



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

CASE NO: 2253/17

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>04/06/2020</u>	
DATE	SIGNATURE

In the matter between:

MATLOU, PETER

First Plaintiff

MALULEKE, MUSA

Second Plaintiff

MATHEBULA, LEN

Third Plaintiff

NGHONYAMA, BONGANI

Fourth Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

YACOOB J:

1. The plaintiffs are policemen. They were arrested, imprisoned and charged with theft, and the charges against them were eventually dropped. They now seek damages for unlawful arrest and unlawful prosecution.
2. The background facts, which are common cause, are as follows.
3. On the evening of 28 October 2015 and the morning of 29 October 2015, the plaintiffs were all on night shift duty, based at Langlaagte Police station. The first and second plaintiffs and third and fourth plaintiffs each formed a “crew”, assigned to a motor vehicle which would patrol an allocated area within the jurisdiction of the Langlaagte Police station during the shift, which lasted from 18h00 on 28 October until 06h00 on 29 October.
4. The third and fourth plaintiffs used a vehicle with registration BSY997B and call sign LL26, while the first and second plaintiffs were in a vehicle with registration BSY338B and call sign LL23. All four plaintiffs, both at the time and at the time of the hearing, held the rank of constable.
5. Also on 28 October 2015, at approximately 19h30 at the Vaal toll plaza on the N1 between Bloemfontein and Johannesburg, a truck was hijacked. The truck contained luxury goods being transported for sale. A device known as a “jammer” was used so that the tracking device on the truck stopped sending out signals and the truck could not be tracked.
6. During their patrols, the third and fourth plaintiffs spent most of the early morning at and around a property at 36 Stellar Avenue. The first and second plaintiffs were also in that vicinity at some point. A truck was discovered at the property, together

with boxes either empty or containing shoes and clothing. It emerged later that the truck was the same truck that had been hijacked the evening before on the N1. It is the events surrounding the property and the hijacked truck on the morning of 29 October that formed the basis of the charges against the plaintiffs.

7. The plaintiffs were arrested and charged with theft, a schedule 5 offence as it was allegedly committed by law enforcement officers. They spent a total of 18 days in prison. Their first court appearance was on 02 November 2015, at which they were charged with robbery with aggravating circumstances, a schedule 6 offence. They had to make a formal bail application, and were remanded for 8 days. When they appeared again in court, they were detained again for purposes of an identity parade related to the robbery charges, in which they were to be identified by the driver of the hijacked truck. This identity parade did not happen. The plaintiffs appeared in court again and were released on bail on 17 November 2015, at which point the charge was again one of theft.
8. The criminal proceedings against the plaintiffs were postponed a number of times either for unavailability of witnesses or for further investigation. The charges were withdrawn on 30 June 2016 and reinstated on 7 October 2016. The charges were finally withdrawn on 17 May 2017 on the basis that there was insufficient evidence to secure a conviction.
9. The outline above is common cause. What is in dispute is what the third and fourth respondents did at 36 Stellar Road that morning, for what reasons, and whether their conduct as it appeared from the evidence gave rise to a reasonable suspicion which justified their arrest. As far as the first and second plaintiffs are concerned, the question is whether their conduct is sufficiently linked with that of the third and

fourth plaintiffs, and therefore whether there is also a reasonable suspicion relating to them. It is obvious that, if there is no reasonable suspicion regarding the third and fourth plaintiffs, then there can be none regarding the first and second plaintiffs.

10. It was rightly agreed that the defendants had the duty to begin, as the defendants bore the *onus* to show that the arrests were lawful. The defendants called eight witnesses:

- 10.1. Mr Bellingan;
- 10.2. Sergeant Ramakatla;
- 10.3. Captain Hicks;
- 10.4. Mr van der Mescht;
- 10.5. Mr Peter;
- 10.6. Colonel Sibanda;
- 10.7. Mr Maharajh, the prosecutor, and
- 10.8. Mr van der Merwe.

11. The defendants also adduced video evidence, from the CCTV cameras of a property across the road from the Stellar Road property, which was presented by Mr van der Merwe. In order to do so, the defendants reopened their case after the plaintiff's first witness, Mr Mathebula, the third plaintiff, had testified, and Mr Mathebula thereafter resumed the stand to deal with issues arising out of the video footage.

12. The plaintiffs called the first, third and fourth plaintiffs, as well as Constable Goodgall, a detective who was called to the scene on the morning of 29 October 2015.

13. In addition, There was agreement between the parties that the statements of Mr Simba and Mr Banda the two civilians at the scene, Mr Masweo the original driver of the hijacked truck, and Mr Khumalo and Mr Ndaba who were security guards at the property across the road from the scene, would be admitted in terms of section 3(1)(a) of the Law of Evidence Amendment Act, 45 of 1998.

THE DEFENDANT'S CASE

Mr Bellingan

14. Mr Bellingan testified that he is employed at a company called RTT apparently a related company to another company called RTT Logistics, to which the truck belonged. His specific job in 2015 was to respond to hijackings.

15. The truck found at 36 Stellar Avenue was equipped with a tracking system which updates at regular intervals. If there is any interference with the updates, for example if the updates stop, then it is assumed that the truck has been hijacked. The tracking system on the truck found at 36 Stellar Avenue had stopped updating on the N1 and resumed some hours later in Langlaagte, at which point he responded by going to the scene. The truck's whereabouts were unknown until the tracking system began updating again at about 05h45 on the morning of 29 October, at which point Mr Bellingan was called by the control room, and he went to the scene. Mr Bellingan thought that the tracking system started updating again because the jamming device's battery ran flat.

16. When he got there, Mr Bellingan found a white 8 ton truck parked on the street on the side opposite to the property, and RTT's truck was inside the property. There were also two marked police vehicles on the street. He found four police officers at the scene and a lot of boxes lying all over the property, some of which had been opened. The boxes contained branded sportswear. He also saw two civilians but only spoke to the policemen.
17. One of the civilians had a pair of obviously new sports shoes on, and there were shoes of the same brand in some of the boxes, but Mr Bellingan did not remember the brand. One of the policemen was taking things out of boxes and Mr Bellingan asked what he was doing, and he asked him to put the things down. Mr van der Merwe arrived soon after.
18. Mr Bellingan asked the policemen where were the photographers and investigating officers and they did not answer. He had some experience with crime scenes because of his job and in his experience everything had to be cordoned off and left in place for photographs and fingerprints to be taken. Also he was a police officer for 11 years before undertaking his current line of work.
19. Mr van der Merwe arrived just a few minutes after he did, and about half an hour after that there were a whole lot of police officers and investigators.
20. Mr Bellingan and Mr van der Merwe found a jamming device on the front seat of the truck connected to a truck battery that had been placed next to the jamming device. That is why they had lost contact with the tracking system, because the jamming device jammed the signal.

21. Mr Bellingan stated that there are always contact details in the horse of their trucks but nobody contacted RTT about the truck until the signal came back on.

22. Mr Bellingan was not sure of the exact number of boxes that had been in the truck nor of the value of the goods. He conceded in cross examination that he did not know where else the truck had stopped before it reached Stellar Road, and that he did not know whether some boxes had been offloaded at some other place. He also did not know what had happened before his arrival.

23. A number of photographs taken from the video footage were put to Mr Bellingan. His evidence on those photographs was not particularly of relevance except insofar as it assisted the Court to understand the layout of the road and the property. At that stage it was not clear whether the video footage would be adduced. In my view anything worthwhile that came out of Mr Bellingan's testimony regarding the photographs (and that of the other witnesses who testified before the footage was adduced) was superceded by the video footage which was later adduced.

Sergeant Ramakatla

24. At the time of the incident Mr Ramakatla was attached to the Provincial Investigating Unit. He was one of the investigating officers in the case. He has been a police officer for 15 years. He was not initially the investigating officer but the initial investigating officer, Constable Moultrie, became ill so Mr Ramakatla took it over. He received the docket with the statements already in it. He did not initially see the video footage which had already been forwarded to the analysts. He only took the statement of the shift commander at the time of the incident.

25. Mr Ramakatla testified that the plaintiffs were charged with theft and ought also to have been charged with defeating the ends of justice because they were police officers, and because they were found tampering with the scene and had not cordoned it off.
26. He did not know whether bail had been opposed at the plaintiffs' first appearance. However later the intention had been to hold an identification parade because there was a suspicion that the plaintiffs may have been linked with the hijacking. Later it became clear that the vehicles they had been driving that night did not go to the area where the hijacking took place and so they could not link the plaintiffs to the hijacking and did not hold the ID parade. In addition the driver apparently informed Mr Ramakatla through his (the driver's) brother that he would not be able to identify anyone since the incident happened at night.
27. Mr Simba and Mr Banda who were the two civilians seen by Mr Bellingan at the scene had been arrested by the plaintiffs. They were the driver of the truck that was parked on the road and the caretaker of the property respectively. They were charged with possession of stolen items.
28. Mr Ramakatla did not know why the charges against the plaintiffs were ultimately withdrawn. He does know that the first time they were provisionally withdrawn was because the witnesses were not available. He could not comment on what they were initially charged with because he was not involved in the matter at the time. However he thought the number of boxes for which the plaintiffs were charged for theft was an estimate based on information from the complainant (RTT).

29. Mr Ramakatla testified that the plaintiffs ought to have waited for the photographers and ought not to have been touching and moving boxes as they apparently had.

Captain Hicks

30. Mr Hicks has been in the South African Police Service for 26 years and a Captain for 10 years. He was in October 2015 stationed at the Operational Command Centre for Gauteng, at Brixton. He and his team was asked to go to Langlaagte to “assist” in the matter on October 30th. He arrived there at 6 or 7pm. He was there to assess the situation and ensure that any arrest was done lawfully. There was also a risk because policemen may be charged and they tend to get angry and if they are armed it is a risk.

31. According to Mr Hicks when a policeman arrives at a scene he is supposed to cordon it off and inform the commander if backup is needed. The evidence of the third and fourth plaintiff’s vehicles going to and from the scene numerous times is unlikely to have been part of correct management of a scene. The policeman is supposed to cordon it off and safeguard the scene until it can be handed over.

32. Mr Hicks was informed that the plaintiffs were interviewed and had declined to disclose what had happened. There was also a brigadier from the legal section of the SAPS to ensure that everything was above board.

33. Mr Hicks then interviewed the plaintiffs. One plaintiff refused to tell him anything and the others spoke of finding a hijacked truck. However none of the plaintiffs was completely forthcoming.

34. When the brigadier from the legal section spoke to them they then agreed to give statements. After interviewing the plaintiffs and after they gave their statements Mr Hicks and his team concluded there was a reasonable suspicion that the plaintiffs had been involved in a crime, and also that the plaintiffs had acted in a suspicious manner by not dealing with the crime scene in accordance with procedure, not informing their commander what they were doing, not getting backup, driving up and down, bringing people to the station without detaining them and only arresting Mr Simba and Mr Banda later. All of these things were inconsistent with applicable procedure.

35. Mr Hicks suggested that any police official would recognise a jammer and would disconnect it because it would also interfere with their own communications. However the third and fourth plaintiffs' vehicle was moving around and would have been out of the range of the jammer so there was nothing to stop them contacting their commander.

36. He also suggested that they are not supposed to move or touch things, and that if they do need to touch anything they should have used gloves. In any event they ought to have reported the scene immediately.

37. Mr Hicks was not aware of the charge of robbery with aggravating circumstances with which the plaintiffs were charged on their third appearance. He was only aware of the charges of theft and defeating the ends of justice, which is what he arrested the plaintiffs for. He could not explain why defeating the ends of justice did not appear on any charge sheet. He said the arresting officer did not do the charge sheet.

38. He also did not do the paperwork when the plaintiffs were arrested so he did not know why the Notice of Rights only mentioned theft and not defeating the ends of justice.

39. As far as the plaintiff's handling of the crime scene was concerned, in his experience the correct way to handle it when something was clearly wrong, for example finding the two trucks and people running away which is what the plaintiff will say, is to call it in. The existence of the jamming device was another indication something was wrong. The plaintiffs ought to have checked the truck also for contact details. If the plaintiffs had followed procedure it was his view that more suspects could have been arrested and those who were arrested could have been arrested earlier and more information would have been obtained, the crime scene was also contaminated. That was the basis of the defeating the ends of justice charge.

40. He did not have the proof of the plaintiff's theft but there was sufficient in his view at the time for a reasonable suspicion and that is why he arrested the plaintiffs.

Warrant Officer van der Mescht

41. Mr van der Mescht was also called to assist with the arrest and was part of the team led by Mr Hicks.

42. Mr Hicks asked him to take the plaintiffs to Sophiatown police station to detain and to fill in the relevant paperwork, such as the cell register, the occurrence book and the notice of rights. He did not do anything else. As far as he could remember the

plaintiffs were only charged with theft but he was not entirely sure. He would have written down as the charge what he had been told by Mr Hicks.

Warrant Officer Howard Peter

43. Mr Peter was on duty for the night shift on the evening of 28 October to the morning of 29 October 2015. He was a Warrant Officer at Langlaagte Station and was the shift commander that evening.

44. As the shift commander he was supposed to know everything that happened during the shift in his area and to inform the duty officer and detective. There were two sectors, one team of one vehicle with two members (of the SAPS) was assigned to each sector. There was no reason for a team from one sector to be in another sector unless they were called for backup. In addition if this happens the shift commander must be informed by phone or over the radio. He was however not informed of anything before 6 o'clock which was the end of his shift.

45. Even if the plaintiffs did not immediately know that the truck had been hijacked, he should have been informed of the suspicious circumstances so that he could then take whatever steps he had to take, such as informing other role players or deciding to send back up.

46. Mr Peter saw that the plaintiffs brought some people, he thinks there were four, to the "client side" of the police station. The station has a "client side" and a "suspect side". The fourth plaintiff was there and he doesn't remember who else. It was some time between 11pm and 2am. The people were brought there and left there and then fetched about an hour and a half later. The plaintiffs did not report anything or ask for assistance, nor did they book these people in. If someone

comes to the client services side they come for help not as suspects. Because these people had come with police members I assumed they had been helped by those members so he did not ask them if they needed help. These people were not recorded in any way.

47. Mr Peter was taken through the vehicle logs ("AVL") of the vehicles driven by the plaintiffs. The third and fourth plaintiffs were assigned to Sector 2 in vehicle registration BSY997B with call sign LL26. The first and second plaintiffs were assigned to Sector 1 in vehicle registration BSY388B with call sign LL23. LL is the code for Langlaagte. The cars had radios and the plaintiffs had pocketbooks and firearms.

48. If the plaintiffs called the landline of the police station and reported to Ms Silikhane nobody told Mr Peter about it. Mr Peter and Ms Silikhane were both working in the charge office but she did not say anything to him. If they called Colonel (then Captain) Sibanda he did not know, but they should have called him and it was for him to call Mr Sibanda.

49. It was put to Mr Peter that the plaintiffs will say their pocketbooks were taken from them on arrest. He did not know anything about that. However this was not put to the arresting officer Mr Hicks.

50. According to Mr Peter even if the two sectors are small it was not expected that different teams would cross into the other sector unless they were called for backup.

51. He said that he did not see any of the plaintiffs interviewing the civilians who were brought to the station. They were left there and then fetched. They were not interviewed at the station.

52. Sgt Baloyi was also issued with a vehicle. If he had received any reports from the plaintiffs he did not report to Mr Peter.

53. The fourth plaintiffs' vehicle went outside of the two sectors, but Mr Peter did not receive any report from them about why.

Lieutenant-Colonel Sibanda

54. Mr Sibanda was a Captain at the time and was the Acting Station Commander at Langlaagte. He has been in the Police Service about 30 years and was a captain for 9 years. He was the duty officer on the date in question.

55. He was telephoned at about 5.30 am and informed about a truck, and went to the scene. He got there at around 6. He found the third and fourth plaintiffs at the scene. He remembers someone from RTT being there but he does not remember names. He was the first person to arrive there.

56. Mr Mathebula, the third plaintiff, showed him the jammer in the front of the truck and also showed him the truck parked outside on the street. He also showed him the driver of the outside truck who had come there to load goods. He would not say it was normal that he would only be informed at 5.30 when the truck had been discovered four hours earlier. He should have been called earlier. There was no detective there, there was no one from "LCRC" which deals with certain cases – they should have been there because there was a jammer.

57. The truck had registration numbers, but Mr Mathebula said he did not know if it had been stolen despite the jammer. I told him I would come and see if there is something wrong.
58. There were two people arrested in Mr Sibanda's presence on the day. Mr Mathebula told him he was holding them until I could say whether he should arrest them or not. He also said he only saw the jammer after he had called Mr Sibanda.
59. He does not know why the witnesses from RTT only saw two police officers there, he definitely arrived before them. However he could not find his car before they arrived in the photographs taken from the video footage. They could have seen officers taking things out of the boxes, but he did not see it, he did not see everything.
60. Mr Sibanda did not instruct the plaintiffs to load the boxes on to the trucks which was the plaintiffs' version. They told him on the telephone they wanted to take the truck to the police station and he told them to wait there for him first. He did not instruct them to load the boxes.
61. Once Mr Sibanda saw the jammer he told them not to tamper with the scene, and they got the scene cordoned off. He then called in the relevant role players – Captain Sina and the "Trio Team" who work with serious crimes, the "LRC" who take fingerprints, the "PIU", the Provincial Investigation Unit and the cluster duty officer. That is the procedure when there is a truck hijacking. Once the Trio Team and Captain Sina arrived he handed over to them to continue the investigation.

62. Mr Sibanda did not notice anyone at the scene wearing new takkies. He was shown a photograph but did not recall anything like that. But he knows photographs and fingerprints were taken. He does not remember if he was told that Banda and Simba had been taken to the police station earlier. He did see the video footage with a police vehicle entering and leaving the scene. But he could not see the call sign and registration.
63. The security guards from Stellar Park which was across the road from the scene informed the police that they had seen the police unloading boxes from the truck on the scene but we could not see that on the footage. Statements were taken from them immediately in their guardroom.
64. Mr Sibanda was taken through the photographs which should a vehicle arriving. At one point there were two vehicles and then one. At one point a police vehicle entered the property and the gate was closed. Mr Sibanda said that whether this was normal would depend on the reason the gate was closed.
65. Mr Sibanda was taken to the statement of one of the Stellar Park security guards, a Mr Khumalo who said that he saw the police van with brown boxes at the back, he walked past the scene when the gate was open and saw similar boxes in the truck, and later saw the van return empty.
66. Mr Sibanda was aware that the plaintiffs were arrested for theft but was not fully aware of all the details because he did not do the arrest or the paperwork. He was aware that the goods recovered were handed over to RTT at the scene rather than at the police station because there were too many to take back. As far as he was aware the correct procedure was followed before they were handed back and the

SAP299 was filled in but he did not know by whom. He also does not recall the dates on which they appeared. He does not know about the robbery charge. But the charge is up to the investigating officer and prosecutor.

67. Mr Sibanda had heard that the plaintiffs also called Ms Silikhane at the station (Client Services Centre). He could not remember exactly what the plaintiffs had told him but when put to him in cross examination he said it came back to him that they had told him people had run away when they arrived and that one person had dropped a Zambian driver's licence and some bank cards. These items were booked in terms of the proper procedure.

68. However the plaintiffs ought to have called the relevant roleplayers before they carried on at the scene. Mr Sibanda agreed that not following these procedures in itself is not criminal conduct, although it may be misconduct leading to a disciplinary hearing. He did not know of anything found in the plaintiff's possession that might have been stolen.

Mr Maharaj

69. Mr Maharaj dealt with this matter having received representations for the withdrawal of the charges. He was not the prosecutor attending to the trial in the Johannesburg Magistrates Court. He obtained the docket from the investigating officer. He realised that although there was a *prima facie* case against the plaintiffs, the matter was not ready for trial, and recommended that charges be provisionally withdrawn against all four plaintiffs.

70. There were still some essential investigations that needed to be carried out to strengthen the case enough so that a conviction was more likely. For example they needed the cellphone records of the plaintiffs.

71. In his view for a schedule 5 offence and the value of the alleged theft, whether it was R9 million or R3.2 million, would mean that bail on first appearance would have been unlikely. The plaintiffs would have had to bring a formal application.

72. He was not aware of the ID parade that had been suggested but knew that they were also attempting to use facial recognition software on the video footage. This did not happen in the end because the footage could not be enhanced enough.

73. According to Mr Maharaj it was reasonable that the charges and the issues such as whether there will be a parade or not change, depending on developments and also different investigation officers and different prosecutors, because each would use their discretion. It would be normal to oppose bail for further investigation to avoid interference.

74. It does not inherently matter whether a suspect or accused person is a police member or not, it depends on the merits of the case. However a police member would have intrinsic knowledge of the facts so it may be prudent to oppose bail until investigations are at an advanced stage, particularly if the person is going back to work at the same place.

75. The basis on which he concluded that there was a *prima facie* case was that on the merits there were many anomalies in how the scene was dealt with. They apparently removed items without cataloguing them, there was no senior officer, they did not call the owner of the property, they did not cordon the area off, items

were removed from the boxes. The fact that a senior officer was called at 5.30 does not normalise all of that.

76. According to Mr Maharaj he was able to see from a picture that the police van was loaded with goods. He looked at the photographs as well as the statements and noted that the security guard from Stellar Park had seen the van going to and from with boxes. He was adamant that this is not how a crime scene is dealt with especially one of that magnitude.

77. It was put to him that in one statement the guard said he saw something in the back of the van but could not quite make out what it was, but in another he said he could see the brown boxes. Mr Maharaj said that in his view it was not a contradiction but an elaboration. He thought it was ludicrous to suggest that there was no *prima facie* case.

78. It was not unusual that the matter was withdrawn more than once, this happens with many criminal cases. It is also not unusual for the charges to change as an investigation progresses. The charge only becomes important when the accused is asked to plead to it.

79. Mr Maharaj was aware that Mr van der Merwe had pursued his own investigation and had shared information with the police, having tracked down the suspects who hijacked the truck. He was not aware of the truck driver having arrived at the scene that morning and not pointing out the plaintiffs.

80. Mr Maharaj did not believe that the investigation displayed anything which led to a conclusion that it was malicious and that his colleagues had failed to apply their

minds. In his opinion they acted prudently in the circumstances. He would also have enrolled the matter had the matter been his.

Mr van der Merwe

81. Mr van der Merwe is a risk manager at RTT which is a courier company. He deals with all crime related issues, losses and damages and does the investigations. The company transports stock for clients from distribution centres to depots using trucks carrying between one and eight tons. A 15m container travelling from Cape Town to Johannesburg had gone off grid on the evening of 28 October 2015, that is the tracking system had stopped updating, and Mr van der Merwe got a call at about 05h30 on 29 October to say it had started updating again. He was given the co-ordinates and went there. He knew the driver was Joseph but did not know where he was.

82. A jamming device has a number of aerials and is connected to a 12 volt battery. It jams signals for about a 25 metre radius.

83. When he arrived there he found the vehicle parked in the yard. The back door of the container was open. The registration number of the horse was FLM687FS. He arrived around 06h15 when Mr Bellingan was there already and the police. There were a number of cars outside, and also an Isuzu 8 ton truck.

84. When he went inside the property he found a marked vehicle inside the premises and boxes lying everywhere, they were brown with purple security tape. The boxes were for TFG, the Foschini Group, and were mostly for Sportscene, a division of Foschini that distributes sportswear. The labels on the boxes did not say what was

inside, one would have to scan the barcode to see what was inside without opening it. Most of the boxes were opened and empty.

85. He introduced himself to the police and also took some pictures of the scene and the jammer. After he noticed that the police were there doing their work, he went across the road to see if there was any footage because he noticed a camera at Stellar Park opposite. The captain was there with him when he viewed some footage in the guardhouse. He then got a memory stick, copied it, and handed it to the police. This was at about 09h00.

86. When he went back to the scene, the LCRC had been there to process the crime scene already and they started packing up the empty boxes into another 12 ton truck to take them to the warehouse. Later they found Joseph and interviewed him at RTT.

87. Mr van der Merwe confirmed that Joseph came to the crime scene but said he interviewed him at his office. The police took his statement at the crime scene and also later in more detail.

88. Mr van der Merwe personally loaded the boxes with some assistance. They were told that they could take them. He went back to the police station the same day and was told that information from the AVL was that the two vehicles of the plaintiffs had been at the scene. He was at the police station for about four hours and did not participate in the interviews of others. His supervisor and police officials did most of the questioning. He had to leave the boardroom where the interviews were done. The first he knew the details of the hijacking was when he interviewed Joseph.

89. Mr van der Merwe then took the court through the video footage which was displayed in court. It was also handed up on a memory stick. The truck arrived at the premises at 23h32. A small Hyundai delivery vehicle arrived at 23h42, went inside and left again at 00h03. The 8 ton truck arrived at 00h05 and waits outside. At 00h11 the security guard comes outside and speaks to the driver.
90. There is quite a bit of activity from the time of the truck arriving until about 00h40. This includes someone doing something on the wheel of the 8 ton truck on the street.
91. The hijacked truck begins manoeuvring back and forth at 01h20 and is still moving when the police arrive at 01h23. They are shown to be interested in the 8 ton truck.
92. The security guard comes out to the police and the police get out of the vehicle. The hijacked truck is still inside with its hazards on. The police go into the premises with the security guard. The truck is still moving. Then at 01h27.56 people start jumping over the fence. One runs and another walks away.
93. At 01h46 two people emerge and get into the police vehicle. They drive off. They return at 01h52. The left front light is not working. One person gets off and goes to the gate and the vehicle enters.
94. At 02h02 the Stellar Park security guard flashes his light at the gate. Then the police vehicle exits again. Until now the truck driver of the 8 ton has remained in his truck. He then approaches the van, speaks to someone in it, it drives off and he gets back into the truck.

95. The police van returns at 02h13. It exits again at 02h20. In the intervening time flashlights can be seen moving inside the premises. It returns at 02h30. The driver opens the gate himself. At 02h36 the van exits again. This time both lights are working. It is back at 02h48, and leaves again at 02h53. A police vehicle arrives at 03h02 and exits at 03h07. It has its lights off as it leaves. It returns at 03h26 and leaves at 03h49.
96. At 04h11 what appears to be another vehicle arrives because a different light is not working. It exits at 04h18 with both lights working. A vehicle arrives at 04h25 and enters. As it gets later and brighter, there are more cars and people going past. It can be seen that there is some activity and people are brought in from the street to help with what Mr van der Merwe believes is the loading of empty boxes into the truck. He says all the boxes found on the truck were empty.
97. It is possible to see boxes and someone moving with boxes in the police's presence at 05h09. At 05h10 a policeman comes outside and is on his phone. He takes a passer-by inside with him at 05h11. Mr van der Merwe believes the policeman had to come outside the property to be out of the radius of the jammer.
98. While the policeman is standing by the gate people can be seen inside the property. There is also someone in the truck. It can be seen that boxes are being thrown in.
99. At 05h13 a policeman comes outside and walks up and down the street. A police vehicle approaches with only the left hand light working. Another police vehicle exits the property. The two vehicles stand next to each other with the one policeman in between. The two vehicles drive off separately by 05h17, but the one policeman is still outside on the telephone.

100. People can be seen moving boxes until around 05h30. A police vehicle arrives at 05h32. It goes further into the property in front of the hijacked truck. Mr van der Merwe says he saw the tracks of this movement later.
101. A policeman and the driver of the 8 ton truck emerge and are standing by the truck talking. The driver gets into the truck and then comes out and they cross back to the scene. This is at about 05h39 and then the gate is closed again.
102. A number of people leave at 05h41. A police vehicle exits at 05h44. There is something in the back of the vehicle but it cannot be seen clearly what it is. At 05h53 it can be seen that there is still activity with the boxes. This is after the jamming device turned off and also after Mr Mathebula says he called Mr Sibanda. Mr Sibanda arrives in a Nissan Tiida at 05h58. Another police vehicle arrives and parks on the verge. The Tiida parks next to the police vehicle.
103. Another police vehicle arrives and enters the property. There is still movement with the boxes at 05h59. That vehicle leaves at 06h06. The other police vehicle moves into the driveway. Mr Bellingan arrives at 06h07, someone else at 06h12 and then there are a number of arrivals. Mr van der Merwe in the midst of these.
104. Mr van der Merwe stated that it was the first time he saw a scene looking like this. He has not before seen contents removed from the boxes.
105. Mr van der Merwe produced pictures of the scene that he had taken, there was no objection from the plaintiffs. They show the back of the truck and boxes piled up, as well as tyre tracks in front of the truck. There is a picture of the cabin of the

truck, the jammer is behind the front seat and still connected to the battery. The photographs show that some boxes still had items in them.

106. When Mr van der Merwe arrived at the scene the captain told them to leave because they were busy working.

107. He said that they claimed a total loss of R9 million because nothing was left except a few bits and pieces. The Hyundai could not have taken all the goods, it was there for too short a time. A truck is not sent until it is full. He conceded there was no way of knowing where the truck was before it arrived at Stellar Avenue.

108. The Isuzu truck was still there when Mr van der Merwe left so he does not know if it was really damaged or if it was fixed before it left.

109. Mr van der Merwe conceded he did not get footage of what happened after the police arrived, or get testimony from the person who had been on duty at Stellar Park, he said that was the police's job.

110. When it was put to Mr van der Merwe that the boxes loaded back into the truck were full boxes, he said they only found empty boxes or boxes with a few units in them. Mr van der Merwe could not explain where the invoices and inventory for the contents of the truck were. He said they had been provided to the police later. At the scene only the manifest was handed over.

111. It must be noted that although Mr van der Merwe speculated at times when explaining the video footage about what was happening, and what it meant, the footage itself and the times of events are not at issue.

THE PLAINTIFF'S CASE

Constable Mathebula (before video footage)

112. Mr Mathebula was the plaintiff's first witness. He is the third plaintiff. He began his testimony before Mr van der Merwe adduced the video testimony but was recalled to deal with Mr van der Merwe's testimony.

113. Mr Mathebula has been a member of the SAPS since 2007.

114. He was arrested in the early hours of the morning of 30 October 2015, along with the other three plaintiffs. He signed the notice of rights at about 01h35 that morning. It said that he was charged with theft. 30 October was a Friday and the first appearance in court was on Monday 02 November. At that first appearance they were charged with robbery with aggravating circumstances. This was the hijacking. They were told they would not get bail. They were sent to Johannesburg Prison for seven days. On the second appearance, after seven days, they were told there would be an ID parade relating to the hijacking. They were then sent to Brixton for a week because the parade was to be held there. They then went back to court and got bail the following day at a different court. By that stage the charge was now only theft.

115. He was not aware of a charge of defeating the ends of justice.

116. On the night in question Mr Mathebula was driving the vehicle in Sector 2 and was accompanied by Mr Nghonyama. The shift is from 18h00 to 06h00 although they start at 17h45. Shifts occurred in cycles of four days – two day shifts followed by two night shifts. This was the first of two night shifts.

117. On their patrol he and Mr Nghonyama noticed a truck parked in the road at Stellar Avenue. It was a large white truck and a spare wheel was leaning against its side together with a metal pipe or rod. He thought perhaps it had a puncture. According to him he used to work with trucks and that is what gave him this idea. However he could not tell what kind of truck it was. He later testified that there was no puncture, the wheel and rod were there to make it look like there was.
118. They stopped near the truck, facing it, and heard voices on their left hand side, and alighted. He thought this was around 2am. They heard some noise and went to see, they found a large gate and a high wall. They opened the gate which was not locked and as they entered the yard people started running away. He and his colleague split up, chasing different people. There were at least six people.
119. He then heard his colleague calling him, and he went towards him. He found Mr Nghonyama near the wall looking very dirty. He had also heard a gunshot. A person had jumped out of a truck on the property and he and Mr Nghonyama started fighting and when Mr Mathebula arrived the man had just jumped over the wall.
120. Mr Nghonyama's firearm had fallen during the scuffle and he could not see where it had fallen so they both started looking for it. After they found it they discovered that the person who jumped over the wall had left behind his t-shirt which had come off in the scuffle. They also found a purse with a bank card and a driver's licence. It was a high wall the same height as the wall at the front of the property.

121. The two policemen then came across the caretaker or security guard of the premises, Mr Banda. They started to question him. They had already assessed the place and looked around so now had to ask what was going on since people ran away and the truck driver had run away. There were also another two trucks parked inside. The rear doors of the trailer of the first truck on the premises out of which the driver had jumped were open. It was empty, there was nothing there. There were some cardboard boxes scattered on the ground, some were open. So they then asked Mr Banda what was happening as they were walking to the front of the truck. Mr Nghonyama got into the truck and found a phone there, and told him he had found one. Mr Banda told them the people had asked to come in to open the goods. They asked him who owned the goods and he could not say, so they knew they had a “situation”.

122. They then decided to take Mr Banda with them and drive around to the back to see if perhaps the driver would see them and come to them. They all then got into the police vehicle and drove around past a squatter camp to the back of the property. They saw a person who Mr Banda identified as the driver, they called but he ran away. They went back to the scene and saw a person approaching the truck on the street. Mr Banda said he was the driver of that truck on the street.

123. Mr Mathebula told the driver through the window to get into his truck and stay there. They then went back inside the premises. He had to use his vehicle’s lights because it was dark. He then said that his crew member, Mr Nghonyama had remained at the yard and he had to tell him what had happened.

124. They then spoke further to Mr Banda but he told them nothing. Mr Mathebula then took him to the police station. He told him he was arresting him because he

was not telling the truth. It is not clear why he did not in fact arrest him. He did not know the time. It was possibly between half past two and three am. Mr Banda sat in the front seat beside him as they drove to the station.

125. He said that people sometimes change their mind when they are at the station.

At the station Mr Banda told him that people asked him to let them offload the goods but he could not give their particulars. He had sometimes seen them but he did not know them.

126. Mr Mathebula said that he parked outside the Client Services Centre and spoke to Mr Banda in the parking lot. They did not go inside. Mr Peter's version was untrue. Mr Mathebula asked Mr Banda two or three questions at the station, and then they went back to the scene where Mr Mathebula explained to Mr Nghonyama that Mr Banda could not give me suitable answers. He found Mr Nghonyama with the driver, Mr Simba, who he had cuffed. He had been at the station only about ten minutes. There were some other SAPS members there in the charge office.

127. The gate of the premises was closed while they had been away. When they returned he drove in to the premises and closed the gate. There were boxes there and if the gate was open someone may just see a box and take one. Mr Nghonyama had arrested Mr Simba and he was seated inside.

128. There were countless boxes on the property. Some were open, there were some bags and some goods had been put in bags. There were many things lying on the ground. Mr Simba had been handcuffed because he had wanted to go away. He said he had been sent by his boss to load boxes onto his truck. He did not know where his boss was. Mr Mathebula then decided to take Mr Simba to the police

station to question him, leaving Mr Nghonyama and Mr Banda behind. He put Mr Simba at the back of his vehicle. He wanted to take him to the police station to show him he was serious. He also spoke to him in the driveway outside the Client Services Centre.

129. Mr Simba said he was given an address to go to to load the boxes. He did not know where they were from. Mr Mathebula asked him to phone his boss to come to the station. His boss came on the phone and asked to speak to him, Mr Mathebula cannot remember his name. Mr Mathebula asked him to come to the station with the invoices. He said he was coming. He said he stays in Amalgam. Mr Mathebula told him that if he did not come then he would address the driver and book the boxes. He said he was coming. Mr Mathebula was at the station with Mr Simba for only about ten minutes. The drive between the scene and the station was about four minutes.

130. While they were back at the scene Mr Mathebula asked Mr Simba to call his boss again and he again said he was coming. He asked Mr Simba if he knew where his boss stayed and he said in Production Road. So they went out again, to see if Mr Simba could point out the boss's place. He did not do so. They went back to the scene.

131. This was according to him the fifth time they entered. They then decided to start loading the goods on the truck because when one finds goods there is a suspicion they have been stolen from another place. Before doing that Mr Mathebula phoned the Client Services Centre. He spoke to Constable Silikhane. He called on the

landline 011 473 6219. Constable Silikhane was the commander.¹ Constable Silkhane said he would call the station commander and get back to Mr Mathebula. But Mr Mathebula decided to call the station commander, Mr Sibanda, himself. He thought it was after four. Mr Sibanda said that they should load the goods on the truck and book them at the station.

132. There were a lot of boxes. The truck was almost full because they loaded so many boxes. While they were loading, Mr Banda then said to him there was a jamming device. He then showed Mr Mathebula it was there in front of the truck between the driver's seat and passenger seat, connected to a battery. Mr Mathebula had seen a different kind of jammer before. It was then that he thought the truck had been hijacked. There were perhaps between thirty and fifty boxes still on the ground, some were torn open.

133. Mr Mathebula then phoned Mr Sibanda again to say that they found a jamming device and they think the truck was hijacked. Mr Sibanda then said he was coming to the scene. After he arrived Mr Mathebula "briefed him" and Mr Sibanda said the scene must be cordoned off and role players called to the scene.

134. Mr Mathebula was very surprised that he was charged with the theft of 337 boxes because he did not know how they came to the number. The boxes had according to him been loaded on to the truck and moved from the scene without counting. Mr Mathebula had handed the scene over to Detective Goodgall when he arrived but he continued to assist him.

¹ It was unclear whether Constable Silikhane was male or female.

135. According to Mr Mathebula Mr Bellingan had not told the truth. Mr Sibanda arrived first at the scene. Then Mr Bellingan arrived and Mr Mathebula went and introduced himself but Mr Bellingan did not want to speak to him. He then told him it was their truck and it had been hijacked and a case had been opened.
136. Mr Mathebula said that Mr Sibanda arrived at something past five, then the RTT people. Then other police units and role players who had been called by Mr Sibanda. Mr Mathebula spoke to Mr van der Merwe when he arrived and showed him the phones they had found and the two suspects but he did not want to listen to him.
137. Mr Matlou and Mr Maluleke, the first and second plaintiffs were only passing, they never entered the premises. They came to the scene around a quarter past five while Mr Mathebula was speaking to Mr Sibanda on the road (on the phone). They asked him if he was alright and he said he was and they went away. He did not tell them what was happening because his life was not in danger and he had already contacted people who would assist him. He would only seek backup when his life is in danger or when a housebreaking or robbery is in progress.
138. Mr Mathebula said that after Mr van der Merwe arrived the driver who had been hijacked also arrived and “they” were introduced to him, he did not say by whom. The driver identified the truck and said he had been hit on the head with a firearm and his phone taken. Mr Mathebula showed him the phone from the truck but it was not his. This was much later between 08h00 and 10h00, there were lots of people there by then. He would have pointed them out if they had been the robbers.

139. RTT then brought another truck and took the boxes away. They then decided to arrest Mr Banda and Mr Simba for possession of suspected stolen goods. So they took them to the station and charged them and opened a case. They saw them when they were in Johannesburg Prison but not after that.
140. After Mr Mathebula and Mr Nghonyama had arrested Mr Banda and Mr Simba they were asked to remain at the station because the complainant (RTT in the person of Mr van der Merwe) was not satisfied. They were asked by a number of people what happened. Colonel Sithole from the PIU told them he was happy with their success at discovering the truck and arresting two suspects. However they were told to stay even until their shift was to begin the next night. They called them individually to a boardroom where a number of people were there asking questions. Mr van der Merwe said they have them on footage stealing but Mr Mathebula never saw that footage. He saw it first on Carte Blanche that December.
141. They were eventually arrested on the morning of 30 October at about 01h30. They had been on the go for over thirty hours and it was twenty four hours since they had discovered the truck.
142. According to Mr Mathebula if you find a truck and stolen goods you must take it to the police station and book it there. That is the procedure.
143. They had a disciplinary hearing at which they were acquitted of misconduct but this was much later.
144. Mr Mathebula was taken to his vehicle log and explained that he had gone out of his sector before discovering the crime scene at something past 12, to go an

look at a car he wanted to buy in a garage. After discovering the crime scene he only went out of the Sector to go to the police station and to go to Production Road.

145. When they were arrested they were still in their uniform and were taken to Sophiatown in their uniform. It was very painful being a policeman and being detained with criminals. The prosecutors and the charges kept changing and he did not know why.

146. According to Mr Mathebula it was not true that one of the suspects (Mr Simba) were wearing brand new shoes in his presence as Mr Bellingan testified. When Mr Bellingan arrived Mr Simba and Mr Banda were in the van. And nobody put on takkies in front of Mr Mathebula. He conceded that Mr Simba may have been wearing them all along and agreed that Mr Goodgall had identified the takkies worn by Mr Simba. He denied that he permitted Mr Simba to take the shoes because he assisted Mr Mathebula in looting. He also denied that it was “payment” for helping reload the boxes.

147. Mr Mathebula’s explanation for not noticing that Mr Simba was wearing shoes that resembled the goods was that it was not his duty to notice, it was the detective’s duty to notice, and anyway Mr Mathebula had been concentrating on the goods rather than on Mr Simba. He said he did not fill in the SAP13 when Mr Simba was arrested. He had already handed over to Mr Goodgall by then and it was Mr Goodgall’s responsibility.

148. According to Mr Mathebula he did his preliminary investigation between 01h20 and 06h00 to follow the information and make the right decision, and then by 06h00 everyone was there. In the preliminary investigation he discovered that the truck

had been hijacked and the alleged owner did not come and two suspects were arrested. He ascertained that the truck had been hijacked when he saw the jamming device at 05h30 when Mr Banda showed it to him. Only Mr Nghonyama had seen inside the truck and Mr Mathebula did not know about the jammer until it Mr Banda showed it to him. He said that the fact that he did not do something did not mean he did not do his work of the preliminary inspection. He could not explain how Mr Banda went from being extremely uncooperative to being so co-operative that he then showed Mr Mathebula the jamming device.

149. Despite that he was adamant that they had been investigating the truck and the boxes for five hours. He later said they were loading boxes for five hours.²

150. According to Mr Mathebula Mr Sibanda was not telling the truth when he said he did not tell them to load the boxes, and when he said that he told them to stop tampering and to put tape around the scene. He said Mr Sibanda could not have told him that since he, Mr Mathebula, told him about the scene. He said that when Mr Simba and Mr Banda said in their statements that another person told them to stop loading this meant Mr Mathebula not Mr Sibanda. He stated that Mr Bellingan could not have seen him tampering because he could not have been tampering in Mr Sibanda's presence.

151. Both Mr Banda and Mr Simba's statements were consistent that they were made to wait at the police station for some time, and were then brought back to the scene forced to load boxes until others arrived and told them to stop. Mr Simba

² It was actually four hours but the question put to him was five hours.

states that he enquired about who offloaded the boxes. Mr Mathebula did not agree.

152. Mr Mathebula said that he co-operated with the investigators the whole day of 29 October and then decided not to co-operate only after he was “given his rights”. That is why he said he would give his statement to the court. However this was not put to any of the defendants’ witnesses.

153. He could not tell them where the boxes were because he did not know. These were senior people but he did not know them.

154. In cross examination he also said that he went out numerous times to the station and also to Production Road. He denied that he had said it had been four times or five times. He also said he had to go and check if Mr Simba’s boss had arrived and perhaps to go to the toilet.

155. On being shown the vehicle log and photographs he said that he did not remember whether he had been away from the scene for about an hour. It also showed that he had been to Production Road more than once.

156. He did not report the loss of the pistol or that there was a gunshot because he thought it was not important. He then said that Mr Sibanda was informed and it was up to him to report it.

157. On being asked in cross examination why he took Mr Banda with him to go and look for the driver of the hijacked truck he said that because Mr Banda had told him that there was a jammer on the truck there must have been a conversation between

Mr Banda and the driver of the hijacked truck and so he may be able to point him out, also if the driver did not have his shirt he could be pointed out.

158. He said that even though he spent very little time at the crime scene, because he was busy driving around doing his preliminary investigations, it was fine because his crew (Mr Nghonyama) was at the scene. However at some point Mr Nghonyama was also driving, this was before they found the scene and again at about 05h15. He said that nevertheless someone was always at the scene. Anyway he says that he went to different places each time he went out, the squatter camp, Production Road and the police station.

Mr Mathebula (after the video footage)

159. Mr Mathebula testified that he opened the police van at the back to put Mr Simba inside because Mr Simba wanted to go. Mr Mathebula then went to talk to Mr Nghonyama about Mr Simba and Mr Simba started banging on the side of the van from the inside. Mr Mathebula then let him out and asked him what was the problem and he said his boss had phoned him and he was at Production Road so Mr Mathebula said they would go there. They then rushed off to go there, but Mr Mathebula had forgotten to close the door of the van so Mr Simba closed it. He then got in. He was sitting in the passenger seat. This incident was at 04h17.

160. Mr Mathebula reiterated that the boxes they loaded on the truck were not opened and had goods inside. There were also some on the ground that were empty and opened. Only full boxes were loaded, empty boxes were piled up.

161. Mr Mathebula confirmed that he had got people off the street to help. This was for full boxes not empty boxes. He then said that “we” loaded the full boxes from the hijacked truck to the second truck that RTT brought. Mr Goodgall completed the SAP299 but Mr Mathebula had seen it when it was handed over.
162. The truck outside on the street was driven away by the owner – there was nothing wrong with it.
163. Mr Mathebula testified that the lights on the vehicle they were using were problematic. If they are on dim only one goes on and if on bright both go on.
164. When Mr Mathebula and Mr Nghonyama were at the police station later on Mr van der Merwe came to them while they were in the car and made them switch the lights on and off and on to bright and off.
165. Mr Mathebula accepts that he went in and out of the premises 9 times. He does not know how many of those times he was with Mr Simba. He said that sometimes he was with him and sometimes not. When Mr Simba made phone calls he left him at the premises.
166. Mr Mathebula conceded that when the incident with the open door occurred at 04h17 his narration is not consistent with the video since the vehicle does not slow down for someone to get in after the door is closed as he described. However he later said that it happened as he says.
167. He insisted that he had already provided an adequate explanation for his trips. He also repeated that he was busy with the boxes that is why he did not

concentrate on the truck. However he also conceded that he was away from the premises a lot.

168. He also denied that he had said he was trying to find Simba's boss. He concentrated more on the truck outside than the one inside because he said you still had to check a truck if it was used in the commission of the crime. This was despite the fact that the truck inside was clearly connected to the boxes which he had testified he thought were suspicious.

169. Mr Mathebula testified under cross examination that they took 19 minutes when they first arrived to search and secure the scene because they were doing their job.

170. Mr Mathebula insisted that he was correct to bring people in off the street to load boxes. He said it was his crime scene so he could do that. He compared it with asking a woman on the street to help search a female suspect if you thought she had drugs on her. He denied that inviting outsiders in was allowing tampering with the crime scene.

171. Mr Mathebula could not explain under cross-examination why he was outside the crime scene while civilians were inside loading boxes. In re-examination he said that Mr Sibanda had called him for directions.

172. Mr Mathebula says they took 19 minutes when they first arrived to search and secure the scene. However there was no evidence of them having secured the scene. His evidence was that they surprised people who were running away, Mr Nghonyama's gun went off in a scuffle, and he found Mr Nghonyama looking dirty. They then found Mr Banda and he went out with him.

Mr Nghonyama

173. Mr Nghonyama was asked to explain the incident of the open door. He said that after Mr Simba told them his boss had found and that his boss was somewhere at Production Road, Mr Mathebula started leaving with the door open. Mr Simba then jumped to close the door. There was nothing inside. This did not explain how Mr Simba then got into the vehicle which moved off immediately.

174. Mr Nghonyama testified that he had found the drivers licence and bank cards, a Samsung cellphone and a jamming device. But he did not book the things, Constable Goodgall did. The items were handed to him at the scene.

175. Mr Nghonyama confirmed that they found the Isuzu truck parked on the road. He said that he checked the wheels of the truck and they were not damaged. There was no one in the truck when they first arrived.

176. When they entered the premises he saw boxes on the ground, some were open and there were loose items all over the yard, such as Nike and Puma takkies, jeans and squeeze bottles. He does not know why squeeze bottles were not on the charge.

177. He saw someone alight from the horse of the truck on the premises, and that person ran away. There were all sorts of other people who also started to run. Mr Nghonyama started chasing the driver and fired a warning shot. There were perhaps six or seven other people.

178. Mr Nghonyama caught up with the driver, started to wrestle, and called Mr Mathebula. He caught hold of the driver's shirt and it remained in his hands when the driver jumped over the wall. Mathebula arrived after the person had run away. The firearm had fallen to the ground. They looked for it and found it. This took about a minute not more.
179. Mr Nghonyama remained on the premises when Mr Mathebula and Mr Banda left. They were going to the police station. The scene could not be left unattended. Mathebula was going to the station to interrogate the driver because people tended to give information more easily at the station.
180. Mr Nghonyama then found Mr Simba outside. He could not remember all the details of what happened. He also drove in the morning hours. He knows that sometimes Mr Mathebula left alone and sometimes with Mr Simba. He was trying to find Mr Simba's boss.
181. Mr Nghonyama went alone in the van to the police station, and also to the garage for airtime and to Production Road to monitor. It was a short road. They were monitoring it to see if Mr Simba's boss was there.
182. Mr Nghonyama denies that he was stealing anything.
183. When Mr Mathebula and Mr Banda were gone the first time, Mr Nghonyama was inside and heard the engine of the truck outside. Mr Simba was putting the spare wheel back in the truck. Mr Nghonyama instructed him to switch off and go with him into the premises. This was some time just after 02h00. He questioned him and was told that the truck was there to fetch the boxes. When Mr Mathebula came back he told him what had happened.

184. Mr Banda and Mr Simba did not give satisfactory information so Mr Nghonyama and Mr Mathebula decided to phone the station. Then Mr Mathebula got hold of Mr Sibanda who told them to load the boxes on the truck. So the four of them started loading boxes and later on got some passersby to assist. The boxes were not empty. Most of them had something inside although they were opened. The empty boxes were left as they were. Some boxes were sealed.
185. When they finally stopped loading the truck was three quarters full. There were still some sealed boxes on the ground. They stopped loading when Mr Banda came and told them there was a jammer. Mr Sibanda then also arrived. Mr Bellingan could not have seen them interfering with the boxes.
186. Mr Nghonyama confirmed that they arrested Mr Simba and Mr Banda for possession of stolen goods. They were both taken to Brixton because there are no cells at Langlaagte.
187. When they went back to Langlaagte they were told not to leave because Mr van der Merwe was not happy. So they stayed until they were arrested on the morning of 30 October.
188. When he was asked what happened at the scene he told them. He was questioned for thirty or forty minutes.
189. He confirmed Mr Mathebula's evidence about the various appearances, charges and the ID parade that did not happen.

190. When Mr Matlou and Mr Maluleke drove past they stopped and the four started to chat. Mr Mathebula and Mr Nghonyama did not tell them about the crime scene because by then Mr Sibanda was on his way.
191. It is only necessary to seek backup when your life is in danger. There was no danger.
192. Mr Nghonyama made a statement in case 208 which was the case against Mr Banda and Mr Simba. He did not make a statement in case number 213 which was the case against the plaintiffs. His statement is commissioned by Mr Mathebula and Mr Mathebula's is commissioned by Mr Nghonyama.
193. Mr Nghonyama had reported the warning shot to his commanders that is why he did not put it in his statement. He also did not put in his scuffle with the driver because he did not think it was important to put everything in.
194. It was put to him that Mr Simba's truck had to have had something wrong with it because it did nothing for almost an hour after it got there before he and Mr Mathebula arrived. He said that the plan had been for Mr Simba's truck to enter the premises after the hijacked truck had left. It had definitely not been broken.
195. Mr Nghonyama also asserted that the many trips were part of their investigation, they were trying to find Mr Simba's boss. In addition he himself went to the police station to use the toilet. He also went to buy airtime at the garage. On being asked what else he investigated, he maintained that he was following information given by Mr Simba and Mr Banda. Apart from going to look for Mr Simba's boss he could not remember what other investigations they did. While

inside the property, his investigations were concentrating on the boxes because he thought they could have been stolen from somewhere.

196. Mr Nghonyama did not think there was anything suspicious about Mr Simba's truck. The only suspicious thing for him about the hijacked truck was the jammer which was found in the morning. He did not know what a jammer was before it was pointed out to him. And at some point they started to load, even though they had not investigated the truck itself. He stated like Mr Mathebula that if you find boxes you have to take them in with the suspects.

197. He does not know the time Mr Sibanda was called. Mr Mathebula called Mr Sibanda and he said that Mr Sibanda said they must load the boxes. The loading started at around 04h18, and he did not know what time Mr Sibanda was telephoned. He only knows what Mr Mathebula told him about having phoned Mr Sibanda and having been told to load. He only discovered what a jammer is when the guy from RTT told him what it was.

198. He was charged with the other plaintiffs for theft of 337 boxes with a value of R3.2 million. He does not know why the AVL for the vehicle in which the first and second plaintiffs was often in the same vicinity as he was in and at similar times. He did not see them when he was driving. It was put to him that the vehicle of Mr Baloyi the sergeant also on duty that night was in the vicinity of Stellar Avenue at about 02h15 so they could have had help if they needed it. But they did not ask for help because they wanted to do their own investigation in person. He did not know why these other vehicles would have been in his sector.

199. Mr Nghonyama stated that since he found the boxes he had to investigate them.

200. A statement from Mr Simba's boss was put to him which he said he was unaware of. Mr Tumeko, Mr Simba's boss said he lived in Bedfordview, not near the area at all. Mr Nghonyama said that this was the owner of the truck and which was not the same as the boss, despite the fact that the statement said that Mr Tumeko employed and paid Mr Simba. That morning they had been looking for the boss because they had to follow up the information given to them. They did not phone control to ask for information from the licence disc and plates. Although they could have done and that would have been "investigation".

201. Mr Nghonyama said that his pocket book had been taken by the people who arrested him, and the same with the other plaintiffs. However he did not write in it. He would have written in it later.

Constable Glaxton Goodgall

202. Mr Goodgall was at the time of the incident a detective and had been since 2009. At the time he gave evidence he was doing "crime prevention". He had previously consulted with the defendants' counsel but was not called by the defendants. He had been the detective on standby attending to crime scenes around Langlaagte. He would have seven days on and seven days off, and in the seven days on shift would investigate all crime scenes in that time.

203. Mr Goodgall was called to the scene by the charge office on the morning of 29 October. He was called at some time between 07h30 and 08h00. Mr Mathebula and Mr Nghonyama were at the scene. He found a horse and trailer parked inside with clothing lying around and open boxes of clothing items such as sneakers and

jeans scattered all over the yard branded TFG. The horse and trailer had a Free State registration. Mr Goodgall called the photographer to the scene.

204. Mr Goodgall saw a suspect wearing shoes similar to the ones in the yard and asked him about them, and he said he took them and exchanged them with his while he had been taking boxes. Mr Goodgall then also found the suspect's takkies which were a different brand, and the suspect confirmed. He got the photographer to photograph the suspect with the new and the old shoes.

205. Some people from RTT were there but he did not know how. Mr Goodgall and the team proceeded to process the scene and handed over the remaining stock in the yard and the trailer. He does not know how many boxes. There was clothing everywhere and in all the boxes. There were also empty boxes and sealed boxes. There were also boxes in the trailer. The boxes in the trailer were still sealed.

206. One of the trailer doors was closed and one was open. Not many boxes had been taken out, maybe a metre's length. The trailer was packed to the roof. They had to take the truck to the pound since it was hijacked so he told the person from RTT that they had to bring another truck to take the stock, which they did and the stock was transferred, We could not book the stock in at the station because we had nowhere to store it. The boxes were not empty.

207. There was too much to count so they referred to the truck manifest and assumed that what was there was what was left. It is not clear what this meant. There were some loose items which could not be repacked. They agreed on a number of what was taken out. Nobody knew exactly what was missing. They did

not count the boxes while transferring them because some items were loose. And since the stock had been recovered they thought it was less important to itemise.

208. The R3.2 million in the charge sheet was an estimate. No calculations were done.

209. According to Mr Goodgall Mr Mathebula told him that Mr Simba and Mr Banda had been arrested but did not tell him that they had assisted Mr Mathebula and Mr Nghonyama to load boxes. Nor did Mr Mathebula tell him that he had originally wanted to remove the truck from the premises. He did not know what Mr Sibanda had said. Nor had Mr Mathebula told him how long he spent on the crime scene. He just said they had had to chase a lot of suspects. Mr Goodgall first saw the suspects when Mr Mathebula showed them to him in the back of the police van. He did not know what happened to Mr Banda and Mr Simba later, because the docket was taken from him at the station.

210. Mr Goodgall said that if he came upon a scene like the one at issue who would ascertain if it was a scene of crime and if it was would not touch anything until the relevant role players arrived. That is the normal procedure but he can't say precisely because they had to use their discretion. He would have reported the scene immediately if he had found it and found the things scattered as they were.

Constable Matlou

211. Mr Matlou is the first plaintiff. He was the driver of the vehicle with call sign LL23. He was with Mr Maluleke the second plaintiff. They had been posted to patrol Sector 1 on the same shift as the third and fourth plaintiffs.

212. At the time when the two police vehicles were on the street, at about 05h15, he had been driving on Stellar Avenue and saw Mr Mathebula on the street. He stopped to greet him. Mr Mathebula did not tell him anything. They only greeted each other. Mr Matlou then continued driving, he was patrolling. Only the left hand headlight was working on his vehicle. It had been that way for quite a while. He was on Stellar Avenue only just after 5 in the morning. Just before he left Mathebula he saw another vehicle. He carried on patrolling, stopped somewhere to buy cakes and continued. He then reported to the station for the end of the shift. He never entered the crime scene.

213. Mr Matlou went home after his shift to sleep. He came back to report for the next night shift and he and Mr Maluleke were posted together to Sector 2. They went on patrol. They were then called back by the charge office. When they arrived back Mr Peter told them they were wanted in the board room. They had to wait outside the boardroom. There were a number of members inside including Captain Sina who was the head of the detective section. Mr Matlou and Mr Maluleke were questioned separately.

214. Mr Maluleke was asked if he had been to the crime scene and he said he knew nothing about the crime scene. When he was told where it was he said he only passed there just after five and greeted Mr Mathebula in passing. He says he asked them about the AVL (vehicle log) and they told him it was still being printed.

215. Mr Maluleke went in after Mr Matlou. After that they were all called in and told they were being arrested for theft of some boxes of clothing. The arresting officers took their insignia, their belts, firearms, handcuffs, pocket books, wallets and any

loose items. Mr Maluleke did not remember everything. They were handcuffed and verbally abused, and pushed into separate cars and taken to Sophiatown.

216. Mr Matlou's lawyer made representations to court and as a result the charges were withdrawn. But the four of them were always together in court.

217. The vehicle logs were put to Mr Matlou in cross examination. They showed that his vehicle was idling in one place for 35 minutes, between 03h05 and 03h40. He thinks it was at the time that he was tired so he went to the station to go and rest. His colleague could not drive the vehicle because he had no authorisation.

218. During that time Mr Mathebula's vehicle was at the same place within 0.0004 minutes latitude, which is very close. He does not recall seeing them, they may have been driving past each other. However the log shows that the speeds of the vehicles were 0km/h. They were parked near one another between 03h19 and 03h23, a period of four minutes. There is one entrance to the police station and there are many parking bays. He may not have noticed them. Mr Matlou also said that he would not say he did not see them.

219. He does not think Mr Mathebula would have brought stolen goods to the police station.

THE APPLICABLE LAW

220. The plaintiffs and defendant were *ad idem* about the legal test to be applied. It is not whether there was a *prima facie* case made out, or whether the defendant is at this stage able to prove the plaintiff's guilt, either on a balance of probabilities or beyond a reasonable doubt. It is whether, at the time of the arrest and prosecution,

there was objectively a reasonable suspicion that the plaintiffs committed the offence.

221. In terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977, ("the Act") as amended:

A peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 5, other than the offence of escaping from custody.

222. The test is objective, that is it must be shown that there were objective grounds for the suspicion.³ Once the suspicion arises there is a discretion to arrest the suspect.⁴

223. As far as malicious prosecution is concerned, the plaintiffs have to prove that the defendants

- 223.1. set the law in motion;
- 223.2. acted without reasonable and probable cause;
- 223.3. acted with malice or *animo injuriandi*, and
- 223.4. that the prosecution had failed.

224. Simple negligence on the part of the defendants would not suffice.⁵

³ *Olivier v Minister of Safety and Security and Another* 2008 (2) SACR 387 (W)

⁴ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at [28]

⁵ *Minister for Justice and Constitutional Development v MOleko* 2009 SACR 585 (SCA) at [64]

225. The standard of proof in these proceedings is the balance of probabilities. The court has to evaluate the probability or improbability of the parties' versions and determine whether the party which bears the *onus* has discharged that *onus*.⁶

ANALYSIS

Wrongful arrest

226. It is necessary to separate the consideration of the third and fourth plaintiffs from the first and second plaintiffs. There was very little evidence put forth by the defendants regarding the first and second plaintiffs. I deal first with the third and fourth plaintiffs.

227. In my view the defendant has shown that there was sufficient basis on which to found a reasonable suspicion that the third and fourth plaintiffs had committed theft of goods from the truck at 36 Stellar Road. The primary basis for this is the video footage, and the manner in which the crime scene was dealt with, as well as the admitted statements. Adding to this the evidence of the third and fourth plaintiffs themselves, it was riddled with inconsistencies, contradictions and improbabilities. Some examples of this are:

227.1. Mr Mathebula first said he went to the police station with Mr Banda and Mr Nghonyama and then that Mr Nghonyama did not go with them.

227.2. Mr Mathebula said he called Mr Sibanda twice but this was not put to Mr Sibanda. It was also put to Mr Hicks that Mr Mathebula only called Mr Sibanda after finding the jamming device.

⁶ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) [5]

- 227.3. Mr Mathebula testified that when he was on the phone at 05h17 when Mr Matlou's vehicle went past, he was calling Mr Sibanda about the jamming device, and Mr Sibanda told him to stop loading the truck. However it is only after this that they starting getting people in off the street, ostensibly to help them load.
- 227.4. Mr Mathebula and Mr Nghonyama both stated that the correct procedure at the crime scene was to load stolen goods and take them to the station without any photographs or analysis being done. This was gainsaid not only by the defendants' witnesses, but also by Mr Goodgall.
- 227.5. Mr Mathebula testified that they only got suspicious of hijacking on being shown the jamming device. Before that they were only suspicious of the boxes, not of the truck on which the boxes were found. This is highly improbable.
- 227.6. Mr Mathebula alleged that the outcomes of his four hour long "preliminary investigation" was that they found the jammer, and arrested suspects. However none of this happened in the four hours before the jamming device stopped functioning. He was unable to say with any clarity what had happened and what his many trips were for.
- 227.7. Mr Mathebula also said that they had been loading boxes for four hours, although he also testified that they only started loading boxes after he allegedly phoned Mr Sibanda the first time, at some time after 04h00. If Mr Sibanda told them to stop loading when he called him at about 05h17, then they were only loading boxes for an hour.
- 227.8. According to Mr Mathebula the people who had run away when the police first arrived were able to unload more boxes than the third and fourth

plaintiffs were able to load on, although the third and fourth plaintiffs were there much longer.

227.9. Mr Mathebula said they opened sealed boxes to see what was inside, because that was the only way to do an investigation. However this was inconsistent with there being a number of empty boxes on the site.

227.10. Mr Mathebula and Mr Nghonyama contradicted one another regarding when and how often Mr Nghonyama drove the vehicle.

227.11. Mr Nghonyama found it necessary to leave a crime scene to go and buy airtime for no particular reason, which in my view is highly improbable.

227.12. Mr Mathebula in chief never mentioned going back to the police station to check on Mr Simba's boss. He said they phoned him again from the scene. Later he tried to justify his many trips by saying he went to the police station to check if Mr Simba's boss had arrived.

227.13. Mr Mathebula and Mr Nghonyama said they told Mr Sibanda about the pistol going off but this was not put to Mr Sibanda.

227.14. In cross examination Mr Mathebula says that when driving near the squatter camp they found the driver of the truck parked outside (Mr Simba) but in chief he said that they found him in the street when they came back from driving around the squatter camp. Later he said that the original version was correct. He also said that because the security officer (Mr Banda) told him there was a jammer on the truck which it would indicate there was a conversation between the inside truck driver and Mr Banda because he'd left his shirt he may be identifiable, which was why he took Mr Banda with him to look for the driver of the hijacked truck. This is inconsistent with him only learning of the jamming device after 05h00.

227.15. After the video footage was shown Mr Mathebula said he was outside on the phone at 04h17 because Mr Sibanda had called him asking for directions. This had not been part of his version nor was it put to Mr Sibanda. In addition, this was before Mr Sibanda had allegedly been told of the jamming device and decided to come to the scene.

227.16. Mr Nghonyama contradicted Mr Mathebula in that Mr Mathebula said the boxes loaded were full and sealed while Mr Nghonyama said they were opened and had something inside.

228. These are only some of the more obvious contradictions, improbabilities and inconsistencies. As I have said, even without that, the video evidence coupled with the nature of the scene discovered by the “role players” who arrived after the jammer was allegedly discovered, as well as the admitted statements of the security guards and Mr Simba and Mr Banda, was in my view sufficient to raise a reasonable suspicion that the third and fourth plaintiffs had been involved in the theft.

229. As far as the first and second plaintiffs were concerned, the only really suspicious circumstance was the 35 minutes they spent at the station during which time the third and fourth plaintiff’s vehicle was very close by for four minutes. The defendant has not attempted to show this court any evidence against them to found a reasonable suspicion.

230. I am therefore not satisfied that the defendant has discharged its *onus* regarding the first and second plaintiffs.

Malicious Prosecution

231. As I have stated above the test for malicious prosecution is entirely different.

The plaintiffs bear the *onus*. Also it was not suggested that a finding of unlawful arrest must necessarily lead to a finding that the prosecution was malicious, although it would be relevant to the inquiry, in particular whether there was reasonable and probable cause.

232. In my view the plaintiffs have done almost nothing to attempt to discharge their *onus* and establish the elements of a malicious prosecution. In particular there was no effort to establish malice or an *animus injuriandi*. As far as the first and second plaintiffs are concerned, it can be assumed that the prosecution lacked reasonable and probable cause. However without more I cannot assume that there was malice. There was not even an attempt to show that the difference in their cases was brought to anyone's attention. At best the plaintiffs have shown some negligence on the part of the defendants in the prosecution and this is insufficient.

Damages

233. Having found that the first and second plaintiffs have established that their arrest was unlawful, I must make some award of damages. No evidence or argument was submitted in this regard. However this is not fatal.⁷

234. The plaintiffs have claimed an amount of R2 million each, in my view this is excessive. Having done a survey of various awards made in recent years it is my view that an amount of R700 000 each is sufficient compensation for having been

⁷ *Maphoto v The Minister Of Police* 2019 JDR 1675 (GJ)

arrested. This takes into account that they were police officers, arrested in view of their colleagues, and incarcerated with criminals for 17 days. Their dignity was infringed in addition to their freedom.

CONCLUSION

235. For these reasons I make the following order:

- (1) The claims of the third and fourth plaintiffs are dismissed with costs.
- (2) The claims of the first and second plaintiffs for malicious prosecution are dismissed with costs.
- (3) The claims of the first and second plaintiffs for unlawful arrest succeed.
- (4) The first defendant is to pay each of the first and second plaintiffs an amount of R700 000, together with interest at the rate of 10.5% from the date of judgment.
- (5) The first defendant is to pay the first and second plaintiffs' costs associated with the unlawful arrest claim.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for Plaintiff: M Mthombeni
Instructing Attorneys: TN Ramollo Inc Attorneys

Counsel for the Defendant: Ms TP Bokako
Instructing Attorneys: State Attorney, Johannesburg

Date of hearing: 27 August 2019 – 6 September 2019, 19 September 2019

Date of judgment: 04 June 2020