



IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 2129/2020

2129.2020 Korkie v Minister of Police (01 February 2022)

RICARDO LLEWELEN KORKIE

Plaintiff

and

MINISTER OF POLICE

Defendant

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**JUDGMENT**

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**Bloem J.**

[1] The plaintiff instituted a claim for damages in the sum of R450 000.00 against the Minister of Police for malicious, alternatively wrongful, arrest and detention. He instituted another claim for damages in the sum of R200 000.00 for malicious prosecution. He alleged that at approximately 01h30 on Sunday, 18 August 2019 and at King William's Town he was arrested by a member of the South African Police Service on a false charge of being in possession of a firearm without a licence. After his arrest, he was detained until after his appearance in court on 19 August 2019 when he was granted bail. The case was postponed on three occasions. The state withdrew the charge against him on 22 November 2019. The plaintiff alleged that, when the law was set in motion against him on 18 August 2019, the member had no reasonable or probable cause for doing so, had no reasonable belief in the truth of the information given to him and acted *mala fide* and *animo injuriandi*.

- [2] In respect of the plaintiff's claim based on his arrest and detention, the defendant admitted that the plaintiff was arrested without a warrant of arrest by Siyabulela Witvoet, a police officer. He pleaded that the arrest was lawful since sergeant Witvoet, who was a constable at the time of the plaintiff's arrest, could, in terms of section 40(1)(a) of the Criminal Procedure Act,<sup>1</sup> arrest the plaintiff without a warrant of arrest since he committed an offence in his presence. In the alternative, the defendant pleaded that sergeant Witvoet reasonably suspected the plaintiff, in terms of section 40(1)(h) of the Criminal Procedure Act, of having committed an offence under the laws governing the possession or disposal of arms or ammunition, various alleged offences having been pleaded in detail. The defendant also denied that the plaintiff was unlawfully detained, pleading that his detention was justified in terms of section 39(3)<sup>2</sup> and section 50(1)<sup>3</sup> of the Criminal Procedure Act.
- [3] The defendant admitted that sergeant Witvoet set the law in motion against the plaintiff by laying a charge against him of being in possession of a firearm without a licence. He denied that sergeant Witvoet acted wrongfully, unlawfully and intentionally or gave false and clearly wrong information. He pleaded that the charge against the plaintiff was *bona fide* and reasonable and that sergeant Witvoet had reasonable cause for laying the charge against the plaintiff.

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<sup>1</sup> Criminal Procedure Act, 1977 (Act 51 of 1977).

<sup>2</sup> Section 39(3) of the Criminal Procedure Act reads as follows:

"The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."

<sup>3</sup>Section 50(1) of the Criminal Procedure Act deals with the procedure to be followed after the arrest of a person, for example, where he or she shall be taken after arrest, that he or she shall be informed of his or her right to institute bail proceedings and by when he or she shall be brought before a court, if not released.

[4] The plaintiff testified that he resides in Port Elizabeth. However, due to work commitments, he sometimes works out of town. He did not go home over the weekend of 17/18 August 2019 but remained in King William's Town. During the evening of 17 August 2019 he and his friends consumed some alcoholic drinks. He testified that he had consumed the contents of two 340ml bottles of beer before he and three of his friends set off from their guest house to a night club in town to purchase more alcoholic drinks. Before they entered the night club, he saw one of his friends, Jenrick, pointing an airgun<sup>4</sup> at another person. He went to Jenrick, grabbed the airgun from him and put it in his pocket. They went into the night club where they remained for approximately twenty minutes and emerged with the liquor that they had purchased.

[5] As they were leaving, he saw some policemen outside the night club. He also saw the person at whom Jenrick had earlier pointed the airgun. That person pointed at Jenrick as the person who had pointed a firearm at him and at him (the plaintiff) as the person who had grabbed the firearm from Jenrick. A police officer, who turned out to be sergeant Witvoet, asked him whether he had the firearm. He produced the airgun. Sergeant Witvoet looked at it and took out its magazine. The plaintiff testified that sergeant Witvoet must have seen that there were a gas canister and small silver balls in the magazine, that there were no rounds of ammunition inside it and that it was therefore not a real firearm.

[6] He asked the policemen whether they would arrest him despite the fact that what was in his possession was not a real firearm. They told him not to talk to them at the scene but at the police station. He and Jenrick were placed in a police

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<sup>4</sup> During his evidence the plaintiff referred to the device as a gas gun, whereas sergeant Witvoet referred to it as a firearm. That device shall accordingly be referred to as a gas gun, airgun and firearm interchangeably, albeit that it is common cause that it was an airgun.

vehicle and taken to the police station where they were detained in a cell until their appearance in court on the Monday morning. The case against Jenrick was withdrawn at their first appearance. The magistrate set bail for him in the sum of R500.00 and postponed the case to 19 September 2019, on which date it was postponed to 29 October 2019, whereafter it was further postponed to 22 November 2019, on which date the charge against him was withdrawn by the state.

[7] After the close of the plaintiff's case, the defendant's application for absolution from the instance was dismissed.

[8] Sergeant Witvoet testified that he has been a member of the South African Police Service for the past thirteen years. He reported for duty at 18h00 on 17 August 2019 and performed patrol duties with warrant officer Ngese around the central business district of King William's Town. When they were near the night club in question during the early hours of 18 August 2019, they were stopped by a young man who told them that two youngsters pointed a firearm at him. They proceeded towards the night club. The complainant had a stick in his hand and pointed out the two persons who he said had pointed a firearm at him. They went to the plaintiff and a person who was with him and enquired which one had a firearm. The plaintiff said that he had a gas gun, which he said was not a real firearm. Sergeant Witvoet testified that the plaintiff then handed the firearm to him. He looked at it and saw it as a 9mm pistol. Many people had in the meantime gathered around them. More police officers arrived on the scene.

[9] Sergeant Witvoet testified that, when he made enquiries, the plaintiff confirmed

that he had consumed some beer. He asked him whether he knew the dangers of a firearm to a person who had consumed liquor. He made those enquiries after the plaintiff had told him that he had grabbed the gas gun from his friend, Jenrick, who had pointed it at the complainant. The plaintiff repeated that he did not have a real firearm. Sergeant Witvoet said that he could not trust that it was not a real firearm since, according to him, the law had already been broken when the firearm had been pointed at the complainant. He informed the plaintiff of his rights before arresting him.

[10] He testified that the plaintiff was at all times co-operative. He arrested the plaintiff because the complainant had reported that a firearm had been pointed at him. According to him, the law was broken in that the firearm was in the plaintiff's possession although he did not have a licence for such possession and the plaintiff had explained to him that he had grabbed the gas gun from Jenrick. He thought that by that act the plaintiff endangered himself, Jenrick, the complainant and nearby property.

[11] The plaintiff and Jenrick were taken to the police station where sergeant Witvoet inspected the firearm. He pressed a button to release the magazine, similar to a 9mm pistol. He saw that there were no rounds of ammunition in the magazine. Instead, there was an air canister inside it which was on top of a spring with small silver iron balls on top of the canister. It was the first time for him to see such a magazine. He said that he needed to establish what the nature of that firearm was. It was entered into the relevant book at the charge office and placed in a safe. It was later sent for ballistics examination.

[12] He decided to have the plaintiff detained because he feared that, if released, he

might break the law again, people might be robbed and people's property might be damaged. He also was unable to follow up on the plaintiff's Port Elizabeth address that he had given to him. In the circumstances, he detained the plaintiff so that he could appear in court on the following day.

[13] The onus was on the defendant to justify the plaintiff's arrest and detention. The defendant sought to justify the plaintiff's arrest on the basis of section 40(1)(a) and (h) of the Criminal Procedure Act. He contended that the plaintiff committed an offence in sergeant Witvoet's presence. Section 40(1)(a) entitles a police officer to, without warrant, arrest any person "*who commits or attempts to commit any offence in his presence*".

[14] In the circumstances of this case, the plaintiff's arrest would be lawful if the defendant established on a balance of probabilities that (1) the plaintiff was arrested by a police officer; (2) the plaintiff had committed or attempted to commit an offence; and (3) the commission of the offence, referred to in (2) above, or the attempted commission of that offence, occurred in the presence of the police officer.

[15] The defendant's case is that sergeant Witvoet arrested the plaintiff because he was in possession of a firearm without a licence, in contravention of section 3(1)(a) or (b) and (2) of the Firearms Control Act.<sup>5</sup> Section 3 of the Firearms Control Act reads as follows:

**"3. General prohibition in respect of firearms and muzzle loading firearms**

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<sup>5</sup> Firearms Control Act, 2000 (Act 60 of 2000).

- (1) *No person may possess a firearm unless he or she holds for that firearm –*
  - (a) *a licence, permit or authorisation issued in terms of this Act; or*
  - (b) *a licence, permit, authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.*
- (2) *No person may possess a muzzle loading firearm unless he or she has been issued with the relevant competency certificate."*

[16] Section 120(1)(a) of the Firearms Control Act makes it an offence for a person to contravene or fail to comply with any provision of that Act. It is accordingly an offence to possess a firearm without holding for that firearm a licence, permit or authorisation in terms of the Firearms Control Act. An essential element of such an offence is that the person should be in possession of "a firearm".

[17] It is common cause that sergeant Witvoet arrested the plaintiff and that the plaintiff did not have a licence to possess a firearm. If it is found that the plaintiff possessed a firearm, then it follows that it must also be found that the offence envisaged in section 3(1)(a) or (b) was committed in the presence of sergeant Witvoet. What remains to be determined is whether the plaintiff, while in the presence of sergeant Witvoet, was indeed in possession of a firearm and thereby committed an offence.

[18] For purposes of section 40(1)(a) the test is not whether sergeant Witvoet had a reasonable suspicion or belief that the plaintiff committed the offence of possessing a firearm without a licence in his presence. It is in this regard that section 40(1)(a) differs from many subsections<sup>6</sup> of section 40(1) which entitle a police officer to arrest a person on reasonable suspicion or reasonable grounds for believing that an offence had been committed.

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<sup>6</sup> See subsections (b), (e) to (h), (k) to (o) and (q) of section 40(1).

[19] The test is whether the arresting officer had personal knowledge of facts upon which it can be concluded that the arrested person had *prima facie* committed an offence in his presence. By way of example, if the arresting officer walks into a room and sees A hitting B across his face with an open hand, he would be entitled in terms of section 40(1)(a) to arrest A because the facts observed by him disclosed the offence of assault. That it later turned out that A acted in self-defence and accordingly acquitted, is irrelevant for purposes of the arrest. One has to look at the facts, as they existed at the time of the arrest, to determine whether it could be concluded that, on the face of it, A committed the offence of assault on B in the arresting officer's presence.

[20] What were the facts which sergeant Witvoet observed which led him to conclude that the plaintiff had committed the offence of being in possession of a firearm without a licence? He knew that the plaintiff did not have a licence to possess a firearm, because the plaintiff had told him so. The plaintiff told him that he did not require a licence because what he possessed was not a firearm, but a gas gun. It was at that stage that sergeant Witvoet should have ascertained whether or not the device in the plaintiff's possession was a firearm. The plaintiff's evidence was that sergeant Witvoet inspected the device on the scene. Sergeant Witvoet denied that. I accept the plaintiff's evidence in that regard because it is corroborated by the contents of the statement that sergeant Witvoet made after the plaintiff's arrest. In that statement sergeant Witvoet said that he approached the plaintiff and asked if he had a firearm, whereupon the plaintiff took out a 9mm pistol from his pocket. When he took out the magazine to make the firearm safe, he saw "*a gas tube came out with no live ammunition*". Since the situation had become volatile outside the night club, he could and should have taken the



plaintiff to a place where he could inspect the device to ascertain whether it was indeed a firearm. He inspected the device at the police station. But the plaintiff had by then already been arrested. If sergeant Witvoet was certain or entertained the belief that the device was a firearm, it is unlikely that he would have inspected it at the police station. Such inspection is, in my view, proof that he entertained doubt whether the device was indeed a firearm.

[21] I do not accept sergeant Witvoet's evidence that, after he had inspected the device at the police station, he still believed that it was a firearm. Although the exterior of the device might resemble the features of a 9mm pistol, once the magazine is taken from it, the difference between the magazine of a 9mm pistol and an airgun is apparent. The rounds of ammunition of a 9mm pistol are stacked one on top of the other with a spring at the bottom of the magazine. When he saw the magazine of the airgun, it contained an air canister on top of a spring and smaller silver balls above the canister. There were no rounds of ammunition in the magazine of the airgun.

[22] Sergeant Witvoet has training in firearms and ammunition. In my view, he should have known, after inspecting the airgun, that it was not a firearm. He should then have given heed to what the plaintiff had said in that regard or he should have entertained serious doubt about whether or not it was a firearm.

[23] It was agreed between the parties that the plaintiff was found in possession of an airgun. Section 5(1) of the Firearms Control Act specifically provides that an airgun is not regarded as a firearm for purposes of the Firearms Control Act. In the circumstances, because the plaintiff did not possess a firearm at the time of his arrest, he did not require a licence and did not commit an offence in the

presence of sergeant Witvoet. On that interpretation it must be found that the plaintiff's arrest cannot be justified under section 40(1)(a) of the Criminal Procedure Act.

[24] In the alternative, the defendant pleaded that sergeant Witvoet reasonably suspected the plaintiff of having committed an offence in terms of section 40(1)(h) of the Criminal Procedure Act. Insofar as it is relevant to this case, that subsection entitles a police officer to, without warrant, arrest any person:

*“who is reasonably suspected of committing or of having committed an offence under any law governing ... the possession or disposal of arms or ammunition”.*

[25] The pleaded offences which sergeant Witvoet allegedly reasonably suspected the plaintiff of having committed are that he was in possession of a firearm without a licence;<sup>7</sup> he was in possession of a device that had the appearance of a firearm but was not capable of operating as such and cannot by superficial examination be identified as an imitation;<sup>8</sup> alternatively he handled an airgun in a manner likely to injure or endanger the safety of property of any person or with reckless disregard for the safety of property of any person;<sup>9</sup> or in circumstance where it created a risk to the safety or property of any person and not to take reasonable precautions to avoid the danger;<sup>10</sup> he handled an airgun while under the influence of a substance which has an intoxicating or narcotic effect;<sup>11</sup> he pointed an airgun at persons without good reason to do so;<sup>12</sup> or he pointed a thing which was likely to lead a person to believe that a firearm, an antique

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<sup>7</sup> In contravention of section 120(1)(a) as read with section (3(1)(a) or (b).

<sup>8</sup> In contravention of section 120(1)(a) as read with section 4(1)(e).

<sup>9</sup> In contravention of section 120(3)(b).

<sup>10</sup> In contravention of section 120(3)(c).

<sup>11</sup> In contravention of section 120(4).

<sup>12</sup> In contravention of section 120(6)(a).

firearm or an airgun was pointed at such person without good reason to do so;<sup>13</sup> and he was in possession of an airgun with intent to commit an offence.<sup>14</sup>

[26] There was no evidence that the plaintiff pointed his airgun or a firearm at any person. There was also no evidence from which it could be concluded that the plaintiff was in possession of his airgun with the intention to commit an offence. On the contrary, the undisputed evidence was that the plaintiff was unaware that Jenrick had taken the plaintiff's airgun from the guesthouse before they went to the night club. The plaintiff could accordingly not have had an intention to commit an offence when he was unaware that Jenrick had his airgun.

[27] Regarding the plea that sergeant Witvoet reasonably suspected the plaintiff of possessing a firearm licence, it is found that, when sergeant Witvoet first saw the device, he could have suspected it to have been a firearm. However, the undisputed evidence is that, when the plaintiff handed the device to him, he told sergeant Witvoet that it was not a firearm but, what he referred to as, a gas gun. I accept the plaintiff's evidence that, while they were still in front of the night club, sergeant Witvoet looked at the device and its magazine. He must then have realised that the magazine did not contain rounds of ammunition. Under those circumstances, sergeant Witvoet cannot be said to have entertained a reasonable suspicion that the plaintiff was in possession of a firearm. When sergeant Witvoet saw the contents of the magazine, there was, in my view, a duty on him to have investigated the plaintiff's exculpatory statement that he was not in possession of a firearm, but a gas gun. In the circumstances, although sergeant Witvoet might initially have had a suspicion that the plaintiff possessed

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<sup>13</sup> In contravention of section 120(6)(b).

<sup>14</sup> In contravention of section 120(10)(b).

a firearm, that suspicion was not reasonable after he saw the contents of the magazine.

[28] Section 4(1)(e) of the Firearms Control Act does not prohibit the possession of an airgun. It prohibits the possession of an imitation of a gun, cannon, recoilless gun, mortar, light mortar or launcher manufactured to fire a rocket, grenade, self-propelled grenade, bomb or explosive device as well as any frame, body or barrel of a gun, cannon, recoilless gun, mortar, light mortar or launcher. On the evidence, Sergeant Witvoet could not reasonably have suspected the plaintiff of having committed an offence by being in possession of a prohibited firearm, as envisaged in section 4(1)(e) of the Firearms Control Act.

[29] There was no evidence to suggest that the plaintiff handled his airgun in a manner that was likely to injure any person outside the night club or that he handled the airgun with reckless disregard for the safety or the property of others or that his handling of the airgun created a risk to the safety or property of other persons and that he did not take reasonable precautions to avoid the danger. The evidence was that, when sergeant Witvoet asked whether the plaintiff or Jenrick had the firearm, the plaintiff handed his airgun to him. There was simply no evidence to suggest that an offence in terms of section 120(3)(b) or (c) was committed or that sergeant Witvoet could reasonably have suspected the plaintiff of having committed such an offence.

[30] Although the plaintiff admitted that he had consumed beer, there was no evidence that he was under the influence thereof. On the contrary, the evidence was that the plaintiff was co-operative. Before he climbed into the police vehicle, he had the presence of mind to hand his cellphone to his friends with the request

that his wife be informed of his arrest. Sergeant Witvoet testified that he informed the applicant of his rights when he arrested him. I am sure that sergeant Witvoet would not have taken the trouble of explaining the plaintiff's rights to him had he been under the influence of liquor. In all the circumstances, the defendant's reliance on section 40(1)(h) of the Criminal Procedure Act cannot be sustained. The plaintiff's arrest was accordingly unlawful. The plaintiff adduced insufficient evidence to establish that sergeant Witvoet made improper use of the legal proceedings to deprive him of his liberty.<sup>15</sup> Accordingly, although the plaintiff was unlawfully arrested, he was not maliciously arrested.

[31] Since the plaintiff's arrest was unlawful, it follows that his subsequent detention until his appearance in court on 19 August 2019 when he was released from custody was also unlawful.<sup>16</sup> The defendant can rely on neither section 39(3) nor section 50(1) of the Criminal Procedure Act to justify the plaintiff's detention following his unlawful arrest.

[32] I now consider whether or not the plaintiff was maliciously prosecuted. In order to succeed with his claim for malicious prosecution, the plaintiff was required to allege and prove that (1) sergeant Witvoet set the law in motion, meaning that he instigated the criminal proceedings against the plaintiff; (2) sergeant Witvoet acted without reasonable and probable cause; (3) sergeant Witvoet acted with *animo injuriandi* (malice); and (4) the proceedings instituted against the plaintiff terminated in his favour.<sup>17</sup>

[33] The enquiry as to whether or not the plaintiff proved that sergeant Witvoet had

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<sup>15</sup> *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA) at par 14.

<sup>16</sup> *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at par 12.

<sup>17</sup> *Minister for Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA) at par 8.

reasonable or probable cause, is whether, when he instigated or initiated the criminal proceedings against the plaintiff, he had such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of possession of a firearm without a licence to hold that firearm.<sup>18</sup>

[34] For a defendant to be held liable for malicious prosecution, the plaintiff must prove *animus injuriandi* by showing that:

- 34.1. the defendant intended to cause the plaintiff to be prosecuted or must have foreseen that his conduct would cause the plaintiff to be prosecuted; and
- 34.2. the defendant knew or foresaw the possibility that there were no reasonable grounds for the prosecution, meaning that he was aware of the wrongfulness of his conduct or foresaw the possibility that his conduct may be wrongful; but
- 34.3. the defendant nevertheless continued with his wrongful conduct, reckless as to the possible consequences of his conduct.

[35] It is common cause that sergeant Witvoet instigated or initiated the criminal proceedings against the plaintiff by arresting him on a charge of being in possession of a firearm without a licence, in contravention of the Firearms Control Act, and that those criminal proceedings terminated in the plaintiff's favour. This court must determine whether, when sergeant Witvoet initiated those criminal proceedings, he had reasonable or probable cause for doing so, and whether he had *animus injuriandi*.

[36] Sergeant Witvoet's evidence was that the device would be sent for ballistics

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<sup>18</sup> *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135G-136B.

examination. He must have been aware that, without confirmation that the device was a firearm, he had insufficient information at his disposal to have acted with reasonable or probable cause. The fact that he wanted the device to be sent for ballistics examinations suggest that he was unsure, at least at that stage, whether or not it was a firearm. He knew that the ballistics examination could either confirm that it was indeed a firearm, as described in the Firearms Control Act, or that it was not a firearm. In other words, the possibility existed that it might not have been a firearm. Sergeant Witvoet must have foreseen that his arrest of the plaintiff would cause the plaintiff to be prosecuted. He must also have foreseen the possibility that, if it was not a firearm, there were no grounds for the prosecution. He must have foreseen the possibility that his conduct may under those circumstances be wrongful, but he nevertheless continued with the assertion that the device was a firearm, reckless as to the consequences of his conduct.

[37] In the circumstances, I am satisfied that the plaintiff established that sergeant Witvoet acted without reasonable and probable cause when he instigated the criminal proceedings against the plaintiff and that, for purposes of malicious prosecution, he acted with malice. The plaintiff has accordingly established that he was maliciously prosecuted at the hands of sergeant Witvoet.

[38] I now deal with the quantum of the plaintiff's claims for unlawful arrest and detention and malicious prosecution. The plaintiff is married and employed. He was arrested in full view of his friends and many other persons who gathered outside the night club. He was deprived of his freedom for approximately 32 hours. He was detained in a cell at the police station under very unpleasant circumstances. He had to appear before a magistrate on four occasions.

His undisputed evidence was that his appearance before court caused him humiliation. Furthermore he had to travel from Port Elizabeth to King William's Town on at least three occasions to attend court.

[39] Counsel for the plaintiff suggested that an amount of R120 000.00 should be awarded for the plaintiff's unlawful arrest and detention and that the sum of R100 000.00 would be appropriate for his malicious prosecution. Counsel for the defendant has suggested that the sum of no more than R50 000.00 should be awarded for the plaintiff's unlawful arrest and detention. No submission was made in respect of the quantum of the plaintiff's claim for malicious prosecution.

[40] I have had regard to the authorities referred to by both counsel.<sup>19</sup> Regard being had to the fact that the Constitution places a high premium on the right to freedom, which includes the right not to be deprived of freedom without just cause, the plaintiff's personal circumstances, the circumstances under which he was detained and the humiliation when he appeared in court, I am of the view that his damages should be set in the sum of R80 000.00 in respect of his arrest and detention and R50 000.00 in respect of his malicious prosecution.

[41] There is no reason why the defendant should not pay interest on the above sums calculated from the date of service of summons on the defendant to date of payment thereof.

[42] The plaintiff could have instituted the above claims against the defendant in the

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<sup>19</sup> *Rudolph and others v Minister of Safety and Security and others* 2009 (2) SACR 271 (SCA); *Rahim and others v Minister of Home Affairs* 2015 (4) SA 433 (SCA); *Ndlovu v Minister of Safety and Security* 2014 (7K6) QOD 38 (ECG); *Mpange v Minister of Safety and Security* 2015 (7K6) QOD 133 (ECM); *Minister of Police v Mahleza* (CA 106/2020) [2021] ZAECGHC 83 (14 September 2021); *Oriyomi v Minister of Police* (14132/13) [2020] ZAGPPHC 224 (6 April 2020); and *Ntombikhona Maleshiyo v MEC for the Department of Health, Eastern Cape* (451/2018) [2020] ZAECBHC 28 (23 October 2020) and the authorities referred to therein.



magistrate's court. Despite submissions to the contrary by counsel for the plaintiff, it would, in my view, be inappropriate to order the defendant to pay the plaintiff's costs on the High Court scale when the plaintiff could have instituted the proceedings in the magistrate's court. However, the plaintiff would be entitled to the cost of counsel on the relevant magistrate's court scale because the defendant raised defences which appeared, at least on the pleadings, to be complex.

[43] In the result, it is ordered that:

- 43.1. The plaintiff was unlawfully arrested on 18 August 2019.
- 43.2. The plaintiff's detention after his aforesaid unlawful arrest until his first appearance in the magistrate's court, King William's Town at 09h00 on 19 August 2019 was unlawful.
- 43.3. The plaintiff was maliciously prosecuted.
- 43.4. The defendant shall pay to the plaintiff the sum of R80 000.00 as and for damages for his aforesaid unlawful arrest and detention.
- 43.5. The defendant shall pay to the plaintiff the sum of R50 000.00 as and for damages for his malicious prosecution.
- 43.6. The defendant shall pay interest on the sums of R80 000.00 and R50 000.000 at the prescribed rate of interest, from the date of service of the summons on him to date of payment.
- 43.7. The defendant shall pay the plaintiff's costs of suit on the magistrate's court scale, such costs to include counsel's fees, which fees shall not exceed thrice the amount specified in the applicable tariff.

For the plaintiff:

Ms M du Toit, instructed by Peter Mckenzie Attorneys, Port Elizabeth and N N Dullabh & Co, Grahamstown.

For the defendant:

Mr W H Oliver, instructed by the State attorney, Port Elizabeth and Netteltons Attorneys, Grahamstown.

Date heard:

15, 16, 17 and 18 November 2021.

Date of delivery of judgement:

1 February 2022.