IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

NOT REPORTABLE

Case no: 2496/2020

In the matter between:

XOLILE ARNOLD VITSHIMA	**Plaintiff**
and	
MINISTER OF POLICE	**First Defendant**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Second Defendant**

JUDGMENT

Govindjee J

[1] The plaintiff was arrested without a warrant sometime late on 6 August 2019. He was detained at the KwaZakhele Police Station until taken to court on 8 August 2019. Pursuant to the order of the presiding magistrate, the plaintiff was remanded in custody and detained from 8 August to 16 August 2019. Following a bail hearing on

that date, the plaintiff was released, bail being set at R500. The prosecutor withdrew the criminal case against the plaintiff on 23 January 2020.

[2] The plaintiff's action is for damages in the amount of R800 000, based on unlawful arrest, detention and malicious prosecution. Absolution from the instance was granted in respect of the claim for malicious prosecution. The reasons for that decision were provided *ex tempore*. The arguments of the parties in respect of the various remaining components of the action have been usefully summarised in a detailed statement of issues, extracts of which appear below.

Unlawful arrest

The pleadings and evidence

[3] It is alleged that the arresting officer(s) invoked the power to arrest for unlawful purposes and without considering the plaintiff's explanation, the absence of sufficiently strong evidence to warrant arrest without a warrant and the availability of less drastic measures to secure his attendance at court. It is also averred that the arresting officer(s) failed to exercise any discretion in effecting the arrest, did not consider whether the plaintiff's detention was necessary and ignored the plaintiff's constitutional rights. The main issue in dispute is whether the arresting officer entertained a reasonable suspicion that the plaintiff had committed murder, a schedule 1 offence.[1]

[4] Captain Makaula, a captain in the South African Police Service (SAPS), testified that he had been a detective since 1993. He had been part of a cluster that investigated mob justice related murder cases. One such murder had occurred on 29 July 2019 in Stofile Street, when Mr Nkosi had been assaulted and burnt to death.

[5] Captain Makaula identified one of the eye-witnesses as Mr Schultz, who deposed to a statement before him on 31 July 2019. In essence, Mr Schultz

[1] This court granted condonation for the late delivery of the notice to institute legal proceedings in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act 40 of 2002) on 30 August 2022.

indicated that he had stood at the door of his flat at approximately 10h30 when he heard shouting. About 100 men and women were observed. They passed his flat and grabbed Mr Nkosi, who was his friend, walked away with him and assaulted him in various ways.

[6] The mob returned after approximately 45 minutes. Mr Nkosi had injuries on his face and head. Mr Schultz handed over a cell phone that had been given to him by Mr Nkosi to a lady who was part of the mob. The mob proceeded across the road and assaulted Mr Nkosi at an open space at Stofile Street. He observed the assault. This included the mob's attempts to place a tyre on Mr Nkosi, a cement block was dropped onto Mr Nkosi's head and his body was set alight. Mr Schultz then returned to his yard.

[7] Four men subsequently visited Mr Schultz and took him to a meeting, where he was engaged about his conduct and given various instructions. He was told who could be invited to his home and ordered to attend a further meeting later that day. Mr Schultz fell asleep and missed the appointed time. As a result, an angry mob, allegedly including persons involved in attacking Mr Nkosi, visited him and took him to a second meeting. He was instructed to engage with a person who was suspected of being part of robberies in the area, and did so once he was permitted to leave the meeting.

[8] Mr Schultz conveyed to Captain Makaula that he recognised a few of the faces that had been part of the mob. He did not know their names or addresses but knew that the people resided in his neighbourhood, KwaZakhele. The arrangement was that Mr Schultz would somehow establish the addresses of those people that he knew. The two communicated with each other by mobile phone. At some point Mr Schultz indicated that he had obtained the addresses of the suspects.

[9] Captain Makaula followed this up and arranged for Sergeant Mto and members of the uniform branch to accompany him as back up. He and Sergeant Mto fetched Mr Schultz and, based on the information he provided, arrested some suspects in KwaZakhele. At approximately 23h30 the group proceeded to the

plaintiff's address and knocked on the door. The lights of that premises were on. Mr Schultz identified the person who opened the door as a person who was involved in the mob attack. Captain Makaula and Sergeant Mto introduced themselves and arrested the plaintiff for the murder in Stofile Street. The plaintiff dressed and accompanied Captain Makaula and Sergeant Mto to the police van, while they informed him of his rights.

[10] Captain Makaula also made various contemporaneous notes in his pocketbook while effecting the arrests. The entries confirm his version of events and the manner in which he proceeded that evening. He had picked up Mr Schultz at approximately 22h21. Mr Schultz had managed to obtain the locations or addresses of the suspects that had allegedly participated in the murder. He knew these people by sight and would take Captain Makaula to their addresses. One of the first suspects was not at home. Captain Makaula was given his number by a resident. The person who answered the call directed him to where he was walking with a group of men in the street. Captain Makaula stopped his vehicle in front of them and the witness pointed out two men who were allegedly involved in the murder. He walked to the two men and informed them of their arrest for murder. One of the suspects indicated that he knew nothing about the murder. Captain Makuala then returned to the vehicle where Mr Schultz was seated and verified the information he had provided. He was then told that this was the person who had used the 'cement brick' to assault the deceased on the head and that Mr Schultz was sure of his identity. Mr Schultz was, on each occasion, able to link the suspect to specific conduct that he had observed during the commission of the murder, such as assault with a stick, assault with stones or assault with a cement brick.

[11] The entry in respect of the plaintiff was marked as '23h48' and reflects that Mr Schultz indicated that the plaintiff had been one of the people who had assaulted the deceased with a stick.[2] Captain Makaula explained that he had made notes with reference to his watch and the time indicated in his motor vehicle.

[2] The complete entry reads as follows: '23:48: The witness led us to [the address] whereupon he pointed out the suspect who became known as Xolile Vitshima. I introduced myself to the suspect and informed him that I was arresting him for the murder that took place at Stofile Street KwaZakele on 29 July and I informed him of his rights. According to the witness Xolile had assaulted the deceased with a stick and Limka had assaulted the deceased with stones. All the suspects were detained at New Brighton and Sgt Mto gave and read them their rights as per SAP 14A New Brighton…'

[12] A second statement was taken from Mr Schultz approximately 24 hours later. That statement further confirms Captain Makaula's evidence as to the process followed in arresting the various suspects. Mr Schultz indicated in the statement that the various suspects, including the plaintiff, had been pointed out by him because they were party to the mob and had taken part in assaulting and burning the deceased.

[13] Captain Makaula explained that he had believed Mr Schultz because he had been present at the time of the incident and had spent time with members of the mob when they took him to a meeting, spoke to him and returned to collect him for a second meeting later that day. These encounters had occurred during the day, so that Captain Makaula was of the view that he had ample time to identify the perpetrators. The fact that the incident itself had occurred during the day and was observed by Mr Schultz also played a role in the exercise of his discretion, as did the seriousness of the crime. Mr Schultz confirmed his identification and pointing out under oath, and Captain Makaula deposed to a statement explaining the process followed. He emphasised during evidence that deliberately took Mr Schultz with him to arrest the suspects to ensure that there was no mistaken identification.

[14] Ms Vuso, another eye-witness to the incident, deposed to a statement in front of Captain Makaula on 1 August 2019. She indicated that she would be able to identify four people from the mob. Captain Makaula testified that an identification parade was planned on an unspecified date after the arrest of the suspects.

[15] Captain Makaula emphasised that each case was unique and to be treated on its merits. It was not possible to investigate or double-check the addresses provided by Mr Schultz given that the circumstances were such that the accused persons' names were unknown. He had little concern that it had taken six days for Mr Schultz to revert with the addresses of the suspects, as he had done so voluntarily. Similarly, the lack of description of the suspects in Mr Schultz's first statement was not a matter of concern, as this was unnecessary.

[16] Captain Makaula explained that he had not made any efforts to ascertain the process followed by Mr Schultz, on the basis that Mr Schultz lived in the vicinity and would be able to identify the suspects. He conceded, upon reflection, that his approach might have differed, in that he could have obtained the names of those persons to be arrested. He subsequently testified that Mr Schultz had advised him in the vehicle en route to effect the arrests that he had not managed to ascertain the names of the suspects, but was certain of their faces and where they resided. Mr Schultz was also able to describe the role played by the suspects during the mob attack, Captain Makaula having instructed him to identify only people who were 'perpetrators' in the attack on the deceased.

[17] The gist of Captain Makaula's testimony as to the process leading up to the arrest of the plaintiff was confirmed by Sergeant Mto when he testified. Sergeant Mto recalled that Captain Makaula had engaged with Mr Schultz in the vehicle en route to arresting the suspects, and questioned him about his level of certainty. Mr Schultz indicated that he was sure of the various suspects and where they stayed, and proceeded to lead the police officers to those addresses.

[18] On the plaintiff's version, three police officers wearing civilian clothing knocked at his door and asked about a person known as 'China'. He informed them that he was not 'China' and pointed out where China lived. He was told to prepare to be taken to the police station. At the police station, he was asked about a murder that occurred on 31 July 2019 and replied that he knew nothing. His girlfriend testified that she was watching television when the police arrived. She conceded that she could not hear the conversation between the plaintiff and the police. The plaintiff had told her at the time that the police were looking for China.

Assessment of the evidence

[19] In so far as there are mutually irreconcilable versions as to the circumstances surrounding the arrest, applying the usual approach these must be resolved in favour of the version of the first defendant ('the Minister').[3] The evidence of Captain

[3] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others* 2003 (1) SA 11 (SCA) para 5.

Makaula is corroborated by the testimony of Sergeant Mto and accords with the available documentary evidence as to the events of the evening in question. Their evidence was credible, truthful and ultimately more probable. In particular, Captain Makaula was an excellent witness, measured in his responses and able to concede certain points adverse to the Minister's case.

[20] Although the plaintiff remained steadfast in his version as to the police enquiring about 'China', that version stands on its own and does not accord with the probabilities. The plaintiff's recollection of events was, at times, poor. He was confused as to dates and times and some of his responses during cross-examination were implausible and evasive. The assertion that he informed the police that he had been at work at the time of the murder was unsupported by the available documentation, notably the plaintiff's warning statement and bail application affidavit. His version that he was not given any chance to say anything at the police station is unlikely. Instead, it must be accepted that he exercised his right to remain silent and advised the police that he would speak in court with a legal representative. Despite earlier statements to the contrary, the plaintiff eventually conceded during cross-examination that this is what occurred. It must be accepted that the plaintiff did not inform the police that he had employment and was at work at the time of the murder.

[21] The testimony of Ms Ntontela, the plaintiff's girlfriend, was wholly unreliable and adds nothing to the plaintiff's version in this respect. She initially testified in a manner that suggested that she had heard the police enquire if the plaintiff was China. She repeated this during her evidence-in-chief and cross-examination. In fact, subsequent questioning revealed that she had seemingly not heard the conversation at all and that her testimony was based on what the plaintiff had told her. In addition, she maintained that the officers at the door were in uniform when all other evidence suggests the contrary. She also had no qualms about changing her evidence from one minute to the next in respect of the lighting in the room. She reverted during further cross-examination to her initial position that the lights in the room were off and the police were using their torches. This version contrasted that of the plaintiff and the police and cannot be accepted. The evidence of Mr Mncedisi Booi, the plaintiff's friend, also does not support his case. He apparently only saw the plaintiff

at approximately 18h00 on the day of the murder and was then told that the plaintiff was returning from work.

[22] The probabilities favour the conclusion that Mr Schultz accompanied the two police officers, who were in plain clothes, to the plaintiff's address, having already assisted them to arrest other suspects. The lights were on when the door was opened by the plaintiff and Mr Schultz identified and pointed him out as a person involved in the incident. He was informed of the reason for his arrest and his rights were explained to him as described in Captain Makaula's pocketbook entry. There was no mention of a person named 'China'. At some stage Mr Schultz informed Captain Makaula that the plaintiff had assaulted the deceased with a stick. He had provided similar information in respect of other persons arrested at the time. The plaintiff was given time to dress before being taken away, as per the testimony of both police officers and Ms Ntontela. At no stage during his arrest or subsequent detention did the plaintiff inform the police that he was at work at the time of the murder.

The legal position

[23] The Constitution of the Republic of South Africa, 1996, ('the Constitution') guarantees the right of security and freedom of the person, including the right 'not to be deprived of freedom arbitrarily or without just cause'.[4] A peace officer may, without warrant, arrest any person reasonably suspected of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody, in order to bring the arrested person to justice.[5] Given that it results in an interference with liberty, and is prima facie unlawful, the onus rests on the Minister to justify an arrest.[6] At issue is whether Captain Makaula's suspicion that the plaintiff had

[4] S 12(1)(a) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[5] S 40(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA') read with *Sekhoto and Another* 2011 (5) SA 467 (SCA); [2010] ZASCA 141 ('*Sekhoto*') para 30. The so-called jurisdictional facts which must exist before the power conferred by this section may be invoked are as follows: (1) the arrestor must be a peace officer; (2) they must entertain a reasonable suspicion; (3) it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the CPA (other than the one offence mentioned); (4) that suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer has a discretion whether or not to exercise that power: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ('*Duncan*') at 818G–I.
[6] *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E–F; *Sekhoto* above n 5 para 16. The decision to arrest must be based on the intention to bring the accused person to justice: *Duncan*

committed the offence of murder rested on reasonable grounds, and whether his discretion to arrest was properly exercised.[7]

[24] The tension between the need to combat crime and the right of a person not to be deprived of their liberty has been acknowledged:[8]

'The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt.'

[25] While it is wrong to attempt to craft hard and fast rules to address the question at hand,[9] the following principles have emerged through decided cases and may be applied to the present facts:

a) Each case must be decided on its own facts.[10]

b) A suspicion, by definition, means the absence of certainty.[11] In its ordinary meaning it is a state of conjecture or surmise where proof is lacking. The officer in question need not be convinced that the information in their possession was sufficient to commit for trial or convict, or to establish a prima facie case for conviction, before making the arrest.[12] Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.[13]

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above n 5 at 820D.

[7] *Sekhoto* above n 5 para 28. The officer is not obliged to effect an arrest merely because the jurisdictional facts are present. As to the relationship between the schedule 1 offence of murder and the doctrine of common purpose, applied by the courts to enable it to convict a number of people acting together of murder, see S Hoctor *Snyman's Criminal Law* (7th Ed) (2020) at 226–228. Cf *Minister of Police v Mahleza* [2021] ZAECGHC 83 ('*Mahleza*') para 19.

[8] *Duncan* above n 5 at 466D – F.

[9] See *Minister of Police v Dunjana and Others* [2023] 1 All SA 180 (ECG) ('*Dunjana*') para 18.

[10] *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC); 2007 (10) BCLR 1102 (CC) ('*Van Niekerk*') paras 17, 20.

[11] *Dunjana* above n 9 para 17.

[12] C Okpaluba 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and commonwealth decisions' PER (2013) vol 16, no. 1, at 249.

[13] *Duncan* above n 5 at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H; *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) ('*Powell NO*') para 37, citing *Shabaan Bin Hussien & Others v Chong Kam & Another* [1969] 3 All ER 1626 (PC) at 1630C–D.

c) There must be evidence for the arresting officer to form a reasonable suspicion which is objectively sustainable.[14] The issue is not whether there is evidence admissible in a court available to the arresting officer, but whether there was information available which would cause the officer to reasonably suspect the suspect of having committed the relevant offence. The reasonableness requirement extends inter alia to the reliability or accuracy of the information upon which an arrest is founded, including the quality and ambit thereof.[15]

d) This does not imply that the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on the information, the quality of which has not been subjected to scrutiny, will render an arrest unlawful.[16]

e) Bearing in mind that the section authorises drastic, invasive action, the suspicion should not be fanciful, 'far-fetched, misguided or patently mistaken' but based on 'sound' evidence.[17]

f) A suspicion might be reasonable even if there is insufficient evidence for a prima facie case against the arrestee.[18] The grounds for a suspicion are not limited to facts which can be proved in court and a reasonable suspicion could conceivably be formed where a person has been seen at the scene of a crime and, upon being questioned, gives a false alibi or refuses to answer questions.[19]

g) Police officers are required to have regard to the facts and circumstances at their disposal and, where reasonably possible, to satisfy themselves of the merits thereof.[20] What constitutes reasonable grounds for suspicion is judged against what was known or reasonably capable of being known at the relevant time.[21]

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[14] *Mataba v Minister of Police* [2021] ZALMPPHC 4 para 33. This entails the arresting officer investigating the circumstances of the particular offence which is alleged to have been committed before it can be said that there is reasonable suspicion that an offence has been committed.
[15] *Biyela v The Minister of Police* [2022] ZASCA 36 ('*Biyela*') paras 23, 24.
[16] *Dunjana* above n 9 para 21.
[17] *Powell NO* above n 13 para 38.
[18] *Duncan* above n 5 at 819I – 820B.
[19] *Mawu and Another v Minister of Police* 2015 (2) SACR 14 (WCC) ('*Mawu*') para 32.
[20] *Mananga and Others v Minister of Police* [2021] ZASCA 71 ('Mananga') para 16.
[21] Okpaluba above n 12 at 249.

h) '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 … [and] based on credible and trustworthy information.'[22] If, in a particular case, the quality of the information at the disposal of the police officer is so tenuous or conflicting that it cannot objectively sustain a suspicion as envisaged in s 40(1)*(b)*, the police officer may first have to make further enquiries before an arrest is affected.[23]

i) The focus of the enquiry is the information at the disposal of the arresting officer, which information is to be measured against the standard of reasonableness, as opposed to the reasonableness of the conduct of the police officer concerned.[24] An arrestor's grounds for suspicion must be reasonable from an objective point of view.[25] The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first schedule offence.[26] The question is simply whether a reasonable person, confronted with the same information possessed by the arresting officer at the time of the arrest, which would include an exculpatory statement of the arrestee, could form a suspicion that the suspect had committed an offence as envisaged in Schedule 1.[27]

j) The SCA has cited the following paragraph of the judgment of Jones J, in this division, with approval:[28]

'The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)*(b)* is objective … Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of [the schedule 1 offence] … It seems to me that in evaluating his information a

[22] *Biyela* above n 15 paras 34, 35.
[23] *Dunjana* above n 9 para 20. A resultant finding that the police officer could not reasonably have formed a suspicion as required, is because the information at his disposal was insufficient to sustain such a suspicion, and not because there was a failure to investigate information given by an arrestee.
[24] *Dunjana* above n 9 para 21.
[25] *Duncan* above n 5 at 814D–F. The suspicion need not be based on information that would subsequently be admissible in a court of law: *Biyela* above n 15 para 33.
[26] *Mananga* above n 20 para 20.
[27] *Dunjana* above n 9 para 21.
[28] *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E–H as cited in *Brits v Minister of Police and Another* [2021] ZASCA 161 para 20.

reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of 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 on solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.' (References omitted).

k) The reasonable person is the person of ordinary intelligence, knowledge and prudence. A mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited.[29]

l) The test is not to be applied in a vacuum. It is subject to the facts and the context, which may be crucial.[30] The factual context will be provided by matters such as the nature of the crime, the elements thereof, the source and the nature of the information on which the suspicion is said to be based, and its significance in supporting the suspicion entertained by the arresting officer.[31]

[26] On the question of discretion:

a) If one or more of the grounds listed in paras *(a)* – *(q)* of s 40(1) of the Criminal Procedure Act, 1977 ('the CPA) is satisfied, the discretion whether to arrest arises. The officer must collate facts and exercise their discretion on those facts. The officer must be able to justify the exercise of

[29] *R v Mbombela* 1933 AD 269 at 272.
[30] *Van Niekerk* above n 10.
[31] *Dunjana* above n 9 para 18. In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE), the reasonableness of the suspicion of the arresting officer was determined in the context of the fact that the source of the information, on which the officer based his suspicion, was an anonymous informer – a fact that would have caused a reasonable police officer to be more cautious.

their discretion on those facts, which may include an investigation of the exculpatory explanation provided by an accused person.[32]

b) The arresting officer is not obliged to arrest based on a reasonable suspicion because they have a discretion. The exercise of discretion must be objectively rational and not arbitrary.[33] Police officers exercise public powers in the execution of their duties and 'rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries'.[34]

c) That aside, a court will not interfere with the result of the exercise of a discretion that has been bona fide exercised or expressed, the arresting officer duly and honestly applying themselves to the question left to their discretion.[35]

d) Even a discretion exercised in a manner deemed sub-optimal by the court will not breach the standard: 'A number of choices may be open … all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.'[36]

e) The factors to be weighed in exercising the discretion must be gleaned from a consideration of the CPA as a whole, including consideration that an arrest is one step in the process of bringing a suspect to justice, rather than isolated focus on s 40.[37]

f) Generally speaking, there is no onus upon the police to carry out a thorough investigation in each and every case before an arresting officer exercises their discretion whether or not to effect an arrest without a warrant.[38]

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[32] *Groves NO v Minister of Police and Another* 2024 (1) SACR 286 (CC) para 52.
[33] The objective enquiry is to determine whether the decision was rationally related to the purpose for which the power was given: *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of the President of the RSA* 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*') paras 85–86 as cited in *Sekhoto* above n 5 para 36.
[34] *Pharmaceutical Manufacturers* above n 33 para 90.
[35] *Shidiack v Union Government (Minister of the Interior*) 1912 AD 642 at 651–652, as cited in *Sekhoto* above n 5 paras 34–36.
[36] *Sekhoto* above n 5 para 39.
[37] *Sekhoto* above n 5 para 40 and following.
[38] *Lifa v The Minister of Police and Others* [2023] 1 All SA 132 (GJ) para 66.

g) Although the purpose of arrest is to bring the suspect to trial, the arrestor's role in that process is limited. In cases of serious crime, including those crimes listed in schedule 1, a peace officer could seldom be criticised for arresting a suspect for that purpose.[39]

h) It is for the plaintiff to prove that the discretion was exercised in an improper manner.[40]

i) Again, the enquiry is fact specific and it is neither prudent nor practical to formulate a general rule. Police officers have the discretion to arrest and exercise this power in pursuit of their constitutional duty to combat crime. As police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases.[41]

Analysis

[27] Captain Makaula was in possession of a murder docket, indicating that the deceased person had been assaulted and burnt to death. His suspicion that the plaintiff had committed the murder had, as its basis, the statement of Mr Schultz, which he obtained on 31 July 2019. That statement described in some detail events that led to the deceased's murder, including mention of an initial assault, the street where this occurred, a description of the tyre placed on the deceased's neck, his attempts to fend off his attackers, a further attack which caused him to fall, the use of a cement brick to hurt his head and the way he was set alight. Ms Vuso's statement, captured by Captain Makaula the following day, broadly supports Mr Schultz's description of events.

[28] On the accepted evidence, Mr Schultz told Captain Makaula that he was able to identify some of the people responsible for the murder, bearing in mind that the

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[39] *Sekhoto* above n 5 para 44: 'It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.'

[40] *Duncan* above n 5 at 819B–D; *Sekhoto* above n 5 para 49.

[41] *MR v Minister of Safety and Security and Another* 2016 (2) SACR 540 (CC) ('*MR*') para 42.

mob had numbered approximately 100 people. He had recognised some faces and knew these people as residents of KwaZakhele, where he also resided.

[29] Captain Makaula believed that Mr Schultz was able to identify some of the perpetrators. This was because Mr Schultz had observed much of the incident. The nature of the attack on the deceased was such that it lasted for some time. It occurred during daylight. It involved his friend. The mob were attempting to end the deceased's life in a gruesome manner, and ultimately succeeded in doing so. Unsurprisingly, considering that the incident involved such efforts to end the life of his friend, it is apparent from his statement that he paid attention to what was occurring.

[30] In addition, Mr Schultz had not provided information anonymously.[42] He had deposed to an affidavit explaining his observances and contacted Captain Makaula, some six days later, once he was able to identify some of the people involved. He was willing to accompany the police to ensure that the correct persons were arrested. Moreover, he deposed to a further affidavit after the arrests, adding that each of the persons he had pointed out were known to him by sight, were party to the mob and had taken part in assaulting and burning the deceased. This accords with the evidence of both Captain Makaula and Sergeant Mto as to what transpired in the vehicle en route to the arrests: on the probabilities, Captain Makaula engaged with Mr Schultz in the vehicle and obtained credible assurances that he was certain that the persons he had identified were active participants in the murder.

[31] Evidence of identification is generally approached with caution. This is one of the many considerations which may be relevant in evaluating ex post facto whether the information possessed by the arresting officer was objectively sufficient to sustain a reasonable suspicion. But the requisite level of information in possession of the arresting officer is not to be equated with the level of admissible evidence required to support a conviction at trial.[43] On the accepted facts, Captain Makaula cannot be criticised for having surmised that he was arresting the correct persons, as a necessary part of the completion of the police case before trial. The test does not

[42] *Dunjana* above n 9 para 28.
[43] *Dunjana* above n 9 para 28.

require him to have reached a state of conviction as to their guilt. The detailed initial statement of Mr Schultz, coupled with his subsequent conduct, as described, enhanced the sense of reliability and accuracy of the information he provided. The description of his vantage point and observations created the impression that he provided information of substantial quality.[44]

[32] Mr Schultz indicated at the onset that he would be able to identify the people whose faces he had recognised, given that they lived in his neighbourhood. He made good on that when he contacted Captain Makaula prior to the arrests. Captain Makaula sensitised him as to the importance of only pointing out perpetrators and not mere bystanders. From the evidence of Captain Makaula and Sergeant Mto, coupled with the pocketbook entries, it must be accepted that Mr Schultz was questioned in the vehicle about his level of certainty. This demonstrates Captain Makaula's efforts to subject the information provided by his witness to a level of scrutiny, bearing in mind the drastic consequences of arrest.

[33] Mr Schultz responded in a manner that indicated that he was convinced that the persons to be pointed out were the perpetrators and led the police to the addresses he had ascertained. As such, the ambit of the information he was able to provide was also extensive. It included identification of various assailants and was coupled with notes linking specific forms of conduct to each person arrested. Furthermore, it cannot be ignored that Mr Schultz demonstrated his state of conviction when one of the first persons to be arrested denied involvement. The documentary evidence confirms that Captain Makaula returned to the vehicle and engaged with him and was reassured as to the precise nature of the involvement of the person concerned. This was prior to the arrest of the plaintiff. Any doubts that

[44] Cf *Mawu* above n 19 para 38. It may be noted, as an aside, that the case was only withdrawn sometime after the accused persons were released on bail. Mr Schultz had been attacked in what he believed was an attempt to assassinate him because of his involvement in this case. Captain Makaula struggled to locate either Mr Schultz or his girlfriend, the second witness to the case. Mr Schultz later confirmed that he had been on the run and believed his life to be in danger, so that he preferred not to have any further involvement in the matter. Captain Makaula informed the prosecutor of these developments, resulting in the case being provisionally withdrawn.

Captain Makaula held would have been quelled by the various interactions with Mr Schultz in the vehicle en route to the arrests and during the preceding arrests.

[34] In all the circumstances, I am unable to conclude that Captain Makaula's suspicion that the plaintiff had committed a schedule 1 offence was fanciful or flighty. It cannot be ignored that Mr Schultz's first statement reveals that he was himself, in a sense, a target of members of the mob. He was harangued and threatened both before and after he observed his friend being murdered. He had watched the events as they unfolded until he could, in his own words, not watch any further. If anything, this would have served as motivation for his subsequent conduct. The picture that emerges is one that is sufficient for purposes of the formation of an objectively sustainable reasonable suspicion in the mind of Captain Makaula, considering the nature of the crime and its elements and the source and nature of the information received. The offence was a mob murder seemingly perpetrated by members of a particular community. The information upon which the arrest was based was founded on a willing informant, himself a member of that community. That informant provided specific, articulable facts as to the murder. The information as to the perpetrators was seemingly credible and trustworthy, provided in a consistent and concrete fashion. It had also been subjected to further enquiries and a sufficient level of scrutiny in the circumstances. A reasonable person in possession of the information at Captain Makaula's disposal would have considered there to be good and sufficient grounds for suspecting the plaintiff to be one of the active mob participants and guilty of murder. A greater measure of certainty was not required.[45]

[35] On the accepted evidence, the plaintiff said and did nothing to alter this perception when he was placed under arrest. If he had genuinely been at work at the time of the killing, sharing this information would have been a natural response, even if Captain Makaula had already decided that he was to be arrested. Had he done so, the probabilities favour the assumption that Captain Makaula would have engaged further with Mr Schultz, and eventually enquired as to the veracity of any alibi. Absent any additional information, and having collated the various facts already described, Captain Makaula's decision to exercise his discretion to arrest the plaintiff

[45] See *Maswana v Minister of Police* (unreported, case no. CA 25/2023) (Eastern Cape Division, Bhisho) para 34.

cannot be faulted. That decision was objectively rational and not arbitrary, the arresting officer duly and honestly applying himself to the question whether to arrest. Captain Makaula testified that he was alive to other possibilities of bringing the plaintiff to court, but was influenced by the seriousness of the alleged offence. He considered the case against the plaintiff to be strong given the opportunity that Mr Schultz had to observe the incident, which occurred during the day. He believed that he had acted prudently in having Mr Schultz accompany the officers in order to point out the accused persons on the night of their arrest. That Captain Makaula may have proceeded differently does not alter the position. He may, for example, have asked Ms Vuso to accompany the police when they proceed to arrest the suspects, or engaged Mr Schultz on the process he followed in locating the persons identified. The standard is not perfection, or even the optimum, judged with the benefits of hindsight. The serious nature and context surrounding the crime are significant factors supportive of the exercise of discretion to arrest the plaintiff. In the circumstances, the plaintiff has not demonstrated that the discretion was exercised improperly.[46]

Initial detention

[36] The Minister's defence to the claim of unlawful detention prior to the first court appearance rested upon s 39(3) of the CPA. That section provides that the effect of a lawful arrest shall be that the person arrested shall be in lawful custody, to be detained until lawfully discharged or released from custody. It was the Minister's case that the plaintiff's detention pursuant to a lawful arrest remained lawful until his release.

[37] S 39(3) of the CPA provides for the continuity of the lawfulness of the detention of a suspect. It must be read in the context of those provisions of the CPA which provide for the release of a suspect from detention.[47] Lawful release from custody may occur either before, at or after the detained suspect's first appearance in court, as is required by s 50 of the CPA and the Constitution.

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[46] See *MR* above n 41 para 44.
[47] *Syce and Another v Minister of Police* [2024] ZASCA 30 para 42.

[38] On the pleadings, the plaintiff's claim for unlawful detention prior to the first court appearance is, in essence, intertwined with the claim for unlawful arrest, which has been unsuccessful. There is no suggestion that the plaintiff was not, subsequent to his arrest, brought to a police station as soon as possible.[48] The evidence supports the Minister's version of events as to the procedure adopted in detaining the plaintiff. There is little on the papers to suggest that he ought to have been released prior to his first court appearance. Considering the provisions of ss 39 and 50 of the CPA, read with ss 59 and 59A, and the undisputed seriousness of the alleged offence, the Minister has succeeded in proving that the plaintiff's detention until the first court appearance was justified.[49] There was a constitutionally acceptable reason for the deprivation of liberty, so that the applicable public law duty was not breached in respect of this period of detention.[50]

Subsequent detention

The evidence

[39] Following his initial appearance in court on 8 August 2019, the plaintiff was remanded in custody until 16 August 2019. While he testified that he did not have legal representation at the time of his first court appearance, he conceded during cross-examination that he had in fact elected to be represented by a legal aid representative shortly after proceedings commenced on 8 August 2019. This is consistent with the documentary evidence presented as to what occurred at that time. The magistrate read the accused their rights, confirmed the agreement of all the accused and indicated that they all elected to apply for legal aid, as confirmed in the documentary evidence.

[40] After documenting the responses received from the accused persons as to their prior convictions and pending cases, the magistrate records that the public prosecutor was opposed to bail, because of the applicability of schedule 5, and that a postponement was requested until 16 August 2019 for a formal bail application

[48] See *Stuurman v The Minister of Police and Another* [2021] ZAECPEHC 15 paras 39–40.
[49] *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC) ('*Zealand*') para 25.
[50] See *Banda v Minister of Police NO* [2021] JOL 50674 (ECG) paras 61 – 64.

‘and profiles’. The submissions of the defence are then recorded: appearance was confirmed together with the date suggested by the prosecutor. This is followed by the court remand in respect of each of the accused until 16 August 2019, for the reasons mooted by the prosecutor.[51]

[41] To the contrary, the plaintiff maintained that his legal aid representative made no submissions in this respect, and that only the prosecutor and magistrate spoke at all. When it was put to him that this interpretation would mean that the court had fabricated that portion of the document, the plaintiff repeated his earlier suggestion that he was not legally represented at the time of that first appearance. He later acknowledged that there were attorneys to represent him, but added that the matter had not been discussed. During cross-examination by Ms *Hesselman*, he readily conceded that he had applied for legal aid and that he was then represented in court at the time. While mindful that the proceedings in question would have occurred with some rapidity, the suggestion that the magistrate’s recordal of events was erroneous cannot be accepted. The plaintiff appeared flustered and vacillated in explaining his version of what had occurred, adversely affecting my assessment of his credibility.

[42] In any event, the plaintiff later conceded that he received representation during his first court appearance and agreed to the matter being postponed until 16 August. When it was put to him that this resulted in the subsequent detention being lawful, he indicated that his sole complaint was that the wrong person had been arrested, so that subsequent detention was unlawful. As to the events in court at the time of the first appearance, his complaint appeared to be that the matter had not been tried. He agreed that the magistrate had written something down and that his rights had been read to him, but complained that he had not received anything in writing. He accepted that the magistrate’s notes reflected the application of schedule 5 of the CPA. He also testified that he struggled to remember what had occurred at the time of the first court appearance. He nevertheless maintained that ‘nothing’ was discussed and suggested that his rights had only been read during his second court appearance. His testimony in all these respects was extremely poor. Belatedly he conceded that he had been informed of the charge and that it fell within schedule 5.

[51] For a similar interpretation of recorded proceedings, see *Mahleza* above n 7 para 46.

He was also told the reasons for the postponement at the time of the first court appearance, which he indicated he understood.

[43] Mr Moolman, a principal legal practitioner at Legal Aid South Africa, testified that court 54 at New Brighton was a ‘reception court’, whereas court 55 was designated as a ‘bail court’. Matters would only be transferred to the bail court if there was a dispute between the parties. Mr Moolman took issue with the rote postponement of matters for seven days for reasons of convenience.

[44] He had been unable to locate the plaintiff’s file. His evidence was that even if the plaintiff had insisted on bail at the time of the first court appearance, it would have been impossible to obtain this because of the established practice and volume of cases.

[45] Ms Els testified that she was employed by the second defendant as a Regional Court prosecutor in New Brighton. She received new cases and considered whether there was a prima facie case and whether the matter should be placed on the roll, providing guidance to the prosecutor dealing with bail in court.

[46] She had considered the docket at hand and decided that there was a prima facie case against the arrested suspects, so that the matter could be placed on the roll. Ms Els decided that the matter could proceed directly to the bail court considering the nature of the alleged offence and the schedule applicable. She also suggested that bail be opposed due to the information contained in the docket. She perused all the statements, and considered the eye-witness statements in the docket, coupled with the subsequent pointing out, to be particularly important. The decision to oppose bail and seek a postponement was prompted by the schedule of the offence and its seriousness, because addresses were not verified and because information as to previous convictions and pending cases was required. In respect of the plaintiff, it was necessary to verify information received from him regarding previous convictions and pending cases. Fingerprints were needed to obtain these profiles and SAP 69 records often demonstrated a different picture to that presented by an accused person. The prosecution could not simply rely on the word of an

accused person and there were tools available to the police to verify SAP 69s and profiles. Some of the plaintiff's co-accused, for example, indicated that they did not have previous convictions, whereas the SAP 69 forms reflected the contrary.

[47] Ms Els confirmed, with reference to a criminal court register that was produced, that proceedings had taken place in court 55, which was a court dealing with bail applications. Ms Balicawa was the prosecutor who appeared in court on 8 August and Ms Els was certain that her duties at the time were in the bail court. The so-called 'reception court' was a different court, numbered 54, with its own register. Reference to that court number when the proceedings of 8 August 2019 were recorded had, therefore, been a simple error through use of the wrong form. While the prosecution sought a remand for a seven-day period, in order to obtain the necessary profiles, nothing stopped the plaintiff from objecting and instituting a bail application. Having not objected to the remand, it was apparent that the defence did not wish to move a bail application, despite enjoying the right to do so. She explained during cross-examination that had their approach been different, the matter might then have stood down until later that day for argument.

[48] Although Ms Els was not present in court, it was apparent from the documentation available that the defence had not objected to the postponement sought by the court prosecutor. This was for purposes of obtaining additional information in accordance with the CPA and the interests of justice. She testified that the case had eventually been withdrawn because state witnesses were in hiding.

[49] During cross-examination, Ms Els explained that she was unconcerned about the lapse of time between Mr Schultz's statements. This was typical in cases where suspects could not be located on the day of the incident and where an investigating officer was contacted subsequently. Arrests did not always occur on the day of the incident and suspects moved around. That the pointing out had occurred some days later was simply not a concern.

[50] Ms Els was an excellent witness who explained the exercise of her discretion to recommend enrolment of the matter at the time. She explained that this did not

imply that the court prosecutor was bound by this recommendation. If the court prosecutor was not in agreement, the two would have a discussion, and the court prosecutor could also proceed as they deemed fit based on what occurred in court. Nonetheless, her recommendation was that a formal bail application was necessary. With specific reference to schedule 5 offences, she also confirmed that there were instances where information might be verified beforehand. Each case depended on its own merits and the court had decided to grant the remand until 16 August. The documentation revealed that the SAP information and profiles remained unavailable on 15 August, so that the position had not changed at that stage.

[51] Ms Balicawa testified that she had worked as a prosecutor in court 55 on 8 August 2019. She had received the docket from Ms Els, perused the documentation and noted the recommendation that bail be opposed. She had satisfied herself that there was a prima facie case against the accused and appeared in the bail court. She was in agreement with Ms Els' view of the matter because a schedule 5 offence had been alleged, which was a serious matter, having considered the statements in the docket and the pointing out of the accused.

[52] Ms Balicawa recalled that the plaintiff had elected to be represented by a legal aid practitioner. Bail had been opposed and the matter postponed at her request until 16 August 2019, with the agreement of defence counsel. There was, however, no apparent reason for bail to be opposed on 16 August 2019 when the matter appeared before court again.

[53] The witness explained during cross-examination that she would have discussed the matter with Ms Els in the event that there was disagreement on how to proceed. Further disagreement might have resulted in a senior public prosecutor being approached. While open to persuasion, Ms Balicawa understood that it was her discretion on how to proceed. She had the power to proceed as she wished if in disagreement with Ms Els, who had decided to enrol the matter. Here, however, the two had been in agreement. Considering both Mr Schultz's statements, Ms Balicawa was satisfied that there had been proper follow-up so that any doubts had been cleared.

[54] The investigation diary reflected various additional instructions addressed to the investigation officer, including a request for an identification parade. Information provided by the plaintiff on a bail information form had not been verified by time of the first court appearance. The witness recalled that Captain Makaula had subsequently ascertained that some of the accused persons had been at work at the time of the incident. Bail was not opposed on 16 August 2019 because of the doubt this caused. By that time the plaintiff had deposed to an affidavit and requested release on bail. Captain Makaula had also deposed to an affidavit explaining that addresses had been verified and, absent proof of previous convictions or pending cases, that bail was not opposed.

Analysis

[55] The plaintiff pleads that employees of the defendants owed a duty of care to assess the strength of the state's case against him and to determine whether there existed a prima facie case, and to ensure that the charges and proceedings were dealt with in accordance with the dictates of justice. This includes ensuring that the plaintiff's detention in custody would not be extended absent a prima facie case. Implicit in the pleadings is the allegation that bail was denied absent a prima facie case against the plaintiff, and due to a failure to place relevant information in the plaintiff's favour, and illustrative of the weakness of the state's case, before the court during his appearance on 8 August 2019. It is averred that the defendants are responsible for maliciously opposing the granting of bail that day, in circumstances where continued detention was unnecessary.

[56] Every interference with physical liberty, including through arrest and detention, is prima facie unlawful, the burden being on the person that caused the interference to establish a ground of justification.[52] A detention constitutes a drastic curtailment of a person's freedom. There should be a justifiable cause for any

[52] *Zealand* above n 49 para 25. The requirements for a claim under the *actio iniuriarum* for unlawful arrest and detention are summarized in *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) ('*De Klerk*') para 14.

interference with this right, especially considering the 'traumatic, brutalising, dehumanising and degrading' effect that detention can have on people.[53]

[57] It must also be noted that a remand order by a magistrate does not necessary render subsequent detention lawful:[54]

'Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons…What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the matter in which the remand order was made.' (Footnotes omitted.)

[58] The Constitutional Court has held that it is erroneous to shift the onus so that the plaintiff is required to prove the unlawfulness of post-appearance detention. In *Mahlangu*, that Court criticised the SCA for placing emphasis on an accused person's failure to apply for bail in considering state liability for detention after a court appearance.[55]

[59] Various constitutional provisions oblige police officers to establish, before arresting and detaining a person, the justification and lawfulness of arrest and detention, including any further detention if the underpinning facts are within the knowledge of that official.[56] It is the duty of the police official who has arrested a person for purposes of having them prosecuted to give a 'fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not'.[57] Where there are no facts which justify further detention, the investigating officer should inform the prosecutor accordingly, the purpose being to eventually place the magistrate in an informed position to determine whether the person should be detained further.[58] The defendants would be liable for post-

[53] MR above n 41 para 67.
[54] *De Klerk* above n 52 para 62.
[55] *Mahlangu and Another v Minister of Police* 2020 (3) SACR 136 (SCA), read with *JE Mahlangu and Another v Minister of Police* [2021] ZACC 10 ('*Mahlangu*') paras 45–47.
[56] *Botha v Minister of Safety and Security, January v Minister of Safety and Security* 2012 (1) SACR 305 (ECP) ('*Botha*') paras 29–30, cited with approval in *Mahlangu* above n 55 para 40.
[57] *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) para 40.
[58] *Botha* above n 56 paras 29–30.

appearance detention where their wrongful and culpable conduct materially influenced the decision of a court to remand the plaintiff in custody.[59]

[60] Once an accused person is brought before a court, the authority to detain him is exhausted and further detention is then within the discretion of the court, and subject to wide-ranging statutory directions.[60] The plaintiff was facing at least a schedule 5 charge so that the provisions of s 60(11)*(b)* obliged his detention in custody unless he adduced evidence that satisfied the court that the interests of justice permitted his release.[61] Because this implicates the freedom of the person concerned, and triggers the corresponding constitutional right in s 12(1)*(a)*, the police and prosecutor may be found to have a public law duty to assist the court in giving effect to, and protecting this right.[62] The nature of the duty must be determined on the facts, subject to the existence of a charge and the underlying decision to charge the accused.[63] In appropriate circumstances, neither the police nor the prosecutor would be relieved from disclosing to the court that there is an absence of evidence to substantiate the charges, or that the only evidence implicating the accused is very weak, or, for example, entirely dependent upon the admission of hearsay evidence emanating from a co-accused:[64]

'A failure by the prosecutor to inform the court of the absence of evidence implicating the accused in the charge would leave the court with the impression that such evidence does exist. To allow the court to proceed to exercise its function … from that premise, is in my view tantamount to misleading the court. It is in conflict with the role of a prosecutor in criminal proceedings. Whether or not there are sufficient grounds for a charge as envisaged in section 60(11)*(a)* is a matter which would fall within the knowledge of the police and the prosecution. It is a decision which cannot be made arbitrarily and without a proper consideration of the evidence. The absence of evidence is a matter which is accordingly relevant to such proceedings, and would place a duty on the prosecutor to bring that to the

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[59] *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) para 27.
[60] *Singata and Another v Minister of Police and Another* [2015] ZAECBHC 19 ('*Singata*') para 41.
[61] S 60(11)*(b)* provides that '…the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given the reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.'
[62] It is a basic component of the rule of law that state functionaries, including the police, are constrained by the principle of legality and may not exercise any power nor perform any function beyond that conferred upon them by law: *Mahlangu* above n 55 para 26.
[63] *Singata* above n 60 para 42.
[64] Ibid paras 42, 43, as quoted by the full bench in *National Director of Public Prosecutions v Swarts* [2018] ZAECPEHC 65 ('*Swarts*'), in the context of s 60(11)*(b)* of the CPA.

court's attention, particularly, as in the present matter, when the police docket is in the possession of the prosecutor.'

[61] On the evidence, to the extent that the particulars of claim suggest malicious arrest and detention, this is simply not borne out by the evidence. The arrest and subsequent detention were not malicious. The legal process was not used improperly by employees of the defendants, or for a purpose not contemplated in the empowering legislation, to deprive the plaintiff of his liberty.[65]

[62] As for the claim of wrongful further detention under the actio iniuriarum, the evidence reveals a legal justification for what occurred. The plaintiff, having been brought to court timeously, was detained further by the order of the magistrate based on the information she was able to glean at the time. The evidence confirms, contrary to Mr Moolman's contentions, that this was not a mechanical remand where the presiding officer hastily went through the motions and failed to interrogate the possibility of bail. The case is distinguishable from *De Klerk v Minister of Police*,[66] where the evidence presented the picture 'of a high-volume remand court in which accused persons were brought up and down from the cells with great rapidity' so that the police officer knew that magisterial remand would be the result a routine or mechanical act, as opposed to a considered judicial decision.[67] Mr Moolman was not present at the time and was also unable to locate the plaintiff's file. Much of his evidence was presented on the assumption that the proceedings in question had occurred in court 54, a 'reception court', which was simply not the case. The use of a form incorrectly labelled '54' as opposed to '55' clearly does not alter this position.

[63] In the present circumstances, the police complied with their constitutional and statutory duty to ensure that the plaintiff was brought before a court as soon as possible after arrest, for the second defendant, represented by the public prosecutor, to determine whether the plaintiff should be charged. A fair and honest statement of the relevant facts was provided, so that a proper decision whether or not to prosecute could be made by the prosecutor. As Mr *Petersen* argued, there was also

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[65] *Minister of Police v Lebelo* 2022 (2) SACR 201 (GP) para 69.
[66] *De Klerk* above n 52.
[67] *Mahleza* above n 7 para 50.

no improper influence exerted on the prosecutor or the magistrate, by the employees of the Minister, so as to cause the further detention.[68]

[64] As for the second defendant, both Ms Els and Ms Balicawa applied their minds based on the information contained in the docket and were of the view that there was a prima facie case against the plaintiff. The contention that Ms Balicawa had not applied her mind, failed to exercise her discretion and simply followed Ms Els' recommendation blindly, is not supported by the evidence. Ms Balicawa clearly applied her own mind to the docket and agreed with Ms Els' recommendation. The decision to oppose bail on 8 August 2019, and to seek a postponement pending a formal bail application, was made also considering the schedule of the alleged offence and the information that was outstanding at the time. The plaintiff, through his legal representative, had not objected to this, and it cannot be said that the magistrate was not informed of material facts that might have resulted in his release. To repeat, this was not an instance of a mechanical remand based purely on the schedule linked to the alleged offence. The prosecutorial conduct was grounded in the contents of the docket and was not arbitrary or unsound.[69]

[65] The consequence is that the plaintiff, having been brought before a magistrate pursuant to a lawful arrest in respect of a schedule 5 offence, was lawfully detained until 16 August 2019 in the interests of justice, so that the second defendant has discharged the onus and is not liable for any harm caused to the plaintiff. Thereafter, he was rightly released based on the additional affidavits that were then at hand.

Costs

[66] In the circumstances, there is no basis for departing from the usual order in respect of costs. A final issue requires determination. On 20 April 2023, the matter was postponed for trial to 5 February 2024, by order of court. The costs occasioned by the postponement of the matter were reserved for determination by the trial court.

[68] Also see *Mahleza* above n 7 para 58 and following.
[69] See *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) paras 28, 34. It may be added that the plaintiff's reliance on *Swarts* above n 64, appears to be inapposite. In that matter the plaintiff was detained despite an assurance by the arresting officer, as confirmed by way of an affidavit contained in the docket, that he would be released on the same day of his initial court appearance.

Mr Dwayi, who was the plaintiff's counsel until 18 April 2023, was ordered to file an affidavit setting out the facts and circumstances that led to him becoming unavailable to conduct the trial on 20 April 2023. I have considered the contents of his affidavit, as well as his explanation for his conduct, which I accept. I consider it just and equitable that the order of costs includes the wasted costs occasioned by the postponement on 20 April 2023.

Order

[67] The following order is issued:

1. The plaintiff's claims are dismissed with costs, to include the costs occasioned by the postponement on 20 April 2023.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 05,06,07,08,09 February 2024

Delivered: 30 April 2024

Appearances:

Counsel for the Plaintiff:	Adv AE Teko St George's Chambers, Makhanda
Instructed by:	Magqabi Seth Zitha Attorneys Attorneys for the Plaintiff 14 Harmony Building North end Market Street Gqeberha Email: mszattorneys@gmail.com
Counsel for the 1st Respondent:	Adv F Petersen Chambers, Gqeberha
Instructed by:	State Attorney Attorneys for the 1st Defendant 29 Western Road Central

	Gqeberha Email: PNotley@justice.gov.za
Counsel for the 2nd Respondent:	Adv L Hesselman Oasim Chambers, Gqeberha
Instructed by:	State Attorney Attorneys for the 2nd Defendant 29 Western Road Central Gqeberha Email: PNotley@justice.gov.za