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

Case No: 1697/2016

Date Heard: 23 November to 02 December 2020

Date Delivered: 6 May 2021

In the matter between:

JEFF MICHAELS PLAINTIFF

and

THE MINISTER OF POLICE FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS SECOND DEFENDANT

JUDGMENT

MULLINS AJ:

[1] On 23 May 2016 the Plaintiff, Jeff Michaels, issued summons against the First and Second Defendants, the Minister of Police and the National Director of Public Prosecutions respectively, the factual allegations in the amended particulars of claim being the following:

(a) On Wednesday, 3 December 2014 at approximately 11h00, at Kuyga, Greenbushes, the Plaintiff was arrested by one W/O Van Staden on a charge of robbery. The arrest was without a warrant;

(b) There was no reasonable and/or probable cause for the arrest, which was accordingly *animo iniurandi;*

(c) The Plaintiff's request for an identification parade at the time of his arrest was refused (or, in any event, ignored);

(d) The Plaintiff's Constitutional rights were not explained to him;

(e) Van Staden failed to comply with sections (4) and (8) of the Police Standing Order G341;

(f) Thereafter the Plaintiff was detained without just cause at the Kabega Park Police Station until Friday, 5 December 2014, when he was taken to Court;

(g) At this first appearance bail was opposed by the representatives of both Defendants and:

(i) The matter was remanded to 8 December 2014;

(ii) On 8 December 2014 the matter was remanded to 10 December 2014;

(iii) On 17 December 2014 the matter was remanded to 23 December 2014;

(iv) On 23 December 2014 the matter was remanded to 5 January 2015;

(v) On 5 January 2015 the matter was remanded to 8 January 2015, on which date the bail application was heard;

(h) After hearing the evidence the Magistrate refused bail;

(i) Thereafter the Plaintiff appeared in Court on a number of occasions until 7 December 2015, when the charge was withdrawn in Court on the basis that the complainant, when he saw the Plaintiff, stated that he, the Plaintiff, had not been involved in the robbery.

[2] It is not in dispute that at all times relevant to the events described above the First and Second Defendants servants were acting in the course and scope of their employment. Accordingly, vicarious liability is not in issue.

[3] Insofar as the unlawfulness of the arrest, initial detention and subsequent detention are concerned, the Plaintiff pleaded the standard allegations and, in addition, certain specific allegations, which will be dealt with hereunder.

[4] In its amended plea the First Defendant pleaded to the arrest and initial detention as follows:

(a) The Plaintiff was arrested by Van Staden on the instructions of W/O Weyers;

(b) The arrest was reasonable in that there was a reasonable suspicion that the Plaintiff had been involved in a robbery on 21 October 2014 at Kuyga, Greenbushes;

(c) The suspicion was based on a photograph identity parade ("the photo ID parade") in which the Plaintiff had been identified by the complainant as one of his attackers;

(d) On his arrest the Plaintiff's Constitutional rights had been explained to him and he had signed a document accordingly;

(e) It was denied that on his arrest the Plaintiff had requested an identification parade, alternatively if he had, it could not be granted at that point in time;

(f) The arrest was in accordance with sec 40(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the Act");

(g) The initial detention (i.e., up until 5 December 2014) was in accordance with sec 39(3) read with sec 50(1)(c) of the Act and, therefore, lawful.

[5] In respect of the subsequent detention the First Plaintiff pleaded that:

(a) After 5 December 2014 the further detention was in accordance with sec 60(11) of the Act;

(b) The charge was withdrawn on 7 December 2015 for reasons other than that the complainant had stated that he, the Plaintiff, was not involved in the robbery;

(c) The further detention was accordingly lawful.

[6] In its plea the Second Defendant pleaded that:

(a) On 5 December 2014 the Plaintiff was brought before Court and remanded in accordance with sec 60(11) of the Act;

(b) The Plaintiff was charged with the crime of robbery, which is a Schedule 1 offence as well as a Schedule 6 offence in terms of the Act.

[7] In summary, it is not in dispute that the Plaintiff:

(a) Was arrested without a warrant on 3 December 2014;

(b) Was detained by the police until his first appearance in Court on 5 December 2014;

(c) Was remanded in custody by the Magistrate;

(d) Made a number of appearances before the bail application was heard on 8 December 2014, which bail was refused;

(e) Remained in custody until 7 December 2015, when the charge was withdrawn and he was released.

[8] What is in dispute is whether:

(a) The initial arrest and detention was lawful;

(b) The subsequent detention was lawful.

[9] The first dispute concerns the First Defendant only and the second dispute both the First and Second Defendant.

[10] In respect of the arrest and initial detention the Plaintiff claims damages against the First Defendant in the sum of R150,000.00, plus interest at the legal rate from date of summons to date of payment, plus costs of suit.

[11] In respect of the subsequent detention the Plaintiff claims damages against the First and Second Defendants jointly and severally, the one paying the other to be absolved, in the sum of R4,000,000.00, plus interest at the legal rate from date of summons to date of payment, plus costs of suit.

[12] The Plaintiff was represented by Ms *M du Toit*, the First Defendant by Ms *N Msizi* and the Second Defendant by Mr *A Barnett*.

[13] At the outset of the trial there was an argument as to the duty to begin, it being the Plaintiff's view that the Defendants had this duty, the Defendants holding the opposite view. After hearing argument, as the onus in respect of the first cause of action rested on the First Defendant and in respect of the second cause of action on the Plaintiff, and because there were two Defendants before the Court whose defences to the claims were not necessarily on the same page, as it were (which subsequently proved to be the case), I ruled that the Plaintiff should begin.

[14] The Plaintiff (who testified in Afrikaans and gave evidence through an interpreter) testified as follows:

(a) He is 33 years old and lives at 42 Jansen Drive, Kuyga. He lives with his partner and their child;

(b) On the day of his arrest he was alone at home when Van Staden, who he knows well because he regularly patrols in the area, entered his residence. He was accompanied by a white female police officer. Van Staden informed him that he had come to conduct a search and that he was looking for drugs. He did not find anything and he then told the Plaintiff to come with him as there was a docket for one "*Jeff Fortuin*";

(c) The Plaintiff said that this was not his name, to which Van Staden replied that if that was the case he would be able to come home. Van Staden informed him that the matter concerned a robbery. On hearing this the Plaintiff said that he should be taken to the complainant, which, he says, Van Staden refused to do;

(d) The Plaintiff was placed in the back of a police van and taken to the police station. At the police station Van Staden said he was going to phone *"Antoinette"* (i.e., Weyers). Van Staden then took a photograph of the Plaintiff and sent it to Weyers. She apparently replied that *"it is him";*

(e) The Plaintiff was placed in a cell. His Constitutional rights were not explained to him (although he signature appears on the SAPS14A, the time being recorded as 12h15);[1]

[1] Trial Bundle "1A"; p. 15

(f) Initially he was alone in the cell, but during the night two other individuals were brought in. They were taken to Court the following day and he queried from one Capt Claasen, who he had grown up in front of, why he was not also been taken to Court. He received no explanation. He had no further contact with anyone for the rest of that day;

(g) At about 08h00 on Friday one Roelofse took him out of the cell and he was charged with robbery and interviewed. In response to the invitation to make a statement the Plaintiff stated:

> *"I never robbed anybody."*

(h) The Plaintiff signed this document.[2] Thereafter his fingerprints were taken and he was then taken to the New Law Courts. He appeared alone and he was asked whether he wanted a Legal Aid attorney, to which he replied in the affirmative. An attorney, who was present in Court, thereafter represented him;

(i) He was shown the charge sheet, which indicated that he was the fourth accused;[3]

(j) The Plaintiff was also shown a document in terms of which his rights had been explained to him by the Magistrate.[4] This document records, *inter alia,* that the Plaintiff:

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[2] Trial Bundle "1A"; pp. 21 – 26
[3] Trial Bundle "1C"; pp. 1 – 4
[4] Trial Bundle "1C"; p. 34

(i) Was one of the four accused;

(ii) The right to apply for bail had been explained to him;

(iii) He had been warned in accordance with sec 60(11)(B)(a), (c) and (d) of the Act;

(iv) He was represented by Legal Aid;

(v) He was in custody;

(k) As to why he was to remain in custody the Plaintiff was told that he had to wait for the other accused. However, he raised his hand and requested an identification parade, as he had no knowledge of any robbery. This was said in the presence of the prosecutor;

(l) On 8 December 2014 he again appeared in court, together with two of the other accused. They raise their hands and informed the Magistrate that the Plaintiff did not belong there. The Magistrate's response was that this would have to be dealt with at the trial;

(m) On this occasion the matter was remanded to 17 December 2014. The investigating officer, Weyers, was present at Court and took his fingerprints after his Court appearance;

(n) On 23 December 2014 he again appeared in Court and the matter was remanded for his *"Profile"* (which is an individual's criminal record). In the result the bail application had to be postponed again;

(o) On 5 January 2015 the bail application was again postponed, no reason being forthcoming;

(p) Finally, on 8 January 2015 the bail application was heard, the Plaintiff being represented by a Legal Aid attorney, one Terblanche. The Plaintiff gave evidence, as did Weyers;

(q) The Plaintiff did not testify as to what his evidence in the bail application consisted of. Weyers evidence consisted of her reading out an affidavit, which was handed in as an exhibit.[5] (I will return to this document in due course);

(r) At the conclusion of the hearing the Magistrate recorded the following:[6]

> *"Accused no 4 appears before Court 26*
>
> *Proceedings are mechanically recorded*
>
> *Judgment: Bail is hereby refused and denied for Applicant no 4."*

(s) The record goes on to state that the matter was postponed for further investigation, the Plaintiff to be remanded in custody;

[5] Trial Bundle "1C"; pp. 41 – 47
[6] Trial Bundle "1C"; p. 40

(t) In response to a question from me, the Plaintiff stated that the reason bail was refused was because of the evidence of Weyers;

(u) On the day the charges were withdrawn the Plaintiff was in Court with three other accused, the complainant was also present. The complainant pointed to the Plaintiff and said that he did not know him and that the fourth person who had robbed him was outside. In the result the case against him was withdrawn. Ms *du Toit* then took the Plaintiff to an entry in the investigating diary, dated 7 December 2015,[7] which record as follows:

> *"I Charles Owen Mamvura declare that I told Mr V Makasana a state prosecutor that Mr Jeff Fortuin acc 4 whom I was not sure about at ID parade (photos) is not involved in this case. I said so after I saw the fourth gentleman outside. I then asked that the case be withdrawn against Jeff Fortuin. All others I'm sure about and their involvement. I agree that the investigating officer can get a full statement from me about this. I signed this after it was read out to me and I am satisfied."*

(v) This statement is signed by the complainant and countersigned by the prosecutor.

[15] So much for the merits. Insofar as the conditions of his incarceration were concerned the Plaintiff testified that:

[7] Trial Bundle "1A"; p. 49

(a) The Kabega Park cell was extremely filthy and the blanket smelled;

(b) At St Albans Prison he was incarcerated in a cell with 62 other people. He had to sleep on the floor with only a blanket and no mattress, as he didn't qualify for one, having refused to join a gang;

(c) The shower and toilet in the cell were both in the open;

(d) He was confined to the cell for long periods of time;

(e) He constantly feared being raped;

(f) During this entire time he never once saw either of his two children;

(g) He appeared in court 18 times, which he found very stressful;

(h) The year in custody felt like 10 years.

[16] In describing his ordeal the Plaintiff became very emotional and started crying.

[17] The Plaintiff was subjected to a lengthy cross-examination by counsel for the First Defendant, Ms *Msizi*, during which his version of the events was thoroughly tested. By and large the Plaintiff withstood the cross-examination and it cannot be said that his evidence in chief was impugned to any degree. Many of the issues put to him were not within his knowledge and he was unable to comment.

[18] Of particular relevance is the affidavit of Van Staden[8] as to the circumstances surrounding the arrest, which was put to the Plaintiff. The relevant portion of which reads as follows:

> "2. *I was informed that Jeff Fortuin was a suspect in Cas 249 – 10 – 2014 by W/O Weyers. She informed me that he was identified in a photo id parade. I saw the photo's and recognised him as the same person on my phone also named Jeff Fortuin. She informed me that as soon as I find him he can be arrested.*
>
> 3. *I tasked a source to identify where he stays and to inform me when he is at his place of residence.*
>
> 4. *On 2014 – 12 – 03 at approximately 11:15 the source contacted me and informed me that the suspect is at home. I immediately went to the house that was pointed to me and found the man known to me as Jeff Fortuin. I informed him of the case. At the station I again took a photo and send it to the detective to verify if this is indeed the suspect to which she confirmed. He supplied me with his right name and I arrested him as Jeff Michael – – –."*

[19] The Plaintiff's only response to the quoted passage was that he denied that his rights were ever read to him by Van Staden. He did not dispute the contents of the affidavit.

[20] It was put to the Plaintiff that Van Staden would testify that he was satisfied as to the identity of the person suspected of the robbery as the photograph shown to him by Weyers matched the one that he already had on his phone. The Plaintiff's response was that he knew

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[8] Trial Bundle "1A"; pp. 13 - 14

nothing about any photographs (which is not actually correct, as his evidence was that at the police station his photograph has been taken by Van Staden and sent to Weyers).

[21] The Plaintiff was also referred to the photo ID parade,[9] which consists of a pro forma affidavit attested to by the police officer holding the identity parade (in fact, there was a second parade involving some of the other accused), an affidavit by Weyers and a list of names of the persons whose photographs are shown to the witness. The following passage from Weyer's affidavit was read out:

> *"I checked the index and according to it photo [13] thirteen belongs to Vusumsi "Star" Yolo and photo [2] two <u>which he is not sure of belongs to Jeff Fortuin."</u>* (My underlining).

[22] The Plaintiff was asked for his comment and he stated that he had none.

[23] I should add that the affidavit of Weyers was admitted in evidence by agreement and at the same time the complainant's statements[10] were admitted into evidence by agreement as well as an entry in the investigation diary, dated 21 October 2014,[11] in which it is recorded that the complainant will be able to identify one of the suspects (I will return to these statements below).

[24] Ms *Mzisi* then turned to the proceedings of the first Court appearance. The Plaintiff was asked:

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[9] Trial Bundle "1A"; pp. 29 – 34
[10] Trial Bundle "1A"; p. 2 and pp. 8 – 9
[11] Trial Bundle "1A"; p. 41

(a) Whether the Magistrate saw him raise his hand. He replied in the affirmative and said that he had been given an opportunity to speak;

(b) Whether the attorney representing him had access to the docket. He replied that according to what he observed she did not.

[25] That concluded the cross-examination on behalf of the First Defendant.

[26] Mr *Barnett* for the Second Defendant then cross-examined the Plaintiff. Not surprisingly, he did not deal with the arrest and initial detention, but instead concentrated on the events surrounding the first appearance in Court, and thereafter.

[27] It was put to the Plaintiff that:

(a) On his first appearance, when he said that he wanted representation he was indeed represented by Legal Aid attorney, who happened to be in Court. He agreed and said that she wrote down his name;

(b) On every occasion he appeared in Court, 18 times in total, he was represented. He agreed;

(c) Prior to the bail application his lawyer asked him whether he was prepared to testify at the hearing. He replied that he was;

(d) The reason for each postponement was explained to him by the Magistrate. He agreed;

(e) The documents before Court do not indicate that his attorney ever objected to a postponement. He replied that he would not know;

(f) He had informed the Magistrate that he wanted an identification parade. He agreed and said that the Magistrate informed him that his attorney would request one. He cannot say whether this was ever done;

(g) He was given an opportunity to speak in Court and he was listened to. He agreed;

(h) On the day of the bail application all four accused were in Court and accused 1 and 2 asked the Magistrate what he (the Plaintiff) was doing there as he was not involved in the robbery. He agreed with this proposition;

(i) The Magistrate informed him that whether or not he was involved in the robbery would be addressed at the trial. He agreed with this proposition;

(j) When the above was stated by the Magistrate his lawyer was present in Court. He agreed with this proposition;

(k) At the bail hearing he was represented by an attorney. He agreed with this proposition.

[28] That concluded the Second Defendant's cross-examination.

[29] In reply to a question in re-examination as to whether he was also known by the surname "*Fortuin*", the Plaintiff denied this. He also stated that he knew one of the other accused but that he did not know the complainant at all.

[30] Significantly, the Plaintiff stated that at no stage was the Magistrate informed by any of the prosecutors as to the details of the photo ID parade.

[31] The Plaintiff closed his case. Both Defendants brought an application for absolution from the instance.

[32] The test for absolution from the instance is trite, namely, whether at the close of a plaintiff's case there is evidence that a court, applying its mind reasonably to the evidence, could or might, not should, or ought to, find for the plaintiff. This has sometimes been referred to as *prima facie* evidence or as evidence sufficient to shift the evidential burden.

[33] The question to be asked is this: does the evidence led require an answer from the Defendants, or at the very least an explanation? I was of the view that it did, particularly in that in respect of the First Defendant as it bore the onus in respect of the first claim, and refused the application.

[34] The First Defendant called Van Staden (who gave evidence in Afrikaans through an interpreter). He testified that:

(a) At the request of Weyers he arrested the Plaintiff, who had been identified in the photo ID parade, which individual he recognised (the photograph having been sent to him by Weyers), as he also had the Plaintiff's photograph on his phone;

(b) The Plaintiff was known to him as he had been a suspect in the past. He knew him as Jeff Fortuin;

(c) He had been stationed at Kabega Park for 25 years and as Kuyga was a relatively small area he had seen many individuals grow up in front of him. That is also how he knew the Plaintiff;

(d) He did not know where the Plaintiff lived, but received information through an informant, and went to the house pointed out to him. He knocked on the door, introduced himself and advised the Plaintiff that he was being arrested for robbery;

(e) The Plaintiff did not ask any questions other than to request an opportunity to put on warmer clothing and collect his medicine, which Van Staden allowed him to do;

(f) As they were walking to the vehicle Van Staden informed the Plaintiff of his rights, namely: that he had the right to remain silent; that anything he said would be recorded and used in Court; that he had the right to legal representation of his choice; if he couldn't afford an attorney one would be provided by Legal Aid; that he had the right to apply for bail;

(g) He did not read from a document, but recited this from memory;

(h) According to Van Staden informing a suspect of his/her rights was standard procedure, which is to complied with as early as possible when effecting an arrest;

(i) He did this walking between the house and the vehicle as police vehicles often get stoned and he wanted to get out of the area as soon as possible;

(j) He drove to the police station where he contacted Weyers and informed her of the arrest. He took a photograph of the Plaintiff and sent it to her. She replied that it was the right person and that he should be kept in custody;

(k) He read the Plaintiff his rights (referring to SAP14A), which the Plaintiff said he understood, and the Plaintiff signed the document (which is in fact the case);

(l) He denied not explaining to the Plaintiff his rights as it is standard practise;

(m) The Plaintiff's personal belongings were removed and he was then taken to the cells;

(n) He then wrote up his pocketbook;

(o) He then wrote up the arrest affidavit (which he read into the record);

(p) He confirmed an entry in the occurrence book relating to the arrest (which he read into the record);

(q) He confirmed the details of the cell register;

(r) He denied that the Plaintiff had requested to be taken to the complainant or that he had requested an identification parade;

[35] Mr *Barnett* on behalf of the Second Defendant had no questions.

[36] Ms *du Toit*, on the other hand, cross-examined Van Staden at length. Of relevance was the following:

(a) Van Staden admitted that he was acting on the instructions of Weyers and that he had no knowledge of the case;

(b) He did so because as an experienced detective he accepted Weyers' word;

(c) He denied that he searched the Plaintiff's house;

(d) He denied that he did not inform the Plaintiff of his rights;

(e) He photographed the Plaintiff at the police station and sent the photograph to Weyers in order to make sure he had the correct person;

(f) He admitted that his statement/s omitted certain details which he had now testified about (which issue is dealt with below);

(g) The Plaintiff was known to him as he was known to be involved in criminal activities;

(h) He was alone on the day, there being no white female with him;

(i) He had lost his pocket book;

(j) He had no knowledge of statements made in the matter, which included the photo ID parade;

(k) Even if Weyers had advised him that there was some doubt as to the identity of the Plaintiff, he would still have arrested him in the circumstances;

(l) Finally, in response to the proposition that he had been responsible for the Plaintiff having spent a year in custody, he responded that based on Weyers' experience he had accepted her word and arrested the Plaintiff.

[37] In re-examination Ms *Msizi* dealt with Van Staden's pocket book and he stated that he had got the Plaintiff to sign the relevant entry, but that he had lost his pocket book.

[38] Not surprisingly, Ms *du Toit* objected to this evidence in that it did not arise out of cross-examination. She was quite correct in this regard, but I allowed the line of questioning as Ms *Msizi* explained that she had omitted to deal with the issue during examination in chief.

[39] The point Ms *Msizi* wanted to make is that although there was no reference to a pocket book having been signed by the Plaintiff, that did not mean that it did not happen. The same

applied to other omissions in his statement, such as the reading of the Plaintiff's rights. The failure to mention this (and certain other aspects) did not mean that it did not happen.

[40] As a result of this new evidence Ms *du Toit* was given an opportunity to further cross-examine Van Staden. She dealt at some length with the procedure to be adopted when a pocket book is lost and that Van Staden had failed to follow the procedure. It was put to him that one cannot be issued with a new pocket book without the completed one being handed in. He did not dispute this but said that it was done all the time and that his old book was not handed in as it had been lost.

[41] That completed the First Defendant's case. I should add that Ms *Msizi* had advised the other parties at the commencement of the trial that she would not be calling Weyers as she was indisposed and, accordingly, unavailable.

[42] Mr *Barnett* closed the Second Defendant's case without leading any evidence.

[43] Insofar as the unlawful arrest and detention is concerned, the fact that Weyers was not called does not, in my view, harm the First Defendant's case. Her unavailability was explained and not disputed. What she did, and why, is before the Court and is not in dispute. Whether she was justified on those facts in requesting Van Staden to arrest the Plaintiff is another matter. Her further conduct of the case, or lack thereof, is also not in dispute (and is dealt with below).

[44] Weyers held a photo ID parade in which the complainant in the robbery case identified the Plaintiff, although he had some doubts. Weyers sent Van Staden the photograph with instructions to arrest the Plaintiff, if he could. Van Staden recognised the individual and duly

complied. Moreover, at the police station he took a photograph of the Plaintiff and sent it to Weyers who confirmed that he had the right person. In the result he detained the Plaintiff.

[45] The crisp question is this: were there sufficient grounds to arrest the Plaintiff? I am of the view that there were. Despite the equivocal identification, it was a positive identification by the complainant, which justified the arrest. It would have been a brave police officer who ignored the identification, notwithstanding the tentative nature thereof (which is dealt with below).

[46] Relying on the **Ralekwa v Minister of Safety and Security** **2004 (1) SA 131 (T)** at para [14], Ms *du Toit* submitted that the arrestor must form his own suspicion before arresting a suspect, and may not rely on someone else's opinion. The test is objective.

[47] **Ralekwa** is distinguishable in that it is common cause that the actual arresting officer in the present matter was Weyers. Van Staden was merely carrying out her request. See **Minister of Justice v Ndala** **1956 (2) SA 777 (T)**. However, that does not completely exonerate Van Staden. As the "instrument" of the arresting officer he also has a duty to ensure that the arrest is justified.

[48] I am satisfied that Van Staden had no reason to second guess the information provided to him by Weyers. In fact, he went the extra mile and at the police station sent Weyers a photograph of the Plaintiff in order to confirm that he had right person.

[49] I do not place any weight on the fact that the Plaintiff denied being involved in the robbery and demanded that he be taken to the complainant (if he did). If every suspect who denies having committed an offence is allowed to go free, there will never be an arrest.

[50] Thus, I conclude that in effecting the physical arrest of the Plaintiff Van Staden acted reasonably in the circumstances.

[51] But what of Weyers? She was armed with the result of a photo ID parade which, on any version, was open to some doubt. Notwithstanding this element of doubt, objectively speaking, I am of the view that there was sufficient grounds for Weyers to suspect the Plaintiff as being one of the robbers and have him arrested. Of course, the subsequent events are another matter and are dealt with below.

[52] A final word in respect of Van Staden's evidence. In cross-examination and in argument he came in for a lot of criticism from Ms *du Toit* which criticism, in my view, was not justified. He received information which he had no reason to question. As he pointed out, Weyers was an experienced detective and he had no reason, or basis, for doubting her. He went to the extra trouble of sending her a photograph from the police station to confirm that he had the right person. Also, the fact that his evidence and his various statements differ in certain respects is hardly critical and is in any event understandable in the circumstances. See **S v Mafaladiso 2003 (1) SACR 583** at 593e – 594h. The loss of his pocket book and the failure to report it may have been a breach of the police's standing orders, but it did not affect his credibility, or reliability, in this matter.

[53] In **Duncan v Minister of Law and Order 1986 (2) SA 805 (A)** at 818G – H it was held that jurisdictional requirements for a lawful arrest without a warrant were that:

(a) The arrestor must be peace officer;

(b) The arrestor must entertain a suspicion;

(c) The suspicion must relate to an offence referred to in Schedule 1 of the Act;

(d) The suspicion must be reasonable.

[54] I am satisfied that the First Defendant has acquitted the onus resting on it on a balance of probabilities and accordingly find that the Plaintiff's first claim stands to be dismissed.

[55] I turn now to the second claim, i.e., the further detention. The first issue to resolve is: when did the initial detention cease and the further detention commence?

[56] The Plaintiff appeared in Court on no less than five occasions prior to the bail application. The period involved was a total of 34 days.

[57] Sec 50(6)(d) of the Act provides that a bail application may be postponed for periods not exceeding seven days, on good cause being shown.

[58] I accept that the bail application could not take place on the first appearance, (5 December 2014), nor on the second appearance (8 December 2014), nor on the third appearance (17 December 2014), nor on the fourth appearance (23 December 2014) as the profiles were not available. But thereafter there was ample opportunity for the State to get its act together and make the necessary arrangements. Neither Defendant showed any urgency and the fact that there were other accused involved cannot be used as a justification for keeping the Plaintiff in custody any longer than was absolutely necessary.

[59] Perhaps I am being overly lenient to the Defendants, but in the circumstances I hold that the bail application could and should have been held on the Plaintiff's fifth appearance, namely 5 January 2015.

[60] Thus, if the Plaintiff has a claim for the further detention, it commenced on that date.

[61] The evidence led in the bail application is crucial. Unfortunately, there is no evidence before me as to what the Plaintiff testified in the application. What is before me, however, is the evidence of Weyers, which is contained in her affidavit prepared for the bail application. Three passages in this document are of relevance:

(a) In response to the provisions of sec 60(6)(g) Weyers states:

> *"The case against the accused are* (sic) *strong. He was identified on a Photo Identity Parade in Kabega Park Cas 249/10/2014. <u>Witnesses know the persons who robbed them</u>."* (My underlining).

(b) In response to the provisions of sec 60(7)(b) of the Act Weyers states:

> *"Statements are filed in the docket <u>where the victims name their attackers</u> and Photo Identification Parade was held."* (My underlining).

(c) In response to the provisions of sec 60(8)(A)(f) of the Act Weyers states:

> *"The accused will appear today to apply for bail. He is linked in Kabega Park Cas 249/10/2014. House Robbery via a Photo Identification Parade held. There is DNA analysis which needs to be obtained."*

[62] The complainant, Mr Mamvura made two statements. In both of them he mentions "*Star*". In neither statement does he mention the Plaintiff's name. The high watermark in this regard is contained in the following passages:

(a) *"… I saw four 4 <u>unknown</u> men coming into my house, but I can point out one of them …"* (My underlining).

(b) *"… I saw "Star" standing inside my place and he was denying taking the cellphones. I got up and started asking "Star" where are the cellphones and he said he doesn't know, he then shouted for his friends and in a few moments three <u>unknown</u> males came into my place, two of the three males are short coloured ones, one is tall black male (I can point him out if I see him again)…"* (My underlining).

[63] An entry in the investigation diary, which is dated 21 October 2014 (being the date of the offence), records:

"The complainant alleged that he will be able to identify <u>one</u> of the suspects." (My underlining.

[64] This can only be a reference to the individual referred to on numerous occasions in the docket as "*Star*". The other three suspects were unknown to the complainant.

[65] Then there is the outcome of the photo identification parade:

(a) with reference to the plaintiff the following is recorded:

"± 1 minute – Photo 2 but not sure." (My underlining).

(b) In her affidavit in support of the photo ID parade Weyers says:

> *"I checked the index and according to it photo [13] thirteen belongs to Vusumzi "Star" Yolo and photo [2] which he is not sure of belongs to Jeff Fortuin."* (My underlining).

[66] On what basis it can be deduced from the above that the Plaintiff was known to the complainant is a mystery. The opposite is the case. Not only was he unknown to the complainant, his identification was tentative, at best.

[67] All this information was available to both the First and Second Defendants, as it contained in the docket from the outset. Thus, it defies logic that Weyers could have made such definitive statements in her evidence in the bail application. It is not surprising that the Magistrate refused bail on the evidence before him/her.

[68] In addition, the following undisputed facts are also relevant:

(a) The photo ID parade was equivocal. This is not in dispute;

(b) At his first appearance the Plaintiff put up his hand and said he was not involved. Neither Defendant led any evidence to gainsay this;

(c) At a subsequent appearance two of his co-accused said that he was not involved in the robbery. Again, neither Defendant led any evidence to gainsay this;

(d) When the matter eventually came to trial the complainant confirmed that he was not involved. The Plaintiff's statement in the investigation diary confirms this.

[69] In fact, having regard to what is stated above, what is surprising is that on the evidence available to the State (the First and Second Defendants) bail was opposed at all.

[70] Freedom of the individual is one of the paramount rights entrenched in the Bill of Rights. It is trite that there is a duty on the State (be it the police or the prosecution) to bring all relevant facts to the attention of the Court when considering bail. That clearly did not happen in this case. On the contrary, the Magistrate was misled by the evidence presented by the State.

[71] What compounds the issue is that, despite the "dodgy" identification, Weyers never deemed it advisable to hold a proper face-to-face identification parade. Nor did the prosecutors involved deem it appropriate to advise that one be held. Had either taken this step, at worst for the Defendants the period in which the Plaintiff was unnecessarily detained would have been substantially shortened.

[72] In cross-examination of the Plaintiff Ms *Msizi* went to great lengths in an attempt to distance the First Defendant from any responsibility <u>after</u> the Plaintiff's first appearance in Court. In this regard she was unsuccessful. The fact that the matter had been handed over to the Second Defendant and the Plaintiff was remanded in custody by the Magistrate did not mean that the investigating officer could thereafter wash her hands of the matter. Weyers had a duty to draw to the prosecutor/s the weakness in the State's case and to testify at the bail application that the Plaintiff was not known to the complainant and that his identification was uncertain. She failed to do so. In fact, she testified to the contrary.

[73] Furthermore, despite having more than a year to do so, she never arranged a proper identification parade which, had she done so, would have resulted in the immediate release of the Plaintiff and the withdrawal of the charge.

[74] Mr *Barnett* was at pains to distance the Second Defendant from any responsibility after the Magistrate had made an order remanding the complainant in custody, in that thereafter the matter was out of the prosecuting authority's hands. This ignores the fact that the prosecutor/s who dealt with the matter had access to the docket and could and should have brought the information contained therein to the Magistrate's attention. Had this been done an entirely different picture would have been painted, particularly at the bail application.

[75] It does not help the Second Defendant that it closed its case without calling any witnesses. No explanation was forthcoming as to why the Second Defendant elected not to place its version before the Court. The prosecutor/s involved must surely have been available. In any event, I was not advised to the contrary.

[76] It was argued that the Plaintiff could have appealed against the Magistrate's decision to refuse bail. This argument suffers from two difficulties. Firstly, it should not have been necessary for the Plaintiff to go on appeal to correct a manifest injustice. Secondly, the appeal Court would have been faced with the same presented in the Magistrate's Court and, based on that evidence, would in all probability come to the same conclusion.

[77] As it is, due to the failure by the servants of the First and Second Defendants the Plaintiff spent just over of a year in custody, which is a considerable time, in awful conditions.

[78] From the aforegoing it is clear that I am satisfied that the Plaintiff has proved the second claim. I find that the servants of both Defendants were negligent in the manner in which they (mis) handled the subsequent detention of the Plaintiff, and that his subsequent detention was unlawful. They are concurrent wrongdoers. It is not necessary to apportion the blame. The servants of both Defendants were, in my view, equally remiss in the exercise of their legal duties.

[79] Which brings me to the difficult issue of quantum. On a cursory perusal of the case law it is evident that there is no consistency whatsoever, in the sense that there is no correlation between the length of time spent in custody and the amounts awarded. There is no such thing as a "daily rate", as it were. The Courts are vested with a discretion, which must obviously be judicially exercised.

[80] The difficulty a Court has in deciding what delictual damages to award was summed up by Watermeyer JA in **Sandler v Wholesale Coal Supplies Ltd** 1941 AD at 199, as follows:

> *"The question now arises whether this Court should increase the amount awarded to the appellant for pain and suffering and permanent disability. In considering that question it must be recognise that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general*

considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[81] In determining quantum I have had regard to the authorities referred to me by Ms *du Toit*, in particular **Msongelwa v Minister of Police [2012] ZAECMHC 10**, **Mofokeng & Another v Minister of Police [2015] ZAGPJHC 30**, **Malefetsane Mofokeng v Minister of Police and Another** (unreported) **Case No. 29678/2014**; Gauteng, Pretoria.

[82] Apart from the fact that there is no consistency, from the authorities referred to, three things emerge:

(a) The Plaintiff's personal circumstances play an important role;

(b) The conditions of the incarceration play an important role;

(c) The defendants' actions, or inaction, play an important role.

[83] Insofar as the Plaintiff's personal circumstances are concerned he lives in a shack in what appear to be an informal, or semi-formal, settlement. Although he professed to work as a "gardjie" there was no claim for loss of earnings and I intend working on the basis that, at best, he was occasionally employed. I also take into account that he had had a run-in with the law in the past.

[84] The circumstances of his incarceration were extremely dire. That anyone, let alone a person who had done nothing wrong, should be forced to endure the conditions in which the Plaintiff was detained, defies ones credulity.

[85] The attitude of the servants of both Defendants leaves much to be desired. At the trial the First Defendant tried to shift the blame on the Second Defendant; the Second Defendant tried to shift the blame onto the Magistrate. In truth their servants of both Defendants adopted a laissez faire attitude and failed dismally in their duties.

[86] The Plaintiff claimed R4,000,000.00 and persisted with this sum in argument. This sum, in my view, is not justified. Taking all the relevant facts into account I am of the view that an award of R2,000,000.00 will do justice to the case.

[87] The Plaintiff has claimed interest as from the date of summons, being 26 May 2016. Ms *du Toit* referred me to a number of authorities, in particular **Blything v Minister of Safety and Security & Others** **[2016] ZAGPPHC**, and the authorities quoted therein, in which the Court's discretion conferred on it in terms of sec 2A(2)(a) of the Prescribed Rate of Interest Act, 55 of 1975, was discussed. I can see no reason not to follow that judgment.

[88] In the circumstances I make the following order:

1. The First and Second Defendants are liable to the Plaintiff as and for damages for unlawful detention as from 5 January 2015 to 7 December 2015, jointly and severally, the one paying, the other to be absolved, in the sum of R2,000,000.00.

2. The said sum will bear interest at the legal rate as from date of service of summons (26 May 2016), to date of payment.

3. The First and Second Defendants are jointly and severally liable for the costs of suit, the one paying, the other to be absolved.

N.J. MULLINS
ACTING JUDGE OF THE HIGH COURT

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