

REPUBLIC OF SOUTH AFRICA



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

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

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DATE SIGNATURE

In the matter between:

Case No: 43007/2020

PRINCE XOLANI SERITE

PLAINTIFF

and

MINISTER OF POLICE

1ST DEFENDANT

DIRECTOR OF NATIONAL PUBLIC PROSECUTIONS

2ND DEFENDANT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

3RD DEFENDANT

JUDGEMENT

JOYINI AJ:

INTRODUCTION

[1] The Plaintiff (Prince Xolani Serite) instituted a claim for damages against the Minister of Police (the 1st Defendant), the National Director of Public Prosecutions (NDPP) (the 2nd Defendant), and the Minister of Justice and Correctional Services (the 3rd Defendant). The 3rd Defendant had not filed his notice of intention to defend. The matter therefore proceeded only with the 1st and 2nd Defendants. The claim is premised on unlawful arrest and detention¹; further detention²; and malicious prosecution³ owing to a charge of unlawful possession of a firearm.

[2] By agreement between the Plaintiff and the 1st and 2nd Defendants, merits were separated from quantum in terms of Rule 33(4) of the Uniform Rules of Court. In this regard, the trial proceeded only on the issue of merits.

[3] The matter was set down for trial on 4; 5; 6; and 8 March 2024. Before turning to the issues for determination, let me take this opportunity to thank all the parties' legal representatives for assisting the Court with their Heads of Argument.

PLAINTIFF'S CASE

Pleadings

[4] Counsel for the Plaintiff submitted that the Defendants had on the 29th day of February 2024, served a notice in terms of Rule 28(10)⁴ of the Uniform Rules of Court, four years after a bear denial plea⁵ seeking to amend their plea just three calendar days before the commencement of the trial. The plea in the forementioned intended amendment sought to introduce a defense in terms of Section 40(1)(b) of the Criminal Procedure Act⁶, which could have been done four years ago. Nevertheless, the trial

¹ Caseline 001-6.

² Caseline 001-6.

³ Caseline 001-10.

⁴ Caseline 011-1.

⁵ Caseline 003-1.

⁶ Act 51 of 1977.

proceeded and amendment was also effected during trial. The Plaintiff then served his reply to the amended plea.

Background facts

[5] On the 28th day of October 2017, the Plaintiff was wrongfully, unlawfully arrested, detained, and further detained for alleged possession of an unlicensed firearm. On Monday, the 30th day of October 2017, Plaintiff made his first appearance in the Magistrate Court. The matter was postponed for further investigation and the Plaintiff was also afforded the opportunity to seek legal aid. On the 9th day of November 2017, the Plaintiff appeared for a formal bail application, which bail was posted. On the 13th day of December 2017, the matter was postponed to March 2018. On 26th day of February 2018, Warrant Officer JL Scheepers deposed to an affidavit, the ballistics report⁷ indicating that the alleged confiscated firearm is not a firearm, as defined in terms of the Firearms Control Act⁸. On 7th day of March 2018, the case was withdrawn against the plaintiff.

Issues in dispute

[6] According to the Plaintiff's Counsel, the following are issues in dispute: (i) Whether both the arrests, detentions and further detentions were lawful? (ii) Flowing from the above whether the arresting officer had reasonable suspicion at the time of arrest? (iii) Whether the defence in terms of section 40(1)(b) of the Criminal Procedure Act (CPA) stands or the defendants should have pleaded section 40(1)(h) which provides that- A peace officer may without warrant arrest any person - who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence – producing drugs or the possession or disposal of arms or ammunition? (iv) Whether the Plaintiff was in possession of an unlicensed firearm as defined in the Firearms Control Act *vis a vis* the ballistic report? (v) Whether the Plaintiff was in possession of the alleged firearm in accordance with Section 117 (d) (i), (ii) and (iii) of the Firearms Control Act? (vi) Whether the plaintiff was maliciously prosecuted having regards also to the ballistic reports?

⁷ Caseline 012-14 to 19

⁸ Act 60 of 2000

Onus of Proof

[7] It is trite that in the trial court the Plaintiff bears the onus of proving malicious prosecution, whilst on the other hand the Defendant bears the onus of proving the lawfulness⁹ of the arrest and detention where the arrest was effected without a warrant. The onus of establishing such facts and circumstances is on a preponderance of probabilities.

Plaintiff's testimony

[8] The Plaintiff had only two witnesses, which were the Plaintiff himself and his younger brother Tshepiso Serite. The evidence as led by the Plaintiff was that on the 28th October 2017, he was from a 21st birthday party in Extension 5 Mamelodi. With him was his brother, cousin, Steven and Steven's friends. He asked the other friend who was driving a Quantum mini bus to allow him to sleep in it as he was too drunk and tired to drive his City Golf motor vehicle. He then asked his friend Steven to drive his motor vehicle. Both the Quantum mini bus and the Plaintiff's motor vehicle followed each other to Steven's parental home in Lusaka Mamelodi. In the meantime, he slept in the Quantum mini bus whilst his brother had earlier slept in his vehicle. He testified that he and his friends were standing next to his motor vehicle listening to music. He further testified that his brother went to buy some more beer for them when a police motor vehicle passed them and later returned to where the Plaintiff and his friends had parked. In the police van were three male police officers (one of them driving) and one female officer. The driver male police officer stayed in the vehicle.

[9] The police officers alighted the vehicle, greeted the Plaintiff and his friends and introduced themselves and requested to search both the Plaintiff's motor vehicle and the Plaintiff and his friends which they had agreed. The vehicle was searched by Constable Makunyane who found the alleged unlicensed firearm whilst on the other hand the Plaintiff and his friends were being searched by Sergeant Nwaila who informed the Plaintiff and his friends to face Steven's parent's house. Whilst Sergeant Nwaila was searching the Plaintiff and his friends, Constable Makunyane asked or

⁹ See *Cele v Minister of Safety and Security* [2007] 3 All SA 365 D; *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (TK); *Lombo v African National Congress* 2002 (5) SA 668 (SCA) para 32.

enquired with them on who was the owner of the motor vehicle. The Plaintiff replied that he was the owner of the vehicle. Constable Makunyane asked him to open the glove compartment and inside was the alleged firearm.

[10] The explanation the Plaintiff gave to Constable Makunyane was that he does not know anything about the alleged firearm and that his friend Steven was the one who was driving his motor vehicle. Since they were parked in front of Steven's parent's house, the Plaintiff asked Constable Makunyane and Sergeant Nwaila to go with him inside the premises to look for Steven. Steven's sister informed them that Steven stays at the backyard and they should look for him there. They went to the backyard and did not find Steven there and the Plaintiff was told that he was under arrest as they could not find Steven. Constable Makunyane and Sergeant Nwaila concluded with arresting the Plaintiff because they could not find Steven. The police officers did not enquire with the friends who were there about Steven's whereabouts.

[11] The police officers proceeded to handcuff and effected the arrest and the Plaintiff was charged with possession of unlicensed firearm and was placed in the police vehicle whilst the Plaintiff's vehicle was driven by another police officer to the police station. The Plaintiff was taken to Mamelodi Police Station and detained in the police cells from Saturday till Monday and went to court on Monday the 30th day of October 2017. However, during his stay in the police cell, a different warrant officer brought a form stating Notice of Rights and the Plaintiff was told to sign it without further explanation however the warrant officer went on to say something in Ndebele which is a language the Plaintiff does not speak nor understand. The Plaintiff was told to remove his belt and shoelaces and some of his possessions were kept in a safe by the police officers. None of the police officers who were with him at the scene were present with him when the Plaintiff was booked in nor when the notice of rights was brought to him as it was brought by a different warrant officer.

[12] On Monday the 30th day of October 2017, the Plaintiff was taken to the Magistrates' Court where the Plaintiff was asked whether he wanted legal aid which he agreed to. The Plaintiff also testified that besides confirming that he needs legal aid, the Court postponed the matter for 7 days for further investigation which was what the court said,

reception court. Plaintiff was sent to Kgosi Mampuru Prison where he stayed up until the 9th day of November 2017. The Plaintiff indicated during re-examination that he did not know why he was kept longer than 7 days as he is not a prosecutor. Whereafter he appeared at the Magistrates' Court for formal bail application. There was a formal bail application done whereby the Plaintiff paid R2 000.00. The matter was further postponed to 13th day of December 2017, with Magistrate Swart indicating that it was final as the matter would not be remanded again.

[13] On the 7th day of March 2018, the charges against the Plaintiff were withdrawn. To date the Plaintiff has not been summoned to appear in court and/or a subpoena being served on the Plaintiff, since 2018, for a period of five [5] years.

Tshepiso Serite's testimony

[14] Tshepiso Serite's testimony was very short. The defendant also elected not to do a cross-examination. He testified to the Court that on the day his brother was arrested they were from a 21st birthday party in Extension 5 Mamelodi. He had earlier at the party slept inside the Plaintiff's motor vehicle whilst waiting for the Plaintiff and his friends from inside the party. They were also delayed because there were many people and they could not move their vehicle out. He then slept in the vehicle. He said that he had to wake up at one point only to see that the vehicle was moving and driven by Steven. He went back to sleep as Steven was one of the people who was in their company. When they got to Steven's parental home he then went to buy beer. On his coming back he was surprised to see his brother inside the police motor vehicle and his vehicle being driven by a police officer. Tshepiso testified that he was told his brother was arrested for possession of alleged unlicensed firearm and had to make a call to inform their mother.

Adv Anna Marie Bendaman's testimony

[15] She testified that she is an admitted advocate. It was her testimony that on the 30th day of October 2017, she was with a control prosecutor and conducting a strict screening process. They checked whether the accused person was linked to the crime or charged of possession of firearm, in contravention of Section 3 of the Act. She testified that they had six statements, two police officers' statements, Notice of Rights,

A4 Warning statement, bail affidavit, A6 confirmation address by Plaintiff. She testified that what she considered on the statement was that the police were on duty in a high crime area. They stood down four men who were listening to music and requested permission to search them which was granted. Nothing illegal was found on the men however inside the car they found a 9 mm firearm. Upon inquiry the owner of the car said he knew nothing about it, the most important part of it is he could not give the name of the friend and the license of the firearm. She proceeded to testify that this always happens in Mamelodi where the accused always say they do not know the owner of the firearm or whatever is found on them.

[16] It was her further testimony that the elements of the crime were there. The accused was linked to the car and the gun to the motor vehicle. She indicated that there was no version given by the accused. She further indicated that she could not *nolle prosequi* as all the elements of the crime were there. She testified that she does not know the accused therefore she had no malicious intention. It was her further testimony that the Plaintiff was arrested on the 28th of October, appeared in court on the 30th of October and Mr Mahlangu was the prosecutor. She also testified that the matter was withdrawn on the 7th of March 2018 as it was not ready. She indicated that there is no reception court in Mamelodi and *that the court did not enquire about the bail which is not the truth*. She indicated that the matter was withdrawn because there was a backlog.

Johannes Mahlangu's testimony

[17] He testified that he was a prosecutor at that time and stationed at Mamelodi Magistrates' Court and the decision to prosecute came from Advocate Bendaman. He confirmed that on the 30th the Plaintiff appeared before him and that the matter was remanded because the Plaintiff requested for legal aid. He also testified that the Plaintiff appeared for bail application and the matter was remanded to 13th December 2017 where the Magistrate insisted that it was wherein they had to bring the ballistics report. He testified that the matter appeared before his female colleague and was withdrawn on October 2017 because there was no ballistics report.

Constable Makunyane's testimony

[18] It was Constable Makunyane's testimony that he only got to know the Plaintiff after his arrest. He testified that on the 28th October 2017 he was doing crime prevention duties in Lusaka when he spotted a blue city golf parked on the pavement. When he alighted the police vehicle he introduced himself and asked to search the motor vehicle and found a pistol.

[19] It was Makunyane's testimony that he enquired whose vehicle it was in which he had found the pistol when the Plaintiff indicated that it belonged to him. He further indicated that the Plaintiff said the pistol found in his vehicle belonged to his friend. He did not know his friend's whereabouts and if he could have known the name he could have taken the Plaintiff to the person concerned. He further testified that after the Plaintiff was arrested he was taken to Mamelodi Police Station and had nothing further to do with the case.

Sergeant Nwaila's testimony

[20] He testified that he was on crime prevention duties too with Constable Makunyane. He further testified that they did a stop and search when they spotted a blue golf. He says that he was on guard for his colleague who had asked the Plaintiff and his friends if they can search the vehicle. The Plaintiff was asked who the car belonged to and he confirmed that it was his and the firearm was found in his motor vehicle. The Plaintiff informed him that the firearm belonged to a friend and he does not know his name or where he stays then they arrested him. He testified that it was the first time he had dealings with the Plaintiff and did not complete the SAP14A as it is done by the arresting officer, and it was Makunyane.

Unlawful arrest and detention & further detention

[21] Counsel for the Plaintiff submitted that it is undisputed that the Plaintiff was arrested. The evidence as it is, remains unchallenged that the arrest was done at Steven's parental home (Plaintiff's friend). Although the Defendants admitted arrest, it does not end there. The Defendants must prove that the arrest was justifiable and lawful. It is submitted that there is no justification for the arrest and the arrest was and remains wrongful and unlawful. There are a number of issues that surfaced during cross

examination of Constable Makunyane and Sergeant Nwaila. The police officers seem to be labouring under the impression that the arrest can only be done by one person who will be held accountable. It is noted on his statement¹⁰ that was handed during trial that when he introduced himself to the Plaintiff he also introduced his colleague Sergeant Nwaila. In any event, Segeant Nwaila conceded that they were working as a team and that they could not all do the act of arrest, one person had to do it.

[22] The second thing noted, when it was put to both Makunyane on whether they did a mini investigation, amongst other, to enquire with the friends who were present at the time of arrest none of the police officers bothered themselves to ask the people who were there about the ownership of the firearm. Neither did they try to look for Steven whom the Plaintiff referred the two police officers to. It was Sergeant Nwaila's testimony that there was no need to do a mini investigation, as he was also asking Counsel for the Plaintiff 'what mini investigation is?'. This clearly showed that these police officers do not know what is involved during arrest and thus failing completely on their duties.

[23] Case law has dealt with what a reasonable police officer should do when confronted with information before him before he could make an arrest. In the case of **Mabona & Another v Minister of Law and Order & Others**¹¹ the court took the view that "**the reasonable man will therefore analyse and assess the quality of the information at his disposal critically and will not accept it lightly or without checking where it can be checked.**" The police officers were less interested in interrogating the Plaintiff further or even his friends whom were there with him.

[24] It does not make sense that a person will not know a name of his friend. It further does not make sense that where a person is faced with spending a night behind bars would prefer that than to tell the police the truth. In this instance, the Plaintiff was faced with being taken to the police cell, he told the police the truth including taking the police into Steven's parental home as the person whom has used his motor vehicle and the firearm belonged to.

¹⁰ at paragraph 3 and Nwaila statement caseline 012-46 at paragraph 4.

¹¹ 1988 (2) SA 654 (see) AT 658 F-H, as quoted on Du Toit at al (supra), Jones J.

[25] Du Toit et al on the Commentary on the Criminal Procedure Act ad page – 5-12B states that police officers who purports to act in terms of section 40(1)(b) should *investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion of a lawful arrest.*

[26] MR v Minister of Safety and Security¹² , Bosielo JA stated the point thus: "In other words, the court should enquire whether, in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in Duncan or Sekhoto where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's dignity in our constitutional democracy, held that the discretion conferred in S 40(1) must be exercised' in light of the Bill of Rights"¹³.

[27] The explanation and the subsequent act were reasonable. The Plaintiff also indicated that he had even told the police what Steven was wearing, none of these explanations were considered. Taking into consideration what the court said in the aforementioned case, that the discretion of the police must be exercised in the light of the Bill of Rights, the police should have known that the ultimate act of arrest and detention borders on the liberty of an individual. The right to liberty is enshrined in the Constitution, regardless of the fact that the Plaintiff did expressly plead it on the papers is neither here nor there.

[28] The court in **JSS Industrial Coatings CC**¹⁴ stated that '...not all allegations that are relevant to the dispute ought to be pleaded. For purposes of determining the allegations the parties ought to plead, it is important to draw a distinction between *facta probanda* and *facta probantia*....'

[29] The Plaintiff's right to liberty was transgressed and this is as a consequence of an unlawful arrest, detention and further detention. The further detention was not disputed, for the period between the 30th October to the 9th of November 2017. Even though the

¹² 2016 (2)SACR 540 CC.

¹³

¹⁴ JSS Industrial Coatings CC v Inyatsi Construction (South Africa) (PTY) LTD (2013/9610){2013}ZAGPJHC 209(16 August 2013) at paragraph 6 -7.

defendants pleaded that it was as a result of a court order, which is denied, and the Plaintiff submits that it was as a consequence of the Defendants' conduct.

[30] Constable Makunyane testified that he had explained the Plaintiff's rights in Ndebele which is the language not known to the Plaintiff as he speaks SiSwati. Plaintiff indicated that it was not truthful of Makunyane to have said that he spoke to the Plaintiff in a language known to him. Sergeant Nwaila who said he heard the Plaintiff talking to Constable Makunyane and yet did not know what language they were speaking clearly showed how untruthful he was as he did not want to contradict his colleague who was clearly not talking to him in SiSwati.

[31] It is submitted that, from the testimonies especially that of the Defendants, the Defendants failed to plead section 40(1)(h) which is relevant to this matter. This section provides that- A peace officer may without warrant arrest any person - who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence – producing drugs or the possession or disposal of arms or ammunition.

Malicious prosecution

[32] Counsel for the Plaintiff submitted that it is without doubt that proceedings have been instituted and further without doubt that the Plaintiff appeared before court on the 30th October 2017, and matter was remanded to the 9th November 2017, in December 2017 and lastly the 7th day of March 2018. There were further postponements and to date the prosecution failed and this remains undisputed.

[33] The Court in the case of **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS V MOLEKO**¹⁵ indicated that in order to succeed to established a claim for malicious prosecution there are requirements to be met which are: 'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove – that the defendants set the law in motion (instigated or instituted the proceedings); that the defendants acted without reasonable and probable

¹⁵ (2008) 3 ALL SA 47 (SCA) at paragraph 33 and 34.

cause; that the defendants acted with 'malice' (or *animo injuriandi*);¹⁶ and that the prosecution has failed.

[34] It is clear that from the 28th October until the 7th of March 2018, the Defendants had maliciously set the law in motion. It was conceded during cross examination by the Mr Mahlangu and Adv Bendaman that the police have set the law in motion.

[35] There was really no reasonable cause nor justification to arrest and detain nor bring the Plaintiff before court as there was no evidence against the Plaintiff as the ballistic report was not yet submitted. A reasonable police officer should have noticed that the alleged firearm was not a real firearm as defined in the Act. The arresting officers failed to reasonably and objectively assess the evidence before them nor make a mini-investigation. An explanation was given by the Plaintiff and yet they failed to objectively look at it. The Plaintiff's mother had given proof of address and thus known where the Plaintiff can be found.¹⁷ When the ballistics report was finally submitted the matter could have been re-enrolled for Plaintiff to be charged and prosecuted.

[36] The disheartening facts were that the prosecutors did not even know the elements of the crime which the Plaintiff was charged with. Adv Bendamin was not objective and failed to treat the Plaintiff's case objectively and generalised the alleged explanation said to be given by the Plaintiff that in Mamelodi Magistrate Court accused people always said that they do not know the owner of a gun or anything found in their possession which they are being charged with. In this case, the Plaintiff not knowing the owner of the firearm in his possession.

[37] The above-mentioned show *malice* on the side of the prosecution, they do not have to show that they know the Plaintiff for there to be *malice*. Both the prosecutors especially Mr Mahlangu conceded that the prosecution has failed. It was also confirmed by Mr Mahlangu and the Plaintiff that to date there has been no re-instatement of the

¹⁶ See *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) para 5, referring to *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) at 196G–H; *Thompson v Minister of Police* 1971 (1) SA 371 (E) at 373F-H and J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2 ed (2005) pp 124-125 (see also pp172-173 and the authorities there cited). Cf 15 *Lawsa* (sv 'Malicious Proceedings' by DJ McQuoid-Mason) (reissue, 1999 para 441; François du Bois (General Editor) *Wille's Principles of South African Law* 9 ed (2007) pp 1192-1193; LTC Harms *Amler's Precedents of Pleadings* 6 ed (2003) p 238-239.

¹⁷ Caseline 012-23

charges, nor the Plaintiff found guilty of the charge of alleged possession of unlicensed firearm.

[38] Should this Honourable Court not agree with the Plaintiff's submission so far as malicious prosecution, I submit that the Court must consider the following cases as quoted in LIFA V MINISTER OF POLICE AND OTHERS¹⁸ – ***“The recent decision of the Supreme Court of Appeal in the matter of Minister of Police and Another v Erasmus [12] is illustrative of the more recent developments in our law pertaining to unlawful arrest and detention. At paragraph [12] of the judgment the Court held:- “When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, and (b) was the factual and legal cause of the post-hearing detention. In Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR 409 (SCA), the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty. Similarly, in Minister of Safety and Security v Tyokwana [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime.*”**

[39] With the present case, the police were negligent not to consider what the Plaintiff told them, including the description of what Steven was wearing, nor go back to Steven's house to check whether Steven was there nor even leave a message for him to avail himself at the Mamelodi Police Station.

¹⁸ (2020/17691) [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ) (17 October 2022 at paragraph 41.

Ballistics report and failure to call a witness

[40] The Defendants discovered the ballistic report. It is clear that the purpose of discovery is to assist the court and the parties in discovering the truth and by doing so helps towards the just determination of the case¹⁹. Thus reference was also made during trial to the ballistic report and therefore it forms part of the documents before court. This report was discovered by the Defendants and therefore should have called the author to testify regarding the contents thereof.

[41] The court in the matter of Tshishonga²⁰ held: ***“112. The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case. That inference is strengthened if the witnesses have a public duty to testify. 113. The respondents are publicly accountable for the actions against the applicant. Their defence is paid from public funds as will any compensation award. They owe the applicant and the public an explanation. The claim is not against them as individuals but in their official capacities. 114. Their failure to testify results in a dearth of factual material on their side which makes it impossible to exercise any discretion in their favour. 115. There was no suggestion from Mr Hulley that the respondents were not available or able to testify. In fact, there was no explanation at all for why they did not testify. 116. The court must therefore accept the evidence for the applicant, qualified by its probative value.”***

¹⁹ Du Toit et al on the Commentary on the Criminal Procedure Act.

²⁰ Tshishonga v Minister of Justice and Constitutional Development and Another (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC); (2007) 28 ILJ 195 (LC) (26 December 2006) at paragraphs 112-116.

[42] It is further submitted that it will be in the interest of justice that the ballistic report be admitted as evidence according to Law of Evidence Amendment Act.

Probability

[43] In **Ngakula vs Minister of Police**²¹, the court held that so far as the probabilities are concerned, what is being weighed in the balance is not the quantities of evidence, but are probabilities arising from that evidence and all the circumstances of the case". The Court further said that "If the acceptable evidence is such that "I think that it is more probable than not", the burden is discharged, but if the probabilities are equal, it is not". It is submitted that the testimony as provided by the Plaintiff is more probable than of the Defendants.

[44] It is respectfully submitted to the above Honourable Court that Section 117(d)(i) to (iii) of the Firearms Control Act, find application in this matter as the Defendants has failed to prove that indeed the Plaintiff was the (i) driver of the vehicle, (ii) in charge of the vehicle; and lastly (iii) in control of all the goods on the vehicle.' It is submitted with respect that evidence led was that the Plaintiff was not the driver of the vehicle from the party to Steven's homestead and further that at the time of the search and subsequent arrest, the Plaintiff was never in control of all the goods on the vehicle.

Conclusion

[45] The Defendant failed to prove that the arrest, detention, and further detention were lawful, nor and the arresting officers had a reasonable suspicion to arrest the Plaintiff. The prosecution was malicious and without probable cause. It is therefore, based on the above arguments, submitted that a case has been made and the Plaintiff's claim for wrongful, unlawful arrest, detention, further detention including malicious prosecution be granted in favour of the Plaintiff with costs.

1ST AND 2ND DEFENDANTS' CASE

[46] The 1st and 2nd Defendants, through their Counsel, deny liability towards the Plaintiff on the following basis: The Plaintiff was lawfully arrested by a member of the 1st Defendant in terms of section 40(1)(b) of the Criminal Procedure Act (CPA) 51 of 1977.

²¹ [2021] ZAGPJHC 97 at para 43 and 45.

There was reasonable and probable cause for the prosecution of the Plaintiff which was instituted by a duly authorised representative of the 2nd Defendant. The prosecution of the Plaintiff was not instituted maliciously (“*animo injurandi*”). And pursuant to his first appearance before court, the Plaintiff was detained in terms of an order of court by way of a deliberative judicial decision on the part of the presiding Magistrate. For reasons stated below, the 1st and 2nd Defendants respectfully submit that the action falls to be dismissed with costs, including the costs of two Counsel.

Arrest/detention: Legal Principles

[47] Counsel for the Defendants submitted that it is trite law (given that an arrest without a warrant is *prima facie* unlawful) that a Defendant has the onus to prove the lawfulness of an arrest.²² The jurisdictional facts which must exist before the power to arrest a suspect without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (“the CPA”) may be invoked are that:²³ (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the arrestee committed an offence referred to in Schedule 1 of the CPA; and (iv) the suspicion must rest on reasonable grounds.

[48] Concerning the requirements of section 40(1)(b) of the CPA referred to in subparagraphs (ii) and (iv) above, the following principles are settled law: “*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*”.²⁴ The word ‘suspicion’ “(implies) an absence of certainty or adequate proof. A suspicion might be reasonable, even if there is insufficient evidence for a prima facie case against an arrestee”.²⁵ In determining the lawfulness of an arrest “*there is no warrant for holding that the Legislature did not contemplate further investigation subsequent to the arrest of a suspect. Indeed, it must*

²² See: *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F; *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at para [7].

²³ See: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security v Sekhoto and Another*, *supra*, at paras [6] and [21].

²⁴ See: *Duncan v Minister of Law and Order*, *supra*, at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H.

²⁵ See: *Liebenberg v Minister of Safety and Security and Another* [2009] ZAGPPHC 88 (18 June 2009) at para 19.22.

have contemplated that such investigation could lead either to the arrestee's release from detention or his prosecution on a criminal charge".²⁶ The question as to whether the suspicion of the person effecting the arrest is reasonable, must be applied objectively. The circumstances giving rise to the suspicion must be as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence".²⁷

[49] Once the jurisdictional facts for a lawful arrest in terms of section 40(1)(b) of the CPA are established, peace officers are entitled to exercise their discretion whether to effect an arrest as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because a peace officer exercises the discretion in a manner other than that deemed optimal by the court. The standard is not perfection or even the optimum, judged from the vantage of hindsight.²⁸ It is for the Plaintiff to prove that the discretion to effect an arrest under section 40(1)(b) was exercised in an improper manner.²⁹ It is submitted (to quote the *dictum* of the Supreme Court of Appeal) that "*it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect*".³⁰

Lawfulness of the Plaintiff's arrest

[50] Counsel for the Defendants, applying the afore-going legal principles, submitted that the Plaintiff was lawfully arrested in terms of section 40(1)(b) of the CPA on a charge of possession of an unlicensed firearm. The First Defendant called two witnesses who testified as to the circumstances under which the Plaintiff was arrested, namely Cst Makunyane and Sgt Nwaila. On the evidence of Cst Makunyane (who effected the arrest of the Plaintiff) and Sgt Nwaila (in whose presence the arrest was effected), Counsel for the Defendants argued that neither of these witnesses, in his

²⁶ See: *Duncan v Minister of Law and Order*, *supra*, at 819G-H.

²⁷ See: *Liebenberg v Minister of Safety and Security and Another*, *supra*, at para 19.21.

²⁸ See: *Minister of Safety and Security v Sekhoto and Another*, *supra*, at para [39].

²⁹ See: *Minister of Safety and Security v Sekhoto and Another*, *supra*, at paras [46] – [49]; *Duncan v Minister of Law and Order*, *supra*, at 819B-D; *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) at 37B-39F.

³⁰ See: *Minister of Safety and Security v Sekhoto and Another*, *supra*, at para [44].

evidence as to the circumstances under which the Plaintiff was arrested, contradicted himself under cross-examination, nor is there any reason to doubt their honesty. Over and above each of the witnesses not having contradicted himself under cross-examination, the witnesses corroborated each other in all material respects regarding the circumstances under which the Plaintiff was arrested. On the probabilities, there is no reason to doubt the version of these witnesses regarding the circumstances under which the Plaintiff was arrested.

[51] According to the Counsel for the Defendants, the Plaintiff testified on his own behalf regarding the circumstances under which he was allegedly arrested, and called as a witness his brother, Tshepiso Serite (“Tshepiso”). The evidence of Tshepiso was that he was not present at the time of the Plaintiff being arrested, given that at that time he had gone to the liquor store to purchase liquor. Given that Tshepiso was not present at the time of his arrest, the Plaintiff is a single witness to whose evidence the cautionary rule applies. Accordingly, the Honourable Court will not readily rely on the evidence of the Plaintiff unless it is clear and satisfactory in all material respects.³¹ It is submitted that the Plaintiff’s evidence was anything but clear and satisfactory in all material respects.

[52] It is settled law that one of the ways in which the credibility of a witness may be impeached is by way of previous inconsistent statements made by the witness which differ from what he or she is saying in court.³² In the affidavit deposed to by him in support of an application for condonation of his non-compliance with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 prior to the institution of the action, the Plaintiff stated as follows:³³ *“4.5 Upon the vehicle being searched, members of the 1st respondent found an unlicensed firearm underneath the front passenger seat, which upon inquiry from the members of the 1st respondent, I preferred a reasonable explanation that **I had lent my vehicle to my friend who was present at the time of questioning**, however the officers elected not to question him about the said unlicensed firearm”* [Emphasis added].

³¹ See: Zeffert & Paizes, *Law of Evidence*, Third Edition, pp 1081-1084.

³² See: *Phakula v Minister of Safety and Security* [2023] ZAGPPHC 277: case no 64450/2011 (6 April 2023) at paras [73] and [65].

³³ See: CaseLines 005-1-12 at para 4.5.

[53] In his evidence before court, the Plaintiff testified that he had not lent his vehicle to a friend. The Plaintiff's evidence in this regard was, rather, that he had requested a friend to drive his vehicle from a birthday celebration as he was himself under the influence of alcohol. Secondly, more importantly, in his evidence before court the Plaintiff testified that his friend was not present at the time of the Plaintiff having been questioned concerning the unlicensed firearm which was found in the cubbyhole of his vehicle. Rather, the version of the Plaintiff in his evidence before court in this regard was that he had allegedly accompanied Cst Makunyane and Sgt Nwaila to his friend's house but that his friend was not to be found. Clearly, the version of the Plaintiff in his evidence before court cannot be reconciled with the version quoted in paragraph 4.5 of his affidavit referred to above.

[54] In similar vein, it is clear that the version given by the Plaintiff to his attorney was that his friend was present at the time of the Plaintiff having been questioned concerning the firearm. In this regard, it is averred in the particulars of claim that "*upon inquiry from the members of the 1st defendant, plaintiff preferred a reasonable explanation that he had lent his vehicle to a friend **who was present***" [Emphasis added].³⁴ The version of the Plaintiff according to the pre-trial minutes was that "*plaintiff informed the arresting officer and/or members of 1st defendant that he is the owner of the vehicle, which he had borrowed to his friend **who was present at the time when the vehicle was searched***" [Emphasis added].³⁵ Once again, the version of the Plaintiff in his evidence before court cannot be reconciled with the version given by him to his attorney.

[55] In the circumstances (in the light of the afore-going inconsistent statements), it is submitted that the Plaintiff cannot be believed regarding the circumstances under which he was arrested. It is submitted further that the afore-going versions of the Plaintiff regarding the circumstances under which he was arrested are improbable in the extreme. This is confirmed by the evidence of both Cst Makunyane and Sgt Nwaila who testified that the Plaintiff told them that he did not know the name of his (supposed)

³⁴ See: Particulars of claim, para 4.5, CaseLines 010-7.

³⁵ See: Pre-trial minutes, para 8.7, CaseLines 011-57 to 011-58.

friend. Had the Plaintiff informed them of the name and address of his (supposed) friend, they would surely have taken steps to approach and question this person. In the premises, on an acceptance of the evidence of Cst Makunyane and Sgt Nwaila, the Plaintiff was lawfully arrested in terms of section 40(1)(b) of the CPA on a charge of possession of an unlicensed firearm (which is an offence in terms of Schedule 1 and Schedule 5 of the CPA).

Lawfulness of Plaintiff's detention

[56] Counsel for the Defendants submitted that pursuant to his having been lawfully arrested, the detention of the Plaintiff at Mamelodi Police Station during the period 28 October – 30 October 2017 on which date he made his first appearance before court was lawful in terms of section 50(1)(c) of the CPA (in terms of which an accused is to be brought before court within 48 hours after his arrest). It is submitted further that the Defendants are not liable to the Plaintiff in respect of his detention pursuant to his first appearance before court on 30 October 2017. Counsel contended that in the *De Klerk* matter,³⁶ the Constitutional Court were divided on the effect of an order of remand granted by a magistrate on the issue of liability for further detention.

[57] In the *Muller* matter,³⁷ the Supreme Court of Appeal summarised this division as follows: “[34] *What emerges from the various judgments in De Klerk is that one half of the court considered that a deliberative judicial decision in respect of the further detention of the arrestee constitutes an intervening act which truncates the liability of the police for the wrongful arrest and detention. The remainder considered that it may do so, but not necessarily. Theron J summarised the applicable principles thus: ‘The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In*

³⁶ See: *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC).

³⁷ See: *Minister of Police and Another v Muller* 2020 (1) SACR 432 (SCA).

determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made”
[Emphasis added].

[58] In the *De Klerk* matter, pursuant to his having been arrested, the plaintiff made his first appearance before a ‘reception court’, which meant that the order remanding him in custody was a routine or mechanical act rather than a considered judicial decision. The plaintiff was accordingly not afforded an opportunity to apply for bail and was remanded in custody. Writing for the majority, Theron J acknowledged that there is no reason why a deliberative judicial decision (in contra-distinction to merely a failure to apply the mind) could not constitute a break in the chain of causation, but that the exercise of a judicial discretion should not always be considered sufficient to break the chain of causation.³⁸

[59] In the *Muller* matter, the Supreme Court of Appeal distinguished the *De Klerk* matter (in which the remand order was granted by way of a routine or mechanical act, rather than a considered judicial decision) from the *Muller* matter (in which the plaintiff was remanded in custody by way of a deliberative judicial decision). In the *Muller* matter, at the first appearance the magistrate did give judicial consideration to the release of the plaintiff and remanded him in custody.³⁹Based on the afore-going distinction, the Supreme Court of Appeal held in the *Muller* matter that liability for wrongful arrest and detention of the plaintiff “*was truncated upon the remand order made at the first appearance*” by the magistrate.⁴⁰

[60] The offence of possession of the firearm on which the Plaintiff was charged is an offence referred to in Schedule 5 of the CPA. Section 60(11)(b) of the CPA provides that where an accused is charged with a Schedule 5 offence, “*the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release*”. For purposes of being granted bail, therefore, the *onus* was on the Plaintiff to satisfy the

³⁸ See: *De Klerk v Minister of Police, supra*, at para [74].

³⁹ See: *Minister of Police and Another v Muller, supra*, at para [38].

⁴⁰ See: *Minister of Police and Another v Muller, supra*, at para [39].

court that the interests of justice permit his release on bail.

[61] In the light of the offence for which he was charged, being an offence referred to in Schedule 5 of the CPA, at his first appearance on 30 October 2017 before the Mamelodi Magistrate's Court which is not a 'reception court', the presiding Magistrate remanded the Plaintiff in custody until 9 November 2017 for a formal bail application. Self-evidently, then, at his first appearance before court on 30 October 2017 the presiding Magistrate gave judicial consideration to the release of the Plaintiff on bail, but remanded him in custody (by way of a deliberative judicial decision) for a formal bail application to be brought for the granting or not of bail in respect of a Schedule 5 offence.⁴¹

[62] Over and above the Plaintiff having been remanded in custody on 30 October 2017 in terms of a deliberative judicial decision on the part of the presiding Magistrate, the evidence of the prosecutor, Mr Mahlangu, was that this was done at the request of the Plaintiff for him to obtain Legal Aid representation. The evidence of the prosecutor, Mr Mahlangu, in this regard is borne out by the inscription of the presiding Magistrate on the charge sheet at the time of the Plaintiff having been remanded in custody.⁴² In the premises, applying the legal principles applicable to lawfulness of Plaintiff's detention, any liability on the part of the 1st or 2nd Defendants for the detention of the Plaintiff pursuant to his first appearance before court on 30 October 2017 "*was truncated upon the remand order made at the first appearance*" by the presiding Magistrate.⁴³

Malicious Prosecution: Legal Principles

[63] According to the Counsel for the Defendants, the requirements for a plaintiff to succeed with a claim for malicious prosecution are that⁴⁴ the defendant set the law in motion (instituted the proceedings); the defendant acted without reasonable and probable cause; the defendant acted with 'malice' (*animo injuriandi*); and the prosecution has failed. The requirement of reasonable and probable cause, in the

⁴¹ See: Charge sheet, CaseLines 012-71.

⁴² See: Charge sheet, CaseLines 012-71.

⁴³ See: *Minister of Police and Another v Muller, supra*, at para [39].

⁴⁴ See: *Minister of Justice and Constitutional Development & Others v Moleko* [2008] 3 All SA 47 (SCA) at para [8]; *Rudolph and Others v Minister of Safety and Security and Another* [2009] 3 All SA 323 (SCA) at para [16].

context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of criminal proceedings is justified. The defendant must have subjectively had an honest belief in the guilt of the plaintiff and his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.⁴⁵

[64] The concept of reasonable and probable cause (which involves both a subjective and an objective element) has been formulated as follows:⁴⁶ “*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 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. It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff’s guilt.*” Although the expression ‘malice’ is used, what this means in the context of a claim for malicious prosecution is *animus injuriandi*.⁴⁷ *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness.⁴⁸ In order for a plaintiff to succeed in his or her claim for malicious prosecution, “*the defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, ... , even gross negligence) will not suffice*”.⁴⁹

Reasonable and probable cause / *Animus injuriandi*

⁴⁵ See: *Minister of Justice and Constitutional Development & Others v Moleko*, *supra*, at para [20].

⁴⁶ See: *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at para [14].

⁴⁷ See: *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 103G-104E; *Relyant Trading (Pty) Ltd v Shongwe*, *supra*, at para [5]; *Minister of Justice and Constitutional Development & Others v Moleko*, *supra*, at para [61].

⁴⁸ See: *Minister of Justice and Constitutional Development & Others v Moleko*, *supra*, at para [63].

⁴⁹ See: *Minister of Justice and Constitutional Development & Others v Moleko*, *supra*, at para [64].

[65] Counsel for the Defendants submitted that the Plaintiff falls well short of discharging the onus which rests on him to prove that there was a lack of reasonable and probable cause to prosecute the Plaintiff and that any prosecutor in the employ of the 2nd Defendant acted with ‘malice’ (*animo injuriandi*) in instituting the prosecution against the Plaintiff. The decision to prosecute the Plaintiff was taken by Adv Bendeman, Senior Public Prosecutor at the Mamelodi Magistrate’s Court, acting in the course and scope of her employment with the 2nd Defendant. The decision to institute criminal proceedings (‘to set the law in motion’) against the Plaintiff was taken by Adv Bendeman on the strength of the sworn statements of Cst Manunyane and Sgt Nwaila contained in the police docket. The sworn statements of Cst Makunyane and Sgt Nwaila speak for themselves.⁵⁰

[66] It is submitted (indubitably so) that on the strength of the sworn statements of Cst Makunyane and Sgt Nwaila, there indeed existed reasonable and probable cause for the institution of the prosecution against the Plaintiff. Their statements were of such a nature that if proved in a criminal trial, the court would convict the Plaintiff. There was accordingly a duty on the State to prosecute the Plaintiff in the circumstances. It is submitted further, over and above there having been reasonable and probable cause for the prosecution of the Plaintiff, that it cannot be said that Adv Bendeman acted with malice (*animo injuriandi*) in instituting the prosecution against him. Any such suggestion was emphatically refuted by Adv Bendeman in her evidence (*inter alia*, by way of her stating that she does not know the Plaintiff ‘from a bar of soap’). On the contrary, the evidence of Adv Bendeman was that in the light of the sworn statements of Cst Makunyane and Sgt Nwaila she was duty-bound to institute the criminal proceedings against the Plaintiff.

Status of Documents

[67] According to the Counsel for the Defendants, at the pre-trial conference held on 9 March 2022,⁵¹ the parties agreed on the status of documents to be used at the trial. The

⁵⁰ See: Statement of Cst Makunyane, CaseLines 012-49A to 012-49B; Statement of Sgt Nwaila, CaseLines 012-46 to 012-47.

⁵¹ See: Pre-trial minutes, CaseLines 011-51 to 011-67.

agreement reached between the parties in this regard was that “*all documents be admitted as evidence, without admitting the content thereof and without further proof thereto, and that only documents referred to during the trial be regarded as evidence in the trial*”.⁵² In the light of the agreement (which is somewhat clumsily worded) reached between the parties at the pre-trial conference, it is clear that only documents referred to in the evidence during the trial would be had regard to by the Honourable Court in determining the issues between the parties.

[68] The content of the documents referred to in the evidence would in the nature of things not serve as proof of the truth of what is stated in such documents (for example, as proof of the truth of what is stated in the statements of Cst Makunyane and Sgt Nwaila). The documents referred to in the evidence (without admitting the truth of the content of such documents) are what they purport to be, without the need to formally prove the existence of the documents. In the light of agreement referred to above, the covering letter to the ballistic report dated 2018/02/26⁵³ is what it purports to be, without the need formally to prove the existence of the letter or that it was addressed to the Commanding Officer at Mamelodi East Police Station and the truth of the content of the ballistic report is not admitted in the absence of evidence being led to prove the truth thereof.

Object of pleadings

[69] Counsel for the Defendants submitted in the Supplementary Heads of Argument that the object of pleadings is to define the issues.⁵⁴ It has in this regard been held by the Supreme Court of Appeal and the Constitutional Court as follows: “*It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet*”;⁵⁵ “*It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to*

⁵² See: Pre-trial minutes, paras 13.1-13.2, CaseLines 011-64.

⁵³ See: CaseLines 012-14.

⁵⁴ See: *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (SA) at 107C-D; *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) at 223G-H.

⁵⁵ See: *Knox D’Arcy AG and Another v Land and Agricultural Development Bank of South Africa* [2013] 3 All SA 404 (SCA) at para [35].

have recourse to issues falling outside the pleadings when deciding a case”;⁵⁶ “The pleadings are of paramount importance in every civil dispute. They identify the legal and factual issues in dispute that have to be decided ...”;⁵⁷ “It is a fundamental rule of fair civil proceedings that parties ... should be apprised of the case which they are required to meet; ... The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone”.⁵⁸ On the pleadings, it is not in dispute that what was found in the cubbyhole of the Plaintiff’s vehicle was an unlicensed firearm. It is specifically pleaded in this regard in the plaintiff’s particulars of claim that “(upon) the vehicle being searched, members of the 1st defendant **found an unlicensed firearm**” [Emphasis added].⁵⁹ In the premises, it does not avail the Plaintiff to rely on the ballistics report for his contention that what was found in the cubbyhole of his vehicle was not an unlicensed firearm.

Conclusion

[70] In the light of the afore-going, it is respectfully submitted that the Plaintiff was lawfully arrested in terms of section 40(1)(b) of the CPA by Cst Makunyane, acting in the course and scope of his employment with the First Defendant. There was reasonable and probable cause for the prosecution of the Plaintiff which was instituted by Adv Bendeman, acting in the course and scope of her employment with the Second Defendant. The prosecution of the Plaintiff was not instituted *animo injuriandi*. Pursuant to his first appearance before court, the Plaintiff was remanded in custody in terms of an order of court by way of a deliberative judicial decision on the part of the presiding Magistrate as a result of which liability on the part of the 1st and 2nd Defendants for his detention after 30 October 2017 was truncated.

ANALYSIS OF EVIDENCE AND FINDINGS OF FACT

[71] It is trite law that an arrest, without a warrant, is *prima facie* unlawful and the same goes for detention. It (detention) is also *prima facie* unlawful. The onus is on the

⁵⁶ See: *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11.

⁵⁷ See: *Mahlangu and Another v Minister of Police* 2020 (2) SACR 136 (SCA) at para [26].

⁵⁸ See: *Molusi v Voges NO* 2016 (3) SA 370 (CC) at paras [27] - [28].

⁵⁹ See: Particulars of claim, para 4.5, CaseLines 010-7.

Defendants to prove the lawfulness of an arrest⁶⁰ and of course, the detention. The onus rests on the detaining officer to justify the arrest and detention. Section 12(1) (a) of the Constitution of the Republic of South Africa⁶¹ (the Constitution) guarantees the right to be free from unjustified detention. Everyone has the right to personal security and freedom which includes the right to be free from arbitrary and unjustified deprivation of liberty. Section 7(2) of the Constitution provides that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights.

[72] The undisputed evidence is that, Constable Makunyane was told by the Plaintiff that he (Plaintiff) does not know anything about the alleged firearm found in his car and that his friend was the one who was driving his motor vehicle up to where it was parked. Under those circumstances, Constable Makunyane, in my view, had a duty on him to have investigated this information (Plaintiff's statement). This (even the allegation of not knowing his friend's name and address who was driving his car) must have triggered a need to investigate this information even by simply asking for more information from the people around especially his friends who were with the Plaintiff standing together next to his car when he was arrested.

[73] Constable Makunyane did not do a simple "on the spot investigation." Constable Makunyane was, for whatever reason, less interested in interrogating the Plaintiff further or even his friends whom were there with him. In *Mabona v Minister of Justice* 1988 [2] SA 654 SEC the following was stated as regards suspicion: "... *the reasonable man will therefore analyse and assess the quality of information at his disposal critically and will not accept it lightly or without checking it where it can be checked . It is only after an examination of this kind that he will allow himself to entertain a suspicion that will justify the arrest. This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact*

⁶⁰ See: *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F; *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at para [7].

⁶¹ Act 108 of 1996, the Constitution.

guilty. The section requires suspicion not certainty. However the suspicion must be based on solid grounds. '

[74] Constable Makunyane also did not comply with Section 117(2)(d) (i) to (vii) of the Firearms Control Act, 2000, Act 60 of 2000, which reads as follows: “(2) *Whenever a person is charged in terms of this Act with an offence of which the possession of a firearm or ammunition is an element, and the State can show that despite the taking of reasonable steps it was not able with reasonable certainty to link the possession of the firearm or ammunition to any other person, the following circumstances will, in the absence of evidence to the contrary which raises reasonable doubt, be sufficient evidence of possession by that person of the firearm or ammunition where it is proved that the firearm or ammunition was found—*

- (d) in or on a vehicle and the person was, at the time—*
- (i) the driver of the vehicle;*
- (ii) the person in charge of the vehicle;*
- (iii) in control of all the goods on the vehicle;*
- (iv) the consignor of any goods in or among which the firearm or ammunition was found;*
- (v) the only person who had access to the firearm or ammunition;*
- (vi) the employer of the driver of the vehicle and present on the vehicle; or*
- (vii) over the age of 16 years and present on the vehicle.”*

[75] This raises many questions i.e. when Constable Makunyane found the firearm in the car, who was in control of all the goods on the vehicle; was the Plaintiff the only person who had access to the firearm or ammunition; who was the driver up to where the car was parked; etc. It is trite that when an arresting officer has a suspicion, investigative steps should be pursued to determine the reasonableness of the suspicion.⁶² Constable Makunyane did not do the on the spot investigation and as such,

⁶² R v Heerden 1958 [3] SA 150 71.

he cannot be said to have entertained a reasonable suspicion that the Plaintiff was in possession of a firearm as defined in the Act. What he did was in contravention of section 117(2)(d) (i) to (vii) of the Firearms Control Act, 2000, Act 60 of 2000, referred to above.

[76] It is well established that the onus rests on a police officer to justify arrest. In *Minister of Law-and-Order v Hurley and another*,⁶³ Rabie CJ held: “An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.” In *casu*, Constable Makunyane did not discharge the onus of proving that his action (arresting the Plaintiff) was justified in law.

[77] In the circumstances of this case, the Plaintiff’s arrest would be lawful if the Defendants have established on a balance of probabilities that (1) the Plaintiff was arrested by a police officer; (2) the arrestor must entertain a suspicion that the Plaintiff had committed or attempted to commit an offence; (3) the commission of the offence, referred to in (2) above, or the attempted commission of that offence, occurred in the presence of the police officer; and the arrestor’s suspicion must rest on reasonable grounds.

[78] It is against the set jurisdictional requirements that the conduct of Constable Makunyane had to be evaluated to ascertain if it passes the muster justifying the arrest of the Plaintiff. There is no discordant that Constable Makunyane is a police officer and was acting vicariously as employee of the 1st Defendant.

[79] It is my considered view that three of the four jurisdictional requirements justifying the arrest of the Plaintiff are absent. But, for Constable Makunyane being a peace officer, his evidence did not establish that he entertained a suspicion; that there was no evidence that the suspicion was that the Plaintiff committed an offence in Schedule 1

⁶³ 1986 (3) 568 (A) at 589 para-E-F.

[CPA]; and finally the suspicion must rest on reasonable grounds. As such, the arrest and detention of the Plaintiff by Constable Makunyane were unlawful.

[80] On application of the law to the facts, it could not be found that Constable Makunyane had a suspicion of any crime being committed based on the evidence at his disposal at the time the Plaintiff was arrested.

[81] On the conspectus of the evidence as a whole, there existed no suspicion to effect an arrest of the Plaintiff. The arrest of the Plaintiff in the absence of a suspicion automatically renders the arrest unlawful. That normally would sound the death knell for the case for the Defendants as the jurisdictional factors set out in section 40[1][b] of the CPA are symbiotic in nature.

[82] The absence of a suspicion would circumvent an inquiry into the reasonableness thereof. In sum, three of the jurisdictional requirements justifying the arrest of the Plaintiff had not been met.

CONCLUSION

[83] The Plaintiff adduced sufficient evidence to establish that Constable Makunyane made improper use of the legal proceedings to deprive him of his liberty. On the basis of the evidence, reasoning and conclusions referred to above, I am persuaded that the Plaintiff's arrest was accordingly unlawful. Accordingly, the Plaintiff was also maliciously arrested. Since the Plaintiff's arrest was unlawful and malicious, it follows that his subsequent detention and further detention were also unlawful.

[84] I now consider whether or not the Plaintiff was maliciously prosecuted. In order to succeed with his claim for malicious prosecution, the Plaintiff was required to allege and prove that (1) Constable Makunyane set the law in motion, meaning that he instigated the criminal proceedings against the Plaintiff; (2) Constable Makunyane acted without reasonable and probable cause; (3) Constable Makunyane acted with *animo injuriandi* (malice); and (4) the proceedings instituted against the Plaintiff terminated in his favour.

[85] The enquiry as to whether or not the Plaintiff proved that Constable Makunyane had reasonable or probable cause, is whether, when he instigated or initiated the

criminal proceedings against the Plaintiff, he had such information as would lead a reasonable person to conclude that the Plaintiff had probably been guilty of possession of a firearm without a licence to hold that firearm. For a Defendant to be held liable for malicious prosecution, the Plaintiff must prove *animus injuriandi* by showing that: the Defendant intended to cause the Plaintiff to be prosecuted or must have foreseen that his conduct would cause the Plaintiff to be prosecuted; and the Defendant knew or foresaw the possibility that there were no reasonable grounds for the prosecution, meaning that he was aware of the wrongfulness of his conduct or foresaw the possibility that his conduct may be wrongful; but the Defendant nevertheless continued with his wrongful conduct, reckless as to the possible consequences of his conduct.

[86] It is common cause that Constable Makunyane instigated or initiated the criminal proceedings against the Plaintiff by arresting him on a charge of being in possession of a firearm without a licence, in contravention of the Firearms Control Act, and that those criminal proceedings terminated in the Plaintiff's favour. This court must determine whether, when Constable Makunyane initiated those criminal proceedings, he had reasonable or probable cause for doing so, and whether he had *animus injuriandi*.

[87] Reference was made during trial to the ballistic report and it was discovered by the Defendants. However, the Defendants did not call the author to testify on the contents of the ballistic report. Instead Counsel for the Defendant made the following submission on the ballistic report: *"The documents referred to in the evidence (without admitting the truth of the content of such documents) are what they purport to be, without the need to formally prove the existence of the documents. In the light of agreement referred to above, the covering letter to the ballistic report dated 2018/02/26⁶⁴ is what it purports to be, without the need formally to prove the existence of the letter or that it was addressed to the Commanding Officer at Mamelodi East Police Station and the truth of the content of the ballistic report is not admitted in the absence of evidence being led to prove the truth thereof."*

⁶⁴ See: CaseLines 012-14.

[88] Be that as it may, evidence was also adduced to the Court about postponements linked *inter alia* to the awaited ballistic report. Constable Makunyane must have been aware that, without ballistic report confirming that the firearm he found in the Plaintiff's car was a firearm as defined in the Act, he had insufficient information at his disposal to have acted with reasonable or probable cause. The fact that he wanted the firearm to be sent for ballistics examinations suggests that he was unsure, at least at that stage, whether or not it was a firearm as defined in the Act. He knew that the ballistics examination could either confirm that it was indeed a firearm, as described in the Firearms Control Act, or that it was not a firearm.

[89] In cases of unlawful possession of firearms in terms of the Firearms Control Act 60 of 2000, evidence is required that a weapon was indeed a firearm as intended by the Act. The Court did not get this evidence from the Defendants as they decided, for whatever reason(s), not to call the author of the ballistic report to testify on the contents thereof. In these circumstances, it is incumbent on the Defendants to prove that the weapon of which Plaintiff was allegedly in possession was a firearm as defined in the Act. In my view, the Defendants have failed to discharge this onus.

[90] In the circumstances, I am satisfied that the Plaintiff established that Constable Makunyane acted without reasonable and probable cause when he instigated the criminal proceedings against the Plaintiff and that, for purposes of malicious prosecution, he acted with malice. The Plaintiff has accordingly established that he was maliciously prosecuted at the hands of Constable Makunyane.

[91] Considering all the evidence, arguments from all the parties, applicable law including relevant legal principles, I am persuaded that the 1st and 2nd Defendants failed to prove that the arrest, detention, and further detention were lawful. I am also persuaded that the prosecution was accordingly malicious and without probable cause. It is considered view that a case has been made by the Plaintiff. The Plaintiff's claim for unlawful arrest, unlawful detention, further unlawful detention and malicious prosecution is bound to succeed. As a result, the Plaintiff's claim on the issue of merits succeeds.

COSTS

[92] Counsel for the Plaintiff submitted that the issue of costs is the discretion of the court, which discretion must be exercised judicially. It must be submitted with respect that our courts must desist from treating state official with kids gloves, when they defend the indefensible and in such cases, the court must order punitive costs against such officials.

[93] In *casu*, the Plaintiff seeks that cost should be on the scale as between attorney and own client in accordance with contingency fee agreement and/or alternative costs *de bonis propriis* for the following reasons: The Defendants have defended the indefensible. For a period of four years, the Defendants have maintained a plea of bare denial. On the eve of trial, specifically three [3] days before trial, Defendants introduced an amendment with a plea of section 40(1)(b), that a police officer, specifically Constable Makunyane entertained a reasonable suspicion that a schedule 1 offense has been committed in his presence, *to wit, possession of unlicensed firearm*. The Defendants discovered a ballistic report deposed by JL Scheepers, which the Defendants' legal teams sought to distance themselves from, their very own document which was discovered by them. For four years, the defendant had perused the docket and the ballistic report and noted the contents thereof as well as the date of commissioning, *to wit, 26th day of February 2018*.

[94] Defendant knew that the contents of the ballistic report are not favourable to their case and/or defense hence they distance and importantly, failed to call the author of the ballistic report. During the hearing, reference was made to the ballistic report. It is undeniable that the prosecution has read the ballistic report to the extent that the charges against the Plaintiff were withdrawn nine [9] days after the ballistic report was commissioned. For five [5] years the charges against the Plaintiff were never reinstated. In its amended plea, the Defendants plead that the charges against the Plaintiff were ***provisionally withdrawn***, which allegation is not supported by any shred of evidence, except to the contrary.

[95] Our courts have held legal practitioners liable for costs of another where there are special grounds justifying this. Such grounds have been found to be present in cases

where a litigant has been found **guilty of dishonesty or fraud** or **where their motives have been vexatious, reckless, malicious and frivolous,** or **where they have acted unreasonably in the conduct of litigation** or **where their conduct has been in some way reprehensible**⁶⁵. In *casu*, the conduct of the Defendants' legal representatives squarely fits within the conduct as described herein *supra*.

[96] In **Gois t/a Shakespear's Pub v Van Zyl and Others**⁶⁶, the court held as follows: ***"...this court may make a punitive costs order such as costs on an attorney and own client scale where it believes it (is) appropriate to do so. Factors to consider whether or not to grant such punitive costs order include where the conduct of the party (a) is vexatious and amounts to an abuse of legal process, even though there is no intention to be vexatious; (b) evinces a lack of bona fide; and (c) is reckless, malicious and unreasonable."***

[97] It is my respectful submission to the above Honourable Court, that the Court does not take the issue of costs *de bonis propriis* lightly and it has to be shown that the conduct of the practitioner was such that it was **grossly negligent, mala fide, negligent or unreasonable.**'

[98] It is submitted with respect that the conduct of the Defendant's representatives should be found to be **unreasonable, mala fide and grossly negligent** to defend the indefensible with their bare denial plea, even with their amended plea.

[99] In **Brown v Papadatis and Another NNO**⁶⁷ Davis J held at 545J-546D is apposite here. The learned Judge said: ***"Mr Khan submits that he was given instructions to so pursue this course of action, but attorneys must surely apply a professional standard in deciding to do this. See the dictum of Innes CJ in Vermaak's Executor v Vermaak's Heirs 1909 TS 679 at 691. Applicants have rights, but the courts are not playthings, to be abused at the convenience of litigants who raise spurious, reckless arguments which jeopardize the integrity of the court, so as to postpone proceedings, when they, as in this***

⁶⁵ See *Erasmus Superior Court Practice at E12-20 and footnotes cited there.*

⁶⁶ (2003) 24 ILJ 2302 (LC)

⁶⁷ 2009 (3) SA 542 (C)

case, have clear rights, which can protect any interest or rights which they may have. In my view, this is a case where the court should say: Of course, litigants have rights; of course, courts must fastidiously respect these rights; of energetically as he or she may be able, to protect these rights. But when the boundary is overstepped so grossly in circumstances where there is no legal basis, no precedent, no serious evidential edifice on which to launch such an application (ie even on these vague affidavits could a recusal application ever be brought?), the court should say, you have overstepped the mark and have crossed a bridge in circumstances where an order of costs de bonis propriis must follow.”

[100] In University of South Africa v Socikwa and Others⁶⁸, the court held as follows at paragraph 31 of the judgment: “[31] I squarely attribute the launching of these absolutely hopeless urgent applications to legal practitioners who represented Unisa and the Justice Department. Legal practitioners, as officers of the court, have the fiduciary responsibility to the court. Once legal practitioners accept either the instructions and/or briefs, their appointment by their clients connotes that they become fiduciary in relation to the litigant. In the words of Innes CJ, fiduciary duty also involves “...a solicitor to his client...” . Once appointment is confirmed and accepted, the forensic skills of legal practitioners must be ignited to ensure that they protect the court from the burden of entertaining and adjudicating absolutely hopeless cases. It remains the duty of a legal practitioner to act in the best interests of his or her client. Acting in the best interest of the clients also denotes that a legal practitioner has an obligation to disclose to the client that the case sought to be pursued is either absolutely hopeless or has prospects of success.

[101] Further in the above judgment, para 35, 36 and 37 the court held: “[35] In respect of the legal representatives of the applicants, they assisted in bringing absolutely hopeless cases to court when they reasonably ought to have known that the applications were not urgent and there were no reviews pending before court. Had they simply embarked upon drafting the chronology and juxtapose same with Section 145 of

⁶⁸ (J 675/23; J 680/23) [2023] ZALCJHB 172; [2023] 8 BLLR 836 (LC); (2023) 44 ILJ 1785 (LC) (7 June 2023)

the LRA, Practice Manual and the Rules, the court's resources could have been directed to worthy cases. [36] Mindful of the fact that the Justice Department is represented by the State Attorney and not a private attorney, what should be the fate of an Attorney from the State Attorney in the circumstances of the costs. Attorneys employed by the State Attorney are employed in terms of the Public Service Act 103 of 1994 ("the PSA"), as amended. As civil servants, they are bound by the provisions of the Public Finance Management Act 1 of 1999, ("the PFMA"), as amended.

[102] *Section 45(c) of the PFMA provides: "45. Responsibilities of other officials - An official in a department, trading entity or constitutional institution— (c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due. [37] An attorney duly employed by the State Attorney who agrees to take a hopeless case to court without properly advising the litigating department or organ of state, contravenes section 45 (c) of the PFMA. In the premise, consequence management measures must ensue."*

[103] In considering, the costs sought against the Defendant's legal representatives, the court is implored to consider the bleeding of national budget and should stop the rot of "we do not care attitude" on the part of public officials, specifically in the office of the State Attorneys.

[104] In the event, that the above Honourable Court, does not find in favour of the Plaintiff, therefore the Plaintiff pleads that he was entitled by law to exercise his constitutional rights and further that the principles as laid down in ***Biowatch***⁶⁹, find application in this matter and the court should find as such.

[105] It is further submitted that the matter was not complicated, and it did not warrant or necessitate the employment of a senior and a junior nor a senior at all. Should the Court

⁶⁹ (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

grant in favour of the Defendants, consider the issue of costs favourably in respect of the Plaintiff as he was exercising his constitutional rights.

[106] Counsel for the 1st and 2nd Defendants pray that the action be dismissed with costs, including the costs of two Counsel.

[107] Matters of costs are always important and sometimes complex and difficult to determine. In leaving a Judge a discretion, the law contemplates that he should take into consideration the circumstances of each case. One must carefully weigh the various issues in the case, the conduct of the parties, and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties.

[108] As the starting point, the Court must determine whether any costs are payable to any of the parties. Once the Court has decided that costs are payable it has to decide who of the parties is entitled to costs. This exercise cannot be embarked on capriciously or by chance, there should be sound legal principles upon which the decision is based. The idea behind granting a costs order in favour of a successful party is to indemnify it for its expense in '*having been forced to litigate*'. Further, a balance must be struck '*to afford the innocent party adequate indemnification within reasonable bounds*'. In order to achieve the necessary balance, the individual circumstances of each case must be taken into account.

[109] A Court exercising a wide discretion may choose from all the options at its disposal and award a cost order that it considers just in the circumstances of the case at hand. The Court has to, *inter alia*, consider the conduct of the parties during the actual litigation process, all other matters that lead up to and occasioned the litigation and whether there were attempts to settle the matter before and during the litigation. The extent to which a party raised, pursued or contested a particular issue and whether it was reasonable for that party to pursue that issue.

[110] The Court's approach is to look first at who the successful party is. I believe that the principle that costs should follow the result is fair too. In the end, the exercise of the

Court's discretion on costs, is an exercise to determine what is fair, an enquiry in which substantial success carries significant weight. Substantial success is often described as the general, although not an inflexible rule. It is not easily departed from, as in general, the purpose of a costs award is to indemnify the successful party.

[111] In circumstances such as the present, I am of the view that a punitive order for costs is not appropriate. However, I think, in this case, an order for costs is appropriate and the costs must definitely follow the results as there is no reason for deviation. I am therefore inclined to grant the costs order on a party and party scale.

[112] In the premise, I issue the following Order:

[112.1] The Plaintiff's arrest was unlawful.

[112.2] The Plaintiff's detention and further unlawful detention (after his aforesaid unlawful arrest) were unlawful.

[112.3] The Plaintiff's prosecution was malicious.

[112.4] The 1st and 2nd Defendants (the Defendants) are jointly and severally liable to pay 100% of the Plaintiff's damages arising from unlawful arrest, unlawful detention, further unlawful detention and malicious prosecution referred to above.

[112.5] The quantum proceedings are postponed *sine die* for a date to be determined by the Court.

[112.6] The 1st and 2nd Defendants are jointly and severally liable to pay the costs of suit to the Plaintiff on a party and party scale.

T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

Counsel for the Plaintiff: Adv WN Sidzumo
Instructed by: Makhafola & Verster Attorneys Inc.
Counsel for the 1st and 2nd Defendants: Adv TWG Bester SC and Adv CGVO
Sevenster
Instructed by: State Attorney in Pretoria
Date of Hearing: 4; 5; 6; and 8 March 2024
Date of Judgment: 8 April 2024

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 8th of April 2024 at 10h00.