

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 2558/2018
3747/2018
2556/2018
2557/2018
2555/2018
2559/2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	☒
(3) REVISED	☐
30/4/2018	<i>A. G. Mny</i>
DATE	SIGNATURE

In the matter between:

PIET LASSY MASHAVA
LINDIWE GLADNESS MBALI NHLABATHI
MOSHOMANE PHILADELPHIA NTABISENG
PHEMELO ALPHEUS PHAKEDI
MAKGAHLELELE THOKO NCHABELENG
CETHEKILE SANAH MOKHONAZI

FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF
FOURTH PLAINTIFF
FIFTH PLAINTIFF
SIXTH PLAINTIFF

AND

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

TOLMAY J:

INTRODUCTION

- [1] The six plaintiffs, all instituted action against the Minister of Police, as respondent (the Minister), alleging that on 22 June 2017, near Pretoria Central Police Station, Gauteng, they had been unlawfully arrested and detained by the South African Police (SAPS). Their claims were heard together after consolidation of their actions. The actions of all the plaintiffs are based on the same incident.
- [2] The parties agreed that *quantum* and merits should be separated and the matter proceeded on the merits only.
- [3] The plaintiffs' particulars of claim were carbon copies of each other. They all alleged that on 22 June 2017, at or near Pretoria Central Police Station, Gauteng, they were arrested by members of the South African Police (SAPS). They alleged that they were held in detention and while in detention they were insulted by a Captain Henrico, who used racial slurs against them. They all alleged that while they were detained, they were denied the right to have family members visit and were released the next day without any charge. They furthermore alleged that their

Constitutional rights in terms of section 10, 12, 18 and 24 of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution) were infringed. It was common cause between the parties that they were arrested without a warrant of arrest.

- [4] As a result of the aforesaid the plaintiffs' claimed damages for unlawful arrest and detention, general damages based on the alleged racial slurs and damages based on emotional shock, trauma and impairment of dignity.
- [5] It is worth mentioning that the general damages claims based on the utterance of racial slurs were described in the particulars of claims as "general damages as a result of defamation of character," however no cause of action for defamation was made out on the pleadings and this incident was presented as part of the unlawful arrest.
- [6] Despite the defendant carrying the *onus* to prove that the arrest was lawful, the plaintiffs' proceeded to start leading evidence.

COMMON CAUSE FACTS

- [7] Before the commencement of the trial the parties agreed that the following facts were common cause:
 - a) The arrests arose from an incident that occurred on 20 June 2017 when the plaintiffs who were police reservists and community forum patrollers intercepted and sought to search the

complainant, who was later identified as Dr Omotunde Owomo Fayon (the complainant);

- b) During the search of the complainant and his vehicle the plaintiffs found in his car tablets, money in foreign and local currency, files relating to abortions and other medically related document;
- c) The complainant was taken to the police station where upon inquiries with the Health Professionals Council of South Africa (HPCSA) confirmed that the complainant was a medical practitioner and was assumed to be in lawful possession of the goods found in his possession;
- d) The complainant was then released without being charged;
- e) During the morning of the 21st of June 2017, the matter was assigned to an investigating officer who summoned the plaintiffs, Mr Thabo Malebye and the complainant to his office. On this occasion the complainant identified who searched and brought him to the certification office at the police station on 20 June 2017. He also identified Mr Malebye as the one who was in possession of the brown bag that belonged to him and from which certain items were missing;
- f) The parties agreed that the plaintiffs and Mr Malebye went outside, a dispute however existed regarding at whose insistence they left the room;
- g) When they returned Mr Malebye handed the investigating officer R3 000-00 which were money taken from the complainant. The other items were not returned, however Mr Malebye took some

pills from his pocket which belonged to the complainant and handed them to the investigating officer;

- h) The complainant insisted that he also wanted the other items, including the US dollars back. The investigating officer released the plaintiffs with an instruction to return at 17:00 with the outstanding items;
- i) On 22 June 2017 all the plaintiffs were called to the police station and arrested on charges arising from the incident. It was also common cause that the arrest was without a warrant;
- j) The plaintiffs appeared before a magistrate at the Commercial Crimes Court, Pretoria where the matter was postponed and they were released from police custody on 23 June 2017;
- k) It was also common cause that the arrest was pursuant to a case of theft opened by the complainant under case no. 100/06/2017 at Pretoria Central Police Station.

THE DEFENCE

- [8] The defendant's defence was based on section 40(1)(b) of the Criminal Procedure Act 51 of 1977, which in relevant part, reads as follows:

"40 Arrest by peace officer without warrant (1) A peace officer may without warrant arrest any person-

(a) ...;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

- [9] In the light of the aforesaid the Court had to determine whether the arrests of the plaintiffs were lawful.

THE EVIDENCE

- [10] The sixth plaintiff (Ms Mokhonazi) was the first to testify. She testified that on 20 June 2017 she was on patrol with Mr Malebye, Ms Mashomane, and Mr Phakedi. They were in Schoeman Street going towards Van Der Walt Street, when they were called to assist by colleagues on the opposite side of the road, as they were having difficulty with a person who was apparently refusing to be searched. Only one of the people in the other group, who would later turn out to be the first plaintiff's (Mr Mashava) group, was wearing a uniform. The rest of his team were wearing reflector jackets over their normal clothes. Mr Mashava was a police reservist and the rest of his team were community patrollers. Ms Mokhonazi and Mr Malebye were police reservists and were wearing police uniforms. Ms Nchabeleng and Mr Phakedi were community patrollers wearing reflector jackets only. Ms Mokhonazi's team went to assist. It transpired that the man, who later became the complainant, was not co-operating as he mistrusted Mr Mashava's group, because only one of them wore a police uniform. He was apparently satisfied with the legitimacy of the search when Ms Mokhonazi's group joined. Mr Mashava searched the complainant, but did not find anything, they then requested to search his vehicle. Mr Malebye searched the boot, where he found boxes with files, relating to abortions. There was also a brown bag in the boot of the car, Mr

Malebye took the brown bag and put it over his shoulder. Ms Mokhonazi testified that the complainant told them that he was a medical doctor, they were however concerned that he could be a “fake” doctor, due to the files in the boot that related to abortions. They requested him to accompany them to the police station so that they could verify whether he was indeed a medical practitioner.

[11] She testified that she, Ms Moshomane, Ms Nchabeleng and Ms Nhlabathi and Mr Phakedi walked back to the police station, while the complainant, Mr Malebye, Mr Mashava and Mr Nchabeleng drove to the police station with the complainant's vehicle. When they arrived at the police station the complainant was still in the vehicle, refusing to get out. After she talked to him, he agreed to accompany them into the police station.

[12] They all went to the certification office. She phoned Captain Mataung (at that stage he was still a Constable) to come and assist in verifying whether the complainant was indeed a medical doctor. He came immediately and took the complainant's identity document and HPCS card. He left and very shortly after that returned and confirmed that the complainant was indeed a medical practitioner.

[13] Ms Mokhonazi testified that while they were in the office, waiting for Captain Mataung to return, the complainant asked where Mr Malebye was with his bag. She phoned Mr Malebye, who told her that he was in

the bathroom. He then came to the office with the bag. Mr Mashava then wrote in his pocket book and asked whether the complainant had checked his possessions. The complainant however said he trusted the police and signed without checking the contents of the bag.

[14] She further testified that she walked with him to his car. He told her he was not feeling well and gave her R20 and requested her to go and buy him a Coke, which she did. After drinking the Coke, he felt better and they parted ways.

[15] The following day she was called by Captain Mataung, who told her that she and the people who were with her on duty the previous day should come to his office. When they arrived there, he was not in. She called him to find out where he was, he told her that he was at court and that they should stay in the vicinity, and he would call them when he was back from court. When he returned, he called and they went to his office. He phoned the complainant, who told him that he was busy, but would be there at 13:00. They left and Captain Mataung phoned her when the complainant arrived, she phoned the others to inform them. Apparently everyone except Mr Malebye arrived at the same time. When Mr Malebye arrived he greeted the complainant, but he ignored Mr Malebye. Captain Mataung then told them the complainant opened a case as his phone, watch, some tablets and some cash, including US dollars were missing from his bag.

[16] Ms Mokhonazi then told Captain Mataung that she did not see the items mentioned, but Mr Malebye was in possession of the complainant's brown bag. An argument then started between Mr Malebye and the rest of the group. Captain Mataung, according to her, then told them to go outside and sort the issue out between themselves. When they were outside the argument continued. Ms Moshomane grabbed Mr Malebye by the collar and told him to please give back the complainant's property. They told him that they did not want to get into trouble because of what he did. Mr Malebye then produced R3 000-00. They entered the office and Mr Malebye threw the money on the table. The complainant refused to take it and insisted that the other items should also be returned. Mr Malebye initially said that the Viagra tablets, which were part of the missing items, were in the office where they worked, but then proceeded to unzip his jacket and returned some of the tablets. He apologized and said that he had already used one of the tablets. The rest of them then requested to leave, Captain Mataung, Mr Malebye and the complainant remained in the office. Before leaving Captain Mataung requested them to stay in the vicinity.

[17] Later Mr Mashava went to the police station and informed the commander about the incident. When the complainant left they were still there. She said they later returned to Captain Mataung's office and asked why he did not inform their commander, but Captain Mataung said that he was not yet arresting them, but was merely talking to them. This time Mr Malebye was not present. They were only allowed to go home

after 19:00.

[18] On 22 June 2017 Ms Mokhonazi was again called by Captain Mataung, he said that she must come to the police station and the others must also come as they were all going to be arrested. She was very upset, she prepared herself and phoned her husband to take her to the police station. She called the others and told them that they should go to the police station. When she got there she called Captain Mataung. When they arrived Captain Mataung phoned the complainant and told him that he was going to arrest them. He put the complainant on loudspeaker. According to her the complainant then said "*you cannot arrest those people. You must arrest Thabu*" (Mr Malebye). The complainant then said he could not come as he was busy in Johannesburg. Captain Mataung said he was going to write down the arrest statements. He asked that they be taken to the cells. He later arrived at the cells and verified their personal particulars. When they arrived Mr Malebye and Mr Mashava were already in the cells. The SAP 14 was completed and they were detained.

[19] A Colonel Tumiso called out the names and in which cell each person was and at 15:00 said that they had some visitors, the cells were opened and she said they "*went down.*" When they arrived they were not allowed to speak to their visitors, who were apparently chased away. They were taken back to the cells. Later the Commander called the eight of them and they were moved to the waiting cells. The

Commander said they found Mr Malebye and asked him why he “*did such a thing*”, Mr Malebye apologized. Mr Malebye then apparently offered to pay everyone’s bail. She said she refused. She was very upset as she had a baby which she had to breastfeed. Mr Malebye continued to ask for forgiveness, until the Commander left. Later during the night Captain Mataung came to charge them and take their statements.

[20] On 23 June 2017 they appeared in the Magistrate’s Court, in the holding cells were four women, herself, Ms Moshomane, Ms Nhlabathi and Ms Nchabeleng. At this point a Captain Henrico came to the cell, a warrant officer opened the door for him. Captain Henrico had a document in his possession, he called Ms Mokhonazi, who at this point was seated on the floor. She stood up, he then according to her said “*come here you kaffir and sign*”. She shouted at him that he could not call her that. He also told her that she should bring her uniform when she got out of there. After she refused to sign he left. Shortly afterwards he entered the cell with another Captain, who asked her whether it was true that she would not sign. After she again refused, they left the cell.

[21] They then waited to appear in court, after a while they were taken to the Commercial Crimes Court. The men and women were separated. A male prosecutor arrived with the docket. He asked who the suspects were. They said all eight of them. He shook his head and went away. Their lawyer then arrived. They re-appeared in court, bail was set at

R500-00 and they were then released on bail. They returned to court and at this point a female prosecutor told them she did not understand the case against them. Another date for appearance was set on which date the charges against them were withdrawn.

[22] She denied that she was ever requested to become a state witness in terms of section 204 of the Criminal Procedure Act (CPA) and that the charges against her were withdrawn for that reason, and said that she was never requested to come and testify against Mr Malebye.

[23] She was referred to a statement, that she admitted she signed on 2 June 2017, but stated that the statement was wrong in so far as it recorded that it stated that they requested Captain Mataung to go out of the office, during the interview with the complainant, and insisted that he requested them to go outside.

[24] During cross-examination Ms Mokhonzai was referred to her particulars of claim, where in paragraph 5.4 it was stated that the day after 22 June 2017, she was released without any charge. She could not give any satisfactory explanation for this allegation, that was clearly incorrect. It must be noted that the same allegation appeared in all the particulars of claim and contradicted the evidence of all the plaintiffs. This inconsistency with the evidence was also not clarified by the legal representative for the plaintiffs.

[25] She insisted during cross-examination that she and her group merely provided backup for Mr Mashava's group. In this context it is important to note that Mr Malebye, who was part of her group searched the boot of the complainant's car. She was reluctant to admit that she was the leader of her group, but her actions clearly indicated that she and Mr Malebye were police reservists and she was the one who persuaded the complainant, on her own evidence, to co-operate. Evidence of the other plaintiffs also contradicted her evidence as she was clearly regarded by them to have been the leader of her group.

[26] She was also the one who persuaded the complainant to get out of the car at the police station. She called Captain Mataung to verify his credentials and she comforted the complainant after the incident, when he was traumatised with what had happened. There is no doubt that Ms Mokhonazi was an important and central figure during the incident, during which the complainant was apprehended. Her insistence that her group merely provided back-up and did not form part of the whole process is not probable in the light of her own evidence.

[27] Ms Mokhonazi was also, during cross-examination, referred to a second statement she made on 17 August 2017, this statement corroborated her earlier statement, and also referred to the fact that the group requested to go out and discuss the matter, this statement she also signed, but testified that everything, but that paragraph, was correct. It was put to her that this statement was made, when the

agreement was reached that she would become a state witness in terms of section 204 of the CPA and the charges were withdrawn against her.

[28] She tried to explain her alleged signing of the statements, without reading it, by claiming that she was not aware of the implications thereof, which is hard to believe in the light of the fact that she had been a police reservist since about 2007. She admitted writing statements, but tried to convince the court that she only wrote what witnesses told her, and in all these years she said she never took a statement of a suspect, which seems improbable.

[29] It was put to her that the charges were withdrawn on 18 August 2017. She said she could not remember, seeing that the second statement was signed on 17 August 2018, the probabilities favour the version that she was converted from a suspect to a section 204 witness.

[30] It was also put to her that the complainant opened a case against the whole group. She first answered yes, but then later on denied it and reiterated that only Mr Malebye was pointed out as a culprit by the complainant.

[31] Under cross-examination she stated that she opened a criminal case against Captain Henrico on 12 July 2017.

[32] The fourth plaintiff (Mr Phakedi) who was a community patroller testified next. He confirmed the incident of 20 June 2017 and how it came about that they joined the other group when they apprehended the complainant. He confirmed that Ms Mokhonazi introduced them and explained their duties to the complainant. He specifically testified that Ms Mokhonazi, after doing that, instructed Mr Mashava to search the complainant. He was unaware of what motivated the group led by Mr Mashava to want to search the complainant. He also confirmed that Mr Malebye searched the boot of the car and confirmed that files were found relating to abortions. He also testified that a brown bag and black bag were also found in the boot and that Mr Malebye took possession of it. He testified that the complainant, Mr Malebye, Mr Mashava and Ms Moshomane got into the complainant's car and drove to the police station. The rest of them walked there.

[33] He confirmed that when they got to the police station they found the complainant still in his car, refusing to get out. He was only willing to get out once Ms Mokhonazi arrived. He said that Ms Mokhonazi treated the complainant well, where Mr Malebye was harsh towards him. He confirmed the interaction between Ms Mokhonazi and Captain Mataung and how the complainant's identity was verified. He also confirmed Mr Malebye's absence initially, whilst he was in possession of the brown bag. According to his evidence it seems that Mr Malebye only returned when Captain Mataung returned to confirm the fact that the complainant was indeed a medical practitioner. At this point Mr

Malebye apparently put the brown bag on the table. After Captain Mataung left, Mr Mashava requested the complainant to sign his pocket book. The complainant was released and according to him the two groups went back to their patrol duties.

- [34] The following morning 21 June 2017 he got a call from Ms Mokhonazi who informed him that Captain Mataung wanted to see them, and that they should meet at his office. He confirmed the evidence regarding Captain Mataung's initial absence and the evidence regarding the conference with Captain Mataung and the complainant and that they were informed that the complainant opened a case. He said that Mr Malebye was initially not there. When Mr Malebye arrived, the complainant pointed at Mr Malebye and said that he was the one who took his property, and the complainant refused to greet him. Captain Mataung said that a case was opened. Captain Mataung, according to Mr Phakedi, told Mr Malebye to bring the items back as the complainant would withdraw the case if he got his property back. Ms Mokhonazi, Ms Nchabeleng and Ms Moshomane then started shouting at Mr Malebye and said that they were not going to be arrested because of something that he did. Due to the noise Captain Mataung requested them to go out of the office and discuss the situation amongst themselves. The argument continued outside Captain Mataung's office. Mr Malebye denied having taken the items and he was grabbed by the collar, Mr Malebye then admitted that he had the money and they went back into the office, he wanted to give the money

back, but the complainant insisted that he wanted his watch, tablets and US dollars. Mr Malebye then produced the Viagra tablets, but said that he had already used one. Mr Malebye denied having seen the other missing items.

[35] After this meeting Captain Mataung said that they could leave but should not go far and he would phone them. Captain Mataung, the complainant and Mr Malebye remained in the office.

[36] He waited outside, but when it became late he decided to go to the charge office, where he met with his commander and asked to be released to go home, by this time it was already after 23:00.

[37] During the morning of 22 June 2017, Ms Mokhonazi informed him that Captain Mataung wanted to see them. It was after lunch that Captain Mataung met them at his office and told them to go down to the charge office. He told them that Mr Malebye had already been arrested. He found Mr Malebye and Mr Mashava in the cells. Captain Mataung indicated that he was going to arrest all of them. They wanted to know why they were being arrested, but Captain Mataung did not reply. They were processed and put in a cell. Captain Mataung went to take statements from the women in the group. He did not make a statement. Later the ladies were also brought to the cell and their constitutional rights were given to them. The men were then taken to a cell upstairs. When it was visiting time they were not allowed to receive visitors.

While in the cell their fingerprints were taken. Mr Malebye asked whether they had a lawyer. Mr Phakedi was angry and said no, Mr Malebye in response to this said he would make a plan and offered to pay the bail on his behalf.

[38] The following day they were taken to court and they were charged with common robbery and extortion. He confirmed that they were transferred from the Magistrate's Court to the Commercial Crimes Court. Before their appearance their lawyer arrived and told them the case was complicated and the prosecutor did not want to take the case. They were granted bail and the case was remanded. When they appeared again the charge of robbery was changed to theft. They were given another date for appearance and on that date the case was withdrawn.

[39] Under cross-examination he said that Ms Mokhonazi was the leader of their group. He confirmed that members of the group searched the complainant. He confirmed that nothing was found when the complainant was searched and that files were found in the boot. He said that Ms Mokhonazi, Ms Nhlabathi and himself walked to the police station, the others drove there in the complainant's car.

[40] He verified that all eight of them went to the office. He confirmed most of what Ms Mokhonazi said about what happened at the verification office, but contrary to what Ms Mokhonazi said about the complainant

leaving, he said that the complainant hurriedly left and said that they wasted his time. He also said that the complainant was all right when he left and not distressed as was testified by Ms Mokhonazi. After Ms Mokhonazi's version about the complainant's departure was put to him, he tried to adapt his version and said that she left with the complainant and he only saw her when she came back, after she bought the cold drink. How he knew about the cold drink is unclear, since this happened, according to Ms Mokhonazi, when the complainant was already in his car and on Mr Phakedi's own version he was not with them.

[41] He testified that he could not remember whether the boxes with the files were in the certification room with them or not. It was put to him, that they split the complainant's money, which was taken from him between them and part of it was returned to the complainant. Mr Phakedi denied this. It must be noted that this was never put to Ms Mokhonazi.

[42] He confirmed the evidence of Ms Mokhonazi regarding the events of the following day, in most respects. He changed his version regarding the charge under cross-examination, initially he said that they were informed that a case was opened against them and later he said that Captain Mataung did not specifically say that a case was opened against all of them. At this point he also said that he did not know whether they were at Captain Mataung's office in relation to this case.

Given the circumstances it is highly unlikely that he did not know why they were there. He conceded that there was no other reason for them to be there.

[43] It was put to him that when they were outside Captain Mataung's office they raised R250-00 each to give back to the complainant. This was also not put to Ms Mokhonazi. Mr Phakedi also denied that the case was withdrawn against him, because the state wanted to use him in terms of section 204 of the CPA as a witness against Mr Malebye.

[44] The fifth plaintiff (Ms Nchabeleng) was the next witness. She was a community patroller and on 22 June 2017 she was patrolling the city centre and formed part of Mr Mashava's group.

[45] While on patrol they saw a man putting a box in his car's boot. Mr Mashava suspected that there was something suspicious about the man's actions and they approached him. Mr Mashava was in uniform, but the rest of the group were in plain clothes and wore reflector jackets. Mr Mashava introduced himself and asked whether he could search the man. The man however said that he did not trust them as only one of them were in uniform. They then called Ms Mokhonazi's group, they were at that point on the opposite side of the street. They requested them to come and assist them. She confirmed that there were two people in uniform in the other group. They came over and Ms Mokhonazi introduced them to the man. He then agreed to be

searched.

- [46] Ms Nchabeleng confirmed the other witnesses' evidence relating to the search of the complainant and his vehicle as well as Mr Malebye's taking possession of the complainant's brown bag, their suspicion about the complainant being a "*fake*" medical practitioner and the decision to go and verify the information at the police station.
- [47] She testified that the complainant was trembling so much that Mr Mashava asked whether he should rather not drive the complainant's vehicle. The people in the complainant's car, according to her, was the complainant, Mr Mashava, Mr Malebye and herself. She testified that when they arrived at the police station the complainant did not want to get out of the car, but when the others arrived, he alighted from the vehicle without being requested. This contradicted Ms Mokhonazi's version that she was the one who persuaded the complainant to get out of the car. She confirmed the evidence of the others regarding the verification of the identity of the complainant. She also confirmed the evidence of Ms Mokhonazi regarding the pocket book and the complainant not checking the contents of his brown bag. She merely mentioned during evidence in chief that the complainant left, but said nothing about with whom he and in what emotional state he left.
- [48] She said that Ms Mokhonazi phoned her the next day and told her that Captain Mataung wanted to see them. She confirmed the evidence of

the other witnesses about the incidents leading up to the meeting in Captain Mataung's office. She said the complainant told Mr Malebye that he was the one that was in possession of the brown bag. She confirmed the altercation outside the office. She also said Captain Mataung ordered them to go out of the office and discuss the matter. She confirmed that Mr Malebye placed the money on the table, but that the complainant was angry and said he wanted the other items also to be given back. She confirmed the evidence of the others about the tablets. She said they told Mr Malebye to bring the other items back. She also confirmed that they left and the complainant, Mr Malebye and Captain Mataung remained in the office. Later, after Captain Mataung phoned, they left.

[49] She confirmed that the following day they were summoned back to the police station and were told that they were going to be arrested. At about noon they met at Captain Mataung's office where he told them that they were under arrest and sent them to the cells where they were processed and their constitutional rights were given to them.

[50] She said that the following day they were first taken to the Magistrate's Court and from there to the Commercial Crimes court. They appeared and were granted R500 bail and the matter was remanded to a later date, when the charge was changed from common robbery and extortion to theft and extortion. In due course and after further appearances the charges against the plaintiffs were withdrawn, but not

the charges against Mr Malebye.

[51] When prompted by counsel, asking her if anything happened in the cells, she said that while they were in the cells a white male came to the cells. She said she did not know who this white male was, but he had a file in his possession, and he was looking for Ms Mokhonazi, as he called out her name. He then made the racial slur, previously referred to. She said that they then shouted at him. He left and came back with another male person. This man, who was black, was apparently "cool and ok" and merely asked Ms Mokhonazi if she indeed was refusing to sign.

[52] She also denied that the charges were withdrawn against her, because she agreed to become a state witness in terms of section 204 of the CPA.

[53] During cross-examination she admitted that they all agreed to go to the police station after the complainant and his car was searched, as they worked as a team.

[54] She said she could not remember who brought the boxes with files to the office and that Mr Malebye was initially not with them in the office. They only realised it when the complainant asked where his brown bag was. She also said that the complainant was not detained more than 20 minutes. It was put to her that the defendant's witness would say that the complainant was kept at the office for four hours, this was

however not put to the previous two witnesses.

- [55] She said that she was present when the complainant left and he was happy at the time. This contradicted Ms Mokhonazi's evidence about the complainant's mental state when he left. She did not see the complainant to his car, she only saw him leaving the office. She also said he left with Ms Mokhonazi, Ms Moshomane and Ms Nchabeleng. Ms Mokhonazi in her evidence said nothing about the other two women being present. She testified that her group, that is Mr Mashava's group went back on the street, I infer to continue with their patrolling duties.
- [56] She was also asked whether the complainant was requested to empty his pockets and that they divided a portion of the money amongst them. She denied it, and as already stated this was never put to Ms Mokhonazi.
- [57] She admitted that they were informed that a criminal complaint was laid by the complainant against all of them. It was put to her that they were told to go and look for the items and were to return it. She denied it. According to her they were arrested in Captain Mataung's office where their rights were read out, and then they were taken to the cells. She could not remember whether she made a statement.
- [58] She said all of the people in the cell shouted at the man who made the racial slurs. Her explanation of why they did not tell the captain who

returned with the white male about the racial slurs was that he only asked why Ms Mokhonazi refused to sign.

[59] Ms Nthabiseng testified that she was in Mr Mashava's group on 20 June 2017. She confirmed the evidence regarding the incident that occurred while they were on patrol. According to her she was one of those who walked to the police station. She confirmed that the complainant only got out of his car when they arrived. She confirmed the series of events leading up to the identification of the complainant as a medical practitioner and once that was done, that he signed Mr Mashava's pocket book without checking the contents of his bag. She said that she and Ms Mokhonazi left with the complainant and the complainant gave Ms Mokhonazi money to buy him a cold drink and asked him whether he was ok and left. They then had lunch.

[60] She was called by Ms Mokhonazi on 21 June 2017 and told that Captain Mataung wanted to see them. She confirmed the other witnesses' evidence relating to the events leading up to the meeting in Captain Mataung's office. She also confirmed that Mr Malebye arrived after the others and that the complainant refused to greet him. She also confirmed the evidence relating to the missing items and that the complainant pointed Mr Malebye out as the person who must have taken the items since he was in possession of the brown bag. She also confirmed the argument that ensued, and that Captain Mataung asked them to go out and discuss it amongst themselves. She said that when

they were outside she grabbed Mr Malebye by the collar and confronted him about taking the items of the complainant, and he then took out the money and put it on the table. She confirmed the version about him producing the tablets and the complainant wanting the rest of the property back.

[61] Later during the day Captain Mataung phoned and said Mr Malebye was nowhere to be found. He later met them at the charge office and informed them that Mr Malebye was in Hammanskraal. They all then went home.

[62] The following day Ms Mokhonazi phoned her and told her they had to go to the police station as they were going to be arrested. She confirmed the arrest and the processing at the cells. Captain Mataung later came to the cell and took statements from her and Ms Mokhonazi. All of them asked Mr Malebye why he did such a thing where after he apologised, asked their forgiveness and offered to pay their bail. They were then taken back to the cells.

[63] She confirmed that the next morning they were taken to the Magistrate's Court and were informed that the charges were common robbery and extortion. While in the holding cells Captain Henrico came by, he stood at the door and called Ms Mokhonazi's name, four of them were in the cell. Ms Mokhonazi stood up when her name was called. Captain Henrico had documents with him and he uttered the racial slur

previously referred to against Ms Mokhonazi. All of them then started shouting, Ms Mokhonazi refused to sign the documents and he left. He then came back with Captain Malala who asked Ms Mokhonazi whether she confirmed that she refused to sign, which she did, they then left.

[64] She confirmed the evidence regarding their appearance at court and later the withdrawal of the charges. She also denied ever agreeing to become as state witness in terms of section 204 of the CPA.

[65] She denied that she was in the car contrary to what Ms Mokhonazi and the others testified. She denied that the complainant was ever handcuffed.

[66] She could also not remember whether the boxes were brought to the office. It was put to her that the doctor took R7 500.00 out of his pocket. She said that she did not see it. During cross-examination she denied that Captain Mataung told them that the complainant laid a complaint against all of them and said that a case was opened against Mr Malebye. She could not explain why they got so agitated if, her version was true, that they were told that a case was opened against Mr Malebye only. She denied that all of them were being given time to return the complainant's property. She said they left later than usual, because Captain Mataung asked them to stay in the vicinity. She said that they were arrested by about noon.

- [67] Under cross-examination, when confronted with her statement, she denied that certain aspects of it was correct. This included the part that states that Mr Malebye handcuffed the complainant and removed it when they got in the car. She also denied that, contrary to what was stated in her statement, that Captain Mataung sent them out of the office to discuss the issue amongst themselves. This statement was made on 17 August 2017, a day before the charges were withdrawn. In the statement she also said, contrary to what she testified, that she was one of the people who drove with the complainant in his car to the police station. She also denied that the complainant laid a complaint against all of them.
- [68] The second plaintiff, (Ms Nthlabathi) was the next witness. She confirmed what the other witnesses testified, but contradicted them in some aspects. She was in Mr Mashava's group on the day in question. She could not remember who was in the car on the way to the police station, but testified that she was in the group who walked there. She said that when the complainant left, Ms Mokhonazi came to her and they had lunch whilst waiting for the parade. She confirmed the incident in Captain Mataung's office.
- [69] The day after the meeting she was summoned to the police station. She met Captain Mataung at the charge office and he told her to go to the cells, where she was given her constitutional rights and processed. She found the rest of the group was already there. She confirmed they

were charged with common robbery and extortion. She also confirmed that Mr Malebye apologised and offered to pay their bail. She was very concerned as her child was alone at home with no one to take care of him.

[70] They were taken to the female cells where they spent the night. While in the holding cells Captain Henrico entered the cell. Contrary to Ms Mokhonazi's evidence, that he only talked to her, she said that he also addressed her and told her to bring her uniform back to him. If I understood her evidence correctly, while in the holding cells the cells were opened and a person called her. She walked with her lawyer to the office where they found Captain Henrico and two other officers. Captain Henrico told her to sign something, but apparently her lawyer said she should not sign. Her lawyer took the papers with him and she then went back to the cells.

[71] She confirmed the evidence regarding the initial change of the charge and later the withdrawal of charges and denied that she ever agreed to become a state witness.

[72] Under cross-examination she denied ever having seen the complainant being handcuffed, contrary to what she earlier testified. She could also not remember who brought the boxes of files into the office. She denied that she saw the complainant taking money from his pocket or that it was divided between them. In cross-examination she

said that Captain Mataung did not mention against whom the case was opened.

[73] During cross-examination she said she did not know Captain Henrico before this incident occurred. She had been a reservist since 2010 at Pretoria Central Police Station and Captain Henrico had been working there with police reservists. It was put to her that it was highly unlikely that she would not know her Captain, especially as his office was not far from hers. Her evidence also contradicted Ms Mokhonazi's version that Captain Henrico spoke only to her which evidence was confirmed by Ms Mashobane and Ms Nchabeleng.

[74] The last witness for the Plaintiffs was the first plaintiff, Mr Mashava, he was a police reservist and in uniform on the day in question. He confirmed the evidence of the others regarding the incident of 20 June 2017. He testified that he noticed the complainant putting a box quickly in his boot and that action seemed suspicious to him and that resulted in what followed. He confirmed that the complainant was suspicious as only one person in his group was in uniform. He confirmed the search that followed and Mr Malebye taking possession of the brown bag.

[75] He confirmed that they went to the police station. According to him the complainant was shivering, one can only infer from fear, so much so that he agreed that Mr Mashava should drive his car. According to him Mr Malebye, Ms Nchabeleng, himself and the complainant was in the

car. He said the complainant was sitting in the back of the car next to Mr Malebye. He heard the click of handcuffs. He looked and saw that Mr Malebye had handcuffed the complainant who was not under arrest. Mr Malebye then removed the handcuffs.

[76] He confirmed the circumstances surrounding the arrival at the police station and the verification of the complainant's credentials. He then requested the complainant to check his belongings and to sign his pocket book. The complainant did not check the contents, but signed, after that he left. He did not know who went out with the complainant, and who took the boxes to the car. He then went on patrol and later went off duty.

[77] The following day he was called by Ms Mokhonazi, who told him that Captain Mataung wanted to see them. He confirmed the version of the other witnesses regarding how they met with Captain Mataung and the complainant in the office of Captain Mataung. He confirmed that Mr Malebye was initially not present and that the complainant refused to greet him, when he arrived. He confirmed that an argument ensued about the missing items and that Captain Mataung sent them out of the office to discuss it. He also confirmed that when they returned Mr Malebye put R3 000 on the table, and that the complainant requested the return of the other items too and that Mr Malebye produced the tablets. Captain Mataung then said they must go and fetch the other items, and they must remain in the vicinity. When it was already dark,

Captain Mataung called them to the charge office and told them Mr Malebye was nowhere to be found.

[78] The following day at the police station Captain Mataung called and asked where he was, when he got there he looked for Captain Mataung. When he finally found him, he was told to accompany him to the cells. He was charged and was given his constitutional rights to sign. He was taken to the cells where he had to remove his shoelaces and belt. Mr Malebye was there. Captain Henrico came and wanted his personal number and home address. He was aware that he was charged with common robbery and extortion. They were taken to a cell upstairs where they were detained. Mr Malebye said he should not make a statement and said he would pay the bail money. He called someone after which his phone was taken. They sat there for a long time. At a point he heard Ms Mokhonazi. When it was visiting time, they were not allowed to receive visitors. Captain Mataung came to the cell and said his brother had confirmed his address.

[79] The following day they were taken to the Magistrate's Court and later the Commercial Crimes Court. While they were in the cells the women and men were separated. Someone called him and said someone was looking for him, it was Captain Henrico, who had certain documents with him, who apparently came to confirm his personal information. They were granted bail and the case was remanded and later withdrawn. He denied that Mr Moshomane was in the car, which

contradicted her evidence.

- [80] He said he did not know who brought the boxes to the office. The entry in his pocket book indicated that the complainant was happy when he left and confirmed that nothing was taken from him. The evidence about the complainant's state of mind when he left, contradicted that of Mr Mokhonazi, regarding the complainant's state of mind.
- [81] That concluded the evidence of the plaintiffs.
- [82] Mr Malebye then testified on behalf of the Minister. He confirmed the evidence regarding the patrol. He was part of Ms Mokhonazi's group who was called to assist Mr Mashava's group when they apprehended the complainant.
- [83] He however said that Mr Mashava was holding the complainant by the collar when he called him over. According to him Ms Mokhonazi told him to handcuff the complainant, but then said he should take it off. This was never put to Ms Mokhonazi. He confirmed that he searched the boot and found boxes with files. In the brown bag which was also in the boot there were an identity document, a drivers licence and keys.
- [84] He said he searched the complainant himself and found a lot of money in R100 notes on him. They suspected him of being a "fake" doctor due to the files relating to abortions and decided to go back to the police

station to verify his credentials. According to him the following people were in the car, himself, the complainant, and Ms Nchabeleng were sitting in the back, with the complainant occupying the middle seat. Mr Mashava and Ms Moshomane occupied the front seats. When they arrived at the police station, he suggested that they took the boxes with the files to the office, and carried it to the office. Ms Mokhonazi took out the complainant's identity document and HPCSA card. He confirmed that the complainant's identity was verified. He said nothing about him being with the brown bag in the bathroom, as the plaintiffs testified. The process of identifying the complainant's credentials took about 30 minutes and Captain Mataung said they could let him go.

- [85] At that stage the boxes and the brown bag were on the table. Ms Mokhanazi said that she thought he was doing illegal abortions and phoned one of the people whose name appeared on a file. This was never put to Ms Mokhonazi. The complainant said they should not phone the patients as the information in the files are confidential. He said he had no money for a lawyer but had money for cool drink for the police. The complainant took out R7 500-00 and Mr Malebye said that that Ms Mokhonazi then asked how much money was for the "cold drink" and they took R4 000-00 and gave the rest back to the complainant. According to him Ms Nchabeleng took R1 000-00 and the rest took R250-00 each. This evidence was not put to the other witnesses.

- [86] The evidence regarding how the money was divided and who actually got what, was unclear and did not make sense. According to Mr Malebye the complainant gave him the Viagra tablets. He testified that the complainant was angry about the money being divided. According to Mr Malebye they spent approximately three hours with the complainant. He did not witness the signing of the pocket book, as he and Mr Phakedi left to continue with their duties.
- [87] He also testified that when they initially arrived at the certification office, he and Mr Mashava carried the boxes from the car to the office.
- [88] The next day, 21 June 2017, he was called by Ms Mokhonazi who told him the complainant had opened a case against them. He confirmed the evidence of the others, regarding how they came to be in Captain Mataung's office and how they all finally met with him and the complainant.
- [89] He testified that Captain Mataung told them that the complainant opened a case against all of them. He said that Captain Mataung, during the meeting with the complainant, told them to go out and discuss the complainant's allegations amongst themselves. He said that as the division of the money was not equal, those who got R250-00, each gave that amount and the others produced R2 000-00. They gave the money to him and when they got back he put it on the table, but the complainant was not satisfied as he wanted his other items

back, including the tablets. Mr Malebye pointed out that the complainant gave him the tablets, he gave two back and said that he had already used the one. Captain Mataung told the others to leave and told them they had until 17:00 to return the complainant's property. He remained behind with Captain Mataung and the complainant. Mr Malebye did not explain why he remained behind with Captain Mataung and the complainant. He was also told to return at 17:00. All of them returned to the office at 17:00, but did not return any of the other missing items. They then returned home.

- [90] The next day he went to the office of Lt Colonel Phiri, who made a statement. In this statement Lt Colonel Phiri said that he was called by Mr Malebye on 21 June 2016 at 07:30, who requested a meeting with him, as he was the acting branch commander. On his arrival Mr Malebye told Lt Colonel Phiri that Captain Mataung wanted to arrest him for common robbery. He mentioned the names of the people who were on patrol. He said that he was called as back-up after the complainant was arrested. After this Captain Mataung called him to come to his office where he was arrested and detained. He found the others in the cells and they asked him why he gave their names to Lt Colonel Phiri and threatened to put the blame on him. They were charged and taken to Court the following day, and later to the Commercial Crimes Court. The matter was remanded and they were all granted R500-00 bail. At the following appearance the case was withdrawn against the others. He however stood trial and was

eventually acquitted.

- [91] Under cross-examination he denied that when Ms Mashava searched the complainant after they apprehended him, that nothing was found. He said that the complainant had money in his pockets. He insisted that during the search of the car and the subsequent actions they acted as a group. According to him there was only an identity document, passport, HPSCA card, bank cards and tablets in the brown bag. He confirmed that he had the brown bag in his possession, until it was put on the table at the certification office.
- [92] It was only during the meeting in Captain Mataung's office that the other items that were allegedly missing from the brown bag were mentioned. They said they only took R4 000-00 from the amount of R7 500-00 that the complainant had in his possession, and they returned R3 000-00 the following day. Ms Mokhonazi's group gave R1 000-00 back and Ms Mashava's group gave R2 000-00 back.
- [93] Mr Malebye denied that the complainant refused to greet him or pointed him out as the person who took the items from the bag.
- [94] Mr Malebye was referred to the statement made by the complainant on 21 June 2016 from this statement it transpired that the complainant was a Nigerian citizen and medical practitioner residing in Sunnyside. The statement indicated that he laid a complaint of robbery under case

number CAS 000/06/2017. In this statement the complainant stated that he told Captain Mataung that he would withdraw the case if the suspects returned his belongings. All of the suspects were called to the office, the complainant identified all of them. The complainant stated that he pointed out that Mr Malebye was the one who took his property and was also the one who verbally harassed him and handcuffed him. He was also the one who was in possession of his bag. He also stated that Mr Malebye was the one who took the money. According to him Mr Malebye removed items from the bag including the Viagra tablets. In the statement the complainant stated that he identified all the suspects and informed them that he had opened a case against them and that they should bring back his property. According to this statement the suspects voluntary collected a sum of R3 000-00 and brought it to him, he however told them he still wanted the cell phone, wrist watch and \$ 820, Viagra tablets and a souvenir US Dollar Trillian bill. Mr Malebye then took out the Viagra tablets and gave it to him, and said he had already used one. He informed them that he would give them until 17:00 to return the items, failing which he will proceed with the criminal charges against them. It is unclear why the defendant's counsel did not also put the statement to the plaintiffs, as he should have.

- [95] Mr Malebye denied the contents of the statement insofar as it contradicted his evidence. He also testified that Captain Mataung told him that the other suspects were going to turn against him, and that

was why he went to Lt Colonel Phiri.

[96] Captain Mataung then testified. He had been a member of SAPS for thirteen years. He confirmed that on 20 June 2016 he was called by Ms Mokhonazi to confirm the identity and credentials of the complainant, which he did. After he informed them that the complainant was indeed a medical practitioner, he told them to release him and continued with his duties.

[97] On 21 June 2017 he received a docket with case number 1000/06/2017. After perusing the docket, he realised that it related to the same person and incident that he dealt with the previous day. There was a statement by the complainant dated 21/06/2017 in which he set out the incident that occurred the previous day. In this statement the complainant stated that apart from searching him the suspects shouted at him and *inter alia* called him 'a fucking foreigner'. Mr Mashava searched him and took from him the contents of his pockets which included keys, phone and cash. He was forced to unlock his phones and they read his messages, sms's, WhatsApp's, videos and photo galleries. He was uncomfortable and wanted to contact his lawyer, in response Mr Malebye said that he was not co-operating and handcuffed him. At this point he was handcuffed and two ladies entered the car. He was taken to the Pretoria Central Police Station, where he was interrogated and called names. He stated that they wanted to go to an ATM to check the pins of his cards.

- [98] According to the statement they put all the complainant's items in a bag and threatened to lock him up. He requested to phone his lawyer, whereupon he was told that he had money for a lawyer, but not for "cold drink", referring to a bribe. They counted the money, which was R7 500-00 and divided it in two. They gave him his bag and when he checked it R4 000-00, \$ 820, his wrist watch and Viagra tablets were gone. He said that Mr Malebye was the person who took it. The statements should have been put to the other witnesses, no objection was however raised by the plaintiffs' counsel in this regards. In any event most of the evidence was in one way or the other, with some deviation confirmed by the plaintiffs.
- [99] Captain Mataung testified that after reading the statements he phoned the complainant and informed the plaintiffs and Mr Malebye to come to his office. He confirmed the meeting of all concerned at his office. When everyone was present they were informed about the complaint. According to him, he told them that the complainant was willing to withdraw the complaint, if they returned his property. They requested to go outside to discuss it and returned with R3 000-00 and Mr Malebye produced two of the three Viagra tablets. They were given until 17:00 to return the items, failing which they would be charged. He phoned to find out whether they made any progress. The plaintiffs were still around, but Mr Malebye was nowhere to be found. He eventually got a call from Mr Malebye who said that he was stuck in Hammanskraal. He told the others to go home.

[100] On the morning of 22 June 2017 he went to the station and reported to the station commander, Lt Colonel Phiri and informed him about the situation and requested him to read the statement from the complainant. He said it was clear from the statement that the plaintiffs acted together and used force by threatening the complainant, handcuffing him and threatening him with arrest. According to him they were arrested without a warrant, as they were charged with common robbery in terms of section 40(1)(b). They were also charged with extortion. In terms of the complainant's statement he was threatened with arrest, handcuffed and forced into his car. He arrested them and they were taken to the cells. The matter was transferred to the Commercial Crimes Court and the matter was remanded and they were released on bail. The charges were in due course withdrawn against the plaintiffs, as they agreed to become section 204 witnesses.

[101] What also informed his decision to arrest the plaintiffs and Mr Malebye was the fact that they returned R3 000-00 to the complainant in his office, which was indicative of the fact that there was substance in the complainant's claim that his property was taken by the group, the fact that Mr Malebye put it on the table, did not in his eyes absolve the others in light of all the circumstances. In the light of the statement of the complainant, and the money that was returned Captain Mataung said that he had reasonable suspicion that common robbery was committed by the group.

- [102] On 16 August 2017 the prosecutor requested Captain Mataung to obtain a statement from Lt Colonel Phiri to explain why the other persons were linked to the crime as the complainant only mentioned Mr Malebye and Mr Mashava. This observation was however incorrect as the statements made by the complainant, despite mentioning Mr Malebye by name, also implied involvement by the other members of the group. One must take into consideration that even if Mr Malebye was the main culprit the others, who were part of the police service, did nothing to stop him and allowed a crime to be committed in their presence. As a result, there existed a reasonable possibility that they identified with the crime committed and could have been found guilty on the basis of common purpose or various other criminal constructs, depending on the evidence produced at the trial.
- [103] Captain Mataung testified that he was of the view that in the light of the statement made by the complainant, the actions of the plaintiffs and Mr Malebye, he was entitled to arrest them in terms of section 40(1)(b) of the CPA as he was convinced that they committed common robbery, as it is known in legal vernacular, which is a schedule 1 crime. The decision of the prosecutor to charge and later withdraw the charges was not in his control. He also testified that the charges against the other witnesses were withdrawn as they were going to make statements as witnesses against Mr Malebye in terms of section 204 of the CPA.

- [104] The police docket referred to in cross-examination indicated that the prosecutor requested Captain Mataung to contact the complainant inter alia, but importantly also stated "I am well aware that the matters was (sic) withdrawn against others (sic) suspects but it can always be reinstated should it be necessary and the state is at liberty to do that".
- [105] The last witness was Captain Henrico. Before analysing his evidence, it must be pointed out that he is presently positioned at the Pretoria High Court. This was not revealed to the Court, and although I had very little contact with him as I have not been in the criminal Court for some time, this could have created numerous legal and ethical problems. As the matter was done virtually I saw him for the first time when he started testifying during the last day of the two-week trial, and did not recognise him. My Registrar after the first day of his evidence pointed out to me that he was stationed at the court. This was discussed with counsel but both of them agreed that it did not disqualify this Court to hear his evidence. It must however be pointed out that this fact should have been brought to the Court's attention as it could have happened that the presiding judge might not have been in a position to hear the case, if she knew the witness. The fact that the Court only became aware of this fact at nearly the end of the trial could have had catastrophic consequences for all the litigants. Legal practitioners should timeously warn a presiding officer of any facts or circumstances that could possibly compromise the integrity of the process.

[106] The evidence as set out was that Captain Henrico used racial slurs against Ms Mokwanazi. Something that he vehemently denied. The pleadings however alleged that he used the racial slurs against all the plaintiffs. No amendment was sought, nor was any explanation given for this contradiction. In the absence of the above some doubt is placed on Ms Mokhwanazi's version. Her evidence should also be considered with the contradictions about this incident between her evidence and the evidence of the other women in the cell. However, all of the above turned out to be irrelevant as it is unclear what the relevance of the alleged racial slurs were seeing that this court had to determine only the merits of an unlawful arrest action. The pleadings also did not assist. No cause of action was set out in the pleadings relating to this incident the pleadings read as follows:

"5.

5.1 *On or about 22 June 2017 at or near Pretoria Central Police Station, Gauteng Province, the Plaintiff was arrested by members of the SAPS.*

5.2 *The Plaintiff was held in detention and while there, was insulted by one Captain Hendrico, we referred to the Plaintiff using racial slurs.*

5.3 *While detained, the Plaintiff was denied the right to have his family members visit.*

5.4 *The plaintiff was released the next day, without any charge.*

6.

GENERAL DAMAGES

The Plaintiff was wrongfully and unlawfully insulted while held detention by a member of the SAPS known as Captain Hendrico in that:

6.1 *The members referred to the Plaintiff and his co-arrestees using racial slurs.*

6.2 *The verbal insults were derogatory and defamatory in nature;*

6.3 *The verbal insults were made in the presence of an audience.”*

[107] From a perusal of the papers Captain Henrico’s actions would only have been relevant if the plaintiffs succeeded and the *quantum* needed to be determined. I refrain from making any finding in this regard as this incident has nothing to do with the merits of the claim against the defendant, which was solely based on an unlawful arrest and Captain Henrico’s alleged actions had nothing to do with the arrest itself. I was informed that he was found guilty of *crimen injuria*, but that finding has no relevance in the matter before me.

APPLICATION OF THE LAW TO THE EVIDENCE

[108] It was common cause that the defendant in order to succeed in proving that the arrest without a warrant was justified in terms of section 40(1)(b) of the CPA had to prove, that the arrester was a peace officer, and must have entertained a reasonable suspicion that the suspect committed a Schedule 1 offence and the suspicion must have rested on reasonable grounds. Seeing that the defendant carried the onus it is unclear why the plaintiff chose to begin leading evidence in the light

of all these facts. If the defendant started leading evidence, as should have been the case, the duration of the trial could have been shortened, as a lot of the evidence that was led was not determinative of the dispute between the parties.

[109] Once the aforesaid jurisdictional facts are present a discretion arises whether or not to arrest.¹ The only issue that actually needed to be determined was whether Captain Mataung had reasonable grounds to suspect that the plaintiffs' committed a Schedule 1 offence. A perusal of the evidence makes it clear that in at least one statement the complainant stated that he was threatened with arrest, handcuffed and insulted. He made two statements, implicating all the plaintiffs, despite identifying Mr Malebye as the main culprit. To top it all the plaintiffs left Captain Mataung's office and produced R3 000-00, after they had discussions between themselves. The fact that Mr Malebye put it on the table, did not mean that a suspicion that they were all involved was not reasonable. The evidence of some of the plaintiffs also confirmed that the complainant was handcuffed and money was taken from him, despite the fact that the statement was not put to the plaintiffs the evidence bore the statement out.

[110] A police officer has to weigh and consider all the facts and circumstances, when he/she exercises the discretion to arrest or not and it has been stressed by our courts that it is neither prudent nor

¹ Du Toit et al; Commentary on the Criminal Procedure Act, Service 60 – 2018) 5 – 14B

practical to lay down a general rule under which a police officer may exercise his discretion, as it may stymie them in the exercise of their power and constitutional duty to combat crime.²

[111] I am of the view that Captain Mataung in the light of all the facts and circumstances exercised his discretion properly and based it on reasonable grounds.³ It is also clear from the evidence that he exercised his discretion in good faith and not arbitrarily.⁴

[112] The use of threats of arrest, insults and the allegations that the complainant was handcuffed, brought the offence which was possibly committed under the definition of robbery, which is a Schedule 1 offence. It must be remembered that absolute certainty that the offence was indeed a Schedule 1 offence is not required⁵.

[113] It is trite that the question of whether the suspicion is reasonable must be approached objectively, as a result the circumstances must be such that it would move a reasonable man to believe that a first Schedule offence was committed. In the light of all the facts the Court found that Captain Mataung's suspicion was reasonable under the circumstances. It must also be noted that the subsequent withdrawal

² MR v Minister of Safety and Security 2016(2) SACR 540 (CC), Molewa v Minister of Police (unreported, NMW case no 56/2015, 15 December 2016)

³ Duncan v Minister of Law & Order 1986(2) SA 805 (A) at 818 G-H, Minister of Safety and Security v Sekhoto & Another 2011(1) SACR 315 (SCA)

⁴ Naidoo v Minister of Police & Others 2016(1) SACR 468 (SCA) at para 40-41

⁵ Du Toit, *ibid* 5 – 14C

of charges did not affect the lawfulness of the arrest.⁶

[114] The essence of the case before me accordingly was whether Captain Mataung acted in accordance with the legal position set out above. Despite the evidence and inconsistencies between the witnesses, regarding certain details of the incident. Captain Mataung was confronted with a complaint that indicated that a robbery could have been committed by members of the police and he acted on the information that he obtained.

[115] I am of the view that the defendant succeeded in proving the jurisdictional facts on a balance of probabilities. It must also be noted that the issue of discretion is not one of the jurisdictional facts required in section 40(1)(b) once the jurisdictional facts are established the party who raised the issue of discretion will have to prove that it was not exercised properly⁷. The plaintiffs did not succeed in the proving that the exercise of discretion in the light of the facts was not exercised properly and this issues was never raised or ventilated by the plaintiffs during the trial.

[116] In the light of all the facts the defendant proved the necessary jurisdictional facts and the claim should be dismissed with costs.

⁶ Du Toit, *ibid* 5 – 14 E

⁷ Du Toit, *ibid*

[117] I make the following order:

1. The actions are dismissed; and
2. The plaintiffs are ordered to pay the costs of the defendant jointly and severally the one paying the others to be absolved.



TOLMAY J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 18 – 29 JANUARY 2021

DATE OF JUDGMENT: 30 APRIL 2021

ATTORNEY FOR PLAINTIFFS: MWIM ATTORNEYS

ADVOCATE FOR PLAINTIFFS: ADV J S C NKOSI

ATTORNEY FOR DEFENDANT: STATE ATTORNEY

ADVOCATE FOR DEFENDANT: ADV K TOMA