

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

Case No.: 1836/2019

Date Heard: 25-27 January 2021

Date Delivered: 9 March 2021

In the matter between:

MARIO STUURMAN

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

POTGIETER AJ:

[1] The plaintiff has instituted action against the Minister of Police, being the first defendant, and the National Director of Public Prosecutions (“NDPP”), being the second defendant, for damages in the sum of R50 000 in respect of unlawful arrest and detention during the period 28-29 June 2018 against the first defendant only (claim 1) and R750 000 in respect of unlawful detention during the period 29 June 2018 to 6 December 2018 against both defendants (claim 2).

[2] The action is defended by both of the defendants.

[3] The claim arose from the arrest without a warrant of the plaintiff, together with a relative Bramwill Stuurman, on charges of dealing in and the possession of drugs, as well as an illegal firearm and ammunition on 28 June 2018 at 604 Slinger Street, Arcadia, Humansdorp. The material common cause facts can be briefly set out as follows. The plaintiff was detained for approximately 20 minutes at the Humansdorp Police cells immediately after his arrest and was then transferred to the Jeffrey's Bay Police cells where he was held overnight and taken to the Humansdorp Magistrate's Court where he appeared on 29 June 2018. The plaintiff was remanded in custody at St Albans Prison until 6 July 2018 to enable him to obtain legal representation. He was represented by a Legal Aid attorney on 6 July 2018 and the matter was postponed to 11 July 2018 for a formal bail application. The Legal Aid attorney withdrew on 11 July 2018 and plaintiff's new attorney arranged for a formal bail application to be heard on 16 July 2018. On the latter date the bail application was proceeded with. The plaintiff deposed to an affidavit in support of the application and the investigating officer, Warrant Officer Hofman deposed to an affidavit opposing the granting of bail. The matter was fully argued and the magistrate gave judgment on the same day refusing bail. There was no appeal against the refusal of bail or a renewal of the bail application. The matter was postponed in the Humansdorp District Court on a few occasions and was subsequently transferred to the Humansdorp Regional Court on 8 October 2018 and postponed to 26 October 2018. The plaintiff remained in custody at St Albans Prison until the matter was finalised on 6 December 2018 when Bramwill Stuurman (accused no. 1) pleaded guilty on count 2 being in possession of drugs and count 1 (possession of an unlicensed

firearm) was withdrawn against him. Both charges were withdrawn against the plaintiff and he was released from custody.

[4] While two special pleas were raised with regard to statutory notice of the action, these were not pursued and the matter proceeded in respect of both the merits and the quantum at the trial. The arrest of the plaintiff without a warrant and his subsequent detention were admitted by both the defendants in the plea, but the unlawfulness thereof was disputed.

[5] The police relied upon the provisions of sections 40(1)(a), 40(1)(b), alternatively 40(1)(h) of the *Criminal Procedure Act, 51 of 1977* ("CPA") as justification for the arrest and initial detention of the plaintiff until 29 June 2018. They pleaded that the subsequent detention was lawfully ordered by the presiding magistrate over whose actions they had no control and for which they cannot be held liable. The police specifically denied that there was any causative nexus between any alleged unlawful conduct on their part and the subsequent judicial detention of the plaintiff.

[6] The defence pleaded by the NDPP largely coincided with the defence of the police. In addition, it was denied that the NDPP breached any duty it had or that it acted in any of the improper ways as pleaded in the Particulars of Claim, in dealing with the prosecution of the plaintiff from his first appearance on 29 June 2018 until the matter was finalised on 6 December 2018. The specific grounds relied upon by the plaintiff in this regard more fully appear from paragraphs 13 and 14 of the particulars of claim and

are, *inter alia*, based on the averment that the relevant prosecutors failed to acquaint themselves with the contents of the police docket and determine that there was no justification for the continued detention of the plaintiff, failed timeously to withdraw the charges and ensure the plaintiff's release or to inform the magistrate that there were no facts implicating the plaintiff together with related alleged breaches of these pleaded legal duties.

[7] The plaintiff testified and called no witnesses. Warrant Officer Frank Jantjies, the arresting officer, was the only witness who testified on behalf of the defendants. While much of the evidence is not really in contention there is one matter which was extensively addressed in argument and which, on the submission of Mr Swarts who appeared on behalf of the plaintiff, was the central issue in the case and was dispositive of the matter. This related to a dispute concerning the evidence of Warrant Officer Jantjies that there were mandrax tablets lying on a coffee table in the sitting room close to where he arrested the two accused. This was denied in his testimony by the plaintiff. In my view, Mr Swarts attached too much significance to this issue more particularly his submission that if there were no drugs on the coffee table, Warrant Officer Jantjies could not have formed a reasonable suspicion that the plaintiff was either dealing in or was in possession of drugs. (He did not expressly concede that the converse would apply if the drugs were in fact lying on the table, namely that the reasonable suspicion would then have been established.) He submitted that Warrant Officer Jantjies was mendacious, had concocted this version to boost the case against the plaintiff, that the plaintiff was telling the truth and that the court should find that there were no mandrax

tablets on the table and in the result uphold the plaintiff's case. In order to determine this issue which resulted from the mutually destructive versions of the plaintiff and Warrant Officer Jantjies, I proceed to deal with the evidence in somewhat more detail than I would otherwise have done given my view that the matter is in any event capable of being decided upon the remaining uncontentious evidence without reference to this issue.

[8] A further issue which requires attention arose between the parties during the trial and was canvassed during argument. This concerned the nature of the court proceedings when the criminal trial was postponed, especially at the plaintiff's first appearance. Mr Swarts contended that the proceedings at the first appearance was akin to a "*reception court*" which resulted in a violation of the plaintiff's fundamental rights for which both the defendants are liable. This issue is pertinent to claim 2, namely damages for unlawful detention from the first court appearance on 29 June 2018 until the charges were withdrawn against the plaintiff on 6 December 2018. I proceed to deal with the evidence presented at the trial.

[9] The plaintiff testified that the house at 604 Slinger Street belonged to his aunt, Lorna Grootboom. The latter is actually his mother's cousin. In addition to the main brick building there is also a corrugated iron outbuilding on the premises which is occupied by his cousin Jenovin Grootboom, the son of Ms Grootboom. On the day of his arrest he called at the property because he was busy performing building work on the outbuilding of Jenovin. He is not a qualified bricklayer, but his father taught him how

to build. He was accompanied by his cousin, Bramwill Stuurman, who was to assist him.

[10] There was insufficient building sand and Jenovin went to look for transport to buy sand. When Jenovin left he locked the security gate on the main entrance to the outbuilding with padlocks while the plaintiff and Bramwill were inside the outbuilding. It was while they were locked inside waiting for Jenovin that the police arrived and removed the padlocks on the security gate with a bolt cutter. The police entered and searched him and found nothing in his possession. It should be added that at a later stage he confirmed that approximately R300 was in fact found in his pocket by a detective who placed the money back into his pocket. He was searched again at the police station and the money was confiscated. It was maintenance money for his child. Bramwill was also searched and the police found a matchbox in his pocket containing 10 mandrax halves (this being mandrax tablets that were cut in half). They were both immediately handcuffed. The police proceeded to search the structure and found various items of drugs and dagga as well as a firearm. He heard the police saying "Bingo" when these items were found and he asked what game was being played. One of the police officers, Lee-André Msinga came out of Jenovin's bedroom with the firearm. Plaintiff protested with the Captain that Msinga was handling the firearm without gloves. I revert to this aspect when I deal with the evidence of Warrant Officer Jantjies who indicated that he had found and handled the firearm on the scene and not Msinga. I should also add that according to the search warrant at pages 13-14 of the police docket (exhibit "A"), five officers including Constable Lee-André Ketteldas (not

Msinga) and Warrant Officer Jantjies, were authorised to assist Captain Wagenaar to execute the warrant. There was no Msinga amongst the officers identified in the search warrant. In response to one of the police officers who informed him, as he was being led to the police van, that he would be charged he remarked that the officer was mad in his head ("mal in sy kop"). Both he and Bramwill were placed in the police van and transferred to the Humansdorp Police cells where they were kept for approximately 20 minutes in a dirty cell and were transferred to the Jeffrey's Bay Police cells which were cleaner. He refused to sign a notice of rights form and informed the police that he knew nothing about drugs and refused to sign for things he did not know about.

[11] He indicated to the court that Jenovin locked them inside the outbuilding because he did not want the plaintiff to be able to go outside and to start drinking because Jenovin knew if he starts drinking he does not stop. This explanation should be seen in the light of the undisputed evidence of Warrant Officer Jantjies (dealt with below) that there are three entrances to the structure, namely the locked main entrance, a door leading to the main house akin to a back door/kitchen door, and another door leading to the tap.

[12] Plaintiff further testified that the next morning, 29 June 2018 he and Bramwill were transported from Jeffrey's Bay to the Humansdorp Magistrate's Court where they were detained in the court holding cells and then taken to court. They were approximately five or six persons in the dock. When their case was called he and Bramwill stood up while the other persons in the dock remained seated. The magistrate

just said that there was a postponement for 7 days to 6 July 2018 for legal representation and that they will remain in custody. The other persons in the dock then appeared and the magistrate told them the same things.

[13] The prosecutor did not tell the magistrate where the drugs were found or that no firearm was found on him. He was detained at St Albans Medium A Prison until his next court appearance.

[14] They appeared on 6 July 2018 and again no information was provided to the magistrate about the whereabouts of the drugs or firearm. The matter was postponed to 11 July 2018 and again to 16 July 2018 when the formal bail application was heard by the magistrate. He deposed to an affidavit for purposes of the bail application. They were represented by Ms Barnard at the bail hearing. The magistrate refused bail. Ms Barnard later withdrew as their attorney on 10 September 2018.

[15] After each remand he was detained at St Albans Prison under very adverse conditions. He was not aware of the drugs and firearm that were found by the police and he did not live at the place where the items were found. He was humiliated by his arrest because members of the public took photographs while he was being arrested and published them on social media.

[16] Under cross-examination he confirmed that he was acquainted with the arresting officer, Warrant Officer Jantjies and that there was no bad blood between them. He had

three previous convictions, namely two for assault and the remaining one for possession of drugs and he was disqualified to own a firearm. He contended that his arrest was unlawful because neither the drugs nor the firearm was found in his possession. These items were found in the outbuilding. No money was found in the outbuilding. At the time of their arrest he and Bramwill were the only people in the outbuilding. He denied that they were in charge of the outbuilding when they were arrested. He surprisingly indicated presumably to support his contention that they were not in charge of the outbuilding, that he would have done nothing to stop a stranger from entering the outbuilding and taking Jenovin's possessions.

[17] The police found him in the lounge and he stayed there throughout the period that the police searched the structure. When the police arrived the burglar gate at the main entrance was locked but the door was standing open. Jenovin had earlier locked the burglar gate and left to look for transport to buy building sand. He denied that he or Bramwill locked the security gate when the police arrived and indicated that the police came running to the door with a bolt cutter and removed the padlocks from the gate. The police ordered them to sit still. He denied that the police had to use a bolt cutter because he and Bramwill refused to open. He indicated that they could not open the gate which resulted in the police using the bolt cutter. There was a table in the lounge where they were but there was nothing on the table. He specifically denied that there were drugs on the table. The police found drugs in the bedroom. He told the police that he did not live there and was waiting for the owner and that he was busy with building work at the property. This was the truth which he believed would save him from arrest

and he had no problem to disclose this to the police. When he was confronted with his warning statement to the investigating officer in which he gave no version and stated that he would speak in court, he said that he did this because the police had no reason to arrest him. When it was put to him that the arresting officer denied that he said that he was doing building work at the property, he said that the arresting officer was not telling the truth.

[18] He confirmed that the drugs and firearm were placed into forensic bags inside the structure. The dagga, mandrax, tik and the firearm were each placed into a separate bag. He expressed the view that a somewhat obscure photocopied photograph at page 127 of the police docket (exhibit "A"), depicted the bare hands of officer Msinga holding a firearm and a magazine. When it was put to him that the firearm was recovered by Warrant Officer Jantjies and that the latter was wearing gloves when handling the firearm, he responded that the person on the photograph referred to above, was not wearing gloves. It should be indicated that it is well-nigh impossible for me to discern whether the person on the photograph was wearing gloves or not given the extremely poor quality of the black and white photocopy. This issue was, however, clarified in the evidence of Warrant Officer Jantjies who identified the photograph and confirmed that it depicted him holding the firearm and magazine and that he was wearing gloves at the time.

[19] When confronted with his evidence that no money was found inside the outbuilding he indicated that the money was found on him. As pointed out, he had

testified that a detective found approximately R300 in his pocket and placed it back into his pocket. He was searched again at the police station and the money was confiscated. In this regard Warrant Officer Jantjies testified that he and Constable Ketteldas were the only officers in civilian clothes while the rest of the officers were in full uniform. It is a known fact that detectives are dressed in civilian clothing, and not in uniform, when they are on duty. Warrant Officer Jantjies in fact indicated that he searched both the plaintiff and Bramwill inside the outbuilding and that he found money in the plaintiff's pocket which he confiscated. It is not in contention that R570 in total was confiscated. In this regard the photograph at page 117 of the police docket (exhibit "A"), depicts a matchbox, tablets, notes and coins. Warrant Officer Jantjies testified that all the photographs were taken inside the outbuilding. There can be no doubt in the circumstances that it was Warrant Officer Jantjies that searched the plaintiff and found the money in his pocket. It was most likely the fact that he was dressed in civilian clothes that led to the plaintiff referring to the officer that searched him as a detective.

[20] It was put to him that the first time the police became aware of his version that he was at the property in question in order to do building work, was when he filed his bail affidavit at the bail hearing on 16 July 2018. Paragraph 22 of the affidavit stated as follows:

*"I intend pleading **NOT** guilty to the charge against me. I do not wish to disclose the basis of my defence at this stage and will do so at the trial. I have been in custody since 28th June 2018. I also want to submit that the state does not have a strong case against me as on the date of the alleged*

incident I was at my aunt's home assisting them with building of which (sic) extension of their house. The police arrived on the scene handcuffed me while I was outside the house. After they handcuffed me they want to search my aunt's house and my cousin's room. They found the drugs and gun in my cousin's room while I was handcuffed outside. The said property does not belong to me and the drugs and gun was found in my cousin's room. I had no control over the said property and it does not belong to me."

[21] The plaintiff responded that upon their arrest, the police asked him what he was doing at the property and he gave the same explanation to them. It was further put to him that after the police became aware of the above version in the bail affidavit they approached Ms Lorna Grootboom, the owner of the property and took a statement from her which appeared at page 43 of the police docket. He could not explain why Ms Grootboom indicated in her statement that she had no builders on her property and that she did not know the persons who were arrested at the property.

[22] He stated that he was certain what happened at his first appearance. The magistrate just said that the case was postponed for 7 days for legal representation and they were told to stand down. He was referred to the form appearing at page 12 of the bail proceedings (exhibit "B") that recorded what transpired at the first appearance on 29 June 2018. The form indicates that when their right to legal representation was explained, the plaintiff, being accused no. 2 indicated that he wanted his own attorney, while Bramwill indicated that he wanted to apply for a Legal Aid attorney. The matter then stood down for the latter application. When the matter resumed a Legal Aid

attorney, Ms van Wyk appeared for Bramwill who was accused no. 1. The magistrate's notes indicated as far as they are legible, in respect of the plaintiff as follows:

"L Swarts is prok. 2: dui so aan".

[23] It appears from the note that the plaintiff was conveying the details of his attorney to the magistrate. The form furthermore indicated that the right of the accused to apply for bail in terms of section 60 of the Criminal Procedure Act was explained and they both elected to bring a bail application. The matter was postponed to 6 July 2018 for a formal bail application and the accused were remanded in custody. It is common cause that the plaintiff was charged with a Schedule 5 offence and that the provisions of section 60(11)(b) of the Criminal Procedure Act applied which obliged the plaintiff to be detained in custody unless he adduced evidence that satisfied the court that there were exceptional circumstances permitting his release in the interests of justice. In response to what had been recorded on the form by the magistrate, the plaintiff indicated that he does not know a Ms van Wyk and that he and Bramwill always had the same attorney. He confirmed that the right to apply for bail was explained to them and that they elected to bring a bail application and were remanded in custody until 6 July 2018.

[24] The plaintiff confirmed that at his first appearance the docket contained the statement by the arresting officer, Warrant Officer Jantjies (A1), the search warrant for the property together with supporting statements from an officer of the crime Intelligence Unit and a police informer confirming that drugs were sold at the property by Jenovin

who made use of two runners (A2), the notice of constitutional rights form in respect of the plaintiff which he refused to sign (A4), the plaintiff's warning statement containing no version and indicating that he will speak in court (A6), the SAP13 register listing all confiscated items/exhibits (A7) and the enquiry on firearm status indicating that the confiscated firearm was licenced to a Mr Ngalavu of Queenstown. Plaintiff also confirmed that none of these items exonerated him.

[25] The record of the remands contained in exhibit "B" indicates that an attorney, Mr Hofmann (presumably from Legal Aid) appeared on behalf of the accused on 6 July 2018 and was standing in for another attorney and that the matter was on that occasion postponed to 11 July 2018 for a formal bail application. On 11 July 2018 the Legal Aid attorney who appeared on that occasion (the name is illegible) withdrew because the accused had appointed a private attorney, Ms Barnard who was present at court. After the matter stood down, it was postponed to 16 July 2018 for a formal bail application. This was confirmed by Ms Barnard. Both the accused were remanded in custody. The plaintiff confirmed that the formal bail application that was brought on 16 July 2018 was refused. He was represented at the time by Ms Barnard.

[26] In re-examination the plaintiff stated that no keys to the property where he was arrested, were found in his possession. He could not move in or out of the outbuilding because Jenovin had locked the security gate. The detective had placed the money back into his pocket after he was searched inside the outbuilding. The firearm was found in Jenovin's bedroom. He was doing building work for Jenovin and was never

identified as a runner nor was he aware that Jenovin was the primary dealer. In response to a question from the court, the plaintiff confirmed that drugs were being sold at the property. I proceed to deal with the testimony of Warrant Officer Jantjies.

[27] Warrant Officer Jantjies testified that he has 23 years' service in the police. He is stationed at Humansdorp and is attached to the Visible Policing Unit. At the time of the incident in issue in this matter he was attached to the Crime Prevention Unit.

[28] On the morning in question, being 28 June 2018 he was part of a police operation, effectively a drug raid, under the command of Captain Wagenaar. He attended a parade where the officers who participated in the operation were briefed by Captain Wagenaar who indicated that there was a search warrant to be executed at 604 Slinger Street, Arcadia in Humansdorp. The information was that drugs were being sold at the premises by Jenovin Grootboom alias Noeyi who also utilised two runners to sell the drugs. He knew the dealer Jenovin, but did not know who the runners were. The police knew that Jenovin sold drugs at the premises. Warrant Officer Jantjies had previously effected arrests at the premises of people who had bought drugs there.

[29] There were approximately 8-10 officers involved in the search under the command of Captain Wagenaar. Only he and Constable Ketteldas were wearing civilian clothes.

[30] The main house on the property is built with bricks while there was a wooden outbuilding, with its own entrance attached to the main house. Upon their arrival Captain Wagenaar spoke to Ms Lorna Grootboom, the owner of the property and obtained her permission to search the premises. He, Constable Ketteldas, Warrant Officer Meyer and Sergeant Rademeyer then moved towards the entrance to the outbuilding. As they approached he saw people inside the structure. There was a security gate that was locked with padlocks and a wooden door that was standing open but was closed from the inside as they approached. He did not see who closed the door. He made himself audible and indicated that he was a police officer, had a search warrant and that the occupants should open the door. When there was no response they used a bolt cutter to remove the padlocks and entered the structure. They found the plaintiff and another male (later identified as Bramwill Stuurman) standing near to a coffee table. There were different mandrax tablets on the table. There was also a large blade that is used to cut mandrax tablets with on the table. It entered his mind that the two males were dealing in drugs. He told them that he had a search warrant and requested to search them which they agreed to. They were standing in front of him and he proceeded to search Bramwill Stuurman first. He found a matchbox containing mandrax wrapped in foil in his pocket. He confiscated the mandrax and then searched the plaintiff. He found cash on the plaintiff and confiscated it. A total of R570 was confiscated. He informed them both of their rights and that he was arresting them for dealing in drugs. Bramwill did not respond. The plaintiff said that he did not know about the drugs but gave no explanation about the cash. The plaintiff never alleged that it was

money for maintenance for his child and he never said that he was busy with building work on the premises. Warrant Officer Jantjies saw no construction in progress at the premises. He also never placed the cash back into the plaintiff's pocket. He handcuffed both of them and proceeded to search the premises in their presence. There was only one bedroom, a type of dining room, no separate kitchen and a toilet. He searched the whole structure in the presence of the plaintiff and Bramwill. He found a firearm with two rounds on the wardrobe in the bedroom and a packet of tik in another wardrobe. He was wearing white gloves and he was holding the firearm and magazine in his hands on the photograph on page 127 of the docket. It was not Warrant Officer Msinga who was holding the firearm and magazine.

[31] Constable Ketteldas found loose dagga in toilet pipes and there were also loose tik straws. Photographs were taken of the items inside the structure. These were the photographs filed in the docket. All the items were collected and placed in forensic bags and removed to the police station together with the two arrestees.

[32] He issued notices of rights for both arrestees. Bramwill signed his form, but the plaintiff refused to sign. He again gave the plaintiff a full explanation of the procedure but the plaintiff still refused to sign. He handed the copy of the unsigned form to the plaintiff. He placed both of them in the police cells at Humansdorp and was subsequently instructed to transfer them to the police cells at Jeffreys Bay. He had no further contact with either of them. He found the explanation of the plaintiff that he knew

nothing about the drugs unacceptable and did not believe the plaintiff. Given the circumstances, it was clear in his view that drugs were being sold at the premises.

[33] He confirmed under cross-examination that he knew that the plaintiff could be detained due to what he had said in his statement. He indicated that all the photographs filed in the police docket were taken by Captain Wagenaar inside the structure. The drugs were found in different places inside the structure. All the items were collected and were confiscated.

[34] He testified that the padlocks on the security gate were locked from the inside. In response to questions from the court, he indicated that he did not see the locks physically being locked but it was only the plaintiff and Bramwill inside the structure. On further cross-examination he testified that he heard a noise inside the structure while they were removing the padlocks with a bolt cutter. This sounded as if the occupants were trying to get away. There were three entrances to the outbuilding, namely the main entrance where the police entered, a door leading to the main house akin to a kitchen or back door and a third door leading to the tap. The latter door was standing ajar when they entered the structure. He disagreed with the proposition of Mr Swarts that the suggestion made no sense that the occupants were trying to run away because if they did they must have returned given the fact that the police found them in the lounge near the main entrance. He indicated that the property was cordoned off by the police.

[35] He furthermore confirmed that he made his statement within a few hours of the arrest when the events were still fresh in his memory. When it was put to him that there was no mention in his statement of the drugs on the coffee table, he indicated that he made a mistake and forgot to refer to this. He agreed that this was an important aspect. It was put to him that Constable Ketteldas also did not mention in his statement that there were mandrax on the coffee table. He responded that this was what indeed happened and he just forgot to deal with it in his statement. He had nothing against the plaintiff who was unknown to him. He confirmed that there was no photograph of the table with the drugs in the police docket and indicated that he did not take the photographs. All the drugs found inside the premises, including those found on the coffee table, were confiscated and booked in. There was only one table inside the structure. He denied that dagga was found outside the structure.

[36] When the plaintiff's version was put to him, Warrant Officer Jantjies indicated that the plaintiff never said that Jenovin had gone to fetch building sand or that the plaintiff was doing building work on the premises. There was in any event no construction work in progress at the premises. He confirmed again that the plaintiff said he knew nothing about the drugs. He cannot say whether the drugs belonged to Jenovin but it was found inside the structure which was under the control of the plaintiff and Bramwill at the time. To his mind the plaintiff and Bramwill were the two runners, although they were nowhere specifically identified as such. He came to this conclusion on all the circumstances and it was logical that they must have known what was going on at the premises. As indicated, the plaintiff confirmed that he knew drugs were being sold at

the premises. Warrant Officer Jantjies also denied again that the money that was found in the plaintiff's pocket was put back into his pocket or that the plaintiff said that it was maintenance money. He did not know whether the plaintiff was related to Ms Grootboom, the owner of the property. He disagreed with the proposition that there was no basis for a reasonable suspicion justifying the plaintiff's arrest and indicated that he had every right to arrest the plaintiff under the prevailing circumstances.

[37] In re-examination he reiterated that at the briefing session before the raid, they were told that there were two runners at the premises. When they found two males inside the locked premises, one in possession of drugs and the other of money, he formed the suspicion that they were the runners. All the details of the confiscated items were recorded in the SAP13 register at pages 30-33 of exhibit "A" (the police docket). A total of 29 items, including the firearm and cash, were booked into the SAP13 register.

[38] Before proceeding to deal with the two disputed issues, it is necessary to set out the applicable legal position. It is trite that the first defendant bears the onus of justifying the arrest and initial police detention until the plaintiff appeared in court on 29 June 2018. This is common cause between the parties (cf *Mahlangu and another v Minister of Police* 2020 (2) SACR 136 (SCA) para [6] and the authorities collected in footnote 10; *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 284H-I; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 821A-C; *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) at para [17]).

[39] Once a lawful arrest is effected it brings the provisions of section 39(3) of the CPA into play. The subsection provides that an arrest has the effect that the arrested person shall be in lawful custody and shall be detained in custody until lawfully discharged or released from custody. The provisions of section 50(1)(c) of the CPA also become applicable and allow for the arrestee to be detained for 48 hours before being brought to court.

[40] It is not in contention that the plaintiff was brought to court within 48 hours of his arrest. It thus follows that if his arrest was lawful, his period of police detention would also be lawful. I now turn to the issue of the arrest.

[41] As indicated, the first defendant relied on the provisions of section 40(1)(a), (b) or (h) of the CPA as justification for the arrest of the plaintiff. These subsections provide as follows:

“A peace officer may without a warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;*
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;*

...

- (h) who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence – producing drugs or in the possession or disposal of arms or ammunition”.*

[42] Although sections 40(1)(a) and (h) were both also raised as justification for the plaintiff's arrest, the thrust of the case and the arguments were directed at section 40(1)(b) which I now turn to. It is trite that once the jurisdictional facts set out in section 40(1)(b) have been satisfied a peace officer may invoke the powers set out in the section. The jurisdictional facts are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds (*Duncan v Minister of Law and Order supra* at 818G-H; *Minister of Safety and Security v Sekhoto* 2011 (5) SA 567 (SCA) at para [6]). It is the requirement that the suspicion must rest on reasonable grounds that was contested at the trial. The remaining requirements were not in real contention. I will accordingly only consider this requirement with regard to the arrest. In the process I will also deal with the disputed issue concerning whether or not there were drugs on the coffee table. I turn to this issue next.

[43] The informative guidelines and principles in resolving factual disputes set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et CIE* 2003 (1) SA 11 (SCA) at para [5] are particularly apposite in deciding the disputed issue concerning the drugs on the coffee table. The court indicated that in order to come to a conclusion on disputed issues findings must be made on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

[44] The court in *National Employees General Insurance Limited v Jaggars* 1984 (4) SA 427 (E) at 440D-G held as follows with regard to mutually destructive versions:

“... where the onus rests on the plaintiff as in the present case and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on the preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of the witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.”

[45] I proceed to evaluate the versions of the respective witnesses with regard to the drugs on the coffee table mindful of the approach set out in the above authorities as well as the fact that the first defendant bears the onus of justifying the arrest.

[46] Warrant Officer Jantjies’ clear evidence was that there were drugs on the coffee table. This was part of a quantity of drugs found in various places inside the structure. His testimony was consistent in this regard. He was strenuously cross-examined by Mr Swarts on this issue but he never contradicted himself or deviated from his version in any material respect. The plaintiff was not known to him and he had no reason falsely

to implicate the plaintiff. He showed no hostility towards the plaintiff or an inclination wilfully to prejudice the plaintiff. His explanations are reasonable in the circumstances that it was an oversight on his part not to refer to the coffee table in his statement and that he cannot account for the fact that there was no photograph of the drugs on the coffee table filed in the police docket. He has made a good impression in general in the witness box and has not left the impression that he was prepared to deliberately tell an untruth to prejudice the plaintiff's case. He had no personal interest in the case and he did not stand to lose anything should the plaintiff be successful in his damages claim. His version that there were drugs and a blade that is used to cut mandrax tablets lying on the table, is supported by the fact, which is common cause, that drugs were being sold at the premises. The police confiscated a number of mandrax halves, some in the pocket of Bramwill, inside the structure. There were also quarter mandrax tablets confiscated which probably point towards the form in which the mandrax tablets were being sold either as quarter or half or full tablets obviously at differing prices. It is probable in the circumstances that the table was being used to cut up the mandrax tablets.

[47] The version of Warrant Officer Jantjies that there were drugs on the coffee table accordingly in my view coincide with the probabilities. The plaintiff on the other hand did not make a favourable impression as a witness. His version is unsatisfactory in various respects. He attempted to show that his presence at the property was for innocent purposes. His version that he came to do building work at the property is contradicted by both Ms Lorna Grootboom, the owner of the property as well as Warrant

Officer Jantjies. Ms Grootboom indicated in her police statement that there were no builders at the property while Warrant Officer Jantjies testified that he saw no building work in progress at the property. On the plaintiff's version he was already engaged in the building work prior to the day of his arrest. It entailed replacing the corrugated outline of the structure with brick and mortar. I have no hesitation in accepting Warrant Officer Jantjies' version that there was no evidence of such construction taking place at the premises. I also reject the plaintiff's version that he had informed the police on the scene that he was on the premises in order to do building work there. I accept Warrant Officer Jantjies' version that the first time the police learned about the plaintiff's allegation that he was engaged in building work on the premises was when the plaintiff filed his affidavit in the bail application. This is supported by the fact that a statement was taken from Ms Lorna Grootboom shortly after this affidavit was filed by the plaintiff. It is inconceivable that the police would not have verified the plaintiff's version there and then with Ms Grootboom who was present when the raid was effected. It is unlikely that the police would have waited until after the bail application before approaching Ms Grootboom in order to verify the plaintiff's version.

[48] Furthermore, the plaintiff's version that he was related to Ms Grootboom and that he was engaged in building work for her son, was contradicted by the statement that she did not know the persons who were arrested at the premises. It is common cause that the plaintiff was at all material times inside the structure, also when he was arrested. His statement in the extract from his bail affidavit quoted in paragraph [20]

above that he was outside when the police handcuffed him and found the drugs and firearm inside Jenovin's room, is patently untruthful.

[49] A further unsatisfactory aspect of the plaintiff's evidence is his allegation that Jenovin had locked himself and Bramwill inside the outbuilding while Jenovin had gone to buy building sand. He indicated that the reason for this unusual conduct was that Jenovin wanted to ensure that the plaintiff would not leave and go and start drinking. This explanation becomes senseless in the light of the undisputed evidence of Warrant Officer Jantjies that there were two further entrances to the structure and that the entrance that led to the tap was standing ajar when the police entered the structure. Jenovin must obviously have been aware of the two remaining entrances and that by only locking the security gate he would not have ensured that the plaintiff cannot leave and go and start drinking. The plaintiff's version in this regard is clearly mendacious in my view.

[50] It is furthermore highly unlikely that the Plaintiff would without demur have allowed himself to be locked up in premises where he knew drugs were being sold. Plaintiff is not a credible or reliable witness and his version does not accord with the probabilities.

[51] I accordingly find the evidence of Warrant Officer Jantjies that there were drugs on the coffee table to be true and reject the denial by the plaintiff in this regard as false.

[52] It follows in my view that there were reasonable grounds for the suspicion of Warrant Officer Jantjies that the plaintiff and Bramwill were the two runners and that

they were dealing in and were in possession of drugs justifying their arrest without a warrant in terms of section 40(1)(b) of the CPA. The evidence in this regard is overwhelming. Bramwill had drugs on his person and the plaintiff was in possession of cash of various denominations. There were drugs on the coffee table in their immediate vicinity and quantities of drugs were found inside the structure. They did not respond to the request of the police to open the premises. An innocent third party would have informed the police immediately that he cannot open up because he was locked in by the owner who has the keys. They waited instead for the police to remove the padlocks with a bolt cutter. Their behaviour constituted more than sufficient grounds for Warrant Officer Jantjies to conclude that they were part of the drug selling operation. In view of the conclusion I have come to there is no need to deal with possible justifications of the arrest in terms of section 40(1)(a) or (h).

[53] In the result I find that the plaintiff was lawfully arrested.

[54] Insofar as the judicial detention of the plaintiff from 29 June 2018 to 6 December 2018 is concerned, it is of fundamental importance that the magistrate's remand orders are not being impugned in these proceedings. The magistrate has neither been joined as a party nor faced any claim in these proceedings. The remand orders accordingly had binding effect until set aside and therefore remained valid. (*Mahlangu supra* para [17].)

[55] The remand orders were the factual cause of the plaintiff's judicial detention. The police can nevertheless incur liability for damages for unlawful detention,

notwithstanding the fact that the court has ordered such detention. Examples are the matters of *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) [*“De Klerk”*] and *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) [*“Woji”*]. *De Klerk* dealt with the situation of a “*reception court*” where the case of the plaintiff in that matter was postponed simply as a matter of routine. He was remanded in custody without any further ado on his first appearance without any consideration having been given as to whether he should be released on bail or otherwise. His arrest was unlawful and the police knew that he would be remanded in custody and would not receive bail at his first appearance although they did not oppose the granting of bail. The case was withdrawn before the next appearance. The majority of the court held that the issue to be decided was causation, namely whether the arresting officer at the time of unlawfully arresting the plaintiff, foresaw his continued detention by the court at his first appearance as a consequence of his unlawful arrest. The arresting officer confirmed as much. The court found that on the facts of the case the initial unlawful arrest was sufficiently closely linked to the judicial detention to warrant the liability of the police, i.e that it was the legal cause of the harm. What happened in the reception court was not “*an unexpected, unconnected and extraneous causative factor*” also referred to a *novus actus interveniens* (*De Klerk supra* para [81]).

[56] In *Woji* the case dealt with a further instance where the police would incur liability for judicial detention. In this instance unlawful conduct of the police, unrelated to a lawful arrest, intended to influence the decision to release the accused on bail, resulted in bail being refused where bail would otherwise have been granted but for such

unlawful conduct. The facts were that the plaintiff was lawfully arrested for robbery and remanded at his first appearance for a bail application. The investigating officer falsely alleged at the bail hearing that the plaintiff could be identified as one of the robbers on video footage of the incident. As a result, bail was refused. The charges were withdrawn against the plaintiff after the prosecutor viewed the footage and ascertained that the plaintiff could not be identified as one of the robbers. The police were held liable for the unlawful conduct of the investigating officer which constituted a separate delict from the arrest. As was stated in *Mahlangu supra*:

“[25] Thus, if pleaded properly, the police will incur liability for wrongful conduct subsequent to an arrest, whether lawful or unlawful, which caused a detained person to be deprived further of his liberty after the first court appearance, until that unlawfulness could be corrected.”

[57] In the present matter the onus was on the plaintiff to prove that the remand orders stood to be impugned. No attempt has been made to do so. These orders were thus valid and binding and caused the continued detention of the plaintiff which cannot be ascribed to any of the defendants. In order nevertheless to establish liability on the part of the defendants, the plaintiff had to prove wrongful conduct on their part which caused the further judicial detention of the plaintiff. The plaintiff dismally failed to do so. It is clear from the facts set out above that this was not an instance of a “*reception court*” where the defendants failed to bring material information to the attention of the remand court which would have resulted in the release of the plaintiff. The second disputed issue accordingly has to be decided in favour of the defendants. In this case

the plaintiff had to remain in custody unless he could satisfy the requirements for his release on bail. The bail application was brought as soon as circumstances permitted and there were no undue delays in this regard. The bail application was dismissed and plaintiff never appealed this decision or brought a new bail application. As indicated, the magistrate's orders are not being impugned in these proceedings. There was accordingly clearly no wrongful conduct on the part of the defendants that caused the further judicial detention of the plaintiff.

[58] It follows that there is no basis upon which the judicial detention of the plaintiff could be assailed. The claim in this regard (claim 2) falls to be dismissed. I have already indicated that the arrest and police detention of the plaintiff were lawful. The claim in the latter regard (claim 1) similarly falls to be dismissed.

[59] In the result I make the following order:

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

D O POTGIETER

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Mr L Swarts, instructed by Swarts Attorneys, Korsten, Port
Elizabeth

For Defendant: Adv V Madokwe instructed by the State Attorney, Port Elizabeth