



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

CASE NUMBER: 23025/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4)

5/07/2023

DATE

SIGNATURE

In the matter between:

MASIMULA THEMBINKOSI JIMMY

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

- [1] The plaintiff, Mr Thembinkosi Jimmy Masimula, instituted the current action against the Minister of Police (the defendant), wherein he seeks damages arising out of his arrest, detention and assault by the members of the South African Police Services (“SAPS”) on 11 September 2013. The vicarious liability of the defendant was admitted in the matter.
- [2] The parties agreed on the separation of issues in terms of Rule 33(4), which agreement was subsequently made an order of this court. Therefore, the issue of liability and quantum was separated, and the matter proceeded on liability only. Also, by virtue of the admissions made by the defendant on the pleadings, it was agreed between the parties that the defendant bore the *onus* of proof and the duty to begin.

Plaintiff’s case pleaded in the Particulars of Claim

- [3] The plaintiff alleges that on 11 September 2013 he was unlawfully arrested and detained by three (3) unknown members of the defendant stationed at Motetema Police Station. He alleges that the arrest was effected on a mountain in the Tafelkop/Motetema area in the Limpopo Province. As a direct result of the of the unlawful arrest and detention, the plaintiff claims R300 000.00 (three hundred thousand rand) in relation to claim 1.
- [4] Furthermore, the plaintiff alleges that following his arrest on 11 September 2013 he was unlawfully and wrongfully shot and assaulted by one of the three unknown members of the defendant and he sustained severe bodily injuries consisting *inter alia* of the following:
- 1) 1cm and 2cm entrance and exit wounds on medical aspect of the right leg;
 - 2) Open proximal tib-fib fracture of the right leg with swelling, deformity and shortening of the right leg.

- [5] As a result of the injuries referred to above, he was admitted and hospitalized at Groblersdal Hospital until his discharge on 26 September 2013.
- [6] Due to the injuries the plaintiff sustained; he claims an amount of R 600 000.00 (six hundred thousand rand) in relation to claim 2.

Defendant's pleaded case

- [7] The defendant, however, denies that the plaintiff was unlawfully shot by any member of the SAPS and pleads that the plaintiff was lawfully shot by Sergeant Thoka ("Thoka") acting in self-defence, alternatively in a situation of necessity; or that the firing of the shot by Thoka was under the circumstances lawful, reasonable and necessary.
- [8] The defendant further denies that the arrest of the plaintiff was unlawful and pleads that firstly, the SAPS member was a peace officers as defined by section 1 of the Criminal Procedure Act 51 Of 1977 ("CPA"), and secondly, that Thoka reasonably suspected the plaintiff of having committed an offence referred to in Schedule 1 of the CPA namely, stock theft, alternatively resisting arrest. This places the arrest within the parameters of section 40(1)(b) of the CPA.

Defendant's Evidence

- [9] It is trite that in an action for damages for unlawful arrest and detention, once the arrest and detention has been admitted or proved, the defendant bears the onus to prove the existence of grounds justifying the arrest and detention.¹ For that reason, the defendant began adducing evidence and called Sergeant Thoka, the arresting officer to testify.
- [10] Thoka testified that on the morning of 11 September 2013 he reported on duty at Motetema Police Station. While he and Warrant Officer Mokolo were doing patrols, they received a complaint from the charge office of stock theft. They proceeded to the police station where they interviewed the complainant, Ms Leah Mothupi ("Leah"). Leah reported that 6 (six) donkeys were stolen from her parental home at Tafelkop. As a result of the report a case of stock theft was opened, CAS 92/9/2013.

¹ *Tsose v Minister of Justice and Others* 1951 (3) S 10 (A).

- [11] After receiving the information from Leah, Thoka, Leah and Mokolo headed to the parental home of Leah. On arrival at Leah's parental home, Thoka was informed by Joseph and Piet, brothers of the complainant, that earlier that morning they tracked the donkeys and they found them tied to a tree. They further told Thoka that a male person, whom later transpired to be the plaintiff, was seated not far from where the donkeys were tied. Joseph and Piet approached the donkeys and identified the donkeys as their property. This they did on the basis of the burn mark and the cutting of the ears. While they were untying the donkeys the plaintiff approached them and insulted them.
- [12] Thoka, Mokolo, Joseph and Piet proceeded on foot in the direction of the mountain where the donkeys were tied to the tree. On arrival at the place, the donkeys were gone. They all followed the tracks of the donkeys. After some time, the donkeys were found grazing in a veld and the plaintiff and another man were in close vicinity of the donkeys. Joseph was with the witness and he identified the donkeys as their property. Joseph also confirmed that the plaintiff was the person who earlier that morning insulted them when they attempted to untie the donkeys.
- [13] At that stage Piet was in the company of Mokolo and they were a distance away from the witness and Joseph.
- [14] Thoka testified that he was satisfied that the donkeys belonged to the complainant and that the plaintiff was in possession of stolen property. He shouted and introduced himself as a police officer to the plaintiff, who was seated on a stone. The plaintiff stood up from where he was seated and started running in their direction. While the plaintiff was running in their direction, he took out an okapi knife from his trouser pocket, which he opened.
- [15] Thoka stated that he realised that their lives were in danger, whereafter he pulled his firearm from the holster on his hip. During this time, he shouted "Stop", "Stop" "Stop".
- However, the plaintiff kept on running towards them. Thoka fired a warning shot in the air believing that the plaintiff would stop running towards them. However, the plaintiff kept on running in their direction despite the warning shot being fired in the air. Seeing

that the plaintiff was still approaching them, Thoka aimed and fired a second shot in the direction of the plaintiff foot in an attempt to stop him.

[16] The plaintiff was struck by the second shot after which he fell to the ground. Mokolo came to where the plaintiff was lying on the ground. The okapi knife was lying next to the plaintiff. The plaintiff was arrested for resisting arrest. An ambulance was summonsed and the plaintiff was transported to the hospital.

[17] Thoka testified that he and Mokolo were dressed in full uniform at the time of the incident. He stated that prior to the incident he did not know the plaintiff.

[18] The witness further testified that prior to the shots being fired he was satisfied that the donkeys were stolen from the complainant. He further stated that if the plaintiff adhered to his instructions he would not have been injured and would have been arrested without any incident.

[19] After the incident Thoka opened a case of resisting arrest against the plaintiff, CAS 95/9/2013. He conceded that the charge against the plaintiff was withdrawn by the prosecutor. He was unable to provide any further information regarding the stock theft charge opened against the plaintiff by Leah.

Plaintiff's Evidence

[20] The plaintiff testified that on or about 7/8 September 2013 he made contact with a person known as Willy in order to buy 4 (four) donkeys. Willy informed him that he would make enquiries from his home as to whether there were donkeys for sale.

[21] After receiving a phone call from Willy on 10 September 2013 the plaintiff proceeded to Willy's parental home where they discussed the transaction. Willy told the plaintiff that the donkeys were at Sterkfontein. The plaintiff stated that at around 18h00 Willy arrived at his parental home with 5 (five) donkeys. He enquired from Willy as to why he brought 5 (five) donkeys instead of 4 (four) as per their discussion previously to which Willy responded that 1 (one) donkey could not remain behind and therefore he should take all five (5) the donkeys. After some discussions with his grandmother the

plaintiff paid an amount of R1200 (one thousand two hundred rand) for the donkeys. Willy left and the donkeys remained at the plaintiff parental home.

- [22] The plaintiff stated that Willy informed him that the donkeys were his property.
- [23] The following morning, 11 September 2013 the plaintiff took the donkeys to the mountain to graze. While the donkeys were grazing 2 (two) gentlemen approached him and told him that the donkeys belonged to them. A verbal argument ensued between them after which the 2 (two) men left.
- [24] The plaintiff testified that he remained with the donkeys on the mountain after the men left. After about an hour and a half 3 (three) men and a female approached him. One of the men was wearing black vest and trousers, the man had a firearm in his hand. The plaintiff testified that as the group was moving in his direction, he realised the men who approached him and with whom he had the argument earlier that morning were part of the group.
- [25] The plaintiff stated that he immediately ran away when he noticed the firearm because he was scared and alone. While running away from the group approaching him, he heard gunshots being fired. He was shot in the right lower leg and fell to the ground. Thoka came to where he was lying on the ground and placed his knee on the plaintiff's chest whereafter Thoka hit the plaintiff with an okapi knife on his head.
- [26] Thoka then moved away from where the plaintiff was lying on the ground and after talking to the people with him, Thoka fired a second shot. Thoka picked up the cartridge and threw it next to where the plaintiff was lying.
- [27] After members of the SAPS arrived on the scene he was escorted down the mountain and an ambulance transported him to hospital. On arrival at the hospital, he was informed that he was under arrest for stock theft.
- [28] The plaintiff testified that he was unable to provide the court with any information as to where the donkeys were at the time of his testimony.

Common Cause Facts

[29] The following issues are *common cause* between the parties:

1. On or about 11 September 2013 5 (five) donkeys, the property of Ms Leah Mothupi were stolen from her parental home at Tafelkop, Limpopo. Following the arrest of the plaintiff the donkeys were recovered and handed back to the owner.
2. During the incident the plaintiff was arrested by members of the South African Police Service stationed at the Motetema Police Station, without a warrant of arrest.
3. Prior to his arrest, the plaintiff was shot in the right lower leg by Sergeant Thoka. As a result of the injury sustained, the plaintiff was transported to, and admitted at Groblersdal Hospital for treatment of the gunshot wound to the lower right leg.
4. Pursuant to the arrest, the plaintiff was detained at the Groblersdal Hospital from 11 September 2013 until his date of his discharge from hospital on 16 September 2013. Pursuant to the plaintiff's discharge from Groblersdal Hospital, he was further detained at Motetema police station from 11 September 2013 until his first appearance in court on 1 October 2013.
5. The plaintiff was charged with the following charges under CAS: 95/09/2016:
 - 5.1 Resisting of arrest; and
 - 5.2 Possession of a dangerous weapon (knife).
6. Following his first appearance in the Magistrate's Court the charges were withdrawn against the plaintiff.

Issues in Dispute

[30] The first question to be answered is whether it can be said that sufficient information was available for the arresting officer to reasonably suspect that the plaintiff committed a schedule 1 offence, and whether the arresting officer properly exercised the discretion whether to arrest the plaintiff without a warrant.

[31] The second issue to be decided upon was whether the concerned police officer's conduct falls within the ambit of section 49(2) of the CPA

The Case Law and Legislative Framework

[32] Before dealing with the facts in the matter, it may be important to traverse and consider firstly the applicable legislative framework and the applicable legal principles.

Unlawful Arrest and detention

[33] An arrest or detention is *prima facie* wrongful. Once the arrest and detention are admitted, as is the case *in casu*, the *onus* shifts onto the defendant to prove to allege and prove the lawfulness of the arrest and detention. So, for example, it was held by the Supreme Court of Appeal as follows in *Zealand v Minister of Justice & Constitutional Development & Another*²:

“This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.”

² *Zealand v Minister of Justice & Constitutional Development & Another* 2008 (4) SA 458 (SCA) at para [25].

[34] Section 40(1)(b) of the CPA confers the power on a police officer, without warrant, to arrest a person reasonably suspected of having committed a schedule 1 offence,³ which includes the offence of theft.

[35] It is not required for a successful invocation by a peace officer of Section 40(1)(b) of the CPA, that the offence was actually committed; the question is whether the arresting police officer had reasonable grounds for suspecting that such a crime had been committed. This requires only that the arresting officer should have formed a suspicion that must rest on reasonable grounds. It is not necessary to establish as a fact that the crime had been committed.⁴ ‘Suspicion’ implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.⁵

³ **Schedule 1**

Treason.

Sedition.

Public violence.

Murder.

Culpable homicide.

Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Trafficking in persons for sexual purposes by a person contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Robbery.

Kidnapping.

Childstealing.

Assault, when a dangerous wound is inflicted. Arson.

Malicious injury to property.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision. Receiving stolen property knowing it to have been stolen.

Fraud.

Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage.

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.

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.

Offences referred to in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

⁴ *R v Jones* 1952 (1) SA 327 (E) at 332.

⁵ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I – 820B.

[36] In cases such as *Duncan v Minister of Law and Order*⁶, the Supreme Court of Appeal endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect, but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."

[37] The question, whether the suspicion by the police officer effecting the arrest is reasonable, as envisaged by section 40(1)(b), must be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a schedule 1 offence. The information before the arresting officers must be such as to demonstrate an actual suspicion, founded upon reasonable grounds, that a schedule 1 offence had been committed by the person to be arrested.

Use of Force during Arrest

[38] It is an unobjectionable fact that the use of force, even deadly force, in effecting arrests is unavoidable in certain situations. The circumstances and degree to which it may be employed has, however, been under debate for centuries.

[39] Section 49 of the CPA provides police officers with legal justification to use force in carrying out arrests, and includes the rules governing the degree of force to be used, as well as the circumstances in which such force may be employed. Where a police officer's forceful conduct extends beyond the ambit of these legislative provisions, that officer may be subject to criminal liability.⁷

[40] Section 49 of the CPA reads as follows:

(1) For the purposes of this section-

(a) "arrestor" means any person authorised under this Act to arrest or to assist in arresting a suspect; and

⁶ 1986 (2) SA 805 (AD).

⁷ Burchell *South African Criminal Law & Procedure* 197.

(b) “suspect” means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists 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 resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-

(a) that the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.⁸

[41] It is evident that deadly force can only be used when it is *immediately* necessary to protect the arrestor or any other person, where the suspect poses a threat of serious violence to the arrestor and such person, or where the “suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and where there are no other reasonable means of effecting the arrest, whether at that time or later”.⁹

[42] An act that causes injury to another, or death, is *prima facie* wrongful.¹⁰ However section 49(2) sanctions the use of force including deadly force in certain specified instances when effecting an arrest. Deadly force is defined in the section to mean force

⁸ Snyman *Criminal Law* 130.

⁹ Report on the OSF-SA roundtable discussion on the human rights and practical implications of the proposed amendment to section 49 of the Criminal Procedure Act: 2010:2.

¹⁰ *Cape Town Municipality v Paine* 1923 AD 207 at 216-217; *Minister of Safety and Security v Van Duivenbode n* 2002 (6) SA 431 (SCA) para 12 and *Minister van Veiligheid en SekuriteIt v Geldenhuys* 2004 (1) SA 515(SCA) para 24.

that is likely to cause serious bodily harm or death and includes as in this matter the shooting at the suspect with a firearm.

[43] It is clear from the section that the use of deadly force is limited only to those instances where the suspect poses a threat of serious violence to the arrestor or any other person. The defence is seeking to rely on this section on the basis that the plaintiff posed a serious threat of violence to the arrestor, Thoka, and Joseph, in that he came running towards them while armed with an okapi knife when Thoka attempted to arrest the plaintiff.

[44] We live in a constitutional democracy and our Constitution demands respect for the life, dignity and physical integrity of every individual.¹¹ Whilst section 49(2) of the CPA seeks to grant the right to use force including deadly force in certain circumstances, it is the view of this court that its interpretation should be limited to those genuine instances where the life and/or safety of the arrestor or other person is threatened.

Evaluation

[45] There are material differences between the evidence of the plaintiff and the defendant. In determining whether the plaintiff has discharged the *onus*, the court has to have regards to the balance of probabilities before it.

[46] The Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie*¹² said the following:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. Therefore, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the

¹¹ See *Ex Parte The Minister of Safety and Security and Others v Walters* CCT28/01 at para [44].

¹² 2003(1) SA 11 SCA 3 para [5].

witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' 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."

[47] The evidence of the plaintiff is also that of a single witness; accordingly, the plaintiff's evidence must be approached with caution.

[48] The plaintiff did not provide a favourable impression on the court during his evidence. I find the evidence of the plaintiff wanting. His evidence was improbable, unreliable and clearly fabricated.

[49] There are a number of problems with the plaintiff's evidence. The plaintiff stated that on or about 7/8 September 2013, he approached a person called Willy, whom he knew since 2002, in order to buy 4 (four) donkeys. The plaintiff contradicted himself in that he previously bought donkeys from Willy's grandfather in 2002 and again from Willy in 2013. However, during cross examination, the issue as to his previous transactions with Willy became even more confusing as he testified that he bought the donkeys in 2002 with the assistance of his uncle.

[50] The plaintiff further contradicted averments made in his particulars of claim. The averment was made that three (3) members of the SAPS approached him during the

incident. During his testimony he stated that while he was seated in the veld, he was approached by three (3) male persons and a female.

[51] During his evidence in chief examination, the plaintiff stated that he was arrested at the mountain after being injured. This was changed during his evidence when he testified that he was arrested for stock theft at the hospital after being admitted.

[52] The particulars of claim lacked a number of important issues that came up during the trial. The evidence by the plaintiff that Thoka took an okapi knife and hit him on the head with knife was not included in the papers. It is evident that the plaintiff was fabricating evidence during his testimony.

[53] Be that as it may, I find the evidence pertaining to the transaction concluded between the plaintiff and Willy questionable and unbelievable due to the following reasons;

1. The transaction discussed between the plaintiff and Willy was for the purchase of 4 (four) donkeys. However, on 10 September 2013, Willy delivered five (5) donkeys at the plaintiff's parental home. The explanation provided by Willy as to why an extra donkey was delivered does not hold water. Willy informed the plaintiff that the fifth donkey could not be left behind and therefore it was included in the transaction.
2. The plaintiff further testified that Willy delivered the donkeys on 10 September 2013 after 18h00, this in itself must have raised concerns with the plaintiff. Why was there any need for Willy to deliver the donkeys at that time of the day?
3. Furthermore, it was not disputed by the plaintiff that on the evening of 10 September 2013 the donkeys were placed in the kraal by the owners and were removed after night fall. Therefore, the donkeys could not have been delivered to the plaintiff at 18h00 on the previous night.
4. According to the plaintiff, he concluded an agreement with Willy and he handed over an amount of R1200 (one thousand two hundred rand) for which the

plaintiff signed. However, in 2020 his house burned down and as such the documentation pertaining to the agreement and payment was lost. The claim against the defendant was instituted in March 2015, one would have expected that the attorneys acting on behalf of the plaintiff would have requested the plaintiff to provide them with this important document because the agreement/receipt of payment was of paramount importance to the plaintiff's claim, and oddly the document was lost in 2020, five years after the claim was instituted. What seems even more concerning regarding the evidence by the plaintiff during cross examination is that he informed his attorney that he was in possession of a written agreement relating to the sale to the donkeys.

5. On the day of the incident, the plaintiff stated that he herded the donkeys to Tafelkop mountain to graze. It is not in dispute that he was approached by Joseph and Piet, who informed him that the donkeys belonged to them. The plaintiff reacted aggressive towards them and refused to discuss the ownership of the donkeys. It is important to mention, on the plaintiff's version, when Joseph and Piet approached him, he was in possession of a document that confirmed his ownership of the donkeys, despite being in possession of such proof, he chased Joseph and Piet away.
6. The criminal case was withdrawn against the plaintiff on 1 October 2013, surprisingly, the plaintiff did not follow up on the whereabouts of the donkeys he bought from Willy. The plaintiff paid an amount of R1200 (one thousand two hundred rand) for the donkeys, and in the financial position the plaintiff found himself in, one would have expected that he would either reclaim his donkeys from Joseph, Piet and Leah or, alternatively, approach Willy to enquire as to why stolen donkeys were sold to him and to reclaim his money. In fact, the plaintiff did nothing, this in itself seemed highly unlikely.

[54] The plaintiff adamantly stated that he purchased the donkeys from Willy and he had a written agreement to support his version, however, when Thoka and Joseph approached him on the mountain on the day of his arrest, he ran away. He stated that, when he was approached by Thoka he was the lawful owner of the donkeys, there was no reason for the plaintiff to run away.

[55] In the context of the matter and the surrounding circumstances, it can safely be said that the evidence given by the plaintiff was highly improbable, far-fetched and fabricated.

[56] This brings me to the evidence presented by the defendant. Thoka provided the court with a cogent version and there were no material contradictions in his evidence. The witness was cross examined extensively, for hours, but he remained calm and repeated his answers to questions being rephrased by the plaintiff's counsel. I find him to be a good witness.

[57] Furthermore, Thoka was, in my judgement, not subjectively motivated by any irrelevant personal considerations of sympathy or vengeance. He had no reason to be so motivated. His suspicion that the plaintiff had committed the said crime was based on reasonable grounds, notably information received from amongst others, Joseph, the owner of the donkeys. A further important fact in the present matter is that the plaintiff was found in possession of the stolen donkeys shortly after being stolen the night before.

[58] If one is to consider the probabilities and improbabilities of the two versions, the version of the defendant strikes me more as the one that is more probable.

[59] I can find no reason why Thoka would revert to deadly force other than the plaintiff posing a threat of serious violence not only against him, but also against Joseph. The evidence before me confirms that the actions of Thoka were justified in the circumstances. Thoka acted in pursuance of his duty to protect himself and Joseph who was in his company at the time of the incident.

[60] Thoka testified that he fired a warning shot in order to warn the plaintiff to stop, however, the plaintiff proceeded towards him armed with an okapi knife. He stated that he took a further precaution in order not to inflict serious harm to the plaintiff and he fired a second shot at the plaintiff's lower legs. The evidence in this regard indicates that the actions of Thoka were proportionate to the danger posed by the plaintiff to him and Joseph.

[61] The mere fact that the plaintiff was not prosecuted for the resisting of arrest or the stock theft does not detract from the reasonableness of the suspicion that the crimes had in fact been committed by the plaintiff. There can be a myriad of reasons why the prosecution did not follow the arrest.

[62] There can be no doubt that the arresting officer, Thoka, manifestly harboured a suspicion that the plaintiff had committed at least the offence of being in possession of suspected stolen property. He would also have been justified in suspecting that the plaintiff had committed the offence of stock theft. He may not have had sufficient evidence to support his suspicion, but that is of no moment – the simple fact of the matter is that his suspicion was reasonable for the reasons mentioned above, notably the proximity in time and space between the theft of the donkeys and the plaintiff being caught in the possession of the donkeys.

[63] The question, whether the suspicion by the arresting officer effecting the arrest is reasonable, must, be approached objectively. Therefore, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a schedule 1 offence. In my view, the defendant had established that there were reasonable grounds to suspect that the plaintiff had committed the schedule 1 offence, theft.

[64] Regarding claim 1: Unlawful arrest and detention of the plaintiff, I find that the arresting officer, Thoka, exercised a reasonable suspicion as required in section 40 (1) (b) of the CPA and on reasonable grounds that the plaintiff committed a schedule 1 offence. I therefore, further find no basis for concluding that the discretion to arrest was wrongly exercised. Consequently, I find that the arrest and detention of the plaintiff was lawful.

[65] Regarding claim 2: Assault of the plaintiff, I find that the defendant has demonstrated that the police officer's conduct, use of force, under the circumstances and hence the injury resulting therefrom was justified and not wrongful or unlawful

[66] For all of these reasons, the plaintiffs' claims falls to be dismissed.

Costs

[67] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

[68] The plaintiff should therefore be ordered to pay the defendants' costs of the action.

Order

[69] Accordingly, I make the following order:

1. The plaintiff's claims are dismissed with costs.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 5 July 2023.

DATE OF HEARING: 9, 10, 25 May 2023

DATE JUDGMENT DELIVERED: 5 July 2023

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