



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

23/5/2013

CASE NO: 70842/11

DELETE WHICHEVER IS NOT APPLICABLE	
1 REPORTABLE	YES / NO
2 OF IMPORTANCE TO OTHER JUDGES	YES/NO
3 REVISED	
23 May 2014	
DATE	SIGNATURE

In the matter between:

RAISIBE TINY SEEMA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

TEFFO, J:

[1] The plaintiff instituted an action for damages against the defendant for unlawful arrest, unlawful detention, assault and malicious prosecution after she was arrested without a warrant and detained by members of the South African Police Service (SAPS) on a charge of unlawful possession of a firearm at the Atteridgeville Police Station.

[2] It is alleged that at the time of her arrest she was assaulted by members of the SAPS in the course and scope of their employment with the defendant.

[3] The plaintiff further alleges that she was maliciously prosecuted.

[4] The defendant denies the allegations.

[5] The parties agreed that the issues of quantum and merits be separated. I accordingly made an order in terms of Rule 33(4) of the Uniform Rules of Court postponing the issue of quantum for later determination. The trial then proceeded only on the issue of liability.

[6] The following facts are common cause between the parties:

6.1 The plaintiff and her husband were arrested at their homestead on 6 September 2011 after members of the SAPS searched their premises without a warrant and found a 303 rifle with ammunition and 2 X small 9mm round while they did not have a licence to possess the aforesaid articles.

6.2 They were both detained at the Atteridgeville police cells.

6.3 They were both charged for unlawful possession of a firearm and ammunition and appeared at the Atteridgeville Magistrate's court.

6.4 Charges against the plaintiff were subsequently withdrawn.

[7] Two witnesses testified on behalf of the defendant while the plaintiff adduced evidence on her own to prove the allegations and did not call any witnesses.

[8] The evidence led in this matter is briefly as follows: Sello Ambros Mogale (Sgt Mogale) testified that he is a member of the SAPS, holds the rank of Sergeant and is stationed at Silverton SAPS, Pretoria, K9. On 6 September 2011 during the night while on duty, he was given an address and information that at that address there were unlicensed firearms. He together with his crew immediately drove to the address and entered the yard of a squatter camp through the gate and knocked at the door. They identified themselves as police officers. The occupants of that homestead took about 15 minutes to open the door. Upon realising that they were not opening the door, they forced the door open, entered the three roomed shack. Upon entering the first room of the shack they met the man of the shack, introduced themselves to him and explained the purpose of their visit.

[9] They subsequently asked for permission to search the shack. He gave them permission and told them that he had no knowledge of the presence of firearms in his shack. They also asked him as to how many occupants were there in the shack and he said it was him and his wife only at the time. His wife was in the bedroom while they were with him in the first room. Capt Motshwane informed his wife (the plaintiff) to dress. She came to them dressed. They also explained to her the reason for their visit. They entered the bedroom where they were sleeping and started searching. Nothing was found in their bedroom. They proceeded to another bedroom where they also searched. At that time he was in the company of Constable Moyana and as they were searching, they were with the plaintiff's husband. He searched the left side of the room while Const Moyana searched the

right side. In that room there were two beds. He pulled one of the beds' mattresses up. He was surprised to find a 303 rifle (firearm) with a magazine which had eight life ammunitions on it. The plaintiff's husband who was with him at the time was also surprised as to how that firearm came to their shack. He proceeded to search on the wall following the information he had. He did not find any firearm there but he could see that a small pistol stays there.

[10] At the time he found the aforesaid firearm the plaintiff was in the dining room. The firearm was also shown to the plaintiff. When they asked the plaintiff and her husband about the firearm, they said they knew nothing about it.

[11] Const Moyana also recovered a two life ammunition from a small pistol. At that time the plaintiff's husband started crying, hit his head against the bedroom door and he suddenly realised that he was bleeding. When he asked him what was he doing, he informed him that on the previous occasion there was a house breaking at his shack and that he was surprised that the police came to search his shack. Further that it was better for him to commit suicide as he had problems. He then explained to the plaintiff and her husband that he was arresting them for unlawful possession of a firearm and ammunition. He arrested them and they were detained at the Atteridgeville police station. He did not know if they had appeared in court. He did not have a search warrant to search the premises.

[12] Under cross examination he testified that he received information that there were firearms at the plaintiff's shack and that the plaintiff's husband has a friend who resided at an address he had who was also in possession of a firearm. They entered the first address which they searched and found a rifle (firearm) and a magazine which had life ammunition but could not recall how many they were. They asked the plaintiff's husband's friend as to where was the other firearm. He gave them the address of the plaintiff, which address was the same as the one they got from the informer. Subsequent thereto they proceeded to the plaintiff's address. The person they first arrested told them that there was a small pistol at the plaintiff's

homestead on the wall. They went to the plaintiff's homestead to search and the arrest would only emanate from the results of the search. It was put to him that nothing prevented him from getting a search warrant before they proceeded to search. His response was that they received the information midnight and after receiving it, they realised that it was going to take them time to apply for the search warrant. He stated that as a police officer he has never applied for a search warrant. He further stated that the items mentioned were movables and could be disposed of quickly.

[13] As the occupants of the shack took 15 minutes and more to open the door, they pushed the door open and four of them entered the house, while one was on the door and the other one was at a corner.

[14] Capt. Motshwane informed the plaintiff to dress because at the time they entered their shack, the plaintiff and her husband were asleep. He conceded that they gained entry into the shack, viz, the first room, with force but denied the use of any force thereafter except to say that after they had met the plaintiff's husband who informed them that the house was occupied by him and his wife, Captain Motshwane told the plaintiff to dress. The plaintiff then came and the reason for their visit was also explained to them. From there they started searching. They searched the shack in the presence of the plaintiff's husband and the plaintiff was in the dining room at the time.

[15] When he was asked as to why they had left the plaintiff in the dining room when they searched the house and then arrested her for possession of an unlicensed firearm, he explained that they arrested the plaintiff and her husband because when they asked them as to how did the firearm come to the shack, they all said they knew nothing about it and they were the only occupants of that shack at the time. Her husband told them that the firearm was placed in the shack by people who committed a housebreaking at their shack previously. He disputed that when he searched the shack, the plaintiff's husband was a suspect because at that stage he

did not have evidence to link him with the allegations. He was at that time following the information to prove the allegations. He did not believe the plaintiff's husband when he told him after he found the firearm about a previous housebreaking at his shack. He did not investigate the information about the alleged housebreaking.

[16] He disputed that he encroached upon the plaintiff and her husband's rights. He maintained that even though he was furnished with their address, he did not know their names. He also disputed that it would have been easier for him to take the recovered items and summoned them to court after an investigation. They arrived at the plaintiff's premises after 24:00 and when they entered their shack they were in possession of torches which they always use when they are on night duty. When they were searching the shack, they used torches. He could not remember if the electricity was on at that shack but the light was on which was switched on by the plaintiff's husband when they met him.

[17] He disputed hearing the plaintiff's husband asking who they were when they were knocking at the door and that the door was kicked. He also disputed that they stormed into their shack, into the bedroom where the plaintiff and her husband were sleeping, flashed them with torches, ordered them to remain still while they woke the plaintiff up, started assaulting her husband thereby choking him on his body and thighs. He further disputed that the plaintiff was naked at the time when she was told to dress. He disputed that the plaintiff was assaulted with open hands in his presence while torches were flashed in her eyes. He disputed that one black police officer took off the blanket that the plaintiff covered herself with from her and she stood up from the bed. He also disputed that one of their members slapped the plaintiff on her bums, calling her a bitch and saying she was curvaceous while she was naked at the time. He further disputed that the plaintiff dressed up in their presence and went to the children's bedroom where they asked her what did she know about firearms.

[18] He conceded that the shack together with the plaintiff's husband's motor vehicle were searched. He explained that he forgot to mention that the plaintiff's husband's motor vehicle was also searched in his evidence in chief as he did not include this evidence in his written statement. He disputed that they took water from the dustbin that was on the stoep and poured it on the body of the plaintiff's husband. He also disputed the plaintiff's version about how they recovered the firearm in that they did not call her and her husband from their bedroom to tell them that they found a firearm but that it was found while they were with her husband.

[19] He was referred to paragraph 4 of his arresting statement and asked where on the statement does he state that the plaintiff's husband gave them permission to search the house. He explained that he did not include that in his statement although the plaintiff's husband gave them permission when they spoke to him face to face. He further stated that they were impatient when they were knocking at the door and no one was opening because they believed that the plaintiff's husband had dangerous weapons. He conceded that in his statement he did not mention that Captain Motshwane told the plaintiff to dress. He also conceded that he did not mention anything on his statement regarding visibility at the time and that they were using torches when they searched the plaintiff's shack.

[20] He disputed that based on the information that the plaintiff's husband told him that their shack was previously broken into, he could not have formulated a reasonable suspicion that the plaintiff was in possession of a firearm. He maintained that the position in which they found the firearm and the ammunition, he found it unnecessary to investigate the housebreaking incident. He disputed that when he arrested the plaintiff he ought to have known that on the facts there was no reasonable basis to arrest her. He also disputed that when he took her to the police station, he ought to have known that there was no probable cause for her to be prosecuted for what she was charged for. He conceded that when he took her to the police station he wanted her to face a charge of unlawful possession of a firearm. He was adamant that after he received information from the first suspect he had reasonable belief to suspect that the plaintiff was in unlawful possession of a firearm.

He stated that he did not know how the case against the plaintiff ended when he was told that the charges were withdrawn on 20 September 2011.

[21] He further disputed that his conduct as a police officer resulted in the plaintiff facing malicious prosecution. When it was put to him that had he verified the information about an alleged previous housebreaking at the plaintiff's shack, it could have been possible that those firearms could have been left by the housebreakers at that shack as he also testified that both the plaintiff and her husband were surprised when the firearm was found there, he maintained that he did not find it necessary to investigate the allegations about the housebreaking and that he did not have proof that the firearm was left by the housebreakers at the plaintiff's shack. He disputed that the arrest of the plaintiff was unlawful and that he encroached upon her constitutional rights when he arrested her.

[22] W/O David Shibambo also testified. He was the investigating officer in the criminal matter that was opened against the plaintiff. He met the plaintiff and her husband in the cells on 8 September 2011 when he charged them with unlawful possession of a firearm and ammunition. At that time he had sight of the firearm and the ammunition. The plaintiff never complained to him about an assault by members of the SAPS. In any event if the plaintiff had a complaint, senior officers visit the cells every hour. They ask if prisoners have complaints and each and every complaint is recorded in the occurrence book. Where an assault has been reported, the senior police officer will assist the prisoner to lay such charges. No charges of assault had been laid by the plaintiff against the police.

[23] On 9 September 2011 he took the plaintiff and her husband to court and the plaintiff's husband told the prosecutor in his presence that he is the owner of the firearm and the ammunition which was found at their shack and that the plaintiff knew nothing about them. The charges against the plaintiff were then withdrawn. He did not examine the firearm to check if it could take out a projector or was active

[24] Under cross examination he testified that the information that he had at his disposal when he charged them was a statement by the arresting officer that they were found in possession of unlicensed firearm and ammunition. He interviewed them before he decided to charge them and they informed him that they would make their statements in court. When he was told that the plaintiff will testify that on 9 September 2011 no charges were withdrawn against her and that she was taken to Pretoria prison, she conceded that she cannot mention it as a fact that the charges were withdrawn on that day but can only say that the prosecutor told her that the charges were going to be withdrawn against the plaintiff. He ultimately conceded that the charges against the plaintiff were withdrawn on 20 September 2011. He did not comment when he was shown exhibit B4 where it was stated that bail was fixed in favour of the plaintiff for an amount of R500,00 on 15 September 2011.

[25] He conceded that he did not know what happened at the scene of the arrest as he was not present when the plaintiff and her husband were arrested and could not comment about whether the plaintiff was assaulted or not. He disputed that there was nothing linking the plaintiff with the unlawful possession of a firearm and ammunition on the statement of the arresting officer. He also disputed that the statement only refers to the plaintiff's husband. He did not comment when he was referred to paragraphs 3 and 4 of the arresting officer's statement. I will deal with the statement later on when I analyse the evidence.

[26] He disputed that at that time he ought to have known that there was nothing against the plaintiff but proceeded to charge her. He was also referred to paragraph 5 of the statement, the first three lines, and told that the statement refers to one person but he proceeded to charge both. He disagreed and said the firearm was found in the shack where the plaintiff and her husband resided. He conceded that he had a discretion to charge or not to charge the plaintiff but disputed that he did not have a probable cause to charge her as there was no need for her to be prosecuted. He has been a member of the SAPS for 27 years and has been an Investigating Officer for 22 years, 12 years of which he has been a Warrant Officer.

[27] Tiny Raisibe Seema (the plaintiff) testified as follows: She is 31 years old and at the time of her arrest she was 29 years old. On 6 September 2011 midnight while she and her husband were asleep in their bedroom, they heard a sound like people were kicking the door. Her husband asked who were they, they said they were the 'police'. They told them to stay still as they entered their bedroom thereby eliminating them with torches. They ordered them to wake up. They choked her husband on the thigh and at the back asking him about the firearm. She was also ordered to wake up and she informed the police that she was not dressed. One police officer slapped her with an open hand on her face and took off the blanket she had covered herself with.

[28] When she woke up he slapped her on her bums and said she was curvaceous and a bitch. She dressed in front of them and they took her to the children's bedroom. They asked her what did she know about a firearm. She told them she knew nothing. They asked her if she never saw it and she said 'no'. They then started searching their three bedroomed shack. They started at the children's bedroom and they did not find what they were looking for. She and her husband moved from room to room with them. They also went outside where they searched inside her husband's motor vehicle to wit, a Ford Sierra. They also did not find anything. Other police officers were on the side. They spoke softly. She did not hear what they were saying. Her husband was initially assaulted and choked inside the shack. They also choked him on the stoep. There was a dustbin with water on the stoep. They poured her husband with water from the dustbin while choking him. They did that as they were going out to search the motor vehicle.

[29] As they kept on talking, she and her husband went inside the shack into their bedroom as they realised that the police did not find what they were looking for. The police also came in the dining room. They said a 'firearm'. Her husband asked them where did they find it. They said they found it in the children's bedroom. Her husband then told them that the firearm was not his, why did they search and not find it. They then took them and said they were going to lock them up as her husband said the firearm did not belong to him. She conceded that when they were

shown the firearm they were surprised. Her husband also told them that they previously had a housebreaking in their shack. She confirmed that prior to their arrest, their shack was broken into and cash in the sum of R200,00 and tekkies were stolen while her identity document was torn apart. They did not open a case of housebreaking.

[30] She did not bear any knowledge of a firearm in their shack.

[31] She was granted bail and charges against her were withdrawn. The police came to their shack knowing what they were looking for and from whom. They ended up arresting her while she knew nothing about the firearm. She does not know why the charges were dropped against her. The police officers who were at her shack were more than six or seven. She cannot identify the police officer who hit her on her bums as they eliminated them with torches.

[32] Under cross examination she testified that she stays with her husband at that shack and she has been staying there for nine years. She did not see the firearm when it was found as she was not with them when it was found. She saw it after it was found before she was taken into the SAPS motor vehicle. She also did not see the ammunition. In the shack a candle light was on. She did not sustain visible injuries and she never laid charges of common assault or indecent assault after the incident. She did not complain to anybody else about the assault but she went to her attorney after her release from custody. When asked what did she expect the police to do after she and her husband denied knowledge of the firearm after it was found in their shack, she said the police came to their shack knowing that what they were looking for was with her husband. They should not have arrested her. She was adamant that the police should not have arrested both of them. She then asked who was going to look after their children as they were visiting her mother at the time. She confirmed that she and her husband did not have licenses to possess a firearm.

[33] The issues for determination are whether the arrest and the detention of the plaintiff were unlawful, whether she was indeed assaulted as she alleged and whether she was maliciously prosecuted.

[34] Section 40(1)(b) of Act 51 of 1977 ("the Criminal Procedure Act") provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

[35] As was held in *Duncan v Minister of Law and Order* [1986] 2 ALL SA 241 (A) the jurisdictional facts for a section 40(1)(b) defence are the following:

- 35.1 The arrestor must be a peace officer;
- 35.2 The arrestor must entertain a suspicion;
- 35.3 The suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and
- 35.4 The suspicion must rest on reasonable grounds.

[36] It is trite that the onus rests on the defendant to justify an arrest. As Rabie CJ explained in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 A at 589E-F.

"An arrest constitutes interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law".

[37] In *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (6) BCLR 601 (CC) the Constitutional Court in affirming this principle said:

"It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification".

[38] Once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to arrest. This was made clear by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) in relation to section 43 as referred to in *Groenewald v Minister of Justice* 1973 (3) SA 877 at 883 G - 884B.

[39] Van Heerden JA in *Duncan v Minister of Law and Order* at 818 H-J referred to *supra* said the following:

"If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (of Holgate – Mohammed v Duke E [1984] 1 ALL ER 1054 HL at 1057). No doubt the discretion must be properly exercised".

[40] In *R v Van Heerden* 1958 (3) SA 150 (T) the court held that the suspicion must be reasonable and the test for such reasonableness is objective.

[41] The approach to be adopted in considering whether the suspicion was reasonable is the one followed by Jones J in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 F-H:

"It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant;

i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion".

[43] At paragraph 25 of its judgment the court in *Sekhoto* matter referred to *supra* held as follows:

"It could hardly be suggested that an arrest under the circumstances set out in section 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause, in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary".

The court went on at paragraph 44 of the judgment to say the following:

"While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime - and those listed in Schedule 1 are serious, not only because the legislature thought so - a peace officer could seldom be criticised for arresting a suspect for that purpose.

[44] Innes ACJ articulated the following principle in *Shadiack v Union Government (Minister of Interior)* 1912 AD 642 at 651 – 652:

“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 lie, 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 its own... 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”.

[45] In *Minister of Justice and Constitutional Development v Moleko* [2008] 3 ALL SA 47 (SCA) it was held that in order to succeed on the merits with a claim for malicious prosecution, a claimant must allege and prove:

- 45.1 that the defendant set the law in motion (instigated or instituted the proceedings);
- 45.2 that the defendant acted without reasonable and probable cause;
- 45.3 that the defendant acted with “malice” (or *animo injuriandi*); and
- 45.4 that the prosecution has failed.

[46] In *Rudolph and Others v Minister of Safety and Security and Another* [2009] 3 ALL SA 323 (SCA) the court with approval referred to the cases of *Moaki v Reckitt &*

Colman (Africa) Ltd and Another [1968] 3 ALL SA 242 and Prinsloo and Another v Newman [1975] 2 ALL SA 89 and said:

"the requirements of 'malice' have been the subject of discussion in a number of cases in this court. The approach now adopted by this court is that, although the express 'malice' is used, the claimant's remedy in a claim for malicious prosecution lies under the actio injuriarum and that what has to be proved in this regard is animus injuriandi".

[47] In the *Moleko* matter referred to *supra*, the following was said:

"The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless have continued to do so, reckless as to the consequences of his or her conduct (dolus eventuarlis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice".

[48] The statement of the arresting officer, Sgt Mohale, reads:

3. *At approximately 00:00 I received information from my informer that at Brazzaville there is someone in possession of unlicensed firearm and ammunition. I immediately went with my colleagues to the address at Block ZM 347 Brazzaville in Saulsville. On our arrival we knocked on the door, introduced ourselves by telling the person inside the house that we are members of the SAPS from Pretoria Dog Unit and that we are at his place to search in the house.*
4. *The person in the house did not open immediately. He took about 15 minutes and we forced the door open and entered, and again I told him that we are at his place to search because we have information that he is in possession of unlicensed firearm. Mr Steve Masonganyi 39 was together with his wife in the house, Mrs Tiny Seema 30 years.*

4. *The person in the house did not open immediately. He took about 15 minutes and we forced the door open and entered, and again I told him that we are at his place to search because we have information that he is in possession of unlicensed firearm. Mr Steve Masonganyi 39 was together with his wife in the house, Mrs Tiny Seema 30 years.*
5. *I asked Mr Steve if he knows anything about the firearm and he told me that he does not know anything and that he is working for his family at Coke Company, we then started searching in the shack which was three roomed. While busy searching in the room where they were sleeping we found nothing and we went to the other sleeping room where there was no one inside and under the mattress I recovered 1 X 303 rifle with serial no 013376, 1 X Magazine containing 8 X life ammunition. I asked Mr Steve who is the owner of those and also his wife but they both said they don't know how did all these come into their house. On the other bed my crew was busy searching. He also recovered 2 X small round (9mm round).*
6. *Mr Steve started shouting at us and he banged his head with the room door and he got injured open wound. I asked him why is he doing that that he said he want to kill himself because he has some problems. He said last time the thugs came into his house and do housebreaking. Now the police again are searching his house. So he wants to die and rest. I told them that both of them are under arrest for possession of an unlicensed firearm and ammunition".*

[49] The evidence of the two police officers who testified on behalf of the defendant was straight to the point. It was honest, credible and could be relied upon even though there were minor discrepancies as against that of the plaintiff which evidence was not corroborated or supported by any evidence and not probable. The crux of the defendant's evidence is that the arresting officer received information together with an address where it was alleged that someone was in possession of firearms unlawfully. The information was followed at that address and indeed a

firearm and ammunition were found. When the plaintiff and her husband who were the occupants of that homestead where the ammunition and the firearm were found, were asked as to whom did the articles belong, they both said they knew nothing about them. Both of them did not have licenses to possess the articles in question.

[50] On the other hand the plaintiff alleges that when the firearm was found, she and her husband were not with the police officers. She creates the impression that because the shack was initially searched before her husband's motor vehicle was searched outside the shack, the police could have come with the firearm to the shack and then maintain that it was found in there. To support this her evidence reads:

"As they kept on talking, she and her husband went inside the shack into their bedroom as they realised that the police did not find what they were looking for. The police also came in the dining room. They said 'a firearm'. Her husband asked where did they find it. They said it was found in the children's bedroom. Her husband then told them that the firearm was not his, why did they search and not find it".

Strange enough with her evidence, the evidence of Sgt. Mogale to the effect that as they searched the different rooms in the shack, and when they found the firearm and ammunition her husband was with them, was not contested. It remained undisputed. In any event it is not probable that police who gave evidence that they did not know the people and the place where they were going to look for firearms could come with a firearm and say it belongs to them. They have nothing to gain. From the evidence nothing was said about the ammunition. It means the fact that the ammunition was also found at the plaintiff's shack is not contested.

[51] It is clear from the evidence and the pleadings that the arrest and the detention of the plaintiff is not in dispute. What is disputed is the lawfulness or otherwise of her arrest and detention. Counsel for the plaintiff submitted that the information that the arresting officer had at the time he went to the plaintiff's

investigate or verify that information, indicates that he did not analyse and assess the information at his disposal critically to enable him to entertain a suspicion that would justify the arrest of the plaintiff as required in the *Mabona* matter referred to *supra*.

[52] Although counsel for the defendant relied on the provisions of section 40 (1)(a) of the Criminal Procedure Act and argued that the firearm was found after the police followed information and the plaintiff and her husband did not have a license to possess the firearm and ammunition, I will ignore this argument as it does not tally with the pleadings and the evidence on record... The evidence and pleadings refer to section 40(1)(b) of the Criminal Procedure Act. According to the evidence the arresting officer received information, went to the address given, searched and found the firearm and the ammunition. From his testimony, he mentioned that he received information relating to two addresses. They went to the first address, searched and found a firearm and ammunition. When they arrested the person found in the first address and asked him for more information about the firearms, he told them that the other firearm is at the plaintiff's homestead. Taking into account that the address given by the first person arrested was the same as that he received from the informer, they proceeded to the plaintiff's address. His evidence was that when he arrived at the plaintiff's shack he did not suspect anybody for having committed an offence as he could not link anyone with any offence at the time but after the search and having found the firearm and the ammunition, he arrested the plaintiff and her husband as he only suspected them of committing the offence of unlawful possession of a firearm and ammunition.

[53] From these set of facts I accept that based on the initial information received from the informer which was corroborated by the first person arrested at the first address, the fact that upon following that information a firearm and ammunition were found at a shack occupied by the plaintiff and her husband and that when they were asked about the articles, they denied knowledge of them, they also did not have licenses to possess a firearm and ammunition, the arresting officer entertained the

suspicion that the plaintiff and her husband (arrestees) committed an offence of unlawful possession of a firearm and ammunition which is a Schedule 1 offence. I do not agree with the submission by the plaintiff's counsel that the fact that the firearm and ammunition were found at the plaintiff's homestead should be ignored. Further to the above his submission that the suspicion could not be entertained because the plaintiff was not mentioned in the information given to the arresting officer as per statement is without merit in that the plaintiff and her husband were the only occupants of the shack when the firearm and ammunition were recovered. None of them was able to tell the police to whom the articles belonged. An issue was raised that Const Moyana should have been called to testify as it ^{was} alleged that he also found ammunition in one of the rooms. I do not agree as I find his evidence to have been unnecessary as Sgt Mohale who also found the firearm and the ammunition testified. His evidence was sufficient.

[54] The next question to ask is whether the suspicion rested on reasonable grounds. The arresting officer testified that he arrested the plaintiff and her husband on the basis that they disputed that they were the owners of the firearm and the ammunition. He stated that he did not investigate the allegation by the plaintiff's husband about a previous housebreaking at the premises because he did not believe him.

[55] In *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) it was held that the test for the requirement in section 40(1)(b) of the Criminal Procedure Act for a reasonable suspicion that a person to be arrested has committed an offence referred to in Schedule 1 is whether there has been an investigation into the essentials relevant to the particular offence.

The court went on to say:

"In proceedings for wrongful arrest the defendant has to show that after investigating the essential facts, persons responsible for the arrest had a

reasonable suspicion that the plaintiff committed the offence in question, being an offence referred to in Schedule 1 to the Act”.

[56] The plaintiff although she confirmed what her husband told the police about the previous housebreaking at her shack which allegation was not denied by the arresting officer that her husband told him about it, testified that the housebreaking was not reported to the police.

[57] From the test as articulated in the *Ramukulukusha* matter referred to *supra* I am of the view that the allegation of a previous housebreaking at the plaintiff's premises and that the thugs who broke into the premises could have left the firearm at the plaintiff's premises cannot be regarded as an essential relevant to the offence. Further to the above it cannot be probable that a firearm and ammunition that was found under the mattress can be said to have been left at the premises by somebody else, let alone, an intruder. The fact that the firearm was found under a mattress in the children's bedroom is an indication that either the plaintiff or her husband knew about it and or how it came about to be at the premises. The police officer testified that he did not find any proof that there was a housebreaking at the plaintiff's shack. He stated that he did not believe the allegations and based on what he found, he did not find it necessary to investigate the allegation about the housebreaking. For these reasons I am of the view that the arresting officer cannot be faulted for not investigating the allegation. An issue was also raised as to why did he not apply for the search warrant before he went to the plaintiff's shack to conduct the search. His explanation was that he received the information during midnight. He realised that it was going to take long for the warrant to be issued and that the articles to be searched were movables. They could be easily disposed off. I find the explanation acceptable under the circumstances. Counsel for the plaintiff referred to the case of *Le Roux v Minister of Safety and Security 2006 (2) SACR 178 (T) 186* and argued that the police should have just seized the recovered articles and summoned the plaintiff and her husband to appear in court.

[58] In the *Le Roux* matter referred to *supra* a white police officer arrested and detained a suspect solely to demonstrate to black members of the police services that she did not have racial prejudice in favour of the suspect. In these circumstances the court found that the suspect's detention was unlawful and did not constitute a reasonable interference with his liberty and fundamental dignity because there had not been a sufficiently reasonable rationale for his detention. This case is clearly distinguishable from the matter before me. The arresting officer could not have left the premises without arresting the plaintiff and her husband after what he found. The submission by the plaintiff's counsel does not therefore have any basis.

[59] I am therefore satisfied that the suspicion that the police officer had when he arrested the plaintiff was based on reasonable grounds for the reasons advance *supra*. Borrowing from the words of the court in the *Mabona* matter, I find that the arresting officer analysed and assessed the quality of the information he had at his disposal critically, did not accept it lightly, or without checking it where it can be checked and that after this examination he allowed himself to entertain a suspicion that justified the arrest.

[60] As regards the alleged unlawfulness of the plaintiff's detention, I am of the view that because I had found that the arrest of the plaintiff was justified, it therefore follows that her detention was also justified.

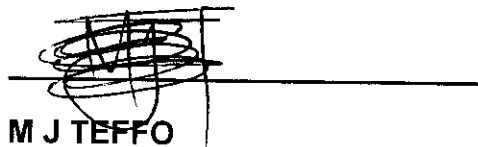
[61] The plaintiff further alleges that she was assaulted by one police officer who she could not identify because the police officers who stormed into their bedroom eliminated them with torches. She testified that charges of assault were not opened or reported to the police. Furthermore she did not have visible injuries as she was slapped on her face and bums. There is surely no evidence to support the plaintiff's allegations. If she was indeed assaulted as she alleges she could have alerted the senior police officer who visits the cells about the assault even though she did not sustain visible injuries. She could have also mentioned this fact to either her

representative at court, police officers who took her to court and the magistrate. She has also failed to report the matter to the police. She has the onus to prove the allegations of assault. The allegations are disputed. I find that she has failed to discharge her onus on a balance of probabilities.

[62] The plaintiff also alleged that she was maliciously prosecuted. Without repeating the evidence I am satisfied that members of the defendant, in particular, Sgt. Mogale and W/O Shibambo, set the law in motion by having the plaintiff arrested and charged. I find that given the charges and the evidence discussed *supra*, the two police officers had reasonable and probable cause to do what they did, given the information at their disposal at the time. It can therefore not be said that their actions were malicious when they facilitated the prosecution of the plaintiff. The plaintiff has therefore failed to prove on a balance of probabilities that she was maliciously prosecuted.

[63] In the result I make the following order:

63.1 The plaintiff's actions against the defendant are dismissed with costs.



M J TEFFO

JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION, PRETORIA

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DATE OF HEARING: 23 MAY 2013

DATE OF JUDGMENT: 23 MAY 2014