



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:
32049/2012**

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

(Signature)

(Date)

In the matter between:

NGAJUKA, SIYABULELA KISSINGER

Plaintiff

and

MINISTER OF POLICE

Defendant

Claim for unlawful arrest and torture of plaintiff. Arrest by a private individual.

JUDGMENT

DE VILLIERS, AJ:

Procedural history

- [1] In issue, is a claim for unlawful arrest and torture. I repeat averments in the pleadings. My silence, regrettably, is not complimentary. As will appear later, the pleadings failed in their purpose and for some reason, even factually, did not accord with the contents of the two discovered dockets. I reflect the procedural history in some detail as the versions set out in a statutory notice, in the pleadings and in the amendments to the pleadings would become relevant in assessing the evidence.
- [2] The plaintiff gave notice to the defendant of his intention to institute an action for damages on 27 July 2010, in terms of the *Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002*. The notice alleged that the plaintiff was arrested on 29 July 2010 for theft of a motor vehicle, detained and prosecuted. The police station was not identified in the notice, but it could be identified as a Zonkiziwe (Police Station) docket number was reflected. It was alleged in the notice that the members of the South African Police Services had no reasonable cause for the arrest of the plaintiff as there was no *prima facie* evidence linking the plaintiff to the theft of the motor vehicle. It was alleged in the notice that the plaintiff was detained from 29 August 2010¹ to 5 November 2010 when the matter was withdrawn. The notice advised that the amounts of damages that were claimed were R800 000.00 for the arrest and detention, R150 000.00 for malicious prosecution, and R100 000.00 for *contumelia* and violation of *dignitas*, being a total of R1 050 000.00. The claim for malicious prosecution and the claims for *contumelia* and violation of *dignitas* (if distinct causes of action), were not pursued in the summons that followed. No mention was made of an assault or torture by members of the police force in the notice, and no amount was claimed in respect thereof. However, such claims were included in the summons that followed.
- [3] More than two years later, on 24 August 2012, the plaintiff issued a summons against the defendant, and on 25 September 2012, the plaintiff served the summons. Relevant are the following:
- [3.1] The plaintiff alleged that he was unemployed, and resided at “535 section *Katlehong, Gauteng*”, where it was pleaded that he was arrested by unknown police officers on 29 July 2010. It was alleged that the arrest was unlawful in that the police did not have a warrant for the plaintiff’s arrest and as “*there was no reasonable basis for the Policemen to suspect that the Plaintiff has committed any offence*”. The plaintiff would later testify that he resided at a different address;
- [3.2] It was pleaded further that the plaintiff was not released on bail “*on his first appearance as the policeman investigating the case misled the prosecutor into believing that there was strong evidence against the Plaintiff which was still to be obtained*”. It would later transpire that the police officer was a female;

¹ The date alleged earlier in the notice was 29 July 2010.

[3.3] It was further pleaded that the plaintiff was released on bail on 24 August 2010 (and not on 5 November 2010 as previously alleged in the statutory notice). The plaintiff would later testify that he was released on 19 August 2010;

[3.4] The plaintiff did raise assault in the summons and did so as follows: "**At the time of his arrest and during the course of his detention, the Plaintiff was assaulted by some policemen whose identity are unknown to the Plaintiff. And the said assault was wrongful and unlawful.**" The plaintiff would later testify that he was assaulted and tortured by the persons who arrested him, but did not testify about any assault subsequent to their arrival at the police station, where he was detained; and

[3.5] The plaintiff claimed damages in the amount of R150 000.00 for unlawful arrest, the amount of R500 000.00 for unlawful detention, and the amount of R100 000.00 for assault, a total of R750 000.00 (less than the total amount claimed in the statutory notice).² The heads of damages for the unlawful arrest and detention were split in the particulars of claim, but only one delict was pleaded.

[4] The defendant opposed the action and pleaded, including a special plea of non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act. On a date in August 2012, the exact date is not clear from the documents loaded onto CaseLines, the plaintiff launched an application against the defendant for condonation for non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act. He did not first seek a separation of issues.

[5] Almost six years after seeking condonation, an order was obtained on 28 June 2018 before an acting judge, it appears on an unopposed basis. The order reads:

"IT IS ORDERED THAT:

(1) *The late service by Applicant/Plaintiff upon respondent/ defendant of a notice in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, is hereby condoned.*

(2) *Leave to proceed with legal action against the Respondent/Defendant is hereby granted to the Applicant/Plaintiff*

(3) *No order as to costs."*

[6] The defendant did not persist with its special plea.

The amended pleadings

[7] The plaintiff gave notice on 30 January 2020 of his intention to amend the particulars of claim. There was no objection to the amendment and months later and out of time, on 11 August 2020, amended papers were served, also without objection. By then ten years had elapsed since the arrest.

[8] The details of the arrest were left unchanged in the amendment. The plaintiff, in the amended particulars of claim, pleaded with regard to his detention:

² R1 050 000.00

“6.1 On the 30th of July 2010, the Plaintiff was detained by the said Police officers in the Police cells at Zonkizizwe Police Station.

6.2 On the 2nd of August 2010, the Plaintiff appeared in court and was further detained at Heidelberg Correctional Centre. The Plaintiff was never released on bail on his first appearance as the policemen misled the prosecutor into believing that there was a strong evidence against the Plaintiff which was still to be obtained.”

[9] The plaintiff still pleaded that he was released on bail on 24 August 2010 (as already stated, later contradicted in his evidence, as he would testify that he was released on 19 August 2010).

[10] The plaintiff pleaded the following details as to his assault:

“8 At the time of the arrest and during his detention at House no 535 Katlehong and later in Germiston, Gauteng, the Plaintiff was wrongfully and unlawfully assaulted by the members of the South Africa Police Services whose identities are to the plaintiff unknown, in that

8.1.1 They tied a black plastic bag around the plaintiff's neck

8.1.2 They the wrapped the black plastic bag around the Plaintiff's head

8.1.3 They the suffocated the Plaintiff with a black plastic bag.”

[11] The plaintiff added these details about his unlawful arrest, detention and assault:

“10 The unlawful arrest, detention and assault of the Plaintiff caused injury to bodily integrity, personality and status in one or more of the following ways:

10.1.1. The Plaintiff was arrested in winter and he received one (01) blanket despite the nature of injuries and his health condition;

10.1.2. The Plaintiff was injured during arrest and never received medical attention.

10.1.3. The Plaintiff was assaulted and never received medical attention.

10.1.4. The Plaintiff was on medication and access to his medication was denied.”

[12] Lastly, the plaintiff increased his damages claim from R750 000.00 to R3 000 000.00 being:

“11.1. Damages for unlawful arrest: R500 000.00.

11.2. *Damages for unlawful detention R1 500 000.00.*

11.3. *Damages for bodily integrity R1 000 000.00.”*

[13] When the plaintiff sought the amendment on 30 January 2020, he had already made discovery on 30 May 2018 and the defendant had made discovery too, on 25 July 2018. He had the material documents available to formulate the amendment, although no cell registers were discovered, and the record of proceedings of the plaintiff’s appearances were not discovered. I was informed from the bar that the plaintiff’s attorney tried to obtain these documents, but could not gain access to them.

[14] One pleaded matter became irrelevant. The particulars of claim (and not the statutory notice) made various averments about an unlawful search by police officers of the plaintiff and of his residence, being no 535 section Katlehong Gauteng. When the trial commenced, the plaintiff’s counsel confirmed that no relief in respect of such searches would be sought. As reflected, the plaintiff would later testify that he resided at a different address. He would also testify that no search had taken place.

[15] The defendant’s case was not pleaded with clarity. The initial plea contained an admission that a police officer arrested the plaintiff:

“Save to admit that the arrest was without a warrant, the Defendant pleads that the arrest of the Plaintiff is justifiable in terms of section 40(1)(b) of the Criminal Procedure 51 of 1977 in that;

4.1. *He was arrested by a police officer;*

4.2. *The arresting officer entertained a suspicion;*

4.3. *The suspicion rested on reasonable grounds;*

4.4. *And the arresting officer exercised a proper discretion on having Plaintiff arrested and incarcerated.”*

[16] Who the police officer was, what the suspicion was, what the grounds for the suspicion were, were not pleaded, or later enquired about by the plaintiff in the pre-trial processes. The answer to the alleged unlawful detention of the plaintiff from the date of his first bail hearing, was pleaded as follows:

“7 *The detention of the Plaintiff was lawful in that:*

7.1 *that there was a lawful reason to detain the Plaintiff as police officers were investigating the case and did not want the Plaintiff to interfere with witnesses or tamper with the evidence and further to secure his appearance to court.*

7.2 *The Defendant denies each and every allegation made in this paragraph and put the Plaintiff to the proof thereof. The Defendant further avers that the continued detention was to*

enable the investigating officer to conduct the investigation without any interference.”

[17] This plea did not state expressly that the defendant had reasons to believe that the plaintiff would interfere with witnesses, would tamper with the evidence, or would not appear at court. The plaintiff would later testify that the magistrate, in refusing bail at his first appearance, (properly) took into account the fact he used two surnames, and had stated different residential addresses. For some reason, the defendant did not plead those factors, or the matters that appeared from the form completed about the plaintiff's eligibility for bail, completed by Constable Masilelo on 1 August 2010, a document that appeared in the discovered docket.

[18] Having previously admitted the arrest of the plaintiff and sought to justify on vague grounds, the defendant, in an amended plea (according to a note on CaseLines, dated 17 September 2020), denied the averments of an arrest by police officers. The amended plea reads:

“3. AD PARAGRAPH 3 THEREOF

The Defendant denies each and every allegation made in this paragraph and put the Plaintiff to the proof. In amplification of its plea, the Defendant pleads that the Plaintiff was arrested by Mr. Thulani Dube (Private investigator) at the place and date alleged in this paragraph and that the aforesaid Mr. Dube was not and is not a member of the South African Police Services.

4. AD PARAGRAPHS 4 THEREOF

4.1 Save to admit that the arrest was effected without a warrant pursuant to the provisions of section 43 of the Criminal Procedure Act, 51 of 1977, as amended the remaining allegation are specifically denied and the Plaintiff is put to the proof thereof.”

[19] Despite having raised a plea that its officers did not arrest the plaintiff, the defendant did not amend its plea about the justification for the plaintiff's continued detention.

[20] I did refer to the averments by the plaintiff about an unlawful search by police officers of his person and his residence. The original plea of the defendant admitted such searches, but took issue with the unlawfulness averment and instead sought to justify the searches. (Searches that the plaintiff would later testify did not take place.) Having denied that members of the police arrested the plaintiff in its amended plea, the plea was not amended with regard to the search by such members. Thus the following remained the plea:

“5.1 Save to deny that the search was unlawful the rest of the allegations are admitted.

5.2 The Plaintiff consented to the search.

5.3 The police have on reasonable grounds believed that;

5.3.1 The search warrant would have been issued to had they applied for such search warrant;

5.3.2 *The Defendant avers that the delay in obtaining a search warrant would defeat the object of the search.*"

[21] The plaintiff did not deliver any response to the amended plea. In particular, the plaintiff did not seek, in the alternative, damages based on a finding by this court that Mr Dube arrested the plaintiff and that the defendant committed a delict by not releasing the plaintiff when Mr Dube handed the plaintiff over for detention.

Pre-hearing procedures

[22] It seems that the first pre-trial conference was held on 19 August 2020, and this presumably was before the defendant sought an amendment to its plea. (The notice and filing notes were not uploaded on CaseLines). At that conference, the defendant admitted arrest and detention of the plaintiff (presumably by its officers), but denied that the arrest was unlawful. It denied the assault. The parties agreed to this confusing and inherently contradictory assessment on onus (and thus meaningless agreement):

"Plaintiff: The plaintiff to prove assault, unlawfulness and/or wrongful arrest.

Defendant: Defendant to justify the arrest and detention".

[23] The parties agreed, at this conference, to a four to five-day hearing and came before me on Tuesday 3 August 2021. I tried to arrange a pre-hearing conference on the day that I received the allocation (Friday 30 July 2021), and again on Monday 2 August 2021, but my registrar and the plaintiff's counsel could not make contact with the state attorney. When the matter was called on Tuesday 3 August 2021, the defendant was represented by counsel who could not explain why his attorney could not be contacted.

[24] In the meantime, I had shared notes to the parties on CaseLines on matters to be attended to ensure that the matter was ready to start running at the allocated time by video conferencing. Due to the unavailability of the state attorney, these were not attended to either. The matters included such basic matters as the uploading of the trial, pleadings, and notices bundles to CaseLines, arrangements for a video hearing, clarifying the issues in dispute, and the like. None of these matters were dealt with before the matter was called.

[25] I did not strike the matter from the roll, and exercised a discretion to hear it, as the matter was already 11 years old. The matter had to stand down till 14H00 on the first day to attend thereto and to hold a further pre-trial conference. I had hoped that a further pre-trial conference would actually

assist the parties. Instead, they held a short one of 20 minutes. No real progress was made to define and/or limit the issues. The confusing and inherently contradictory agreement on onus was replaced with the following:

“5. *Does the defendant dispute liability against the Plaintiff's claim as appears in the amended particulars of claim?*

ANSWER: Yes. The Defendant denies arresting, assaulting and unlawfully detaining the Plaintiff.”

The evidence

[26] No one would have expected the plaintiff to deliver clear oral evidence about smaller details, and if true, a series of horrific events that he was called upon to recall many years after a night of torture. Somewhat surprisingly, he did not state that he could no longer remember matters clearly, and testified about times and events with no stated difficulty.

[27] I stated at the outset that I reflect the procedural history in some detail as the versions set out in a statutory notice, in the pleadings and in the amendments to the pleadings would become relevant in assessing the evidence. In the end, there were many contradictions between the statutory notice, the amended particulars of claim, the plaintiff's affidavit, and his evidence.

[28] The affidavit is one that that the plaintiff made when he opened a criminal case against the police members for assault and theft (“*the plaintiff's affidavit*” or “*his affidavit*”). It was deposed to on 21 October 2010, three months after the incident. The affidavit sets out his complaints about his arrest and assault, and is three pages long. It is fairly detailed. It was made at Germiston Police Station and not at the station where he was detained. Two police officers assisted him. They had nothing to do with the matter in which he was an accused, and he did not know them. There is no suggestion that the affidavit was anything but an honest attempt to record the plaintiff's version.

[29] The plaintiff was called first:

- [29.1] He testified that he is an unemployed person, who has never been employed. He makes a living by selling some vegetables on a Saturday. His job description is that of a vegetable vendor;
- [29.1.1] However, his affidavit states that he was employed as a director of Sibuyile Aluminium at 315 Mavimbela Section, Katlehong, being the address where he was arrested;
- [29.1.2] He denied, in cross-examination, the version in his affidavit and stated that he knows of the business, but that it was in another street nearby, not where he was arrested;
- [29.1.3] He testified that he was arrested at 315 Mavimbela Section, Katlehong, but this version is in conflict with the summons, even after amendment of the particulars of claim, where the place of arrest was given as 535 section Katlehong;
- [29.2] The plaintiff testified that his arrest came about after a call from Mr Ariel Mahlobo. Mr Mahlobo was known to him, being a friend of his brother. Mr Mahlobo asked to see the plaintiff, and the plaintiff drove to 315 Mavimbela Section, Katlehong. It would later transpire that he drove to this address in his vehicle, a Mercedes Benz vehicle. The model and year were not established;
- [29.2.1] Under cross-examination, the plaintiff was pressed for details about the call by Mr Mahlobo. He could provide no real explanation as to why he went to see Mr Mahlobo, a mere distant acquaintance;
- [29.2.2] The plaintiff's affidavit states that Mr Mahlobo needed transport to Carltonville, but this version, the plaintiff denied in cross-examination;

[29.3] Under cross-examination, the plaintiff was pressed for details about where he was when he received the call from Mr Mahlobo. He testified that he was driving, and was a street away;

[29.3.1] However, his affidavit states that he was at the home of a friend when he received the call, in the company of friends. This he denied in cross-examination;

[29.4] The plaintiff testified that he was arrested at the address where Mr Mahlobo would wait for him, 315 Mavimbela Section, Katlehong. As reflected, this address differs from the address in the particulars of claim, 535 section Katlehong, Gauteng;

[29.4.1] Further, contrary to the averments in the particulars of claim, 315 Mavimbela Section, Katlehong is not his home address. Under cross-examination, he gave his home address as No 4 Tembisa Section;

[29.4.2] He stated under cross-examination that 535 section Katlehong is also his address as he was born there. It is his paternal home, but he does not stay at the address. It is (later became?) his deceased aunt's address. His aunt had passed away before the incident, and only her husband, children and tenants remained at the house;

[29.5] The plaintiff testified that four police officers (three males and one female) arrested him between 19H00 and 19H15 on 29 July 2010. He did not know their names. They were not in uniform, did not drive marked police vehicles, but carried firearms and handcuffs. They introduced themselves as police officers;

[29.5.1] Under cross-examination, the plaintiff changed his version and alleged that he was arrested by two police officers;

- [29.5.2] After about two hours of testimony, the plaintiff stated that the police officer who arrested him and who was with him the whole night thereafter, was a Mr Dube;
- [29.5.3] Under cross-examination, the plaintiff testified that he was not searched (neither his person, nor his property). This is in conflict with the particulars of claim; and
- [29.5.4] Under cross-examination, the plaintiff testified that, contrary to the averments in the particulars of claim, he was not assaulted at the time of his arrest. Surprisingly, his affidavit also contained details of an alleged assault that took place at the time of his arrest when he was allegedly hit with fists and kicked;
- [29.6] The plaintiff testified about various incidents of assault and torture during the night as the persons who arrested him, drove around with him and looked for his alleged accomplices. I do not repeat the evidence (as the further detail does not strengthen the plaintiff's reliability as a witness), but he went into greater detail in his evidence than as pleaded, and added a version about injuries inflicted to his body and a cattle prod type instrument being used;
- [29.7] The plaintiff testified that he was eventually taken to Zonkiziwe Police Station. It was at about 03H45. A female officer, Mbata, removed his handcuffs;
- [29.8] The plaintiff testified that when he was taken to court on Monday 2 August 2010, the matter was remanded for further investigation. On 11 August 2010, the next hearing, the magistrate told him that he does not qualify for bail, as he is a high-risk individual with many home addresses and using different surnames. The different addresses seem to be common cause. He explained that he does use two surnames, one being that of his father, and the other that of his mother. The cell register reflected his mother's surname, which is not the one in his identity document;

[29.9] The plaintiff testified that at his appearance on 13 August 2010, he was informed that he does not qualify for a state appointed lawyer, and by 19 August 2010, he had a privately appointed lawyer, and was released on bail with no conditions on that date;

[29.10] After one or two more appearances, the matter was withdrawn on 5 November 2010;

[29.10.1] The statutory demand reflected his release date as 5 November 2010, and the particulars of claim as 24 August 2010. Both are wrong. In fact, he was in detention from the evening of 29 July 2010 to sometime on 19 August 2010, three weeks.³

[30] The plaintiff did not testify that the investigating officer misled the prosecutor (or the magistrate) at any of his appearances at court.

[31] The next witness was Mr Alfred Ndlovu, a childhood friend of the plaintiff. He said that they grew up together, in the same street as the plaintiff. He resides next to the house where the plaintiff avers his aunt lived. He witnessed the arrest. He testified that there were (whom he believed) four police officers who carried out the arrest. He said he was not surprised about the plaintiff giving different residential addresses, as he had many relatives in the area. At first, he testified that he saw no assault on the plaintiff. When he, in cross-examination, was referred to his statement that reflected an assault when the arrest took place, he started to remember the assault. This contradicted the plaintiff's version that he was not assaulted when he was arrested. Mr Ndlovu clearly has forgotten most of the events over 11 years.

[32] The defendant called one witness, Captain Fourie, the investigating officer in the case. Her evidence was clear: She played no role in the arrest of the plaintiff. The evidence bears this out. Her first entry in the investigation diary was on 13 July 2010. She noted that there were no suspects and no eye witnesses to the theft. She then closed the matter.

[33] During the morning after the arrest, she was informed by a superior that the plaintiff had been arrested. Thus, on 29 July 2010, she re-opened the docket, noted in the investigation diary that a private investigator arrested the plaintiff. She referred in evidence to his statement (which she took). She noted in the diary that the plaintiff could possibly make

³ In argument, the plaintiff's counsel stated the date to be 9 August 2010, but my notes show 19 August 2010.

pointings out in Soweto where the stolen vehicle (allegedly) was sold. In a note to the public prosecutor prepared for the first court appearance, she advised him or her that only the statement by the private investigator linked the plaintiff to the crime. (He or she would have noted also the entries in the investigating diary that the complainant did not know who stole his vehicle (entry dated 09/07/2010) and that there were no eyewitnesses or suspects to the theft (entry dated 13/07/2010).

[34] During cross-examination, she was asked about the statement by the private investigator (Mr Dube), and she referred to paragraph 4 in which it was stated that the plaintiff had confessed to the crime and that he had identified the persons who were with him when the vehicle was stolen. She testified in cross-examination that the fact that Mr Dube seems to have completed the Notice of Rights in terms of the Constitution, does not show that he is a police officer. She assumed it happened because the statement was explained in isiZulu.

[35] It was not put to the officer that she was untruthful, or that she had concocted the documentary evidence in the docket. The pleaded case that she “*the policeman investigating the case misled the prosecutor into believing that there was strong evidence against the Plaintiff which was still to be obtained*”, was not put to her for comment.

The evidence, assessment principles and assessing the evidence

[36] The minority judgment by Cachalia JA in *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para 176 summarises the law on the determining of conflicting versions, crisply:

“[176] *The nub of the factual dispute between the parties is whether Mr Flusk had signed the OTP on 17 November 2006. To decide where the truth lies, a court must have regard to all the evidence and make findings (a) on the credibility of the witnesses; (b) their reliability; and (c) the probabilities of each version.⁴ The process of reasoning is integrated with credibility and reliability being assessed, not in isolation, but in the*

⁴ “*Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.”

light of the proven facts and the probabilities.⁵ The final step is to determine whether the party burdened with the onus of proof has discharged it.”

[37] The full bench judgment by Van der Linde J (Manamela AJ concurring) in *South African Bank of Athens v 24 Hour Cash CC* (A3027/2016) [2016] ZAGPJHC 217 (11 August 2016) should be referred to as well. The court, with reference to *Selamolele v Makhado* 1988 (2) SA 372 (V) at 374 on the assessment of evidence, the discharging of the burden of proof, and the *Stellenbosch Farmers' Winery* judgment,⁶ held in paragraph 11:

“Assessing the evidence

[11] *One takes from these dicta then the cue that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavour is not to be equated with box-ticking; the constituent parts of the exercise are indicated merely to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth of what had happened; these considerations are markers along the way.”*

[38] It is trite that the wider probabilities stand central in the assessment of evidence. This calls for assessment of the evidence against the underlying probabilities, more so than as to the manner in which the evidence is delivered.⁷ Amongst the three matters, credibility, reliability and probability, probability often prevails.

[39] Against this background, I first need to address what is admissible evidence, before I inadvertently put the cart before the horse in assessing evidential weigh.⁸

[40] The plaintiff testified that the persons who arrested him introduced themselves as police officers. The evidence is hearsay evidence. See section 3(4) of the *Law of Evidence Amendment Act* 45 of 1988, the

⁵ “*Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) ([2004] 2 All SA 23) para 5.”

⁶ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.

⁷ See *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) para 14, referring

inter alia, to *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 16. See also *Stellenbosch Farmers'*

Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) para 5, *Dlanjwa v The Minister of Safety and Security* (20217/2014) [2015] ZASCA 147 (1 October 2015) para 14 and para 19. See further *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others* 2004 (2) SA 433 (SCA) para 40-41 referring to *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA)

at 979I – J and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 79.

⁸ *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* (supra, but this time the majority judgment) para 33.

probative value of the evidence depends upon the credibility of a person other than the plaintiff giving such evidence. See too *Van Niekerk v Van Den Berg* 1965 (2) SA 525 (A) at 537G, an averment by an alleged agent does not prove agency as against the alleged principal in a contractual setting. In a delictual setting, where vicarious liability of an employer is in issue, the same principle will apply.

[41] No request was made that I should allow the evidence under section 3(1)(c) of the Law of Evidence Amendment Act. Even if I were to allow the evidence, it would be of very low probative value to prove the appointment of the arresting persons as police officers. In my view, the evidence is inadmissible to prove the actual appointment of the persons who arrested and tortured the plaintiff. I approach the assessment of the evidence on this basis and in the alternative, on the basis that I ought to have allowed the evidence, but should give it a low weight. The outcome is the same.

[42] At the centre is the question of whether the persons who arrested the plaintiff, were police officers or not:

[42.1] On the evidence of Captain Cloete, they were not. She was not involved in the arrest despite being the investigating officer, she had no leads, and the docket had been closed. She took a statement under oath from Mr Dube, added it to the docket, and in contemporaneous notes, reflected that he was a private investigator. In order to be untrue, she had to have been part of an elaborate fraud. No attempt was made to discredit her evidence as untrue, and there were no contradictions therein. The investigation diary (and the existence of the affidavit by Mr Dube) seems to me to be solid proof of her version. Her evidence was reliable, credible and most importantly, probable in light of a docket that was closed because there were no leads;

[42.2] Against this strong evidence, the plaintiff's case is that he was arrested, the persons who arrested him carried guns and had handcuffs (and told him that they were police officers). The further facts that the plaintiff relies upon are first, that a notice of

Constitutional rights was explained to the persons who were also arrested during the night of his arrest by Mr Dube. (But Captain Cloete explained that it probably happened as it was done in isiZulu.) I have little difficulty in accepting the plaintiff's evidence about guns and handcuffs. It is probable that the arresting persons had such equipment, but it is equally probable that they were private individuals. Ultimately, the test for the acceptance of circumstantial evidence is that the inference drawn from such facts must be consistent with the other proven facts, and that they must be the most reasonable inference (such as that the persons who arrested the plaintiff were police officers and not private individuals possibly pretending to be police officers). See *Macleod v Rens* 1997 (3) SA 1039 (E) at 1049A-B, and *H Mohammed & Associates v Buyeye* 2005 (3) SA 122 (C) at 129D-F. I have greater difficulty in accepting that the persons who arrested the plaintiff told him that they were police officers (if I in error excluded the evidence as inadmissible hearsay evidence). I have referred to numerous instances where his evidence was in conflict with the version his attorneys used for the statutory notice and the pleadings, and in conflict with his affidavit. This places large question marks about the reliability and credibility of his evidence. The mere fact that the plaintiff testified on this issue, and no one testified to the contrary, does not necessarily make the evidence true. See *McDonald v Young* 2012 (3) SA 1 (SCA) para 6-7, and *Kentz (Pty) Limited v Power* 2001 JDR 0448 (W) para 15-20, a judgment by Cloete J. But even if I should accept his evidence, an equally probable inference to be drawn from these facts is that the persons who arrested the plaintiff merely pretended to be police officers.

[43] It may all well be an exercise in futility to consider in this case if the circumstantial evidence relied upon by the plaintiff has been established, as in the end, the question is whether the plaintiff discharged the onus to prove that the persons who arrested him, were police officers. The answer is "no". I have referred to *South African Bank of Athens v 24 Hour Cash CC* relying on

Selamolele v Makhado. In *Selamolele v Makhado* (supra), Van der Spuy AJ held at 374J-375D:⁹

“Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. See Maitland and Kensington Bus Co (Pty) Ltd v Jennings 1940 CPD 489 at 492 where Davis J stated:

‘For judgment to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.’

(Italicised by me.) As pointed out by Clayden J. in International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1) 1955 (2) SA 1 (W) at 13 - 14:

‘Though a “strong probability” may be less than “absolute reliance” it seems with respect that an unnecessary adjective has been introduced.’

It would therefore be correct for me to say that in order to give judgment for plaintiff I must be satisfied on adequate grounds that sufficient reliance can be placed on the story of the plaintiff and his witnesses, showing that their version is more probable than that of the defendant. But one still has to go through the process of considering the credibility of the witnesses and of assessing their weight or cogency and after these processes have been completed

‘what is being weighed in the “balance” is not quantities of evidence, but are probabilities arising from that evidence and all the circumstances of the case’.”

[44] Later at 375H-376A the learned judge stated:¹⁰

“... I must say something about the balance of probabilities or the preponderance of probabilities argued by both counsel. It is of course clear that the Court is not engaged at the end of the day in a mere mechanical process of balancing out the number of acceptable witnesses on the one side and the other because

‘the object of the law is, or ought to be, to secure the sequence of certain results upon certain objective facts’.

See Wigmore Evidence (1981 ed) para 2498. As to the degree of probability that is sufficient for plaintiff to discharge the onus, see the remarks of Denning J in Miller v Minister of Pensions [1947] 2 All ER 372 (KB) at 373 cited in

⁹ Relied upon with approval in *South African Bank of Athens v 24 Hour Cash CC* (supra).

¹⁰ *South African Bank of Athens v 24 Hour Cash CC* (supra).

Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 157D. If the acceptable evidence is such that I can safely say 'I think that it is more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

- [45] In my view, the plaintiff failed to discharge the onus to prove unlawful arrest and torture by police officers. I cannot safely say that it is more probable than not that he had been arrested by police officers. It thus follows that he had not been assaulted and tortured by police officers either. As such, his claims for R500 000.00 damages for unlawful arrest, and R1 000 000.00 for damages for bodily integrity, must fail.

Is it the end of the matter?

- [46] The plaintiff also claimed R1 500 000.00 for damages for unlawful detention as part of the pleaded delict. The plaintiff's counsel freely stated that his client did not plead a case that he was arrested by a private individual and that the police acted unlawfully and culpably in not releasing him when he was brought to the police station by that person. The pleadings indeed do not contain such a cause of action. The plaintiff's counsel stressed (but not on this issue) that a party should be held to its pleadings and referred me to *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11-12:

"[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.¹¹ It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

*[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*,¹² this court said:*

'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue.'

- [47] The plaintiff's counsel also referred me to *Molusi and Others v Voges NO And Others* 2016 (3) SA 370 (CC) para 27-28 where *Slabbert* was approved. *Slabbert* in the context of this matter, is of particular importance. In that case,

¹¹ "See particularly *Moaki v Reckitt & Colman (Africa) Ltd and another* 1968 (3) SA 98 (A) at 102A; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107; *Buchner and another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216H-J; *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 902H."

¹² "1976 (1) SA 708 (A) at 714G."

the plaintiff pleaded an unlawful arrest for being drunk and disorderly, but did not plead that his continued detention (once he sobered up), instead of releasing him in his wife's care, was unlawful. This was fatal to the case as the evidence in that case (as in this case) did not expand the issues. In the minority judgment by Harms DP, approved by the majority, the matter is put beyond doubt:

"[21] The onus can arise only after the issue itself has arisen. The aggrieved person must claim that a particular arrest or detention was wrongful before the police are saddled with this onus. As pointed out in the judgment of Mhlantla JA, the plaintiff's case was that his arrest and detention were unlawful because he had not been drunk and disorderly. His case on the pleadings was not, in the alternative, that his detention had become unlawful when his wife and friend arrived.

[22] A court is not bound by pleadings if a particular issue was fully canvassed during the trial. But there is not the slightest suggestion that the matter was so canvassed. As a matter of fact, neither the plaintiff's friend nor his wife testified on his behalf in respect of his state of intoxication at the police office. One can only assume, in the absence of any other explanation, that they would not have supported him. In other words, the police had at the end of the plaintiff's case not the slightest inkling that they had to defend the continued detention after the arrival of the plaintiff's wife at the police station. The defendant was entitled at that stage, at the very least, to know that it had to establish that the legality of the continued detention was an issue. Cases by ambush are not countenanced."

[48] This would end the matter. The plaintiff did not plead a case that he was arrested by a private individual and that the police thereafter unlawfully detained him. I am indeed bound by *Slabbert*.

[49] Even if I were not bound by *Slabbert*, the plaintiff's claim had to fail for a further reason too.

[50] The first question would be what the obligations of the police are in dealing with an individual arrested by a private person. On a quick read of the *Criminal Procedure Act 51 of 1977*, the duties of the police in such a case, apart from having to bring such a person "*before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest*" are not addressed. I base this summary on section 50(1)(a) that refers to "*any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason*". From amongst such persons, the Act

provides, a person arrested without a warrant must be brought to a police station as soon as possible. If bail is not granted to such person by the police or the attorney general in the defined circumstances (see sections 59 and 59A), in terms of section 50(1)(c), such a person must be brought “*before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest*”. This, the police officers did do in this case. The section seems to cover section 42 in the same chapter, which bears the heading “*42 Arrest by private person without warrant*”. Section 42 itself stipulates when a private person may arrest another person without a warrant. The argument before me did not address this aspect, but see *Damon v Greatermans Stores Ltd and Another* 1984 (4) SA 143 (W) at 148I that interpreted section 50(1) of the Criminal Procedure Act to apply to an arrest by private person without warrant. Again, on a quick read, the Criminal Procedure Act also does not seem to suggest that a further arrest by the police in terms of section 40 must take place. I find no such case authority, and cannot with respect, see the need for such a provision.

[51] It seems that the question about the obligations of the police in dealing with a an individual arrested by a private person is one that does not arise from the Criminal Procedure Act. Instead, it seems that the police must make a determination that the detention should continue arising from the right to freedom of movement and the role of the police as an organ of state to ensure the fulfilment of that right under the Constitution.

[52] I came across *Mtshemla and Another v Minister of Police and Others* 2020 (2) SACR 254 (ECM), a full bench decision by Griffiths J (Brooks J concurring) which dealt with a civilian arrest where the court held at paragraph 19:

“[19] *The upshot of all this is that the magistrate ought to have found that the respondents had not established that the arrest itself was lawful. That being so, the subsequent two and a half days detention was also unlawful. It was incumbent on the police who detained the appellants to ensure that their arrest had been lawful. To simply detain the appellants, apparently on the say-so of a civilian who had arrested them, does not seem to me to be sufficient. Surely, at the very least, there should be an interrogation of some sort to ensure that the arrest was lawful. After all:*

“Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.”¹³

[20] *I would add that if, shortly after an arrest, it becomes irrefutably clear to the police that the arrest was unlawful, there would be no justification for any further detention.”*

[53] The case relied upon in *Mtshemla, Minister of Police and Another v Du Plessis*, dealt with a damages claim for unlawful arrest and detention. That judgment held in paragraphs 16-17:

“[16] In Zealand v Minister of Justice and Constitutional Development and Another [2008] ZACC 3; 2008 (4) SA 458 (CC) para 24 the following is said:

‘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. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.’

[17] Justification for the detention after an arrest until a first appearance in court continues to rest on the police.¹⁴ Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.¹⁵”

[54] Assuming, for a moment, that the pleadings do not stand in the way of the plaintiff, then in my view in any event, the decision to detain the plaintiff was justified. In this case, the investigating officer obtained an affidavit from Mr Dube that the plaintiff had admitted to the crime, and that he had named his accomplices. It was common cause that the plaintiff had used two surnames and more than one alleged address, both significant matters for the court to consider in a bail application. Theft (in this case, of a motor vehicle) is a Schedule 1¹⁶ offence. This is not a case, as dealt with in *Du Plessis*, where the suspicion against the arrested persons did not survive even a few hours at the police station. Under

¹³ *“Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA)”*.

¹⁴ *“In Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) at 284H-I the following appears:*
‘Hoewel hierdie passasies slegs verwys na ‘n inhegtenisneming – dit was al wat daar in geskil was- geld dieselfde beginsel klaarblyklik ook vir die aanhouding van ‘n persoon.’

¹⁵ *“In Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 821A-C the following appears:*
‘It is clear, however, from the decision in Duke’s case that that duty does not relate to the time of the arrest, but to the period of detention prior to bringing the arrestee to justice or releasing him, as the case may be. It is only when a policeman in England has subsequent to the arrest, but whilst the arrestee is still lawfully detained, reached the conclusion that prima facie proof of the arrested person’s guilt is unlikely to be discovered by further investigation that it is his duty to release him from custody: Duke’s case at 1058b. But a South African policeman is under a similar duty.’”

¹⁶ To the Criminal Procedure Act.

those circumstances, the police discharged their duties properly by letting a magistrate decide on detention, in a matter where the public prosecutor was properly advised that the only evidence against the plaintiff was the affidavit by Mr Dube, who is a private investigator.

[55] **Accordingly, I find that the plaintiff's claim for unlawful arrest by the police, for assault and torture by the police, and also for unlawful detention, must fail.**

Accordingly, I make the following order:

1. The action is dismissed with costs, including all reserved costs.

DP de Villiers AJ

Heard on: 3 and 4 August 2021, and 20 and 21 September 2021

Delivered on: 9 November 2021 by uploading on CaseLines

On behalf of the Appellant: Adv PP Baloyi

Adv BM Khumalo

Instructed by Gqwede Attorneys

On behalf of the Defendant: Adv L Tyatya

Instructed by The State Attorney