question obviously firstly lay in the history of the matter that the plaintiff had skedaddled and had gone into hiding, necessitating the complainant to have engaged the services of a private investigator. Secondly, the enquiry report indicated that he was wanted by the police for the outstanding Midrand warrant. It would have been entirely counter intuitive for Sgt Fredericks under these circumstances and for that moment to have released

him under his own recognizances. It was correct for him to have left it up to the court to decide. He explained convincingly why he felt constrained to detain the plaintiff for then, even if the investigating officer chose to release him later on.

[130] In a rationality enquiry, the critical enquiry, as suggested by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto and another*,³⁰ should not be focused on the manner of the arrest but rather the *rationale* for the arrest. The court made this clear when it remarked upon the limited role of the peace officer in the process of making an arrest as follows:

“While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or, in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose.”³¹

[131] As in *Sekhoto*, the opinion was formed in the present matter concerning the serious offence of fraud (co-incidentally involving a considerable sum of money) and one in respect of which the legislature has deemed it proportional to arrest without a warrant.³² Therefore the mere nature of the offence justified the arrest of the plaintiff for purposes of bringing him to justice.

³⁰ 2011 (5) SA 367 (SCA).

³¹ *Sekhoto Supra* at para [44].

³² As was stated in *Sekhoto* at para [25] it can hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) of the CPA would amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights.

[132] Mr. Mpakane suggested that a proper “investigation” of the matter by Sgt Fredericks would have revealed that the debt at the core of the alleged criminal deception could be recovered by civil process (as was endorsed in the docket by the supervising officer after the plaintiff was acquitted) but Mr. Bengé was not bound by such election especially against the background indicated by him in his statement that the plaintiff was ducking and diving and could not be trusted to keep his word.

[133] In any event the nature of the offence on its own and the reasonable indication in the docket of a criminal deception (even if the elements of debt are established thereby) warranted the arrest.

[134] In my view therefore there was nothing flighty or arbitrary about Sgt. Frederick’s suspicion. He methodically and painstakingly went through all the processes before making the decision to arrest.

[135] In the result I conclude that he entertained a reasonable suspicion that the plaintiff had committed the offence of fraud, which justified his arrest of the plaintiff without a warrant under all the circumstances.

The other legality challenges:

[136] Having accepted the first defendant’s version of the events, I find nothing to suggest any constitutional breach that taints the validity of the arrest.

[137] Sgt. Fredericks gave a proper account of his actions. He meticulously and sensitively took the steps that he did; there was no disregard of the plaintiff’s constitutional rights; and no proven breach of any Police Standing

Order. The arrest (and by implication the detention after the plaintiff's first appearance) was rationally justified and additionally necessary by reason of that fact that he was wanted on the SAPS circulation system.

[138] Sgt. Fredericks was not obliged in the unique circumstances to consider a less invasive means of bringing the plaintiff to justice and in this respect, I consequently find no overreach. Peace officers are entitled to exercise their discretion as they see fit as long as they stay within the bounds of good faith and rationality. Indeed, the standard is not breached because an officer exercises the discretion in a manner other than that deemed optional by the court.³³

[139] The plaintiff's suggestion that the police did not follow up on his explanation simply falls to be rejected as having no basis. He chose not to give any exculpatory statement. As it turned out, he offered no demur either at his home or at the police station. If there ever was a moment to complain that he didn't owe Mr. Benghe any money at all or that he had been threatened by him, this negating the premise of any criminal misrepresentation at all, the plaintiff should have offered an exculpatory explanation, but it is common cause that he did not.

[140] I add that there is by parity of reasoning in my judgment above no reason to find that the plaintiff's continued detention after his first court appearance was unlawful. The first defendant's implied defence, consistent with the evidence adduced by the defendant parties, is that since the plaintiff's arrest was lawfully justified in the first place, it followed that his ensuing detention was therefore also lawful.³⁴

³³ Sekhoto *Supra* at par [39].

³⁴ See Section 39(3) of the CPA which sets out the general legal consequences of an arrest, although it follows axiomatically that any subsequent detention which is not sanctioned by the CPA cannot be legalized by section 39(3). It is however for a plaintiff to allege and prove why he or she contends that the detention is not sanctioned by the CPA thereby rendering it unlawful. See *Jacobs v Minister of Safety and Security* (CA 327/2012) [2013] ZACGHC 95 (23 September 2013) at para [40]. There was no pertinent case made out by the

[141] Concerning the first defendant's stance adopted in the bail proceedings there appears to have been good and solid reasons to oppose bail on the basis of the fraud charge in respect of which his conviction was reasonably anticipated, the fact that he had evaded detention and remained at large and, most importantly, that he was flagged on the SAPS circulation system to have been a wanted person since 2012.

[142] It appears by all accounts that Cst. Mtanda responsibly informed the magistrate ultimately that he could no longer in earnest oppose bail once he realized that the co-operation of the Midrand police was not forthcoming. Mr. Mpakane argued that the delay on the part of the Midrand police could not just be obliterated from the equation because the cited first defendant would include the officers in Midrand, but this was certainly not the plaintiff's pleaded case that the defendants were required to meet. (It is a trite principle that the onus on the first defendant to respond to a legality challenge can only arise "after the issue itself has arisen" on the pleadings.)³⁵

[143] In any event it could hardly have been the plaintiff's case that the fact of the Midrand warrant caused him any trouble at all because he flat out distanced himself from any knowledge of its existence until after his release on bail.

[144] Not surprisingly however this did not stop the plaintiff from making capital of the fact that once a basis to oppose was taken off the table by Cst. Mtanda he was in fact then released on bail, as if to suggest that there had been no lawful basis for his continued detention before that moment. In reality however he was dishonest in not disclosing his prior convictions, one of which

plaintiff in this respect that the defendants were required to meet.

³⁵ See *Minister of Safety and Security v Slabbert* [2010] 2 All 474 (SCA) at [20] - [21].

would have resulted in the offence with which he had been charged being elevated to a schedule 5 offence for bail purposes.

[145] There is the further fact that the question concerning whether the plaintiff was entitled to be released on bail was out of Cst. Mtanda's hands so to speak. This is demonstrated by the fact that even though he and the prosecutor withdrew their opposition to bail, the magistrate was not convinced that the plaintiff's position was assisted by such a concession.³⁶

[146] The plaintiff would obviously only have been entitled to be released if the interests of justice permitted it, and obviously the prevailing circumstances did not mitigate for him at that juncture.³⁷ That is however not something to have laid at the door of the defendants. The plaintiff was the author of his own misfortune.

The claim for malicious prosecution:

[147] The plaintiff bore the onus resting on him in respect of this claim to allege and prove that the defendants instigated the proceedings; that in doing so they had no reasonable and probable cause; that they acted *animo injuriandi*, and that the prosecution failed.³⁸ The first and last of these elements brook no contention although as stated above the fact of the acquittal gives the plaintiff no arrow in his quiver that on its own proves malice.

³⁶ See par [94] above.

³⁷ Section 35 (1)(f) of the Constitution.

³⁸ *Minister of Justice and Constitutional Development v Moleko* 2008 (3) SA 47 (SCA) at par 8; *Rudolph & others v Minister of Safety and Security & another* 2009(5) SA 94 (SCA) at par 16; *Minister of Safety and Security NO v Schubach* [2014] ZASCA 216 at par 11. See also *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375.

[148] Reasonable and probable cause in the context of this claim means “*an honest belief found on reasonable grounds that the institution of proceedings is justified*”. The concept involves a subjective and an objective component.³⁹

[149] Where reasonable and probable grounds for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful.⁴⁰

[150] In respect of this element, I am constrained to find in favour of the defendants that reasonable grounds existed to prosecute the plaintiff on the basis of what is indicated in the docket, supported by the related documentation, and buttressed by consultations with Mr Benge, regarding the commission by him of the offence of fraud.

[151] Both Ms. Totyi and Ms. Fourie gave a good professional account of themselves and cogently justified a reasonable and probable cause for the plaintiff’s prosecution. The institutional machinery I alluded to above was not challenged in any way, yet Mr. Mpakane argued in closing that their overview of the handling of the prosecution by the relevant NPA staff constituted hearsay evidence which fell to be rejected. This too was nothing short of opportunistic and a misconception as to who bears the onus in respect of this claim. It would be outrageous to expect each person involved in the cog to give a personal account of what opinion he or she entertained along the way especially where the reasonable cause speaks for itself from an objective assessment of the documentation that was before the NPA staff at each juncture. The plaintiff can hardly wish away what was contained in the docket. It was not the duty of the staff to establish whether he had a defence, but whether there was indeed a reasonable and probable cause for the prosecution.⁴¹ Having regard to the NPA’s processes and statutory obligations it is fair, against the objective

³⁹ *Moleko supra* at 53 C.

⁴⁰ *Relyant Trading (Pty) Ltd, Supra*, at 382a.

⁴¹ *Landman & Others v Minister of Police* 1975 (2) SA 155 € at 156.

background, to conclude that the opinion was formed and maintained up until the criminal trial that there was an honest belief entertained by one and all that there was a reasonable and probable cause for the prosecution and that nothing had occurred along the trajectory to have warranted a deviation from the original decision to enroll the matter and prosecute the charge to its normal end.

[152] As for the third element, the contemporary approach is that although the expression “*malice*” is used, the remedy in a claim for malicious prosecution lies under the *actio injuriarum* and what has to be proved is *animus injuriandi*,⁴² that is “not necessarily personal spite and ill-will, but any improper and indirect motive.”⁴³ Absolutely none was suggested to the NPA’s witnesses. Indeed it is hard to imagine against the objective evidence of what the A1 statement and related documents foreshadowed that the NPA staff would not have enrolled and prosecuted the fraud charge or that they should have had any misgivings in the plaintiff’s guilt.⁴⁴ They were simply not shown not to have believed in his guilt which would have disproved the existence for them of reasonable and probable cause.

[153] The plaintiff’s suggestion as to what transpired in the criminal trial is so improbable as to be rejected out of hand and nothing but a red herring.

[154] In the result I am not satisfied that the plaintiff has met the burden on him to prove his claim for malicious prosecution. With hindsight the second defendant’s application for absolution in respect of this claim ought to have been successful, but the court record that was placed before this court by agreement between the parties required to be explained and given a proper context.

⁴² *Rudolph v Minister of Safety and Security* 2008 (5) SA 94 SCA at par [18].

⁴³ *Fyne v African Reality Trust Ltd*, 1906 E.D.C. 248 at 257.

⁴⁴ *Beckenstrater v Rottcher and Theunissen* 1995 (1) SA 129 (A) at 136A-B.

[155] In the premises I issue the following order:

1. The plaintiff's claims are dismissed with costs.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 22 February 2022

DATE OF JUDGMENT: 8 September 2022

APPEARANCES:

For the plaintiff: Mr. S Mpakane instructed by T Matu Attorneys care of Phillip & Mabona Attorneys, East London (ref. Mr. Matu).

For the first defendant: Mr. S Cole instructed by Frans Attorneys, East London (ref. Mr. Maritz).

For the second defendant: Ms. L Brauns instructed by The State Attorney, East London (ref. Mr. Isaacs).