

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number 3233/2013

In the matter between:

MTAKWE IKECHUKWU NJOKU

PLAINTIFF

and

**MINISTER OF HOME AFFAIRS:
MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT:**

1st DEFENDANT

2ND DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS:

3RD DEFENDANT

MINISTER OF POLICE:

4th DEFENDANT

HEARD ON: 17-20 FEBRUARY, 4-7 AUGUST, 28 AUGUST & 4 SEPTEMBER 2015

DELIVERED ON: 23 OCTOBER 2015

MOCUMIE, J

[1] The plaintiff visited the Department of Home Affairs (the department), Welkom, on 3 August 2012 to apply for an unabridged birth certificate for his third child. This action emanates from such visit and the subsequent arrest and detention of the plaintiff by employees of the defendant. The plaintiff subsequently issued summons against the first, second and third defendant for:

- '1. Payment of the amount of R30 000 in respect of Claim A.
2. Payment of the amount of R1 100 00 in respect of Claim B.
3. Payment of R256 000 in respect of Claim C.
4. Interest on the aforementioned amounts a *tempora mora*.'

The first defendant (the defendant) is sued in her capacity as the official representative of the department under whom the employees, who allegedly unlawfully assaulted,

arrested and detained the plaintiff. No relief is sought against second to fourth defendants.

[2] The plaintiff instituted three claims against the defendant set out in his particulars of claim as follows:

'CLAIM A

3.1. That during his arrest he was assaulted by officials of the Defendant in the following manner:

3.1 hitting him on the face with open hands;

3.2 hitting him on the face with closed hands;

3.3 twisting his arms into an unnatural position, so as to place handcuffs on him in such a manner as to cause him pain;

3.4 Shoving, pulling and generally manhandling the Plaintiff, so as to cause him great discomfort.

He alleged that as a result of the assault, he suffered a dead/dysfunctional tooth as well as general loss of *contumelia*, temporary disability and loss of amenities of life.

CLAIM B

[4] The second claim was based upon damages suffered as a result of his detention under the following headings:

(a) Unlawful arrest;

(b) Deprivation of liberty and impairment of dignity;

(c) Psychological and Psychiatric damage;

CLAIM C

[5] The third claim was based upon the instructions which the defendant gave to the National Director of Public Prosecutions to institute criminal proceedings against the plaintiff without any reasonable and probable cause. As a result therefore, the plaintiff allegedly suffered damages in respect of the following:

5.1 Incurred legal costs;

5.2 Loss of income;

5.3 General damages for *contumelia* and pain and suffering.'

[6] In the plea, the defendant admitted that the plaintiff was arrested by her officials during the course and scope of the performance of their duties but denied that the arrest

was unlawful and/or malicious. The defendant pleaded that the plaintiff was arrested by an immigration officer in terms of Section 41, read with Section 34 of the Immigration Act 13 of 2004 (the Immigration Act). The defendant further pleaded that the officer effecting the arrest was under a reasonable suspicion that the plaintiff was not entitled to be in the Republic of South Africa (South Africa) and such officer took all reasonable steps to assist the plaintiff in verifying his identity and or status. The defendant pleaded further that although the detention of the plaintiff was admitted, the detention was lawful. The defendant denied the balance of the allegations and put plaintiff to the proof thereof.

[7] During the Rule 37 conference, the parties agreed that the onus of proof rested on the plaintiff and that the plaintiff had the duty to begin to adduce evidence. Although, Mr Masoka, on behalf of the plaintiff attempted to go back on this agreement, however, he subsequently accepted that he had to lead evidence. The correct legal position on the onus of proof in a claim of this nature particularly where the defendant admitted the arrest and detention of the claimant is set out authoritatively, having considered earlier decisions¹ and decisions of other jurisdictions , by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto and Another*² as follows:

'[49] [A] party who alleges that a constitutional right has been infringed bears the onus. *The general rule is also that a party, who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This is the position whether or not the right to freedom is compromised.* For instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue.

[50] Onus in the context of civil law depends on considerations of policy, practice and fairness; and, if a rule relating to onus is rationally based, it is difficult to appreciate why it should be unconstitutional. Hefer JA also raised the issue of litigation-fairness and sensibility. It cannot be expected of a defendant, he said, to deal effectively, in a plea or in evidence, with unsubstantiated averments of mala fides and the like, without the specific facts on which they

¹ *Cumming & Ors v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 para 26 and *Lyons v Chief Constable of West Yorkshire* [1997] EWCA Civ 1520. See also *Minister of law and Order & Others v Hurley & Another* 1986 (3) SA 568 (A) at 589E-F.

² 2011 (5) SA 367 (SCA) para 49-50.

are based being stated. So much the more can it not be expected of a defendant to deal effectively with a claim — as in this case — in which *no* averment is made, save a general one that the arrest was 'unreasonable'. Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding, that the onus has not been discharged, may ensue. Such a state of affairs is quite untenable.' (My emphasis)

[8] The plaintiff testified alone on the alleged unlawful assault, arrest and detention. He testified that on 31 July 2012, he visited the office of the defendant in Welkom to obtain an unabridged birth certificate for his daughter born on 22 July 2012. The officer, who was attending to him, Mr Leonard Modisenyana Ramakau (Ramakau), refused to register the child but did not give him any reason. He left the Welkom office and went to Bultfontein to register the child there. Bultfontein referred him back to Welkom as the child was born in Welkom. Upon arrival, he was informed by the same officer, Ramakau that the Immigration Unit had been looking for him. Ramakau also instructed a security officer to arrest him. The security officer there and there took him to the first floor of the same building where they found another official of the defendant, Mohau. The latter enquired from him whether his names were Njoku. When he replied in the affirmative, Mohau said 'we have been looking for you, you criminal...We've got you'. Mohau thereafter took him to a certain Mr Breedt (Breedt) who was apparently a senior officer of the defendant, in the Inspectorate unit. He enquired from Breedt why the unit had been looking for him. Instead Mohau gave him a big blow on the mouth, everything became black and he fell down on the floor. As he put it 'I was seriously impaired'. When he came to his senses Ramakau was also there. As he stood up his cellphone rang. Mohau grabbed it from him and told him that he wil not receive any calls while he was in his office. Only four people were in the room: him, Ramakau, Mohau and Breedt.

[9] Breedt interviewed him in the presence of Mohau and told him that he was illegal in the republic, showing him a print out from the computer. He denied that and explained how he came into South Africa in 1999 as an asylum seeker, fleeing from his country of origin, Nigeria through Zimbabwe; he was granted his first permit as such in 1999 which was renewed every month but expired in 2005; in May 2005 he married a South African

woman called Ms Donna Rakhavha (Donna) from Venda; arising from his marriage he obtained a permit under s26(b)(i) of the Immigration Act 13,2002 (the Immigration Act) which had to be renewed every two years; he separated from Donna due to lack of financial means to support her (as Donna testified later or undisclosed reasons as he maintained during his testimony) and he went to stay at a church in Pretoria where he continued his relationship with Donna who visited him from time to time. Later he started another relationship with another woman, Ms Simphiwe Kronci (Kronci) who he later married. He has a child with Kronci as Donna refused to have children with him, apparently, due to his mental illness or psychiatric condition which Donna believed may be passed on to the child; which he said he suffered from since he was diagnosed in 2002, long before his arrest. But Donna gave her blessings and consent to such arrangement. His relationship with Simphiwe bore him a child, Hesina Joy Njoku, who is 9 years old. This relationship entitled him to the s27 (g) permit which the defendant granted to him in 2009. There was no condition attached to this category of permanent residence.

[10] He stated that on the day in question, when he visited the defendant's office in July 2012 to obtain the unabridged birth certificate for his third child he had his identity document only. He was told by one of the defendant's employees that in the circumstances it was not necessary to use a s26 (b) permit as he was a relative of a citizen of the republic of South Africa within the first line i.e arising from being a father to his 9 year old South African born daughter. He did not have nor did he ever apply for s26 (b) permit as the defendant's officials insisted. Breedts there and then endorsed his identity document as a s26 (b) (i) which had lapsed in 2010; which made him to be regarded as illegal in the republic from that moment.

[11] He testified further that after the defendant's employees arrested him, he was kept in detention for further police investigation until he was taken to court on 8 August 2012. He was released on bail of R1000. His wife arranged a lawyer for him. He appeared on 29 August 2012, 18 September and 11 October 2012 when his case was struck from

the roll by the magistrate when no formal charges were preferred against him.³ He testified further that on the day of the alleged assault, he did not get any medical assistance from the concerned officials. As a result, upon his release on bail, he consulted a dentist. The dentist told him that one tooth in his mouth had changed colour and was dead. The dentist, however, did not remove the tooth. He testified that the responsible officials did not give him any assistance including to take him to his home to fetch the documents he referred, his s27 (g) permit which he was not carrying with him when he was arrested.

[12] He also testified that some time in December, between the 31 December and 1 January, on New Year's Eve, he met Mohau at a recreational park in Welkom. Mohau threatened to assault him but he walked away from Mohau to avoid a fight. He went to the police station to open a case of assault against Mohau. Instead a charge of *crimen injuria* was already opened against him by Mohau. He appeared in court twice and the second occasion the case was withdrawn by the State. From that time he alleged the police and defendant's employees harassed him through phone calls. But he reported to a certain police Commander and the harassment stopped. After some time he instituted this action against the department. On one particular day a Mrs Erasmus, one of the defendant's employees called him and asked him to come and see her. On his arrival, she asked him why is he suing the department when his identity document had been corrected. He maintained that he was going ahead with the law suit and left. Mrs Erasmus called him for the second time and told him that amongst other things to investigate, Breedts had gone to Cape Town to trace and interview the mother of his child, Ms Simphiwe Kronci.

[13] Ramakau also met him after he had instituted this action. He told him that he did not want to arrest him on the day in issue in 2012. He, Ramakau, was instructed by Breedts to arrest him. He did that although he did not believe that the plaintiff was wrong simply because he was afraid of Breedts who was responsible for one of his colleagues losing his job over a similar matter.

³ Page 13 of the Plaintiff's Bundle.

[14] During cross examination he stuck to his version that the defendant's employee, Mohau, assaulted him by hitting him as he described in court: 'struck on the mouth with an open hand' as a result of which he fell and lost consciousness. He denied that he was illegal in the republic. He denied that he had forged any document presented to him by the defence including a s26 (b)(i) permit which he purportedly signed; that at the time he applied for an extension of his permanent residence under s26 (b)(i) (category of a spouse) he did so fraudulently as he was no longer in a good spousal relationship with Donna. He also denied that information to the effect that he was in the republic under s26 (b)(i) but no longer in a good spousal relationship with Donna was in the national computer despite Breedts telling him so. He denied that he married Donna in May 2005 for the sole purpose of obtaining the spousal permit. He maintained, without saying how it was done, that Breedts put false information into the system in Welkom on the day he had him arrested. That is why such information was not on the national data system as Mayekiso said. He denied that he married Donna in July but left her in November/December of the same year; meaning if that were the case then his spousal permit would have lapsed automatically if brought to the attention of the department.

[15] The plaintiff then called his first witness, his wife, Ms Alice Nyathi (Alice) who testified that she stayed with the plaintiff as husband and wife during 2009 after they met in Johannesburg. The two of them then moved to Masemong, Welkom. She has two children with the plaintiff. She testified further that a day after the plaintiff was arrested by the defendant's employees; she went to visit the plaintiff in the holding cells. When she saw him, he did not look like when he left home the previous day. So, she asked him what had happened and he told her that he had been assaulted at the offices of a certain Mr Breedts that she did not know. But she saw bruises on his mouth, on the lips.

[16] The plaintiff called his second witness, Mr Bonakele Shadrack Mayekiso (Mayekiso), the Provincial Manager of the defendant in the Free State Province. His responsibility amongst others is to receive complaints from the public whenever

aggrieved by the department. He testified that sometime in 2012 the plaintiff came to his office and complained that the Welkom office had endorsed his permit as a s26 (b) permit whereas his was a s27 (g) permit. This caused a problem because he could be arrested at any given moment as it appeared that he was illegal in the republic. As the head of the defendant in the province, he launched an investigation in that regard. He contacted Ms Erasmus in the Welkom office to investigate the matter. When the plaintiff returned to him he did not have the answer. He then sought the assistance of Mr Hednick, the provincial co-ordinator, it was found that the plaintiff's permit was a s27 (g) permit and not a s26 (b). Consequently, he instructed Welkom office to correct this error by removing the s26 (b) endorsement from the plaintiff's permit on the system. This was done by endorsing the identity document with the words to the effect that s26 (b) was erroneously endorsed on the plaintiff's identity.

[17] He testified further that although he was not working directly with applications of immigration permits/permanent residence, when he had a suspicion that a permit had been obtained fraudulently, as in this case, if he were the officer faced with the same situation, he would rather investigate the matter first before he arrested the suspect. In other words, ordinarily, he would satisfy his suspicion first by gathering information from the data base readily available across the country and other means than arrest first and then investigate. But this depended on the varying circumstances of each case when presented to the relevant officer(s). But he could not make any comment as he did not have all the necessary information before him or the facts presented to the officers in question at the time they decided to arrest the plaintiff. Neither could he comment on whether they had acted unreasonably. He was however of the view that that there was a lot that was being done in terms of upgrading and improving the systems in place with regard to picking up fraudulent applications made for permanent residence even through all the stages including upon verification. In many towns the systems were not talking to each other. In closure, he said ,once he had assisted the plaintiff as he did ie instructing Welkom office to remove the s26 (b) endorsement from his permit he did not take the matter any further.

[18] During cross examination he indicated that mistakes do come to the fore from time to time within the department. In clarification at the request of the court, he said if there was an error on the part of the department, the department had to take responsibility and could not blame or accuse the applicant. He testified that because he was not privy to all the issues of the arrest of the plaintiff it would be unfair of him to say whether it was fair or not for Breedt to have arrested the plaintiff when he did. He said, in the event that there was an error upon application for permits under discussion, the department took responsibility without apportioning any blame on the applicant in the particular application. He also testified that after the arrest, pending investigations, persons detained under the Immigration Act are kept in holding cells with other suspects where they no longer fall under the auspices of the Immigration office. They are taken by the South African Police Services to the respective courts with all other suspects. The Immigration Office does not have its own holding cells despite the request having being made to the department responsible.

[19] The defendant called several witnesses, Mr Nyakallo Samuel Mohau (Mohau), Mr Modisenyana Leonard Ramakau (Ramakau), Mr Nicolas Gerhardus Jakobus Breedt (Breedt), Mrs Adriana Johanna Erasmus (Erasmus) and Ms Donna Ravhela (Donna).

[20] Donna testified that she met the plaintiff early 2005 and in June/July they were married in Springs, Gauteng. They stayed as husband and wife in Yeoville. In less than six months, around November the same year, when the plaintiff could not pay rent as he was unemployed, they both moved out. She went to stay in Soweto and the plaintiff went to stay in Pretoria at a church. During 2008, when they were not staying together, the plaintiff phoned her because his permit required to be extended and she went him to Springs to apply for an extension of his permit. Although they were not staying together as husband and wife such fact was not reported or brought to the attention of the officer who was assisting them. In 2013 or so she divorced the plaintiff as they were no longer staying together as husband and wife and she had met another man who she wanted to be in a relationship with.

[21] Ramakau testified that on the day in question, he was on duty when Breedt instructed him to arrest the plaintiff on allegations of contravening s26(b). The plaintiff had been there earlier on that day but had left. Upon his return, he took him to Mohau and all went to Breedt's office. After an interview by Breedt, the latter instructed him to put the plaintiff under arrest and he did that by instructing a security officer on duty to help him put the plaintiff in a police van outside the building.

[22] Mohau testified that on the day in question he took the plaintiff to Breedt as the plaintiff testified. He denied that he assaulted the plaintiff as alleged. He testified further that during December festive period, contrary to what the plaintiff said, the plaintiff is the one who confronted him in the presence of his wife and child and wanted to start a fight. The fight did not continue.

[23] During cross examination, Mohau denied having assaulted the plaintiff. He did not know the plaintiff before the day in issue. There would therefore be no reason for him to accuse the plaintiff of being a criminal and assaulting him.

[24] Erasmus testified that she was an employee at the office of the defendant in Welkom where she occupied the position of Operations Officer since 1986 until her elevation to Director in May 2010. All officers who serve as Control Managers such as Breedt and Mohau reported directly to her and she in turn reported to Mayekiso. She testified that she met the plaintiff at the end of 2012 when he was referred to her by Mayekiso to attend to his complaint. She informed the plaintiff that the original documents were at Head Office in Pretoria and thus she had to wait for some time to address his problem as instructed by Mayekiso. This was going to take some time. But informed him about what the preliminary investigations had revealed that he was not supposed to be in the republic but for the South African born child he had. The plaintiff at some point became impatient and started to show signs of impatience and unreasonableness. When she met the plaintiff for the first she was not aware that he had instituted a claim against the department until sometime in 2013. She and others

were thereafter advised not to pursue investigations any further until the matter was finalised in

[25] Under cross examination she maintained that because the plaintiff's permit was endorsed under s26 (b) he was no longer legal in the republic. Her evidence did not change to course of the action either way, except to corroborate Breedt on the legal frame work which they operated under. That, with the information before him, Breedt was expected to arrest the plaintiff. She denied that she harassed and or threatened the plaintiff in any manner including deporting him and confiscating his belongings as the plaintiff alleged. She maintained that she was not aware when the plaintiff came to her office the first time that he had instituted an action against the department. She had no reason to jeopardise the department's case by hurling threats. She denied that the plaintiff asked to be taken home to get his identity document and or s27 (g) permit. She maintained that there was no other obligation to take further steps after the plaintiff was arrested. As she put it, if the plaintiff indeed had a s27 (g) permit at, he could just as well have asked his wife to bring it to him whilst he was detained and produce same in court. Instead the plaintiff had said he had an identity document. In her view Breedt acted as he ought to have acted otherwise he would have been charged in the event that the plaintiff did not return after he had released him on warning as s49(5) of the Immigration provided.

[26] Breedt was probably the defendant's key witness as the plaintiff alleged that he initiated the purported unlawful arrest and detention. Breedt testified that the plaintiff came to the Welkom offices as he testified to apply for a permit under s 27(g). The officer who assisted him picked up an anomaly ie that the plaintiff was in the republic under s26 (b) which had since expired in 2010. He checked the information on the computer and confirmed same. He printed out a copy. The plaintiff later arrived to apply again for the registration of his child. He was confronted with the information on the computer printout. He denied that. He was brought to him in his office by Mohau. He interviewed the plaintiff based on the information he had on the computer printout that he was in the republic illegally at that stage. The plaintiff denied this and said he was

under s27 (g).He explained to the plaintiff that he could not be in the republic on that basis as his s26 (b) permit had lapsed.

[27] The plaintiff, he testified, was arrested in terms of the Immigration Act and handed over to the South African Police Service for detention at the local holding cells until his appearance in court. Subsequent to his arrest and detention he continued with his investigation in the matter. He interviewed the two woman the plaintiff had been in relationships with: Donna and Simphiwe. The information he gathered from them confirmed his suspicions that when the plaintiff applied for an extension of his spousal permit in July 2008 he was no longer staying with Donna. That Simphiwe was also not even with him when such extension was sought, yet her names were inserted in the application form. An insertion which a busy officer would not have picked up easily.

[28] During cross examination he denied that the plaintiff was assaulted in his presence. He stated that the plaintiff did not complain to him that Mohau had assaulted him. He did not see any visible injuries on the plaintiff. He maintained that the plaintiff was not was in the republic under s26 (b) (i) on the condition that he was in a good spousal relationship with Donna. The permanent residence permit was depended on that condition. Once he separated from Donna he was no longer legal in the republic. The fact that he called Donna from where she was to sign for an extension of his permanent residence was done fraudulently and confirmed that he had not complied with the prescripts of the Immigration Act. Thus the extension should not have been granted in the first place.

[29] On the issue of an assault and injuries on the plaintiff ,Breedt was adamant that he did not see any sign of injury on the plaintiff's mouth shortly after Mohau had brought him to his office. Neither did the plaintiff report any assault to him.

[30] Section 41 of the Immigration Act provides:

'When so requested by an immigration officer or a police officer; any person shall identify himself or herself as a citizen, permanent resident or foreigner; and if on reasonable grounds

such an immigration officer or police is not satisfied that such person may be interviewed by an immigration officer or police officer may take such person into custody without a warrant and, shall take reasonable steps as may be presented to assist the person in verifying his or her identity or status and thereafter if necessary detain him or her in terms of section 34.'

The legislative framework regarding the granting of a permanent residence permit.

[31] Section 26 of the Immigration Act provides:

'26 **Direct residence**---Subject to section 25, the director general may issue a permanent residence permit to a foreigner who:

- (a)...;
- (b) is the spouse of a citizen or resident, provided that
 - (i) the Department is satisfied that a good faith spousal relationship exists; and
 - (ii) such permit is issued on condition that it shall lapse if any time within three years from its application the good faith spousal relationship no longer subsists, save for the case of death.'

[32] Regulation 33(4) of the regulations published in terms of Section 7 of the Immigration Act, defines 'good faith spousal relationship' as follows:

'(4) A good faith spousal relationship shall be a relationship that was not entered into primarily for the purpose of gaining benefits under the Act and shall be confined to a relationship of two persons calling for cohabitation and intended to be permanent.'⁴

[33] Regulation 33(5) allows for an investigation by the department to verify if a good spousal relationships still exists. It provides:

'(5) The Department may at any time satisfy itself as envisaged...

[34] Section 27 of the Immigration Act provides:

'The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who-

- (a)- (f)...;
- (g) is the relative of a citizen or permanent resident within the first step of kinship.'

⁴ See also *Mahmood v Director-General, Department of Home Affairs and Another* (22394/12) [2013] ZAWCHC 75 (8 May 2013) para 8.

[35] I deal with the issue of the unlawful assault first. The plaintiff was the sole witness on the alleged assault. He was not an impressive witness although not unsophisticated and communicating well in English. He repeatedly deviated from what he alleged the witnesses did to him including how Mohau allegedly assaulted him. In the Particulars of Claim he recorded that he was hit in the face with open hands; hit in the face with closed hands; his arm was twisted into an unnatural position, so as to place handcuffs on him in such a manner as to cause him pain; and he was shoved at; pulled and generally manhandled so as to cause him great discomfort.

[36] No evidence was led on the use of handcuffs by the employees of the defendant or even the members of the SANPS where the plaintiff was detained, or how he was manhandled to enter the vehicle which took him to the police station. His evidence that his tooth was dead or black as a result of the alleged assault can likewise not be accepted. No expert evidence was tendered that the tooth may have died as a result of an assault on the particular day nor was any expert evidence tendered that he was struck on the mouth. Significantly, the warning statement which appears to be signed by the plaintiff records that the plaintiff did not have any injuries, nor was he assaulted or threatened.

[37] During cross examination, the version of the plaintiff became muddled and incoherent. At the end of the cross examination, it was clear that he was not assaulted as he pleaded in his particulars of claim. That he did not sustain injuries as serious as he attempted to portray in his pleadings. There was no medical evidence to substantiate his claims of assault to the extent of the *quanta* claimed under Claim A, B and C i.e apart from what he alleged was his psychological trauma. In his own evidence he suffered from post-traumatic stress as a result of his problems where he came from, Nigeria long before his arrest by the defendant's employees. No doctor examined him after his detention. Annexure FA12 which is dated 10 October 2002 did not substantiate his pleaded case in any manner. It is clear that the plaintiff did not sustain a dead or black tooth as suggested in paragraph 3.3 of the plaintiff's Heads of Argument. Instead

Ms Nyathi, alone and different from what the plaintiff stated, mentioned that one of the plaintiff's teeth was shaking.

[38] Alice did not assist the plaintiff's case in any manner because her evidence under cross-examination that the plaintiff did not tell her or at least remind her about what to say in court after the incident happened three years ago and that she had never consulted with plaintiff's legal representatives at all before taking the witness stand is so improbable that her entire evidence falls to be rejected.

[39] The question whether the employees of the defendant exercised their discretion properly when they arrested the plaintiff, has to be answered in the following manner succinctly set out in *Shidiack v Union Government*⁵ :

'Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would be; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. This doctrine was recognised in *Moll v Civil Commissioner, Paarl* (14 S.C., at p. 468); It was acted upon in *Judes v Registrar of Mining Rights* (1907, T.S., p. 1046) ; and it was expressly affirmed by this Court in *Nathalia v Immigration Officer* (1912 AD 23). There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong. In regard to the conclusion of the Minister as to any question falling under subsections (a), (c) and (f) of the statutory clause, therefore, it cannot be admissible to call evidence before a Court of law merely to show that the conclusion was wrong. It would be different if the object were to show *mala fides*, or an ulterior motive, or a failure to consider the question at all; But cases in which a decision is attacked upon those grounds will be of rare occurrence. With reference to disabilities

⁵ *Shidiack v Union Government* 1912 AD 642 at 651-652.

falling under subsections (b), (d) and (e), however, the position is different. None of those grounds depend upon the exercise of official discretion; and the authorities who seek to rely upon them must establish them absolutely. In proceedings which challenge the action of an Immigration Officer under any of those heads, therefore, it will be competent for a Court to inquire into and determine the whole matter.'

[40] Recently the Supreme Court of Appeal in *Minister of Safety and Security v Katise*⁶ restated the principle as follows:

'[17] As to the question whether Marangule exercised his discretion properly, all that is required is that he acted in good faith, rationally and not arbitrarily. In *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 39 Harms DP said peace officers are 'entitled to exercise their 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. A number of choices may be open to him, all of which may fall within the range of rationality. *The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached.*'(My emphasis)

[41] Its common cause that on 18 July 2008 the plaintiff requested that his temporary residence permit (the spousal permit) be extended. That permit would have lapsed on 17 July 2010. The condition attached to the permit was that the plaintiff had to reside with his spouse, Donna as identified by her identity number. But Donna testified that she did not know how the plaintiff acquired the extension on his permit because at that time they were no longer living together as husband and wife although not divorced yet. She told this court that she did not go with the plaintiff to renew his permit. It is only correct to conclude that if Donna or Kronci were not present when the extension was sought, the plaintiff inserted Kronci's names and thus forged the names. i.e taking into account that the plaintiff admitted that he filled the form with all the details including his address in Yeoville and then signed the document. His denial is simply improbable.

⁶ *Minister of Safety and Security v Katise* 2015 (1) SACR 181 (SCA) para 17.

[42] If it is not the plaintiff that inserted the names of Kronci who would have? Surely it could not have any of the defendant's employees including Breedt. How would they have done that? How would they have known about the names when they did not know Kronci prior to the further investigations which were launched after the plaintiff's arrest?

[43] The plaintiff's allegations that his arrest and detention in July 2012 were unlawful are not substantiated by any credible evidence. My view is that, Breedt found information on the data base that the plaintiff's permanent residence permit was fraudulently obtained by forging Kronci particulars. Thus by 2010 his spousal permanent permit had lapsed. If I accept that as a fact, then axiomatically I must find that his s26 (b) lapsed in 2010 before he could apply for a permit under s27 (g). It follows then that the s27 (g) permit which he was granted, was granted on the basis of false information. That on its own is an offence under the Immigration Act.

[44] The question then becomes why did his wife not bring the s27(g) permit which he claimed he had at his home when she visited him the very next day after his arrest so that he could be released. Where he got it after his release is not relevant to these proceedings. From the facts, Breedt formulated a reasonable suspicion that the plaintiff was illegal in the republic. Once he had formulated that suspicion he was bound to arrest the plaintiff. Section 41 of the Immigration Act provides that

'[w]hen so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

(2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence.'

[45] The plaintiff could hardly point at conduct on the part of Breedt which could indicate that Breedt was spurred by some malicious intent to arrest him. He was unknown to and had no altercations prior to this day with Breedt. Neither could he say how Breedt could have secretly fed wrong information into the system; where would Breedt have found such information even before interviewing Donna. The long story about the subsequent fall out with Mohau bears no mention. Suffice to say that such near scuffle between the two can in no way establish malice or motive to abuse the Immigration process to the disadvantage of the plaintiff. From the evidence in its entirety, it is clear that Breedt sourced information upon a query from the immigration officers. He reacted on that information and found that the plaintiff was in the republic under s26(b)(i). Thus illegal in the republic since 2010. The extension of his permanent residence in the republic was obviously sought and obtained on false information that he was still in a good spousal relationship with Donna; which Donna refuted under oath. To see someone from time to time can never equate to good spousal relationship envisaged by s26(b)(i).

[46] The plaintiff knew what a 'good faith spousal relationship' entailed: 'staying permanently with his wife'. He also understood that when the first permit was granted to him the requirement was simple, that he must stay with Donna and stay married to her. He even took it further to say he had to be faithful to her as well. From a simple reading of regulation 33 (4) 'good faith spousal relationship' does not only refer to cohabiting under one roof as husband and wife and exchanging conjugal rights but endeavors to deal with the element of gaining benefits which those who are not citizens of the republic may seek such as permanent residence and or citizenship from such relationships. The regulations anticipate that the cohabiting parties should truly stay together; not meet some times or not upon the one party's request only when the permit must be extended. Also not, as the plaintiff admitted, Donna staying somewhere else and he staying at a church in Pretoria.

[47] Mr Modise's submission on behalf of the plaintiff that Breedt failed to use the arrest as a last resort pending investigations to establish the true position and also not take the plaintiff to his home to get his s27(g) permit is not supported by any evidence.

Breedt and Mohau stated categorically that the plaintiff did not tell Breedt that he had a s27 (g) permit at his home. Assuming he did tell them and they ignored him, why did he not tell the police where he was kept that he had such permit at home. Why did not ask his wife to bring it along on her numerous visit to him before he was released on bail. Why was his attorney not given such instructions from the onset?

[48] Instead Breedt continued with his investigations as s41 prescribes. He interviewed the two women in the plaintiff's life in this whole saga. He even travelled to Cape Town to interview Cronsey. Who confirmed his suspicion more that the plaintiff obtained an extension of his s26 (b) permit fraudulently. Breedt maintained that at the time he formulated the suspicion, he believed that the plaintiff might not return if he warned him to come back pending investigations on the basis of the report on the data base. Not to act in terms of s41 would jeopardise his own job. He could be charged with aiding and abetting an illegal immigrant which is a summary dismissal offence in the department. The Act and the regulations do not specify that the officer concerned must investigate before (s)he arrested a suspect. Nor do they specify that further or independent investigations and assistance to a suspect are mandatory. Regulation 33(5) is not mandatory. The regulation states:

'(5) The Department may at any time satisfy itself as envisaged in section 26(b)(i) of the Act whether a good faith spousal relationship exists by (a) interviewing the applicant and spouse separately;(b) by contacting family members and verifying other references;(c) requesting proof of actual or intended cohabitation; and or (d) inspection in loco of the applicant's place of residence.'

[49] In hindsight as Mayekiso testified, perhaps, Breedt could have done a more perfect job as it can never be correct to abuse anyone who uses the Immigration Act processes. But as is now trite *'the standard is not perfection or even the optimum, judged from the vantage of hindsight ...'*⁷.

⁷ *Minister of Safety and Security v Katise* above at para 17.

[50] The fact that there could have been an error on the part of the department did not help the plaintiff's case at all because s48 of the Immigration Act provides that no illegal foreigner shall be exempt from the provisions of the Act or allowed to be in Republic on the grounds that he or she was not informed that he or she could not enter or stay in the Republic through error or misrepresentation or because of his or her being an illegal foreigner was undiscovered. In any event not to arrest the plaintiff when he had a suspicion that he was illegal in the country and it was found to be the case as it happened in this case, would have exposed Breedt to criminal charges of aiding and abetting contravention of the Immigration Act. He may lose his employment.

On the basis of the evidence, it is clear that plaintiff came into the republic as an asylum seeker in 1999 and fell extremely sick physically and even mentally. For an asylum seeker he had to go the department every month to seek an extension. This was burdensome on him. As he put it, as a sick person he could not go to the department like that. In less than the three months he had met Donna, he married her and fell under a more permanent residence permit, s26 (b). He was married to Donna for six months during which he impregnated Kronci and they had a child together. He then, coincidentally, left the home he was sharing with Donna to stay at a church. On the other hand, Kronci, coincidentally also moved to Cape Town leaving the child behind. He raised the child on his own and acquired a s27(g) permanent residency permit by virtue of his relationship to a South African born child. He thereafter married another woman his own national Ms Nyathi who he had two children with. They both now reside in the republic on the basis of their relationship to the children born in the republic.

[51] The insinuation which the plaintiff seemingly wanted to bring in was corruption on the part of the defendant's employees; which he could not establish or manage to bring in. To the contrary, what came out are employees of the defendant who suspected fraud and immediately reacted on it decisively and in terms of the prescripts: arrest and bring before a court of law. Based on the evidence led, the plaintiff obtained the extension of his spousal permit based on false information. From the time and before the expiry of three years his permanent residential permit lapsed. From that time he was illegal in the republic. When he applied for a permit in terms of s27 (f) it was on the basis of false

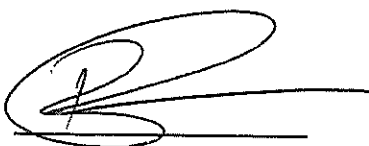
information. Such permanent residence permit should not have been granted. In terms of s48 he cannot get the benefit of such error on the part of the department. Thus with effect from the date of this judgment, the plaintiff will be illegal in the republic.

[52] Considering the evidence as a whole, I find that the plaintiff's arrest was not wrongful. It was based on a reasonable suspicion that he had committed fraud when he was granted an extension on his permanent residence permit in terms of s26 (b) (i) as at the time he sought the extension he was not in a good spousal relationship with Donna. It is improbable and extremely far-fetched that employees of the department in Springs and or Welkom could have inserted what is clearly the name Simphiwe Kronci on the application for extension. The only probability is as presented by the defendant that the plaintiff forged the names of Kronci to get an extension for his permit in the republic. From that moment, after the s26 (b)(i) lapsed, onwards whatever permit or extension the plaintiff was granted was based on false information. His claims under A,B and C stand to be dismissed.

[53] In the result, the following order is granted.

ORDER

- '1. The combined action is dismissed;
2. The plaintiff is directed to pay the costs of the action;
3. The costs due to the defendant shall include the costs occasioned as a result of the postponement occasioned at the instance of the plaintiff during November 2014.'



B. C. MOCUMIE, J

On behalf of the plaintiff:

Adv. M. B. Masoka

Instructed by: Modise Modise Attorneys

On behalf of the respondent: Adv. A. Williams

Instructed by: State Attorney