IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**~~YES~~/NO**
Of Interest to other Judges:	**~~YES~~/NO**
Circulate to Magistrates:	**~~YES~~/NO**

Case number: 2454/2020

In the matter between:

KHOTSO JULIUS RAMABANTA Plaintiff

and

THE MINISTER OF POLICE 1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2nd Defendant

CORAM: AFRICA, AJ

HEARD ON: 20 APRIL 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be have been at 14h00 on 31 May 2022.

JUDGMENT

INTRODUCTION

[1] This is delictual claim for damages arising from the alleged unlawful arrest and detention on the 27th of February 2019 against the Minister of Police ("first defendant") and the alleged malicious prosecution by the National Director of Public Prosecutions ("second defendant").

[2] At the onset of this trial, the defendants placed on record that the Special Plea of non-compliance with the provisions of Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, has since been abandoned at Pre-Trial.

[3] This matter was adjudicated in respect of both merits and quantum.

[4] EVIDENTIAL MATERIAL

Exhibit Bundle A:	Index: Consolidated Discovery Bundle
Real evidence "1":	Toy fire-arm booked into SAP13 140/2019

[5] Issues which are common cause

[5.1] That the plaintiff was arrested, by the police, at his home on the 27th of February 2019, without a warrant of arrest under CAS No: 297/02/2019, on a charge of attempted murder and detained at the Mangaung Police Station.

[5.2] The plaintiff made his first appearance at the Bloemfontein Magistrate's court on 1 March 2019. At that stage the plaintiff elected to be represented by Legal Aid and the matter was postponed, until 8 March 2019, in terms of section 50(6)[1] to obtain bail information to be verified in order for the state to determine whether bail will be opposed.

[5.3] On 8 March 2019, Mr Mazibuko, a private attorney came on record and matter was postponed for formal bail application. The state indicated that "one of the reasons" for the opposition to bail was the legality of the accused.

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[1] Page 67 Exhibit Bundle "A" refers incorrectly to section 30(6) if regard is had to the reason for the postponement.

[5.4] On the 20th of March 2019, after the affidavit in support of the plaintiff's Schedule 5 bail application was read into the record and a copy of plaintiff's passport presented to the prosecutor, the matter was withdrawn.

[6] Issues in dispute:

[6.1] Whether plaintiff was arrested unlawfully and without reasonable suspicion;

[6.2] Whether plaintiff was maliciously prosecuted;

EVIDENCE FOR THE PLAINTIFF

[7] Khotso Julius Ramabanta ("Plaintiff") testified that he is a Lesotho National, who is legally in South Africa. He is aged 37 with his highest level of education being standard 5 (five). On the 27th of February 2019, he was arrested by the police, upon entering his residence, being from work. Upon enquiring about the reason for his arrest, the police informed him, that he, Rorisang and Thabiso, shot the complainant at Mochabela, which allegation the plaintiff refuted.

[8] Plaintiff stated that he knew the complainant as Putsweng, but that he was not the person who shot the complainant but rather, Rorisang, his younger brother. This he knew because he was present when the complainant was shot. Plaintiff stated that on the day in question, whilst walking with Rorisang and Thabiso, they met up with the complainant, approaching from the opposite direction. The plaintiff did not see from where Rorisang took the firearm, as he (Rorisang) and Thabiso were walking on plaintiff's left-hand side. Plaintiff then saw complainant running away and Rorisang firing a shot. At that stage he (plaintiff) and Thabiso kept on walking.

[9] After plaintiff's arrest, he appeared in court on 01 March 2019, where after the matter was postponed for 7 (seven) days. Ultimately the matter was withdrawn. The plaintiff intimated that he remained in custody at all times, whilst the state did not have any evidence against him. He was initially detained at the Mangaung Police station and thereafter, Grootvlei Prison. The conditions of his detention were terrible, unlike at his home. As a non-smoker, was he detained with smokers; the blankets smelt of feet and he was detained in a crowded cell, with ± 30 (thirty) other detainees. He was given little breakfast and lunch was

served around 14h00, in the afternoon. His next meal will be the following day, whereas, at home he enjoyed 3(three) meals per day. At Grootvlei prison, inmates will fight over the food, brought from outside. He was detained with ±50 (fifty) inmates and his sleeping arrangements were uncomfortable as the space was overcrowded and cramped. The plaintiff intimated that the arrest even impacted where he resided, as his landlord said that she does not want him on the premises anymore.

[10] During cross-examination, the plaintiff confirmed that he was also known by the name of Mahashe and was residing with his 2 (two) siblings, Mathatsi and Rorisang, at the time of his arrest. He conceded that the arresting officer, dressed in full uniform, informed him that he was arrested on a charge of attempted murder.

[11] Plaintiff further conceded that upon searching his dwelling, with permission, the arresting officer found a toy-firearm[2] hidden inside the couch. However, subsequently, plaintiff said that the firearm was found in Rorisang's shack. After it was put to the plaintiff that the firearm was indeed found in his shack, he reverted back to his earlier version, and confirmed that the toy-firearm was indeed found in his shack. When confronted with the fact that he never testified in chief that a toy-firearm was found in his shack, plaintiff responded that he failed to mention it because he was not asked about it.

[12] Plaintiff further stated that the shooting incident unfolded after 19h00 in the evening, but he was able to see that complainant took out something resembling a firearm. This he observed at a distance of 10 – 12 meters. He however did not manage to see from where Rorisang took the firearm, as he was facing in the same direction as Rorisang.

[13] Plaintiff's interview statement[3] was put to him in that he told the investigation officer that he knew nothing about the incident. Plaintiff denied this saying that he informed the investigating officer that Rorisang committed the offence.

[14] The plaintiff confirmed that at the time of his arrest, he was employed at the University as a plasterer, which job he lost as a result of the arrest. He stated

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[2] As depicted on pages 81-82 of Exhibit Bundle "A".
[3] Page 10 of the exhibit bundle.

that he was working under the contractor as a sub-contractor, then changed his version stating that he worked for Ramabanta, who had a sub-contract. The plaintiff was asked which version between that given in respect of his income, should this court believe, the one given at his bail application or his oral evidence in court. The plaintiff conceded that the versions differ but stated that his *viva voce* evidence should be accepted.

EVIDENCE FOR THE DEFENDANTS

[15] Hendrick Squire ("Constable Squire") testified that he holds the rank of constable, within the South African Police Service, for the past 11 years. He is stationed at Mangaung Police station, doing crime prevention and visible policing for the past 3 years. His duties include tactical training in crime prevention.

[16] In explaining the events leading up to the arrest of plaintiff, Constable Squire testified that he and his colleague were patrolling in Town, around the 25th or 26th of February 2019, in a marked police vehicle, when they were flagged down by the complainant, in St. Andrews Street. The complainant was a certain Mr Nthako, who showed them a piece of paper, with a case number and police stamp on it. The complainant also showed Constable Squire, that he was shot on both legs, by pulling up his trouser. He (complainant) said that he knew the people that shot him and that they are from the Lesotho. He then asked for Constable Squire's number, in order for an arrest to be affected, should he see the suspects again.

[17] On the 27th of February 2019, around 18h10, Constable Squire received a call from the complainant, stating that he knew the whereabouts of the suspects. Constable Squire mobilized back-up as he knew a firearm was involved. The complainant directed them to a house in Segope Street, which had a shack at the back of the residence. They knocked at the door of the shack and the suspect Ramabanta ("plaintiff") opened the door. Constable Squire asked plaintiff if he knew the complainant, to which he said yes, but that he was not the one who did the shooting. When the plaintiff uttered these words, constable Squire told himself that he was at the right place.

[18] Constable Squire proceeded to search the shack with permission, and found a fire-arm inserted into a cut, made in the sofa. The firearm, which was made of iron and black in colour, looked like a real firearm, but on closer inspection, constable Squire noticed that it was a toy-firearm. When he enquired from plaintiff what he was doing with it, plaintiff did not answer.

[19] Constable Squire then arrested plaintiff on suspicion of attempted murder as he was pointed out by the complainant and the fact that plaintiff placed himself on the scene. The toy-firearm was booked into the SAP13.

[20] During cross examination constable Squire confirmed that at no stage before effecting the arrest, did he have insight to the docket. He confirmed that complainant's statement refers to Rorisang as the person that shot and not plaintiff. Further, that the complainant referred to one firearm and that the 3(three) males was known to him from Lesotho. Constable Squire agreed that he did not make further enquiries about how the shooting happen. When asked why not, constable Squire said that it was clear that the men were acting in common purpose and that they might have arranged or planned the whole shooting. When asked why he arrested the plaintiff for attempted murder as opposed to assault with the intent to do grievous bodily harm, constable Squire said that he effected the arrest for attempted murder because a firearm was involved.

[21] It was put to constable Squire that he had no reasonable suspicion that plaintiff committed attempted murder. Constable Squire said that he believed the complainant because he pointed out the plaintiff and a case docket by then was opened, causing him to act in making an arrest.

[22] Mutla Sylvester Chaacha ("Detective Chaacha") testified that he has been in the employment of the South African police services for the past 23 years, 16 years of which as a detective. His duties entail gathering of evidence and investigating cases. He is stationed at the Mangaung police station and confirms that the is the investigating officer in the present matter, with cas number 297/2/2019. His involvement in this matter started after the 23rd of February 2019, when he received the docket.

[23] He first went to the complainant in order to get a lead or further information on who the suspects are. The complainant revealed to him that he was shot at by 3(three) people and one is named Rorisang. Constable Chaacha confirmed that he conducted an interview with plaintiff, on the 28th of February 2019, and he explained plaintiff's rights at which point plaintiff said that he does not wish to make a statement until he is legally represented. Plaintiff further told him that he has no knowledge of the shooting, neither does he know the complainant or the name Mahaashe.

[24] The J88 was obtained confirming the injuries sustained by complainant, and he visited the address of the outstanding suspects on a few occasions, but found no-one except the who indicated that he last saw the suspects on the 27th of February 2019. Detective Chaacha said that on the 28th of February 2019, plaintiff informed him that he did not have a passport and he requested Home-Affairs to confirm whether the plaintiff was legally in the country. Detective Chaacha was provided an affidavit[4], stating that the name Kgotso Ramabanta ("plaintiff"), did not appear on their records.

[25] Detective Chaacha confirmed that he was not present at the hearing of the formal bail application, but confirms that the case was withdraw at that stage due to insufficient evidence to show that plaintiff acted in common purpose, in attacking the complainant.

[26] During cross examination, detective Chaacha confirmed that the complainant did not specify that he was shot at by the plaintiff. When asked whether, based on the information in docket, he would have effected the arrest, detective Chaacha intimated that he would, even though plaintiff did not fire the shot, but he was in the company of the person who did. Detective Chaacha said that the complainant informed him that plaintiff was the one who instructed Rorisang to shoot him. When he (detective Chaacha) was asked where in the docket this information was contained, he said that it does not reflect in docket because it had slipped his mind. He further confirmed that he did not take a further statement in this regard from the complainant, as complainant had moved from his address by the time the matter was withdrawn.

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[4] Affidavit in terms of section 212 of Act 51 of 1977

[27] When detective Chaacha was asked whether the plaintiff should have been granted bail on the 1st of March 2019, he said that plaintiff was not in a position to get bail as they did not have enough bail information at that stage and the information from Home Affairs was still outstanding. Detective Chaacha said that he was present at court on the 20th of March 2019, to oppose bail for the plaintiff, but the case was withdrawn, and he was unaware of that.

[28] On the courts question detective Chaacha said that he never had insight to the passport of the plaintiff, which was presented at plaintiff's bail application, as plaintiff told him that he did not have one.

[29] Jakobus Johannes De Vries ("Mr De Vries") testified that he was appointed as prosecutor by the National Prosecuting authority in 2000. He confirms that he was the prosecutor on duty at the plaintiff's first appearance on the 1st of March 2019. He said that the plaintiff on that day applied for legal aid assistance and the matter was postponed in terms of section 50(6)[5] to obtain bail information and verify plaintiff's legality, as he is a foreign national. On the 8th of March 2019, the plaintiff was represented by Ms Mosiane from Legal Aid, who informed the court that she wishes to withdraw, as plaintiff appointed a private attorney. Mr Mazibuko came on record and the matter was accordingly postponed for a Schedule 5 formal bail application to the 20th of March 2019. On the said date, Mr Mazibuko read into record the affidavit in support of the plaintiff's bail application as well as handing up a copy of the plaintiff's passport and work permit, which purportedly expired on the 31st of December 2019. The state requested the matter to stand down for discussion with the senior prosecutor. On resumption, Mr De Vries withdrew the case because the plaintiff presented a copy of his passport and because the outstanding suspects by then have not been arrested.

[30] Mr De Vries explained that the matter was initially placed on the roll because the complainant pointed the plaintiff as one of the people who was present, when he was shot and the perpetrators were known to the complainant. He said that the outstanding suspects had to be traced as they acted in common purpose. Mr De Vries stated that the suspects approached and fled the scene

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[5] Of the Criminal Procedure Act 51 of 1977.

together and the plaintiff never denied his involvement. He further stated that because this was a schedule 5 bail application, the *onus* was on the plaintiff to adduce evidence to show that it will be in the interest of justice for him to be released on bail, having regard to sections 60(4)(a) to (e) of Act 51 of 1977.

[31] During cross examination, Mr De Vries confirmed that at the time of arrest and on the day of the bail application a charge of contravention of section 49[6] was not added. When asked why he (Mr. De Vries) stood the matter down for discussions, Mr. De Vries responded that they did not know of the passport, till that day, which stated that the plaintiff was legally in the country. As this information was contrary to the section 212 statement contained in the docket, he had to approach the senior prosecutor. Mr. De Vries said charging the plaintiff at that stage with contravention of section 49 would not have had a bearing on the fact that it was still a schedule 5 bail application. When asked why he had to discuss the matter with the senior prosecutor, Mr. De Vries said that as it appeared from the passport that the plaintiff was legally in the country (thus not a flight risk), it would be better at that stage, to first have the outstanding suspects arrested, to prove common purpose. Mr. De Vries confirmed that the *postea* entry[7] was made by him and it was his view at that stage that there are insufficient evidence to argue common purpose. Mr. De Vries further explained that at the stage of the withdrawal, there was still common purpose, but he felt it would be better if all the suspects are first arrested.

[32] Mr. De Vries conceded that neither the complainant nor the arresting statement states that the suspects "approached and fled the scene together". When asked why, if the information in the docket on 1 March 209 was the same at it was on the 20th of March 2019, was bail not granted to the plaintiff and the matter taken to trial. Mr. De Vries said that he maintains that there was common purpose however it would be better if all the suspects were charged together, hence his entry in the investigation diary[8] that there was "insufficient evidence to proceed at that stage" and not that there is no evidence.

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[6] Of the Immigration Act 13 of 2002.
[7] Page 51 of the exhibit bundle.
[8] Page 51.

EVALUATION OF THE EVIDENCE

[33] In the case of *Zealand v Minister of Justice and Constitutional Development* [9] Langa CJ held:

> "The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom... The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken." As stated by O'Reagan J in *S v Coetzee and Others*[10] "[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]...Our constitution recognizes that both aspects are important in a democracy; the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprive citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair."[11]

[34] In *Minister of Law and Order and Others v Hurley and Another*[12] the following is stated:

> "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law."

[35] The basic rule in civil proceedings is that he who asserts must prove[13] and the standard of proof in a civil case is the well-known balance of probabilities which has been described as follows:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not'...This means that if there is more than

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[9] 2008 (2) SACR 1 CC at page 11 C.
[10] 1997 (1) SACR 379 (CC).
[11] Zealand v Minister of Justice and Constitutional Development *supra*.
[12] 1986 (3) SA 568 (A) at 589E – F.
[13] Law of Evidence, Paragraph 2.2.1.1, page 2-10

one possible interpretation of the facts relating to any particular issue in dispute, the interpretation least favourable to the party bearing the onus of proof must be applied"[14]

[36] In *Casu,* the defendant admitted to the arrest and subsequent detention of the plaintiff, but pleaded that it was justified because constable Squire had a reasonable suspicion that plaintiff made himself guilty of an offence or offences as referred to in Schedule 1 of Act51 of 1977, namely attempted murder and/or contravention of section 9(1) or 9(2) of the Prevention of organised Crime Act of 1998. Further to this it was pleaded that the arresting officer exercised his discretion to arrest the plaintiff in a *bona fide*, rational and non-arbitrary manner.

[37] Section 40(1) (b) of Act 51 of 77 reads as follows:

(1) A peace officer may without warrant arrest any person-

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

[38] JA Van Heerden in *Duncan v Minister of Law and Order*[15], it was held that "the jurisdictional facts which must exist before the power conferred by section 40(1) (b) of the present Act may be invoked, are as follows:

1. The arrestor must be a peace officer.
2. He must entertain a suspicion.
3. It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act.
4. That suspicion must rest on reasonable grounds.

[39] The *Duncan* case further referred to[16] " *Ingram v Minister van Justisie*[17] which correctly stated the test to be applied as:

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[14] Vermaak v Parity Insurance Co Ltd 1996 (2) SA 312 (W) at 314C
[15] 1986 (2) 805 at G-H.
[16] 1986(2) SA 806 (A) at 818G-H.
[17] 1962 (3) SA at 229G-230A.

> The words "reasonable suspicion" may tend to indicate some subjective test to be applied; however, that is not so; the test as to whether "reasonable suspicion" could have existed and did exist, is to be determined by an objection standard, namely that of the reasonable man with the knowledge and experience of a peace officer based on the facts and circumstances then known to the arresting officer."

[40] This court was referred to the case of *Mabona v Minister of Law and Order and Others*[18] where it was stated that :

> "Would a reasonable man in the second defendant's position and possessed with the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to be stolen? The reasonable man will therefore analyse and assess 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 the information at his disposal must be of sufficiently high quality and cogency to engender in him conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However, the suspicion must be based on solid grounds"

[41] It is argued on behalf of the plaintiff that constable Squire's conduct falls short of what is expected of a reasonable arresting officer as expressed in Mabona (*supra*). Further that constable Squire failed to analyse and assess the quality of the information at his disposal critically and merely accepted it lightly without checking it where it can be checked. This is so, as it is argument goes because constable Squire failed to acquaint himself with the content of the relevant police docket. Had constable Squire acquainted himself with the content of the docket before the arrest, he would have realised that complainant's statement expressly indicates that he was shot by Rorisang. Thus, the arrest of the plaintiff was founded on the say-so of the complainant, namely that he was shot by 3 (three) people.

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[18] 1998 (2) SA 654 (SE) at 658E-H.

[42] On behalf of the defendants this court was referred to the case of *Shabaan Hussein and Others v Chong Fook Kam*[19] where it was stated:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. I suspect but cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie proof* is the end...*Prima facie* proof consists of admissible evidence; suspicion can take into account matters that could not be put in evidence at all...Suspicion can take into account also matters which although admissible could not form part of a *prima facie* case."

[43] Thus the question for consideration is whether a reasonable man in constable Squire position and possessed with the same information have considered that there were good and sufficient grounds in formulating a reasonable suspicion that the plaintiff committed the offence of attempted murder.

[44] The objective facts at constable Squire's disposal was that the complainant approached him, showed him a piece of paper containing a cas number and police stamp. The complainant relayed to him that he was shot on both legs and that the perpetrators are known to him, from Lesotho. The complainant showed him the wounds.

[45] It is correctly argued on behalf of plaintiff that the complainant never said that he was shot by all 3 (three) suspects; the complainant only mentioned "a firearm" and that prior to effecting the arrest, constable Squire did not further probe the complainant's account of how the shooting happened, more so because the plaintiff indicated to him that he did not shoot the complainant.

[46] This court is also mindful that apart from knowing the perpetrators, the complainant showed constable Squire where they resided and he pointed plaintiff in the presence of constable Squire. On plaintiff's own version, when constable Squire asked whether he knew the complainant he said yes, and stated complainant's name as Putsweng. According to constable Squire, the plaintiff freely, before being asked any questions, told him that he ("the plaintiff") did not shoot the complainant. This utterance, convinced constable Squire, that

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[19] 1958 (3) SA 105 (T) 152.

indeed he must be at the right place, because plaintiff confirmed the complainant's version that he was shot at by known perpetrators, despite the fact that plaintiff absolved himself from any wrongdoing.

[47] This court was also referred to the case of *Mofokeng v Minister of Police and Another*[20] where the following was stated.

> "In order to exercise this discretion, the arresting officer must have sufficient knowledge of the evidence against the accused. In *casu* Motlogi confirmed during cross-examination that he had no knowledge of the contents of the docket and could not form an independent opinion to arrest or not"

[48] Premise hereupon, it is argued that had constable Squire's acquainted himself with the contents of the docket before the arrest, he would have realised that the statement of the complainant filed in the docket, expressly indicates that he was shot by Rorisang and thus the decision to arrest the plaintiff was unreasonable.

[49] The difficulty with this line of reasoning is that it does not account for the fact that to the mind of constable Squire, the complainant was shot in common purpose and further that plaintiff could have part of this plan to shoot the complainant, bearing in mind that plaintiff was walking alongside the outstanding suspects and was present when the complainant was shot. The reasoning employed in the *Mofokeng* case, that because the arresting officer had no knowledge of the content of the docket, he could not form an independent opinion to arrest, can't find application in *casu*. The doctrine of common purpose establishes that where two or more people agree to a commit a crime, each will be responsible for the acts of the others that fall within their common purpose or design. In the present matter, the plaintiff was present at the scene; the plaintiff observed the attack on the complainant, at the hands of his younger brother. From that point of view, constable Squire's suspicion can't be deemed unreasonable, simply because the plaintiff did not play an active role in the shooting.

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[20] [2019] ZAGPPHC 566 at para 66 (saflii).

[50] It is further argued on behalf of the plaintiff that the case of *Gellman*[21] is authoritative on the fact that the mere say-so of a complainant is not, without more, sufficient to arouse a reasonable suspicion that an offence has been committed. That is more so when the complainant's version is unsatisfactory...The inspector made no attempt to supplement the unsatisfactory witness statement by seeking out independent corroborative evidence..." (my emphasis)

[51] This court fails to understand how constable Squire's failure to acquaint himself with the content of docket in the circumstances of this case, led to an unreasonable suspicion to arrest, as is argued. Even if this court accepts momentarily that if constable Squire had prior insight to the docket, he would have seen that the complainant identified Rorisang as the shooter. How would knowing the identity of the shooter have impacted constable Squire not to arrest the plaintiff, when the essence of the doctrine of common purpose is, that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.

[52] Further, it can hardly be argued that on the face of it, the complainant's version appeared to any reasonable person to be improbable, contradictory and unsatisfactory, as alluded to in the *Gellman* case *(supra)*. This is so because complainant's version is materially corroborated by the plaintiff himself, save for the fact that he ("plaintiff") was not the shooter. Constable Squire was shown the wounds inflicted as a result of the shooting, giving credence to the version of the complainant that indeed he was shot with a firearm.

[53] It is the view of this court that a reasonable person in the position of constable Squire, possessing the same information, after having objectively analysed and assessing the quality of the said information at his disposal, could formulate a suspicion based on reasonable grounds. The court finds that the defendants had established the listed jurisdictional facts for a defence based on s 40(1)(b).

[54] Police officers are never obliged to affect an arrest, when all the jurisdictional factors are present. It must be borne in mind that the object of an arrest is to

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[21] Gellman v Minister of Safety and Security 2008 (1) SACR 446 (W).

ensure that the accused person appears before court in answer to a charge, and not to punish him for an offence of which he has not been convicted. An officer, it should be emphasized, is not obliged to effect an arrest. The exercise of such discretion will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature. The decision to arrest must be based on the intention to bring the arrested person to justice.

> "Therefor if the object of the arrest though professedly to bring the arrested person before court, is really not such, but is to frighten or harass him and induce him to act in a way desired by the arrestor, ...the arrest is no doubt unlawful".[22] Such an arrest is not *bona fide* because the arrestor has used a power for an ulterior motive.

[55] Further, where there is no urgency and the person to be charged has a fixed and known address, it is generally desirable that a less intrusive method of summons be adopted.[23] However, an arrest or subsequent detention does not become unlawful merely because a summons, or notice to appear in court, would have been equally effective in ensuring his or her presence at court.

[56] > "This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercised the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, 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, as long as the discretion is exercised within the range, the standard is not breached."[24]

[57] The court is mindful of the fact that arrest, being the most drastic method to secure a person's attendance at his trial, ought to be confined to serious cases. There is however no evidence to suggest that Constable Squire, under the present circumstances, did not exercise his discretion rationally, in arresting plaintiff. This court, finds that the necessary jurisdictional facts were proved for

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[22] Tsose v Minister of Justice and Others 1959 (3) SA 10 (A) para 17.
[23] Tose v Minister of Justice 1951 (3) SA 10 (A).
[24] Minister of Safety and security v Sekhoto & another 2011 (5) SA 367 (SCA).

a lawful arrest and that constable Squire's discretion was not improperly exercised.

[58] Once an arrest has been lawfully executed without a warrant the question arises as to an arrestee's rights thereafter. Generally, this is governed by Section 50 of Act 51 of 1977, but must be read with Section 59 and 59A thereof.

[59] It is argued on behalf of plaintiff that at the time of plaintiff's arrest, constable Squire foresaw that plaintiff might be detained post his first appearance in court, thus the first defendant should be held liable for plaintiff's detention after his first appearance. This court was referred to the case of *De Klerk v Minister of Police*[25] in arguing this point.

[60] In the *De Klerk* case Cameron J stated:

> "What is more, the evidence established that, when Constable Ndala arrested the applicant, she knew that at the Randburg Magistrates' Court he would have his first appearance and that is normally postponed. This conforms her other evidence about what she knew of how that Court operated. The arresting officer thus knew that, without her intervention, in the particular court to which he would be taken, the case would be postponed for at least seven days, and that he would be imprisoned during the postponement."

[61] The facts in the *De Klerk* case[26] reads succinctly as follows:

> "After an altercation that descended into violence, a charge was laid against Mr de Klerk ("the applicant") at the Sandton Police Station. Eight days later, Constable Ndala contacted the applicant, who agreed to present himself at the station. This he did, on 21 December 2012. There he was unexpectedly arrested and detained. His arrest was woefully unlawful. Less than 45 minutes after this woeful act, a colleague of Constable Ndala took the applicant, still under arrest, to the Randburg Magistrates' Court. There his case docket was handed to the prosecutor. Inside the docket was recorded a recommendation that he be granted bail of R1 000. In other words, she knew that at the first

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[25] 2021 (4) SA 585 (CC).
[26] Para 110-111.

appearance the remand would be a routine or mechanical act rather than a considered judicial decision." (my emphasis)

[62] This court indeed embraces the reasoning as was employed in the *De Klerk* case, but respectfully disagree with plaintiff, that in *casu,* the actions of constable Squire was woefully unlawful, warranting the inference that first defendant must be liable for plaintiff's entire period of detention. On the objective facts of this case can it not be said that constable Squire knowingly invoked the power to arrest for a purpose not contemplated by the legislature.

[63] In respect of the claim of malicious prosecution, plaintiff argues that the issue for determination is whether or not the second defendant's employee, in prosecuting the plaintiff, acted without reasonable and probable cause and *animo iniuriandi.*

[64] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

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

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

(c) that the defendants acted with 'malice' (or *animo injuriandi*);[27] and

(d) that the prosecution has failed.[28]

[65] Absence of reasonable and probable cause can only be proved with reference to subjective and objective elements. "Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as it would have been exercised by a person using ordinary care and prudence"[29]. The plaintiff must prove that the proceedings were instituted without reasonable and probable cause. The test is objective in that when it is alleged that a defendant had no reasonable cause for prosecution it means that he or she did not have such

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[27] See Relyant Trading (Pty) Ltd v Shongwe [2007] 1 All SA 375 (SCA) para 5.

[28] (In this case, of course, the case was withdrawn against the plaintiff on... and requirement (d) need detain us no further.)

[29] Wille's Principles of South African Law pp 1193-1194.

information as would lead a reasonable person to conclude that the plaintiff had probably committed the offence charged with.

[66] Plaintiff was charged with attempted murder, where reliance on the principle of common purpose was placed, as testified by constable Squire. This statement is supported by the first entry in the investigation diary[30] where it reads: *Modus Operandi*: Suspects came to kill complainant as they started shooting at him on the street more than eight (8) times…Suspects: Rorisang, Mahashe and other unknown African male all from Lesotho"

[67] It can hardly be said that the police at the institution of proceedings, did anything more than one would expect from a police officer in those circumstances, namely 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.

[68] It is trite, for the purpose of bail, that the offence of attempted murder with a firearm, resorts under Schedule 5 and therefore at first appearance the state requested a remand in terms of section 50(6) for bail information to be verified. In this regard that information will include establishing the legality of plaintiff. At this stage, the docket already contained information that the plaintiff was a Lesotho National, and the investigation was geared at tracing the outstanding suspects.[31]

[69] On the 8th of March 2019, the mandate of the legal aid attorney was terminated and Mr Mazibuko, a private attorney, came on record and confirm the date of 20th of March 2019, as suitable for the purpose of a formal bail application, in terms of Schedule 5. Noteworthy, on the 8th of March 2019, Mr Mazibuko is aware that the legality of the plaintiff is one of the reasons bail would be opposed. This court finds it peculiar why the plaintiff did not at the time of his arrest or at his interview with investigating officer or at his court appearances leading up to the withdrawal of the case, present his passport to the state for verification. Only a copy of the passport is presented to the state, on the day the matter is withdrawn.

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[30] Page 46 of the exhibit bundle.

[31] (see diary entries dated, 1/3/2019, 6/2/2019, 6/3/2019, 7/3/2019)

[70] Mr De Vries testified that the reasons for the withdrawal of the matter on the 20th of March 2019, was firstly because plaintiff presented the prosecution with a copy of what purported to be valid passport and because no other suspects, have been arrested by then.

Mr De Vries, who took the ultimate decision to prosecute plaintiff, testified that at the time he took this decision, he had access to the docket, indicating that the plaintiff and other suspects, was part of a group of known men, who shot the complainant and the plaintiff who was pointed by the complainant, was present at the scene. He therefore concluded that there was a common purpose, but by the time the matter was placed on the court roll, the other suspects were outstanding.

[71] Mr De Vries, on this information before him at the relevant time, was clearly convinced that there was enough reasonable and probable cause to believe that the plaintiff acted in common purpose with the suspects at large. It is a fact that the Rorisang(shooter) is plaintiff's younger brother and the 3rd suspect was and acquaintance of Rorisang.

[72] It is trite that the plaintiff in a Schedule 5 bail application, bore the *onus* and it is common cause that plaintiff is a Lesotho national as per the particulars he provided the police at the time of his arrest.[32] In part, this information set in motion the investigating officer to request Home Affairs to verify the status or movement of the said plaintiff to determine whether he entered the country legally and whether he has a valid visa in his passport. According to the Movement Control System the was no record of the plaintiff.

[73] This is not a case where the plaintiff was detained and nothing happened until the case was withdrawn, hardly. The investigation diary clearly sets out the attempts made to trace the outstanding suspects. The arrest of the plaintiff was based on a reasonable suspicion, not certainty that the plaintiff is guilty.

[74] It is argued on behalf of the plaintiff that if on the 20th of March 2019 there was no possibility of a conviction of the plaintiff on the evidence contained in the police docket, such possibility did not exist on the 1st of March 2019, when the prosecution was initiated. It is the view of this court, that Mr De Vries had an

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[32] Page 53 of the exhibit bundle.

honest belief in the guilt of the plaintiff when the matter was placed, based on the doctrine of common purpose; in the belief that the outstanding suspects will be traced and the fact that plaintiff only presented a copy of his passport on the day the matter was withdrawn. Thus, the conduct of Mr. De Vries was objectively reasonable when he at first appearance requested a postponement in terms of section 50(6) to obtain bail information, taking into account that as part of the grounds listed in section 60 (a) to (e), the likelihood of evading trial, is a key consideration. The plaintiff bore the *onus* to show that the interest of justice permitted his release, but for reasons known only to the plaintiff did he not take the investigating officer nor the court into his confidence, to present his passport, albeit a copy, for verification. This court agrees with the contention as made by Mr De Vries, in that the words "insufficient evidence to argue common purpose at this stage" does not mean that there was "no" evidence against the plaintiff.

[75] This court is of the view that the 2nd defendant had reasonable and probable cause which entailed an honest belief founded on reasonable grounds that the institution of proceedings was justified.

[76] In the result the following order is made:

[76.1] Plaintiffs action is dismissed with costs.

A. AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE PLAINTIFF:	Adv. Mazibuko Instructed by: Mazibuko and Wesi Inc
COUNSEL FOR THE DEFENDANTS:	Adv. Nhlapo Instructed by: State Attorney