IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 43393/2012

In the application between:

NKOSINATHI MBELE Plaintiff

And

THE MINISTER OF POLICE 1st Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2nd Defendant

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

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DATE : 14/12/2023

JUDGMENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14h00 on 14 December 2023.

LENYAI J

[1] The plaintiff in this matter instituted a claim against the first defendant for assault, unlawful arrest and detention as well as malicious prosecution by the first and second defendants. The plaintiffs' claims range as follows:

Claim A: On 13th May 2010 in the early hours of the morning at Middleburg, unknown members of the SAPS unlawfully assaulted him by shooting him on his chest, right arm, and leg.

Claim B: On the same day after the assault, he was unlawfully arrested by unknown members of the SAPS and detained until his release on the 9th of June 2010.

Claim C: On the 8th of June 2010 unknown members of the first defendant and unknown officials of the second defendant wrongfully and maliciously instituted criminal proceedings against him in the Middleburg Magistrate's Court.

[2] The parties had agreed at the pretrial conference that there should be a separation of issues in terms of Rule 33(4) and the court was requested to only adjudicate on the merits and that the issue of quantum be postponed *sine die* and should only be proceeded with if the defendants are found to be liable.

[3] There were three witnesses who testified at the trial. The plaintiff testified in support of his claims and the defendants had two witnesses Ms. S Barthu, a senior prosecutor as well as Sergeant V.A Mathibela.

[4] The plaintiff testified that he was originally from Mahikeng and he had come to Middelburg to meet a person who promised to assist him to find employment. This person was supposed to connect him to someone in the mining industry who would facilitate that he eventually finds employment. He further testified that he did not know what type of employment he would be offered as he was not qualified for any specific job in the mining sector.

[5] On his arrival at one of the filling stations at the entrance of Middelburg, he contacted the person he was supposed to meet telephonically to no avail. After several attempts and taking into consideration that it was becoming quite late in the day, he decided to look for a quiet place where he could sleep as he was a light sleeper, and he found the filling station to be quite noisy. Plaintiff testified that he walked down the street next to the shops until he found a security gate that was secured by a chain but was not locked. He got in through the gate and chained it after he had entered for his safety. He found a passage that led to a dustbin corner built with bricks and decided to sleep there and he fell asleep after midnight.

[6] While he was sleeping he heard footsteps and woke up. He noticed two people on the roof who were shinning their torches on him and from the gate two other people were also approaching him. He realised that the people on the roof as

well as the people approaching him from the gate were police officials. The police on the roof instructed him to come out from where he was with his hands held up, whilst the ones approaching from the gate told him to lie on the ground.

[7] Plaintiff further testified that he became confused by the different instructions from the police and suddenly the policemen on the roof started shooting at him while he was standing there with his hands held up. He was first hit on his right arm, then on his chest and on his left knee which caused him to fall. Whilst on the ground the fourth bullet just burnt his skin on his left knee. Plaintiff also testified that he had his wallet on him when he was arrested.

[8] After he was shot he became dizzy and the police officials took him to the hospital where he remained until the 23rd of May 2010. He further testified that after he was discharged from the hospital, he was taken to the Middelburg Police Station where he remained in custody until he was released on 9th of June 2010. Plaintiff further testified that he was informed by a female police officer that he was being released and he was not advised why he was released. After some time, he was called on the phone by the police who advised him that he must appear in court. He testified that he appeared in court on several occasions after his release and he was advised by the magistrate on 29th of May 2012 that the case against him was withdrawn and he was never called to court again.

[9] During cross examination plaintiff revealed the name of the person who promised to connect him with someone from the mine as Sipho. Sipho would have introduced him to someone, and they would have looked for any job as

he was not qualified for a specific job. When the plaintiff was confronted with the fact that his affidavit in the condonation application in terms of Section 4 (a) of the Institution of Proceedings Against Certain Organs of State 40 of 2002, where he stated that he had discussions with Themba regarding business opportunities in Mpumalanga, that he wanted to explore a mechanic business in Middleburg and that he had travelled to Middleburg on 12 May 2010 with the objective of exploring the viability of setting up a motor mechanic business, is in total contradiction with his evidence in court, he was unable to explain the contradictions.

[10] The plaintiff maintained during cross examination that he found the gate and a passage where he slept without the assistance of anybody. He was also unable to explain the contrary statement in his affidavit in support of the condonation application, where he specifically stated that he was advised by some people to put up for the night in the premises of Fruit and Vegetable Store.

[11] The plaintiff further admitted during cross examination that there was a house breaking in the early hours of the 13th of May 2010 at the Fruit and Vegetable Store where he was sleeping, but he denied that he heard any noise from a grinder and only woke up when he heard a person running followed by some clicking sounds. He further admitted that he had entered private property without permission however he justified his conduct by saying that he was only looking for a safe place to sleep. The plaintiff also testified that there was a lapse of about 10 minutes between the time he heard the movement of a person running before he became aware of the police on the roof.

[12] During cross examination, the plaintiff was asked if he knew Mr. Vincent Pitseng and his answer was that he had never met him and only saw him for the first time when they started attending their court case in the Magistrate Court. It was put to him by the legal representative of the defendants that Mr. Pitseng is also from Mahikeng and according to his statement he was also looking for employment in Middelburg. He was also in the vicinity of the crime scene moments before the plaintiff was shot and he was arrested by the police while trying to flee from the crime scene. The plaintiff maintained that he was on his own and he was not aware of anybody else being around.

[13] The plaintiff was unable to explain during cross examination why he was confused by the different instructions he received from the police on the roof and the police approaching from the gate. It was put to him during cross examination that he could have simply lied down on the ground and stretched out his hands above his head, again he could not explain his confusion.

[14] The plaintiff was also unable to explain why he mentioned in court, for the first time, that a fourth bullet also hit him. He admitted that the fourth injury he mentioned in court was not recorded in his hospital records, and that he never mentioned it to the occupational therapist when he was interviewed by her. Plaintiff also confirmed during cross examination that he is right-handed.

[15] The plaintiff further denied any knowledge of the bag which was, according to an entry in the SAP 13 Register found near him and contained several house breaking tools as well as his driver's license and he also denied that he was in

possession of a beretta toy pistol which was also entered into the SAP 13 Register.

[16] Ms. Bhartu, who was a senior prosecutor at Middleburg during the years 2010 to 2013 testified on behalf of the second defendant. She testified that the police were requested to compile two duplicate dockets regarding this matter, after a letter of demand to institute civil action against the National Director of Public Prosecutions (NDPP) was received and the original dockets had gone missing. She further testified that the duplicate dockets were compiled in 2013 and on perusal of these duplicate dockets she "nollied" both dockets mainly because Sergeant Steyn had passed on.

[17] Ms. Bhartu testified that she had sight of the original house breaking and theft case dockets for the first time during consultation on Monday the 31st of July 2023. On perusal of the said dockets, she concluded that on 17th of May 2010, when Ms. Malan instituted prosecutions against both Mr. Pitseng and the plaintiff, the information in the investigation diary, the affidavits from Sergeant Steyn and Mr. Rodrigues as well as the warning statement of Vincent Pitseng, constituted a *prima facie* case against both Mr. Pitseng and the plaintiff. She confirmed that according to the information in Sergeant Steyn's affidavit there was a house breaking at Fruit and Vegetable store, where entry was obtained through the roof, that there was a shooting incident and that two people were arrested, the one was arrested when he fled the scene and the second one was the person who was shot and also that there was some cash and air time stolen.

[18] Ms. Bhartu testified that the case against the plaintiff was transferred for trial to the regional magistrate court where it was postponed several times until it was withdrawn on 29th of May 2012 by Mr. Mtsweni, the prosecutor in the matter. According to her, it was evident from the entry in the investigation diary by Mr. Mtsweni on 29th of May 2010, that the case against the plaintiff was withdrawn mainly because Sergeant Steyn, the key witness had passed on. No fingerprints were lifted from the scene of the crime and Mr. Rodrigues, the owner of the store, had stated in consultation that he knew nothing about what transpired that night. The state could not prove its case beyond reasonable doubt and therefore it was pointless to proceed with the case. She further admitted that fingerprints can be useful in any house breaking case but maintained that the lack of fingerprints is not detrimental to any prosecution.

[19] Ms. Bhartu was cross examined about the postponement of a case in absentia where an accused is in hospital, and she stated that a letter from the hospital must be made available to the court to confirm the patient's admission to hospital. During re-examination she referred the court to a letter attached to the charge sheet dated 16th of May 2010 from the Department of Health, which confirmed that the plaintiff was admitted at Steve Biko Academic Hospital in Pretoria. She further testified that the plaintiff made an appearance in court immediately after being discharged from the hospital.

[20] Ms. Bhartu throughout her testimony in chief, cross examination and re-examination maintained that there was sufficient evidence in the case docket to constitute a *prima facie* case when the prosecution of the plaintiff was instituted on 17th May 2010 and that she would have also instituted

persecution. She further confirmed that the plaintiff was represented by a legal representative when the case against him was withdrawn. Ms. Barthu further confirmed under cross examined that the evidence of the security guard at KFC would not have assisted, as he could only confirm that he heard the sound of iron being cut but he did not see who committed the crime.

[21] Sergeant Mathibela testified on behalf of the first defendant. He testified that he was on duty at the police station on the night in question when he received a call from Warrant Officer Botha to go and assist after a house breaking was reported at around 04:00 at the Fruit and Vegetable Store. When he arrived at the scene, he found Sergeant Steyn and the security guard from KFC. The security guard advised them that he was on the outside of KFC, patrolling both the KFC and the Fruit and Vegetable store when he heard a terrible noise that sounded like iron bars being cut from the Fruit and Vegetable Store and it also smelled like iron burning. Sergeant Mathibela further testified that he also smelled burning iron at the outside safe of the fruit and vegetable store and he together with Sergeant Steyn also heard people running on the roof of the shop.

[22] The assistance of the fire brigade was sought because they were unable to get on the roof. A step ladder was brought by the fire brigade and he together with Sergeant Steyn were able to get on top of the roof of the fruit and vegetable store. He further testified that there were several police officials on the scene and around the complex and there were also three police vehicles. Sergeant Mathibela further testified that once he and Sergeant Steyn were on the roof, they heard a person running on the ground and jumping over the wall next to the trellis gate. He shouted at Sargent Radebe who was outside the trellis gate

to arrest the person who jumped over the wall, and he heard her arresting the person.

[23] He further testified that he and Sergeant Steyn used their torches to shine into the passage and the back of the fruit and Vegetable store. They heard a noise down in the passage and they realised that there was another person hiding there. Sergeant Mathibela testified that his view was slightly obscured by Sergeant Steyn, and he had a partial view to the plaintiff.

[24] Sergeant Mathibela testified that they instructed the plaintiff to come out with his hands in the air and he came out running towards the gate. Suddenly Sergeant Steyn said "*he has a gun*", and he saw the plaintiff turning and touching his waist on his right side and under the circumstances he believed that he was going for his gun. Sergeant Mathibela admitted that he never saw a gun in the hands of the plaintiff. Sergeant Steyn started shooting at the plaintiff and he also shot at him. He further testified that he fired once, and Sergeant Steyn fired three shots and the plaintiff fell to the ground. After the plaintiff fell, they came down from the roof and he saw a toy gun next to the plaintiff and there were other police officials surrounding the plaintiff who also saw the gun. He then went into the shop to make further observations and left the plaintiff with Sergeant Steyn and the other police officials.

[25] During cross examination Sergeant Mathibela stood his ground and confirmed that although he did not see the gun in the hands of the plaintiff he saw him stretching his hand to his waist and he reasonably believed that he was reaching for his gun and he acted in self-defense. He further confirmed that the

plaintiff never fired his gun, but he was shot because he believed that he was pointing a firearm at the police. Sergeant Mathibela further testified that it was a difficult situation, and everything happened quickly, and he feared for his life. He further confirmed that he saw the gun next to the plaintiff as he had to walk past him to get into the shop and other police also saw the gun. He was questioned during cross examination why there was no photograph of the gun taken at the scene of the crime and his response was that he does not know as he was not there when the evidence was collected. He was further questioned about the bag of tools also found at the scene. His response was that he does not recall seeing the bag at the scene of the crime and he only saw it at the police station when it was booked into evidence together with the gun.

[26] It is trite that the onus rests on the defendant to justify an arrest. In the matter of ***Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F** the court stated that:

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

[27] In the matter of ***Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 SA 375 (SCA) at para 6**, the Supreme Court of Appeal held that :

> *"... to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as an agent or employee deprived him of his liberty."*

[28] Section 40(1) of the Criminal Procedure Act 51 of 1977 reads as follows :

"(1) A peace officer may without a warrant arrest any person –

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects to have committed a schedule 1 offence other than the offence of escaping from custody. "

[29] The section requires that the peace officer must have a reasonable suspicion that a schedule 1 offence had been committed by the suspect when effecting an arrest in terms Section 40(1)(b). The term 'reasonable grounds to suspect' has enjoyed considerable attention by our courts. In the matter of ***R v Van Heerden* 1958 (3) SA 150 T**, Galgut AJ (as he then was) stated that "*these words must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have suspicion.*"

[30] This principle was followed in the matter of ***Duncan v Minister of Law and Order* (38/1985) [1986] ZASCA 24; [1986] 2 All SA 241 (A) (24 March 1986)** where HJO van Heerden JA said the following:

"*The so called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:*

1) The arrestor must be a peace officer.

2) He must entertain a suspicion.

3) It must be a suspicion that the arrestee committed an offence referred to Schedule 1 to the Act

4) The suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect."

[31] In the matter of ***Minister of Safety and Security v Sekhoto and Another*** **(2011 (1) SARC 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; 131/10 (19 November 2010),** the jurisdictional facts for a section 40(1)(b) defence were confirmed by Harms DP at para 6 where he stated that :

> *"As was held in Duncan v Minister of Law and Order, the jurisdictional facts for a section 40 (1)(b) defence 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 (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds."*

[32] Turning to the matter before me, regarding the issue of unlawful arrest and detention it is not in dispute that the police arrested the plaintiff and deprived him of his liberty. The first defendant however is relying on the defence of section 40(1)(b) of the Criminal Procedure Act. The jurisdictional facts which have been developed through our jurisprudence over many years and crystallised in the matter ***Minister of Safety and Security v Sekhoto*** at para [31] supra are present and this justified them in invoking the power conferred upon them by section 40(1)(b). These jurisdictional factors are as follows: *(i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.*

[33] The Supreme Court of Appeal in the matter of ***Biyela v Minister of Police*** **(1017/202) [2022] ZASCA 36 (01 April 2022)** stated that

"[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unpopularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offense has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of the arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a suspicion because he or she has a discretion. The discretion to arrest must be exercised properly."

[34] In terms of the four established jurisdictional factors, in the matter before me, the following may be said:

34.1 the first defendant's witness is a peace officer within the definition and meaning of peace officer in terms of section 40(1)(b) of the Act;

34.2 the peace officer entertained a suspicion that a crime of house breaking with intent to steal had been committed;

34.3 the peace officer's suspicion was that the plaintiff's offense of house breaking with intent to steal, is incorporated in schedule 1 offences of act 51 of 1977;

34.4 the peace officer's suspicion rested on reasonable grounds because when he arrived on the scene of the crime, he together with a colleague found the plaintiff hiding in the passage and when he was asked to come out with his hands up in the air he attempted to flee and even went as

far as to point a firearm at the police. There was no one else found at the scene of the crime save for the plaintiff and another man who was arrested while jumping the wall and fleeing from the scene of the crime.

[35] I find that there were glaring contradictions in the evidence of the plaintiff regarding his reasons for being in Middelburg. His evidence in court differed from his affidavit in support of the condonation application like day and night. In the affidavit, he indicated that he had some discussions with Themba about exploring mechanical business opportunities in Middelburg whereas in court, he testified under oath that he had to come meet someone who was going to connect him to someone who would offer him any job in the mining sector as he was not qualified for anything. Even the name of this someone, Sipho had to be coaxed out of him during cross examination.

[36] The jurisdictional facts for a section 40(1)(b) defence were satisfied and the arrest by the police officials was necessary and lawful.

[37] The plaintiff contends that he was held in detention for an unreasonably long time before he was charged. Normally after an arrest, the accused person must be brought before court as soon as reasonably possible but not later than 48 hours of the arrest. The exception will be if the 48 hours fall outside the ordinary court hours, or if the suspect because of his or her physical condition or illness could not be brought before a court or if the suspect was arrested outside the area of jurisdiction of the court. *In casu*, the witness of the first defendant testified that the plaintiff was injured in the process of the arrest and taken to the hospital where he stayed for some time. The charge sheet is dated the 17th

May 2010 and the defendant testified that, attached to the charge sheet was a letter from the hospital dated 16th May 2023 clearly indicating that the plaintiff was in hospital and could therefore not come to court, for the charges against him to be formally presented to him. I am of the view that under the circumstances there was no unreasonable delay in bringing the plaintiff to court within 48 hours of the arrest as he was recuperating in hospital, the charge sheet is dated the 17th May 2010 and there was an official letter from the hospital dated the 16th May 2010 explaining that the plaintiff was hospitalised. In my view the claim for unlawful detention stand to be rejected by the court.

[38] Section 49(2) of the Criminal Procedure Act provides as follows:

> "If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resist the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if -
>
> (a) the suspect poses a threat of serious violence to the arrestor or any other person, or
>
> (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later."

[39] In terms of Section 120 (6) of the Firearms Control Act 60 of 2000, the following constitutes an offence:

"It is an offence to point –

(a) any firearm, an antique or an air-gun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or

(b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an air-gun at any other person, without good reason to do so."

[40] In the matter of ***Phakula v Minister of Safety and Security*** **(64450/2021) [2023] ZAGPPHC 277 (6 April 2023)** the court remarked as follows:

"[84] Likewise, ***Mondlane v Minister of Safety and Security 2011 (2) SACR 425 (GNP),*** *the court stated that*

the belief that the arrestor must hold or must have held is the belief that force is immediately necessary for the purposes of protecting [themselves], and the person lawfully assisting the arrestor and any other person from imminent or future death or grievous harm.

[85] in the end, there is a combination of factors to consider: whether the degree of force used is proportional to the seriousness of the crime which the victim is suspected of fleeing from, coupled with the possibility of the suspect posing a threat of serious physical harm if they should escape arrest. It should be kept in mind that the arrestor at the time often does not have the luxury of time to make a decision, and unlike a court considering the matter, does not have the benefit of hindsight. Still the use of force is invasive and drastic, requiring the court to remain sensitive to the issues raised by section 49 and to decide the case based on the

delicate balancing of the rights in duties involved in a particular factual circumstance.

[86] Was the use of force to prevent the plaintiff from escaping, in this case, reasonably necessary and proportional to the circumstances, as the 2003 amendment requires? In my opinion, yes. The police were stationed in the house based on a tip off that there would be a serious house robbery, which then happened. The suspects were armed, there was a shootout in the house that resulted in the death of a suspect, warning shots were fired and ignored, and De Klerk, acting on information from his colleagues and the knowledge that some suspects were armed, regarded the plaintiff as dangerous. Seeing the plaintiff flee towards an open veld in a buildup area, De Klerk did not aim to kill him but to prevent him from escaping and putting their lives of others in danger. These would be reasonable grounds, even if no firearm was found on the plaintiff."

[41] Turning to the matter before me, the plaintiff testified that he was assaulted by the police in that he was shot four times without any provocation on his part. He testified that he was shot while his hands were up in the air. The first defendant justified that the arrest was made lawfully in accordance with the provisions of section 40(1)(a) of the Criminal Procedure Act – pointing of an object which is likely to lead a person to believe it is a firearm. The evidence of the witness for the first defendant was that he saw the plaintiff fleeing from the scene and his hand reaching for his waist. He had a reasonable belief that the plaintiff was reaching for his gun, and he feared for his life. His colleague fired three shots and he fired once. He further testified that the plaintiff never fired his gun.

[42] During cross examination the plaintiff could not explain why the fourth wound was not recorded in the hospital records and also, why he never mentioned it to the occupational therapist when she interviewed him. What is even more startling is the submission by the legal representative of the plaintiff regarding the fourth wound, that the bullet is still lodged in the plaintiff's knee. The fourth wound seems like a fabrication on the part of the plaintiff and the court rejects it as simply not truthful.

[43] Section 49(2) of the Criminal Procedure Act also empowers the police or an arrestor who is attempting to arrest a suspect who is resisting arrest or is fleeing or attempts to flee, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances. *In casu* the evidence of the witness for the first defendant that the plaintiff was running away and that he reached for his waist, created a reasonable apprehension that he was reaching for his gun is more probable.

[44] Section 120 (6) of the Firearms Control Act is crystal clear that pointing of a firearm at anyone is an offence and it is immaterial if the firearm was loaded or not, nor if it was a real gun or not. In my view the person who would be pointed with a gun would not know if the gun was loaded or not and if it is real or not. It would be remiss of anyone to expect that one must wait to be shot and wounded before they can take any reasonable steps to protect their lives and those of

others around them. The testimony of the plaintiff that he was not armed and had his hands up in the air and that of the witness for the first defendant that the plaintiff was fleeing and reaching for his waist are in direct contrast. What is also very clear to the court is that the police were not trying to use deadly force, they were merely attempting to stop the plaintiff from fleeing and to ensure an arrest. The wounds of the plaintiff are indicative of the fact that they were not trying to kill him as he was shot on his right arm, chest and left knee. Faced with this conundrum, the court must look at the entire body of evidence and facts placed before it and not look at the evidence in piecemeal. Taking into consideration all the evidence placed before court and the fact that a gun was seen next to the plaintiff makes the version of the plaintiff improbable and highly unlikely. The fact that a picture of the gun was not taken seems to be negligence on the part of the police who were taking pictures and does not make the version of the plaintiff feasible.

[45] I found the witness for the first defendant to be highly credible as he simply told the truth. The court says this because when questioned about the bag containing equipment used in the house breaking, he stated that he only saw the bag at the police station when it was booked into evidence.

[46] In addition to the claim for assault, unlawful arrest and detention, the plaintiff has a claim for malicious prosecution. It is trite that to succeed with a claim for malicious prosecution a claimant must allege and prove that:

(i) the defendants set the law in motion, in that they instituted the proceedings;

(ii) they acted without reasonable and probable cause;

(iii) they acted with malice, and

(iv) the prosecution failed.

[47] It is noteworthy to mention that it is not every prosecution that is concluded in favour of the accused that eventually results in a successful claim for malicious prosecution. Often times, the test for a successful prosecution is confused with the test for an arrest by a peace officer without a warrant. In proving malicious prosecution, the claimant must amongst other things, allege and prove that the defendants acted without reasonable and probable cause whereas the test for an arrest without a warrant, the peace officer must have a reasonable suspicion that a schedule 1 offence has been committed.

[48] Turning to the matter before me, it is common cause that the case against the plaintiff was initially withdrawn because of the passing on of Sergeant Steyn, the key witness. The state could no longer prove its case beyond reasonable doubt without the evidence of its key witness. It is my view that as soon as Mr. Mtsweni became aware of the demise of the key witness, he immediately withdrew the case as early as 29th May 2010. The witness for the second defendant, Ms. Bhartu's testimony which remained uncontested, was that the police were requested in 2013 to compile two duplicate dockets regarding the matter after a letter of demand to institute civil proceedings against the second defendant was received and the original case dockets were missing. She further testified that on perusal of the duplicate dockets she "nollied" them, mainly because Sergeant Steyn had passed on.

[49] Ms. Bhartu further testified that she first had sight of the original dockets on the 31st July 2023 during a consultation. After perusing the docket of the plaintiff,

she concluded that on the 17th May 2010 when Ms. Malan instituted the prosecution against both Mr. Pitseng and the plaintiff, there was enough information in the investigation diary, the affidavits of Sergeant Steyn and Mr. Rodrigues, the owner of the store and the warning statement of Mr. Pitseng, all constituted a *prima facie* case against both Mr. Pitseng and the plaintiff.

[50] There is no indication on the evidence presented before court that the police were moved by any other intention other than to have the plaintiff stand trial for the charges against him. With regard to the second defendant, it was simply carrying out its duties as stipulated in section 179 of the Constitution of the Republic of South Africa, 1996 as well the National Prosecuting Authority Act,1998, which is to institute criminal proceedings on behalf of the state and ensure that it carries functions that are necessary to the institution of same.

[51] The plaintiff in my view has failed to prove his claim for malicious prosecution and this claim stands to be dismissed.

[52] The parties further argued the costs of the 17th July 2023. It is common cause that the matter was enrolled on the 17th July 2023 but was removed from the roll by the plaintiff on Friday the 14th July 2023 and it was agreed that the costs be reserved. The defendants contend that the matter was on the roll however an incorrect case number was reflected on the roll. The defendants submit that it was unnecessary to remove the matter from the roll and plaintiff should pay the wasted costs occasioned by the unnecessary removal. The plaintiff on the other hand avers that there was an administrative error and they also suffered loss because of the removal. The plaintiff submitted that the costs of the day

should be borne by the respective parties. I am of the view that the unfortunate removal of the matter from the roll on the 17th July 2023, although regrettable, blame cannot be apportioned on any of the parties and each party must bear their own costs of that day.

[53] In the premises, the following order is made:

(a) The plaintiff's claims for assault, unlawful arrest and detention and malicious prosecution is dismissed with costs.

(b) Each party is ordered to be responsible for their own costs of the 17th July 2023.

M.M.D. LENYAI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF: ADV. T Chauke

INSTRUCTED BY: A M Vilakazi Tau Inc Attorneys, Pretoria

FOR THE DEFENDANTS: ADV J Barnadt SC

INSTRUCTED BY : State Attorney, Pretoria

HEARD ON: 01- 02 August 2023,

Heads of Argument submitted on 3 August 2023

DATE OF JUDGMENT: 14 December 2023