

REPUBLIC OF SOUTH AFRICA



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

Case Number: 43325/2019

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
28 DECEMBER 2023	_____
DATE	SIGNATURE

In the matter between:

DAVID DANIEL NKONSI

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL PROSECUTING AUTHORITY

Second Defendant

JUDGMENT ON THE MERITS

Coertse, AJ

Special pleas: Argument: 18, 19, 20, 21 July 2023

Judgement on the special pleas: 27 July 2023

Hearing dates on the merits: 20, 21, 22, 26 & 27 September 2023; 4, 5, 6, 7 December 2023.

Arguments on the merits: 13 December 2023

Judgment: 29 December 2023

COERTSE, CJ AJ

PRELIMINARY REMARKS

1. Plaintiff David Daniel Nkosi¹, an erstwhile Sergeant in the South African Police Service ["SAPS"] and his crew Constable Mr Ntshwanti ["the crew"] were arrested, without warrants for arrest, on charges of corruption in terms of the PRECA², at the Johannesburg Central Police Station on 19 August 2015 on the strength of an authorised entrapment in terms of Section 252A³ of the Criminal Procedure Act ["the CPA"] ["the 252A"]. It transpired during the trial that the crew is presently in litigation arising from the same set of facts. Plaintiff was detained and he applied for bail which was granted, it was paid and he was released on bail on 21 August 2015.
2. A Combined Summons was issued 9 December 2019 after the necessary notices were served on both the Defendants wherein, Plaintiff claimed⁴ for:
 - 2.1. Wrongful and unlawful arrest and detention in the amount of R385 000.
 - 2.2. Wrongful, false and malicious prosecution in the amount of R2 000 000,00; and
 - 2.3. Loss of earnings in the amount of R3 281 880.00

¹ Plaintiff's counsel only applied to the court on 4 December 2023, which application was not opposed, to amend the surname of the Plaintiff from "Nkosi" to "Nkosi". This application was granted and Plaintiff's surname will from now on be Nkosi as is reflected in the heading. Plaintiff's surname NKONSI should be substituted in all references to him.

² Prevention and Combating of Corrupt Activities Act 12 of 2004 as amended. This is the statute that is applicable throughout this judgment.

³ 252A "Authority to make use of traps and undercover operations and admissibility of evidence so obtained (1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) **may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence**, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3)." Emphasis by the court. The emphasis will be further discussed in this judgment. This is the enabling legislation for entrapments.

⁴ Caselines 001-4 to 001-15: Plaintiff's particulars of claim.

3. Defendants filed four special pleas as well as its plea over. This court delivered judgment in respect of two special pleas that were eventually argued and it can be accessed on Caselines⁵.
4. The Defendants pleaded⁶, in summary, as follows: CLAIM A: WRONGFUL AND UNLAWFUL ARREST AND DETENTION:
 - 4.1. ad para 6.2 that the Plaintiff was lawfully arrested in terms of section 40(1)(a) or (b) of the CPA read together with section 4(1)(a)(i) of PRECA.
 - 4.2. Ad paragraph 6.3 Plaintiff's arrest was predicated on the 252A (the entrapment).
 - 4.3. Ad paragraph 7.2 Plaintiff was arrested after accepting money from Mr Nicodemus Majoro Ramatsebe for the release of two suspects and the suspected stolen property found in possession of two suspects.
 - 4.4. Ad paragraph 8.2 Plaintiff was detained in terms of section 50(1) of the CPA.
5. The Defendants pleaded⁷, in summary, to Claim B CLAIM B- WRONGFUL FALSE AND MALICIOUS PROSECUTION ad para 10.2 "the matter was on the roll after the Public Prosecutor was satisfied that there is a prima facie case of corruption which merit prosecution and prospects of successful prosecution."
6. The Defendants pleaded⁸, in summary, to CLAIM C: LOSS OF EARNINGS: ad paragraph 11.2 "Plaintiff lost his employment by operation of the law, after failing to appear at the disciplinary hearing."
7. The civil trial commenced on 20 September 2023. It is also trite that the onus in civil matters is based on a balance of probabilities.
8. The second defendant is cited in the
 - 8.1. The summons as

8.1.1. NATIONAL PUBLIC PROSECTIONS AUTHORITY and

⁵ Caselines 000-1.

⁶ Caselines 006-27 Plaintiff's amended plea.

⁷ Ibid.

⁸ Ibid.

8.1.2. NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS and in

8.2. the particulars of claim ad paragraph 3: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS.

9. In terms of Section 179(1)(a) of the Constitution it is the 8.1.2. NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS.

THE ENTIRE CHAIN OF EVENTS WERE TRIGGERED BY THE ARREST AND DETENTION OF PLAINTIFF AND HIS CREW

10. It is clear that the entire chain of events was triggered:

10.1. by the arrest of Plaintiff and his crew without a warrant of arrest, on 19 August 2015 on the strength of the 252A, which was initially orally authorised and later confirmed in writing,

10.2. when they were detained and released on bail on 21 August 2015,

10.3. at the subsequent criminal trial in the regional court when he and his crew were found not guilty on 23 August 2019 – it is not clear to the court whether it was on an application of Section 174 of the CPA or not.

10.4. during the criminal trial, the employer of the Plaintiff initiated an internal disciplinary hearing in terms of the South African Police Service Discipline Regulations⁹. These Regulations are based, *inter alia*, on the following principles in that the disciplinary proceedings will be instituted and finalised notwithstanding the fact that the act of misconduct is also a criminal offence¹⁰ and at regulation 4(h) disciplinary proceedings should not emulate court proceedings.

11. Plaintiff alleges in paragraph 40 of his particulars of claim that on “... 23 August 2019 he was found not guilty in terms of Section 174 of the Criminal Procedure Act 51 of 1977.”¹¹ The crew gave evidence, on behalf of the Plaintiff, and he testified that

⁹ DEPARTMENT OF SAFETY AND SECURITY No. R 643 3 JULY 2006 REGULATIONS FOR THE SOUTH AFRICAN POLICE SERVICE The Minister for Safety and Security has, under section 24(1) of the South African Police Service Act, 1995 (Act No. 68 of 1995), made the regulations in the Schedule. Caselines 019-1031 e.v.

¹⁰ Ibid. Regulation 4(g) & (h) on Caselines 019-1031 and more particularly Caselines 019-1033

¹¹ Caselines 001-11.

both Plaintiff and himself gave evidence during their criminal trial in the regional court on the charges of corruption; not even the plaintiff testified to this. The public prosecutor Mr Nkabinde gave evidence on behalf of the Defendants and he stated positively that there was no application on behalf of the accused [that is Plaintiff and the crew] for a discharge on the strength of a Section 174 application. The court is left in the dark as to why the Plaintiff's particulars of claim make this averment. During argument, counsel for the Plaintiff downplayed this aspect and relied on the fact that she was not the author of the particulars of claim. The court is of the view that it was misled by this allegation. It reflects adversely on the plaintiff's and the crew's reliability and trustworthiness of their testimony.

WITNESSES FOR THE PLAINTIFF

12. Plaintiff gave evidence and he called the following witnesses to give evidence on his behalf:

- 12.1. Captain Khazamula Ngobeni with 37 years in the SAPS service and he was Plaintiff's immediate commander.
- 12.2. Constable Solomon Ndileko Ntshwanti ["the crew"], who had 6 years' experience in the SAPS on 19 August 2015 and who was his crew member of the Quantum, an officially marked SAPS vehicle that was being driven by the Plaintiff on the day of the incident 19 August 2015. This Quantum was under the full and effective control of Plaintiff and the crew to the exclusion of the public at all times.

WITNESSES FOR THE DEFENDANTS

13. The case for the Defendants rests on the evidence of the following witnesses:

- 13.1. Captain Kasemula George Shilenge who retired from the service during 2020 who had 35 years in the service during 2015 who was deployed at the Provincial Head Quarters of the anti-corruption unit. He was responsible for the anti-corruption unit for Gauteng. It was part of his duties to prevent, detect and investigate and or to uncover the commission of

corruption or to prevent the commission of corruption where police officers were concerned.

- 13.2. Warrant officer Mawethu Xolilizwe and was deployed at the Provincial Head Quarters of the anti-corruption unit under Capt. Shilenge for the period of 2013 to 2016.
- 13.3. Warrant officer Brett Archibalt Clark from Provincial Detectives with 36 years in the service.
- 13.4. Warrant officer Jeremia Musawemkosi Twala in the Organised Crime Investigation Unit under Capt. Shilenge.
- 13.5. Colonel [retired since October 2023] Sean James Andrew Trollip with 42 years and 8 months in the service.
- 13.6. Mr Mzwantile Enok Nkabinde, currently employed as a senior public prosecutor at the Johannesburg Magistrate's Court. During 2015 he was the regional prosecutor during the criminal trial of Plaintiff and his crew Mr Ntshwanti ["the crew"].

COMMON CAUSE FACTS

14. The legal representatives argued certain common cause facts and the court is of the view that there are more common cause facts that were not stated in both their heads of argument and it is amplified hereunder.
15. The Plaintiff was who he was and that he no longer is in the employ of the first defendant and that he has *locus standi* to institute an action for damages and that the Court has jurisdiction to adjudicate the matter.
16. On 19 August 2015 at round about 14:00 Plaintiff and his crew went to buy some food from the bus-terminus that is within walking distance from the Johannesburg Central Police Station and that they were in an officially marked Police Quantum motor-vehicle ["the officially marked vehicle"]. It was equipped with the official logbook which was inside the officially marked vehicle and that this logbook was earmarked for this specific officially marked vehicle. This logbook was also under

the full and unfettered control of Plaintiff and his crew to the exclusion of the public.

17. On their way out of the bus-terminus they encountered a truck full of brand-new tyres and that the truck was driven by Musa. Rafiq was the passenger in the truck.
18. This truck was stopped because Plaintiff and his crew immediately formed a suspicion that the tyres were suspected stolen property; the driver of this truck [Musa] was given instructions to park the truck inside the bus-terminus and they returned to the parking space and stopped in close proximity to the truck with the suspected stolen tyres.
19. After some negotiations and whilst at the bus-terminus, the truck with the suspected stolen tyres was taken over by Plaintiff acting in his official capacity and acting within the course and scope of his duties as a Police officer. He was actually driving the truck and he had Musa, as a passenger, with him in the truck with the tyres. His crew took the officially marked police vehicle to hide at the Central Police Station and walked back to the bus-terminus.
20. Plaintiff and his crew waited at the truck with the driver [Musa] and Rafiq for the owner of this truck to pitch up but to no avail. Plaintiff kept control of this truck with the tyres and he and Musa in the passenger seat, drove to the Oriental Plaza ["the Plaza"] while the crew followed in the officially marked vehicle and that Rafiq was a passenger inside the officially marked police vehicle. At the Plaza his crew parked the officially marked police vehicle outside in the street and kept a lookout what was going on inside the Plaza where the truck with the tyres were parked.
21. Admire Gumbo was arrested at the Plaza on a charge of possession of suspected stolen property, And the entire entourage returned to the Central Police Station with the two vehicles being driven by the Police officers accompanied by Musa and Rafiq.

22. At the Police station negotiations were continuing until Plaintiff's arrest together with his crew at or about 20:00 on 19 August 2023.
23. The plaintiff [see his Notice of Rights¹² K153942 completed 20:35 at Norwood Police Station] and his crew [see his Notice of Rights¹³ K153943 completed 20:35 at Norwood Police Station] were arrested on 19 August 2015 at around 20:00 [some 6x hours later] by members of the South African Police Service anti-corruption unit in the course and scope of their employment by SAPS on charges of corruption.
24. No money was found on the persons of either Plaintiff or his crew.
25. The Plaintiff and his crew were arrested by W/O Xolilizwe.
26. The plaintiff and his crew were detained at Norwood Police Station for two (2) days and released on bail.
27. The plaintiff and his crew were found not guilty and discharged on the October 2019 by the regional court.

THE ONUS ON THE PARTIES

28. In respect of the arrest and detention of a person Harms¹⁴ wrote:

"An arrest or detention is *prima facie* wrongful and unlawful. It is therefore, not necessary to allege or prove wrongfulness or unlawfulness, It is for the defendant to allege and prove the lawfulness of the arrest or detention. ... Thus, where police have arrested and detained a person, once the arrest and detention are admitted, the onus of proving lawfulness rests on the State ... **An arrest without a warrant is lawful if, at the time of the arrest the arresting officer had a reasonable, belief that the plaintiff had committed a schedule one offence.** The defendant has to show not only that the arresting officer suspected the plaintiff having committed an offence, **but that the officer reasonably suspected the plaintiff of having committed a schedule one offence.** ... **The principle that the defendant must justify an arrest without a warrant is also**

¹² Accused Notice of rights: Caselines 019-20. In the instant matter Detainee is Plaintiff.

¹³ His crew's Notice of rights: Caselines 019-19. In the instant matter Detainee is the crew.

¹⁴ AMLER'S PRECEDENTS OF PLEADINGS SIXTH EDITION HARMS, LTC LEXISNEXIS BUTTERWORTHS DURBAN 2003 at p.p. 40 – 41. The authorities cited by Harms are excluded.

applicable where the arrest allegedly took place in terms of a statutory authority.
[emphasis added by the court].

29. Harms¹⁵ continues in respect of wrongful and malicious legal proceedings:

“The plaintiff must allege and prove that the defendant instituted the proceedings – i.e. that the defendant actually instigated or instituted them. The mere placing of the information or facts before the police, as a result of which proceedings are instituted, is insufficient. ... On the other hand, where an informer makes a statement to the police which is wilfully false in a material respect, but on the basis of which no prosecution could have taken place, he or she “instigates” a prosecution and may be personally liable. ... ***The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable and probable cause.*** Reasonable and probable cause means an honest belief founded on reasonable ground that the institution of proceedings is justified. The concept involved both a subjective and objective element... a plaintiff is ... well advised to allege and prove not only *animus iniuriandi* but also malice. ... ***A claim for malicious legal proceedings differs materially from one based on wrongful legal proceedings.*** Examples of the latter include ... [where an] arrest took place without a warrant. These cases have two special features: first the defendant must allege and prove the lawfulness of the ... arrest and, second the absence of *animus iniuriandi* is no defence.” [emphasis added by the court].

30. Harms¹⁶ writes in respect of delictual damages: “It is for the plaintiff to allege and prove the damages suffered as a result of the defendant’s wrongful act.”

PLAINTIFF’S CASE: PLAINTIFF’S EVIDENCE

31. Plaintiff’s evidence in chief was presented in such a way that the impression left on the court was that he repeated it by rote memory – the court could follow his evidence almost word by word as stated in the particulars of claim.

32. Plaintiff was extensively cross-examined. He left an impression on the court of being evasive and argumentative. He was evasive and did not give clear and crisp evidence how he formed a suspicion that the tyres on the truck were suspected stolen property and how the opening of the case docket for this specific case was opened or why it was “imperative” that the anti-corruption unit

¹⁵ Ibid at p.p. 238 - 239.

¹⁶ Ibid page 127. The authorities cited by Harms are excluded.

under the leadership of Captain Shilenge should have investigated the allegations of suspected stolen tyres first.

33. He kept on repeating that he could not trust his colleagues at Central Police Station with the tyres because they would steal it and that is the reason why he and his crew had to keep it safely under their control. That is the reason why the tyres were not booked in under the SAP13 as evidence, but was kept under their control.
34. He denied that he received any money as a bribe at all and that the anti-corruption unit did not find any money on his person nor on the person of his crew.
35. He was argumentative while he was cross-examined by Defendants' counsel and kept on repeating how unfairly he was treated by his erstwhile employers and more particularly by Colonel Trollip during the disciplinary hearing.
36. He was confronted with the rights that were read to him by Shilenge at Norwood Police Station and signed by both the Captain and Plaintiff. This NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION [SECTION 35 OF ACT NO 108 OF 1996¹⁷ document was completed by Captain Shilenge in his own handwriting. Shilenge testified that Plaintiff signed it in front of him and he, Shilenge signed it as well. Plaintiff did not admit to this and was rather vague in identifying it as his [Plaintiff's] signature. Plaintiff's "reason" for being vague whether it is his signature, is that he could not "identify" his signature because it was partly obscured by the official police stamp bearing the date 19 August 2015 and the time was 20:35. Plaintiff, by stating under oath, that he is not able to identify his signature, created an impression on the court that he is just taking chances – it is clear from Shilenge's evidence that it is Plaintiff who signed this Notice in front of Shilenge. Counsel for the Defendants, during her cross-examination of Plaintiff on this specific point, told Plaintiff that he is not honest and he kept on arguing. He stated that the document is not complete in that the OB number is not reflecting next to the word "corruption".

¹⁷ Caselines 019-20 document is marked with the distinctive serial number K153942.

37. His crew's NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION [SECTION 35 OF ACT NO 108 OF 1996 can be found also on Caselines¹⁸ which was signed by both Captain Shilenge and his crew at 20:35.
38. The two NOTICE's serial numbers are sequential and signed simultaneously on the same date of their arrest and are clear that they were warned that the allegations they are faced are in respect of corruption.
39. Plaintiff's reluctance to acknowledge his signature and by parity of reasoning that he was duly informed of his rights is clearly a ploy and is rejected as false and disingenuous. Adv. Lekgetho asked Plaintiff whether he will produce the document that he claimed to have signed, and his answer was "I can't."
40. He kept on referring to "the second docket" – eventually it was agreed during argument stage that there are only two dockets that were referred to during this trial and it was agreed to refer to it as follows:
- 40.1. The docket in respect of the corruption charges have the CAS number 886//08/2015¹⁹. It is referred to as "the corruption docket."
- 40.2. The docket in respect of the suspected stolen tyres with CAS number 894/08/2015²⁰ and is referred to as "the tyres docket."
41. It is thus clear that the corruption docket ranks in front of the tyres docket because it was registered prior to the tyres docket.
42. Plaintiff referred to his resignation but was unable to produce his letter of resignation even after it was undertaken in court that it would be filed. There was no explanation provided why this letter of resignation was never tendered in evidence to the court.
43. His evidence in respect of his suspension by Trollip, that is Plaintiff's second suspension was in terms of the Regulation 18(5), was hugely confusing and

¹⁸ Caselines 019-19 document is marked with the distinctive serial number K153943.

¹⁹ Caselines 019-4. It was agreed between counsel for Plaintiff and for Defendants during argument that this is referring to the corruption case.

²⁰ Caselines 015-51 read with Caselines 015-52. It was agreed between counsel for Plaintiff and for Defendants during argument that this is referring to the tyres. See also Caselines 015-79.

inconsistent. He and the crew were running around to all and sundry to get their suspension by Trollip reconvened, but it was met with no success. All that was required of Plaintiff to reconvene his disciplinary proceedings, was to follow the express onus that was placed on him by the Notice.

44. The suspension by Trollip of Nkonsi can be found on Caselines²¹ and is identical to his crew's ²² suspension.

45. The wording of this notice is clear and unambiguous:

“If you fail to report to the Employer representative within the period of two months, to arrange with him/her for a date of which your hearing can be reconvened, you will be deemed to be discharged from the Service without any further notice, in terms of Regulation 18(5)(a)(ii).”

46. It goes on to state in CAPITAL LETTERS the following clear warning:

“THE **ONUS TO** TAKE THE NECESSARY ACTIONS BEFORE THE EXPIRY OF THE PERIOD OF TWO MONTHS **RESTS ON YOU** TO APPEAR BEFORE THE CHAIRPERSON TO ADVANCE REASONS FOR YOUR FAILURE TO APPEAR BEFORE HIM/HER ON THE PREVIOUS DATE OF YOUR HEARING IN ORDER TO PREVENT YOUR DISCHARGE FROM THE SERVICE” [emphasis added by the court].

47. Trollip testified that Plaintiff and Ntshwanti refused to sign acceptance of this notice of suspension and he then forwarded it to their office.

PLAINTIFF'S CASE: CAPTAIN K NGOBENI

48. Captain Khazamula Ngobeni was the officer commanding of the Plaintiff. At the very start of his cross-examination by Advocate Lekgetho, he loudly and clearly stated that his officers, inclusive of Plaintiff and the crew, reported “... each and every hour ...” [his own words] on how they were executing their duties. A few moments later he backtracked on this bold statement and told the court that his officers, inclusive of Plaintiff and the crew did not report to him “... each and every

²¹ Caselines 019-947 being Annexure I at the disciplinary hearing, Suspension Notice in respect of Plaintiff issued by Colonel Trollip.

²² Caselines 019- 855 being Annexure I at the hearing. Suspension Notice in respect of Ntshwanti issued by Colonel Trollip.

hour...” When the court confronted him with this bold statement, he denied having said it and declined the offer by the court to have his testimony played back to him. On the basis that he was not privy to what transpired on the ground so to speak at either the bus-terminus, Central Police Station, the Plaza and back at Central Police Station his testimony is based on what Plaintiff and the crew told him. He, however confirmed that he took hold of the fire-arms and the Police identification documents of Plaintiff and the crew at Central Police Station; that was on the explicit directions of Captain Shilenge. He wanted to talk to Plaintiff and the crew, but was prevented from doing so.

PLAINTIFF’S EVIDENCE: MR. NTSHWANTI: [PLAINTIFF’S] CREW

49. Mr Tshwanti’s [Plaintiff’s crew] gave evidence and in essence he re-told Plaintiff’s story to the court. And he elaborated further on it. He told the court during his evidence in chief that he was angry with the treatment he and Plaintiff got from the police force especially in respect of their so-called “dismissal by Trollip.” Later he admitted that he was very angry. The court enquired from him whether he is still angry while giving his evidence – and he replied immediately that, as he was standing in the witness box, he is very angry.
50. He repeatedly stated boldly and unequivocally that General Leshabane, Capt. Shilenge, W/O Xolilizwe and Thwala were members of a syndicate working together with Majoro. He also re-iterated on a number of occasions during his evidence that he allegedly proved the existence of this so-called syndicate in “... a court of law...” [his words]. He has never seen General Leshabane in his entire life. This story about a so-called syndicate and that he has proven it “... a court of law ...” smacks of a cock-and-bull story and is treated as such.
51. According to him he was sitting inside the official marked police vehicle at Central Police Station taking statements from Musa and Rafiq when he and Plaintiff were arrested by unknown police officers; it was only later that he got to know who these police officers were.
52. He denied having received any money at all and that no money was found on his person nor on the person of Plaintiff.

53. He also denied that the money was shown to him and Plaintiff.

54. During his evidence in chief, when he related his version of the allegations of corruption, he became so emotional that the court had to adjourn for a short while to give him respite to compose himself and thereafter the hearing resumed.

55. He testified that he and Plaintiff even reported the incident as defeating the ends of justice at the Independent Police Investigative Directorate in Pretoria and "... nothing happened ..." [his words].

56. Ntshwanti attacked the date in the entrapment documents; it should be stated that he was the only witness who attacked it. Not even Plaintiff raised it during his evidence in chief nor during cross-examination²³ it was not even raised in the plaintiff's pleadings. The entire attack, which was at times rather vicious, focused on the date that is referred to in paragraph 2 of this letter and will be discussed in great detail hereunder. It appears as if Ntshwanti did not read the entire document and he got stuck on this date and he strenuously argued it to the point of exhaustion.

57. The document on Caselines 015-49 contains only the front page of the full document as is reflected in Caselines 019-999 and the court will refer to the latter and not the former.

58. This letter, which is the covering letter²⁴ for "Annexure A" APPLICATION FOR A POLICE ACTION: SECTION 252A OF THE CRIMINAL PROCEDURE ACT 51 OF 1977, with the heading: APPLICATION FOR AN AUTHORISATION FOR TRAP/UNDERCOVER OPERATION IN TERMS OF SECTION 252A OF ACT 51 OF 1977 BRIBERY AND CORRUPTION: PHQ ANTI-CORRUPTION ENQ.12/08/2018 is dated 21 August 2015 and the entire wording of this letter is as follows:

"1. Your reference number 26/8/1/4 (130/2015) dated 20 August 2015 was received on the 21 August 2015.

²³ Defendants' heads of argument ad para. 92. Caselines 025-67. The issue was first raised by Mr Ntshwanti who indicated for the first time under cross examination that he has a problem with the section 252A authorisation

²⁴ Caselines 019-999

2. The verbal authorisation for a trap/undercover operation granted on **19 July 2015** telephonically at 19H40 is hereby confirmed.

3. The authorisation is valid from 19 August 2015 to 19 August 2015.

4. I must be kept informed of the development.” [italics and emphasis provided added by the court.]”

59. Ntshwanti has insurmountable problems with the interpretation of this letter in that the date provided in paragraph 2 thereof refers to 19 July 2015 while the authorisation is valid from 19 August 2015 to 19 August 2015. He rejected the proposition that it is a simple typographical error. This error is borne out in the rest of the 252A document “Annexure A” and it can only have been a reference to 19 August 2015. It is also obvious from reading the entire document that it is a typographical error. The court is of the view that this is just hot air that was blown into the matter and worthy of judicial censure and it hereby rejected for what it is worth. Captain Shilenge and W/O Xolilizwe signed it on 19 August 2015 as is evidenced by the complete 252A document.²⁵ The court hasten to add that the plaintiff’s papers also contain errors and it is ludicrous to get stuck on this point and bearing in mind that plaintiff did not raise it not in his pleadings, not during the criminal trial and not during his evidence in chief nor during his extensive cross-examination.

THE DEFENDANT’S CASE: CAPTAIN KG SHILENGE

60. Captain Kasemula George Shilenge testified that he received a report from General Leshabane about police officers being involved in alleged corruption matter and he was given the instructions to follow it up, which he promptly did. These instructions came late on the afternoon of 19 August 2015 after he had knocked off duty and have arrived home. He does not know the Plaintiff or his crew, from a bar of soap; he was very clear that he has never seen them before this incident and he does not have an axe to grind with them.

²⁵ Caselines 019-1000 – 019-1004.

61. He got information from the General, and he made contact with a person with the name of Nicodemus Majoro Ramatseba. They made arrangements to meet next to the Johannesburg Magistrate's Court in Fox Street.
62. He then got in touch with Warrant Officer [W/O] Xolilizwe and W/O Twala, both of whom were under his command, whom he commanded to be of assistance with this situation. These two warrant officers and Majoro convened with the Captain at the Magistrate's Court in Fox Street.
63. Majoro informed them that his friend was arrested by police officers who demanded payment of R20 000.00 for the release of the friend and a truck full of tyres. He further informed them [the police officers] that he could not afford R20 000.00 but he could only afford to pay R5 000.00.
64. The captain instructed W/O Twala to take Majoro's statement²⁶ which he did.
65. In the meantime, Shilenge opened an Enquiry Docket which only reflected online for the corruption unit and it was registered as 12/8/2015 [the court points out that this number is the number reflected in the covering letter to the 252A documents as is evidenced in Caselines 019-999]. And he SMS'ed W/O Clark at the DPP's office and requested authority for a 252A entrapment. Shilenge organised to obtain R5 000.00 for purposes of the entrapment; he got the money from Johannesburg Central Police Station. The 252A was needed to investigate the allegations made by Majoro and of the allegations of ongoing corruption by the two police officers. Majoro's statement had to be captured in writing, and under oath, whether the police officers were demanding the money from Majoro's friend. Shilenge first of all requested by SMS authority for the entrapment and it was later on confirmed in writing. The complete 252A under the covering letter dated 21 August 2015 states clearly what the corruption allegations were that had to be investigated and it was signed by both Shilenge and Xolilizwe 19 August 2015. At paragraph 7²⁷ of the 252A with the heading DETAILS OF POLICE ACTION, METHOD(S) PROPOSED TO BE USED IN THE CASE AT HAND the blank space was filled in as follows: "THE AGENT WILL BE GIVEN MONEY WHICH HE WILL BE DELIVER TO THE TARGET UPON RECEIVING THE MONEY THE

²⁶ Caselines 015-6 – Caselines 015-6.

²⁷ Caselines 019-1003.

TARGET WILL BE ARRESTED. THIS TRAP WILL TAKE PLACE ON THE 2015/08/19 AT ABOUT 20:00 AT JOHANNESBURG CENTRAL SAPS.” And this is exactly what eventually happened and that is how Plaintiff and the crew were arrested for corruption.

66. Captain Mhlongo from Central brought R5 000.00²⁸ in R100 notes and he had photocopies of the notes with him. Shilenge then compared the cash with the photocopies and it corresponded to one another. Mhlongo gave him the cash and the copies of the money. Majoro did not have any money on him. Shilenge gave the cash to Xolilizwe and he and Twala were sent to Central to set up the trap.
67. After some minutes or so, he received a phone call from Xolilizwe who informed him that the police officers were arrested and he then went to the police station at the parking lot within the police station. By the time he arrived there, Xolilizwe were comparing the cash with the photocopies of it and he was counting the money. Nkosi and the “other one” whom he said could have been Ntshwanti were standing near Xolilizwe while the latter was busy with the money as described above. A person approached Shilenge and introduced himself as Nkosi and the crew’s commander; Shilenge gave him [Ngobeni] instructions to take possession of the official fire-arms and the appointment documents of the two police officers who were under arrest. When Shilenge saw Xolilizwe counting the R5 000.00 he was satisfied that they had to execute the arrest to secure evidence of the corruption. He believed Majoro told him the truth. He was also clear that he held the *bona fide* suspicion that an offence was being committed and that it is corruption.
68. He then took them to Norwood Police Station and apprehended them in the holding cells.
69. Xolilizwe read Nkosi and Ntshwanti their rights. And Shilenge read it to them at Norwood Police Station and both of them signed it in the presence of the captain. The court have already dealt with this aspect and will therefore not discuss it again.

²⁸ Copies of the monies that was found in the official marked police vehicle are on Caselines 015-26 to 015-27.

70. Shilenge was vigorously cross-examined by Plaintiff's counsel. He answered all her questions and submissions calmly, clearly and to the point. He displayed no bias towards anybody. He was steadfast in his evidence that he and his team were not investigating the tyres docket, but they were investigating allegations of corruption of police officers and that they got oral authority for the 252A procedure which they executed meticulously.
71. He denies any knowledge of an alleged syndicate that existed according to the crew of which he was allegedly a member.
72. Adv Ntsimane directed a great deal of her cross-examination towards the "relationship" between Shilenge and Majoro. He denied knowing him and predicated his denial that he has met hundreds of people during his career as a police officer. He was then confronted by his testimony in the regional criminal court and was accused of being a liar. It became clear that he met Majoro more or less 15 – 16 years previously and that is the reason for him to denying he knew him; it is so many years that he last saw Majoro that it is possible that Shilenge forgot about this. It is of no moment in the court's judgment because it is so many years back and it is highly likely that he forgot Majoro.
73. He stated also that he has to believe people if they say that police officers demanded bribes and then he have to investigate it, which he did in the instant matter. No, his attitude was clearly that he and his team were not investigating any other alleged crime, but corruption. And there is not a set procedure to follow when arranging a 252A – the circumstances dictate the procedure. He was adamant that he was duty bound to obtain authority from the Prosecuting Authority prior to the trap being proceeded with. In the instant case, the payment of the money was imminent and therefore they had to act speedily.
74. He was involved with the combat of corruption since 1995 and he cannot remember how many entrapments he was involved in. Since 19 August 2015, the day of this incident, he was still involved in entrapments in terms of 252A.

THE DEFENDANT'S CASE: WARRANT OFFICER M XOLILIZWE

75. Warrant officer Mawethu Xolilizwe gave evidence stating he was under the command of Capt. Shilenge; he was also already at home when he received the instructions from his captain to report at the Johannesburg Magistrate's Court at Fox Street; he promptly responded and reported for duty. He and W/O Twala met Captain Shilenge at Fox Street. He learnt that this entire incident was dragging on since that afternoon from about 14:00 and it is now after 17:00 and even later. It worried him that the police were involved in a matter since 14:00 and they have not arrested the suspects and did not even register the tyres in for safe keeping in terms of a SAP13.
76. It was him that searched Majoro and ascertained that he did not have any money on him and thereafter he handed Majoro the R5 000.00. He arranged with him to lift his cap after he had handed the money over to the suspects, whom he did not know at all.
77. He and Twala went to Central Police Station and positioned themselves in such a manner that they could observe what was happening. Majoro got inside the vehicle and after a couple of minutes he got out of the official marked police vehicle he lifted his cap and he and Twala went immediately to this vehicle and found Plaintiff and the crew inside. He started looking for the money in the front part where the driver and passenger were seated, but could not find it at all. He, however, kept on searching and he was about to give up when he decided that he should go around and search there. That is when he saw a file more or less at the back of the driver's seat wedged in between the seat. When he took it out, money fell out of the official logbook of the vehicle and some money spilled out onto the floor of the vehicle. It was only then that he realised that there were passengers because the money fell "... in front of their toes ..." [his words]. He counted the money in the logbook and it was R3 600.00 in one-hundred-rand notes. He also counted the money that fell on the floor of the vehicle and it was R1 400.00 in one-hundred-rand notes. He immediately compared it with the photocopies and found that it corresponded with it. All of this he did in front and in the presence of Plaintiff and the crew.
78. He told the court that he arrested Plaintiff and Ntshwanti because he found the money in the officially marked vehicle inside that official logbook and that was the

money that Majoro gave them. He totally agreed with the proposition that he did not find the money on their personhood but it was fully under their control in the officially marked vehicle hidden in the official logbook of this vehicle.

79. He denied being part and parcel of Ntshwanti's so-called syndicate of which General Lesahabane were the main kingpin.

80. When he and Twala approached the police vehicle and when they opened the doors, neither Plaintiff nor Ntshwanti had any documentation with them, there were no police docket or statements that Ntshwanti allegedly were busy writing up. He was not investigating a case of suspected stolen tyres; he was in this task team under the command of Captain Shilenge and they were investigating allegations of corruption which was given to them under oath by Majoro. Yes, he believed Majoro that the police officers were extracting bribes and that is the fundamental reason for them obtaining authority for a 252A which they then executed.

THE DEFENDANT'S CASE: WARRANT OFFICER B. A. CLARK

81. Warrant officer Brett Archibald Clark also gave evidence. He was for 36 years in the Police service and with the current unit to monitor 252A's since 2012. He explained how he was monitoring the granting of authority to set a 252A in motion. In this instance he received an SMS which he forwarded to the Director of Public Prosecutions for authority; once he received authority, he forwarded it to the captain. It was only later that the oral authority were confirmed in writing. He was rather extensively cross-examined on the date of 19 July 2015 and that the authority was only valid for 19 August 2015. His answer was that it was obviously an error and should have been 19 August 2015. This aspect is just a lot of hot air around the erroneous date and has been dealt with already.

THE DEFENDANT'S CASE: WARRANT OFFICER J M TWALA

82. Warrant officer Jeremia Musawemkosi Twala gave evidence that on the day of the incident, he was stationed at the anti-corruption unit under the command of Captain Shilenge. He was commanded to report and meet with Shilenge at the Johannesburg Magistrate's Court in Fox Street. Shilenge gave him instructions to

take down Majoro's statement which he did. He saw Xolilizwe searching Majoro for money on him, found nothing and proceeded to hand him the entrapment money in the amount of R5 000.00 in R100 notes. He and Xolilizwe went to Central Police Station to set up the trap and to get a good vantage point from where they could observe the official police vehicle. He saw Majoro entering the vehicle and after some time he got out and took his cap off. As it was the agreed sign, he and Xolilizwe went to the marked police vehicle and found the police officers sitting inside it; one police officer behind the steering wheel and the other sitting on the passenger seat. Xolilizwe went to the driver's side and he, Twala went to the passenger side. They explained to these two police officers the reason why they are there and he saw how Xolilizwe searched for the money and how he eventually found the money. Xolilizwe counted the money and compared it to the copies. While they were busy with the arrest, another police officer came running from the inside of the charge office with a docket in his hands. Twala inspected this docket and found that nothing was written inside it; it was blank. The police officers inside the marked police vehicle were sitting inside it and they had nothing with them: no police docket, no statements. He denied being part and parcel of a syndicate that is led by General Leshabane.

83. He did not know Plaintiff nor the crew. Twala said during cross-examination that when Majoro got out of the police vehicle, he was not wearing his hat. He must have taken it off already. If this is different from Xolilizwe's evidence the court is of the view that it is not a material discrepancy at all and should be ignored. Twala wrote Majoro's statement²⁹. It was on this statement that the anti-corruption unit proceeded to obtain authority for the 252A. Twala was satisfied with the veracity of Majoro's statement.

THE DEFENDANT'S CASE: COLONEL S.J.A. TROLLIP

84. Colonel [retired since October 2023] Sean James Andrew Trollip was the officer in the Police Service who conducted between 500 to 600 hundred disciplinary hearings during his stint as the disciplinary officer. His evidence is satisfactory and clear in every material aspect; it is dealt with throughout this judgment and the court will therefore not cover the same ground again. He was adamant that

²⁹ Caselines 015-6 & 015-7.

his suspension in terms of Regulation 18(5) had nothing to do with the merits of the first suspension; it was Plaintiff's and the crew's misconduct during the disciplinary hearing that led to this suspension. He told the court that he did not know Plaintiff nor the crew and was not biased at all; he is regarded by employees and their representatives as "the enemy;" [his words]; it was clear to the court that Trollip regarded that as part and parcel of the hazards for being the disciplinary officer.

85. Adv. Ntsimane cross-examined Trollip on the so-called correct usage of the word/terminology "adjournment" or "postponement" to describe what happens when at a disciplinary hearing, a matter is remanded or postponed or adjourned in terms Regulation 18 (5) and what is the "correct word" to be used; it was proposed by Adv. Ntsimane, but not accepted by Trollip, that Trollip should have used the word "adjourn" as opposed to "postponed or postponement". Col. Trollip stuck to the terminology used in the Regulations namely "postpone." Adv Ntsimane did not submit any authority for her suggestion of the so-called "correct" use of this word.

86. The word "adjourn"³⁰ means "... to stop a meeting or an official process for a period of time, especially in a court of law: The court adjourned for lunch ... The trial court adjourned until next week." Another example of the word "adjournment"³¹ is given: "The judge granted us a short adjournment."

87. In the quoted Oxford Dictionary³², the word "postpone" is defined: "to arrange for an event, etc. to take place at a later time or date."

88. Trollip used the same word as it is used in the Regulations³³ and he cannot be faulted for that. The court prefers the usage of "postponed" because it is in line with the terminology of the Regulations. The court is of the view that there is no substance in the suggestion by Plaintiff's counsel and her submissions that Colonel Trollip used the incorrect word or even, worse that he did not understand what he was doing after 500 – 600 disciplinary hearings in 12 years.

³⁰ OXFORD ADVANCED LEARNER'S DICTIONARY SPECIAL PRICE EDITION. 2005.

³¹ Ibid.

³² Ibid.

³³ Caselines 019-1031 at 019-1045. Regulations 18(5).

89. Advocate Ntsimane argued³⁴ in respect of Colonel Trollip:

“He was charged departmentally where **Mr Trollip dismissed them unlawfully or maliciously because Mr Trollip did not understand the regulations he applied while presiding over the plaintiff’s case.** He was only paid two months’ salary for the second suspension that was ordered by Mr Trollip, which he won at the Bargaining Council. Mr Trollip’s **misunderstanding** of the regulations he applied as the presiding officer on disciplinary cases of police officers **left me flabbergasted** especially when looking at the number of 500 that he presided over. **How many lives had been ruined because of his wrong understanding of regulations. Surely something has to be done.** Our courts are not here to rubber stamp but to bring changes.” [emphasis by the court]

90. The first point of criticism against these allegations is that Trollip denied having “... dismissed them unlawfully or maliciously ...” He was emphatic in his response to this line of cross-examining by Adv. Ntsimane; he repeatedly said that he suspended them in terms of Regulation 18(5). This point on behalf of Plaintiff is rejected as ill-conceived and incorrect. The court finds that Trollip suspended Plaintiff in terms of Regulation 18(5).

91. The second point of criticism against Trollip is to state that “... Mr Trollip did not understand the regulations he applied while presiding over the plaintiff’s case.” This is also rejected. The court was struck by Trollip’s demeanour of candidness, truthfulness, impartiality and professionalism – the court is of the view that he must be regarded as being on top of his work as the disciplinary officer for the Police for 12 years. Trollip did not ruin Plaintiff’s or any other police officer’s career “... because of his wrong understanding of regulations. Surely something has to be done.” The court rejects the call that “... something has to be done.”

THE DEFENDANT’S CASE: MR. M.E NKABINDE

92. Mr Mzwantile Enok Nkabinde was the state public prosecutor during the criminal trial of Plaintiff and the crew. Nkabinde’s evidence is similarly dealt with throughout this judgement and the court will therefore not cover the same ground again, save to state that he was taken somewhat by surprise during cross-

³⁴ See Plaintiff’s heads of argument, that were presented to the court in a Word Document format and at paragraph 6.5 and it can be accessed on Caselines 025-40.

examination about the so-called discrepancies in the chargesheet and the instructions by the DPP. The court is of the opinion that it is not material and this aspect was dealt with satisfactorily by Counsel for the Defendants during her argument.

93. Ad para 3.38 of Adv. Ntsimane's heads of argument³⁵ she writes: "The public prosecutor ignored the charges that he was supposed to charge the plaintiff and Constable Ntshwanti with and drafted the charges of his own because he wanted both of them to be convicted of corruption which is more serious than what he was directed to charge them with, and this on its own is malicious, intentional, spiteful, cruel and vindictive." The court accepted the *bona fides* of Nkabinde; the so-called "discrepancies" was cured either by evidence or at least the Plaintiff's legal representative did not raise this point during the criminal trial. Furthermore, it was not raised in Plaintiff's pleadings and this point is also rejected. The 252A and other documents referred to in this judgment is about corruption and nothing else. There can be no doubt that Plaintiff and his crew were arrested, detained and eventually prosecuted for corruption and nothing else.

THE TYRES DOCKET AND THE CORRUPTION DOCKET

94. During evidence both plaintiff and his witness Mr Ntshwanti, tried their level best to deflect the court's attention from the corruption-docket to concentrate on the tyres-docket. They gave evidence at length referring to the "second docket"; eventually it transpired that this "second docket" was actually the tyres-docket. The court finds that plaintiff and the crew were trying their utmost to avoid references to the corruption docket because it was a very sore point to deal with.

95. The witnesses for the Defendant were cross-examined extensively on the existence and the contents of the tyres-docket. There is cogent evidence by Twala and Xolilizwe that the tyres-docket was empty and it was not in the official marked police vehicle at the time of the arrest.

96. It was argued by Plaintiff's counsel that the anti-corruption unit under Capt. Shilenge and his team should have investigated the tyres-docket prior to making any arrest on a basis of corruption. During argument the court put it to counsel for

³⁵ Caselines 025-23 ad para 3.38.

Plaintiff that, according to her argument, the tyres-docket should have been investigated fully, that the anti-corruption unit should have, ideally, to first obtained the Plaintiff's and the crew's statements regarding the allegations of suspected stolen tyres. Counsel for the Plaintiff's answer was in the affirmative. This is untenable and unpractical to the extreme. The anti-corruption unit was not investigating a case of suspected stolen tyres. They were investigating allegations of corruption by SA police officers and that it was ongoing and required urgent and immediate attention.

97. The witnesses for the Defendants were all of one accord that they were not investigating the tyres-docket; they were investigating allegations of corruption and therefor they were concentrating on the corruption docket. The state prosecutor was also very clear that he was prosecuting corruption and not suspected stolen motor vehicle tyres at all. At the time the 252A was requested and the trap organised, the tyres-docket did not exist.

98. Claims one and two, arrest, detention and prosecution are fundamentally about corruption. And not about suspected stolen property.

99. Counsel for Plaintiff strenuously argued that the SAPS anti-corruption unit under the leadership of Captain Shilenge, as well as the state prosecutor were grossly negligent and malicious by not investigating the tyres-docket prior to the arrest and detention on charges of corruption. Counsel for the Defendants disagreed with this approach and argued that the Defendants followed a sequence of events which were their methods of investigating the corruption allegations step by step.

100. In summary the court take into consideration the following events that ensued on 19 August 2015 after 17:00 when Captain Shilenge got the first telephone call from General Leshabane and Shilenge was given instructions to investigate allegations of corruption by some police officers.

101. Shilenge gathered his team of anti-corruption officers, W/O Xolilizwe and W/O Twala, to meet near the Johannesburg Magistrate's Court at Fox Street. He immediately applied orally for authorisation for an entrapment in terms of Section

252A [“the 252A”] and arranging for the delivery of the money in the amount of R5 000.00 in R100.00 notes:

101.1. He ordered W/O Twala to take a sworn statement from Majoro about the bribe in the amount of R5 000.00;

102. Under Captain Shilenge’s leadership:

102.1. Majoro was searched to ascertain that he does not have any other money on his person [Twala insisted that it was his ultimate duty to search Majoro];

102.2. arranging that Majoro go to the Johannesburg Central Police Station, where Plaintiff and his crew were waiting for the bribe to be paid over;

102.3. Twala gave Majoro instructions to take his cap off when he has handed over the marked money to indicate to the anti-corruption unit that he has handed over the bribe-money;

102.4. Twala and Xolilizwe went to Central Police Station, meticulously setting up the 252A by strategically placing the officers who were tasked to keep close observation of what is happening.

102.5. Once Majoro got out of the official marked police vehicle without his cap, Xolilizwe and Twala closed in on Plaintiff and his crew who were inside the vehicle and Xolilizwe then searched for the money.

102.6. Ultimately Plaintiff and his crew were arrested, without a warrant on a charge of corruption.

103. These steps above, speak volumes to the court about how meticulously the anti-corruption unit operated and how seriously they regarded their sacred duty to their fight against officials against whom there are allegations of corruption; they did not want to make any mistakes in this execution. That was how they investigated the allegations of corruption. The court is of the view that if the SAPS anti-corruption unit are so fastidious to investigate corruption, that this scourge

and plague of corruption by officials in high office would be eradicated, or at least contained, within a short space of time.

LEGAL PRINCIPLES: MALICE BY THE PROSECUTING AUTHORITY

104. Advocate Legetho argues as follows and the court quote from paragraphs 40 – 43 her heads of argument³⁶:

“40 From the evidence presented by Mr Nkabinde, there was no malice on the side of the NDPP to prosecute the Plaintiff. There was evidence contained in the witnesses’ statements including the section 252A authorisation, the copies of the money involved in the bribery or corruption activity. There was an eyewitness/witnesses in the form of Moosa and Rafiki who made statements regarding the sequence of events until the exchange of money occurred in the police combi.

Paragraph 41: The prosecution, had at all material times intended to utilise all the witnesses who were involved in the matter, in particular, Moosa, Rafiki, Majoro and the police officials who arranged the entrapment and effected the arrest. Unfortunately, the two crucial eyewitnesses disappeared during trial and could not be called to testify.”

Paragraph 42: Mr Nkabinde testified, that during the corruption trial, warrants of arrest were issued against the two crucial witnesses, but because they are foreign nationals they could not be traced.

Paragraph 43: Under cross examination the plaintiff’s counsel enquired on whether it was a good idea to release the foreign nationals from custody, while they will be required as witnesses in court at a later stage.

Paragraph 44: We submit that it is unconstitutional to incarcerate foreign national based on securing their attendance in court for giving evidence.

105. This argument by Adv Lekgetho is accepted by the court.

LEGAL PRINCIPLES: IRRECONCILABLE VERSIONS: THE COURT MUST MAKE SOME FINDINGS ON THE EVIDENCE

106. Adv Lekgetho on behalf of the Defendants referred the court to *Stellenbosch Farmers’ Winery Group Ltd & another v Martell et Cie & others*³⁷ and she urged

³⁶ Caselines 025-45 and more specifically on Caselines 025-55.

³⁷ 2003 (1) SA 11 (SCA).

the court to have regard to these guidelines and the court agrees with Adv Lekgetho. Nienaber AJ wrote a unanimous judgement [5x judges of appeal] and the trial court should follow these guidelines closely. At paragraph 5 Nienaber JA writes:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

107. The court has considered most of the aspects that are relevant to this matter, referred to by Nienaber JA, and found that the irresistible inference to be drawn is that the Plaintiff’s case fails miserably and the Defendants’ case was proven on a balance of probabilities.

LEGAL PRINCIPLES: ARREST WITHOUT A WARRANT

108. Section 40 (1) (a) & (b)³⁸ a peace officer may without warrant arrest any person: “(a) who commits or attempts to commit any offence in his presence; (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

109. An arrest without a warrant for arrest is rather risky and the discretion should be executed carefully and judicially Captain Shilenge and his officers under his command were aware of the pitfalls of an arrest without a warrant and that is the reason why Captain Shilenge insisted that Twala should take Majoro’s statement on oath, before proceeding with the entrapment.

110. Ad paragraph 8.2 of the Defendants’ amended plea³⁹, it was pleaded as follows: “The Defendants specifically plead that the Plaintiff was detained in terms of section 50(1) of the Criminal Procedure Act 51 of 1977.”

111. Counsel for the Plaintiff argued that the corruption unit under the leadership of Captain Shilenge, should have first investigated that tyres-docket before they proceeded with the 252A procedure. This argument is a red herring and is rejected. Defendants’ witnesses stated repeatedly under oath that they were not involved with the investigation of the tyres-docket.

LEGAL PRINCIPLES: SECTION 50(1) OF THE CPA: BAIL

112. The court is of the opinion that only section 50(1) (a) & (b) is applicable because the Plaintiff was granted bail in his first appearance [21 August 2015] in court; the court was informed by the state prosecutor during his evidence that the application for the bail was not opposed. Section 50(1) (a) & (b)⁴⁰ under the heading “Procedure after arrest read as follows:

“(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

³⁸ Criminal Procedure Act 51 of 1977 section 40 (1) (a) & (b).

³⁹ Caselines 006-32.

⁴⁰ Section 50(1) (a) & (b) of the CPA

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.”

LEGAL PRINCIPLES: DRAWING OF INFERENCES FROM FACTS

113. “The drawing of an inference requires properly established objective facts” – this was stated by Southwood BR in his ESSENTIAL JUDICIAL REASONING⁴¹ The learned author referred to specific case law such as *S v Mtsweni*⁴². And to *S v Essack and Another*⁴³ where Muller AJ wrote the majority judgment as follows:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture” Rumpff JA dissented from the majority, but his reasons were not disclosed in the report and I assume that Rumpff in all probabilities agreed with the above quote, but the application thereof differed from the majority.

114. Watermeyer J.A. stated in *R v Blom*⁴⁴:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

115. I am aware that this quote is referred to extensively in our courts, be it the High Courts or be it in the Magistrate’s Court. It should be kept in mind that the learned judge of appeal, Watermeyer said this in respect of a criminal trial. Why then should this court in a civil matter take cognizance of this utterance? The court is of the view that the reason for that, lies in Watermeyer J.A. stating clearly

⁴¹ Lexis Nexis 2015 at page 51 – 52.

⁴² 1985 (1) SA 590 (A)

⁴³ 1974 (1) SA 1 (A) on 16 D.

⁴⁴ 1939 AD 188 on 202/3

and unequivocally that “In reasoning by inference there are two cardinal rules of logic which cannot be ignored ...” and then he stated the two “cardinal rules of logic”. It can and should be applied in civil and criminal cases.

116. In the instant case, in respect of the inferences to be drawn from the 252A, it is irresistible that Majoro handed the R5 000.00 in R100 notes to Plaintiff and Ntshwanti while they were inside the officially marked police vehicle and that it must have been either one of them that put the money in the official logbook of the officially marked police vehicle. The court is of the view that this was proven on a balance of probabilities. The evidence for the Plaintiff is rejected and it is found to be speculative, evasive, vindictive and geared towards misleading the court into accepting that he is blameless and that he was virtuously pursuing his high calling as a police officer busy with the arrest of criminals and that Plaintiff was maliciously, unlawfully arrested, detained and wrongfully, falsely and maliciously prosecuted – the court is aware that it is not a criminal trial. Having stated it so tersely, it should be read with the entire judgment and this paragraph should not be read in isolation.

LEGAL PRINCIPLES IN RESPECT OF THE CLAIM FOR LOSS OF EARNINGS

117. In respect of his claim for loss of earnings, the court finds that he is the author of his own misfortune by wilfully disregarding the clear and unambiguous wording of his notice of suspension⁴⁵ in terms of Regulation 18(5). His claim for loss of earnings is also dismissed. It is clear from his own convoluted evidence that he followed the incorrect procedure in the face of the onus being squarely on him to reconvene his disciplinary hearing.

THE COURT ORDERS:

118. I therefore make the following orders:

118.1. Plaintiff’s claim for wrongful and unlawful arrest and detention is dismissed.

118.2. Plaintiff’s claim for wrongful, false and malicious prosecution is dismissed; and

⁴⁵ Caselines 019-947.

118.3. Plaintiff's claim for loss of earnings is dismissed.

118.4. It is ordered that Plaintiff pays the taxed or agreed party and party costs of the Defendants.

**COERTSE CJ AJ
ACTING JUDGE OF THE
HIGH COURT
JOHANNESBURG**

For the Plaintiff: Advocate Ms B.B.
Ntsimane

For the Defendants: Advocate Ms N
Lekgetlo instructed by State Attorney
for both defendants