

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 2499/2009
2500/2009
2501/2009

Date Heard: 25 May 2011
Date Delivered: 2 August 2011

In the matter between:

GARTH HASH

First Plaintiff

ALLAN KETTELDAS

Second Plaintiff

JUNAINE DU PREEZ

Third Plaintiff

and

THE HONOURABLE MINISTER OF

SAFETY AND SECURITY

Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiffs herein claim damages from the defendant for their alleged wrongful and unlawful arrest and detention and for malicious prosecution. Initially the plaintiffs each issued separate summonses in identical terms. The actions have now been consolidated.

[2] The plaintiff's were arrested together on 1 July 2007 by Warrant Officer Els, a member of the South African Police Services, without a warrant, and detained on a charge of robbery with aggravating circumstances. They appeared before a magistrate in Uitenhage on this charge on the 4th of July 2007 and the matter was remanded to 11 July 2007. The magistrate ordered

that the plaintiffs be held in custody. On 11 July the plaintiffs were released on bail and the matter was further remanded to 24 August 2007. On the latter date all charges against the plaintiffs were withdrawn the summonses referred to above followed.

[3] The defendant admits the arrest but pleads that the arrest and the ensuing detention was lawful in terms of section 40 of the Criminal Procedure Act, 51 of 1977 (the Act).

[4] The evidence

Warrant Officer Els testified that he is a member of the South African Police Services and during 2007 he was attached to the Special Task Team at the Specialised Crime Unit which had been set up specifically to address vehicle hijackings, and especially the hijacking of Volkswagen lease vehicles in Port Elizabeth and Uitenhage. He was at home in Port Elizabeth on the evening of 1 July 2007 when he received a phone call from Superintendent Fourie. Superintendent Fourie, who is now deceased, was the officer commanding the Special Task Team. Fourie advised that an armed robbery had occurred at the Sports Complex of Volkswagen in Uitenhage where new motor vehicles are kept. Fourie requested Els to proceed to the Sports Complex.

[5] Els says that he proceeded along the N2 towards Uitenhage. As he was approaching the Stanford Road turnoff, still in Port Elizabeth, he received a further call from Fourie whom he presumed was now at the scene of the alleged crime. Fourie advised that he should be on the look-out for a vehicle

in which the suspects were alleged to be travelling. He described the vehicle, an old whitish Mercedes-Benz with no number plates and indicated that there could possibly be six brown male suspects in the vehicle. As Fourie gave the description of the vehicle Els noticed a vehicle which matched the description approaching from the direction of Uitenhage. He turned around and followed this vehicle which turned into Stanford Road and later into the direction of Durban Road.

[6] Els activated the siren of his vehicle, a white Opel Astra, and put his blue light on. As the Mercedes-Benz came to an intersection the driver stalled the vehicle. Els jumped from his vehicle with his firearm directed at the Mercedes and instructed the driver not to restart the vehicle and the occupants to remain in the vehicle with their hands raised so that he could see them. They obeyed and Els waited for backup to arrive whilst he continuously kept the vehicle under the cover of his firearm. These events, Els says, occurred at about 23h45.

[7] Once the backup arrived, in the form of other members of the Task Team, they instructed the occupants of the vehicle to alight one by one and to lie down on the tar road. There were five persons, all brown men, in the car and the plaintiffs were the back seat passengers of the vehicle. The driver of the vehicle was one Byron Klink and the front seat passenger one Faruk Cesar. When the occupants were removed from the car the vehicle was searched. In the vehicle a number of black heavy duty cable ties, some two-way tape and bolt cutters were found and approximately half a dozen loose

motor vehicle registration plates in the boot. Fourie also arrived at the scene during these events. Fourie confirmed that he was satisfied that the Mercedes-Benz was in fact that suspected vehicle. Els then arrested the plaintiffs for the armed robbery of which Fourie had advised him. Upon affecting the arrest the plaintiffs were taken to the Uitenhage Police Station where they were detained. None of the foregoing evidence has been placed in dispute.

[8] Els states that in his experience as an armed robbery detective cable ties such as those found in the vehicle are frequently used to constrict a person's movements at a crime scene by tying a person's hands behind his back. He acknowledged that cable ties could be used for other purposes, such as a temporary measure to fix parts of motor vehicles, but says that he saw no sign of such repairs on the Mercedes-Benz vehicle.

[9] Two-way tape, he says, is often used as an easy manner to effect the quick change of registration plates on vehicles. He testified further that the vehicles parked at the Sports Complex are new vehicles which are not registered. Where such a vehicle is removed it is likely to attract the immediate attention of the authorities. By the application of registration plates vehicles are not as readily detected as unregistered. Bolt cutters, he says, are used to cut padlocks, gates and other forms of restriction so as to gain access to premises.

[10] These features, together with the plaintiffs occupying the suspected

vehicle, led Els to suspect that the plaintiffs had committed the armed robbery which had allegedly occurred at Volkswagen. Els says the “situation fell in (with) that of what transpired at the Volkswagen crime scene, and as a result thereof I effected the arrest”.

[11] In cross-examination it was suggested to Els that he had been advised at the time of the arrest by the plaintiffs and by Cesar and Klink that the plaintiffs had been at the “Clubhouse”, an established in Salsonville, all evening and that they had merely obtained a lift with Cesar and Klink. Els consistently denied that any explanation of this nature had been proffered at the time of the arrest nor was it ever suggested to him at any other time.

[12] Els made a favourable impression upon me as a witness. He gave his evidence in a forthright manner and with confidence. Whilst his evidence is not beyond criticism I am unable to fault his demeanour. I am mindful, however, of the fact that he is an experienced police official and probably a regular witness familiar with the witness box and court procedure.

[13] Warrant Officer Coleman of the South African Police Services, Uitenhage testified that he was the shift commander of his group in the police on the night in issue. At approximately 11 o'clock that evening he got a call and proceeded to the Sports Complex of Volkswagen where a robbery had allegedly occurred. He was the first police official on the scene although a number of security officers had already arrived. On arrival he found the front gate still locked. The gate was duly opened by cutting the lock with bolt

cutters and he was afforded entry. Inside the premises he was advised that certain security officers were still tied up in the guardhouse. There he found the officers with their hands tied behind their backs with cable ties. After freeing them he conducted interviews with them and took a statement from, *inter alia*, one Malgas.

[14] Back at the police station Coleman opened the docket and made the first entries in the investigation diary, which was handed in in evidence. He recorded therein what he had been told at the scene by Malgas and others. He recorded, *inter alia*, as follows:

- “2. Plaasgevind te V/W Sportkompleks te Peter Searlestraat Uitenhage.
- 3. Verdagtes: ± vier onbekende kleurlingmans – twee te voet en twee in wit Mercedes-Benz m/v – geen registrasienommer nie.
- 4. Modus operandi: twee verdagtes hou wagte besig, terwyl ander twee verdagtes (te voet) op perseel kom, dreig wagte met vuurwapen en maak hulle vas met cable ties.
- 5. ...”

[15] The evidence of Warrant Officer Coleman was similarly not seriously challenged.

[16] Two of the security officials employed by G4 Security, one Malgas and one Kwanini, who were on duty at the Sports Complex on the evening in question testified.

[17] Malgas testified that during the evening of 1 July 2007 at approximately

22h25 a white Mercedes-Benz vehicle approached the gate at the Sports Complex where Volkswagen vehicles are kept. At first he thought it was his supervisor and Kwanini approached the gate to open it. When Malgas observed the vehicle he realised that it was not their supervisor. He recalled Kwanini and he moved out himself to investigate. There were two persons in the car – the driver and a front seat passenger.

[18] When Malgas approached the front seat passenger alighted and spoke to him. He asked for one Jordaan to whom he had allegedly loaned money. Jordaan was not working that evening and Malgas advised that they should approach him at his home. It appears from his evidence that this conversation continued for approximately 20 minutes. When the person again got into the car the vehicle drove off and Malgas turned back to his post. Malgas says that he had entered the guardhouse reflecting on the conversation and he realised that something was not right. As a result of his suspicion he again left the guardhouse and called out to one Fortuin, also a security officer, who manned a guard tower a short distance from the gate. Fortuin confirmed that the vehicle had disappeared from his sight. Malgas called Fortuin to the main guardhouse and he duly complied. As Fortuin and Malgas rounded the corner of the guardhouse he observed a stranger inside the premises at the opposite corner of the guardhouse wearing green trousers. Malgas immediately alerted the main security office and advised of the unauthorised persons on the property at the Sports Complex asking for backup. The man with the green trousers retreated. These events Malgas says occurred approximately 10 minutes after the Mercedes-Benz had moved

off.

[19] Having reported the presence of intruders he entered the guardhouse, however, as he entered he was grabbed from behind with a firearm pushed to his head by another intruder, apparently already inside the guardhouse. Malgas, Kwanini, who was inside the guardhouse and Fortuin were all tied up with their hands behind their backs with cable ties as they were made to lie facedown on the floor. As they lay there the intruders demanded the keys of the Volkswagen motor vehicles. When Malgas advised that the keys of the motor vehicles were not kept on the premises and that he only had the keys of the front gate, they took the keys of the entrance gate to the premises which were lying on the table. They also took a packet of Peter Stuyvesant cigarettes. At that time the Reaction Unit arrived and the intruders left.

[20] Kwanini confirms the material features of the evidence of Malgas which occurred in his presence. He states, however, that after Malgas decided to approach the Mercedes-Benz vehicle himself at the gate he returned to guardhouse. It was a while later that he saw Malgas being held by the shoulder with a gun to his head in the guardhouse. He is accordingly unable to comment on the events which had occurred outside in the interim.

[21] Neither the evidence of Malgas nor that of Kwanini in respect of the aforesaid events is seriously in dispute. Both of them made a favourable impression as witness. None of the members of the Reaction Unit who had allegedly arrived at the approximate time that the intruders fled were called to

testify.

[22] Detective Warrant Officer Victor, a policeman of 23 years experience was the investigating officer. He says that he was on standby on the evening in question. He was summoned to the scene of the crime where he arrived just after midnight. The security guards were still on the scene and a number of members of the South African Police Services were already on the scene. At the scene he was advised that a robbery had allegedly occurred and that the guards had been tied up with cable ties. He found the cable ties at the scene which had allegedly been used. He also noted footprints which he thought may have been left by the robbers. Photographs were also taken of the scene.

[23] The following morning Victor was appointed as the investigating officer. He says that he had sight of the cable ties which Els had handed in and which had been found in the vehicle at the time of the arrest. They were similar in size, width, colour and manufacture to those found on the scene which had been used to tie up the security guards. During the course of the following day Victor interviewed the plaintiffs and warning statements were minuted from them. He considered that there was sufficient evidence to justify their further detention and to charge them. He admits that he formally charged the plaintiffs. I pause to mention that it is admitted on the pleadings that members of the police set the law in motion against the plaintiffs.

[24] The investigation diary which, as recorded above, was handed in as

evidence, records an entry on 3 July 2007, the day prior to the first appearance, by Colonel Ferreira, which reads as follows:

“PP:

1. Case for first appearance pleads.
2. Remand for seven days to hold ID-raid pleads.
3. No bail.”

[25] Colonel Ferreira was not called to testify, however, Victor concedes that he had conveyed to Ferreira his views on the merits of the case and the extent of the evidence which may possibly have influenced Ferreira. He admits too that he met with the public prosecutor on 3 July 2007 to discuss the investigation. An entry in the investigation diary on 3 July 2007 by the prosecutor, Mr Kleynhans, which reads as follows, confirms this:

“Mnr OB

1. Reël vir ID parade so gou as moontlik.
2. Stel vas of die sigarette waarop beslag gelê was aan die wag behoort. Reël dan vir vingerafdrukke.
3. Doen ID op motorvoertuig.“

[26] The perception which Victor held of the evidence and that which he had been told at the seen is that it revealed that the plaintiff's had been arrested in the vehicle which had been seen at the gate of the Sports Complex by Malgas at the approximate time of the robbery and in which he understood that the suspects had fled. He also perceived that their clothing and appearance matched that given of the suspects.

[27] I pause to mention that it is not in dispute that Cesar and Klink were indeed at the Sports Complex that evening in the white Mercedes-Benz in which the plaintiffs were arrested and it is apparent that they were indeed the two persons who engaged Malgas in conversation. This much is clear from the case put on behalf of the plaintiffs.

[28] Victor was cross-examined extensively in regard to his perceptions of the case. He says that he had regard not only to what Els had written in his statement but also what he had been told at the scene. Victor was, however, at pains repeatedly to say, notwithstanding the admission on the pleadings that members of the police set the law in motion, that although he informed the prosecutor of his perceptions of the evidence the decision on whether or not to prosecute was that of the prosecutor, not his.

[29] It is common cause that the plaintiffs appeared before the magistrate on the 4th of July 2007 and the matter was remanded with the plaintiffs held in custody until 11 July. An identify parade was duly held on 10 July 2007 and the security guards, including Malgas, were unable to identify any of the plaintiffs as role players in the robbery. Indeed, during the trial, Malgas testified positively that he certainly did not see any one of the plaintiffs on the scene that night.

[30] I pause to mention that Victor was not in all respects a satisfactory witness. During the course of his evidence he at one stage sought to suggest

that he thought that the first plaintiff was in fact the owner of the Mercedes-Benz vehicle. This was later convincingly dispelled with reference to the registration papers. His entry in the investigation diary relating to the description of the plaintiffs clothing does not accord in all respects with that noted by Els at the arrest. Notwithstanding the shortcomings in his evidence I did not gain the impression that he was dishonest in his account of the events. I am not able to criticise his demeanour as a witness.

[31] Each of the plaintiffs testified in their own defence. Each of the three plaintiffs testified that they had been at the "Clubhouse", a social establishment situated, as I have recorded above, in Salsonville. They contend that during the evening they had consumed some alcohol together and at some stage Cesar and Klink had arrived at the "Clubhouse" in the white Mercedes motor vehicle. After joining their company for a short while Cesar and Klink left indicating that they had some business to conclude in Uitenhage. Cesar and Klink were accordingly absent for some period before they ultimately returned again to the "Clubhouse". Not long after their return to the "Clubhouse" the two of them indicated their intention to leave. The plaintiffs requested a lift home with Cesar and Klink and their request was favourably received. The five of them therefore proceeded to depart from the "Clubhouse", however, as they were leaving a sixth person, unknown to any of the plaintiffs, stopped the vehicle and also requested a lift home. This individual the plaintiffs say was known to Cesar. Again his request was well received and the six persons departed in the Mercedes-Benz from the "Clubhouse".

[32] The plaintiffs all testified that Cesar and Klink then proceeded to Extension 28 in Bloemendal where this stranger was dropped. Thereafter they proceeded towards Port Elizabeth and so it was that they encountered Warrant Officer Els.

[33] The plaintiffs testified that each of them had protested from the outset that they knew nothing of the armed robbery and that they had merely requested a lift. They testified too that Klink and Cesar confirmed this version, however, Els, they say, would not heed their protestations and responded simply by saying “Ag man, julle sal mos nou sê ... julle was nie daar gewees nie, almal sê gewoonlik so”. In this manner they were arrested. The plaintiffs too made a favourable impression in evidence.

[34] Ms Geswindt, the plaintiffs’ attorney of record testified in respect of the events of 4 July 2007. She says that she was instructed to apply for bail. She approached the prosecutor in the postponements court who advised that he had not yet received the docket as it was still in possession of the senior public prosecutor, one Kleynhans. He did however inform her that he had been advised that the investigating officer would seek a postponement for seven days in order to hold an identification parade and would accordingly oppose an application for bail. Kleynhans confirmed this to her.

[35] In these circumstances she advised the plaintiffs that the matter would be postponed for seven days and when the matter was called and the

prosecutor indicated that the State was opposed to bail and requested a postponement for seven days in order to hold an identity parade she did not object. Ms Geswindt says that it is her experience that if the State requests a postponement for seven days and opposes bail they will always get it and therefore she thought there was no point in her seeking to move for bail. She says that she did not at that stage have insight into the docket and that it was only in 2008 after she requested a copy of the docket for purposes of the present trial that she was aware of the content thereof. This was so, she says, as usually the defence only gets access to the docket when the matter is ready for trial. The matter never came to trial because the charges were withdrawn.

[36] Finally, Ms Van Vuuren, the first plaintiff's life partner testified that Victor had attended at her home in the early hours of the morning on 2 July 2007 to advise of the plaintiff's arrest and to seek a new set of clothes for the plaintiff.

[37] Wrongful and unlawful arrest

In their Particulars of Claim (as amended) the plaintiffs allege the said arrest, without a warrant, by members of the South African Police Service acting within the course and scope of their employment. They then each proceed to allege as follows:

- "5. Members of the South African Police Services, acting within the course and scope of their employment with the

defendant deprived the plaintiff of his freedom and wrongfully and maliciously set the law in motion by arresting the plaintiff on 1 July 2007 without having had reasonable and probable cause for so doing and by proceeding to formally charge and detain the plaintiff.

6. The members of the South African Police Services, acting as aforesaid, wrongfully and unlawfully and without having had reasonable and probable cause for doing so continued with criminal proceedings and/or caused such proceedings to be continued with against the plaintiff on an alleged charge of armed robbery.

7. The plaintiff was held in custody in the Uitenhage Police Station, until 4 July 2007, at which date the plaintiff appeared at the Magistrate's Court, Uitenhage, on an alleged charge of armed robbery.

8. The said criminal proceedings against the plaintiff was remanded to 11 July 2007 under case reference B1977/07, Uitenhage CAS 10/07/2007 ("the case"), and it was ordered that the plaintiff should remain in custody, despite the plaintiff having requested to be released on bail.

8(a) In having ordered as aforesaid the presiding magistrate acted on the information supplied by the members of the South African Police Services ("the officers") within the course and scope of their employment with the defendant.

8(b) The officers owed a legal duty to the plaintiff to prevent the plaintiffs wrongful and unlawful detention.

8(c) The officers breached this legal duty in that they:

direct of	(i)	failed to inform the prosecutor that there is no evidence linking the plaintiff to the commission of the crime as it was duty bound to do;
by the	(ii)	failed to properly investigate the alleged crime and/or the plaintiffs alibi as provided to it plaintiff during or about 2 July 2007;
	(iii)	failed to protect the Constitutional rights of the plaintiff.

8(d) The conduct of the officers as set out herein above was wrongful and negligent, alternatively negligent in that they failed in one or more respects as set out above."

[38] The Particulars of Claim are not a model of clarity and appears to me to

conflate the actions for wrongful and unlawful arrest, on the one hand, and malicious arrest on the other. The distinction between these causes of action was considered in **Newman v Prinsloo and Another** 1973 (1) SA 125 (W) where Margo J stated on p. 127H-128A as follows:

“Stated shortly, the distinction is that in wrongful arrest, or false imprisonment, as it is sometimes called, the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose actions he is vicariously liable, whereas in malicious arrest the interposition of a judicial act, between the act of the defendant and the apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law. The importance of the distinction is that, in the case of wrongful arrest, neither malice nor absence of justification need be alleged or proved by the plaintiff, whereas in the case of malicious arrest it is an essential ingredient of the plaintiff's cause of action, which must be alleged and proved by him, that the defendant procured or instigated the arrest by invoking the machinery of the law maliciously. “

[39] This formulation was more recently approved in **Relyant Trading (Pty) Limited v Shongwe and Another** [2007] 1 All SA 375 (SCA). In this case the arrest was effected without a warrant. Malicious arrest and detention does not arise in these circumstances and malice is irrelevant. Whilst a wrongful and unlawful arrest can be relied upon in the alternative to a claim for malicious arrest the two causes of action should, as a matter of pleading, be pleaded separately (compare **Tödt v Ipser** 1993 (3) SA 577 (A) at 587A-C). The averments made in the Particulars of Claim, are, however, in my view adequate to cover a claim for wrongful and unlawful arrest (compare **Tödt supra** at 587A-C. See also **Newman v Prinsloo supra** at 128G-H). In the present case Ms **Potgieter** correctly advised at the commencement of the trial

that the plaintiffs rely only on a wrongful and unlawful arrest. I shall accordingly approach the plaintiffs' claims on this basis.

[40] It is now firmly established that an arrest and detention is *prima facie* unlawful. It follows that once the arrest and detention is admitted, as it is in the present case, that the defendant bears the onus to establish that the arrest was lawful. The defendant in the present case relies on the provisions of section 40(1)(b) of the Act as a justification for the arrest. The defendant contends that Warrant Officer Els, being a peace officer as defined in the Act, was entitled to arrest the plaintiffs as he reasonably suspected the plaintiffs of having committed an offence of robbery, same being an offence referred to in Schedule 1 of the Act.

[41] Section 40(1)(b) of the Act provides as follows:

- “(1) A peace officer may without warrant arrest any person-
- (a) ...
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
- (c) ...”

[42] In order to succeed in a defence based on section 40(1)(b) of the Act the defendant is required to establish:

- (i) that the arrestor is a peace officer;
- (ii) that the arrestor in fact entertained a suspicion;
- (iii) that the suspicion which he held was that the suspect (the arrestee)

had committed an offence which is referred to in Schedule 1 (not being the offence of escaping from lawful custody); and

(iv) that the suspicion rests upon reasonable grounds.

(See ***Duncan v The Minister of Law and Order*** 1986 (2) SA 805 (A) at 818G-H.)

[43] It is not in dispute that Els was in fact a peace officer as defined in the Act nor that robbery is an offence referred to in Schedule 1 of the Act. What falls to be decided is accordingly whether Els entertained a suspicion that the plaintiffs had committed robbery with aggravating circumstances and whether reasonable grounds existed for such a suspicion.

[44] In respect of the first question, whether Els held a suspicion, the Supreme Court of Appeal has repeatedly quoted with approval the passage in ***Shaaban Bin Hussien and Others v Chang Fook Kam and Another*** [1969] 3 All ER 1626 (PC) at 1630c where the following is stated:

“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.”

(Compare ***Duncan supra*** at 819I-J; ***Minister of Law and Order v Kader*** 1991 (1) SA 41 (A) at 50H-I; and ***Isaacs v Minister van Wet en Orde*** [1996] 1 All SA 343 (A) at 348.)

[45] Els was summoned from his home at approximately 23h25 on the evening in question by Superintendent Fourie who advised that an armed robbery had occurred at the Sports Complex of Volkswagen in Uitenhage where unregistered new vehicles of Volkswagen are stored. He was advised on route, again by Superintendent Fourie that he should be on the look out for an old whitish Mercedes-Benz without number plates in which six brown male suspects were thought to be travelling. Whilst still talking to Superintendent Fourie Els saw a vehicle approaching from the direction of Uitenhage which matched the description perfectly. He turned around and followed the vehicle ultimately stopping the vehicle and apprehending the occupants. I do not think it probable that there would be many vehicles at that hour matching the description and bearing no registration plates travelling from Uitenhage towards Port Elizabeth. I consider that Els's conclusion that this may well be the vehicle to which Superintendent Fourie referred was a reasonable one. Inside the vehicle were five brown men. Although the number of occupants did not match the report entirely, the complexion of the persons did. When the vehicle was searched after it had been brought to a stop approximately six loose registration plates were found in the boot of the vehicle. In addition a number of black cable ties, some two-way tape and bolt cutters were found in the car. Els states that these items are items which in his experience are frequently used in motor vehicle robberies. Although Els may not have known at this time what had allegedly taken place he knew that the alleged robbery had occurred at Volkswagen where new vehicles were stored. He says he suspected that the occupants of the car had indeed perpetrated the reported

robbery.

[46] Although no firearm was found in the vehicle I have little hesitation in holding, on the evidence, that Els did indeed hold a *bona fide* subjective suspicion that the plaintiffs had committed the robbery. The contrary was not suggested to him.

[47] I turn to consider whether reasonable grounds to support this suspicion existed. It is clearly established on the evidence of Malgas and Kwanini that robbery with aggravating circumstances had been committed. Malgas had been held up at gunpoint, the guards had been tied up with cable ties and the keys of the new vehicles had been demanded. When these keys were not forthcoming the keys to the gate giving access to the premises were taken. Although he did not at the time of the arrest know all these details Els had been advised of this robbery. The report came to him from a senior police officer and I consider that such a report constitutes reasonable grounds for him to believe that such a robbery had occurred, as indeed it had.

[48] It is not clear from the evidence what the source was of the information that Fourie relayed to Els. From the evidence of Malgas it seems probable that it may have been obtained from one of the members of the reaction team who arrived on the scene at approximately the time that the robbers fled. I need not, however, speculate on this issue. It is common cause that the white Mercedes-Benz in which the plaintiffs were travelling had been at the Sports Complex at Volkswagen that evening. It emerges clearly from the evidence of

the plaintiffs themselves and the case put to Malgas that it was indeed Cesar and Klink who had approached Malgas. This vehicle was present at the Sports Complex at approximately the time when the robbery occurred. It emerges from the evidence of Malgas that the vehicle had approached the Sports Complex in Uitenhage at approximately 22h25 whereafter the occupants thereof had engaged Malgas in conversation for approximately 20 minutes. The robbery occurred shortly thereafter. The vehicle was confronted by Els in Port Elizabeth at approximately 23h45. In the circumstances within an hour of the commission of the robbery the plaintiffs were found in Port Elizabeth to be passengers in the vehicle which had been present at the robbery in Uitenhage.

[49] It is readily apparent from the evidence of Malgas that the intention of the robbery was directed at removing some of the new registered vehicles at the complex, hence the demand for the car keys made by the robbers. The Sports Complex serves as a storage depot for such cars. The discovery of loose registration plates in the boot and two-way tape in the car, Els says, further stimulated his suspicion. I consider that this factor would reasonably found a suspicion that the occupants of the car had committed the offence.

[50] It was repeatedly suggested to Els in cross-examination that two-way tape could be utilised for any other purpose. That he fairly conceded. I do not however consider that the mere fact that this item could be utilised for other purposes serves to detract from the reasonableness of the suspicion of a police officer particularly where it is viewed in conjunction with the unrelated

registration plates found in the boot of the vehicle.

[51] Els states that cable ties are frequently used in robberies to restrict person's movements. Whilst the evidence does not reveal that Els knew at the time of the arrest that the security guards had been tied up with cable ties this fact illustrates the realism of Els's suspicion. Indeed it transpired in due course, as emerges from the evidence of Victor that the cable ties found in the motor vehicle were of the same size, width, colour and manufacture as those used to tie up the security guards.

[52] Ms **Potgieter**, on behalf of the plaintiffs, argues that neither Els nor Fourie had any "direct evidence" linking the plaintiffs to the alleged crime and therefore they ought not to have arrested the plaintiffs. I do not understand section 40(1)(b) of the Act to require "direct evidence". What is required of an arresting officer is that he should hold a suspicion and that such suspicion should rest upon reasonable grounds. A suspicion, per definition, as set out above, is an unproven surmise. In order to meet the requirement of section 40(1)(b) such surmise must of course rest upon reasonable grounds. In the present instance, on the evidence, it cannot be gainsaid that the plaintiffs were present in the motor vehicle which had been at the scene where an armed robbery had occurred at a Volkswagen storage depot less than an hour prior to the apprehension of the plaintiffs. In addition a number of items found in the vehicle were of a nature which may reasonably be utilised in the execution of such a robbery. These factors, I think, constitutes very strong circumstantial evidence which, in my view would found a reasonable

suspicion.

[53] Much was made in cross-examination of the plaintiffs' alleged communication to Els, which Els denies, that they had merely obtained a lift in the vehicle. Even accepting that such a communication was made I do not consider that in itself would be sufficient to displace the reasonable suspicion held by Els.

[54] It is further argued that the evidence of Malgas and Kwanini on oath does not support any reasonable suspicion that the white Mercedes or any of the plaintiffs were connected to the crime. I do not agree. As aforesaid it cannot be gainsaid, nor was the contrary suggested in evidence, that it is the same vehicle and that it was Cesar and Klink who attended at the gate of the Sport Complex and occupied Malgas with their enquiry about one Jordaan. Immediately upon the departure of this vehicle Malgas, a trained security guard, was suspicious of their conduct. The robbery ensued a few minutes later. Malgas testified on oath that he concluded at the time that the vehicle was part of the event. I have little hesitation in finding that the events to which Malgas testified gives rise to a reasonable suspicion that this motor vehicle formed an integral part of the execution of the crime. That is what Malgas conveyed to Coleman immediately after the events. When the items found in the vehicle are added to these facts I do not think that Els can be faulted for having suspected that the occupants of the vehicle had participated in the crime.

[55] In the circumstances I consider that the defendant has established all the jurisdictional facts required to justify an arrest in terms of section 40(1)(b) of the Act.

[56] In cross-examination Els was repeatedly confronted with the plaintiffs alleged statements to him at the time of the arrest that they had been at the “Clubhouse” all evening and it was suggested that Els ought to have investigated this, and other events, before resolving to arrest the plaintiffs. It was suggested to him that had he done so he may have decided not to carry out the arrest. This strikes at his exercise of his discretion whether or not to arrest.

[57] It is now well established that an arrest and detention must be both constitutionally and statutorily justified. (See **Minister of Correctional Services v Kwakwa** [2002] 3 All SA 242 (SCA); and **Mistry v Interim Medical and Dental Council of South Africa and Others** 1998 (4) SA 1127 (CC).)

[58] Once the jurisdictional facts set out in section 40(1)(b) of the Act have been satisfied, as I have found that they have, a peace officer may invoke the power set out in the section, i.e., he may arrest the suspect. He has a discretion whether or not to exercise that power. (See **Duncan supra** at 818H-J.) Where a plaintiff seeks to attack the manner in which that discretion has been exercised in circumstances where the jurisdictional facts referred to above have been satisfied, he bears the onus of proof. See **Minister of**

Safety and Security v Sekhota and Another [2010] JOL 26465 (SCA) at para [49].

[59] In the ***Sekhota*** case Harms JA referred with approval to the approach to onus set out by Hefer JA in ***Minister of Law and Order v Dempsey*** 1988 (3) SA 19 (A). Harms JA states, with reference to Hefer JA's judgment in ***Dempsey's*** case, as follows at para [50]:

"It cannot be expected of a defendant, he said, to deal effectively in a plea or in evidence with unsubstantiated averments of *mala fides* and the like, without the specific facts upon which they are based, being stated. So much the more can it not be expected of a defendant to deal effectively with a claim (as in this case) in which no averment is made, save a general one that the arrest was "unreasonable". Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge, that should he fail to do so, a finding that the onus has not been discharged, may ensue ..."

[60] Where it is sought to attack the manner in which a discretion to arrest has been exercised, whether on constitutional or common law grounds, it is incumbent upon the plaintiff to raise the issue in his pleadings and to plead facts upon which the attack is based. In the present matter the issue has not been raised and no averments are contained in the pleadings which might reasonably have led to an anticipation that it would be an issue in the trial. I do not consider that the issue arises in the present matter.

[61] Before me Ms ***Potgieter*** argues that this shortcoming in the pleadings is not fatal as the issue has been fully ventilated in evidence and "the officers were given the opportunity to answer all these aspects". I do not agree.

[62] In ***South British Insurance Company Limited v Unicorn Shipping Lines (Pty) Limited*** 1976 (1) SA 708(A) at 714G Holmes JA considered when it would be competent for a court to pronounce upon matters not raised in pleadings. He stated as follows:

“However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.”

[63] It is not sufficient for the plaintiff to deal with an issue in cross-examination, no matter how thoroughly it is dealt with. What is required is that the issue should be fully canvassed by both sides. In the present case I do not think that the defendant ever anticipated that the plaintiff was to raise this issue. When Els was called to testify in chief he was not led on any issue relating to the exercise of his discretion. I do not think that it was possible to canvas the issue as no indication is given in the pleadings of the facts upon which such attack would be based. It is clear to me that it is not a matter upon which the defendant had consulted with Els and it was not anticipated that he would be required to meet such a case. In the circumstances I do not consider that this is a case where it can be said that both parties have fully canvassed the issue of the exercise of his discretion.

[64] The plaintiffs’ case in respect of wrongful and unlawful detention on the pleadings is that the detention was unlawful because the arrest was affected without reasonable and probable cause. It was not the plaintiffs’ case, in the

alternative, that if the arrest was lawful the detention became unlawful at some stage thereafter, but prior to their appearance in court. This notwithstanding, Ms **Potgieter** argues that the plaintiffs were not brought before court within the 48 hours as envisaged in section 50(1)(c) of the Act. If this is correct then it follows that the detention of the plaintiffs would have been unlawful from the moment the 48 hours lapsed until at least the plaintiffs appeared in court.

[65] The factual basis for this argument is common cause. The argument relates to an interpretation of section 50 of the Act. In the circumstances I consider that the argument is open to the plaintiffs.

[66] The plaintiffs were arrested at approximately 23h45 on Sunday evening 1 July 2007. Forty eight hours calculated from the time of their arrest lapsed at 23h45 on the evening of Tuesday 3 July 2007. They first appeared in court on Wednesday 4 July 2007.

[67] Section 50(1)(c) reads as follows:

- “(c) Subject to paragraph (d), if such an arrested person is not released by reason that-
 - (i) no charge is to be brought against him/her; or
 - (ii) bail is not granted to him/her in terms of section 59 or 59A, he shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after his arrest.”

[68] These provisions are, as appears from the section, subject to the

provisions of section 50(1)(d). The relevant portion of section 50(1)(d) provides as follows:

- “(d) If the period of 48 hours expires-
 - i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day.
 - ii) ...”

[69] A court day as defined in the Act is a day upon which the court in question normally sits and ordinary court hours means from 09h00 until 16h00 on a court day.

[70] Ms **Potgieter** relies for her argument on **Prinsloo v Nasionale Vervolgingsgesag en Andere** 2011 (2) SA 214 (GNP) where Du Plessis AJ held that on a proper interpretation of section 50(1)(d) of the Act an arrested person must, if the 48 hours within which he must in terms of the section be brought before a court expires outside normal court hours, or on the day which is not a normal court day, be brought before a court during and not later than the end of the first court day after his arrest. On an acceptance of this interpretation the plaintiffs had to be brought before a court on the first day after their arrest, i.e., Monday, 2 July 2007.

[71] I find myself unable to agree with this interpretation of the section. Section 50 requires a detainee to be brought before a court “as soon as reasonably possible, but not later than 48 hours after his arrest.” The section does not entitle the police to detain a person for 48 hours in every instance – he is to be brought before a court as soon as reasonably possible. When it is

reasonably possible would depend upon all the circumstances of each case. However, irrespective of circumstances, subject only to section 50(1)(d), he must be brought before the court before the lapse of 48 hours. The 48 hours accordingly stipulates the maximum period which is permitted, subject to section 50(1)(d). Section 50(1)(d)(i) provides a qualification to the maximum time limit in circumstances where the period expires either outside of the normal court hours or on the day on which the court does not normally sit. In such circumstances he may appear “on the first day”. When reference is had to the remainder of section 50(1)(d) it is apparent that in each instance a limited extension to the period of 48 hours is granted. I consider that the proper interpretation of section 50(1)(d)(i) is that where the 48 hour period expires outside of court hours or on a day on which the court does not normally sit and it has not been reasonably possible to bring the detainee before a court sooner, the detainee is required to be brought before a court on the first day after the expiry of the 48 hours. Any other interpretation of the section appears to me to give rise to absurd results which I do not think that the Legislature could have envisaged. In the present instance, by way of example, it would mean that the plaintiffs would have had to be brought before a court before 16h00 on Monday, 2 July 2007, i.e., the deadline provided would be reduced to just more than 16 hours notwithstanding that the entire Tuesday, 3 July 2007 still falls within the 48 hours limit stipulated.

[72] In the circumstances I am unable to uphold this argument. The plaintiffs did appear on the first court day after the lapse of 48 hours as required by section 50. No case has been made on the pleadings or in the

evidence that it was “reasonably possible” to have brought them before court prior to their actual appearance.

[73] The case in respect of wrongful and unlawful arrest does not, however, end there. On the pleadings (as amended) and the plaintiffs allege that their detention after 4 July 2007, albeit by order of court, is unlawful. The basis for this argument is contained in paragraph 8 of the particulars of the plaintiffs’ claim as set out above. It is conceded in argument that the further detention of the plaintiffs after 4 July 2007 occurred on a warrant of detention issued by the magistrate, as is to be expected in circumstances where the magistrate has ordered the further detention.

[74] I have referred above to the distinction between wrongful and unlawful arrest and detention and malicious arrest and detention as formulated by Margo J in **Newman’s** case and approved by the Supreme Court of Appeal in the **Relyant Trading** case. The distinction, Margo J said, was that in the case of wrongful and unlawful arrest the act of restraining the plaintiff’s freedom is that of the defendant or his agent. In the case of malicious arrest there is an interposition between the act of the defendant and the apprehension of the plaintiff. This makes the restraint of the plaintiff’s freedom no longer an act of the defendant (or his agent) but an act of the law. (See **Newman supra** p. 127H.)

[75] It is for this reason that where an arrest is carried out on an warrant issued in the proper form by a duly authorised official the existence of the

warrant affords the arresting officer a complete defence to a claim for wrongful and unlawful arrest. (See ***Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Limited and Another*** 1966 (2) SA 503 (A); and ***Prinsloo v Newman*** 1975 (1) SA 481 (A) 492.)

[76] By parity of reasoning, where an accused person is brought before a magistrate by the prosecuting authority and the magistrate orders that he be detained in custody his further detention is an act not of the arrestor (or the investigating officer) but of the law. This appears to be reinforced by the recent decision of ***Minister of Safety and Security v Sekhota*** *supra* where Harms JA states as follows:

“[42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in the process. Once an arrest has been effected the peace officer must bring the arrestee before court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.”

[77] It matters not whether the initial arrest was lawful or not (see ***Isaacs v Minister van Wet en Orde*** *supra* at 349f-350g). One of the objectives of such a first appearance before a court is to enable the accused person to raise a dispute as to whether there is sufficient evidence against him to justify his further detention. This is a matter on which the magistrate is called to exercise a discretion. (See ***Isaacs*** *supra* at p. 350d-e.) In this case the

events before the magistrate appear from the evidence of Ms Geswindt. The plaintiffs were represented in the proceedings. The prosecutor indicated to the magistrate that the investigating officer was opposed to the grant of bail and requested a postponement for 7 days for an identity parade to be held. On behalf of the plaintiff no objection was raised apparently because Ms Geswindt was of the view that an objection at that stage would normally not succeed. I do not think that these circumstances can detract from the fact that the magistrate was called upon to exercise a discretion. He performed that function and determined that the matter should be remanded with the plaintiffs held in custody.

[78] In all the circumstances I consider that the further detention of the plaintiffs after 4 July 2007 occurred by “an act of the law” (to adopt the terminology of Margo J, *supra*). That being so, the defendant can only be liable if he, or an agent for whose conduct he is vicariously liable, set the law in motion, *animus iniuriandi* to obtain such a warrant of a detention. Suffice it to say at this stage that the fault required to succeed in such a claim is *dolus*. Negligence, as alleged in paragraph 8 of the Particulars of Claim, as amended, and argued on behalf of the plaintiffs will not suffice. (See ***Minister of Justice and Constitutional Development v Moleko*** [2008] 3 All SA 47 (SCA) para [64].)

[79] In this regard considerable emphasis was placed in cross-examination and in argument before me on Victor’s communications with Kleynhans, the public prosecutor. It was put to Victor that the warrant of detention came

about because Victor had conveyed to Kleynhans that in his view a *prima facie* case had been established. In this, it is argued, he was negligent. He had advised Kleynhans that he believed that sufficient evidence existed by virtue of the fact that the plaintiffs had been arrested in the vehicle which had been seen to be fleeing from the scene of the crime and that the description of the plaintiffs dress and complexion matched the true state of affairs. To the extent that some of the factors relied upon by Victor do not appear from the statements contained in the dockets Victor testifies that he relied not only on the content of the dockets but also inferences which he drew from Els's statement and on what he had been told by witnesses at the scene.

[80] The criticism of Victor in this regard is, in my view, overstated. In ***Rex v Patel*** 1944 AD 511 at 519 Feetham JA said:

"A detective, when discussing with a public prosecutor the evidence which is available, or which may be required for the purpose of supporting a prosecution in any given case, may naturally and properly indicate his view as to the value of any evidence obtained or likely to be obtained, and the prospect of success in proving a charge by means of such evidence; in doing so he is exercising, or seeking to exercise, influence which his official position gives him a legitimate opportunity of exercising, and is thus performing an act in his official capacity and in the exercise of his official functions, though he may not be discharging any duty specifically imposed upon him by law, or obeying any direction expressly given to him by his superiors in respect of the execution of his office. In the circumstances, it seems to me that an investigating officer is entitled to express his views to the prosecutor on whether or not an offence has been committed."

(See also ***Prinsloo and Another v Newman supra*** at 494H.)

In any event, as set out above, negligence on the part of Victor will not suffice.

[81] If however the plaintiffs succeed in their claim for malicious prosecution then it seems to me to follow that the detention after 4 July 2007 would also be unlawful.

[82] To summarise the findings thus far: the defendant has succeeded in establishing the jurisdictional facts required to justify an arrest in terms of section 40(1)(b) of the Act; the manner in which the arresting officer exercised his discretion does not arise on the pleadings nor has it been fully canvassed by both sides in evidence; the plaintiffs were brought before a magistrate within the period envisaged in section 50 of the Act; and by virtue of the plaintiffs having been detained after 4 July 2007 by a warrant ordered by the magistrate at the request of the prosecutor no claim founded in negligence of the investigating officer can succeed.

[83] Malicious prosecution

I turn to consider the plaintiffs claim for malicious prosecution. In order to succeed in a claim for malicious prosecution the plaintiff is required to establish that:

- (a) the defendant set the law in motion – they instigated or instituted the proceedings;
- (b) the defendant acted without reasonable and probable cause;
- (c) the defendant acted with malice (or *animo iniuriandi*); and
- (d) the prosecution has failed (see ***Minister of Justice and Constitutional Development v Moleko supra***).

[84] In a claim of this nature the plaintiff bears the onus in respect of all elements of the delict, including *animus iniuriandi*. See **Beckenstrater v Rottcher and Theunissen** 1955 (1) SA 129 (A) 135-136; and **Van der Merwe v Strydom** 1967 (3) SA 467 (A) at 467. That the servants of the defendant set the law in motion as envisaged above is admitted on the pleadings. It is similarly not in dispute that all charges were withdrawn against the plaintiffs. The first and fourth requirements are accordingly established. What remains to be determined is whether the defendants acted without reasonable and probable cause and with *animus iniuriandi*.

[85] Each of the plaintiffs have alleged at paragraphs 17 of their Particulars of Claim that the defendant acted “unreasonably, without probable cause, *animo iniuriandi*, was actuated by improper motive and/or acted with gross negligence in the criminal proceedings as instituted against the plaintiff ...” . I have stated above that negligence will not suffice. Neither will gross negligence. In the Supreme Court of Appeal in the **Moleko** case *supra*, at para [64] it was said:

“The defendant must thus not only have been aware of what he/she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he/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, I would say, even gross negligence) will not suffice.”

Negligence is accordingly irrelevant for purposes of the present proceedings.

[86] Not every prosecution which is concluded in the favour of the accused constitutes a malicious prosecution. It is in every instance incumbent upon the plaintiff to establish an absence of reasonable and probable cause. It is not necessary that a watertight case must already be contained in the docket at the time the law is set in motion. Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves both a subjective and an objective element. (See *Beckenstrater v Rottcher and Theunissen supra* at p. 136B and *Prinsloo and Another v Newman supra* at 149H.) In *Beckenstrater* Schreiner JA, at p. 136A-B, says:

“When it is alleged that that the 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 had 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.”

[87] Victor testified that he charged the plaintiff. He was the investigating officer. He had the content of the docket at his disposal and, he states, he had further information which had been conveyed to him by witnesses at the scene. It was known at that stage that an armed robbery had occurred. I have dealt above with the evidence of Malgas and the time frame of the events. It appears accordingly that the robbery occurred at approximately 23h00 on the evening of 1 July 2007, or shortly prior thereto at Uitenhage. At approximately 23h45 the white Mercedes vehicle was apprehended by Els at

the Stanford Road turnoff in Port Elizabeth. The plaintiffs were all passengers in the vehicle. It follows that a very brief period had lapsed from the time that the vehicle had been seen at the Sports Complex in Uitenhage to the time that it was apprehended in Port Elizabeth.

[88] Victor had at his disposal two warning statements taken from the plaintiffs and from Klink, the driver of the motor vehicle. Klink in his statement admits that he and Cesar proceeded to the premises of Volkswagen and there Cesar had spoken to security at the gate. He states that they had waited at the gate for approximately 10 minutes. On the totality of the evidence I consider that there was every reason for Victor to believe, as it transpires, correctly, that the motor vehicle which had drawn up to the gate where Malgas had been engaged in conversation was the same vehicle in which the plaintiffs had been apprehended.

[89] It is true that the plaintiffs had all indicated that they had merely received a lift from the "Clubhouse" with Cesar and Klink and that Klink confirmed same. Victor testifies that he had serious doubts about the veracity of this explanation. Given the time frame of the events as they appear from the docket which was in Victor's possession, the relatively brief period which had lapsed from the time when the robbery is alleged to have occurred in Uitenhage to the time of the arrest in Port Elizabeth, I do not think that Victor's doubts were unreasonable. I think that Victor may justifiably have had every anticipation, on what was known at that time, that the plaintiffs may be pointed out at an identification parade. Of course, once the result of the identity

parade was known the position changed.

[90] I have referred earlier to the significance of the articles found in the vehicle at the time of the arrest and the inferences which might reasonably have been drawn from such a discovery. In all these circumstances I am of the view that the plaintiffs have not succeeded in proving on a balance of probability that the information before Victor at the time, prior to the identity parade, was insufficient to lead a reasonable man to conclude that the plaintiffs had probably committed an offence of robbery with aggravating circumstances. No evidence exists on which it may be found that Victor in fact did not believe in the plaintiffs' guilt.

[91] In the circumstances the plaintiffs' case must fail for a want of proof that the information before Victor was insufficient to lead a reasonable man at that stage, prior to an identification parade being held, to hold an honest belief that the institution of proceedings was justified. Put differently, the evidence does not, in my view, establish an absence of reasonable and probable cause.

[92] In the result, the plaintiffs' claims are dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv *Potgieter* instructed by Carol Geswindt Attorneys,
Port Elizabeth

For Defendant: Adv *Naran* instructed by the State Attorney, Port
Elizabeth