

REPUBLIC OF SOUTH AFRICA



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

Case Number: 6107/16

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

.....
 DATE
 SIGNATURE

In the matter between: -

MOTLOUNG DANIEL LETHENA

FIRST PLAINTIFF

THOKOANE STRIKE EDWARD NO

SECOND PLAINTIFF

In his representative capacity obo

THOKOANE PITSI SOLOMON

and

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF

PROSECUTIONS

SECOND DEFENDANT

Summary: Alleged unlawful and wrongful arrests without warrants in terms of sec 40 of the Criminal Procedure Act No 51 of 1977 and alleged unlawful and malicious, alternatively negligent detentions and

prosecutions - Requirements restated - The offence of unlawful possession of firearms in terms of the Firearms Control Act, No 60 of 2000 included and envisaged in Schedule 1 of the Criminal Procedure Act in respect of which an arrest without a warrant is competent - Arrest of an accomplice without a warrant based on a confession of one another accomplice competent - Doctrine of precedent - Principles restated - Circumstances under which a single judge may find that a finding by a previous full bench was rendered *per incuriam* and not binding - Peace officers not obliged to resort to a milder method of procuring a suspect's attendance at court other than to arrest without a warrant if the jurisdictional requirements of section 40 of the Criminal Procedure Act have been met - Role of prosecutors - principles restated

JUDGMENT

HALGRYN AJ

Introduction

1. This is an action for damages based on the alleged wrongful arrests and detentions of the Plaintiffs and their alleged malicious, alternatively negligent prosecutions for unlawful possession of firearms.
2. The facts underlying this matter (actually) lie within a small compass, notwithstanding the fact that so much paper was

generated herein, the matter involving a plethora of exhibits which could easily fill three or four lever arch files, the trial lasting some five days, heads of argument submitted, totalling around 500 pages and the closing arguments lasting near two full days.

3. Due to the approach, I adopt herein, I do not consider it necessary to summarise the evidence of all the witnesses in any amount of detail.
4. I do extend my gratitude to counsel for both parties (especially those for Plaintiffs), for the detailed summary of the evidence and comprehensive exposé of the legal position and the helpful debates during argument.
5. It is also worthy of mention that the Plaintiff's attorneys, (the Wits Law Clinic), dedication to their clients' cause was admirable, as well as that of their counsel.
6. The Second Plaintiff died subsequent to the completion of the trial and was substituted by Order of this Court on the 31st of May 2022 by Strike Edward Thokoane.
7. I will however, simply for ease of reference refer to the Plaintiffs as "the First and Second Plaintiffs" as if there was no substitution.

Two significant legal issues which arise from the adjudication of this matter

8. It is perhaps appropriate (and hopefully helpful) to record at the outset, that two significant legal issues arise from the adjudication of this matter.
9. Whilst the legal position regarding arrests without a warrant has been lucidly pronounced upon by many of our courts, (and I certainly do not need to revisit it), the first of these two issues has not been pronounced upon by our courts (as far as counsel appearing in the matter and I could ascertain) and the second issue has only been briskly touched upon in one judgment by the full bench of this division, albeit without providing any ratio or reasoning for its finding.
10. Counsel and I were unable to find any other judgment on the second issue.
11. The first issue is whether an arrest without a warrant may be effected in terms of section 40 of the Criminal Procedure Act, No 51 of 1977, in respect of the offence of unlawful possession of firearms, which in turn requires an interpretation of a portion of Schedule 1 of the Criminal Procedure Act, which reads, *inter alia*, as follows: -

“Any offence, ... the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine”.
12. It is contended by the Plaintiffs, that upon a proper construction of this (general) definition of “*any offence*” not specifically listed in the

Schedule, an arrest without a warrant is not competent in respect of the offence of unlawful possession of firearms.

13. The second issue is whether an arrest without a warrant, founded upon a confession by a co-accused, is lawfully competent.
14. The Plaintiffs contend, on the strength of a judgment by the full bench of this division, that it is not.
15. Any finding, which I am enjoined to make in respect of these two issues, may well impact on the administration of justice henceforth, in that it will pronounce upon the lawfulness of arrests made without warrants, under the abovementioned circumstances.

Factual background

16. During the middle of the night of the 4th to the 5th of November 2013, a number of police officers embarked upon a joint operation, based on the information received from an informer regarding some business robberies which had taken place in Evaton.
17. At around 24h00, the team arrived at the house where Happy Maseko, ("Maseko"), was residing with her husband, Samuel Mphuthi Moeketsi, ("Moeketsi").
18. Much was made of what occurred during this operation, but I do not deal with it in any amount of detail, as I do not regard it as relevant to the issues which I have to decide.

19. Counsel for the Plaintiffs urged upon me to find that the entry and subsequent arrest of Moeketsi were unlawful and that this impacts on whatever transpired thereafter in respect of the Plaintiffs.
20. I do not agree, and I do not intend to make any findings in respect of the lawfulness of the entry of Moeketsi's house and his arrest.
21. What is of significance is that Moeketsi, (ostensibly of his own volition), pointed out some illegally obtained firearms under their bed.¹
22. Moreover, Moeketsi proceeded to inform the police officers that the firearms were brought to their house by the Second Plaintiff.
23. Moeketsi was arrested, (his wife Maseko was not), and he accompanied the police officers to the house where the Second Plaintiff resided.
24. The police officers knocked and thereafter² forcibly entered the premises of the Second Plaintiff.
25. The Second Plaintiff (in the presence of his girlfriend) was confronted with the fact that he had been implicated in the business robberies by Moeketsi, in that he had delivered illegally obtained firearms to Moeketsi's house, which he denied and immediately contended that he went to Moeketsi's house to borrow money.

¹ The details of the firearms are not important.

² It is unclear how long they waited.

26. Constable Khabo read him his rights (which is denied by the Second Plaintiff) and arrested him.
27. The arrest was without a warrant.
28. The Second Plaintiff was detained at the police station until his first appearance.
29. The next day, the 5th of November 2013, Colonel Jiyane, requested Captain Fouché (allegedly well versed in arrest procedures), to investigate the facts underlying the arrests of Moeketsi and the Second Plaintiff.
30. Captain Fouché requested Colonel Jiyane to ensure that Maseko was brought to the Meyerton Police Station for questioning.
31. Captain Fouché met with Maseko and questioned her as to what she knew about the illegal firearms found under their bed.
32. She implicated both Plaintiffs as the responsible persons who delivered the illegal firearms in a purple bag to their house using a police vehicle.
33. Captain Fouché attempted to locate the relevant SAP 132(b) logbook to ascertain if the use of the police vehicle was properly authorised.
34. He was unable to do so, and it is still uncertain whether the vehicle was properly logged.

35. The vehicle was however fitted with an AVL tracking device and Captain Fouché managed to locate the printout, which confirmed that the vehicle was indeed at Moeketsi's and Maseko's house on the particular day.³
36. Captain Fouché took a statement from Maseko in which she implicated both the Plaintiffs.
37. Although this was not cleared up during the evidence, there appears to be three statements by Maseko.
38. The first is dated the 5th of November 2013.⁴
39. This is the statement which Captain Fouché took from Maseko at the Meyerton police station.
40. In it, Maseko implicated both Plaintiffs as having brought a bag to her and Moeketsi's house, referring to them as "*Phitsi*", (the Second Plaintiff), and "*Danie*", (the First Plaintiff).
41. She knew "*Phitsi*", as he had visited them before, and he was wearing a police officer uniform at the time.
42. "*Phitsi*" handed a bag to Moeketsi, and he took the bag into their house.
43. "*Danie*" was driving the police vehicle.
44. Moeketsi left with both Plaintiffs in the police vehicles.

³ This is not in dispute.

⁴ A copy appears at p251-259 of Volume 3. There appears to be an incomplete duplication of this statement at p322 of the same volume.

45. Maseko later established that the bag contained firearms and she angrily and tearfully confronted Moeketsi about it, telling him that he must get rid of it and asking him if he wanted to go back to jail again, just having been released from it.
46. Another statement by Maseko dated the 6th of November 2013 implicates both Plaintiffs.⁵
47. In it, she states that she went to the Meyerton police station to meet with Captain Fouché on the 6th of November 2013.
48. Whilst she was walking in the yard of the police station with Captain Fouché, she noticed a white VW Polo which resembled the one which “Danie” and “Phitsi” were driving in when they delivered the bag with firearms to her and Moeketsi’s house.
49. She happened to recognise “Danie” sitting in the passenger seat, who was not wearing a police uniform.
50. She stated “...Danie is the same person whom I saw with Phitsi on the 4th of November 2013 19:00 at my place at no 455 Avondale Road and he is the same person who was driving the white VW Polo marked as Meyerton. Capt Fouché told me that the person that I identified as Danie in fact Daniel Motlounge. I was able to identify Danie (Danie Motlounge) as he is short and light in complexion and it was not the first time I saw him.”⁶

⁵ A copy appears at p187 of Volume 2.

⁶ At p187 of Volume 2.

51. There is another statement by Maseko dated the 7th of November 2013.⁷
52. In it, she stated that on the 7th of November 2012, W/O Mciya took her to the Sebokeng Court cells and there she identified (*“pointed out”*), a man known to her as *“Phitsi”*.
53. She stated *“The Phitsi I pointed out in the cells is the same person that brought firearms to my boyfriend Moeketsi Mphuthi with a marked police car. I know Phitsi very well as we both stay near each other in ext 11 and he used to come visit my boyfriend.”*⁸
54. It therefore just so happened that whilst Captain Fouché and Maseko were outside in the police station yard, the First Plaintiff entered the yard in the passenger seat of a police vehicle.
55. The significance of this cannot be overstated.
56. This was not (and could not conceivably have been) planned or orchestrated and it negates any suggestion that the Plaintiffs’ arrests, detention, and prosecution was a contrived affair.
57. Maseko immediately (and spontaneously) identified the First Plaintiff as one of the two persons who delivered the illegal firearms to their house and quite voluntarily informed Captain Fouché of this fact without any prompting from him.

⁷ A copy appears at p181 of Volume 2.

⁸ At p181 of Volume 2.

58. Captain Fouché approached the First Plaintiff and requested an audience with him in a private room.
59. Captain Fouché informed the First Plaintiff that he had been implicated in the unlawful possession of firearms in that he and the Second Plaintiff had allegedly delivered a bag with illegal firearms to the house of Moeketsi and Maseko.
60. Captain Fouché also informed the First Plaintiff that the AVL tracking report placed the police vehicle they were travelling in, at the scene on the day in question.
61. The First Plaintiff denied this and maintained that they went to Moeketsi to borrow money.
62. I pause to emphasize that both Plaintiffs therefore never denied being at the scene on the day in question.
63. Rather, they contend that they were there to borrow money and not to deliver illegal firearms.
64. Captain Fouché read the First Plaintiff his rights (which is denied by the First Plaintiff) and arrested him for unlawful possession of firearms.
65. This arrest was also without a warrant.
66. Both Plaintiffs were brought to court for their first appearance in or about 48 hours of their arrest.

67. The enrolment prosecutor was a Mr A Coetsee, a seasoned prosecutor with more than 30 years' experience.
68. Captain Fouché was present when Mr Coetsee considered the contents of the docket.
69. According to Mr Coetsee, the lawfulness of the arrests of the Plaintiffs did not concern him.
70. What he was interested in, was whether there was evidence of an offence having been committed and that the accused were linked to that offence.
71. In the docket, were (at least) the two arresting officers' statements, the statements by Maseko and the AVL tracking report.
72. It is fair to say, that at all times material hereto, at least these documents were indisputably in the docket.⁹
73. Mr Coetsee was satisfied that the evidence in the docket showed that an offence had allegedly been committed and that the Plaintiffs were implicated therein.
74. Accordingly, he enrolled the matter.
75. Police bail was not an option, and he did not consider bail as the matter fell within the ambit of Schedule 6 of the Criminal Procedure Act, which reverses the onus, in that an accused has to commence

⁹ There may have been others as well.

the bail proceedings and bears the onus of showing that exceptional circumstances exist, which justify the granting of bail.

76. Captain Fouché did not inform Mr Coetsee that both Plaintiffs contended that they went to Moeketsi's house to borrow money.
77. The matter was postponed for a bail application to be brought seven days later.
78. The Second Plaintiff abandoned his bail application.
79. The First Plaintiff proceeded with his bail application, represented by an attorney, who read an affidavit by the First Plaintiff into the record.
80. The prosecution opposed bail and an affidavit (it is not clear which one) was read into the record.
81. The Court considered the application and refused to grant it.
82. The First Plaintiff did not appeal this judgment.
83. The Plaintiffs remained in custody and the matter was postponed on a number of occasions.
84. The First Plaintiff brought a second bail application.
85. At this bail application Maseko testified and completely recanted her earlier statements, including the one made to Captain Fouché.
86. The application succeeded, and bail was granted.

87. After one or two more postponements of the matter, the matter went to trial, Maseko was not called as a witness and a discharge in terms of section 174 of the Criminal Procedure Act was granted in respect of both Plaintiffs.

88. Moeketsi was convicted.

The Plaintiff's attacks on the lawfulness of the arrests, detentions, and prosecutions / Legal analysis thereof

89. I am of the view that my analysis of what transpired, should be done by dealing with the various watershed moments in the process.

90. This is in keeping with the suggestions by Plaintiffs' counsel, who (this correct submission notwithstanding), repeatedly urged upon me to have regard to the fact that Maseko (months later) recanted her initial statements at the second bail application by the First Plaintiff and that this should be a compelling factor which I should bear in mind when I consider the lawfulness of earlier events.

91. I disagree.

92. The officers and prosecutorial officials involved were not blessed with supernatural powers of foresight and it cannot conceivably be said that they should have known or foreseen that Maseko was going to make an about turn somewhere in the unknown future.

93. The correct approach is to simply analyse the nature of the evidence which served before the various officers and prosecutorial

officials (the decisionmakers) at the various stages they exercised their respective discretions to arrest, to enroll, to oppose bail, to postpone, and to further the prosecution, and I should objectively enquire if they did so reasonably and rationally at the various moments they did so.

94. The officers and officials involved herein, were never called upon to make credibility findings; that remained the responsibility of the trial court.

The Second Plaintiff's arrest

95. The attack on the lawfulness of the Second Plaintiff's arrest is fivefold, (as I understand it).¹⁰
96. The first is that an arrest without a warrant was impermissible for this offence, i.e., unlawful possession of firearms.
97. Section 40(1)(b) of the Criminal Procedure Act provides, *inter alia*, that "A peace officer may without a warrant arrest any person -

Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody; ...".
98. Schedule 1 of the Criminal Procedure Act, lists a number of offences, which - notably - includes all of the most serious offences.¹¹

¹⁰ These attacks overlap with the attacks on the lawfulness of the First Plaintiff's arrest and are basically the same. My reasoning in respect of the Second Plaintiff's arrest holds true for the First Plaintiff.

¹¹ To mention but a few, "...*treason, sedition, murder, culpable homicide, rape, indecent assault, sodomy, bestiality, robbery, assault when a dangerous wound is inflicted, arson,*

99. The legislature clearly intended to restrict the extraordinary powers of arrest without a warrant, to the most serious offences.

100. The offence in question is the unlawful possession of firearms, which is not specifically listed in the Schedule.

101. The question is thus whether this offence falls within the ambit of the definition in Schedule 1, of offences not specifically listed: -

“Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.”

102. It may assist if I quote only the relevant portion, i.e., *“Any offence, ..., the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.”*

103. A simple reading of this definition leads to the inescapable inference that the legislature intended to provide that certain unspecified offences are to be included in the schedule, i.e., any offence in respect of which a sentencing court may impose a period of imprisonment (of more than six months), without affording the accused the option of a fine.

breaking and entering, receiving stolen goods knowing it to be stolen, fraud, forgery...”, and so on.

104. The offence in question is a contravention of section 3¹² of the Firearms Control Act, No 60 of 2000, read with section 120 (1)¹³ and perhaps (2)¹⁴.

105. Schedule 4 of the Firearms Control Act lists possible sentences for various offences in terms of the act.

106. In respect of a contravention of section 3 (read with section 120(1)) the maximum sentence is stipulated as fifteen years.

107. In respect of a contravention of section 120(2) the maximum sentence is also stipulated as fifteen years.

108. Section 121 of the Firearms Control Act reads as follows: -

"121 Penalties

Any person convicted of a contravention of or a failure to comply with a section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section."

109. The Plaintiffs contend that Schedule 1 to the Criminal Procedure Act should be read that, if a Court has the discretion to impose a fine, then the offence is excluded from the schedule, which in turn means

¹² Which reads as follows: - *"No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm."*

¹³ Which provides that any contravention of a provision of the Firearms Control Act constitutes an offence.

¹⁴ Which provides that anyone who is aware of the existence of a firearm or ammunition which is not in the lawful possession of a person and who does not report it to a police official without delay, is guilty of an offence.

that an arrest without a warrant is impermissible for such an offence.

110. I disagree.

111. This interpretation would, *inter alia*, detract from the fact that the legislature intended to include the most serious of offences in respect of which an arrest without a warrant would be competent, which the offences in question indisputably are.

112. Moreover, the emphasis should not be on the fact that the sentencing court is empowered to impose imprisonment or a fine, but rather that the sentencing court “*may*” impose a sentence of imprisonment (of more than six months) without the option of a fine.

113. It is undeniably so that a sentencing court, in respect of the offences in question, has the power to do this.

114. I therefore find that the offence of the unlawful possession of a firearm, as envisaged in section 3 read with section 120(1) the Firearms Control Act, is included in the category of offences set out in Schedule 1 of the Criminal Procedure Act, in respect of which an arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act, would be competent.¹⁵

115. The second attack on the lawfulness of the arrest, is that the arrest was based on an unlawful confession by Moeketsi by “*pointing him*

¹⁵ Given that all the other jurisdictional requirements are met.

(the Second Plaintiff) out”, (to use Plaintiffs’ counsels’ words), or otherwise put, identifying, or implicating him.

116. Moeketsi was a co-accused in the criminal case.

117. Counsel for the Plaintiffs submitted that what Moeketsi did, amounted to an inadmissible confession, which in any event, (admissible or not against Moeketsi), was inadmissible against a co-accused in terms of section 219 of the Criminal Procedure Act in the trial and hence this rendered his arrest without a warrant unlawful.

118. I am not convinced that the utterances and actions of Moeketsi in fact satisfy all the requirements of a confession, which includes admissions in respect of each/all elements of the offence, but I do not pronounce upon it finally, and deal with the contention as if it amounted to a confession.

119. As a point of departure on this topic, regard should be had to the wording of section 219 of the Criminal Procedure Act, which reads as follows: -

“Confession not admissible against another

*219 No confession made by any person shall be admissible **as evidence** against another person.”* (I added the emphasis.)

120. This prohibition is clearly directed at the trial, where no confession may be used, *“as evidence”* directly or indirectly against any co-accused, but only against the maker of the confession.

121. But there is nothing in this section, (nor the Common Law as far as I could ascertain) which prohibits an arrest of one accomplice being made based on a confession (lawful or not) by another accomplice.
122. The purpose of an arrest is, *inter alia*, to allow for further investigations, and it may well turn out in certain given circumstances that nothing more is uncovered, leaving only the confession by the one accomplice against another, in which event the further detention of the arrested person may well be unlawful.
123. But it may well be that during the investigation further evidence is uncovered which reasonably shows that the suspect committed the offence, then the fact that the suspect was arrested because of a confession by a co-accused becomes moot and will not and may not be relied upon at the trial.
124. The legal position can in my view not conceivably be that once, and if arresting officers get information incriminating an accomplice, from another accomplice whom they are in the process of arresting or whom they have arrested, that they may not act upon such information by arresting such an alleged accomplice (in compliance with section 40 of the Criminal Procedure Act), simply because the confession made by the first suspect who was arrested, would be inadmissible "*as evidence*", against the accomplice at the eventual trial.

125. The prohibition is expressly aimed at it being used as evidence at the trial, against a co-accused; but this poses no bar for an arrest on the strength of thereof.

126. I was unable to find any precedents on this issue and conveyed this to Plaintiffs' counsel who reverted and referred me to a judgment by the full bench of this Court, Twala J and Matsemela AJ presiding,¹⁶ in support of the submission that this rendered the arrest of the Second Plaintiff unlawful.

127. Plaintiffs' counsel referred me to [11] which reads as follows: -

*"I find myself in disagreement with the contention of the defendant's counsel that the arresting officer's suspicion was based on reasonable grounds because he received information on (sic) a co-accused who was already arrested. **Firstly, the confession of one accused is inadmissible against another.** Secondly, in the particular case, it is on record that the investigating officer initially was lied to by Ayanda who later pointed out the appellant. He gave the investigating officer four names of his accomplices and the follow up on them drew a blank. He admitted to the investigating officer that he was lying to him on other information regarding the commission of the offence. A reasonable peace officer would have henceforth treated any other information from Ayanda with circumspect and sake cannot be said about the investigating officer in this case."* (I added the emphasis to demonstrate that this finding

¹⁶ NGWENYA V MINISTER OF POLICE (A3128/2017) [2018] ZAGPJHC 610 (29 October 2018) SAFLII.

was made without any elaboration, ratio, or reasoning and it omits the express wording of section 219 of the Criminal Procedure Act, i.e., “...as evidence...”.)

128. I am mindful that this is a finding by a full bench of this Division, which in principle should bind me, but with respect, I do not think it is authority for the submission that an arrest of an alleged accomplice may not be effected on the strength of a confession by another.

129. This is not a finding which I make lightly and in fact, this has bothered me much.

130. The principle at issue is however so significant that I, after much consideration, decided to resist the temptation of simply finding myself bound to what the full bench found, albeit without any ratio or reasoning.

131. This is so because I am simply unable to comprehend any logical nexus between a confession being inadmissible as evidence against any co-accused at a trial and an arrest of an accomplice on the basis of a confession by another accomplice.

132. The doctrine of precedent, as Prof George Devenish states in his illuminating article,¹⁷ has been an intrinsic part of our common law, inherited from English law and in terms of our Constitution continues to be in force in our new jurisprudential dispensation.

¹⁷ THE DOCTRINE OF PRECEDENT IN SOUTH AFRICA; OBITER, 2007.

133. The doctrine requires that a legal rule or principle encapsulated in a previous judgment of a higher court should be perceived as authoritative and binding and not merely as persuasive.
134. Prof Devenish lists some of the advantages of the doctrine as stability, protection of justified expectation, the efficient administration of justice, equality of treatment and that it creates the perception of impartiality and justice, and that the legal system does not deal with issues to be adjudicated in a purely casuistic manner.
135. Prof Devenish quotes Coetzee J¹⁸ when he held that *“Orderly administration of justice is wholly impossible without it. Chaos would reign ... if it were to be abolished or even cut down ... It is often more important that the law should be certain than it should be ideally perfect.”*
136. Prof Devenish points out that courts, which have been reluctant to follow a previous decision which is formally binding on it have resorted to outflanking stratagems by pronouncing the relevant passage to be *obiter* or to distinguish the facts, which can sometimes undoubtedly be artificial.
137. Prof Devenish advocates for the notion that the application of the doctrine should not be mechanical and requires a judicious weighing of all the relevant factors.

¹⁸ In *TRADE FAIRS & PROMOSTIONS (PTY) LTD V THOMSON*; 1984 4 SA (W) 186 H-I.

138. Prof Devenish refers to Lord Atkin's dictum¹⁹ that "...finality is a good thing, but justice is better."

139. I agree with Prof Devenish when he advocates that "In addressing the problems inherent in the application of the doctrine of precedent, **it is necessary to bear in mind the quality of legal reasoning found in a written judgment of a court of law.** A written judgment is, *inter alia*, intended to furnish a convincing argument aimed at persuading both the public and a more specialised legal audience of fellow judges and scholars, to accept the merit of the court's argument." (I added the emphasis.)

140. Prof Devenish quotes Hahlo and Kahn²⁰ who set out the rules relating to precedent, *inter alia*, as follows:

"(a) **A court is absolutely bound by the ratio of the decision of a higher or larger court** on its own level in the hierarchy, in that order, unless the decision was rendered *per incuriam*, (for instance, a governing enactment was overlooked), or there was subsequent legislation. In the above circumstances the precedent is deemed to be absolute." (I added the emphasis.)

141. As I have indicated hereinabove, the full bench provided no ratio or reasoning for the finding which I am urged upon to follow.

¹⁹ In RAS BEHARI LAL V KING-EMPEROR 60 La (1993) 361.

²⁰ SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND (1986) 240; at p243.

142. It is not my place to criticise the full bench for not doing so, and I do not do so;²¹ but in the absence of any ratio or reasoning I am simply unable to follow what I perceive to be an incorrect finding.

143. I say it again – the principle involved is so significant that I am constrained to conclude that this finding by the full bench was rendered *per incuriam*.

144. I am of the view that the underlying thinking of the full bench was undoubtedly based on section 219 of the Criminal Procedure Act, which in itself is unconvincing, (it does not deal with arrests), but in addition, it overlooked the fact that the section renders a confession by one accused inadmissible “... as evidence ...” against another, which is inapplicable at the arrest stage.

145. I do not understand how this prohibition can be applied to arrests of one accomplice on the basis of a confession of another.

146. If it were so that this was impermissible, I am of the view that the administration of justice may well be compromised in that members of our police services may be prevented from arresting co-accomplices implicated in confessions by other accomplices without a warrant.

²¹ In fact, my respect for that court continues unabated.

147. Prof Devenish described the approach by Froneman J²² as a superb piece of jurisprudential craftsmanship, as far as precedent is concerned.

148. In that matter Froneman J found that the comments by the Supreme Court of Appeal were made without the benefit of argument and thus brief and tentative and accordingly, they were not binding and merely warranted serious attention by a lower court.²³

149. It is noteworthy that Froneman J was concerned that the judgment by the Supreme Court of Appeal could have a chilling effect on the efforts of courts in the Eastern Province to ensure compliance on the part of the provincial government with its constitutional duties of efficient and accountable public administration.²⁴

150. I take Froneman J's lead in finding that the full bench – with respect – made a finding, i.e., “...*the confession of one accused is inadmissible against another*,” which is inapplicable to arrests and, in any event, over-broad as it omits to mention that the prohibition is against its use “*as evidence*”, at the trial.

151. I do not consider the use of a confession by one accomplice against another for the purposes of arresting the other, as inadmissibly using the confession “*as evidence*”, in contravention of section 219 of the Criminal Procedure Act.

²² In *KATE V MEC FOR THE DEPARTMENT OF WELFARE, EASTERN CAPE*; 2005 1 SA 141 (SE).

²³ *Supra*; at par20.

²⁴ *Supra*; at par1.

152. Otherwise put, arresting a suspected accomplice on the strength of what was said in a confession by another, cannot conceivably be equated to using that confession "*as evidence*" against that suspected accomplice ultimately at the trial.
153. In fact, I can well imagine situations where not acting upon such information may well amount to a reckless dereliction of duty.
154. Imagine a plot to commit ongoing acts of terrorism is uncovered by the arrest of one accomplice, who implicated his accomplices by way of a confession, (lawful or unlawful).
155. I know of no bar which prohibits police officers from acting upon such information, by arresting the alleged accomplice, if needs be without a warrant, and I go so far as to say that they would be obliged to do so.
156. I therefore find that the Second Plaintiff's arrest was not unlawful by reason of the fact that it was made on the strength of an alleged confession by a co-accused.
157. The third attack is that the necessary Constitutional warnings were not given.
158. I am unable to make any definitive findings in this regard, due to the factual disputes.

159. I have no reason to reject the evidence by Constable Khabo, i.e., that he complied.²⁵

160. In the event that I am unpersuaded by either the evidence of the Second Plaintiff or the Defendants, the Second Plaintiff should be held to have failed to discharge the onus of proof on a balance of probabilities.

161. Nienaber JA stated as follows²⁶ regarding the assessment of disputes between factual witnesses:

“[5] 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 courts finding on the credibility of a particular witness will depend upon 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 facts or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and

²⁵ Both arresting officers were peace officers.

²⁶ In *STELLENBOSCH FARMERS’ WINERY GROUP LTD AND ANOTHER V MARTELL ET CIE AND OTHERS* 2003 (1) SA 11 (SCA).

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."

162. Following this approach, I conclude that I have no reason to disbelieve the Defendants' witnesses in this respect.

163. The fourth attack is that the arresting officer could not have had and did not have a reasonable suspicion that the Second Plaintiff had committed an offence.

164. As I have recorded hereinabove, the law in this respect has been definitively pronounced upon in many judgments by our lower and higher courts and I do not propose to rewrite it.

165. I touch upon it to demonstrate that I have been mindful of the legal dispensation underlying this issue.

166. In his commentary on the Criminal Procedure Act, Justice Hiemstra stated that²⁷: -

*“This section gives peace officers extraordinary powers of arrest. Although arrest is a necessary weapon in the fight against crime, it is an infringement of personal liberty and often also human dignity. The courts will carefully scrutinise whether the infringement is legally in order. (Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A) at 38 C). At such an infringement of personal freedoms and rights it is important to bear in mind that one is concerned with the exercise of state power which, according to the principle of legality, has its source in the Constitution...”*²⁸

167. The jurisdictional prerequisites fall into two categories according to Justice Hiemstra,²⁹ i.e., the existence of a particular factual situation which evidences an offence and the objective standard of the reasonable person.

168. Good faith or reasonable mistake does not avail the arrestor.

169. Once the jurisdictional facts are present, a discretion arises whether to arrest or not, which must be exercised in good faith and not arbitrarily.³⁰

²⁷ HIEMSTRA'S CRIMINAL PROCEDURE; chapter 5; p5-7.

²⁸ See also the authorities which the learned author refers to there.

²⁹ Supra.

³⁰ HIEMSTRA; supra, at p5-8(1).

170. The discretion must be exercised rationally in relation to the powers of arrest, which is an objective enquiry.³¹

171. The arresting officer must strike a balance between the reasonable grounds justifying the arrest and explanation given by the suspect.³²

172. The arrest is not unlawful because the arrestor exercised the discretion in a manner other than that deemed optimal by the court and the standard is not perfection, as long as the choice fell within the range of rationality and there exists a measure of flexibility in the exercise because the enquiry is fact-specific.³³

173. Justice Hiemstra records that Bozalek J held that³⁴ the decision to arrest was not rational because less invasive means of procuring attendance at court were available, which recordal required of me to consider that judgment carefully.

174. A perusal of that judgment reveals that in that matter the court had regard to the SAPS standing orders which stipulate that arrest should be resorted to as a last resort if less invasive means of securing attendance at court are available.

175. Bozalek J found as follows: -

³¹ HIEMSTRA; supra, at p5-8(1).

³² HIEMSTRA; supra, at p5-8(1). See also LAPANE V MINISTER OF POLICE 2015 (2) SACR 138 (LT).

³³ HIEMSTRA; supra, at p5-8(1). See also RAUTENBACH MINISTER OF SAFETY AND SECURITY 2017 (2) SACR 610 (WCC) par [43].

³⁴ In EMORDI AND ANOTHER V FBS SECURITY SERVICES (PTY) LTD AND OTHERS 2021 (2) SACR (WCC). I included the full quote of the SAPS standing orders due to its relevance.

“The SAPS standing orders regarding arrests are instructive. Standing Order (G) 341 provides inter alia as follows:

‘Background

Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution of the Republic of South Africa, 1996, the Criminal Procedure Act, 1977 (Act No. 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated must therefor (sic) be strictly adhered to.

3. Securing the attendance of an accused at the trial by other means than arrest

(1) There are various methods by which an accused’s attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.

(2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3).

(3) A member even though authorised by law, should normally refrain from arresting a person if -

(a) the attendance of the person may be secured by means of a summons as provided for in **section 54** of the **Criminal Procedure Act, 1977**; or

(b) the member believes on reasonable grounds that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette, in which such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate's court in accordance with **section 56** of the **Criminal Procedure Act, 1977**.

4. The object of an arrest

(1) General rule

As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. A member may not arrest a person in order to punish, scare, or harass such person;

(2) Exceptions to the general rule

There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined below and constitute exceptions to the general rule that the object of an arrest must be to secure the attendance of an accused at his or her trial. These exceptions must be studied carefully and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.

...

(b) Arrest to verify a name and/or address

*In the circumstances provided for in **section 41(1)** of the **Criminal Procedure Act, 1977**, a member may request a person to furnish his or her full name and address. If such a person furnishes a name or address which the member reasonably suspects to be false, such member may arrest the person and detain him or her for a period of twelve hours in order to verify the name and address.'*

[118] Nothing in these quoted sections, applied to the facts of the present matter, suggest that Sergeant Khumbuza's decision to arrest Mrs Emordi, as opposed to a less invasive means of procuring her attendance at Court, was justified, nor any decision to detain her overnight. In this sense, Sergeant Khumbuza did not seek to justify Mrs Emordi's arrest by suggesting, for example, that he had any reason to suspect that her name or address (which he could have confirmed with her husband, Mr Agholar) were false."

176. I need not enquire whether I find that the finding by Bozalek J was clearly wrong or not.

177. The facts are sufficiently distinguishable.

178. In that matter the plaintiffs, a married couple, sued the defendants for damages suffered as a result of their alleged unlawful detention following an alleged shoplifting incident at the Shoprite store in Parow on 19 October 2015.

179. The First Plaintiff was arrested and taken to the Parow police cells where she was charged and held overnight before being released on warning the next day.

180. Based on this alone, there appears to have been no reason for arresting the First Plaintiff in the first place.

181. Bozalek J's finding does not create a precedent that any decision to arrest without a warrant would be irrational if less invasive means of procuring attendance at court were available.

182. It was fact-specific, to use the wording of Justice Hiemstra and on the face of it, with respect, correctly decided.

183. But it does not bind me in this matter and even if it was persuasive, (which I find that it is not due to the different factual premises), then I find that I am bound to the judgment by Goldblatt J in this division,³⁵ where he found that the existing law was as pronounced upon by Schreiner JA,³⁶ i.e., that there is no rule of law which demands the use of a milder means of securing attendance at court, and that courts have no right to impose further conditions on arresting officers than what the legislature has imposed.

184. Once the jurisdictional requirements have been met and it is shown that the discretion was exercised rationally, the arrest will not be

³⁵ In CHARLES V MINISTER SAFETY AND SECURITY 2007 (2) SACR 137, at 144.

³⁶ In TSOSE V MINISTER OF JUSTICE 1951 (3) SA 10 (A), at 17H, where then Appellate Division found that "*There is no rule of law that requires a milder method of bringing a person into court, be used whatever if it would be equally effective.*" I am obviously also bound to this finding.

unlawful even if a less invasive method was available to secure attendance at court.

185. Reasonable grounds are interpreted and must be of such a nature that a reasonable person would have had such a suspicion and it does not suffice to contend that the arrestor acted in good faith.³⁷

186. The section requires a suspicion, not certainty, but it must make sense otherwise it would be frivolous or arbitrary and unreasonable and there must exist evidence that the arresting officer formed a suspicion which is objectively sustainable.³⁸

187. If I apply the above principles to this case, I find that in the presence of his wife, Maseko (who did not protest or deny what her husband told the officers), Moeketsi pointed out the unlicensed firearms under their bed and it was indeed found there.

188. Moeketsi also implicated the Second Plaintiff in the presence of his wife, who did not protest or deny this.

189. Maseko was not arrested and never was a co-accused.

190. During the arrest of the Second Plaintiff, he did not deny attending the premises of Moeketsi and Maseko, and although he professed his innocence and claimed that he went there to borrow money, this

³⁷ HIEMSTRA; SUPRA; P5-8(1). See also DUNCAN V MINISTER OF LAW AND ORDER 1986 (2) SA 805 (A), at 814D.

³⁸ HIEMSTRA; SUPRA; at p5-8(3). See also MABONA V MINISTER OF LAW AND ORDER 1988 (2) SA 654 (SEC).

served to strengthen the suspicion, it was not for the arresting officer to make credibility findings.

191. I therefore find that the arrest of the Second Plaintiff was not unlawful as a reasonable suspicion existed which is objectively sustainable.

The First Plaintiff's arrest

192. The first attack on the lawfulness of the First Plaintiff's arrest, is that it was impermissible for Captain Fouché to do so without a warrant, for the same reasons advanced in respect of the Second Plaintiff.

193. I have dealt with this hereinabove.

194. The second attack is Captain Fouché failed to comply with his constitutional obligations to warn the First Plaintiff of his rights.

195. Once again, I am unable to find that Captain Fouché's assurances that he had done so, during his evidence were incredible, and I have no option but to find that the First Plaintiff did not discharge the onus to prove this on a balance of probabilities.³⁹

196. The third attack was that Captain Fouché could not have had a reasonable suspicion that an offence had been committed by the First Plaintiff.

197. Applying the above-mentioned principles, I find that there is no merit in this attack either.

³⁹ See STELLENBOSCH WINERY; supra.

198. Captain Fouché found himself in a situation wherein Maseko had quite clearly, and unhesitatingly implicated the First and Second Plaintiffs and stated as much in her statements repeatedly.

199. In addition, (what can only be described as an unfortunate twist of fate for the First Plaintiff), Maseko without as much as a hint or a murmur of uncertainty, spontaneously and certainly of her own accord and volition, recognised the First Plaintiff and pointed him out to Captain Fouché.

200. The First Plaintiff just so happened to be a passenger in a police vehicle which had entered the yard at the very moment she and Captain Fouché were walking in the yard.

201. Captain Fouché had a reasonable suspicion that that the First Plaintiff had committed the offence which is objectively sustainable.

202. I therefore find that the arrest of the First Plaintiff was lawful.

Mr Coetsee's enrolment of the matter at the first appearance

203. The requirements to prove a claim for malicious prosecution are trite and succinctly held by the Supreme Court of Appeal to be as follows⁴⁰: -

"In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove -

⁴⁰ In MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT V MOLEKO [2008] SA 47 (SCA) at par 8. See also RUDOLPH V MINISTER OF SAFETY AND SECURITY AND OTHERS 2009 (5) SA 94 (SCA) at par 16.

- (a) *that the defendants set the law in motion (instigated or instituted the proceedings);*
- (b) *that the defendants acted without reasonable and probable cause;*
- (c) *that the defendants acted with malice (or animus iniuriandi);*
and
- (d) *that the prosecution has failed.”*

204. A prosecutor's role and obligations at the enrolment stage, whether to oppose bail or not, the various postponements thereafter and ultimately whether to proceed to trial, in essence remains the same.

205. The principles I deal with at this stage are thus apposite to other stages in the prosecution as well, i.e., at the bail application, the postponements, and ultimately the prosecution at the trial.

206. A prosecutor exercises his or her discretion on the basis of the information before him or her, which is contained in the docket.

207. To this end a prosecutor takes what he or she finds in the docket at face value and cannot be expected to make any value judgments as to whether the complainant or the state witnesses who deposed to the statements are truthful or not.⁴¹

208. A prosecutor is expected to apply his or her mind to the content of the docket, the various statements by state witnesses and to

⁴¹ MADNITSKY V ROSENBERG 1949 1 PHJ5 (W).

ascertain if there is evidence which if proved at the trial will show that an offence was committed and that the accused is/are linked to that offence.

209. A prosecutor only has to establish if reasonable and probable cause exists which warrants prosecution and that no compelling reason exists not to prosecute.

210. All that is required of a prosecutor is to apply his or her mind to the information available and to satisfy him or herself that it justifies the conclusion that the accused probably committed the crime.⁴²

211. There is no duty on a prosecutor to determine if the accused has a possible defence.⁴³

212. Prosecutors should however consider possible defences at the bail application stage and consider if that nature of the stated defence impacts on whether bail should be granted or not.

213. If, however it appears that a prosecutor realised (or should have realised) that the accused had a conclusive defence, then this would negate a contention that he or she reasonably believed that the accused committed the crime.⁴⁴

214. The Supreme Court of Appeal held⁴⁵ that *“Clearly a person ought not to be prosecuted in the absence of a minimum evidence upon which*

⁴² See MADNITSKY; supra. See also OCHSE V KIG WILLIAM’S TOWN MUNICIPALITY 1990 (2) SA 855 (E) at p857. See also VAN DER MERWE V STRYDOM 1967 (3) 460 (A) at 467.

⁴³ See BECKENSTRATER; supra, at p137. See also LANDMAN V MINISTER OF POLICE 1975 (2) SA 155 (E) at 156.

⁴⁴ See VAN DER MERWE; supra; at p467-468.

⁴⁵ In S V LUBAXA 2001 (2) SACR 703 (SCA) at par19.

he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.”

215. Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority,⁴⁶ but a prosecuting authority’s discretion to prosecute is not immune from scrutiny by our courts, which can interfere where such discretion is improperly exercised.⁴⁷

216. The Supreme Court of Appeal also held⁴⁸ that *“A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.”*

217. The Supreme Court of Appeal also held that:⁴⁹-

“A prosecution is not wrongful merely because it is brought for an improper purpose. It will be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent.”

⁴⁶ See *PATEL V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS*; KZNL, case number 4347/15.

⁴⁷ See generally *NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V ZUMA*; 2009 (2) SA 277 (SCA).

⁴⁸ In *MINISTER OF POLICE AND ANOTHER V DU PLESSIS* 2014 (1) SA 417 (SCA) at par 28.

⁴⁹ In *NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V ZUMA*; supra, at p37.

218. The Supreme Court of Appeal also held⁵⁰ that: -

“When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.”

219. Although the enquiry is primarily an objective one, if the prosecutor did not actually believe that the accused was guilty, even if he or she acted on reasonable grounds, reasonable and probable cause will be absent.⁵¹

220. This reverse is different in that an honest belief in the guilt of the accused, which cannot be justified objectively by the information available to the prosecutor, then reasonable and probable cause cannot be shown.⁵²

221. Prof Chucks Okpaluba provides a helpful summary:⁵³-

⁵⁰ In *BECKENSTRATER V ROTTCHER AND THEUNISSEN* 1955 (1) SA 129 (A) at par 136A-B.

⁵¹ See *BECKENSTRATER*; *Supra*; at p136. See also *OCHSE*; *supra*; at 859. See also *MADNITSKY*; *supra*; at p14.

⁵² See *RAMAKULUKUSHA V COMMANDER, VENDA NATIONAL FORCE* 1989 (2) SA 813 (V) at p844-845.

⁵³ In *REASONABLE AND PROBABLE CAUSE IN THE LAW OF MALICIOUS PROSECUTION: A REVIEW OF SOUTH AFRICAN AND COMMONWEALTH DECISIONS*; 2013 (16) 1 PER / PELJ. I have not included the various references in his footnotes.

"It is not every prosecution that is concluded in favour of the accused person that necessarily leads to a successful claim for malicious prosecution. So much depends on the absence of a reasonable and probable cause, and the animus iniuriandi of the defendant in instigating, initiating or continuing the prosecution. It is widely accepted that reasonable and probable cause means an honest belief founded on reasonable ground(s) that the institution of proceedings is justified. It is about the honest belief of the defendant that the facts available at the time constituted an offence and that a reasonable person could have concluded that the plaintiff was guilty of such an offence. Ultimately, it is for the trial court to decide at the conclusion of the evidence whether or not there is evidence upon which the accused might reasonably be convicted.

In Hicks v Faulkner, Hawkins J defined reasonable and probable cause as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". It was stated that the test contains a subjective as well as an objective element. There must be both actual belief on the part of the prosecutor and the belief must be reasonable in the circumstances.

The necessary deduction, which the courts have for centuries made from that definition, is that there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration of the adequacy of the evidence available to him or her. This is tantamount to a subjectively honest belief founded on objectively reasonable grounds that the institution of proceedings was justified. A combination of both the subjective and objective tests means that the defendant must have subjectively had an honest belief in the guilt of the plaintiff and such belief must also have been objectively reasonable. As explained by Malan AJA in Relyant Trading, such a defendant will not be liable if he/she held a genuine belief in the plaintiff's guilt founded on reasonable grounds. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant instigating it is not wrongful. For Malan AJA, the requirement of reasonable and probable cause "is a sensible one" since "it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives"...".

222. The Plaintiffs claim negligent prosecution in the alternative.

223. It is so that the court introduced negligence as a cause of action for liability in delict, but gross negligence has to be shown.⁵⁴

224. Mr Coetsee impressed me as a witness who found the propositions put to him that no reasonable cause could be gleaned from what was in the docket, simply incredulous, to say the least, judging by his body language and demeanour.

225. I find the fact that Mr Coetsee was clearly perplexed, appreciable, given the contents of the docket.

226. Mr Coetsee informed me that although he has no independent recollection of the matter, upon reflection of what he saw in the docket, there was more than sufficient reason to enroll the matter.

227. I do not see how he can be faulted for saying so.

228. By all accounts, in the docket were the statements by Maseko, implicating both Plaintiffs, those of the arresting officers and the tracking device records.

229. By any analysis, the information in the docket showed probable and reasonable cause.

230. Conviction was possible on the single witness evidence of Maseko, and it was not known to anyone that she would recant her statements at the second bail application hearing.

⁵⁴ See HEYNS V VENTER 2004 (3) SA 200 (T).

231. I do not understand Plaintiffs' counsels' insistence that there was no admissible evidence upon which a conviction could be made.

232. Counsel for the Plaintiffs repeatedly urged upon me to find that the police officers and the prosecutorial officials failed dismally by not considering and investigating the Plaintiffs' defence, i.e., that they were at the scene to borrow money and not to deliver illegal firearms.

233. They went so far as to submit that Captain Fouché deliberately withheld their stated defences from Mr Coetsee, who admitted that he did not inform him, but denied doing so deliberately.

234. There was no duty on the prosecutors herein to establish if there was a defence and even if they were informed of the defence, i.e., that the Plaintiffs attended the scene to borrow money, the prosecutors were not enjoined to decide who is telling the truth and who isn't.

235. I was also repeatedly urged upon to find that the officers and prosecutorial officials ought to have investigated the defence by enquiring into the documents at Moeketsi's house, which would have lent credence to the Plaintiffs' defence that they went there to borrow money.

236. I do not find that there was such an obligation on the officers and prosecutorial officials and in any event, I do not understand, even if such documents were found, that this as of necessity would have

negated Maseko's version, i.e., that they dropped a bag filled with illegal firearms there.

237. The Plaintiffs quite conceivably could have done both, i.e., borrowed money and dropped off illegal firearms.

238. By any analysis, the prosecution had to continue.

239. Mr Coetsee was quite forthright in telling me that the lawfulness of the arrests did not concern him at that time, and I do not see that it should have.

240. If enrolment prosecutors were obliged to do so, they would never get through their daily roll, and over and above the fact that there is no legal requirement that they do so, such an enquiry would end up at a dead end because of differing versions by the arresting officer/s and the suspect.

241. What did concern Mr Coetsee was whether there was evidence of a crime having been committed and whether the accused were linked to it.

242. According to him there was, and that whatever their defences were, this would not have changed his mind.

243. I think it is fair to say that most accused have some form of defence, but it is not the role of officers and prosecutorial officials to make credibility findings; that is the role of the courts.

244. I cannot fault Mr Coetsee's enrolment of the case.

245. Police bail was not an option, and Mr Coetsee did not consider bail as it the matter fell within the ambit of Schedule 6 of the Criminal Procedure Act, no 51 of 1977, which reverses the onus, in that the accused has to commence the bail proceedings and bears the onus of showing that exceptional circumstances exist, which justify the granting of bail.

246. I cannot fault Mr Coetsee's reasoning in this respect either.

The first bail application

247. The Second Plaintiff abandoned his bail application.

248. The First Plaintiff was represented by an attorney who read an affidavit by the First Plaintiff into in the record.

249. The application was appreciably opposed, and bail was refused.

250. I cannot fault the prosecutor for opposing bail, for the same reasons advanced by Mr Coetsee.

251. The evidence in the docket disclosed a very serious offence and albeit that it was based on the evidence of a single witness, i.e., Maseko, the evidence from her statements would have seemed damning.

252. No appeal was lodged against the refusal of bail.

The postponements

253. I do not deal with the various postponements, save to state that the contents of the docket remained the same until the time when Maseko recanted her earlier statements and I deal with the further prosecution of the matter thereafter hereunder, when I deal with the second bail application, the postponements thereafter and the eventual trial.

254. I cannot fault the conduct of the prosecutorial officials for the postponements which saw the Plaintiffs remaining in custody.

255. Postponements are par for the course in the prosecution of criminal matters in a hopelessly over-burdened criminal judicial system in our land.

The second bail application and the further prosecution of the matter thereafter

256. At the second bail application brought by the First Plaintiff, Maseko had a change of heart and recanted all of her previous statements, and unsurprisingly, bail was granted.

257. Counsel for the Plaintiffs contend that after Maseko recanted her previous statements, the State had no case whatsoever and the charges should have been withdrawn against both Plaintiffs.

258. It is helpful to mention that this was put to Mr Coetsee, who conceded that it would have been expected of the State to seriously

reconsider its position, but if it was up to him, he would have proceeded to trial.

259. His reasoning was simple.

260. It is so that Maseko would have been a single witness and that she would have been confronted with the fact that she made contradictory statements, but she could have been declared a hostile witness and the court could have been urged upon to convict on the strength of her initial statements.

261. I can well imagine that this would have been a tall order, but I cannot find that this was so farfetched as to render the further prosecution of the matter unlawful.

262. The fact that the trial prosecutor did not call Maseko does not make the Plaintiffs' case stronger.

263. That was the call which was made at the time, and I am not enjoined to evaluate or pronounce on the wisdom (or lack) of it.

264. What I am required to do is to consider whether the further prosecution of the matter, after Maseko recanted her earlier statements, was unlawful.

265. Mr Coetsee was undoubtedly correct when he told me that Maseko could still have been called to testify.

266. Admittedly, she would have had to be confronted with her earlier statements, which she recanted at the second bail application and in my view a number of options then existed for the prosecution.

267. An application to declare her a hostile witness was a possibility, as Mr Coetsee said.

268. Once the prosecution was in a position to cross-examine her, the reason for her recanting would have come under scrutiny.

269. It must be borne in mind that she made no less than three statements, incriminating both Plaintiffs.

270. She would have been hard pressed to explain that.

271. And if she contended that she was coerced to do so, then the officers implicated in such alleged coercion could have been called to rebut her version.

272. If the trial court found that she was not coerced, then it would have been incumbent on it to investigate possible reasons for her recanting these earlier statements, which could have been death threats and so on.

273. Maseko would have found herself between a rock and a hard place in that she would have had to concede that one or more of her statements were false and every possibility existed that she could have come up with the truth after all.

274. By any analysis, all was not lost after Maseko recanted her earlier statements and I cannot find that the further prosecution was unlawful, simply because it would have been difficult to secure a conviction.

275. If I am unable to find that a conviction would have been impossible, which I am not, then I cannot find that it was unlawful to proceed with the prosecution.

276. I therefore do not find the further prosecution of the matters unlawful after Maseko recanted her earlier statements.

Conclusion

277. In the premises I do not find the Plaintiffs' arrests, detentions, and prosecutions unlawful.

278. I also find no evidence that any of the officers and prosecutorial officials were negligent, (let alone grossly negligent), during the arrests, detentions, and prosecutions of the Plaintiffs.

279. It follows that the Plaintiffs' must fail.

280. The order that I make herein is as follows:

"The Plaintiffs' claims are hereby dismissed with costs."

BY ORDER OF COURT

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