

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/26369

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:/NO
(3) REVISED: YES

19 May 2023

DATE

SIGNATURE

In the matter between:

Sindisa Tessa Tsotetsi

First Plaintiff

Sindisa Tess Tsotetsi (on behalf of her minor child)

Thesele Tsotetsi

Second Plaintiff

Tshego Molefe

Third Plaintiff

Xolani Makroti

Fourth Plaintiff

Thebe Tsotetsi

Fifth Plaintiff

and

Minister of Police

Defendant

Summary: Delict – Arrest and detention – Alleged unlawfulness – Claim for damages- Arrest and detention lawful

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 19 May 2023.

Neutral citation: *Tsotetsi and Others v Minister of Police (Case 26369/2021)* [2023] ZAGPJHC 509 (19 May 2023)

JUDGMENT

MUDAU, J:

- [1] The plaintiffs instituted an action for damages against the defendant for the alleged unlawful arrest and detention by members of the South African Police Service ("SAPS"). In its amended plea, the defendant denied that the police had acted wrongfully and pleaded that the plaintiffs have been lawfully arrested without a warrant in terms of section 40(1) of the Criminal Procedure Act 51 of 1977 ("CPA") on charges of possession of firearms and ammunition. At the commencement of the trial before me the defendant accepted that it bore the onus of establishing the lawfulness of the plaintiffs' arrest.
- [2] The version of the defendant, who began leading evidence, was testified to by Sgt Moagiemang. Another police member, Warrant Officer Bester (Bester), who is the investigating officer also gave evidence. However, the latter's evidence related largely to the status of the case in respect of which 12 suspects, that included the plaintiffs, were arrested. In this instance, 3 firearms and a large quantity of live rounds of ammunitions were also involved. The ballistic reports regarding that were still outstanding.
- [3] According to Bester, two of the cell phones recovered from the scene were later handed back to their lawful owners which includes the first plaintiff, Tessa Tsotetsi. A VW Kombi with false registration numbers, which had been impounded at the scene was later handed back to the lawful owner. He could add nothing to the circumstances regarding the arrest of the plaintiffs in so far as it relates to the firearms and ammunition charges.

- [4] Sgt Moagiemang testified essentially as follows. He is based at Kagiso Police Station. On Saturday 19 December 2020, he and his colleague, Sergeant Koie were on crime prevention duties at Kagiso in the Westrand, doing stop and search duties pursuant to a special operation, "Okae Molao". They drove towards Father Gerald section in Kagiso. It was about 20h40 when they heard gunshots from Nompumelelo St. They drove to the area where they found a minibus Kombi parked on the street directly opposite house number 8966 with people dancing to the music. When the two officers approached the group of people, they ran inside the yard of House number 8966. He and Koie gave chase into the yard through the open gate and did not lose sight of the group of people.
- [5] Inside the yard the group of people, about 12 of them, were ordered to remain on the ground between the main house and an outside toilet. They were all searched as the two officers suspected that they were the ones firing the shots. However, nothing was found in any of the suspects' physical possession. However, next to where the toilet was, as depicted on Exhibit "B", a firearm with two magazines were found about a meter away from where the suspects were being searched. His colleague pointed the incriminating items out to him. The firearm smelt of gunpowder and thus confirmed his suspicion that it had just been used. The two magazines contained 21 live rounds of ammunition in respect of which none of the suspects would take responsibility. The first plaintiff, Tessa Tsotetsi, protested that the police were embarrassing them as it was a funeral house.
- [6] The police officers asked to search the Kombi 5 to 6 minutes later. Sergeant Koie conducted the search of the Kombi in which two further firearms and ammunition, 26 and 19 rounds respectively, as well as cell phones that were later claimed by some of the female suspects, were recovered. Sgt Moagiemang explained the plaintiffs and their companions were arrested and detained on the grounds of common purpose for possession of the firearms and ammunition. However, the second plaintiff, an infant was not arrested but the infant's mother, the first plaintiff insisted on taking the infant along to the police station as the infant was still breastfeeding. It is common cause that

“Exhibit A” is the letter addressed to the SAPS’s forensic science laboratory detailing the 3 firearms and ammunition found at the scene of arrest and the Kombi as well as 16 spent cartridges recovered at the scene.

[7] Under cross examination, Sgt Moagemang also testified that they radioed for additional help and three other police vehicles with six officers were the first to respond after the call. Later, about 15 more police vehicles arrived with between 20 and thirty officers. Of the 12 suspects, the six males had been searched by the time they were joined by the first group of six officers, which hardly took 5 minutes. It was the female officers who searched the remaining six female suspects, which hardly took 10 minutes. As to why he referred to the plaintiffs and their companions as suspects he explained that he and a colleague held a suspicion after hearing gunshots and seeing them run into the nearby yard and that they were the ones who had fired the shots. He explained that they chased them with firearms in hand.

[8] As for the reason why the first firearm was not seen immediately, he explained that they wanted to search the suspects first and to secure the scene. As for the reason why, they did not wait for backup, it was because he did not want to lose sight of the suspects. When it was pointed out to him that per Sergeant Koie’s statement (Exhibit D 2) it was he who indicated where the firearm was, he maintained that it was the other way round and that his colleague showed him the firearm. He was asked whether he arrested any of the plaintiffs. He explained that the arrest was effected in his presence.

[9] In re-examination, he testified that the Kombi which had false registration plates was confiscated by the police for additional investigations.

[10] The first plaintiff, Tessa testified regarding quantum that on 19 December 2020 testified that she was in the yard with other males and females. No one told her that she was under arrest. The police ordered the males out of the yard. She was left in the yard when a female police officer approached and told her to come along. There was no interaction with the females there present until she was ordered out of the yard. The females were ordered out of the yard first followed by the males. They were escorted to a police van. She informed the

police officer that she had an infant. She was told to bring the infant with her. She was then escorted into the house by two police officers, a male police officer and a female. She packed a bag for the infant containing milk formula water and other essentials and she was thereafter escorted by the police into a kombi together with the infant.

[11] On the way to the kombi, she noticed that there were approximately 20 people that had gathered outside the police cordon as onlookers. She knew them from the community. Whilst she was in the kombi with her baby there were two other police officers in the vehicle. She remained in the kombi from about 10pm until about 3am and was thereafter taken to the Kagiso Police Station. At the police station, she was made to wait with her baby outside the holding cells area where she sat on a bench. About an hour later, she was handed a notice of rights. She saw that the offence on the notice of rights stated possession of unlicensed firearm. She refused to sign for the notice of rights as she informed the police that she was not in possession of a firearm. She was thereafter detained in the cells at approximately 5am. She was given a filthy blanket and sponge to sleep on. She could not use it as it was too filthy. She stated that the police gave no consideration that she was detained with an infant. The cells itself was filthy. There were about fifteen other people in the cells and three others were brought in at a later stage.

[12] Tessa also testified that it was during the Covid-19 pandemic and there was no social distancing in the cells. She was asthmatic and she was affected by other suspects smoking in the cells. There was no running water, and the toilets did not flush. As she could not use the sponge to sleep on, she spread her child's blanket on the floor and placed a jacket on it. She and her child slept on the blanket and the jacket. She testified that she cried when she was lodged in the cells with her baby who was about eleven months old. Her baby was released the next day at around midday, and she was released from the court cells on 22 December 2020, also at around midday. She was aggrieved about the arrest and detention for something that she had not done.

[13] Tessa testified that the arrest and detention was embarrassing and degrading for her in the community especially because she was detained for a period of

three days. The family was in mourning for her late brother who committed suicide and was yet to be buried. She also testified that her stepmother could not have remained with her infant child as she was the chief mourner who remained on the mattress. Neither could her younger sister be of help in that regard as she was 14 years of age at the time. She was about 24 years old at the time of her arrest and she worked as an au pair. Her arrest and detention affected her employment opportunity.

[14] Tessa testified that she was interviewed and shortlisted for a job as a personal assistant with a company named Stefanutti. She was to start her employment in Kempton Park where she also had to reside. She was contacted before the date she was to start and questioned about her arrest and detention. After having explained what had happened, she was requested to produce proof of arrest. She went to see Warrant Officer who gave her proof that there was a *nolle prosequi* certificate regarding the case, which she provided to the company. However, nothing came out of it. She is presently employed by the Department of Education as a Reading Champion Assistant Teacher.

[15] During cross examination, Tessa testified that she was not forced to fetch the infant. On her version, she did not see anyone being chased away as she was inside her yard. She testified that she complained to the police that people were smoking in the cells, and this was affecting her and her child as she was asthmatic. The police officer warned the suspects not to smoke in the cells. She testified that she had a problem about being made to sit in the kombi with her child for such a long period of time without being allowed out of the vehicle.

[16] The third plaintiff, Mr Molefe testified that on 19 December 2020, he arrived at house number 8966 Mpumelelo Street at approximately 8.30pm. The police arrived shortly afterwards. When the police arrived, he was standing outside the property near the gate, together with the fourth plaintiff, Xolani Makroti. He was searched by the police and requested to go inside the property.

[17] Later, he was inside the property near the gate with other males and females when the police requested that they accompany the police to the police vans. He was lodged in the police vehicle at around 10pm. He did not hear any gun

shots and neither did he notice any empty cartridges on the street. He knew nothing about the firearms that were found by the police. He remained in the police vehicle until about 3am when they were taken to the Kagiso Police Station. At the Kagiso Police Station they were detained in the holding cells. They were issued with notice of rights about an hour later. The police asked why they were playing with firearms. He informed the police that he knew nothing about firearms.

[18] He was questioned about the firearm that was found in the yard and was told that he was being charged for possession of the firearm. He informed the police that twelve people cannot be playing with the one firearm or be in possession of the same firearm. He also told the police that there were no fingerprints taken from the firearm that could show that they were in possession of the firearm. After being handed a notice of rights he was detained in the cell. The cell was dirty, and the sponge was not good to sleep on. The blanket was very dirty, and he did not use it. There was no running water in the cells and the toilet did not flush. The overall condition of the cell was not good. He was not happy about being arrested and detained for something that he did not do. He too was released from custody at the court cells on 22 December 2020.

[19] During cross examination, Molefe was asked why he went inside the yard he explained that after being searched outside the yard, police told them to get inside the yard. On his version, they were inside the yard and next to the gate when a police officer showed them a firearm and ammunition inside a plastic allegedly found inside the yard. In response to clarifying questions by the court as to whether he could dispute there was shooting that went on at the scene, he responded that he was not able to do so. Arising from this question, counsel for the plaintiffs asked him whether he saw any empty cartridges at the scene and if he did, how the spent cartridges got there to which he had no positive response.

[20] The 4th plaintiff, Mr Makroti testified that on 19 December 2020, he arrived at 8966 Mpumelelo Street at approximately 8.30pm. He went there with the third plaintiff, Mr Molefe to pay his respects. He was a friend of a sibling to the deceased. He and Mr Molefe were standing near Mr Molefe's vehicle, which

was parked near the gate when the police arrived. After the police arrived, they searched people, and they were thereafter told to go inside the yard of the property. They were in the yard under the carport when the police searched the yard. One of the police officers showed them a firearm and magazine in a clear plastic evidence bag. They were questioned about whom the firearm belonged to. However, none of the people in the yard knew anything about the firearm.

[21] Makroti also testified that whilst he was outside the gate with Mr Molefe near their car, he did not hear any gun shots and neither did he see anyone firing gun shots. He too did not notice any spent cartridges on the street where they were. He and the other males were escorted to a police vehicle whereas five females were escorted to another police vehicle. He was arrested around 10pm and he remained in the police van until about 3 am when he was taken to the Kagiso Police Station. He remained in the holding cells for about an hour. He was thereafter issued with a notice of rights and detained in the cells at about 5pm.

[22] The detention cell was filthy. There was no running water, and the toilet did not flush. The toilet was previously used, and the cell, smelly. They were requested to choose blankets and sponges to sleep on. The blankets and sponges were also filthy and smelt badly. He remained in the cells until the 22 December 2020, when he was released from the court cells at around midday. He too felt aggrieved by the arrested and detention for something he did not do, which brought shame to his family in the community. He was 25 years old at the time of his arrest and employed as a Fruit and Veg Controller at Checkers.

[23] As a result of the arrest and detention, he was unable to attend work for three days resulting in a written warning. He had left his employment at Checkers about a year and half by the time he gave testimony. Currently, he is now employed by the Department of Education as an Assistant Sports Teacher. He was told that firearms were found in a VW Kombi on the street but knew nothing about those firearms. He was told about the firearms whilst he was inside the police van.

- [24] During cross examination, Makroti confirmed that the police arrived shortly after his arrival between 8:30 PM and 9:00 PM. When it was suggested to him that the police officer who told him about the firearms found inside the combine could have been Sgt Moagemang, he testified that he only knew Sgt Moagemang, from his attendance at court. He conceded however that he could not dispute that Sgt Moagemang was at the scene of the incident. In answer to a question posed by this court, he explained that the carport in which they had gathered start at the gate, which is approximately 2 meters from the tarmac road.
- [25] The 5th plaintiff, Mr Tsotetsi testified that he resides at 8966 Mpumelelo Street Kagiso with his sister Tessa Tsotetsi, his younger sister Tholwana and his nephew Thesele. His biological mother resides a few streets away in Kagiso. His father was not home as he was arrested and in custody for an unrelated matter. His stepmother resides in Orange Farm. He confirmed that his half-brother who resided in Protea Glen Soweto had committed suicide and that 8966 Mpumelelo Street being the family home, was used as a funeral home. The brother resided in Protea Glen Soweto.
- [26] On Saturday 19 December 2020, mourners attended the house during the day. At some stage, he went out for physical exercises and returned at about 6pm. At that stage most of the people had left. Inside the house were his stepmother, his sisters Tessa and Tholwana, as well as his nephew Thesele. There were people that had gathered on the street outside the property. After his return from training, he had a meal. Thereafter, he went outside to tidy up the yard and put things away. He later went outside the yard to “chill” with the third and fourth plaintiffs. This was between 8 to 9pm. Whilst he was busy in the yard, he heard gunshots, but that was before 7pm. When he returned from training, the gate was closed and upon entering the yard, he closed the gate.
- [27] When he went outside after packing things away, he heard his sister, Tessa calling him back. He spoke to his sister through the gate and thereafter turned towards the street to join the third and fourth plaintiffs. The latter were standing near the third plaintiff’s motor vehicle, a VW Polo that was parked near their gate. At that stage he noticed a convoy of police vehicles approaching. There

were at the time, about fourteen to fifteen vehicles that were parked on either side of the street, a span of about three houses. The VW Microbus Kombi was parked opposite the gate on the other side of the road.

[28] He also noticed a group of people that were outside the VW Microbus. He could not recall how many people were in the group. He was not a part of that group, and neither were any of the other Plaintiffs. The police vehicles parked in the middle of the road and the police exited their vehicles. Some people ran away, and others were searched by the police. The fifth plaintiff knew some of the people on the street. Some were from Soweto and others from Kagiso. The police enquired why the people had gathered there but were informed that they had come to pay their respects. The police then ordered some of those people to stand near the gate after searching them.

[29] According to fifth plaintiff, after searching some of the people, the police allowed them to go. Some people left in their cars and some cars belonging to the people who were ordered to stand aside near the gate, remained on the street. On his version, there were about 30 police vehicles and about 40 police officers that arrived in the convoy. After the police had searched the people, those that indicated that they had come to the funeral home were ordered to stand near the gate. He was part of a group of about 20 people. After a while the police ordered them to proceed into the yard, which they did. The police ordered them to close the gate. The police continued searching the vehicles that were in the street whilst they continued to watch the police through the closed gate from the carport for about 15 minutes. On his version, he was not searched by the police. Tessa was in the yard, but joined the group that stood under the carport and watched the police.

[30] The structures after one enters through the gate is a carport, and beyond that a storeroom. To the left of the storeroom is the main house and behind the storeroom, is a toilet. Some of the people from the group jumped over the wall at the back of the house and left. After about 15 minutes, observed a group of policemen approaching the gate. They demanded that the gate be opened as they wanted to search the premises. Thebe and Tessa enquired from the police if they had a search warrant. The police ignored the request and demanded

that the gate be opened. He and Tessa pleaded with the police not to conduct themselves in the manner that they did as it was a funeral house, But the police were loud and aggressive. According to the fifth plaintiff, he and Tessa with the help of a few others, tried to hold the gate, but the police forced it open and about 20 to 30 of them entered the yard and spread out.

[31] The fifth plaintiff also testified that he saw some police officers attempting to open the sliding door of the main house. He and Tessa went to them and begged them not to enter the house as they were in mourning and the police were being disrespectful. The police ignored their plea and one police officer proceeded into the house, followed by three more. They searched the dining room area in their presence but did not find anything illegal. The police then exited the main building through the sliding door. Whilst he and Tessa stood at the entrance by the sliding door, he observed a policeman approaching them holding an evidence bag with a firearm and magazine inside who informed them that he found the firearm and magazine at the back where the toilet is.

[32] Tessa enquired if it would not have been a proper procedure to take them around while searching, so that they could also see that he had found the weapon where he allegedly found it. The police officer then offered to point out where he found the weapon. He took them to the toilet and pointed to a spot behind a generator in the toilet. He and Tessa told the police officer that they knew nothing about the firearm and magazine. They then proceeded to the front of the house to the carport area. The policeman thereafter exited the yard with the weapon. General Kekana ordered that the gate be closed and that no one should exit the yard. He could not recall Sergeant Moagiemang showing the firearm and magazine to the group and enquiring who the firearm belonged to. The police continued searching outside. At this stage there were 12 persons including the plaintiffs left under the carport, 6 males and 6 females.

[33] The fifth plaintiff went on to state that, after a while, some police officers came into the yard and enquired from one of the males if he was the owner of the VW Microbus. The police were holding either an ID card or a driver's licence. He denied that he knew the car or that the card belonged to him. Thereafter the entire group was ordered to exit the yard. The females were escorted out first

and into a police van. The males were thereafter escorted into another police van. He did not know any of those females and neither did he know the person that was approached by the police officer. Thereafter, he was detained in the police van at about 10pm where he remained with the other 5 males until about 3am. He stated that it was unbearable in the van due to the confined space as he could not stretch.

[34] At the police station the 5th plaintiff testified that they were detained in the holding cells where they waited for about an hour until he was handed a notice of rights and he was later detained in another cell at about 5am. There was no running water in the toilet and the toilet could not flush. As a result, the smell in the cell was foul. The available blankets had an awful smell. There were sponges available to sleep on. He was very cold during the night as he did not have a jacket. He remained in the cell until 22 December 2020 when he was released from the court cells at around midday.

[35] The fifth plaintiff also testified that he knew nothing about the firearms and ammunition that were found in the VW Microbus. On his version, he could not remember seeing any spent cartridges found at the scene. The entire experience was unpleasant, and he was concerned that he would have a criminal record. He was in his final year of university that year and was looking forward to pursuing opportunities thereafter. He was studying IT Business Systems. About a year later, he applied for employment and after a background check was done, it was picked up that he had previously been arrested. He explained the situation that there was a nolle prosequi. He is currently employed as a Software Tester. At the time of his arrest, he was 21 years old.

[36] During cross examination, the fifth plaintiff was asked to confirm that the discharge of firearms at the scene was a mark of paying respect to the deceased, he could neither agree nor disagree. He confirmed however that he too heard gunshots. Upon being pressed whether he could agree or disagree that the sound came from his street, he pointed out that he was not able to say as he was busy inside the yard. As to the question by the police in relation to the gathering to whom it was directed to, he could not explain if his core

plaintiffs heard that. He disputed that he went with the police and others to the VW Kombi parked outside when it was searched.

- [37] It is trite that an arrest is generally a more drastic method of obtaining the presence of an accused at his trial than service of a summons, however an arrest is only lawful if statutorily permissible given the high premium placed by the Constitution on the rights to human dignity and to freedom. In our law, a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1.
- [38] As was held in *Duncan v Minister of Law and Order*¹ the jurisdictional facts for a section 40(1)(b) defence of the Criminal Procedure Act 51 of 1977 (“CPA”) are that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.
- [39] In their nature Schedule 1 offences are serious offences. The rationality of the arrestor’s decision on that question depended upon the particular facts of the case, however, in cases of serious crimes, such as those listed in Schedule 1, an arrestor could seldom be criticised for arresting a suspect to bring him or her before court.² The legislator permits a peace officer the right to make an arrest in the circumstances set out in section 40 of the CPA, as a result of which due compliance with that section by the peace officer is lawful and affords him or her protection against an action for unlawful arrest.³
- [40] *Sekhotho* reminds us at para 39, that “peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality”. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the

¹ 1986 (2) SA 805 (A) at 818G – H.

² *Minister of Safety and Security v Sekhoto* (2011 (1) SACR 315 (SCA) at para 42-44 (*Sekhotho*).

³ *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W) at 144b – c.

vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached”.

[41] As the SCA stated in *Sekhotho*, a peace officer could seldom be criticised for arresting a suspect for that purpose.⁴ Generally, the object of an arrest must be to bring the arrestee before a court to be charged, tried, following which either conviction or acquittal is the result.⁵ It is apparent from the case, as presented by both parties before this court, that the only issue between them in relation to this cause of action concerned whether the peace officers had reasonable grounds for the arrest. However, the onus is on the defendant to show that the arrest and detention was lawful. The corollary is that if, for whatever reason, an arrest is unlawful, then the subsequent detention of the arrestee will similarly be unlawful.⁶

[42] The defendant submitted that on the evidence before this court, it was proved that the arrest was lawful as it was made in compliance with section 40(1)(b) of the CPA. The plaintiffs contended that in the absence of evidence by Koei who did not testify that he entertained a suspicion, the defence raised by the defendant falls to be dismissed. The general rule is that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. In this matter call, the lawfulness or otherwise of the arrest is resolved by which version is accepted by this court.

[43] When the evidence is evaluated in its totality, I have no difficulty in concluding that the version presented by the defendant through Sgt Moagemang is more credible and convincing than any of the plaintiffs in the salient aspects of the case. It is apparent and not seriously challenged that the two officers responded to the sound of gunshots when they arrived at the scene of arrest not long that after. That shots were fired is borne out by the 16 spent cartridges picked up at the scene as per Exhibit A, the forensic evidence bag. This is proof which the plaintiffs could not challenge. There is no suggestion that the spent

⁴ *Sekhotho* at para 44.

⁵ See *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ) at para 28; *Ex parte Minister of Safety and Security & others: In re S v Walters & Another* 2002 (2) SACR 105 (CC), 2002 (4) SA 613 (CC).

⁶ *Minister of Law and Order, Kwandebele, & Others v Mathebe & Another* 1990 (1) SA 114 (A) 122D

cartridges were planted at the scene by the police. The evidence that there was shooting is corroborated by the evidence of the fifth plaintiff who confirmed hearing gunshots outside in the street of his home.

[44] In addition, there was no challenge to the evidence by Sgt Moagemang that the group of people were dancing to the music coming from the Kombi when the police stopped their motor vehicle 2 meters away from the group on the road. This is also consistent with the version of the fifth plaintiff to the effect that he joined his friends 'to chill'. His evidence that the plaintiffs and 7 others ran from the police inside the yard of house number 8966 and that the police had to chase after them with firearms in hand is most probable. Under these circumstances there would have been no opportunity for a fleeing group of people to close the open gate.

[45] It was contended on behalf of the plaintiffs that Sgt Moagemang's failure to observe large structures like the carport and the storeroom adds to the improbability of his version. The criticism is without merit. The situation by its nature was volatile. As he explained, he and his colleagues had to keep their eyes on the group. He identified the outside structure as a toilet not far from where one of the firearms was recovered.

[46] Counsel for the plaintiffs submitted that any reasonable policeman would have waited and not placed his life in danger in that manner as there was no compelling reason to immediately pursue the suspects into the yard where there were buildings that the suspects could use as cover and fire upon the policemen. Again, this is without merit. The police were on crime prevention duties in that part of the city bedevilled by serious and violent crimes. They obviously reacted on the spur of the moment. As it turned out firearms with serial numbers filed off were recovered from the scene of arrest, which could only have been intended to be used for unlawful activities. The group had been cornered and ordered to stay on the ground as they were searched. The police called for additional help which arrived.

[47] The fact that the firearm recovered from the yard was found later but within minutes, there is absolutely no ground for any valid criticism. It is common

cause that Sgt Koie did not testify because he reported sick and unavailable when the defendant's evidence was led. As for the discrepancy between Sgt Moagemang testimony that Koie was the first to see the firearm, which he then brought to his attention whereas Koie 's statement, Exhibit D2 suggests it was Moagemang who saw the firearm first, is not a material discrepancy. First, Koie did not testify and therefore his version was not subject to cross examination. Moagemang who testified insists that it was Koie, who first saw the firearm and brought this to his attention. Counsel for the plaintiffs contended that in the absence of a reliable version as to who in fact found a firearm in the plaintiffs' yard, it cannot be concluded from the evidence that the firearm and magazine was in fact found in the yard. Counsel also argued that it is not improbable that the firearm was found in one of the vehicles in the street and to explain the arrest, the police falsely implicated the suspects by stating that the firearm was found in the yard. Again, this is without any merit the uncontroverted evidence was that the search of the Kombi was done in the presence of all the suspects.

[48] There was no evidence presented by any of the plaintiffs that the firearm allegedly found inside the yard, could have been found in any vehicle outside the yard. Neither was this ever suggested. As Sgt Moagemang testified, there was only a kombi parked directly in front of the gate where the group of people were, which was the subject of the search. There is no plausible explanation tendered why the police would hide the search conducted inside any other vehicle other than the kombi if that was the case. On the uncontroverted version, firearm, ammunition as well as spent cartridges were seized from the scene of arrest and sent for ballistics tests.

[49] All the suspects found at the scene were not only cornered but arrested in circumstances where firearms were evidently discharged in public. As for the suggestion that, Moagemang could not have been able to arrive at a reasonable opinion leading to the arrest of the plaintiffs, this is without merit is the allege allegations upon which the state relies were in his presence. In essence the firearm and ammunition found from the yard was found in his presence. It was clear from his evidence that he was party to the suspicion leading to the arrest of the plaintiffs.

[50] In my view the evidence of the defendant as to disputed events should be accepted as being more probable than that of the plaintiffs for the reasons set out above. As for the infant taken along at the request of the first plaintiff, there is no doubt that that was for the primary well-being of the infant since on the common cause facts, there was no one at the property who would have taken the responsibility of taking care of the best interests of the child. It is common cause that the infant was released into the care of a relative the next day as soon as circumstances permitted.

[51] The eventual conviction or acquittal of a person previously arrested is not of itself proof that the arrest was lawful or unlawful.⁷ Neither is the fact that the State has withdrawn charges against him or her.⁸ Accordingly, the authorities relied upon by counsel on behalf of the plaintiffs such as *S v Mbuli*⁹ are unhelpful and of no application. Similarly, a valid, lawful arrest is not a requirement for the triability of the arrestee. In spite of the unlawfulness of his original arrest, he can later be tried and either convicted or acquitted.¹⁰ The evidence leads to an inescapable conclusion that the defendant's actions were reasonable and lawful. With this finding, it must follow that the plaintiffs' subsequent detention was lawful. It follows, accordingly, that the claims against the defendant are without merit.

[52] The action is dismissed with costs.

T P MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing:

For the Plaintiffs:

Date of judgment:

For the Defendant:

⁷*R v Moloy* 1953 (3) SA 659 (T) 662E.

⁸ *Lekhuleni v Minister of Police* 2014 JDR 2202 (GP); *William v Minister of Police* (unreported, MPM case no 1911/2017, 15 October 2019) at para 30.

⁹ 2003 (1) SACR 97 (SCA)

¹⁰ *R v Jones* 1952 (1) SA 327 (E)

13 February to 23 February 2023

19 May 2023

Mr L Naidoo instructed by Logan
Naidoo Attorney

Adv. K Mashile instructed by State
Attorney