



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No:	1735 / 2016
Heard:	02 / 06 / 2021
Delivered:	03 / 09 / 2021

In the matter between:

SHAUN MOHALE MAKGOKA

Plaintiff

and

**MINISTER OF POLICE
W/O PETRUS HENDRIK VAN DER MERWE
CAPTAIN RUDOLF JOHANNES LOUWRENS**

First Defendant
Second Defendant
Third defendant

JUDGMENT

Moses AJ

INTRODUCTION

[1] The plaintiff, Shaun Mohale Makgoka, a major male educator with the Northern Cape Department of Education, instituted action against the defendants in the High Court under case number 1935/2016. His claims are based on an alleged unlawful arrest and detention that occurred on 06 June 2014 in Kimberley.

1.1 He alleges that the second and third defendants, both police officers within South African Police Services (SAPS), are employees of the first defendant. The second and third defendants were at all material

times acting in their course and scope of employment with the first defendant.

- 1.2 The plaintiff avers that in the light of the fact that the second and third defendants were acting in the course and scope of their employment with the first defendant, the first defendant is vicariously liable for the conduct of the second and third defendants.
- 1.3 He alleges that he was unlawfully arrested on 6 June 2014, on a charge of murder, and detained by the second and/or third defendants under Roodepan CAS: 235/05/2014. He avers that the said arrest was unlawful as the second, alternatively the third defendant did not have a warrant of arrest to arrest him and the said arrest was not necessary to secure his attendance at the court.
- 1.4 With regard to his second claim of unlawful detention, the original second claim of assault having been abandoned, the plaintiff alleges that on 06 June 2014, he was unlawfully deprived of his freedom when the second alternatively the third defendant took him to the Phakamile Mabija Police Station for detention.
- 1.5 As a result of the unlawful arrest, he appeared in court on 09 June 2014 and he was not committed to bail as the employees of the first defendant opposed his release on bail and the matter was postponed to 17 June 2014.
- 1.6 He alleges that on 17 June 2014, when the matter appeared before the court, the employees of the first defendant insisted that they would want to conduct an identity parade and this resulted in the matter being postponed to 24 June 2014.
- 1.7 On 24 June 2014, he appeared in court and the charges against him were withdrawn due to the fact that there was no evidence linking him to the commission of the offence of murder.

[2] The defendants pleaded to the allegations, as follows:

- 2.1 They admitted that the plaintiff was arrested without a warrant of arrest and pleaded that he was arrested lawfully in terms of section 40(1)(b) of the Criminal Procedure Act (CPA).¹ The defendants further pleaded that they were entitled to arrest the plaintiff as the arrest was necessary.
- 2.2 The defendants, in so far as the unlawful detention is concerned, admit the detention and give a bare denial of the unlawfulness of the detention.
- [3] On 02 and 03 June 2021, the trial proceeded on the merits, and the question of quantum was not dealt with as the parties had agreed on the separation of the quantum from the merits.

THE EVIDENCE : IN CHIEF

- [4] The defendant called only one witness being the third defendant.
- [5] He testified as follows:
- 5.1 At the time of the plaintiff's arrest he was a captain at the Organised Crime Unit of the Directorate for Priority Crime Investigation (SAPS) commonly known as the Hawks.
- 5.2 He was requested to assist with the investigation in this matter, which was a murder, as he is an expert in the field of cell phone investigation.
- 5.3 The third defendant made some enquiries on the phone calls made to and from the deceased's phone and established that a certain Bayibayi and Deon Mkwanaazi were possible suspects in the murder case.
- 5.4 Bayibayi was excluded as a suspect after further investigations were done.

¹ 51 of 1977

- 5.5 Deon Mkwanaazi was arrested and the third defendant conducted an interview with Mkwanaazi on 05 June 2014. He denied any involvement and/or knowledge of this crime initially.
- 5.6 During this interview, Mkwanaazi was confronted with information regarding a cell phone obtained from his girlfriend.
- 5.7 Mkwanaazi started crying and then decided that he would like to tell the truth of what happened in relation to the murder.
- 5.8 The third defendant warned Mkwanaazi that anything that he says may be used as evidence against him.
- 5.9 Mkwanaazi then implicated himself, Aaron Sago, Rodger Johnson and one Shaun as the persons involved in the murder. He could not remember the surname of this Shaun. According to the third defendant, Mkwanaazi said the following:

“Dat hy, Aaron Sago, Rodger Johnson en Shaun dit gedoen het.”

- 5.10 Mkwanaazi initially denied any involvement in the commission of the murder. An interview was also conducted with Mkwanaazi's girlfriend and it was after the interview with the girlfriend that Mkwanaazi reported his involvement in the murder and said that he, Roger Johnson, Aaron Sago and one Shaun had done it. The latter person turned out to be the plaintiff herein. Mkwanaazi then asked the third defendant how the police could help him. He then informed Mkwanaazi that he will enquire from the Director of Public Prosecutions (DPP) if they would be interested in making Mkwanaazi a section 204 state witness.
- 5.11 Deon Mkwanaazi explained exactly what happened at the murder scene.

- 5.12 The version that was presented by Mkwanaazi was corroborated by what was already in the docket and as a result he had all the reasons to believe what Mkwanaazi was reporting to him. This report was the basis for his suspicion for the arrest of the plaintiff.
- 5.13 On 05 June 2014, Aaron Sago and Roger Johnson were arrested and they both denied their involvement in the murder.
- 5.14 The third defendant also conducted an interview with Benedict Khooe also known as "McGyver" who also denied any involvement in the commission of the murder. The third defendant informed "McGyver" that Mkwanaazi reported that the plaintiff arranged the firearm and "McGyver" provided the firearm to Roger Johnson. This was denied by "McGyver". "McGyver" admitted to knowing the plaintiff and confirmed that the plaintiff paid him a visit in prison on 03 June 2014.
- 5.15 The third respondent requested "McGyver" to show him where the plaintiff resides and on their way to Greenpoint, "McGyver" identified a green motor vehicle and said that it was the plaintiff.
- 5.16 The motor vehicle was stopped and the plaintiff was arrested after the third defendant had introduced himself to the plaintiff.
- 5.17 The plaintiff denied any involvement in the murder case; however, he, the third defendant, ascertained that the plaintiff's cell phone had a cellular contact number that bore the name of Aaron Sago.
- 5.18 The second defendant obtained a section 204 statement from Mkwanaazi on 07 June 2014 so that the Director of Public Prosecutions could have a look at it after the appearance of the accused in court.
- 5.19 On Monday 09 June 2014, the plaintiff, together with his co-accused, Deon Mkwanaazi, Aaron Sago and Roger Johnson,

appeared in the Magistrate's Court in Kimberley on charges of murder and the matter was postponed to a date that the third defendant cannot recall. It turned out that the matter was postponed to 17 June 2014 for a formal opposed bail application. He did not testify in the bail application and does not know what happened further as the matter was in the hands of the prosecution.

- 5.20 Later that afternoon, on Monday 09 June 2014, the third defendant together with the second defendant, had a meeting with the Director of Public Prosecutions for purposes of further investigations because Mkwanazi had asked how the police could help him.
- 5.21 The third defendant testified that the role of the plaintiff in the matter was that he arranged the firearm with "McGyver" and "McGyver" gave the firearm to Roger Johnson. He further testified that Deon Mkwanazi also told him about a man called "Pantsi" who is/was a traditional healer/doctor and who also knew about this murder incident. Pantsi was later questioned about this but he denied it.
- 5.22 He also confirmed that the second defendant, Warrant Officer Van der Merwe, did not effect the arrest of the plaintiff, but was present when he, the third defendant, arrested the plaintiff and explained the latter's rights to him. He is/was the person who arrested the plaintiff.
- 5.23 He also confirmed that the plaintiff became a suspect in this murder case, based on the information he obtained from Deon Mkwanazi, that he believed the said Mkwanazi, although he did not just accept Mkwanazi's version "blindly". In this regard, he testified as follows (based on my written notes):

"It is not just that I took Deon Mkwanazi's story blindly. There were so many connections to what had happened... What stood out was (the fact) that the deceased spoke to a woman over the phone. And at that stage that information was not available to me. I followed it up and Warrant Officer Buys confirmed that the deceased was talking to a woman..." (on the cell phone).

- 5.24 On a question by the Court as to how long after this consultation with Mkwanazi did he effect the arrest of the plaintiff, he said that it was the following day, 06 June 2014, *"because Deon (Mkwanazi) did not know where the plaintiff stayed although he pointed out a house where he once saw the motor vehicle of the plaintiff parked."*

DURING CROSS-EXAMINATION

- [6] The third defendant was subjected to cross-examination and his evidence can be summarised as follows:

- 6.1 The plaintiff was not granted bail on 09 June 2014.
- 6.2 At the meeting with the Director of Public Prosecutions on 09 June 2014, the Director of Public Prosecutions rejected the proposal that Mkwanazi be made a section 204 state witness. The Director of Public Prosecutions recommended that Mkwanazi be approached for a plea bargaining.
- 6.3 The second defendant was tasked to facilitate the plea-bargaining process. Despite the rejection of the proposal by the Director of Public Prosecutions, Mkwanazi was taken to a magistrate in order to obtain a confession from him.
- 6.4 Later on, Mkwanazi refused to become a state witness or engage in the plea-bargaining process. The decision of the Director of Public Prosecutions was that Mkwanazi was no longer a witness. As of 09 June 2014, the police knew that Mkwanazi was no longer a state witness.
- 6.5 On 17 June 2014, the plaintiff with the co-accused appeared in court again, however, the third defendant, harbours no knowledge of what happened in court and did not know of the future dates.

- 6.6 The third defendant conceded that the plaintiff appeared in court with the other accused and the case against them was withdrawn due to the fact that there was no evidence against the accused. The main reason for the withdrawal of the charges was because Mkwanaazi was no longer a state witness.
- 6.7 Mkwanaazi was later on charged with murder on his own. He was charged on account of the version that he had presented to the police. He was however acquitted of the charges by the High Court – this Court.
- 6.8 During the interview with Mkwanaazi, he disclosed everything to the third defendant. The third defendant testified that he only testified about what he could recall.
- 6.9 He stated that during the consultation he primarily listened to what Mkwanaazi was stating and he may have asked some questions as Mkwanaazi was narrating.
- 6.10 According to the third defendant, the murder took place on 24 May 2014. He, the third defendant, became involved in the matter as from 02 June 2014 after he was invited by Warrant Officer Buys.
- 6.11 He cannot recall what exactly was in the docket but can recall that a statement by one Mr Riet (“Riet”) was in the docket. Riet is the person who, together with a child, were in the deceased’s motor vehicle when they stopped to pick up a man, who named himself “Mr Williams” (“Williams”), before the shooting and killing of the deceased. The information that Mkwanaazi gave corresponded with that which was in the docket. He also studied what was in the investigation diary; however, his recollection of what was in the docket was very sketchy. Whatever that was in the docket did not implicate anyone to the murder including Mkwanaazi himself. According to the contents of the docket, Mkwanaazi was not even the shooter.

- 6.12 There was uncertainty about the person that was picked up. The presumption was that there was someone waiting. At some point, Riet lost sight of the deceased and the person who was picked up. The only information available in the docket was that the deceased picked up a person who pretended to be Williams and that was the only person who was implicated in the murder. The shooting took place out of sight of Riet and Riet did not refer to anyone else about the shooting.
- 6.13 Mkwanazi was arrested by the second defendant, who at all relevant times, was part of this investigation, on a charge of murder. The third defendant maintained that Mkwanazi at first lied to him. He maintained his version which was a denial of any involvement in this murder.
- 6.14 He did not accept Mkwanazi's version until he informed Mkwanazi that according to his girlfriend he was the only person who could have used the "simcard" and the handset. It was after this that Mkwanazi literally "broke down", put his hands on his face, his head on the table and started crying.
- 6.15 Mkwanazi did not give the plaintiff's surname. He maintains that he would have asked him what the plaintiff's surname was and his response would have been that he does not know and/or could not remember the surname of the plaintiff.
- 6.16 He explained that during the interview, Mkwanazi stated that he was the person who pretended to be "Williams", he explained that he took the deceased to the place where Aaron shot him.
- 6.17 At no stage did Mkwanazi mention the name of the plaintiff at the scene of the murder. According to him, Mkwanazi did not state that the plaintiff was in the vicinity of the scene of the murder. At the scene of the murder, Mkwanazi only implicated himself and Aaron and nobody else. There was no information to the effect that the

plaintiff was anywhere near the scene where the murder took place. But according to this witness, the third defendant, one does not have to be physically present at a crime scene to be involved in the crime.

- 6.18 According to the third defendant, the plaintiff arranged the firearm and "McGyver" made the firearm available. He finally explained that the plaintiff was not physically present at the scene of the murder. He cannot recall the date of the arrangement of the firearm.
- 6.19 Mkwanazi did not say what happened to the firearm after the other person had handed it to Roger Johnson. He neglected to ask Mkwanazi how the firearm moved from Roger Johnson to Aaron. He also neglected to ask Mkwanazi if the plaintiff was aware that the firearm would be used for the murder.
- 6.20 The third defendant assumed that the killing of the deceased was a "hit" because Aaron paid the sum of R7,000.00 to Mkwanazi. He has no knowledge as to who else received any payment from Aaron.
- 6.21 He could not say if the plaintiff was directly involved in the murder. Neither could he state that the plaintiff arranged the firearm so that Aaron could kill the deceased. He conceded that on the version of Mkwanazi, the plaintiff was only involved allegedly, in an illegal transaction of arranging a firearm. The evidence in this regard was as follows (based on my written notes):

"Question ("Q"): And he (Mkwanazi) said that he pretended to be Mr Williams?

Answer ("A"): Yes.

Q: And he told you that he took the deceased to a place where Aaron shot him?

A: Correct.

Q: And he did not mention the name Shaun when he described the actual murder?

A: Correct.

Q: He did not put Shaun in the vicinity of murder?

A: Correct.

- Q: And he did not put the motor vehicle of Shaun in the vicinity of the murder?
- A: Correct.
- Q: And at the time he only implicated himself and Aaron?
- A: Yes.
- Q: You had no information that Shaun was anywhere close to that murder?
- A: Correct.
- Q: He also told you him, Roger and Aaron did this murder...and Shaun?
- A: No, Shaun arranged firearm through McGyver, who gave firearm to Rodger. With that explanation it was clear that Shaun (plaintiff) and Roger were not part (of actual murder).
- Q: So you did not ask any questions at the time in relation to the role of Shaun and Rodger?
- A: Well, I must have asked him about it, hence he referred to Shaun and Rodger. Because he must have told me about McGyver who was in jail.
- Q: So you've learnt Shaun was not there with/as a getaway car, he did not shoot, and he was not there at the scene...?
- A: That's how he explained it to me, but it is logical that you don't have to be physically present at the scene to be involved.
- Q: So Shaun arranged the firearm with McGyver, and McGyver handed it over to Rodger?
- A: Correct.
- Q: But was McGyver not in custody at the time?
- A: I would have followed it, but can't recall it. I don't know if he was in custody already on the day of the murder.
- Q: Did you ask any question when Deon told you a Shaun would arrange the firearm?
- A: I must have asked him that, because this is how this "Pantsi's" name popped up – the traditional doctor.
- Q: Did you elicit any further information via these questions?
- A: I can't recall. But there was no reason for me to doubt Deon's version. Because when I followed up...
- Q: Did you know about the date when the firearm arrangement by Shaun would happen?
- A: I can't remember.
- Q: On the day of the murder or before that?
- A: I can't recall.
- Q: And who approached who in respect of this firearm?
- A: According to Deon, Shaun approached McGyver about the firearm. If I can just get the statement of Pantsi, because he refers to people in the car...
- Q: But when you approached Pantsi, he denied everything?
- A: He (Pantsi) denies knowledge of a firearm.
- Q: According to Deon, who approached Shaun for a firearm?
- A: Deon said he, Aaron, Rodger and Shaun committed this crime. So based on this, I accepted that Shaun was the person who arranged this firearm with McGyver.
- Q: Deon did not explain anything further what happened with this firearm?

A: He would have been asked about the firearm. But it was never traced.

Q: But nowhere Deon said this firearm was given by one person to another person?

A: I could have omitted it.

Q: Is this McGyver a dealer in unlicensed firearms?

A: I don't know. All I know was that McGyver was in custody, from Warrant Officer Smit, there was a murder, and the murdered person's firearm was stolen by McGyver. So it was clear to me that McGyver was involved in unlicensed firearms.

Q: Did you ask Deon if Shaun knew that he – Deon – and Aaron would use this firearm in a murder?

A: I am not sure, but Deon named these role players.

Q: You had no information at the time why the deceased was murdered?

A: Not at that stage, no. Later there were rumours that the deceased was a funeral undertaker and he became opposition for another undertaker. He also told me that the next day, after the murder, Aaron Sago gave him R7,000.00. That led me to think that Aaron Sago was the person with an instruction from somebody else to kill the deceased.

Q: So this indicated to you that it was a "hit" and Aaron and Deon shared this money?

A: Yes, that is was a hit. But if he and Aaron shared the money I don't know. Deon only mentioned that he received the money from Aaron.

Q: But no information that plaintiff received any money?

A: No.

Q: You couldn't state under oath that the reason why the plaintiff arranged the firearm was to shoot somebody?

A: No, the plaintiff would not know that Aaron would use it to shoot somebody.

Q: The onus is on you to get clarity before you arrest. You make inferences, but did not get any other information to verify this information?

A: There was more than enough evidence to (arrest the plaintiff)... He (Deon) gave me the names. Plaintiff's name was mentioned as the person who would arrange the firearm... So Deon did not mention McGyver as being involved in this murder, only to arrange a firearm. But Shaun's name was mentioned specifically and linked to this (murder). Shaun's number was on his cell phone, and that of McGyver, and McGyver's note, with the name of Rodger Johnson. And also, McGyver said Shaun came to visit him on 03 June 2014.

Q: And this Pantsi and McGyver denied involvement in this murder?

A: It was not strange to me that McGyver would deny involvement with this firearm. And that Pantsi also would deny any involvement.

Q: I put it to you that Deon's information was so very vague with regards to the involvement of the plaintiff and objectively inadequate to form a reasonable suspicion to effect an arrest.

A: *I totally disagree with that statement. Why would Deon implicate his friends in such a thing?"*

- 6.22 At the time of the arrest of the plaintiff, the third defendant did not have any information under oath that the plaintiff had committed any offence. On Monday when the plaintiff appeared in court, the only available information was the section 204 statement of Mkwanaazi.
- 6.23 When the plaintiff went to court, he expected the accused not to be released on bail. He knew that the position of Mkwanaazi as a section 204 had not been finalised.
- 6.24 Subsequent to the rejection of Mkwanaazi as a section 204 state witness, he knew that there was no direct evidence linking the plaintiff to the murder and he did nothing about it, despite sharing this view with the representative of the DPP, Mr Botha.
- 6.25 He enquired from Mr Botha what has to happen to the other accused now that Mkwanaazi was rejected as a state witness.
- 6.26 The reason why the accused were arrested was to take them to court and prove with evidence that they had committed the offence of murder. He conceded that there was no need for further incarceration of the accused as there was no evidence linking them to the commission of the offence. The need for further incarceration fell away due to lack of evidence.
- 6.27 He informed Advocate Botha that if Mkwanaazi does not become a section 204 state witness, "...*then we do not have any case against the others.*" Advocate Botha, however, insisted that the charges should not be withdrawn.
- 6.28 He conceded that as from Monday after the meeting with the Director of Public Prosecutions, the detention of the plaintiff was

“perhaps so” unlawful. His direct evidence in this regard, when it was put to him that on the Monday, after the consultation with the DPP, the further detention of the accused was unlawful, he said *“Perhaps so, but the DPP probably wanted to see what Deon’s plan was with the plea bargaining.”* He admitted that people cannot be kept in detention whilst waiting for evidence to come in the future. He felt uncomfortable that the plaintiff was held in detention and there was no evidence linking him to the offence of murder.

IN RE-EXAMINATION:

- [7] The third defendant also testified in re-examination that when the matter went to court the section 204 statement of Mkwanazi was in the docket as well as the statement of Theophilus Tyopho also known as Pantsi.
- [8] He then referred the Court to page 174 of Volume 2 of the court bundle, the statement of Pantsi which also implicated the plaintiff, where in paragraph 6 thereof, there is a reference to “Shaun (allegedly the plaintiff herein), and also to “Pyp” which means “a gun”. This statement was made and obtained on 07 June 2014, that is after the arrest of the plaintiff on 06 June 2014.
- [9] No further witnesses were called and the defendants’ case was closed.
- [10] The plaintiff chose not to testify and also closed his case. This is the subtotal of the oral evidence in court.

THE COMMON CAUSE FACTS

- [11] The following facts are now common cause between the parties:
 - 11.1 The citation of the parties.
 - 11.2 The second and third defendants are police officers and on the day in question they were acting in the course and scope of their employment with the first defendant.
 - 11.3 The plaintiff was arrested on 06 June 2014 by the third defendant without a warrant.

- 11.4 The plaintiff was, subsequent to the arrest, detained and only released on 24 June 2014.
- 11.5 The defendant accepted that it bore the duty to begin and bore the onus of proof to justify the arrest and the detention.
- 11.6 Quantum and merits have been separated for purposes of trial.
- 11.7 The plaintiff abandoned his claim for the alleged assault at the commencement of the trial, and the costs on this aspect was reserved for argument.

[12] It is also common cause based on the above stated evidence;

- 12.1 That both the second and third defendants were at all relevant times part of the same investigation team dealing with, and investigating the murder that was committed, and on which those persons mentioned in the said evidence, including the plaintiff, were arrested at the time.
- 12.2 That based on the information elicited from Deon Mkwanazi, (Mkwanazi and/or Deon) by the third defendant on or about 05 June 2014, the names of two other persons were also furnished to the third defendant in the course of his investigation into the said murder, namely one Benedict Khooe also known as "McGyver" and one Theophilus Tyopho, also known as "Pantsi".
- 12.3 That the third defendant consulted with "McGyver" before he effected the arrest of the plaintiff regarding the information of, and allegations by, Mkwanazi, and that "McGyver" denied those allegations as well as any involvement in the said murder.
- 12.4 That the third defendant also followed up Mkwanazi's information and allegations regarding the plaintiff, with Pantsi, before the arrest

of the plaintiff, and Pantsi also denied any involvement in this murder.

12.5 That before and at the time of the arrest of the plaintiff, there was no information available as to who in fact supplied the firearm that was allegedly used by one Aaron Sago, to shoot the deceased on the day of the incident, which happened on or about 24 May 2014.

12.6 The said firearm could not be traced and was never found.

THE ISSUES IN DISPUTE AND FOR DETERMINATION:

[13] It was agreed between the parties at the commencement of the trial, that the court should adjudicate on the following aspects, which remained in dispute.

13.1 Was the plaintiff's arrest lawfully effected in terms of section 40(1)(b) of the Criminal Procedure Act and more specifically, did the investigating officer have a reasonable suspicion that the plaintiff committed a Schedule 1 offence?

13.2 Was the plaintiff's further detention lawful and at the instance of the defendants?

13.3 Costs for the withdrawal of the assault claim by the plaintiff.

13.4 Costs for the trial on the merits.

THE PLAINTIFF'S SUBMISSIONS

[14] With regards to the evidence led and tendered on behalf of the defendants, the plaintiff submitted that:

14.1 The third defendant as appears from the summary of his evidence contradicts himself in many aspects, especially pertaining to the chronology of the events, who said what at the scene and as to what happened at his office. The only aspects where his evidence tends to be the same, are with regard to his denial that the plaintiff

was lawfully arrested and that he arrested him on the basis of the information obtained from Mkwanazi only.

14.2 The third defendant appeared to be more concerned with his understanding of the fact that Mkwanazi said that "*they did it*" and neglected answering the questions that were put to him. From his evidence, it appears that he, Mkwanazi, attempted to downplay his role in the events.

14.3 The versions of the defendants are improbable in the context of the evidence as a whole.

14.4 The following are the questions that the third defendant neglected to ask, according to the submissions made on the Plaintiff's behalf:

14.4.1 when the firearm was arranged?;

14.4.2 what type of firearm was arranged as according to Mkwanazi?;

14.4.3 what happened to the firearm that was handed over to Rodger Johnson?;

14.4.4 what did Rodger do with the firearm that was handed over to him?;

14.4.5 is Rodger Johnson still in possession of the firearm that was handed over to him?;

14.4.6 when did Aaron get to be in possession of the firearm that was used in killing the deceased?;

14.4.7 was the same firearm that was handed over to Rodger the same that was in possession of Aaron?;

- 14.4.8 what happened to the firearm after Aaron allegedly used it?;
- 14.4.9 where was the plaintiff when the murder was committed?;
- 14.4.10 how much did Rodger get for his involvement in the murder?;
- 14.4.11 how much did the plaintiff get for his involvement in the murder, if any?;
- 14.4.12 did anybody inform the plaintiff that the firearm was going to be used in the commission of the murder?;
- 14.4.13 what information did Mkwanaazi have regarding the conspiracy to commit the murder, if any?

[15] With regards to the issue of whether or not the arrest was lawful, the following submissions were made on behalf of the plaintiff, which, on this issue are similar to those submissions made on behalf of the defendant;

- 15.1 For an arresting officer to effect a lawful arrest without a warrant, the following jurisdictional facts must be present:
 - 15.1.1 the arresting officer must be a peace officer;
 - 15.1.2 he/she must arrest a suspect based on a reasonable suspicion that the suspect committed an offence as set out in Schedule 1 of the Criminal Procedure Act 51 of 1977;
 - 15.1.3 he/she must arrest the suspect without a warrant authorizing such arrest.²

² See Section 40(1)(b) of the CPA, 51 of 1977

15.2 An enquiry into whether an arresting officer arrested a suspect on a reasonable suspicion that he committed a Schedule 1 offence is objectively justiciable. The test is not whether the arresting officer had reason to suspect, but whether his suspicion is founded on reasonable grounds³.

15.3 Any additional information available to the arresting officer when he arrests a suspect must also be considered to determine whether he acted on a reasonable suspicion⁴.

15.4 In 2005, the SCA adopted the following definition of suspicion:

*"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of a prima facie proof is the end."*⁵

15.5 Information by a suspect which implicates another person in the commission of an offence, although inadmissible as evidence against a co-accused may be used to determine whether the suspicion harboured by an arresting officer was reasonable.⁶

[16] With regards to the issue of the plaintiff's detention and whether it was lawful or unlawful, the following submissions were made on his behalf.

16.1 The authority of the police to detain a person is inherent in their discretionary power to arrest.⁷

16.2 In the past, it was argued that once a detainee is brought before court, that authority is exhausted. Further detention of a suspect is within the discretion of the court and requires a judicial evaluation to determine whether it is in the interest of justice to release the suspect on bail.⁸

³ *Duncan v Minister of Law and Order* [1986] 2 All SA 241 (A) at para 8.

⁴ *WOJI v Minister of Police* 2015 (1) SACR 409 (SCA) at Para 18.

⁵ *Powell N.O. v Van der Merwe N.O & Others* 2005 (5) SA 62 (SCA) at para 36

⁶ *WOJI* above n 4

⁷ *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA)

⁸ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) at paras 42 – 44

- 16.3 It was held that it is the duty of a judicial officer to guard against the accused being detained on insubstantial or improper grounds and to ensure that his detention is not unduly extended.⁹
- 16.4 However, an order by the reception court (being a court tasked with remanding cases when accused persons first appear in court), without a proper enquiry into whether or not an accused person ought to be detained pending trial, does not end the unlawfulness of the detention of an accused person.¹⁰
- 16.5 Whether the unlawfulness of a detention ceases upon a remand order by a Magistrate has to be answered with regard to the peculiar facts of each case¹¹.
- 16.6 The suspicion that must be held must, in order to be a reasonable one, be objectively sustainable, in the sense that it must rest on reasonable grounds.¹²
- 16.7 In *Zealand v Minister of Justice and Constitutional Development and Another*¹³ the following is said:
- “The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”*
- 16.8 Justification for the detention after an arrest until a first appearance in court continues to rest on the police.

⁹ *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at para 51 A – C

¹⁰ *Magagula v Minister of Safety and Security* (A68/2012 ; 33724/2006) [2016] ZAGPPHC 611 at para 17, see also *Minister of Safety and Security v Ndlovu* 2013 (1) SACR 339 (SCA) at para 16

¹¹ *Tyokwana* above n 7

¹² *Duncan* above n 3

¹³ 2008 (6) BCLR 601 (CC), at para 24

16.9 It is trite that police officers purporting to act in terms of section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest.¹⁴

16.10 It is expected of a reasonable person to analyse and weigh the quality of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify an arrest.¹⁵

16.11 In *De Klerk v Minister of Police*¹⁶, in the Constitutional Court, the following was said by the majority judgment:

"In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-court appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability."

[17] The plaintiff's case against the defendants can therefore be summarized as follows:

17.1 The sole basis for the third defendant's suspicion that led to the arrest of the plaintiff on a charge of murder is the interview he had with Mkwanazi.

¹⁴ *Louw & Another v Minister of Safety & Security* 2006 (2) SACR 178 (T)

¹⁵ *Mabona* above n 13

¹⁶ 2019 (12) BCLR 1425 (CC) at para 63

- 17.2 Mkwanazi informed the third defendant that he, Aaron, Rodger and the Plaintiff did it, however, it is clear that only Mkwanazi and Aaron were involved.
- 17.3 There is no allegation that the plaintiff was present on the scene or in any way involved on the day of the murder.
- 17.4 After the murder, Mkwanazi received the sum of R7,000.00 from Aaron and no mention is made of the plaintiff.
- 17.5 The third defendant conceded that he did not clarify the involvement of the plaintiff in the commission of the offence.
- 17.6 The third defendant knew as early as 09 June 2014 that there was no evidence linking the plaintiff to the commission of the offence.
- 17.7 The third defendant knew or reasonably foresaw that with the plaintiff's appearance in court on 09 June 2014, the matter would be postponed as he had testified that it was a schedule 6 offence and there was no likelihood that the plaintiff would be released on bail.
- 17.8 It is not in dispute that as at the time of the release of the plaintiff on 24 June 2014, there was still no evidence linking the plaintiff to the commission of the offence of murder.

[18] Hence the plaintiff prays for an order in the following terms:

- 18.1 The plaintiff's arrest by the third defendant acting in the course and scope of his employment is unlawful.
- 18.2 The plaintiff's detention by the third defendant and/or other employees of the first defendant from 06 June 2014 until 24 June 2014 is unlawful.

- 18.3 The defendants are ordered to pay the plaintiff for his proven damages, the one paying the others to be absolved.

THE DEFENDANTS' SUBMISSIONS

[19] With regards to the plaintiff's alleged unlawful arrest, the defendants submitted the following:

- 19.1 That the jurisdictional facts as set out in the *Duncan* decision¹⁷ existed before the plaintiff was arrested on 06 June 2014.
- 19.2 The third defendant who was the arresting officer is a police officer and therefore a peace officer as contemplated in the relevant legislation.
- 19.3 The third defendant did have a suspicion that the plaintiff was involved in a Schedule 1 offence.
- 19.4 The third defendant had the suspicion as a result of the information obtained from Deon Mkwanzazi who implicated *inter alia* the plaintiff as the ones who did it, with reference to the murder of the deceased.
- 19.5 The suspicion that the third defendant had in this instance gave him sufficient grounds to arrest the plaintiff.
- 19.6 That suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.¹⁸
- 19.7 The Third defendant was also made aware during the interview with Mkwanzazi that the plaintiff was the person who arranged the weapon that was used in the murder of the deceased.

¹⁷*Duncan* above n 3.

¹⁸ Powell N.O. and Another v Van der Merwe N.O. and Others above n 5; see also *Woji v Minister of Police* above n 4

- 19.8 The uncontested evidence of the third defendant was that he did not merely believe Mkwanazi.
- 19.9 The information given by Mkwanazi however was corroborated by other facts obtained by the investigating team.
- 19.10 The third defendant testified to what these factors were, ie the brown jacket that was found on the scene and which Mkwanazi mentioned in the interview.
- 19.11 It is noteworthy that the third defendant was only convinced that Mkwanazi was telling the truth after weighing his version against the other objective facts obtained during the investigation and summarized in the discussion of the evidence¹⁹.
- 19.12 That the third defendant formed a reasonable suspicion in his mind.
- 19.13 That the suspicion formed in this instance was reasonable, even if there may have been insufficient evidence to establish a *prima facie* case against the plaintiff.
- 19.14 That the third defendant had a reasonable suspicion that the plaintiff committed a Schedule 1 offence.
- 19.15 Murder is a Schedule 1 offence.
- 19.16 The fact that the plaintiff was not at the scene of the actual murder is irrelevant.
- 19.17 The plaintiff could still have been charged with murder on the basis of common purpose. It is important to note that Deon Mkwanazi said the following: “*dat hy, Aaron Sago, Rodger Johnson en Shaun dit gedoen het.*”

¹⁹ See: Defendants’ Heads of Argument, p. 5, par. 4.15

- 19.18 That the third defendant in arresting the plaintiff exercised his discretion rationally and in good faith.
- 19.19 The Court should also not lose sight of the fact that murder is a very serious crime and it would be a sad day if murder suspects are not arrested in circumstances where a reasonable suspicion of their involvement exists.
- 19.20 The fact that the requirement is that the discretion must be exercised in good faith means that peace officers are entitled to exercise discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court.²⁰
- 19.21 It is submitted that the third defendant exercised his discretion within the bounds of rationality.
- 19.22 The third defendant obtained reliable information about an extremely serious crime and only then arrested the plaintiff.
- 19.23 The Plaintiff averred in his summons that the second and third defendants were not entitled and/or authorised to arrest the plaintiff and that the arrest was not necessary to secure the plaintiff's attendance at court.²¹
- 19.24 That the defendants have shown that they were entitled to arrest the plaintiff and that it was necessary to arrest him to secure his attendance at court. His arrest was also authorised in terms of Section 40(1)(b) of the Criminal Procedure Act.

²⁰ *Sekhoto* above n 8

²¹ See Plaintiff's Particulars of Claim, Index of Pleadings, par 9.

- 19.25 That the defendants made out a *prima facie* case regarding the arrest.
- 19.26 The plaintiff however chose not to testify to rebut the *prima facie* case made out by the defendants.
- 19.27 One would have expected that the plaintiff would and should have at least presented evidence that he was not involved in the crime as alleged and/or that the suspicion formed by the arresting officer was not reasonable.
- 19.28 The only evidence before Court is that of the defendants and should be accepted as there is no rebuttal from the plaintiff.
- 19.29 That the third defendant was an excellent witness and should be found a credible witness.
- 19.30 That it is clear that it was only the third defendant that arrested the plaintiff. This was also not contested in cross-examination. The claim for unlawful arrest against the second defendant should therefore be dismissed with costs.
- [20] With regards to the claim of unlawful detention and deprivation of liberty of the plaintiff, it was submitted on behalf of the defendants, *inter alia*, that:
- 20.1 The third defendant's evidence on this aspect was that at the first appearance bail is normally not granted in Schedule 6 matters.
- 20.2 The third defendant could not testify on what happened further as he was no longer involved in the investigation.
- 20.3 It was also his evidence that the matter was now in the hands of the DPP who decided not to withdraw the case against the plaintiff at that stage.

- 20.4 It was clear from his evidence that the way forward against the plaintiff was determined by the DPP.
- 20.5 This was not explicitly denied by the plaintiff in cross-examination.
- 20.6 It was also not put to the third defendant in cross-examination that the members of SAPS insisted on conducting an identity parade.
- 20.7 The plaintiff chose not to testify and it is submitted that the Court only has the evidence of the defendants on the abovementioned aspects.
- 20.8 One would have expected that the plaintiff at least would have testified on how it happened that the matter was postponed or why he pleaded that the members of SAPS were opposing bail.
- 20.9 It is submitted that the Court should also take into consideration the fact that onus of proof is on the accused in Schedule 6 matters to prove that it is in the interest of justice that he/she be released on bail.
- 20.10 The third defendant was confronted in cross-examination with the fact that there was no evidence against the plaintiff when the matter was taken to court, inter alia because Mkwanazi was not formally declared a section 204 witness. The third defendant was furthermore questioned on what the investigators have done about

the plight of the plaintiff from 09 June 2014 when he was arrested until his release.

20.11. The defendants made the following submissions in this regard:

20.11.1 It was never pleaded by the plaintiff that he was detained unlawfully because SAPS did not have any evidence against the plaintiff or that they (the defendants) ought to have done more since 09th June 2014.

20.11.2 The defendants only pleaded that the criminal matter was postponed as the investigators opposed bail and that they insisted on conducting an identity parade.

20.11.3 It is submitted that the plaintiff is bound by his pleadings and should his claim for this reason alone be dismissed.

20.11.4 It is submitted that the fact that the criminal matter was postponed and that bail was denied is not per se unlawful.

20.11.5 The plaintiff also chose not to testify on these aspects. He should at least have testified on what happened at court during the bail hearing to assist this court to determine if the further detention was unlawful.

20.12 It was in any event the uncontested evidence of the third defendant

that when the docket went to court for the plaintiff's first appearance it was not only the statement of Mkwanazi that was filed in the docket but also the statement of Tyopho aka Pantsi, who also implicated the plaintiff in the murder. It was submitted that, although the decision was in the hands of the DPP, SAPS did thus have enough evidence to detain the Plaintiff.

- 20.13 It was submitted that the liability of the Police for detention post-court appearance should be determined on application of the principles of legal causation.²²
- 20.14 The Court should therefore decide whether the harm associated with plaintiff's detention post-court appearance can be attributed to the unlawful arrest by the Police.²³
- 20.15 It was submitted that the *De Klerk* case can only find application if the initial conduct of the police, i.e. the arrest was unlawful. The court in *De Klerk* was clear that an omission by the police at the first appearance of a suspect does not create a further or new delict.²⁴
- 20.16 It was submitted that in this instance the arrest was lawful and could the defendants therefore not be held liable for the further detention of the plaintiff after his first court appearance.

²² *De Klerk* above n 17, at para. 63

²³ *Ibid* at para 16

²⁴ *Ibid* at para. 19

20.17 It was reiterated that the further detention of the plaintiff was at the instance of the DPP, and that there was in any event enough evidence in the docket to further detain the plaintiff after the first appearance.

[21] With regards to costs, the following submissions were advanced on behalf of the defendants:

21.1 **Costs for the abandonment of Claim 2**

21.1.1 It is submitted that the fact that this claim (-the alleged assault-) was abandoned boils down to a withdrawal of the claim.

21.1.2 It is trite that a party who withdraws his claim or defence, is liable for the costs incurred by the other party.

21.1.3 It is submitted that defendants had to consult, plead, discover and prepare their defence of plaintiff's claim 2 and are therefore entitled to costs in this regard.

21.1.4 It is therefore submitted that the plaintiff should pay the costs in respect of the withdrawal of this claim.

21.2 **Costs of suit second defendant**

21.2.1 It is submitted that the plaintiff did not make out any case

against the second defendant.

21.2.2 It submitted that costs should be awarded in favour of the second defendant.

21.3 **Costs of suit first and third defendants**

21.3.1 It is trite that the normal rule is that costs should follow the successful party.

21.3.2 It submitted that there is no reason why the Court should deviate from the general rule.

21.3.3 The defendants submit that they acted lawfully and therefore should be awarded the costs of the action.

A BRIEF EVALUATION AND ASSESSMENT OF THE EVIDENCE AND SUBMISSIONS

[22] The objective facts, together with common cause facts as above-stated can therefore be summarised as follows:

22.1 The murder, which was the subject matter of the criminal investigation led by Warrant officer Buys, at the time, was committed on or about 24 May 2014.

22.2 The third defendant became involved in this investigation on the 2nd June 2014, pursuant to a request by Warrant officer Buys.

22.3 The plaintiff was arrested on the 6 June 2014, by the third defendant, based primarily on the information he obtained from one Deon Mkwanaazi.

22.4 Mkwanaazi was the first suspect to be arrested on the murder charges, and the information was obtained from him by the third defendant, on 5 June 2014 after his (Mkwanaazi) arrest.

22.5 Mkwanaazi initially denied any involvement in this crime, and hence lied to the investigating officer, including the third defendant.

22.6 After having been confronted by the third defendant, with information the latter obtained from Mkwanaazi's girlfriend, the latter apparently "broke down", and "confessed" his knowledge of, and role, in, the murder crime. Interestingly, yet importantly, Mkwanaazi did not say that he obtained and/or arranged the fire-arm with which the deceased was subsequently shot, nor that he shot the deceased.

Although he elaborately explained his role in this murder crime, the critical aspects thereof, such as obtaining/ arranging the fire-arm and shooting the deceased, he ascribed to others, including the plaintiff and one Aaron Sago.

22.7 Mkwanaazi asked the third defendant how the police could help him. In other words he wanted and/or expected something in return for

his “cooperation” with the police, which essentially consisted in naming other people as suspects in the commission of this crime, one of which was the plaintiff.

22.8 All these people whom the said Mkwanazi named, to wit, Aaron Sago, Roger Johnson, and Benedict Khoee, also known as McGyver, denied any involvement in this murder crime. They denied their involvement in this crime on or about the 5 June 2014, before the arrest of the plaintiff, and to the knowledge of the third defendant. Importantly the said McGyver denied specifically that the plaintiff arranged the fire-arm with him, and that he, McGyver provided this fire-arm to Roger Johnson.

22.9 It is common cause that upon his arrest on 6 June 2014, and subsequently, the plaintiff denied any knowledge of and /or role in, the commission of this crime.

22.10 Subsequent to the appearance of Mkwanazi, Aaron Sago, Rodger Johnson and the plaintiff in Court, as accused persons on a murder charge on the Monday, 9 June 2014, the Director of Public Prosecutions (DPP) refused to make and/or use Mkwanazi as state witness in terms of section 204 of the CPA, 51 of 1977.

22.11 The DPP wanted Mkwanazi to enter into a plea bargain with the State, which he, Mkwanazi, refused to do.

- 22.12 There was a meeting between the investigators in this murder crime, including the third defendant and the prosecuting members of the DPP later the afternoon of Monday, 9 June 2014, where after it became clear to all concerned that, without Mkwanazi as a state witness, the State would not, and indeed did not, have any evidence incriminating any of the accused in the commission of this crime, including the plaintiff, and hence had no case against them.
- 22.13 Notwithstanding the afore-stated, the criminal case against the accused, including the plaintiff was postponed until 17 June 2014, with all the accused remaining in custody. This was ostensibly for the hearing of a bail application.
- 22.14 On the latter date that matter was postponed again until 24 June 2014, without any further participation by, and knowledge of, the third defendant.
- 22.15 The case against the accused, including the plaintiff was withdrawn except for Mkwanazi, who alone was subsequently charged and stood trial for murder, based on his version to the police, in this Court.
- 22.16 Mkwanazi was subsequently acquitted of the charges by this Court.

- [23] The first issue that falls to be determined is a crisp one: did the third defendant act on a reasonable suspicion that the plaintiff committed an offence set out in Schedule 1 of the Criminal Procedure Act, 51 of 1977?
- [24] It is trite that such an enquiry is objectively justiceable. The test is not whether the arresting officer had reason to suspect, but whether the suspicion is/was founded on reasonable grounds.²⁵
- [25] It is equally trite that an arresting officer is not required to conduct a hearing before effecting an arrest. The law only requires such an arresting officer to have a reasonable suspicion.²⁶
- [26] The meaning of “suspicion” has been described as follows:
- “Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of a prima facie proof is the end”.*²⁷
- [27] Within the context of this case the main issue in this regard is whether the third defendant, had the requisite *prima facie* proof, based primarily on the information obtained from Mkwanazi, which would constitute a suspicion, which could objectively be said/described to be reasonable in the

²⁵ *Duncan v Minister of Law and Order* [1986] 2 All SA 241 (A), n 3 above

²⁶ *National Commissioner of Police & Another v Coetzee* 2013(1) SACR 358 (SCA); See also Section 40(1)(b) of the CPA 51 of 1977.

²⁷ *Powell NO & Others v Van Der Merwe & Others* 2005 (5) SA 62 (SCA) at para 36 (see also n 5 above)

circumstances. In this regard this Court also had regard to what was said regarding a reasonable suspicion in *Mabona & Another v Minister of Law & Others*²⁸:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1) (b) of the Criminal Procedure Act 51 of 1977 is objective: would a reasonable man in the particular defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the offence or offences for which he sought to arrest the plaintiffs. It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

- [28] On the objective and common cause facts of this case I cannot make such a finding. Mkwanzazi was right at the outset, found to be a liar, on his own version. The people whom he named as “role-players” in this murder crime, all denied any involvement in this crime, including the plaintiff and to the knowledge of the third defendant. The person whom Mkwanzazi named as “McGyver” with whom the plaintiff allegedly arranged for a fire-arm, and which was allegedly handed to one Rodger Johnson, flatly denied these allegations, to the knowledge of the third defendant, and before he effected the said arrest of the plaintiff. The said fire-arm, a crucial piece of evidence, which could have linked the suspects to this crime, was missing and could not be traced, to date. Mkwanzazi’s information obtained by the third defendant, also squarely

²⁸ *Mabona & Another v Minister of Law and Order and Others* 1988 (2) SA 654 654 (SE) at 658 E-H.

implicated the said McGyver in the commission of this offence, importantly with regards to the arrangement of the fire-arm which was allegedly used to shoot the deceased. Whilst the third defendant used that information to arrest the plaintiff herein, he inexplicably did not arrest McGyver in connection with this offence, or any other offence for that matter. All of these objective facts militate against any reasonable suspicion that could have been harboured by the arresting officer, the third defendant, at the time of effecting the arrest of the plaintiff.

[29] I find accordingly.

[30] The second issue regarding the unlawful detention is less complicated based on my above-stated finding.

[31] It is trite that the authority of the police to detain a person is inherent in their discretionary power to arrest. The purpose and objective of the arrest is to bring the suspect before a court. Once a detainee is brought before court, that authority is exhausted. The further detention of a suspect is within the discretion of the court and requires a judicial evaluation to determine whether it is in the interest of justice to release the suspect on bail.²⁹

[32] It therefore follows, given my afore-stated finding, that the detention following the unlawful arrest of the plaintiff by the third defendant on the 6 June 2014

²⁹ *Minister of Safety and Security v Tyokwane* 2015(1) SACR 597 (SCA); see also *Minister of Safety and Security v Sekhoto* 2011(5) SA 367 (SCA) at paras 42-44.

until his first court appearance on 09 June 2014 is/was unlawful.

[33] The crisp issue for determination in this regard is whether the plaintiff's further detention, post court appearance can be attributed to the unlawful arrest of the plaintiff by the third defendant, of which Warrant Officer Buys and the second defendant formed part of the investigation team of the police in this matter.³⁰

[34] It is also trite that the question whether or not the unlawfulness of a detention ceases upon a remand order by a Magistrate has to be answered with regard to the peculiar facts of each case.³¹

[35] It is common cause, based on the evidence of the third defendant, that bail is/was not normally granted at the first appearance of suspects arrested on a Schedule 6 offence, such as murder. He therefore knew and/or foresaw the possibility, that the plaintiff would be further detained after his first appearance in the Magistrate's Court on the murder charge.

[36] It is also common cause that that criminal case, in which the plaintiff was an accused pursuant to his arrest by the third defendant, was indeed postponed from 9 June 2014 to 17 June 2014 for a formal bail application hearing to be held. It therefore follows, and it is common sensical that bail for the accused persons, including the plaintiff, was opposed by the police investigating team,

³⁰ *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC)

³¹ *Minister of Safety and Security v Tyokwane* above n 29

including both the second and the third defendants.

[37] It is also common cause that both the second and third defendants, at all relevant times, acted in the course and scope of their employment with the first defendant.

[38] It is also common cause that the plaintiff then appeared on 24 June 2014, when all charges were withdrawn against him (and the other accused, except Mkwanazi, as above-stated).

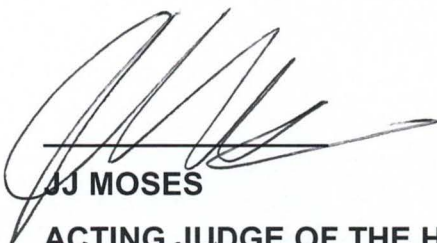
[39] This whole period that the plaintiff spent in detention, from 6 June 2014 until 24 June 2014, is directly linked to his arrest effected by the third defendant on 6 June 2014, and the police's opposition to the accused, including the plaintiff, being released on bail at all relevant times, before and up to 24 June 2014.

[40] In the circumstances I find that the detention of the plaintiff from 6 June 2014 until 24 June 2014 was unlawful and in violation of his constitutionally guaranteed rights to freedom and security of the person as set out in section 12 of the Constitution of the Republic of South Africa.

In the result the following order is hereby made:

1. The plaintiff's arrest on 6 June 2014 by the third defendant acting in the course and scope of his employment with the first defendant is unlawful.

2. The plaintiff's detention by the third defendant and/or other employees of the first defendant from the 6th of June 2014 until the 24th of June 2014 is unlawful.
3. The defendants are ordered to pay the plaintiff for his proven damages, the one paying the others to be absolved.
4. Costs stand over for later determination by the Court hearing the plaintiff's claim for damages.



JJ MOSES

**ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

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