

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

CASE NUMBER: 75961/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 28 March 2023

SIGNATURE:

In the matter between:

REUL DAVID MBATSANA

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

CONSTABLE GODFREY MENTOOR
DEFENDANT

SECOND

NELISIWE MSIMANGA

THIRD DEFENDANT

SUMMARY: *Delict- Unlawful arrest and detention- Plaintiff instituted action against the Defendant for damages suffered for unlawful arrest, detention and assault while in the cells- Whether Plaintiff was unlawfully arrested and detained at Mamelodi Police Station- Whether the arresting officer assaulted the plaintiff – Whether the arresting officer exercised the discretion to arrest reasonably- Whether the jurisdictional requirements are met for a claim of malicious proceedings.*

ORDE

Held: Judgment granted in favour of the plaintiff on merits for unlawful arrest, detention and assault. The claim for malicious proceedings is dismissed.

Held: Determination of quantum is postponed sine die.

Held: First Defendant is ordered to pay costs on party and party scale.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an action for damages instituted against the defendants for an alleged unlawful arrest and detention, assault, malicious proceedings of instituting a criminal case of theft, past and future medical expenses, legal costs and general damages. By agreement between the parties, merits were separated from quantum in terms of Rule 33(4) of the Uniform Rules of Court. The trial proceeded on merits in respect of the alleged arrest and detention, assault and malicious proceedings of instituting criminal case of theft. The claims in respect of past and future medical expenses; legal costs and general damages will stand over for later adjudication. Adv. Sidzumo appears for the plaintiff and Adv. Moja appears for the defendants.

BRIEF BACKGROUND:

[2] On 17 April 2019 the plaintiff was home in company of a family friend when he was confronted by Constable Mentoer who was on duty for an alleged crime of theft of motor vehicle and taken to Mamelodi Police Station. The plaintiff was placed in the locked reception area of the cell building for a few hours before he was taken out. As a result of that incident, the plaintiff issued summons on 9 October 2019 claiming damages in the sum of R1 320 000 00 (one million three

hundred and twenty thousand rand).

ISSUES FOR DETERMINATION:

[3] The defendants in their amended plea aver that the plaintiff was lawfully arrested in terms of section 40(1) (j) of Criminal Procedure Act 51 of 1977 (The CPA). The arrest of the plaintiff is common cause. It is further common cause that the plaintiff was taken to Mamelodi Police Station and placed in the locked reception area of the police cells building. The issues for determination are the following-

[3.1] Whether or not the arrest of the plaintiff was lawful;

[3.2] Whether or not the plaintiff was detained at the time he was placed in a locked reception area;

[3.3] Whether or not the plaintiff was assaulted.

[3.4] Whether or not the second and third defendants maliciously instituted criminal proceedings against the plaintiff for theft of motor vehicle.

DUTY TO BEGIN:

[4] Ordinarily the duty to begin in claims involving unlawful arrest rests with the defendant who must justify the arrest. However, *in casu* by agreement of the parties the duty to begin has fallen upon the plaintiff due to the claim for assault. The plaintiff has the onus to prove his claims on a balance of probabilities.

PLAINTIFF'S CASE:

[5] The plaintiff testified that on 17 April 2019 he was home in the company of his friend Mr Justice Mabuza. The door was opened but the burglar bars were locked. There were people inside the yard who were shouting and swearing saying they will teach a lesson to the 'tsotsi'¹ pastor. He then asked Mr Mabuza to unlock the burglar bars who complied. Two police officers who were armed with rifles

¹ The term 'tsotsi' is a vernacular word meaning a scoundrel or crook.

entered the house. One police officer identified as Constable Mentoer manhandled the plaintiff and pushed him onto the sofa. Mr Mabuza remonstrated with Constable Mentoer not to manhandle the plaintiff and asked that the issue be discussed instead. Constable Mentoer then assaulted the plaintiff by slapping him with an open hand and punching him with fists demanding keys but refused to explain what keys he was looking for. Mr Mabuza asked Constable Mentoer to stop the assault. Constable Mentoer left the plaintiff and went around the house opening drawers searching for the keys which were not found. At that moment two females entered the house and the plaintiff recognised one of them as Ms Nelisiwe Msimanga whom he had a contract with for the sale of an Audi in respect of which he owed the balance to.

[6] When Constable Mentoer could not find the keys, he approached the plaintiff and grabbing him by the waist. He again assaulted the plaintiff and kicked him before pushing him inside the police van where he lost consciousness. The ordeal had lasted for two hours. The plaintiff was transported to Mamelodi East Police Station where on arrival he was dragged out of the police van and further assaulted by Constable Mentoer until he was locked inside the police holding cells. Constable Mentoer confiscated the plaintiff's wallet which contained cash and cell phone. Mr Mabuza who had followed the police vehicle to the police station was requested by the plaintiff to call his wife and to ask her to contact a lawyer. A short while later Constable Mentoer entered the cells where the plaintiff was locked in and continued assaulting him. Before leaving the cell, Constable Mentoer took out plaintiff's cell phone which he hit on the table together with the wallet which damaged the cell phone. Four hundred rand was missing from the wallet. The plaintiff's younger brother who was a police officer in another police station arrived after he was contacted by Mr Mabuza. After a long while Constable Mentoer returned to the cell and took the plaintiff to an office called Office Number 1. Inside this office there was a high ranking officer who introduced himself as Captain Mokwele and ordered Constable Mentoer to leave the office as he was swearing at the plaintiff. Constable Mentoer left the office. Captain Mokwele noticed that the plaintiff's eye had a blood clot and enquired from the plaintiff what happened to the eye who reported that he was assaulted by Constable Mentoer.

[7] Constable Mentoer was called back into Office Number 1 who arrived with two females among them was Ms Nelisiwe Msimanga. The issue of the car was discussed and it was resolved that the plaintiff must return the car to Ms Msimanga notwithstanding the fact that the car was registered in his name. The plaintiff was then released around midnight and was transported home by the younger brother. The plaintiff went home to take the car keys and went to Ms Msimanga's house and handed the keys to her. The following day the plaintiff went to Mamelodi Day Hospital to seek medical attention but found the hospital full so he decided to self-medicate until his consultation with his own doctor six days after the alleged assault. The doctor noted his clinical findings on the J88 however erroneously noted that the plaintiff had pains on the right ear and omitted to note the eye with blood clots. Plaintiff remarked that Captain Mokwele's statement that he had no visible injuries was not true. A case was opened by the plaintiff for the assault, the loss of money from his wallet and the damage to his cell phone but had not knowledge what eventually transpired to the case. Plaintiff remarked that Ms Msimanga's statement that he was rude to the police was a lie.

[8] Plaintiff stated that Captain Mentoer's statement was incorrect about what happened on the night he was arrested. According to the plaintiff, it was incorrect that the car was parked two houses away from his house and that he refused to speak in private with the police. It was further incorrect that the situation became tense which forced Constable Mentoer to take him to the police station. Plaintiff denied that he was arrested for fraud in respect of the Audi and explained that he had an agreement with Ms Msimanga for the sale of the car including registration of the car in his name. Plaintiff denied that the police introduced themselves upon arrival at his home and reaffirmed that he was detained for five hours. In cross examination, plaintiff insisted that when the police officers arrived at his home, they were swearing. When asked to explain the discrepancy with the particulars of claim which alleged that Constable Mentoer introduced himself, he reaffirmed that he did not. He explained that the averments could have been caused by his mistake at the time he narrated the events.

[9] Plaintiff was asked about the clinical findings of his doctor and he remarked that he did not want to answer on behalf of the doctor. He conceded that

the doctor did not see any swelling and bruising on him at the time of consultation. When asked why Captain Mokwele did not see any blood clots on the eye, plaintiff remarked that Captain Mokwele did not examine him but merely commented about the eye. Plaintiff denied the observations that Captain Mokwele noted in his statement and further denied that he asked for permission to call his attorney. He explained that he opened a case the following day. He conceded that Ms Msimanga did not open a fraud case against him. When asked why he was taken forcefully if he was cooperating with the police, he remarked that he did not know. He conceded that there were mistakes in the particulars of claim and explained that he regarded Mr Mabuza to be more than a friend but family. He conceded that he did not pay for the car and owed Ms Msimanga for it. He indicated that after he was released from the cells, he was taken to an office and told to hand the car keys to Ms Msimanga. His brother took him home to get the keys which he dropped at Ms Msimanga's place before taking him to the Mamelodi Hospital.

[8] Mr Justice Mabuza who is the plaintiff's friend testified that he was aware of the agreement between the plaintiff and Ms Msimanga regarding the sale of the car (A4 Audi). Ms Msimanga sold the car to the plaintiff after a mechanic was unable to repair it and plaintiff agreed to pay on terms. On the day of the plaintiff's arrest, he testified that during the day he and the plaintiff had attended a meeting with Ms Msimanga regarding the car which meeting did not end well. They left the Audi at or near Ms Msimanga's home and they walked to the plaintiff's home. While they were inside the plaintiff's home, it was around 18h00 when they heard noise outside and on the request of the plaintiff he opened the burglar door. He recognised police officer Mentoer whom he knew who was with his crew. Constable Mentoer was in possession of a rifle and was swearing. Constable Mentoer entered the house without greeting the occupants or explaining the reason for the police presence. Constable Mentoer pulled his rifle towards his back and proceeded to slap the plaintiff with open hands on his face, kicking him and demanding keys. Constable Mentoer pushed the plaintiff who fell onto the sofa. He reprimanded Constable Mentoer for his behaviour. According to Mr Mabuza, Constable Mentoer without permission proceeded to search around the house looking for the keys. The plaintiff kept asking Constable Mentoer if he was arrested.

[9] Mr Mabuza insisted that the plaintiff was not rude and testified that during the incident, constable Mentoors crew was standing there without saying anything. Constable Mentoors using the belt that plaintiff was wearing he pulled the plaintiff and took him to the police vehicle and pushed him inside. The plaintiff was driven to the police station where he was locked inside the cell. Mr Mabuza testified that after locking the plaintiff's house he walked to the police station which took him time approximated to be an hour. Upon arrival at the police station he found the plaintiff locked in the entrance area of the cells. He testified that there was a gentleman who was sent to see the plaintiff (who was a lawyer) but was refused entry. He stated that plaintiff's brother also arrived at the police station. Around midnight, he, together with the plaintiff and his brother left the police station. They first took the car keys to Ms Msimanga's place before proceeding to Mamelodi Hospital. Upon realising that the hospital was full and they will not be assisted they left. He noticed a stain on the eye of the plaintiff.

[10] Mr Mabuza testified that he tried to nurse the plaintiff by rubbing his body where he was feeling pain. When asked to explain the discrepancy in the time as reflected on his statement, he indicated that there were many mistakes on his statement and had been told that the statement was to give an outline. He reaffirmed that he did see the dot or stain in the plaintiff's eye but could not recall which eye that was. He stated that he did see the plaintiff limping after the incident. It was put to him that Ms Msimanga's evidence would be that the plaintiff was rude, that was disputed. He remarked that the version that the plaintiff was not assaulted was not true.

[11] Mr Morrice Mbatsana is the plaintiff's brother. He testified that he received a report from Mr Mabuza who reported that his brother had been arrested and assaulted. He proceeded to the police station and took a while to get there due to traffic congestion on the way. Upon arrival at the police station, he met a police officer and requested permission to see his brother which was refused. The said police officer was later identified as Constable Mentoors used swear words and blocked entrance to the charge office. He enquired from the police officer what the issue was before deciding to go back to his car to wait. He noticed that a lawyer

was also refused entry into the charge office. After waiting for two to three hours he saw the plaintiff coming out of the charge office. He noticed that he was walking with a limp and that his clothes were crumpled. He observed that the plaintiff's left eye was slightly swollen and red. He testified that the plaintiff got into the vehicle and he drove him home. Upon arrival at his house, the plaintiff went in and returned in possession of keys which they took to a certain house before proceeding to the Mamelodi Hospital. He testified that Mr Mabuza went inside the hospital and when he returned, he reported that the hospital was full. On getting the report from Mr Mabuza, he also went inside to verify for himself and found that the hospital was full. He left the plaintiff and Mr Mabuza at the hospital. When asked what the time was when he waited at the police station, he indicated that his cell phone battery died and he was unable to tell the time.

[12] Mr Mbatsana conceded that he was more worried about the plaintiff and that he did not ask why he was arrested. He further conceded that he was angry about the treatment he received at the police station. It was put to him that the doctor (who completed the J88) did not note that the eye was swollen, he remarked that he had no reason to advance why that was so. It was put to him that Constable Mentoore will deny that he insulted him, he remarked that Mentoore would be lying. He denied that when he made enquiries about his brother he was directed to where he was. With that the plaintiff's case was closed. There was an application for absolution from the instance which was considered and dismissed with costs.

DEFENDANTS' CASE:

[13] Sergeant Alec Isaac Mogagabe was on duty on 18 April 2019 when he attended to a complaint in Mamelodi at the plaintiff's home. The plaintiff was taken to the police station in order to open a case of assault, theft and damage of a cell phone. He took down the plaintiff's statement. He testifies that he proposed to take the plaintiff for medical treatment as he complained of back pain and knee pain but the plaintiff indicated that he will go to his own doctor. He examined the plaintiff but did not see any visible injuries. The plaintiff did not inform him about an eye injury. Sgt Mogagabe conceded in cross examination that he was not a doctor but

reaffirmed that he saw no visible injuries on the plaintiff. He indicated that he did not see any limping on the plaintiff.

[14] Constable Evan Lee- Grant De Wee testified that on 17 April 2019 he was on duty with Constable Mentoer when a report of intimidation was received through the police radio. They responded to the complaint. The complainant, made a report that the plaintiff was refusing to hand over her car keys and was aggressive. This prompted a follow –up of the allegations which led them to the plaintiff's home. They knocked at the door, introduced themselves and informed the occupants the reason for being there. Constable Mentoer had exchange of words with the plaintiff who was not cooperative, asking why they were there and what car keys were they referring to. Constable Mentoer man-handled the plaintiff by using the belt and informed the plaintiff that if he will not cooperate he will take him by force to the police station. The plaintiff was held by the belt and taken to the back of the police van and taken to the police station. Constable De Wee testified that the plaintiff was taken to the holding cells. They proceeded to Captain Mokwele and reported to him the situation and the plaintiff was taken from the holding cells to room 1 where Captain Mokwele resolved the issue. He denied that any assault took place. He conceded in cross examination that he omitted to include in his statement that the plaintiff intimidated Ms Msimanga using bombastic words.

[13] It was put to him that he stood by while the plaintiff was assaulted; he remarked that he stood by because no assault took place. He denied that Constable Mentoer went around the house searching for the car keys. He conceded that they were not in possession of a search warrant. It was put to him that the plaintiff did not fight back, he remarked that he cannot agree with that. He testified that the plaintiff was never arrested. He conceded that Constable Mentoer was in possession of a rifle.

[14] Ms Nelisiwe Nomthandazo Msimanga testified and gave the background on the A4 Audi that ended up with the plaintiff. After they agreed on the purchase price of R45 000 (forty five thousand rand) which the plaintiff failed to make the full repayment. She testified that on 17 April 2019 she called the plaintiff together with the new buyer to a meeting at her home which meeting did not end well. When the

plaintiff refused to hand the car keys, she made the decision to involve the police. Upon the arrival of the police she took the police to the plaintiff's home and she pointed at the plaintiff. Constable Mentoer asked for the car keys but the plaintiff refused to cooperate and the police pulled the plaintiff by a belt and took him to the police station. They spent a few minutes at the plaintiff's home, estimated to be ten minutes. It took an hour while the police circulated the car and it was then that she realised that the car was registered in the name of the plaintiff. She testified that she did not give the plaintiff permission to change ownership of the car to his name. The police instructed the plaintiff to hand over the keys and the matter was resolved within an estimated time of two hours. She denied that there was any assault on the plaintiff. She denied in cross examination that Constable Mentoer assaulted the plaintiff. It was put to her that the incident at the plaintiff's home took longer than ten minutes, she insisted that it was ten minutes.

[15] Ms Msimanga told the court that the Plaintiff was rude and refused to hand over the car keys to the police. She stated that she did not see any limping and any injuries on the plaintiff. She testified that she got the keys while she was still at the police station after the plaintiff fetched the keys. When asked if she told Constable Mentoer about the agreement she had with the plaintiff, she remarked that she could not remember specifically and only remembered telling the police when her statement was taken.

[16] Constable Godfrey Mentoer² testified that on the day in question he attended to a complaint which led him to the plaintiff's home in order to help the complainant get the car keys back. Upon entering the yard, he noticed that the burglar door was locked which was opened by Mr Mabuza. He greeted the occupants and explained the reason for his presence. He testified that the plaintiff who was seated stood up and shouted at Ms Msimanga asking her why she brought the police. This started a shouting match between the plaintiff and Ms Msimanga's daughter. The plaintiff who was angry turned his attention to the police and shouted at the police accusing them of holding a trial at his house. Constable Mentoer informed the plaintiff that he was taking him to a neutral place and

² At the time of giving testimony his rank was that of Sergeant.

proceeded to touch the plaintiff on his shoulder. The plaintiff pushed him away and he held the plaintiff by his belt and lifted him up and put him inside the police vehicle. Mr Mabuza was informed that the plaintiff was going to Mamelodi West Police Station.

[17] Upon arrival at the police station, the plaintiff was pacing around showing signs of being restless and fearing that the plaintiff may leave before resolving the issue, one sergeant suggested that the plaintiff sat with her in the holding cells area. The plaintiff agreed to the suggestion. He testified that while the plaintiff was left in the holding cells, he proceeded to see Captain in charge and explained the situation. He denied that he assaulted the plaintiff. He further denied that he stole the items of the plaintiff. When asked if he swore at the plaintiff, he remarked that he could not swear at the plaintiff without knowing him.

[18] In cross examination, Constable Mentoer remarked that he did introduce himself to the plaintiff and Mr Mabuza. It was put to him that Mr Mabuza remonstrated with him to stop his conduct, he stated that the version was a lie. He testified that he went to the plaintiff's house in order to talk to the plaintiff. He denied that he searched the plaintiff's home. He conceded that the plaintiff was not charged as there was no need to do so because the aim was to resolve the issue. Constable Mentoer testified that there was no need to read rights to the plaintiff because he was not charged, but they were detaining him following the arrest. He explained the arrest was for purposed of getting the keys. He testified that the plaintiff brought this situated upon himself by not cooperating and had he not been arrogant. It was put to him that he failed to afford the plaintiff a chance to explain himself; he remarked that the plaintiff did not explain and did not give them (police) a chance. It was put to him that he abused his powers; he remarked that he protected the members of community.

APPLICABLE LEGAL PRINCIPLES:

[19] For purposes of this judgment, the applicable legal principles will cover the following claims-

[1] **Claim A:** Wrongful arrest and detention for five hours;

[2] **Claim B:** Assault;

[3] **Claim C:** Malicious proceedings in instituting criminal case of theft.

Claim A: Wrongful arrest and detention:

[20] Plaintiff's claim for wrongful arrest and detention invokes vicarious liability against the first defendant for delicts committed by its employees acting in the course and scope of the employment. The requirements for vicarious liability are trite- there must be an employment relationship, there must be a commission of a delict and the delict must have been committed within the scope of employment.³ The common law doctrine of vicarious liability has now been developed to reflect the spirit, purport and objects of the Constitution which has to be applied within the normative framework of the Constitution. See **K v Minister of Safety and Security 2005(6) SA 419(CC)** para [23]. The prism through which liability for unlawful arrest and detention is on the constitutional values and the rights in section 12 (1) of the Constitution of the Republic of SA, 1996.

[21] Courts regard the unlawful deprivation of liberty as a particularly grave wrong and a serious inroad into rights to freedom which must be guarded⁴. An arrest is prima facie unlawful unless there are grounds for justification⁵. In order to escape liability for wrongful arrest, a peace officer effecting an arrest without a warrant must fall squarely within the provisions of section 40(1) of the Criminal Procedure, Act 51 of 1977 (CPA).⁶ A peace officer exercises discretion whether to arrest or not once there is reasonable suspicion. There are four jurisdictional factors that must be satisfied before discretion to arrest arises⁷. In

³ See *Mkize v Martens* 1914 AD 382 at 390

⁴ See *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707A-B.

⁵ See *Minister of Law and Order v Hurley* 1986(3) SA 568 (A) at 589E –F.

⁶ This section provides-“(1) A peace officer may without 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.”

⁷ The jurisdictional factors are -

(i) the arrestor must be a peace officer;

instances where the arrest occurs following a suspicion by the peace officer that a crime has been committed, such suspicion must be based on reasonable grounds. The test whether the arresting officer's suspicion is reasonable is to be assessed objectively. The reasonable suspicion arises after the assessment of the information critically. This includes investigate exculpatory explanations offered by a suspect before forming a reasonable suspicion for the purpose of a lawful arrest⁸.

[22] In **Mabona v Minister of Law and Order and Others 1988 (2) SA 654 (SE)** it was held '*The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion*'

[23] In **Tsose v Minister of Justice and Others 1951(3) SA 10 (A)** at 17C-D where Schreiner JA held 'If the object if the arrest, though professedly to bring the arrested person before court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearance in court, the arrest is, no doubt, unlawful.'

[24] In respect to the claim for unlawful arrest, the defendants raise a defence that the arrest was effected in terms of section 40(1) (j) of the CPA⁹. The onus is

-
- | | |
|-------|---|
| (ii) | the arrestor must entertain a suspicion; |
| (iii) | the suspicion must be that the suspect (the arrestee) committed a Schedule 1 offence; |
| (iv) | The suspicion must rest on reasonable grounds. |
| (v) | |

⁸ See *Louw and Another v Minister of Safety and Security and Others 2006(2) SACR 178 (T) at 183J-184D*.

⁹ This section provides that '**Arrest by peace officer without warrant:**

(1) *A peace officer may without warrant*

on the defendants to prove some act of interference of a physical manner. In respect of the claim for wrongful detention, it is recognised that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivation. See ***Zealand v Minister of Justice and Constitutional Development and Another 2008(2) SACR 1 (CC)*** para [33]

[25] In *casu*, the defendants deny that the plaintiff was detained. The defendants contend that the plaintiff was placed at the reception area of the cells building in order to ensure that he does not leave the police station before the issue pertaining to the ownership of the car has been resolved. A credibility finding must be made whether or not the plaintiff was arrested and detained after assessment of the evidence holistically taking into account probabilities and improbabilities on both sides.

Claim B: Assault:

[26] An assault is an infringement of the right to bodily integrity of another and every infringement of the bodily integrity which is not justifiable in law or consented to is prima facie unlawful. The definition of assault is similar for both civil and criminal law. **C.R. Snyman¹⁰** defines assault as any unlawful and intentional act or omission which – (a) results in another person's bodily integrity being directly or indirectly impaired or (b) inspires a belief in another person that such impairment of her bodily integrity is immediately to take place. The onus to prove that an assault has taken place (that there was physical infringement of his body integrity by the application of force) rests with the plaintiff.

[27] In ***Minister of Justice v Hofmeyer 1993 (3) SA 131 (A) at 145*** it was stated 'One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facts. It embraces not merely the right of protection against direct

arrest any person- (a)...

(j) who willfully obstructs him in the execution of his duty'

¹⁰ Criminal Law, 6th edition page 447.

or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element.'

Claim C: Malicious Proceedings:

[28] The plaintiff must allege and prove the following elements of the claim-

- 1) That the defendants set the law in motion;
- 2) The defendants acted without reasonable and probable cause;
- 3) The defendants acted with malice (animus iniuriandi)¹¹;
- 4) The prosecution has failed.

[29] ***In Minister of Justice and Constitutional Development and Others v Moleko 2009(2) SACR 585 (SCA)*** para [8] it was held 'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-

1. That the defendants set the law in motion (instigated or instituted the proceedings);
2. That the defendants acted without reasonable and probable cause;
3. That the defendants acted with 'malice' (or animus injuriandi); and
4. That the prosecution has failed.'

At para [20] it was further held 'Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore

¹¹ See *Heyns v Venter 2004 (3) SA 200 (T)* para 12 at 208B.

involves both a subjective and an objective element- not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'

[30] The first and fourth requirements are self-explanatory. In instances where there is a genuine belief founded on reasonable grounds in the guilt of the plaintiff, no liability can be attributed to the defendants. The element of malice, the defendant must not only have been aware of what he was doing in instituting the proceedings but must have foreseen the possibility that he was acting wrongfully.

SUBMISSIONS:

[31] Counsel for the plaintiff submits that the evidence relating to Captain Mokwele constitutes hearsay and should be struck off from the record. The submission is that the mere touching of the plaintiff would have been sufficed for purposes of section 39 of the CPA. Counsel argues that there was no proof that the plaintiff had committed a criminal offence and it was wrong for the police to have treated him as such. It is argued that the police did not have full facts on the suspected fraud. Counsel makes reference to ***Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE)*** at 658.

[32] Counsel for the plaintiff contends that the arresting officers failed to analyse the information provided by Ms Msimanga before arresting and detaining the plaintiff. The officers relied on the 'rude' attitude of the plaintiff without giving an explanation of what that meant. It is argued that the plaintiff did not obstruct the police in their duties. There was no evidence that the plaintiff was charged for obstructing the police and therefore the arrest was unlawful. The submission is that the plaintiff was assaulted by Constable Mentoer which was unlawful. It is argued that the minimum force used was unjustifiable, unwarranted as the plaintiff was not fighting. It is submitted that the arresting officers failed to balance the interests of Ms Msimanga and the plaintiff. Counsel argues that holding the plaintiff with his belt was degrading and disrespectful.

[33] The submission is that the loss of consciousness by the plaintiff is a sign

that he was assaulted. The contention is that the plaintiff's freedom was arbitrarily taken by Constable Mentoor which rendered the detention unlawful. Counsel submits that the plaintiff's movements were restricted and Constable Mentoor made a concession that the plaintiff needed to be restrained which, as the argument goes, indicated that the plaintiff was detained. Counsel highlighted the various improbabilities in the evidence of the defendants and places reliance to the case of ***Ngakula v Minister of Police [2021] ZAGPJHC 97*** paras 43 and 45.¹²

[34] Counsel for the plaintiff argues that the injury to the plaintiff's eye was visible and it is inconceivable that the defendants' witnesses could not see. The argument is that it is a factor that the plaintiff consulted the doctor seven days after the assault which caused the doctor not to see the injury and Counsel emphasises that this is stated as a probability. Lastly, the contention is that the plaintiff's version is more probable and the plaintiff was assaulted, arrested and detained. Counsel submits that the defence in terms of section 40 (1) (j) of the CPA cannot stand and prays for merits to be granted in favour of the plaintiff.

[35] Counsel for the defendants submits that there was no evidence to sustain the third claim for malicious proceedings of instituting a criminal case of theft of motor vehicle against the second and third defendants. He contends that the claim for assault is not supported by objective evidence and it was highly improbable that the plaintiff who was allegedly assaulted in the manner he described would sustain less serious injuries and argues that the claim for assault must be dismissed with costs. The contention is that it was the plaintiff's refusal to hand over the keys and lack of cooperation that called for a firm reaction from the police. The police had to forcefully take the plaintiff to the police station in order to resolve the matter. Counsel for the defendants makes a concession that an arrest for purposes of investigations was effected with use of minimum force and the plaintiff was placed in the holding cells until the matter was resolved which was justifiable and lawful. It is argued that the fact that the plaintiff refused to hand over the keys lends credence to the version that he was rude and uncooperative.

¹² Despite diligence search, I was unable to find the cited case. The case found that is corresponding to the cited ratio is *Ngajuka v Minister of Police (32049/2012) [2021] ZAGPJHC 662* (9 November 2021).

[36] It is submitted that the brief detention of the plaintiff was lawful and if found to be unlawful it is to be considered as detention *stricto sensu*. Counsel relies on the legal principle as extracted from **Minister of Safety and Security v Van Niekerk 2008 (1) SACR 56 (CC)** para 20 that lawfulness of the arrest is closely connected to the facts of each situation. Counsel places reliance on the provisions of section 39 of the CPA in support of the contention that the plaintiff had to be arrested. Lastly, Counsel prays for the dismissal of all claims with costs alternatively that an absolution from the instance be granted.

EVALUATION:

[37] The defendants' version is that the plaintiff was lawfully arrested for interfering with the police in their duties and not cooperating. The plaintiff's version on the other hand is that he was arrested and detained at the police station unlawfully. There are mutually destructive versions in this matter. As trite the proper manner in resolving factual disputes is for the court to make factual findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. See **Stellenbosch Farmers' Winery Group Ltd v Martell et Cie 2003 (1) SA 1 (SCA)** para 5. The plaintiff must satisfy the court that his version is true and that the defendants' version is false or mistaken. The court will weigh up the evidence holistically, make credibility findings and assess probabilities.¹³

[38] Both the plaintiff and Mr Mabuza described Constable Mentoors manner of approach as being aggressive. I accept Constable De Wee's evidence that the report from Ms Msimanga was that the plaintiff was aggressive. The only reasonable inference I can draw is that this influenced and clouded both Constable De Wee and Constable Mentoors objectivity and judgment with emphasis on Mentoors. This is based on the fact that they carried with them rifles. By the time they reached the plaintiff's home, all objectivity fell away. The unchallenged evidence is that they entered the plaintiff's yard in a noisy manner, not calm. The unchallenged evidence is that Constable Mentoors made reference to 'moruti' towards the plaintiff and since they were not familiar to one another, the only

¹³ See *National Employers' General Insurance Company Ltd v Jagers* 1984 (4) SA 437 (E) at 440 E-G.

plausible explanation is that this information came from Ms Msimanga. The assessment of Constable De Wee's evidence reflects that as soon as Constable Mentoor regarded the plaintiff as uncooperative, he pulled him by the belt and forcefully took him to the police van. There is no mention that he first asked him to come with them and the plaintiff refused. It follows that the version by the plaintiff that Constable Mentoor was aggressive is probable. The plaintiff and Mr Mabuza corroborate each other that Constable Mentoor slapped the plaintiff and pushed him on the sofa before going around the house looking for the car keys. An important piece of evidence is that Mr Mabuza reprimanded police officer Mentoor.

[39] Constable Mentoor 's attempt to paint the plaintiff as being aggressive to such an extent that it required him to take the plaintiff to the police station in order to diffuse the tension is far-fetched and improbable. The plaintiff's evidence that he did not retaliate as he was conscious of the official duties of the police is plausible on the same basis that he would not have been uncooperative for no reason. He was within his right to question the legitimacy of the presence of the police. Mr Mabuza's evidence was that Constable Mentoor did not explain the reason for the presence of the police at the plaintiff's home. The version that the plaintiff was uncooperative for no apparent reason is unconvincing and improbable. If the police officers entered the plaintiff's house in a professional and calm manner and explained why they were there, it is improbable that the plaintiff would have been uncooperative. According to Mr Mabuza, after the plaintiff was taken to the police station, he remained behind to ensure that the house was locked. That piece of evidence describes the prevailing circumstances at the time by posing the question- why the plaintiff was not afforded an opportunity to lock up his house if the attitude by Constable Mentoor was calm and professional? There were minor inconsequential and non-material differences in the versions of the plaintiff and Mr Mabuza. For example, an inconsistency on the position Constable Mentoor held the rifle at the time of the alleged assault on the plaintiff.

[40] Constable Mentoor's version that the plaintiff agreed to sit at the holding cells is highly improbable to the extent that it is a lie. This is an attempt by Constable Mentoor to exonerate himself. It is an attempt to explain the unexplainable – such as if the whole essence of taking the plaintiff to the police

station was to amicably resolve the issue of the car and to take away the reference of a 'trial' from the plaintiff's home, why was the plaintiff not taken to room 1 from the beginning? The record bears testimony on the attitude that Constable Mentoore had towards the plaintiff. For example, making reference to the alleged 'arrogance' of the plaintiff and that he 'brought this upon himself'. The evidence by Mentoore does not sustain the defence as envisaged in section 40(1) (j) of the CPA.

[41] There is a material contradiction in the defendants' version- in the amended pleadings, the defendants aver that the plaintiff was lawfully arrested but when Constable De Wee testified he denies that the plaintiff was arrested. Constable Mentoore maintains that he took the plaintiff to the police station for questioning because the situation was tense at the plaintiff's house. This is a far cry from the defence raised in the amended plea that the arrest of the plaintiff was within the ambit of section 40(1)(j) of the CPA. There must be factual basis in which a finding can be made that the plaintiff interfered with the police in their duties. In my view, questioning the legitimacy of the presence of the police at his house does not equate to interference¹⁴. In addition there to, the defendants' version raises many unanswered questions. For example it makes no sense what caused the plaintiff to be aggressive for no apparent reason making it necessary to take him to the police station. Secondly, if the plaintiff was not arrested as per Constable Mentoore's testimony, why was he placed at the back of the police van? Why was he placed in the reception area (for lack of a better description of the entrance area to the holding cells) of the holding cells? The Constable Mentoore conceded that the plaintiff was not able to leave the reception area as he pleases. Constable Mentoore's contention that the plaintiff was not arrested when he was placed in the reception area of cell building is with respect not true. The evidence clearly demonstrates that the plaintiff was not in a position to exercise his right to liberty at that moment. He was unable to receive visitors. When assessing the evidence holistically, it appears that Constable Mentoore failed to have regard to the

¹⁴ See *Mbovane v Minister of Police (23852/11)[2013] ZAGPJHC 270* (30 October 2013) para [35] where it was held ' An arresting police officer who relies on Section 40(1)(j) has to prove the existence of jurisdictional facts justifying the arrest that ensued. Whether an arrestee acted willfully in obstructing the execution of a duty of a peace officer must be considered objectively. The obstruction must consist of some or other physical conduct, a positive action although conduct need not always be positive.'

plaintiff's right to be presumed innocent until proven guilty. I am satisfied that Constable Mentoor did not exercise discretion.

[42] On the issue whether or not the plaintiff was assaulted, I am aware that the plaintiff was a single witness and the correct approach is to exercise a measure of caution when assessing such evidence. Section 16 of Civil Proceedings Evidence Act 25 of 1965 provides that 'Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.' Evidence of a single witness must be credible to the extent that his uncorroborated evidence must satisfy the court that on probabilities it is the truth. See **Daniels v General Accident Insurance Co Limited 1992(1) SA 757(C)** at 760A-B.

[43] I accept that the plaintiff was assaulted for the following reasons-

[43.1] It was not challenged that Mr Mabuza assisted the plaintiff after the ordeal by rubbing him. I accept that Mr Mabuza did in fact render medical support to the plaintiff which brings a question what caused Mr Mabuza to do so if the plaintiff was not in need of medical assistance. Simply put, the unchallenged evidence by Mr Mabuza that he rendered assistance to the plaintiff was unchallenged which shifted probabilities in favour of the plaintiff.

[43.2] I accept the fact that the plaintiff consulted his doctor days after the alleged incident. It makes no logical sense why the plaintiff would opt to consult a doctor and be liable for any consultation fees for no apparent reason.

[44] The J88 does not depict the severity of the assault, however, that does not detract from the evidence by the plaintiff that he was assaulted. His version is corroborated by Mr Mabuza. Counsel for the defendants argues that the version that plaintiff was assaulted was improbable based on the lack of serious injuries. This aspect was put to the plaintiff who remarked that injuries were dependant on the force used during the assault. That is plausible explanation. The unchallenged evidence is that Mr Mbatsana drove the plaintiff to Mamelodi Hospital. That brings

about a question, why was the plaintiff driven to the hospital for if he was not assaulted? Why spend time and petrol seeking medical assistance if the plaintiff was not assaulted? Counsel for the defendants places emphasis on the lack of details of injuries on the J88. It must be recalled that the evidence is that the plaintiff attempted to seek medical attention by going to hospital which was found to be full and only consulted his private doctor seven days after the assault.

[45] Captain Mokwele was not called as a witness and a reason was provided for his absence. Notwithstanding the fact that he played a major role in settling the dispute between Ms Msimanga and the plaintiff, his statement is disregarded for purposes of this judgment. The concessions made by the plaintiff and his witnesses in response to the content of the statement by Captain Mokwele stands to carry no probative value as the authenticity of such statement was not proved. The statement constitutes hearsay in the absence of admission by consent or admission in terms of section 3 (1) of Act 45 of 1988. Evidence in connection thereto is inadmissible for the purposes of this judgment.

[46] On assessing the veracity of the claim for malicious proceedings, the following requirements were considered-

[1] That the defendants set the law in motion- it is common cause that Ms Msimanga called the police to report that the plaintiff was refusing to hand over the keys. The evidence proves that ownership of the car had not passed to the plaintiff because he did not pay the agreed purchase amount. I cannot find any wrongfulness in the conduct of Ms Msimanga for doing so.

[2] The defendants acted without reasonable and probable cause- the evidence proves that at the time Ms Msimanga called the police, she had reasonable and probable cause for doing so because the plaintiff had not paid her in full for the vehicle. I cannot find any unreasonableness in the conduct of Ms Msimanga. The arresting officers upon the complaint been opened of 'theft' of a motor vehicle coupled with allegations of intimidation were duty bound to

react to the complaint (this must be understood within the context of this claim, which is different to the inquiry whether the reaction to effect an arrest is justifiable or not which, in my view, separate to this claim).

[3] That the defendants acted with 'malice' (or animus injuriandi)- the evidence proves no factors in which an inference can be made that there was malice on the part of Ms Msimanga and the arresting officers.

[4] That the prosecution has failed- the plaintiff was never formally charged and so this requirement is moot and academic.

To sum up- The evidence proves that Ms Msimanga was the lawful owner of the vehicle even on the plaintiff's own version that he did not pay in full for the car. I find no culpability on the part of Ms Msimanga who requested the assistance of the police for the return of the car. Since I cannot find any wrongful conduct in Ms Msimanga's actions, it follows that the plaintiff has failed to prove the culpability in respect of Constable Mentoore and Ms Msimanga as the third defen.

[47] The plaintiff has created a favourable impression to the court. He gave his testimony in a confident manner. He conceded to aspects which were not favourable to his case. He conceded that only Constable Mentoore assaulted him and exonerated the crew member. I also found Mr Mabuza who is a former police officer to be a credible witness as he gave his testimony in a clear manner. I found Mr Morris Mbatsana an objective witness. He created a favourable impression.

[48] On the other hand, Constable Mentoore's testimony was full of improbabilities which in turn affected his credibility adversely. For example, he testified that the plaintiff was not detained when all of the evidence pointed to the fact that plaintiff was in fact arrested. The concession that the plaintiff was not free to leave the reception area of the cells building has shifted the probabilities in favour of the plaintiff.

[49] Constable De Wee was a satisfactory witness. It is clear that he chose not to reprimand his crew for the behaviour on 17 April 2019. His behaviour fell short of the standard expected of a law enforcer. He made no comment when the plaintiff was pulled by his belt and placed inside the police vehicle. In my view, the use of force was unjustifiable on the facts of this case. At the very least, the use of force constitutes an abuse of power. Yet Constable De Wee failed to come to the defence of the plaintiff at the time.

[50] Ms Nelisiwe Msimanga was found to be a witness with weak points and strong points. It was clear that she was reluctant to indicate fully what transpired inside the plaintiff's home. Her reluctance can be attributed to her concession that she was 'angry' and wanted her keys. Sgt Mogagabe was a fair witness.

CONCLUSION:

[51] In conclusion, on the claim A – whether the arrest and detention of the plaintiff was lawful, I find that the arrest was unlawful on the basis that the arresting officer Constable Mentoer failed to prove the jurisdictional factors giving rise to the discretion. I find that the detention of the plaintiff was unlawful and without justification. On claim B- whether the plaintiff was assaulted, I find that the probabilities shifts in favour of the plaintiff that he was assaulted by means of slapping him, kicking him and pulling him by his belt. On claim C- whether there were malicious proceedings I find that the plaintiff failed to prove on the balance of probabilities all the elements of the claim.

COSTS

[52] Costs are awarded at the discretion of the court which discretion is a wide, unfettered and equitable one and must be exercised judicially with due regard to all relevant consideration.¹⁵ It follows that it is just and equitable to order that the first defendant pays costs on a party and party scale.

¹⁵ See In **Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)** it was held '*The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant consideration.*

Order:

[53] In the circumstances the following order is made:

1. Judgment granted in favour of the plaintiff on merits for unlawful arrest, detention and assault. The claim for malicious proceedings is dismissed.
2. Determination of quantum is postponed sine die.
3. First Defendant to pay costs on party and party scale.

**MNCUBE AJ
ACTING JUDGE OF THE
HIGH COURT GAUTENG
DIVISION, PRETORIA**

Appearances:

On behalf of the Plaintiff	: Adv. W.N. Sidzumo
Instructed by	: Makhafola and Venter Incorporated 977 Francis Baard Street Hatfield Pretoria.

On behalf of the Defendant	: Adv. A. Moja
Instructed by	: State Attorney Pretoria SALU Building 316 Thabo Sehume Corner Thabo Sehume and Francis Baard Streets Pretoria

Date of Judgment

: 28 March 2023