



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE

12/2/13

SIGNATURE

CASE NO: 46179/2011

DATE: 15/2/2013

IN THE MATTER BETWEEN

MICHAEL JOHN WATERS

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

PRINSLOO, J

- [1] The plaintiff claims a substantial amount in damages from the defendant on the basis of the alleged unlawful arrest and detention of the plaintiff by police officers acting in the course and scope of their employment with the defendant at the Krugersdorp police station and the Krugersdorp magistrate's court cells on 21 and 22 August 2008.

- [2] It is not disputed that the relevant police officials, at all times, acted within the course and scope of their employment with the defendant. The arrest and detention are also not disputed.

It is also common cause that the plaintiff, after his arrest and detention, was brought before the Krugersdorp magistrate's court on 22 August 2008 whereafter he was released on bail and the case postponed to a date in October 2008. On the last mentioned date all charges against the plaintiff were withdrawn. The charges related to the alleged unlawful possession of firearms and ammunition in contravention of the Firearms Control Act 60 of 2000 ("the FACA").

- [3] At the commencement of the proceedings before me, the parties jointly applied for the *quantum* of the claim to be separated for later adjudication in terms of Uniform Rule 33(4). I ordered accordingly.

- [4] It was common cause between the parties that the *onus* was on the defendant to prove the lawfulness of the arrest and detention – see Harms, *Amler's Precedents of Pleadings* 7th edition p47, *Mhaga v Minister of Safety & Security* [2001] 2 All SA 534 (Tk) at 537i-j.

[5] It is also common cause between the parties that the arrest was effected without a warrant so that the provisions of section 40 of the Criminal Procedure Act 51 of 1977 ("the CPA") will come into play.

[6] Before me, Mr Erasmus appeared for the plaintiff and Mr Baloyi appeared for the defendant.

Brief introduction: some background facts and a reference to some relevant provisions of the FACA

[7] The plaintiff retired as a lieutenant colonel of the South African Police Services in 1995. He is now 61 years old. He is the sole member of a close corporation, Waters Firearm Training & Assessment Centre t/a Firearm Competency Assessment and Training Centre ("FCATC"). FCATC is an accredited training centre (in terms of section 8 of the FACA) for the holders, and, it seems, prospective holders, of firearm licences. The plaintiff is the proprietor of more than one of these training centres. For example, there is also one in Graaff-Reinet. The one relevant for present purposes, FCATC, carries on business in Krugersdorp (also known now as Mogale City, although the witnesses referred to Krugersdorp and I will do the same). The accreditation certificate for FCATC was already issued some eight years ago, in January 2005, and, according to the evidence led before me, the accreditation is still in force and FCATC is still conducting the training activities. It seems that the plaintiff's training centres also

have so-called Memoranda of Understanding ("MOU's") with some eleven other training centres.

[8] On 21 August 2008, at approximately 10:00, a formidable team of police officers, under the leadership of Colonel Yvonne Burger, arrived, unannounced and without prior arrangement, at the FCATC premises in Krugersdorp. All this is common cause. It appears from the weight of the evidence that there were quite a number of police officials, some twelve to fifteen of them, and some high ranking officers amongst them, and some were armed with R5 assault rifles. The evidence indicates that some of these armed policemen took up strategic positions around the premises and also in the vicinity of the strong room where the safes are housed in which firearms were locked up.

[9] The attitude of the defence witnesses, who testified first because of the incidence of the *onus* on the defendant, was that they merely visited the premises for a so-called "compliance inspection". After an amendment of the plea, it was alleged that it was a "routine compliance inspection" in terms of the FACA.

[10] The evidence on behalf of the defendant was that the "compliance inspection" was done in terms of section 109 of the FACA. Section 109 reads:

"109. **Inspection of documents.** - (1) A police official or any person authorised by the Registrar may enter any

(a) place of business of a dealer;

- (b) firearm or ammunition factory or place of business of a manufacturer of firearms and ammunition;
- (c) place of business of a gunsmith;
- (d) place of business of the holder of an import or export permit;
- (e) place of business, including any vehicle, vessel or aircraft, of an authorised transporter of firearms and ammunition;
- (f) office or premises of an Official Institution which may issue a permit to its employees to possess and use firearms;
or
- (g) place of business, including any vehicle, vessel or aircraft, of the holder of a licence in respect of firearms used for business purposes referred to in section 20,

and conduct such inspection as may be necessary in order to determine whether the requirements and conditions of this Act or of any competency certificate, licence, permit or authorisation issued in terms of this Act are being complied with.

- (2) The Registrar must comply with such security arrangements as may be agreed upon with the head of the Official Institution in question." (Emphasis added.)

Section 109 resorts under Chapter 13, headed "inspections".

According to the evidence, the defendant conducted this "inspection" in terms of the provisions of section 109(1)(g) which is the only subsection which would possibly apply to this plaintiff. Section 20 goes under the heading "licence to possess firearm for business purposes".

In this regard, the difficulty from the point of view of the defendant, is that there were no business licences to possess firearms issued to the FCATC. Colonel Burger, in cross-examination, in so many words, admitted that this was the position and, more significantly, she admitted that she knew at the time of the inspection that no business licences to possess firearms had been issued to FCATC.

In the circumstances, it seems to me that the "inspection" as it was described on behalf of the defendant, fell outside the ambit of section 109 of the FACA and, in that sense, was unlawful.

- [11] The evidence of the plaintiff, supported by the evidence of two other retired high ranking police officers, was that what the police officers conducted was not an inspection in terms of section 109, but a "raid", as they termed it, in terms of the provisions of section 115 of the FACA. In a replication to the amended plea, the plaintiff also pleaded accordingly. Section 115 resorts under chapter 14, headed "search and seizure". The relevant portions of section 115 read –

"115. Inspection, search and seizure for enquiry or investigation

(with special warrant). – (1) For purposes of any enquiry or investigation relating to the application of this Act and subject to subsection (4), the Registrar or any person authorised in writing by the Registrar may-

- (a) at any reasonable time and without prior notice, enter any business or industrial premises; or
- (b) at any reasonable time and with reasonable notice, enter any dwelling,

on or in which anything relating to the subject-matter of the enquiry or investigation is or is suspected to be.

(2) The Registrar or person authorised may-

- (a) inspect and search any premises ...
- (b) examine anything found in the premises or dwelling which may have a bearing on the subject-matter of the enquiry or investigation;
- (c) request information or an explanation regarding such object from the owner or person in control of those premises ...
- (d) make copies of or extracts from any book or document found on or in the premises ...
- (e) against the issue of a written receipt, seize anything on or in the premises or dwelling which may have a bearing on the subject-matter of the enquiry or investigation.

- (3) Any entry upon, inspection of or search of any premises or dwelling, or questioning of any person, in terms of this section must be carried out with strict regard to decency and order.
- (4) Any power contemplated in subsection (1) may be exercised only-
 - (a) in terms of a warrant issued by a judge or magistrate; or
 - (b) without warrant by a police official contemplated in paragraph (a) of the definition of 'police official' in section 1 if
 - (i) there are reasonable grounds to believe that a warrant would be issued and the delay in obtaining the warrant would defeat the object for which the power is exercised;
 - (ii) the person who is competent to do so consents to the exercise of the power.
- (5) (a) A warrant may only be issued if it appears from evidence under oath or on affirmation that there are reasonable grounds to suspect that anything referred to in subsection (2) is or may be on the premises or in the dwelling in question.
- (b) The evidence must contain information ...
- (6) ...
- (7) A warrant contemplated in this section remains in force until ..."

It is common cause that the activities conducted by the police officers on the premises of the plaintiff on 21 August 2008 were not authorised in terms of a warrant issued by a judge or magistrate as contemplated in section 115(4)(a). The alternative prescribed in section 115(4)(b) where such a search and seizure operation can be conducted without a warrant, does not apply to the present case on the weight of the evidence and, in any event, the defendant insisted that the operation was not conducted in terms of section 115. I add that the weight of the evidence also clearly indicates that the plaintiff and his employees or colleagues did not consent to the operation but only submitted to the instructions received from the armed police officers.

As I have already briefly mentioned, the evidence on this subject, which is largely common cause, indicates that a number of police officers (with a number of police vehicles) arrived at the plaintiff's premises unannounced. Many of the policemen were armed, some with R5 assault rifles and some took up strategic positions on the premises. In the end, some twenty three or twenty four firearms were seized and removed to the Krugersdorp police station. Many rounds of ammunition were seized and removed. Documents were inspected. The plaintiff and his colleagues were ordered to open the safes where the firearms were housed.

Under these circumstances, it seems to me that the operation comfortably resorted under the provisions of section 115 of the FACA. Again, the difficulty from the point of view of the defendant, is that the operation was conducted without a

warrant as contemplated in section 115(4) and the alternative circumstances to have done so without a warrant, as contemplated in section 115(4)(b), were not present, neither did the defendant claim such circumstances to have been present. Consequently, I am of the view that the operation, whether conducted in terms of section 109 (which it could not have been for the reason mentioned) or in terms of section 115 (without a warrant) was unlawful.

- [12] After the search and seizure operation, the plaintiff was arrested, as I have explained, and detained for one night, brought before court the next day, charged with the alleged unlawful possession of firearms and ammunition, released on bail and the case was postponed to October 2008 when all the charges were withdrawn.

The evidence

- [13] The trial lasted for seven days. Some of the witnesses offered lengthy presentations in chief, and they were intensively cross-examined. Some of the details presented during the evidence are not relevant for purposes of this particular enquiry. The brief summary of the evidence which follows, will be limited to what I consider to be relevant.

(i) Colonel Yvonne Burger ("Burger")

- [14] She has thirty four years service in the SAP. She spent some time in the section involving the Firearms Register and is now attached to operational response services.

- [15] She knows about the provision whereby training providers, such as FCATC, can be accredited as such in terms of the Act. There is also an oversight body, SASSETA (Safety and Security Sector, Education and Training Authority) which considers applications for accreditation. Police stations are not empowered to issue permits of this nature.
- [16] The operation of 21 August 2008 was a "compliance inspection" and no search warrant or permission was necessary to conduct the operation. The witness gave a somewhat vague explanation for the decision to conduct the operation. She had been informed by a police officer in Brooklyn that there was an indication that a business in Kilner Park Pretoria gives firearm training for purposes of competency certification by using an accreditation number belonging to the plaintiff. This is what she was going to investigate. Details about the alleged Kilner Park operation never came to the fore during the trial. The witness never personally investigated the allegations or visited Kilner Park. In my view there are strong indications that this whole reliance on the Kilner Park operation, such as it was, was nothing but a red herring.
- [17] I have also referred to the fact that FCATC had Memoranda of Understanding (MOU's) with a number of other training providers. According to this witness, she had information that in respect of six of those MOU's the other training providers were not accredited. She received instructions from Inspector Bothma

of the Firearms Registry to investigate this state of affairs and delegated this instruction to certain provincial heads but never established what the outcome of the investigation was. Bearing this in mind, and also the vague "Kilner Park connection" it is difficult to escape the conclusion that this witness (and perhaps also the head of the Central Firearms Control Register, from whom she appeared to take instructions) was determined to investigate the plaintiff for reasons which never really emerged during the trial.

- [18] Turning to the operation of 21 August the witness testified that she went to the premises of the plaintiff with "a team of people". Included in the team was the Designated Firearms Officer ("DFO") of Krugersdorp, Captain Moabelo, who also later became the arresting officer.

They arrived unannounced at about 10:20 and were received by Mr Meyer (who also later testified) in the temporary absence of the plaintiff, who arrived shortly thereafter when telephoned by Meyer to be in attendance. It was explained that they were going to do a "compliance inspection". According to the witness, there was no resistance to this announcement. The evidence of the plaintiff, in contrast to that of Burger, was that he queried the operation, asked whether there was a warrant authorised and asked in terms of which section the "inspection" would be conducted to be informed by the witness that it would be in terms of section 109(1)(g), to which I have referred. Meyer's evidence also suggests that he offered some resistance and put some questions to the witness. The *onus* is on the

defendant. There are two mutually destructive versions on this particular subject. I am not prepared to reject the version of the plaintiff and Meyer that they queried the validity of the operation. I considered them both to be impressive and credible witnesses.

- [19] The witness called for the Training Register and the Shooting Register of the plaintiff. These were scrutinised. She came across yet another red herring by the name of J W Aspeling. According to the Shooting Register, he shot with a shotgun. The Central Firearms Register did not display a shotgun registered in the name of Aspeling. According to the witness, a training institution such as FCATC does not have to own firearms. It may be that the institution only trains the public on the statutory provisions (without shooting) as part of the competency training. Indeed, by far the greatest majority of the clients of FCATC underwent only that type of training. According to the witness, once practical shooting is done by a client of the training institution, either the client (applicant) or the training provider must have a firearm. Because Aspeling did not have a shotgun in his name, and, presumably because it was common cause that FCATC had no business firearm licences, as explained, the witness thought something was amiss. From the cross-examination of the witness, it appeared that she overlooked the provisions of section 22 of the FACA which reads as follows:

"22. Holder of licence may allow another person to use firearm. -

Despite anything to the contrary in this Act but subject to section 120(5), any person who is at least 21 years of age and the holder of

a licence to possess a firearm used in terms of this Act may allow any other person to use that firearm while under his or her immediate supervision where it is safe to use the firearm and for a lawful purpose."

The provisions of section 120(5) do not apply for present purposes. It is common cause that the plaintiff, and some of his colleagues, including Oosthuizen, Meyer, Venter and Vos, had their own private firearms housed on the premises and in separate safes in respect of which each safe each owner of a private firearm had exclusive access. There was also a safe housing firearms of Bossasa Operations (Pty) Ltd ("Bossasa") a security company stationed nearby, which often used the shooting range on the premises for training purposes. Indeed, the undisputed evidence was that the shooting range is used by a whole variety of role players including hunters, Metro police, trainers and other individuals.

- [20] According to the witness she then asked for the firearms used for training purposes to be exhibited to her. The weight of the evidence, as presented on behalf of the plaintiff, suggests that the police (including Burger) asked for all the firearms on the premises to be displayed. According to Burger initially eighteen firearms were brought to her "from a safe" and later another six firearms were brought to her from "another safe not adjacent to the office but in another building on the same premises" after a colleague of the plaintiff, and a later witness, Meyer, took them to that safe. Burger never bothered to inspect the safes neither

was she present when the weapons were removed from these safes. In fact, the evidence is quite clear that there was only one strong room housing six safes. There are photographs to prove this. The safes include the FCATC safe, housing only an air rifle and the so-called BB rifle, none of which needed to be licenced, the plaintiff's own safe containing his own firearms, a safe containing the Bossasa firearms, and safes containing the private firearms of some of the other trainers and colleagues of the plaintiff. All the firearms were properly licenced and could fire the ammunition also housed in some of the safes. A particular class of ammunition was housed in the strong room outside the safes and did not belong to any of the plaintiff or his colleagues or Bossasa. I will revert to this subject.

- [21] For the sake of brevity I can summarise the evidence in chief of Burger by mentioning that according to her she discovered enough irregularities or "contraventions" to persuade her that the plaintiff should be arrested and the weapons and ammunition seized and taken to the police station in Krugersdorp. The contraventions, according to her, included the discovery of a 9mm Browning pistol which had no serial number so that it was a prohibited firearm, and some firearms housed in the safes for storage purposes without the necessary permits. She maintained that the permits were issued by the DFO of Germiston instead of the DFO of Krugersdorp so that the storage was unlawful. She also maintained that although the firearms may have been licenced in the name of some of the individuals, those which, according to her, were used for training purposes were not properly licenced.

[22] The plaintiff was taken to the police station where Burger and her team entered the confiscated firearms and ammunition into the SAP.13 register. She reported telephonically to her chief, Brigadier Bothma, and also "recommended" to DFO Moabelo that an arrest would be in order. She, herself, had nothing to do with the arrest. She does not claim to understand the procedures required in order to effect the lawful arrest neither does she know the provisions of section 40 of the CPA.

[23] In cross-examination it was put to Burger that the 9mm Browning pistol ("the 9mm Browning") was duly licenced in the name of the plaintiff already in 1993 and that it at all relevant times did have a serial number. When the pistol was seized, it was dirty and the serial number was difficult to detect without disassembling the weapon. In fact, Moabelo returned the 9mm Browning to the plaintiff about a month before the trial in terms of official documentation signed by Moabelo and counter-signed by another officer. This is part of the record. Moabelo, in his evidence, said that the 9mm Browning was returned "because of an administrative oversight". That would mean that the counter-signing officer would have made the same mistake. The 9mm Browning was exhibited in court to Burger, Moabelo and other witnesses. It is true that another witness on behalf of the defence, Captain Hendrina Johanna Blignaut, on behalf of the forensic department, testified that the 9mm Browning did not have a serial number when she examined the weapon. This remains something of a mystery. On behalf of the defence, it was suggested that the weapon exhibited in court was probably not the

same weapon that was seized. If that is so, it is a mystery why the 9mm Browning was officially returned to the plaintiff in terms of formal documentation, if it had not been seized in the first place.

It was also put to Burger that the plaintiff tendered to show the licence of the 9mm Browning to her but she was not interested. This she denied. She said she asked the plaintiff for the licence but he could not produce it. The licence is part of the record. She also insisted that even if licences were exhibited to her which were issued to the plaintiff and his colleagues in their personal capacities it would still not be good enough because there should have been licences in the name of the training provider for training purposes. For reasons mentioned, this appears to be the wrong approach. This attitude of Burger was repeated by her on a number of occasions. What was also often repeated on behalf of the plaintiff and his witnesses is that Burger was not interested in listening to their explanations. On considering the evidence as a whole, I am under the impression, on the probabilities, that Burger was determined to find a reason to bring the plaintiff to book. The plaintiff also testified along these lines. He did not know what the reason was for the apparent grudge which was held against him.

- [24] Significantly, in cross-examination Burger admitted that, apart from the dispute around the 9mm Browning, all the firearms seized were lawfully licenced in the names of the individuals I have mentioned. She conceded that there was "an indication of ownership on the system". I have already dealt with the dispute

around the 9mm Browning and that there is clear evidence in the documentation that it was licenced in the name of the plaintiff already in 1993.

[25] Still on the subject of the manner in which this operation was conducted against the plaintiff, I add that on 26 August 2008, a few days after the arrest, a lengthy notice was sent to the plaintiff by the head of the firearms, liquor and second hand goods control department, Director J J Bothma, calling upon the plaintiff to show cause within thirty days why his accreditation as a training provider in terms of section 8 of the FACA should not be cancelled. Nothing came of this. As I have said, at the time of the trial, the accreditation was still in place and FCATC was still doing business.

[26] It is also common cause that on 21 August, the representative of SASSETA, referred to earlier, attended the operation and said that he found no non-compliance. His name is John Baker.

[27] Burger was cross-examined about the permits, *supra*, issued to the plaintiff in his personal capacity to permit the lawful storage by him of seven firearms kept on the premises. Burger insisted that the permits were invalid because they were issued by the Germiston DFO and not the Krugersdorp DFO. Burger's attention was invited to the provisions of regulation 86(4) issued in terms of the FACA which provides that the permits are to be issued by the "DFO responsible for the

area in which the applicant ordinarily resides". This was Germiston at the time. Burger insisted that the permits were invalid.

[28] There was also a dispute about two .22 rifles licenced to the FCATC Graaff-Reinet branch. It was put to Burger that these rifles were returned to the Krugersdorp branch because the DFO of Graaff-Reinet, Mr Johan le Roux, recommended that this should be done. The rifles were not in working order. Burger insisted that this explanation was not given to her at the time. The dispute remained as to whether Burger was not furnished with explanations or whether she was not interested in receiving such explanations. This was an ongoing theme of the cross-examination. It was put to Burger that, in any event, a licence holder has seven days within which to produce a licence, permit or authorisation for inspection when required to do so by a police official. This is in terms of section 106(1)(a) of the FACA. Evidently this provision was ignored by Burger and the rest of her team members inasmuch as licences required may not have been produced at the time of the operation. This is over and above the fact that the plaintiff and his witnesses insisted that the licences were duly exhibited. The *onus* is on the defendant.

[29] In cross-examination, Burger confirmed that she was not the arresting officer and had nothing to do with the arrest. She admitted that she did recommend to Moabelo that an arrest might be indicated. It was put to Burger that before an arrest is effected, the arresting officer has a discretion. He is not obliged to effect

an arrest. Her answer was "I am not an expert on arrest. It is possible most probably that it can be a discretion." I will return to this issue when dealing with the evidence of Moabelo.

[30] I return to the subject of the ammunition that was seized.

[31] The cross-examiner divided the ammunition seized into five groups. Group one was ammunition that may all be possessed legally by the plaintiff in his personal capacity, given the firearms licenced to him personally and the licences that were available for inspection. Group two was ammunition that may be lawfully possessed by H P Oosthuizen one of the trainers who also gave evidence and whose personal firearms were housed in one of the six safes. Group three was ammunition that could lawfully be possessed by G Meyer, another of the trainers who also testified. Group four was ammunition that could lawfully be used by Bossasa security group in a business capacity. Group five was ammunition that could lawfully be used by FCATC at their various branches. The relevant licences were also exhibited and made part of the record.

Burger could not dispute these propositions. It was again put to her that she did not afford all the role players an opportunity to explain the lawful possession of this ammunition to her.

[32] The only exception is group six. This included ammunition which was picked up by an employee of the plaintiff during regular inspections of the shooting range after the range had been used. The ammunition was picked up and collected and the police was telephoned to come and fetch the ammunition for safekeeping or for destruction. The police did so at irregular intervals. The intention of the plaintiff was not to possess the ammunition but to lawfully dispose thereof by handing it to the police. Again, it was put to Burger that neither the plaintiff nor any of his employees were given the opportunity by Burger and her team to explain the presence of the group six ammunition. Although Burger testified that such opportunity was afforded, I find no basis for rejecting the version offered on behalf of the plaintiff. The *onus* is on the defendant. In any event, it is clear that the seven day grace period prescribed by section 106(1), *supra*, was ignored by Burger and her team. In fact, the plaintiff and some of his witnesses testified that they were under the impression that they would have an opportunity to submit further written explanations, if required, and did not anticipate anything like an arrest under these particular circumstances.

[33] Although Burger was a forceful witness, I was left with the impression, for the reasons mentioned, that she adopted an inflexible attitude. She appeared to have been determined to bring the plaintiff to book. She also appears to have overlooked the provisions of sections 106 and 22 of the FACA. Moreover, for the reasons I have mentioned, I have come to the conclusion that the operation she led was unlawful, both with regard to the provisions of section 109 and section 115.

(ii) Captain Hendrina Johanna Blignaut

[34] She has been in the police force since 1993 (for about twenty years). She is attached to the forensic science laboratory: ballistic section.

[35] I have dealt with her evidence. It only turns on the 9mm Browning. I take into account her evidence that the weapon she inspected did not have a serial number.

[36] I have dealt with the evidence of the plaintiff, to the effect that the weapon was licenced to him personally already in 1993. The licence forms part of the record. The weapon was exhibited at court after it was returned a month before the trial by Moabelo and a fellow officer who counter-signed the official documentation. If the weapon was not seized in the first place, it could not have been returned. If it was another weapon that Captain Blignaut examined, that mystery weapon was never described or identified during the trial. The plaintiff also said that it was difficult to find the serial number without disassembling the weapon. He said that he tendered inspection of the licence to Burger but she was not interested.

[37] Given that the ultimate question for decision before me, is whether or not the arrest of the plaintiff was lawful, I cannot see how the testimony of Captain Blignaut can advance the case of the defendant in any way.

(iii) Captain Tlou Isrom Moabelo

[38] I have already explained that he was part of the team that conducted the operation and that he was the DFO for Krugersdorp.

[39] I have referred to his evidence that he returned the 9mm Browning to the plaintiff because of "an administrative oversight".

[40] He could not dispute the evidence that there were six safes in the one strong room. He confirmed that the safes were opened by and on behalf of the defendant and that the police officers removed the firearms and ammunition.

[41] He confirmed that he was the arresting officer and that he brought about the arrest at the Krugersdorp police station after the operation. He confirmed that Burger recommended to him that there should be an arrest but he said he took his own decision.

[42] When asked in his evidence in chief whether he had a warrant of arrest he said it was not necessary because it was a compliance inspection in terms of the FACA. This is nonsensical and incorrect. According to counsel for the plaintiff, there is no provision in the FACA dealing with arrests as such. I accept this submission to be correct. The lawfulness or lack thereof of the arrest has to be judged against the provisions of section 40 of the CPA.

[43] It is convenient to quote the relevant portions of section 40:

"Arrest by peace officer without warrant

40(1) A peace officer may without warrant arrest any person –

- (a) who commits or attempts to commit an offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody;
- (c) ...
- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence producing drugs or the possession or disposal of arms or ammunition;
- (i) ... "

[44] When asked in cross-examination whether he effected the arrest in terms of section 40(1)(b) of the CPA, the witness replied by asking the cross-examiner to read the section to him. He clearly did not know the provisions of section 40 or, perhaps, even of its existence. It is clear that the provisions of section 40 were not in his contemplation when he effected the arrest.

[45] When it was put to him in cross-examination that the cross-examiner could find no empowering provision in the FACA regarding the making of an arrest,

Moabelo answered that they were required, in terms of the FACA to do a routine compliance inspection the purpose of which was to check if licence holders still comply with the provisions of the FACA. "... that is what happened that day. I saw no need for a search warrant."

When it was repeated that there was no empowering section in the FACA dealing with arrests without a warrant he said that he had no comment. When it was put to him that the only provision dealing with an arrest without a warrant was to be found in the CPA he said he had no comment.

When he asked what he meant by no comment he said that he had testified about the FACA and in terms of that Act "we are authorised to make an arrest if there is any violation of that Act". When he was invited to refer to the relevant provision in the FACA and given the text to study he came up with section 109. Those provisions I have quoted. They have nothing to do with effecting of an arrest, let alone arrest without a warrant.

It was put to him that he did not effect the arrest in terms of the FACA and he insisted that he did do so. He said "I acted based on the FACA even though I may not know the section".

In further cross-examination he conceded that he cannot indicate the relevant provision in the FACA dealing with arrest without a warrant.

[46] What follows is a "reproduction" of what I consider to be some more crucial cross-examination of Moabelo on the question of whether or not the arrest was lawful. This is, after all, the central issue to be decided. I call it a "reproduction" because it will not be true to the exact words used during the trial. I am paraphrasing from my notes, because I am not in possession of a typed transcript of the evidence:

"If you have a reasonable suspicion that an offence was committed (any offence) can you arrest without warrant? --- Yes.

I put it to you that the answer is wrong. Section 40(1)(b) of the CPA requires that you must suspect that an offence was committed as referred to in schedule 1. Not any offence.

I put it to you that you did not know this? --- No, not stating it does not mean I did not know.

The question is repeated: it might be my mistake.

I put it to you that the mistake is you did not know. --- I agree.

If you have a reasonable suspicion of a schedule 1 offence having been committed does it follow that you are obliged to arrest? --- You can arrest.

You do not have to? --- You can arrest.

You have an option not to arrest? --- You have no choice you must arrest.

That is also wrong. Section 40(1) says a discretion arises to arrest. You may or you may not? --- No response. I am not aware of that section.

You do not know section 40(1) therefore you could not have arrested in terms of section 40(1)? --- I do not agree.

You have no knowledge of the jurisdictional facts of section 40(1)? --- Correct.

Based on this, you could not have acted to arrest in terms of those subsections. (Here the witness wanted the question repeated and that was done.) --- I effected the arrest because there was no explanation of the plaintiff being in possession of firearms without a permit/licence/authority and also the ammunition.

At the time of the arrest you were not aware of the provisions of section 40(1) of the Criminal Procedure Act? --- I did not know that section but knew that it was unlawful to be in possession of a firearm without a licence.

You also did not know that you had a discretion you thought you had to arrest? --- Correct."

- [47] One of the leading cases now on the issue of arrest without a warrant is that of *Minister of Safety and Security v Sekhoto & Another* 2011(1) SACR 315 (SCA).

In Hiemstra's *Criminal Procedure* (loose leaf edition) 5-7 to 5-8 the subject of the discretion is dealt with as follows:

"Discretion – Once the jurisdictional facts are present, a discretion arises whether to arrest or not. The police officer is not obliged to effect the

arrest. (*Sekhoto, supra*, para [28].) The discretion must be exercised in good faith, rationally and not arbitrarily. (*Sekhoto*, para [38].) It is not correct to say that the police officer is permitted to arrest only if satisfied that the suspect might not otherwise attend court. The arresting officer is not called upon to determine whether the suspect ought to be detained pending a trial. (*Sekhoto* paras [43] and [44].) The discretion must be exercised rationally in relation to the power of arrest. This is an objective enquiry with relation to the facts. (*Sekhoto* paras [36] to [44].) The arrestee who attacks the exercise of the discretion where the jurisdictional facts are present bears the *onus* to prove that the discretion was not properly exercised. (*Sekhoto* para [49].) An attack relating to the discretion must be alleged and proved in order to make it an issue upon which the court must decide. (*Sekhoto* paras [50] to [52]; [57].)"

I add that in his replication, the plaintiff duly pleaded that Moabelo failed to apply his mind and to exercise the discretion conferred upon him properly or at all "... thereby resulting in the irrational and arbitrary arrest of the plaintiff".

[48] The author in *Hiemstra*, at 5-8, then says the following:

"When arrests can be made without a warrant – It is submitted that the present law regarding arrest without a warrant can be summarised as follows following the judgment of the Supreme Court of Appeal in *Sekhoto* ...:

- (i) the jurisdictional prerequisites for section 40(1)(b) must be present;
- (ii) the arrester must be aware that he or she has a discretion to arrest;
- (iii) the arrester must exercise that discretion with reference to the facts;
- (iv) there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court."

In this case, as illustrated, the arrester had no idea of the provisions of section 40, let alone the requirements of section 40(1)(b). In my view, the same would apply, if necessary, to the provisions of section 40(1)(h).

More importantly, the arrester did not know that he had a discretion to arrest. He thought that he had to arrest.

In my view, it is also doubtful whether the arrester exercised his discretion with reference to the facts. I have dealt with the facts when referring to the evidence of Burger under cross-examination. Burger was clearly the driving force behind the operation. It is not clear, and it is doubtful, whether Moabelo took an active part in the discussions with the plaintiff and his witnesses around the availability of licences, the use of the separate safes and related matters.

In *Amler's* by Harms, *supra*, at p47, the learned author says

"The defendant has to show not only that the arresting officer suspected the plaintiff of having committed an offence but that the officer reasonably suspected the plaintiff of having committed a schedule 1 offence specifically."

I have referred to the authorities relied upon by the learned author.

[49] In all the circumstances, I have come to the conclusion that the jurisdictional prerequisites were not present in this case. Nevertheless, inasmuch as it may be necessary, I find that the plaintiff has discharged the *onus* to prove that the discretion was not properly exercised. It could not have been, if the arrester did not even know that he had a discretion. The position is even worse from the point of view of the defendant, because the arrester did not know about the provisions of section 40.

In all the circumstances, I have come to the conclusion that the defendant has failed to prove that the arrest was lawful.

[50] The witness was not able to give a response when he was confronted with the provisions of section 106(1)(a) about the seven day notice period.

[51] It was put to him that he should have properly investigated the matter and given all concerned a full opportunity to explain and that this was not done. His answer was that he felt that he acted in the correct way.

[52] I add that the cross-examiner, for reasons known only to himself, revisited, in cross-examination, the issue of section 40 and the discretion the following day after having dealt with the issue the previous day. Despite the fact that the witness was now given a further opportunity to deal with the issue, I am satisfied that he was unable to remedy the flaws of his earlier evidence which I dealt with at length.

[53] I was also referred by counsel for the plaintiff to *Mabona and Another v Minister of Law and Order & Others* 1988 2 SA 654 (SECLD) where the question of the section 40 discretion came into play. At 658G-H the following is said:

"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."

In my view, this requirement was not met by either Burger or Moabelo.

[54] In general, I did not find Moabelo an impressive witness.

(iv) Michael John Waters (the plaintiff)

[55] After the defendant's case was closed, the plaintiff was the first witness in support of his own case.

[56] I covered most of the plaintiff's evidence when dealing with the defendant's evidence, and particularly that of Burger under cross-examination. I do not intend embarking upon unnecessary repetition.

[57] As a 60 year old retired police colonel, the plaintiff had been well settled as an accredited trainer by the time when he was arrested. By all account he ran a series of well established training centres and was familiar with the provisions of the FACA. There was no need for him to contravene this Act or to walk around, for example, with a prohibited firearm without a serial number.

[58] He testified that for a compliance inspection you do not need a whole team of heavily armed policemen.

He did not agree to the inspection. He asked Burger in terms of what section of the FACA she was conducting the operation and she responded that it was in terms of section 109(1)(g). She knew that there were no business firearms on the premises. This much, as I pointed out, she admitted in cross-examination. He abided by Burger's request to proceed, but did not consent to it. He co-operated by calling his ex employee, Oosthuizen, an ex colonel, who also testified, and who kept the key of the central strong room, to open up. He also gave his own safe combinations and arranged for all the safes to be opened. The details will not be repeated.

[59] John Baker from SASSETA was also present. I have pointed out that Baker said he could detect no irregularities.

[60] Jan Moolman, employed by Bossasa security company, *supra*, was also present. His company uses the shooting range. His company had its firearms available for a shooting exercise scheduled for that day.

[61] Oosthuizen, Gerhard Meyer an ex colonel in the police, Jurie Vos an ex lieutenant-colonel, all employees of FCATC, were also present.

[62] Throughout, he considered Burger not to be approachable. She kept on insisting that she wanted business licences and possession without such business licences was unlawful in the circumstances. It was fruitless to talk to her and Meyer also got involved in a confrontation with her. He told Meyer to leave and to inform the others to produce their firearm licences. He was under the impression that he would in any event have the opportunity to furnish a proper written explanation of any queries. For these reasons he also did not want to argue about the Aspeling query. Meyer wanted to argue with her about certain provisions of the FACA and there is no provision that firearms cannot be used for training purposes when registered in the name of a private individual. According to the plaintiff, Burger made a concession in this regard. Section 22 was referred to. Aspeling's fellow

trainee had a shotgun. Not one of the firearms that were seized was used for training purposes at FCATC.

So far FCATC had already issued approximately 60 000 training certificates without the need for business firearm licences to have been issued.

[63] The plaintiff said repeatedly that he was not given the opportunity to offer full explanations. I find his evidence compelling. He impressed me as a good witness.

[64] The plaintiff, in my view, adequately dealt with the issue about obtaining storage permits from the Germiston DFO instead of the Krugersdorp DFO. He stayed in the Germiston area at the time. The Germiston DFO also inspected his safe before the permits were issued.

[65] At the time of his arrest, the plaintiff's ex wife came to the police station and told the warrant officer present that the plaintiff was a diabetic, had not eaten all day and needed treatment. A letter by the plaintiff's doctor, Dr Gerhard Smidt, dated 21 August 2008 was handed to the warrant officer put in charge of the detention. This is exhibit "B3". The letter refers to the plaintiff and reads:

"This man is well known to this practice.

He is a insulin dependant diabetic who has to inject himself four times a day.

He has diabetic trophic sores on both feet that need twice daily dressing to present worsening and possible amputation."

He was nevertheless detained overnight. I add that the question as to whether or not the letter was handed over appears to be in dispute. There was no application on behalf of the defendant to reopen the case to rebut the evidence. Nevertheless, I refrain from dealing with this issue any further. If there is to be a *quantum* trial, the whole issue will probably be canvassed in detail. In any event, if the arrest was unlawful, as I have found, the detention would also have been unlawful.

(v) Gerhard Meyer

[66] Meyer is an ex colonel in the South African Police. After serving the police for about twenty four years he left in 2000. He joined FCATC as an assessor. This happened in 2004. He was on duty on 21 August 2008.

[67] He also described the operation as a police raid and not a compliance inspection. There were about fifteen policemen, some armed with assault rifles and some took up various strategic positions including positions in the vicinity of the strong room and the entrance to the premises.

[68] This was an impressive witness who corroborated the evidence of the plaintiff in all material respects.

[69] His own privately owned firearms were also exhibited to the police. These firearms were kept in a safe in a strong room to which he had exclusive access. He gave his combination to Oosthuizen to open his safe. When he asked Burger to take back his firearms because she had seen the licences, she refused and said that she was seizing the firearms. When he asked her on what grounds, she said because private firearms were being used to conduct training. He argued with her that, for the reasons mentioned, private arms may be used for training. She relied on section 20 of the FACA. This only deals with firearms registered for business purposes. He confronted her with the provisions of section 22. She said that she was not prepared to enter into any discussions with him regarding the legalities.

[70] He also testified about the "class 6" ammunition that gets picked up regularly at the shooting range and kept in the strong room in terms of an arrangement with the police. This I have explained.

[71] Mr Moolman of Bossasa was also present. The Bossasa firearms are kept in a safe to which Bossasa has exclusive access.

[72] This witness was not discredited in cross-examination. He made a good impression.

(vi) Herman Pieter Oosthuizen

[73] He is a retired lieutenant colonel of the police. He served the police for seventeen years. Thereafter he joined FCATC. He left FCATC in August or September 2008. He was on duty on 21 August 2008.

[74] The plaintiff asked him to open the strong room which he did. He was given all the combinations by those who used the safes and opened all of them. The police were present when this was done. They did not ask him any questions. They removed all the weapons and asked him to stand outside. His own personal weapons, a 6.35 Browning pistol and a .383 rifle were also seized. He had exclusive access to his safe. He also testified about the "class 6" ammunition. He was not asked to give any explanation.

[75] This was also an impressive witness.

Conclusionary remarks

[76] I have already dealt with the provisions of section 109 and section 115 of the FACA. On a general reading of the evidence, and for the reasons mentioned, this was not a compliance inspection in terms of section 109. In any event, it could not have been, because it is common cause that the plaintiff was not the holder of "a licence in respect of firearms used for business purposes referred to in section 20" as intended by the provisions of section 109(1)(g). Consequently, to

the extent that the defendant insists that it was a section 109 inspection, I find that such an operation was unlawful, for the reasons mentioned.

[77] As to section 115, I have come to the conclusion, and I find, that the operation was akin to a section 115 "inspection, search and seizure for enquiry or investigation".

I have pointed out the difficulty from the point of view of the defendant that there was no special warrant issued as required by the provisions of section 115. The alternative to operate in terms of this section without a warrant, as provided for in section 115(4)(b), does not apply, neither did the defendant contend that it applies. Inasmuch as the operation may have been intended to be a section 115 inspection, it is also, for the reasons mentioned, my conclusion that it was unlawful.

[78] In my view, if the operation was unlawful, where it flew in the face of both section 109 and section 115, the arrest flowing from this operation would also have been unlawful.

[79] In addition, I have concluded that the arrest was in any event unlawful for lack of compliance with the requirements of section 40 of the CPA. I have detailed the applicable authorities.

[80] Against this background, I find that the defendant failed to discharge the *onus* to prove that the arrest was lawful. The same would apply to the subsequent detention. Consequently, the action must succeed.

The order

[81] I make the following order:

1. It is declared that the defendant is liable to compensate the plaintiff for any damages which may be proved flowing from the plaintiff's arrest and detention on 21 and 22 August 2008.
2. The defendant is ordered to pay the plaintiff's costs.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

46179-2011

HEARD ON: 4 – 15 OCTOBER 2012
FOR THE PLAINTIFF: J C ERASMUS
INSTRUCTED BY: AZAR & HAVENGA
FOR THE DEFENDANT: F I BALOYI
INSTRUCTED BY: STATE ATTORNEY