

52IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 140/2005

In the matter between:

MOHAN GOPAUL

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

LESLIE GOVENDER

SECOND DEFENDANT

JUDGMENT

NDLOVU J

Introduction

[1] The plaintiff, Mr Mohan Gopaul, sued the defendants, jointly and severally, the one paying the other to be absolved, for damages in the sum of R400 000 plus interest and costs, arising from the alleged wrongful and malicious arrest and detention of the plaintiff at the hands of the second defendant, Warrant Officer Leslie Govender, and other members of the South African Police Service (SAPS); and who at all material times hereto allegedly acted in the course and scope of their employment with the first defendant. The defendants denied liability.

[2] At the commencement of this trial the parties agreed to seek an order separating the issues, in that the trial should proceed on the issue of liability and the issue of quantum be stayed for determination at a later stage. The court granted the order accordingly, in terms of rule 33(4) of the uniform rules of the court.

[3] Shortly before this judgment was handed down, the court ordered, by agreement between the parties, that the original designation of the first defendant (i.e. Minister of Safety and Security) be substituted with the designation of “Minister of Police”, in light of the subsequent name change in the ministerial portfolio concerned. (Rule 15(2)).

The evidence

[4] The evidence for the plaintiff was led from the plaintiff and his wife, Mrs Radhika Gopaul; whilst that of the defendants was adduced from the second defendant and certain members of SAPS, being Sergeant Jayandren Thaver, Captain Logan Naidoo, W/O Njabulo Felix Nxumalo, Captain Sipho Eric Ngwenya and Sergeant Ramachandran Moonsamy.

[5] The plaintiff, aged 49 years, told the court that he resided at 10 Aloe Road, Amanzimtoti, a residential suburb south of Durban. He was a Unisa MA graduate, a former school teacher, author and publisher of school books. He said after his resignation from the teaching profession he occasionally assisted his wife in her business of tarmac driveway construction. The business was incorporated and registered in his wife’s name under the name Ace Driveways CC (the close corporation) and had been in operation since 1981.

[6] In assisting his wife he acted as a consultant – that is, a go-between the prospective client and his wife. He would consult with the prospective clients, discuss the proposed transaction and, after agreeing with his wife on the proposal, the transaction would then be concluded with the client. He also rendered physical assistance to the business by visiting the construction sites where he would supervise the workers.

[7] The plaintiff testified that he knew the second defendant since on or about 4 September 2003. He received a phone call whilst at his office in Amanzimtoti from the second defendant who was requesting a quotation for tarring his driveway at his home at 14 Tensing Way, Everest Heights in Verulam. The plaintiff had then

proceeded to the second defendant's home for the quotation which amounted to R6 520. The second defendant formally accepted the quotation and signed it. The plaintiff's wife signed on behalf of the business. The business was in fact a close corporation and his wife was the sole member thereof.

[8] Indeed, on the following day (5 September 2003) the plaintiff and his wife proceeded to the second defendant's home for site inspection. He told the court that the tarmac driveway construction involved quite a number of stages, namely, grass removal, excavation and preparation of the ground, applying crushed stones, putting kerbs on either side and finally laying the tar. The actual work was to be started on Monday 8 September 2003. The close corporation had five employees who would perform the actual driveway construction.

[9] As a formal requirement, the second defendant had deposited with the plaintiff the sum of R520 cash on 4 September 2003 on condition that the balance would be paid on completion of the work.

[10] When the plaintiff arrived at the second defendant's place on Monday, 8 September 2003, the second defendant asked for a further quotation to tar the additional area adjoining the driveway. The plaintiff issued an additional quotation of R2 019, which the second defendant accepted and signed the quotation document. The total price for the complete job was therefore R8 610. The plaintiff indicated that he did not ask for a deposit in respect of the second quotation. He also explained that the second quotation was not done on a separate document but was incorporated at the bottom of the first quotation which was then duly signed by both the second defendant and the plaintiff's wife (see exhibit C at p. 31).

[11] According to the plaintiff the construction work was commenced and progressed for six days, by which time about 80% of the work had been completed. That was on Friday (12 September 2003). The final tarring was due to begin on the following Monday, the 15th. The plaintiff confirmed that during the six day period when the work was in progress, the second defendant had made separate payments which had totalled up to R5 000. Therefore, the balance was R3 610.

[12] Over the weekend preceding Monday the 15th there was some heavy rainfall which made the soil condition unfavourable for the tarring to be proceeded with immediately. On that Monday the plaintiff phoned the second defendant and informed him that due to the wet weather over the week-end the construction team would not be coming as it would not be suitable to lay the tar under those conditions. He said the second defendant was not impressed by what he heard. The second defendant was agitated and he insisted that the construction team must come and complete the job.

[13] According to the plaintiff, although the rain had slowed down on Monday it was still unsuitable for the tarring. He said he tried to explain to the second defendant that the tar was normally applied at a temperature of 170° centigrade and that this temperature would not hold if applied in the weather conditions that prevailed at the time. He explained to the second defendant that the soil condition was not favourable especially because it was clay soil. He pointed out that clay soil retained a lot of water and as a result it required much longer drainage time before the tar could be applied. It would require up to three days before the soil condition was suitable for tarring. He further stated that the fact that the sun had come out did not necessarily mean that the soil underneath was also dry. However, despite this explanation, the second defendant seemed not interested and not prepared to understand, as they were speaking over the phone. He said the second defendant had then hung up the phone.

[14] On the same day (Monday the 15th) the plaintiff and his workers proceeded to another site in Yellowwood Park where they were to do excavations on the client's premises. He sought to distinguish that instance from the second defendant's position in that to do an excavation, the weather condition was not a problem. In other words, excavation could be done even in wet weather, something which was impossible to do in respect of tarring. He said whilst they were at the Yellowwood Park site, he received a phone call from the second defendant who reported to him that he (the second defendant) had personally physically felt the driveway with his feet and was satisfied that it was hard and dry. On this basis, the second defendant insisted that the plaintiff and his team must come over to lay the tar. The plaintiff

said he told the second defendant that he (the second defendant) was not an expert in conducting such procedures whereas the plaintiff knew what he was talking about. The time then was about 10h00.

[15] The plaintiff pointed out that when he discussed with the second defendant over the phone, he had noted that the second defendant had become very aggressive. At that time the second defendant had made several threats to him over the phone. The second defendant had demanded to know where the plaintiff was so that he would come and show the plaintiff what he could do to him. He said he urged the second defendant not to be angry because that was how this kind of work was done. The second defendant kept on phoning him, as he put it, almost every ten minutes throughout the day, continuing to make threats. At that stage the second defendant disclosed to the plaintiff that he was a policeman and that he could arrest the plaintiff and then show him what he could do to him. The plaintiff said at that stage he was already aware that the second defendant was a police officer. He had seen him in police uniform whilst the plaintiff and his team were working on the second defendant's property. He had also seen the second defendant driving a marked police vehicle, an open bakkie.

[16] The plaintiff further testified that the second defendant was not living on the property at the time. The second defendant had told him that he was living with his parents nearby and that he had just bought the property. He wanted to fix the driveway before he moved into the property to start living there. On Thursday (18 September 2003) the plaintiff proceeded to the second defendant's property only to find that the tar had already been laid by someone else. However, he found nobody on site.

[17] As stated earlier, the balance owing by the second defendant was R3 610. According to the plaintiff, the second defendant had agreed that he would himself pay R3 000 for the tar which he would acquire from a local supplier in Verulam. In other words, in terms of the agreement, the balance was only R610 which was due and payable by the second defendant to the business on completion of the work. The plaintiff further stated that the tar would be purchased by the second defendant on 18 September after the plaintiff's arrival on site. The plaintiff had also verified and

confirmed with the local supplier that the required tar would cost R3000. The agreement that the second defendant would pay for the tar was oral.

[18] On the following day (19 September 2003) the plaintiff prepared a letter to the second defendant, which was signed by the plaintiff's wife, and the letter was part of the plaintiff's bundle (Exhibit "A", at page 22). It reads as follows:

"Our contract dated 4 September 2003 refers.

We wish to inform you that due to the recent rain we were unable to carry out our work at your premises. However, we have so far levelled your driveway, applied weed poison, applied the crusher base cores and inserted the kerbs. For this, we have been paid R5000,00 as work in progress. At a contract price of R8610, 00 a balance of R3610,00 is set aside for the final surfacing with hot premix. This amount shall be paid to the tar supplier by yourself, on our arrival to your premises to complete the task.

On arrival we were surprised to find that you had completed the surfacing of your driveway by another contractor without informing us. As a result hereof, you have breached our contract and we therefore reserve our rights to proceed with a civil claim against you. We also advise you that you have forfeited all guarantees offered to you thereof.

Yours sincerely,

R Gopaul for Ace Driveways CC.

Mrs Radhika Gopaul (Sole member)"

[19] The plaintiff testified that, despite he and his wife having reserved their rights to sue the second defendant, they had decided not to pursue the matter for a while, until the events of February 2004 discussed hereunder.

[20] On 10 February 2004 at about 10h00 whilst the plaintiff and his wife were returning from a visit in Phoenix and proceeding to their home in Amanzimtoti travelling on the N2 freeway in his 1 ton Nissan bakkie, he was suddenly flagged down to stop by two police officers who were standing at the side door of a big police truck (Inyala) which was on the right hand side parallel to the plaintiff's vehicle.

Thereupon the plaintiff pulled up next to the road and the Inyala stopped about 5 metres in front of his vehicle. Two police officers came up to him and one of them ordered him to get out of the vehicle and leave his keys behind with his wife and take only his cell phone with him. He asked the police officers why he had to do that, but they insisted that he must follow them. He then got out and went to the Inyala.

[21] When he got to the Inyala, one police officer pushed him on his back into the truck whilst at the same time hitting him at the back of his head with an open hand once. Once he got into the truck he noticed that behind the steering wheel was the second defendant. At that stage he realised that all that was happening to him had to do with his driveway construction dispute with the second defendant. One police officer whose chest badge reflected his name to be Constable Thaver held the plaintiff's hands behind his back whilst the second defendant came up to him. The second defendant demanded him to pay up forthwith the sum of R3000 which he alleged the plaintiff had stolen from him. The plaintiff assumed that the second defendant was referring to the R5000 that he had paid for the construction work, but it was not immediately clear to him why the second defendant was demanding R3 000 only.

[22] The second defendant told the plaintiff that a warrant of arrest against him had been issued by a certain Inspector Ngwenya and that if the plaintiff did not pay up there and then, the second defendant would arrest him and have him detained at Verulam police cells. There were about six police officers in the Inyala, including the second defendant. Fearing that he would be arrested and detained, the plaintiff agreed to pay the amount demanded and asked the second defendant to phone his home at 16h00 that same afternoon. He said he only made this promise to pay in order to escape the threatened arrest. From there he drove to the SAPS's area commissioner's offices in Prospecton in Amanzimtoti to report the incident. There he was advised to report the matter to Amanzimtoti police station.

[23] During the afternoon of the same day (10 February 2004) the plaintiff received a call (on his home land line phone) from the second defendant. His wife had answered the phone and thereafter handed the phone to the plaintiff telling him that it was the second defendant on the line. The second defendant told the plaintiff that

he was on his way to the plaintiff's house to collect the money that the plaintiff had promised him. The plaintiff told him that he should not come because he did not owe him any money. According to the plaintiff, at that stage the second defendant started shouting and threatening that he was going to come. However, he did not come on that day.

[24] On the following day (11 February 2004) at about 11h00 the plaintiff and his wife were seated and relaxing at home when the plaintiff heard someone shouting his name "Ashley" outside. He said Ashley was the name that he was commonly known by. When he went out he noticed that there were three police officers standing in front of his gate. He identified one of them as Constable Thaver and the other two he learnt later to have been Sergeants Moonsamy and Nxumalo. Constable Thaver said they had come to collect the money (i.e. R3000) on behalf of the second defendant. The plaintiff refused to pay the money. Thereupon Constable Thaver told him that he was under arrest for stealing the second defendant's money.

[25] At that time the plaintiff said he was only wearing a pair of shorts, slippers and a vest. He then told the police officers to allow him to get into the house to change and also for his wife to get the gate key so that the officers would come in. However, before that could happen, Constable Thaver jumped over the driveway gate and advanced straight to the plaintiff. He handcuffed the plaintiff and then hit him on the head and on his back several times. When the plaintiff's wife tried to intervene, Constable Thaver slapped her with his right hand across her face and pushed her against the door gate which was opened. At that stage Sergeant Nxumalo came up to intervene and pushed Constable Thaver aside, telling him to stop.

[26] The plaintiff was still handcuffed. He was then placed at the back of the open bakkie. The handcuffs were released from his one wrist and tied to one of the iron or metal bars fixed vertically behind the bakkie's rear window. The plaintiff's neighbours had come out of their houses and were watching the scene of the plaintiff's arrest. The bakkie was a marked police vehicle with police number plates.

[27] The plaintiff said that they took him to Amanzimtoti police station where he saw all the police officers who had been in the Inyala on the previous day. He said he was not taken into the charge office but the vehicle was simply driven inside the station premises and straight to the back. Other police officers surrounded the vehicle, including the second defendant. At this stage they began interrogating him again about the money, saying that if he did not pay they would take him to the Verulam police station and lock him up. They told him to ask his wife to go to the bank and get money. He told the second defendant that he had money in the bank but he was not prepared to give it to him as he did not owe him any money. He said that the second defendant said he thought he was clever.

[28] He was then taken to the Inyala which was standing in the parking lot in front of the police station. As he was being escorted to the truck, the one handcuff was tied around his wrist whilst the other one was being held by one policeman. He said he told the policeman that this was a civil matter but the policeman brushed that aside. When he was placed in the Inyala the other loose handcuff was attached or tied to the seat inside the truck. He further testified that the policemen at Amanzimtoti police station generally knew him very well and that he felt humiliated by what was happening to him.

[29] They then left Amanzimtoti police station and proceeded northwards. He said he was verbally abused during the journey by all the policemen in the Inyala but mostly by Constable Thaver. He further said he was very agitated by this abuse but Sergeant Nxumalo who was sitting next to him advised him not to say anything to provoke them to do worse. He said the second defendant was not present at that stage as he had remained at Amanzimtoti police station. The police officers present were Constable Thaver, Sergeant Moonsamy, Captain Naidoo, Sergeant Nxumalo and another Indian male officer, whose name he did not know.

[30] He said that whilst on the N2 freeway just before KwaMashu turn-off Constable Thaver asked him for his home phone number which he gave him. Constable Thaver then phoned the plaintiff's wife and he heard Constable Thaver saying that the plaintiff was being taken to KwaMashu police station where "*his ass would be screwed*" which the plaintiff understood to mean he would be raped.

Constable Thaver then told plaintiff's wife that they (i.e. Constable Thaver and his colleagues) would then rape her whilst the plaintiff was in detention. According to the plaintiff he heard all this when Constable Thaver spoke to his (the plaintiff's) wife on the phone.

[31] Eventually they arrived at Verulam police station. The Inyala was parked in the parking lot and the plaintiff remained there with Captain Naidoo and Constable Thaver whilst the others went inside the police station. The plaintiff said that Captain Naidoo and Constable Thaver repeatedly slapped him on either side of his face. By then it was 12h15. They had taken him from his house at about 11h20. This was all happening on 11 February 2004.

[32] The plaintiff said that whilst he was being slapped by Captain Naidoo and Constable Thaver they kept alternately saying: "*This is for Leslie*" and "*This is for stealing R3 000*". Leslie is the second defendant. Then Sergeant Nxumalo appeared and took him away into the charge office. His handcuffs had been detached from the seat of the Inyala. The plaintiff said he waited for a while in the charge office. He enquired from the charge office staff as to what would happen and they said Inspector Ngwenya would attend to him.

[33] At 12h30 Inspector Ngwenya arrived and said to him "*My boys have got you. Wait, I'll come later on*". However, he did not return. The charge office staff then formally charged him with theft. His rights in terms of the Constitution were explained to him. A document was given to him and he was told to read it and then asked if he understood it, which he said he did. This document explained his Constitutional rights and was handed in and marked as exhibit "B".

[34] The plaintiff said that whilst waiting in the charge office Captain Naidoo came in and told him that he was going to rape his wife. He said he was worried because his wife was alone at home. Captain Naidoo had then left. The plaintiff said he took Captain Naidoo's threats seriously. He asked for a phone and one of the charge office staff gave him one to use. He phoned his wife and told her that he was at the Verulam police station. Thaver had earlier phoned her and misled her that the plaintiff would be taken to the KwaMashu police station. The plaintiff also alerted his

wife about Captain Naidoo's threats. He further asked her to try and get him an attorney or someone to assist him. This was at about 13h30 or 13h45 (on 1 February 2004). He was then detained in the police cells at about 14h30.

[35] The plaintiff said in the afternoon his wife visited him in the police cells and told him that she tried to contact Superintendent Govender of Verulam police station to secure his release, but he was not present. She had asked for a senior officer and was told that Superintendent Govender was senior, although she did not know him.

[36] The plaintiff further said he spent the night of 11 February 2004 in Verulam police cells with two male inmates. The conditions in there were deplorable and unhygienic, he described. He had to sleep on the floor on a dirty carpet, the toilet stank. The food was served at about 18h00, but he did not eat it. He had last eaten before his arrest at about 10h30. He did not have lunch and dinner that day.

[37] He said that during the night he was detained he had to watch naked inmates showering near his cell with only a grill or gate separating them. He did not shower that night. He had no pillow. There were no blankets or mattresses. He slept in his clothes. He said the other inmates also complained. His wife had brought him clean clothes which, however, he decided to wear on the following day. He said he could not sleep that night. On the following morning (12 September 2004) breakfast was served and he had a cup of tea with sugar and two slices of bread.

[38] At 11h30 he was called to the charge office and then taken to Superintendent Reuben Govender's office. His wife was then present. Superintendent Govender asked him what had happened and he told him everything. Superintendent Govender confirmed that this was indeed a civil matter which should have gone to the civil court and further that the plaintiff should not have been arrested in the first place. Superintendent Govender then called for Inspector Raju and instructed him to release the plaintiff. Inspector Raju took the plaintiff to a Captain Govindin to sign documents for his release. Captain Govindin initially refused, saying that his son-in-law (the second defendant) wanted the plaintiff to stay in the cells until he had paid the money. Plaintiff's wife had brought the contract documents with her which the

plaintiff showed to Captain Govindin who also realised that the second defendant was wrong to have the plaintiff arrested. Captain Govindin had then held up his hands in disbelief and said "*Oh God, what has my son-in-law done?*". Captain Govindin then signed the plaintiff's release documentation and the plaintiff was eventually released at about 13h00 on 12 February 2004.

[39] The plaintiff further testified that three weeks after his release he was called by Inspector Suraj of Berea police station and asked to come to that station to discuss the case of assault which the plaintiff had opened against the police officers. The plaintiff said he had reported the case at the Amanzimtoti police station and it was transferred to Berea police station. On the following day the plaintiff and his wife went to Berea police station and he was surprised to see all the officers who had assaulted and abused him, including the second defendant, being present there. He was then asked by Inspector Suraj to relate what had taken place and who had assaulted him. Inspector Suraj informed him that the purpose of the meeting was to try and mediate the dispute.

[40] The plaintiff said that there was then a heated argument. The second defendant stood up and with a fist gesture threatened to hit the plaintiff in Inspector Suraj's presence. Inspector Suraj then asked all the officers to leave the office. There were six of them namely: the second defendant, Captain Naidoo, Sergeants Moonsamy and Nxumalo, Constable Thaver and an unknown Indian officer. Inspector Suraj told the plaintiff that it seemed to him a waste of time for the plaintiff to pursue the matter because the collection of evidence would be a problem since the officers concerned were not co-operating with him. Inspector Suraj then enquired from the plaintiff if he wanted, as he put it, "*to cancel the charge*". Considering his position the plaintiff decided to withdraw the charge and he signed the withdrawal statement accordingly. He pointed out that he thought Inspector Suraj was only trying to protect his colleagues. He and his wife then left Berea police station and nothing further happened thereafter.

[41] After a long time the plaintiff received a call from Inspector Ngwenya who informed him that the State prosecutor had declined to prosecute him on the charge laid against him by the second defendant, which then closed the matter. The plaintiff

submitted that his arrest and detention were wrongful and malicious and should never have happened. He considered that the second defendant applied illegal tactics to try to get money out of him. The plaintiff said that he suffered severe damages as a result of this incident. He said that there was no justification in what the police did to him. He further submitted that all the policemen concerned were acting in the course and scope of their employment with the defendant and, on that basis, the first defendant was jointly liable for damages that he suffered. He met his attorney and counsel for consultation and it was counsel who had decided to cite the second defendant as such.

[42] Under cross-examination, the plaintiff confirmed that he was no longer employed by the Department of Education as a teacher. He helped his wife with the construction of driveways. They both did quotations and concluded transactions on behalf of the business. He supervised the workers. His wife purchased the material. He further confirmed that on 4 September 2003 (the first day he spoke to the second defendant) his wife answered the phone and gave him the call as the second defendant was in a hurry. He arranged to go and see the second defendant and he gave him a quotation verbally. All the money was paid to his wife, including the R520 deposit. However, he acknowledged that from a practical point of view he was in charge of the business.

[43] The plaintiff said the second defendant did not say why his quotation was urgent. It was put to the plaintiff that the second defendant wanted the driveway to be tarred urgently because his wife had given birth to their second child and he needed to move into his new house because where they were staying was crowded. The plaintiff said he did not know anything about that.

[44] The plaintiff reiterated that the construction work which was already done on the second defendant's property was about 80% of what he had been contracted by the second defendant to do. What remained was only the actual tarring which would have taken about half a day to complete.

[45] The plaintiff was asked if he knew a Mr Richards of a driveway construction company or firm known as Tri-Star, to which the plaintiff said he knew Mr Richards

only by association because they were both involved in the same industry. He denied that Mr Richards had phoned him to advise that he (Mr Richards) had completed the job at the second defendant's property. He denied that he told the police so. When it was put to him that this averment appeared in his statement that he made to the police, he alleged that he had not read the statement but only signed it. According to him, there would have been no reason for Mr Richards to phone him since he had no dealings with him. He denied that he told Mr Richards that he had made a profit of R3 000 out of the second defendant's work. He vehemently denied that Mr Richards phoned him on 17 September 2003 to notify him that he (Mr Richards) would be going to complete the job at the second defendant's place. He further said that when he came to the second defendant's property on 18 September the second defendant was not present and it was on that day that he noticed that the tarring of the driveway had been completed by someone else. He denied that on that day Mr Richards was present at the premises, busy completing the job.

[46] The plaintiff further stated that he was traumatised by the manner that the police physically manhandled him on 10 February 2004, which amounted to assault. However, he did not receive any medical attention as a result thereof. After his arrest on 11 February 2004 he had reported about the assault on him by the police. He reiterated that he was again assaulted by the police on 11 February when they arrested him. He denied that on 10 February 2004 at about 16h00 Captain Naidoo phoned and advised him that he was under arrest and that he must come to Verulam police station.

[47] The plaintiff's wife, Mrs Radhika Gopaul, testified and confirmed that on 4 September 2003 she received a call from the second defendant who requested a quotation for the driveway construction to be done on his property in Verulam. She and the plaintiff had gone out for site inspection and the second defendant was furnished with the quotation for R6 520 which the second defendant accepted. The second defendant then paid a deposit of R520. She said the contract was signed by the second defendant on his behalf and by herself on behalf of her business, Ace Driveways CC, which was to undertake the project. She confirmed that she was the sole member of this close corporation and that her husband (the plaintiff) was assisting her in the business.

[48] Mrs Gopaul confirmed that they had then undertaken the work at the second defendant's place for some six days until Friday 12 September. They were to complete the job on the following Monday, the 15th. However, over the weekend before the 15th the rain fell heavily to the extent that they were unable to go and proceed with the work at the second defendant's place. They had then decided to proceed to another site in Yellowwood Park where they were to do preliminary preparations. She said on the following day, the 16th, they continued with the preparatory work in Yellowwood Park and that at some stage in the afternoon the second defendant phoned her on her cell phone demanding that they should come to his place to finish the work. She had then explained to the second defendant that since there had been rainfall over the weekend and that the ground on the second defendant's property consisted of clay soil, it was not suitable to lay the tar then. She said the second defendant simply hung up. Shortly thereafter the second defendant phoned again and he was then clearly angry and abusive. He was swearing at her calling her, amongst others, a "*fuckin' bitch*". The plaintiff was present and he took over her phone and also spoke to the second defendant.

[49] Mrs Gopaul further told the court that she and the plaintiff had figured out that by Thursday the 18th the soil at the second defendant's place would have sufficiently dried up and that it would be the day when they would go and finish the work. They had arranged with the second defendant that he would purchase the tar from a local supplier which was close to his place for the sum of R3 000 which the second defendant would pay and that money deducted from the balance he owed them. However, when they arrived at the second defendant's place, they found that he was not present and that the tarring of the driveway had been completed.

[50] Mrs Gopaul further testified about the incident of the 10th February 2004 when she and the plaintiff were travelling in their bakkie and were stopped by the police on the N2 freeway. She confirmed that the police were travelling in the Inyala truck and the second defendant was the driver. The police ordered the plaintiff to accompany them to the truck. She saw the police pushing the plaintiff into the truck and hitting him on the head. She then decided to go there and enquire what was happening. One of the policemen was Constable Thaver. She asked Constable Thaver and

other police officers as to what was going on. Constable Thaver shouted at her to get back to the bakkie.

[51] She said she then saw the second defendant sitting behind the steering wheel. She realised that this had something to do with the construction of his driveway. The second defendant demanded his R3 000 from the plaintiff. She told the second defendant that the money he had paid so far was used in the construction of his driveway. She then identified another policeman by his badge, as Sergeant Moonsamy. The second defendant had then told Sergeant Moonsamy to arrest the plaintiff and take him to Verulam police station which the second defendant said was in fact on Inspector Ngwenya's instructions. The plaintiff, apparently realising his imminent arrest, told the second defendant that he would pay the money and that the second defendant should fetch it from their house at Amanzimtoti and gave him their address.

[52] Mrs Gopaul said that from there they went to the area commissioner's office in Durban South in Prospecton to lay a complaint against the second defendant and the other policemen. At 13h30 on 10 February 2004 they opened a charge at Amanzimtoti police station with the case number CAS395/03/2004 and the docket was subsequently transferred to Ridge Road police station.

[53] Mrs Gopaul further testified that on the same day (10 February 2004) at about 16h00 the second defendant phoned their home landline number. The second defendant said he was coming to collect the money promised to him by the plaintiff. However, he did not come.

[54] On 11 February 2004 at about 11h00 she and the plaintiff were sitting at home when they heard hooting in front of their gate and she said she saw Constable Thaver and Sergeant Moonsamy in an unmarked white bakkie at the gate. Sergeant Moonsamy said that he was there to collect the money owed to the second defendant. She and the plaintiff refused to pay. Sergeant Moonsamy told them that Inspector Ngwenya had instructed them to arrest the plaintiff. Then Constable Thaver and Sergeant Moonsamy jumped over the gate and caught the plaintiff by his vest and hit him with an open hand on his head and his back. The plaintiff was then

arrested and handcuffed. Mrs Gopaul tried to intervene but Constable Thaver slapped her on her face and pushed her against the house door burglar gate. She said it was only when a Black policeman intervened that Constable Thaver and Sergeant Moonsamy stopped assaulting them. The plaintiff was then put into the back of the open bakkie whilst still handcuffed. One hand was handcuffed to the metal bar behind the cab of the bakkie.

[55] Mrs Gopaul further testified that on 11 February 2004 the second defendant was not present. The three officers who were present were Constable Thaver, Sergeant Moonsamy and a black officer, his name was unknown to her. They drove away with the plaintiff and Mrs Gopaul said she was very worried about the plaintiff as she did not know where they were taking him to. Later on the same day at about 12h00 she received a call from Constable Thaver who told her that the plaintiff was being taken to KwaMashu police station where his “*ass would be screwed*” and that while he was detained there they (the police) would come and rape her. She said that Constable Thaver identified himself over the phone, otherwise she would not have recognised his voice.

[56] At about 13h00 on the same day (11 February 2004) the plaintiff telephoned her and told her that he was at Verulam police station and that Inspector Ngwenya was the investigating officer in the matter. The plaintiff said he was not “okay” and that she should come to Verulam police station and also get a lawyer immediately because he had been charged with theft. The plaintiff also warned her that Captain Naidoo had said he was going to rape her. She understood it to mean that if anyone came to the house she should not entertain them. She immediately phoned Inspector Ngwenya at about 13h30. She said he was very rude and did not assist her at all.

[57] She said that when she and her two daughters visited the plaintiff in the police cells at about 15h30 on 11 February 2004 the plaintiff looked very worried and traumatised. The plaintiff was being held in filthy conditions and she had brought him clean clothes to change into. However, the plaintiff told her that he was not going to change as the clean clothes would get dirty from the filthy and smelly conditions.

[58] Mrs Gopaul said that she spoke to police certain officers who advised her to speak to Superintendent Reuben Govender, who was in charge at Verulam police station. However, he was not present, and so she waited for him. Whilst waiting, she spoke to Inspector Ngwenya again. He was still of no assistance. He said she should pay R3 000 which was stolen by the plaintiff and he would then release the plaintiff. Superintendent Reuben Govender did not return and, as it was then late, she returned home at Amanzimtoti.

[59] She returned to Verulam police station the next day at 08h00. She met Superintendent Govender and explained to him the entire situation and produced all the paper work. Superintendent Govender immediately pointed out that this was a civil matter and not theft. He issued an instruction for the plaintiff to be brought out of the cells and a release document was completed. Inspector Rajah prepared the release document and took it to a Captain Govindin who, however, refused to sign it, stating that his son-in-law (referring to the second defendant) wanted the plaintiff to pay the money first and only then would the plaintiff be released.

[60] Mrs Gopaul said that she told Captain Govindin that there was no money stolen from the second defendant and explained how the dispute arose. Then Captain Govindin exclaimed: *"Oh God, what has my son-in-law done?"*. Superintendent Govender instructed Captain Govindin to sign the release document because this was a civil matter. This was done and the plaintiff was released.

[61] Under cross-examination, it was put to Mrs Gopaul that her employees started work on 8 September 2003 and worked for a total of five days during which time she was paid R5 000 by the second defendant. She said that they started work on 5 September and finished on 12 September. However, she confirmed that she was paid R5000 by the second defendant.

[62] Mrs Gopaul reiterated that the second defendant was to pay R3 000 direct to the supplier for the purchase of tar. She confirmed that R3 610 was owing by the second defendant as at 12 September 2003. However, once the second defendant had paid the R3 000 for the tar, the balance would have been R610. It was put to

her that she did not proceed with the work because only R610 was owed to her and it was not profitable for her to travel all the way for that amount. This she denied, saying that it would only have taken one day to do the remaining part of the job.

[63] Concerning the events of 11 February 2004 at her home, she said she did not know why the policemen jumped over the gate as she had told them she was going to fetch the key. She further confirmed that she received a phone call from Constable Thaver on 11 February 2004 at approximately 12h00. At that time the plaintiff had already been arrested and taken away.

[64] Mrs Gopaul further stated that she took copies of all the documents and receipts pertaining to the second defendant's transaction to the police on 12 February 2004 in order to prove that the money received from second defendant was used in fulfilment of the contract and it was not stolen.

[65] That concluded the case for the plaintiff.

[66] The first witness for the defence was Leslie Govender, the second defendant. He confirmed that he resided at 14 Tansing Way, Verulam. He was currently a warrant officer in the SAPS stationed at Phoenix. During 2003 and 2004 he was attached to the Area Crime Combat Unit based in Marianhill. He had been in the SAPS for 23 years.

[67] He knew the plaintiff as he had done work on the driveway at his residence. He contacted the plaintiff on 3 September 2003 as he had purchased a new property and was doing renovations. He saw an advert in the Daily News for driveway construction and he phoned and spoke to the plaintiff from Ace Driveways saying that he wanted his driveway tarred urgently as he needed to move into the property as his wife had just given birth to their second son. The plaintiff said that he would go to the second defendant's place the following day 4 September 2003, a Thursday. He said he did not speak to the plaintiff's wife.

[68] On 4 September 2003 the plaintiff arrived at his house and he informed the plaintiff that he wanted his driveway tarred. The plaintiff gave two verbal quotations,

one for the actual driveway at R6520 and the second for a little piece of yard on the side of the driveway for R2 090. He was happy with the amounts and agreed on the price and he gave the plaintiff R500 deposit. The total contract price was R8 610.

[69] The second defendant further stated that the plaintiff told him he would start the job on the following day (Friday the 5th September) and it would be completed in five days. However, the work was not started on 5 September 2003 as it was drizzling and would then start on Monday the 8th.

[70] The second defendant confirmed that work commenced on 8 September 2003 which was the removal of paving bricks on the driveway. On that day the second defendant paid R2 500 which the plaintiff had requested. On 9 September 2003 the material arrived, a truckload of stones which were put on the driveway and levelled out.

[71] On 10 September 2003 the plaintiff asked the second defendant for R2 000 because he needed to buy kerbs. The plaintiff said a single kerb cost R20 and he needed 100 kerbs. That would amount to R2 000. He said he would pay the plaintiff the following morning (11 September 2003) which he did. On 11 September 2003 after paying the plaintiff he was issued with a receipt for R2 000. As he had then paid a total sum of R2 000, it meant the balance owing was then R3 610. Most of the time when he dealt with the plaintiff on site, the plaintiff's wife was seated in their bakkie and the second defendant did not speak to her.

[72] In the afternoon of 11 September 2003 the plaintiff came to the property with kerb stones. He said he would lay them the following day, Friday 12 September 2003. The second defendant said that there were 50 kerb stones and not 100. On 12 September 2003 when the plaintiff returned, he informed his workers to lay kerbs which did not cover the entire area. The plaintiff then informed the second defendant that he would bring the balance of the kerb stones on the following Monday the 15th, when he would also do the tarring.

[73] On Monday, 15 September 2003, the plaintiff did not come to the site and he did not phone. The second defendant tried to phone the plaintiff but without

success. Eventually he managed to contact the plaintiff on his cellphone on Tuesday, 16 September 2003, at about 12h00. He asked the plaintiff why he had not come. The plaintiff told him that he was busy on another job. The plaintiff also said because it rained over the weekend and the ground was soft he could not come. The second defendant said that at no stage did he talk to the plaintiff's wife.

[74] He said he told the plaintiff that the ground was dry and they should come and continue with the job. The plaintiff then informed him that he was not happy doing the second defendant's job because the second defendant was always on site questioning him about the job and his family also regularly came to check on the work and the plaintiff did not like that. He said he had informed the plaintiff that he was getting help from his family with painting and cleaning the property and that, in any event, he had the right to check on the work as he was paying for it.

[75] The second defendant said that he checked the soil and phoned the plaintiff and told him that the ground was dry and suggested that on the following day Wednesday (17 September 2003) the plaintiff could come himself and check the ground. The plaintiff said he would come only on Thursday. The second defendant was not happy with that. He denied the allegation that he had made threats to the plaintiff. He was terribly angry but he kept his composure because he wanted his job completed. He said the outstanding work included the kerbs to be laid, weed poisoning, bonding liquid, tar laying and the clean-up of the site.

[76] He further testified that when the plaintiff previously informed him that he was busy on another job he had felt that the plaintiff did not have enough money to complete the work. He said the plaintiff had then informed him that he should take down his (the plaintiff's) bank account number and deposit the balance of R3 610 into the account, whereafter he would complete the job. The second defendant said that he told the plaintiff that he would not pay the money into the bank account without the work being completed. The plaintiff then suggested that he should get other quotes to see what his job cost. The second defendant said he was very angry and realised that he was going to swear at the plaintiff over the phone, so he hung up.

[77] The second defendant said he realised that he was being taken for a ride and would get no joy from the plaintiff. He said he then contacted a Mr Richards of Tri-Star construction firm through a mutual friend. He met Mr Richards on 18 September 2003. On that day Mr Richards informed him that no weed poisoning or bonding liquid had been put on the driveway. He then asked Mr Richards how much money would have been spent on the job thus far, to which Mr Richards replied not more than R2 000. Mr Richards said that he would need to get more kerb stones to complete the driveway and each kerb stone cost R4.50. The second defendant informed Mr Richards that the work was urgent because he could not move into the house with the driveway construction incomplete.

[78] Mr Richards informed him that it would cost R5 000 to complete the job. He said he would come the following morning and by after lunch it would be completed. The second defendant accepted this and he was told to pay R5 000. He told Mr Richards about the plaintiff. Mr Richards asked him for the plaintiff's contact number and Mr Richards phoned the plaintiff in his presence. Mr Richards asked the plaintiff why he had not completed the job and allowed the second defendant to listen to the conversation. The plaintiff told Mr Richards that he was busy on another job and that he suspected that the second defendant did not have the money to pay for the job.

[79] The second defendant then arranged with Mr Richards to come the following day to complete the job. Indeed on Friday (19 September) Mr Richards and his staff came and completed the job. At approximately 14h00 he was using his driveway.

[80] During the conversation between Mr Richards and the plaintiff, the plaintiff told Mr Richards that he had made over R3 000 profit from the second defendant, and that Mr Richards should not waste his time completing the job as he would not make any money from it.

[81] On Friday (19 September 2003) the second defendant proceeded to Verulam police station and laid a criminal complaint against the plaintiff of theft by false pretences under reference CAS243/9/03.

[82] The second defendant further testified that the investigating officer Inspector Ngwenya told him that he had contacted the plaintiff telephonically and that the plaintiff had become abusive to him on the phone and did not want to go and see Inspector Ngwenya at the Verulam police station when Inspector Ngwenya had requested him to do so. Inspector Ngwenya further told him that as he (the second defendant) was the only person who could recognise the plaintiff, he should then arrest him wherever he saw the plaintiff, because the plaintiff did not wish to co-operate with Inspector Ngwenya. The second defendant said he did not see anything wrong or undesirable in acceding to Inspector Ngwenya's request.

[83] The second defendant said that, subsequently, on 10 February 2004 whilst on duty driving Inyala truck, travelling on the N2 southbound freeway he saw the plaintiff travelling in his white bakkie. As he got closer he hooted for the plaintiff to pull over to the side of the road. The plaintiff pulled off the road and the second defendant pulled off behind the bakkie. The plaintiff came out to the left hand side of the Inyala as the back sliding door was opened. The second defendant said he jumped out and approached the plaintiff and asked him if he was aware that there was a case of theft by false pretences opened against him and that Inspector Ngwenya was looking for him and further that his arrest was imminent. The plaintiff replied in the negative. The second defendant told the plaintiff that Inspector Ngwenya said he (the second defendant) should arrest him on sight. The plaintiff requested him to withdraw the charge and that he would pay back the money he owed to the second defendant. The second defendant said the plaintiff owed him R3 000 following Mr Richards' quotation. He assumed that Mr Richards' calculation was correct. However, he had not confirmed the kerb stone price at the hardware shops.

[84] The second defendant said that on 10 February 2004 the plaintiff's wife was seated in the bakkie and she did not alight from the vehicle. He confirmed that there were six members in the Inyala, namely Captain Naidoo, Inspectors Joseph, Perumal, GS Naidoo and D Naidoo and Constable Thaver. They were all members of the Area Crime Combat Unit, formerly known as the Riot Unit. The new name was the Public Order Policing (POP) Unit. He said none of the members alighted from the Inyala, but only he did. The plaintiff sought to make arrangements to pay him his money back. The plaintiff asked him to come to the plaintiff's residence that

afternoon to get the money. The plaintiff furnished the second defendant with his physical address.

[85] He said that during same afternoon at about 16h00 he phoned the plaintiff on his landline phone, for the money. However, the plaintiff told him that he did not owe him any money and he should do whatever he wanted about it. He realised that the plaintiff had lied once again and he informed his Captain that he was going to the Verulam police station the next morning.

[86] The following morning (11 February 2004) he went to the Verulam police station and spoke to Inspector Ngwenya and told him that he had the plaintiff's address. It was then that Inspector Ngwenya asked him if he could assist with the arrest of the plaintiff, as Inspector Ngwenya's motor vehicle was in the garage for repairs. The second defendant said he did not know why Inspector Ngwenya could not get assistance from his colleagues at Verulam police station for the arrest of the plaintiff, instead of asking him (the second defendant) who was personally involved in the complaint. In any event, he informed Captain Naidoo about Inspector Ngwenya's request and Captain Naidoo spoke to Inspector Ngwenya. The second defendant confirmed that he was accompanied by Captain Naidoo, Inspectors GS Naidoo, Joseph, Perumal, Sergeants Moonsamy and Nxumalo and Constable Thaver when he went to Verulam police station.

[87] Captain Naidoo told Inspector Ngwenya that as he (the second defendant), was the complainant, he should not get involved so Inspector Ngwenya asked Captain Naidoo if he could assist with the arrest. Captain Naidoo agreed and they then proceeded to Amanzimtoti. At Amanzimtoti police station Captain Naidoo informed the commander that the reason for their presence at Amanzimtoti was the arrest of a suspect. Captain Naidoo then proceeded with two of the members, namely Sergeant Moonsamy and Sergeant Nxumalo to the plaintiff's address. Approximately 10 minutes later Captain Naidoo arrived with the plaintiff at the back of the open police bakkie. The plaintiff was handcuffed. The second defendant said that Captain Naidoo asked him if the plaintiff was the wanted suspect and he confirmed.

[88] The next time the second defendant saw the plaintiff was when they were subsequently called to Ridge Road police station in relation to an assault charge opened by the plaintiff against him and the other members. The detective who was handling the matter later told them that the plaintiff was withdrawing the assault charge against them. He stressed that he did not at any time assault the plaintiff and no members of his unit did so in his presence. The plaintiff knew that he was a policeman as he was most of the time in full police uniform and using a marked police vehicle.

[89] Under cross-examination he was asked what made him say that the plaintiff was taking him for a ride, he said it was because the plaintiff had said that on Monday (15 September 2003) he would come to the site but he did not come and did not phone to explain why. He further stated that the plaintiff lived in Amanzimtoti and would not have known what the weather was like in Verulam. He denied having threatened the plaintiff and having called his wife a "*fuckin' bitch*".

[90] He agreed that Mr Richards was the plaintiff's competitor. On this basis, he conceded that like all other competitors Mr Richards would put himself on a higher pedestal. He further reiterated that Mr Richards completed his driveway in less than a day. However, he disagreed with the suggestion that this confirmed the plaintiff's allegation that he had done 80% of the work. He said Mr Richards had come with a huge workforce and looked professional. He further alleged that the plaintiff had told him that kerb stones cost R20 each. He denied that the plaintiff had given him a globular figure, and not for costs of individual material.

[91] He said he firmly believed that there was a criminal offence committed, and further in his experience this matter was crime-related. He conceded that he had only scant knowledge of civil cases.

[92] It was put to the second defendant that he abused his position and influence in creating a criminal offence where none existed, which he denied. It was further put to him that had any member of the public gone to the SAPS with the same complaint they would have been shown the door. He disagreed with this proposition.

[93] He reiterated that initially he did not have the plaintiff's physical address and he could not remember whether the address appeared on the plaintiff's business advert. However he conceded that he did have the plaintiff's cell number. He further conceded that it would, in any event, have been easy to find the plaintiff's address from the plaintiff's landline number and that if he was investigating the case, he would have done so.

[94] The second defendant confirmed that on 11 February 2004 the police bakkie which belonged to the POP Unit from Marianhill was used to arrest the plaintiff. He said that was done under their commander Captain Naidoo's orders. He also used to drive that vehicle himself. He said that the bakkie was used because that is what they had at the time. He disagreed with the suggestion that this method of arrest was intended to inflict maximum humiliation on the plaintiff. He disputed that it was done through malice.

[95] He confirmed that Sergeant Moonsamy was not present on the N2 freeway on 10 February 2004 and further stated that Thaver was not present when the plaintiff was arrested at his home in Amanzimtoti on 11 February 2004.

[96] The next witness for the defendants was Sergeant Jayandren Thaver (since promoted from Constable). He said he saw the plaintiff for the first time on 10 February 2004 when he was travelling in the Inyala truck together with the second defendant, Inspectors GS Naidoo, D Naidoo and Joseph. The second defendant was driving the Inyala truck and they were travelling on the N2 southbound freeway just passing the Reservoir Hills off-ramp when the second defendant hooted and activated the siren trying to pull off a white bakkie (driven by the plaintiff) on their left hand side. The Inyala's door was open. Other members signalled to the plaintiff to pull over. He said he also signalled to the bakkie to stop. The second defendant had said that was the man his case was opened against. Thaver said he knew that the case was about theft by false pretences and, as the second defendant's colleagues, they all knew that the second defendant had a problem with the construction of his driveway.

[97] Sergeant Thaver said that the bakkie stopped about 5 metres in front of them. The plaintiff alighted from the bakkie and came towards them, and the second defendant jumped out and went to the plaintiff. He and his colleagues did not say anything to the plaintiff. It was the second defendant who approached the plaintiff. Thaver said he was seated in the Inyala just a metre from where the plaintiff and the second defendant were talking outside the door. The second defendant asked the plaintiff if he was aware of the case of theft by false pretences, and that the investigating officer was trying to contact him. The plaintiff suggested that there was no need for the case because he was prepared to pay the money that he owed to the second defendant. The plaintiff asked the second defendant to phone him that afternoon to make arrangements for payment of the money. The plaintiff gave his name and address and home telephone number to the second defendant. He said there was someone seated in the white bakkie, the plaintiff's passenger, but he did not know who it was. That passenger did not get out of the vehicle.

[98] Sergeant Thaver denied having gone to the plaintiff's bakkie to tell the plaintiff to get out of the vehicle and he did not demand him to bring his cell phone and leave the bakkie keys behind. He denied that the plaintiff was assaulted by anyone. He further stated that the plaintiff was not hit by any policeman. Once the plaintiff had promised to pay that afternoon, they parted with the plaintiff.

[99] Sergeant Thaver said that he was not present when the plaintiff was arrested. He said he remained at Amanzimtoti police station at 11h30 with the second defendant and Inspector GS Naidoo. It was Captain Naidoo who went to effect the arrest together with Sergeants Moonsamy and Nxumalo. He denied that he assaulted the plaintiff and his wife on their premises. He did see the plaintiff when he was brought to Amanzimtoti police station under arrest. The plaintiff had to be identified by the second defendant. Sergeant Thaver said he went to the Inyala and did not know where the second defendant was then. After about five minutes Captain Naidoo brought the plaintiff, who was not in handcuffs, to the Inyala.

[100] He said that at no stage did he verbally abuse the plaintiff or harass him. They proceeded from Amanzimtoti police station to Verulam police station. Present in the Inyala were Captain Naidoo, Inspector GS Naidoo, Sergeant Moonsamy,

Sergeant Nxumalo and himself. The second defendant did not travel along with them, but he used the police bakkie.

[101] He further stated that it was not true that they phoned the plaintiff's home and told his wife that they were going to screw the plaintiff's ass. At Verulam he remained in the vehicle whilst Captain Naidoo took the plaintiff to the commanding officer. He said that he did not see the plaintiff after 11 February 2004.

[102] It was put to Sergeant Thaver that the plaintiff's wife testified that she alighted from the bakkie and went to the Inyala and that is when she identified him by his name badge. He retorted by saying that the plaintiff could have told her of his name. It was put to him that she further recognised him on the following day at her house. This Sergeant Thaver denied, insisting that he never went to her house. He said he did not know why the plaintiff and his wife picked on him as he did not know them and had no problem with them. He said they could be fabricating their story to make their case stronger.

[103] It was put to Sergeant Thaver that one of the admitted facts in terms of the pre-trial minute which was signed by attorneys representing both parties was the following:

“It is agreed that the plaintiff was arrested by Constable J Thaver, Captain L Naidoo and Sergeant R Moonsamy.”

[104] Sergeant Thaver denied that he was present when the plaintiff was arrested. He said he did not know how that was agreed, because during their consultation it was made clear that Captain Naidoo, Sergeant Moonsamy and Sergeant Nxumalo had arrested the plaintiff. It was further put to Sergeant Thaver that both the plaintiff and his wife recognised him on 11 February 2004 from the previous day. He agreed that it was a somewhat strange coincidence that the plaintiff's allegation that he was present at the arrest of the plaintiff is corroborated by the “admitted facts” at the pre-trial conference. It was further suggested to him that he had played a more active role by assaulting both the plaintiff and his wife, and having handcuffed the plaintiff. Sergeant Thaver said that the plaintiff and his wife were mistaken.

[105] Sergeant Thaver said that he did not see whether the plaintiff was handcuffed whilst seated at the back of the bakkie. It was further put to him that the plaintiff was handcuffed to a metal bar behind the rear window and Sergeant Thaver would have seen that. He said en route from Amanzimtoti to Verulam they did not speak to the plaintiff as Captain Naidoo had instructed them not to do so.

[106] Sergeant Thaver also denied having assaulted the plaintiff at the open parking at Verulam police station, saying that they could not do such a thing. He also disputed having tightened the handcuffs twice on the journey in the Inyala to add to the plaintiff's discomfort. He said the plaintiff was not handcuffed whilst in the Inyala.

[107] In his testimony, Captain Logan Naidoo acknowledged that during 2003 and 2004 the second defendant was under his command. He said he only met the plaintiff on the date of his arrest. He had telephoned the plaintiff on the day before his arrest as he wanted to know where they could meet so that the plaintiff would hand over money he had promised to pay to the second defendant back for a job not completed. Captain Naidoo said that the plaintiff swore at him over the phone and he then informed the second defendant to hand the matter over to the investigating officer in the case.

[108] Captain Naidoo said that he was not present on the N2 freeway on 10 February 2004 when the plaintiff was stopped. However, he was one of the arresting officers who went to the plaintiff's house to effect the arrest. Prior to the arrest they went to Verulam police station and met Inspector Ngwenya to give him the plaintiff's address because the case had been opened against the plaintiff in Verulam. The investigating officer said he had no transport and asked if he (Captain Naidoo) could assist him in effecting the plaintiff's arrest. Captain Naidoo then proceeded to Amanzimtoti police station to make an occurrence book entry to the effect that they were in the area. They were travelling in an open bakkie. They proceeded to the plaintiff's home. It was himself, Sergeant Nxumalo and Sergeant Moonsamy.

[109] Captain Naidoo said that the arrest was urgent as the case had been opened in September 2003 and it was then already February 2004. The second defendant

had told Inspector Ngwenya that the plaintiff had used delaying tactics and had refused to come to the police station.

[110] Captain Naidoo said that the second defendant had been travelling with them all along but when they went to arrest the plaintiff, the second defendant had remained at Amanzimtoti police station because he was personally involved in the case. However, he understood in retrospect that they could have taken him there for identification purposes.

[111] He said the plaintiff and his wife came outside the house when the police hooted. Sergeant Moonsamy told the plaintiff that he was under arrest for theft by false pretences in respect of a case opened in Verulam. Without saying anything, the plaintiff walked back towards the house. Captain Naidoo could not remember what the plaintiff was wearing. When the plaintiff started walking back to the house, Sergeant Moonsamy jumped over the gate and grabbed the plaintiff on his front. There was a struggle between them as if the plaintiff was trying to escape. Captain Naidoo was still standing outside the gate which was still locked. He said he had full view of all the events.

[112] He further testified that Sergeant Nxumalo was standing next to him and he told Sergeant Nxumalo to assist Sergeant Moonsamy. Sergeant Nxumalo also jumped over the gate and in the process part of the gate broke. They overpowered the plaintiff and brought him to the bakkie. At that stage the plaintiff was not trying to get away. They placed him in the back of the bakkie with Sergeant Moonsamy. Captain Naidoo said that he was driving and Sergeant Nxumalo sitting next to him. He said that the plaintiff did not say anything and he was not handcuffed. Captain Naidoo further stated that no-one had assaulted the plaintiff. He further said that the plaintiff's wife was also not assaulted.

[113] Captain Naidoo further stated that the plaintiff was taken to Amanzimtoti police station because they could not transport him to Verulam in the open bakkie. They had the Inyala truck at Amanzimtoti police station and he parked the open bakkie at the back of the police station.

[114] At Amanzimtoti police station the second defendant confirmed the identity of the plaintiff. No other officers at Amanzimtoti police station had contact with the plaintiff. The plaintiff walked from the open bakkie to the Inyala and he was still not handcuffed. He denied that the plaintiff had been handcuffed to the metal bar at the back of the open bakkie.

[115] Captain Naidoo said that the second defendant used the open bakkie, and he took the plaintiff to Verulam in the Inyala, together with Sergeant Moonsamy, Sergeant Nxumalo and Sergeant Thaver. He said that Sergeant Thaver had remained at the Amanzimtoti police station with the second defendant when he, Sergeant Nxumalo and Sergeant Moonsamy went to arrest the plaintiff. He further stated that Inspector GS Naidoo drove the Inyala from Amanzimtoti to Verulam. Nothing happened to the plaintiff en route to Verulam.

[116] Captain Naidoo said that it was not true that whilst at Verulam he told the plaintiff that he would go to his house and rape his wife. He also denied that he and Sergeant Thaver slapped the plaintiff several times at Verulam.

[117] Under cross-examination, Captain Naidoo said that he did not verify whether there was a warrant of arrest against the plaintiff and did not see the need to find out about it, because it was a relatively minor offence. He reiterated that the investigating officer had asked them to assist with the arrest and there was no warrant of arrest. He agreed that it was obvious that if they had not gone to Verulam, Inspector Ngwenya would not have made the request. He said that there was no pressure put on Inspector Ngwenya to arrest the plaintiff. He said that Inspector Ngwenya did not have the plaintiff's residential address at the time. They had gone there to furnish Inspector Ngwenya with the address. He said that he knew about that because the second defendant had informed him.

[118] Captain Naidoo further agreed that it was not suitable to transport plaintiff from Amanzimtoti to Verulam in the open bakkie as it is a long distance. However, he saw no problem for a short distance from the plaintiff's home to Amanzimtoti police station. Captain Naidoo was asked why they did not use the Inyala. He said it is heavy armoured and could attract attention moving in a residential area. He agreed

that the police bakkie was marked and it would have attracted attention from the neighbours but the Inyala would have attracted more attention. It was put to him that his interest was to teach the plaintiff a lesson, which he disputed, saying it was only to arrest him. Captain Naidoo further stated that there was no other vehicle available. When asked why the arrest of the plaintiff was so urgent, he said they had arrested people and put them in the back of the bakkie, but he conceded that it was not under similar circumstances.

[119] It was put to Captain Naidoo that the plaintiff was intimidated and abused by all the police officers in the Inyala from Amanzimtoti to Verulam, to which he replied that it was not true and the plaintiff could have opened a case against them but he did not. It was put to him that the plaintiff did open a case at the Ridge Road police station. He replied that he was never called there.

[120] Captain Naidoo denied that whilst inside the Inyala he instructed another officer to tighten the handcuffs on the plaintiff to cause him more pain. He further denied that Sergeant Thaver had phoned the plaintiff's wife and told her that the plaintiff was being taken to KwaMashu police station and that his "*ass would be screwed*".

[121] Captain Naidoo said that he had seen the plaintiff's house in Amanzimtoti and did not doubt it was his house. He was further asked why the plaintiff was not at least charged and warned. He agreed that this type of case was not one which warranted an arrest. He further conceded that had they not taken the initiative, all of this would not have occurred. He was also asked whether he did it to help his colleague, and he said he did not. He said if Inspector Ngwenya had not requested this they would not have gone to arrest the plaintiff. He admitted that taking the circumstances of this case into account, the detention of the plaintiff was not warranted.

[122] The next witness for the defendant was Warrant Officer Njabulo Felix Nxumalo (since promoted from sergeant) who said that he only saw the plaintiff when they went to arrest him at his home in Amanzimtoti on 11 February 2004. On

10 February 2004 he was not working with his colleagues and was not present when the police officers encountered the plaintiff on the N2 freeway.

[123] On 11 February 2004 he, Captain Naidoo, the second defendant, Sergeant Moonsamy, Sergeant Thaver and Inspector Perumal reported for duty. At about 10h00 Captain Naidoo informed them that he and his colleagues had to effect an arrest in Amanzimtoti. This did not include the second defendant – he was not there. W/O Nxumalo said that he never went to Verulam police station. Captain Naidoo met them at Amanzimtoti police station. W/O Nxumalo said that he was one of the arresting officers. He could not remember where he was when he got the order from Captain Naidoo. The officers who were to effect the arrest were Captain Naidoo, Sergeant Moonsamy and himself. They were travelling in an open Mazda bakkie. The other colleagues remained at Amanzimtoti police station. They were Inspector GS Naidoo, Inspector Perumal and Sergeant Thaver. W/O Nxumalo said he could not remember where the second defendant was, but he was not at Amanzimtoti police station.

[124] W/O Nxumalo said that at the plaintiff's house they all stood at the gate and Moonsamy shouted for someone from inside the house. The gate was locked. The plaintiff came out of the house and Sergeant Moonsamy told him who he was and that they were looking for Ashley and the plaintiff confirmed that he was Ashley. Sergeant Moonsamy informed the plaintiff why they were there and that a case of theft by false pretences had been opened in Verulam. The plaintiff started going back into the house.

[125] He further told the court that when the plaintiff walked back towards the house "refusing to be arrested", Sergeant Moonsamy jumped over the gate and he saw Sergeant Moonsamy and the plaintiff struggling as Sergeant Moonsamy was trying to effect an arrest on the plaintiff.

[126] He said that Captain Naidoo requested him to assist Sergeant Moonsamy and he saw the plaintiff going for Sergeant Moonsamy's firearm. W/O Nxumalo said that he then pushed the fence and went to assist Sergeant Moonsamy. W/O Nxumalo said that the gun was in a waist holster on Sergeant Moonsamy's right hip region.

When the plaintiff saw him, the plaintiff calmed down. They prevented the plaintiff from going into the house. W/O Nxumalo denied that the police assaulted the plaintiff.

[127] He further said the plaintiff's wife was standing next to the kitchen door, the same door from which the plaintiff had emerged. After arresting the plaintiff they walked through the gate which he thought was opened by the plaintiff. They entered the open bakkie and the plaintiff was placed at the back with Sergeant Moonsamy. The plaintiff was not handcuffed at that time. W/O Nxumalo said that he could not remember whether the plaintiff was handcuffed at any other time.

[128] W/O Nxumalo said that Sergeant Thaver was not one of the arresting officers. It was put to him that the plaintiff's version was that Sergeant Thaver had assaulted the plaintiff and he (W/O Nxumalo) had stopped Sergeant Thaver. W/O Nxumalo reiterated that Sergeant Thaver was not there. W/O Nxumalo further said that it was untrue that he had said to the plaintiff that he did not like what was happening.

[129] W/O Nxumalo confirmed that he travelled in the Inyala to Verulam police station and the plaintiff was not seated next to him but in the seat behind the driver. He said it was not true that Sergeant Thaver and Captain Naidoo assaulted the plaintiff at Verulam police station and that he protected the plaintiff.

[130] W/O Nxumalo said that this incident happened in 2004 and it is possible that he might slip up here and there. He was asked whether he saw the plaintiff trying to grab Sergeant Moonsamy's firearm and he said he did see that. Captain Naidoo saw it too and told him (W/O Nxumalo) to go and assist Sergeant Moonsamy. He said that he could not explain why Captain Naidoo had not mentioned seeing the plaintiff reaching for Sergeant Moonsamy's firearm. He denied trying to make the plaintiff look like a dangerous person. He agreed, however, that this aspect was very important.

[131] W/O Nxumalo was asked to recall that in the Inyala the plaintiff was handcuffed and tied to the seat, but he disputed that. He also disputed that the plaintiff had been handcuffed to the metal bar in the bakkie. He said it was illegal to

do that. W/O Nxumalo said that if the plaintiff was handcuffed to the bakkie he would have seen that. However he could not deny that the plaintiff was handcuffed and seated at the back of the bakkie. He further said that he never saw the plaintiff being intimidated and sworn at on the journey to Verulam. He could not remember Captain Naidoo saying that the handcuffs should be tightened to make the plaintiff feel more pain.

[132] Captain Sipho Eric Ngwenya (since promoted from inspector) was attached to the Verulam SAPS Detective Branch. He confirmed said that the second defendant was the complainant in a case he was investigating and the plaintiff was the suspect. The charge was theft by false pretences involving the sum of R5 000 cash, case reference CAS243/9/03. He confirmed that the case was discussed with the second defendant who promised to get the physical address of the plaintiff in Amanzimtoti. The case was discussed with the second defendant and the second defendant was requested to ask other members of the POP Unit to arrest the plaintiff as soon as his address was ascertained.

[133] He further stated that he had asked the second defendant to arrest the plaintiff because the second defendant was himself a police officer. When asked why he had asked the second defendant to arrest the plaintiff, he said that the address of the plaintiff was not known at that time. He said in this case he asked the second defendant to ask the POP members to arrest the suspect, not the second defendant himself, although he knew that the second defendant was a member of the POP Unit.

[134] Captain Ngwenya said that on 11 February 2004 he was on duty when the second defendant told him that he had found the address of the plaintiff. Captain Ngwenya then told the second defendant that he did not have transport, but asked Captain Naidoo of the POP Unit to arrest the plaintiff. Captain Ngwenya said that the second defendant and Sergeant Thaver had been in his office. He did not know who would be the arresting officer, he only advised them that the second defendant should not be the arresting officer. Captain Ngwenya said that he did not apply for a warrant of arrest as it would have taken time. When asked what was urgent about this case, he said he was complying with his instructions from his superiors.

However, he conceded that he did not have such instructions from his superiors in this particular case. He further conceded that there was nothing urgent about the case.

[135] He said that generally when dockets are taken to court it takes 6-9 months for dockets to be returned. He further stated that this was the only docket requiring a warrant of arrest and said that the prosecutors simply told them to “leave it here”. He pointed out that theft by false pretences was a schedule 1 offence. He further said that reasonable suspicion existed. When the plaintiff was arrested it was the first time he saw the plaintiff when he was brought to his office by Sergeant Moonsamy and Captain Naidoo. He said he did not notice any injuries on the plaintiff. He said he wanted the plaintiff detained and requested Sergeant Moonsamy and Captain Naidoo to take the plaintiff to the commanding officer to be detained.

[136] Captain Ngwenya said that another statement was taken from the plaintiff on 12 February 2004 and he was then released. The reason was that the officers who took the statement, warrant officers Rajah and Reddy, realised that this was a civil matter. Captain Ngwenya said that he did not know who ordered the plaintiff’s release, and did not know where he himself was at the time. It was put to Captain Ngwenya that it was pathetic that he had been the investigating officer and he had no involvement. It was further put to him that everything should have been attended to on the same day of the arrest of the plaintiff.

[137] Captain Ngwenya said that he phoned the plaintiff (on the pretext of getting a quote for a driveway) but what he really wanted was the plaintiff’s address so that he could take his statement and not to arrest him. When Captain Ngwenya was asked what had changed his mind about suddenly arresting him. He could not answer the question. It was put to him that the entry on page 37 of exhibit “C” clearly stated “*Suspect to be arrested*”, so his intention could not have been merely to obtain a statement, he agreed that it was so.

[138] He further conceded that it had always been his intention to arrest the plaintiff and not merely take a statement. He further conceded that it was his own decision as the investigating officer. He said he did not apply for a warrant of arrest because

he had previously taken dockets for warrants of arrest and only got them back 1-2 months later. That is what he had referred to earlier in his evidence, that they only got the dockets back after a long time. He further said that the branch commander in charge of detectives at the time was Lieutenant Colonel Reuben Govender, who is now at the Phoenix cluster.

[139] It was put to Captain Ngwenya that the reason he did not apply for the warrant of arrest in this case was that he knew it would not be granted due to the circumstances of this case, which he denied. He believed that the warrant of arrest would have been granted because he construed this case as criminal and not civil. However, he later conceded that it was possible that the warrant of arrest would not have been issued, because ultimately the public prosecutor had declared that this matter was not criminal, but civil.

[140] Captain Ngwenya conceded that the plaintiff spent the whole day in the cells without him taking his statement. He confirmed that he was present when the plaintiff was detained in the cells although he had not spoken to him. He said he knew a little about the Criminal Procedure Act. However, he knew that the plaintiff could be served with a summons or written notice to appear, and it could have been done to the plaintiff in this case, without being arrested.

[141] Captain Ngwenya said that he did not engage with the plaintiff when the plaintiff was brought to his office (after arrest) as they *“don’t engage with the suspect until he is put in the registers”*. He conceded that he did not ask the plaintiff if he wanted a lawyer because, as he put it, it was the arresting officer who should have done that. He was going to charge the plaintiff and then explain his rights at that stage.

[142] Captain Ngwenya also confirmed that he asked the second defendant for the plaintiff’s address. It was put to him that since he had the plaintiff’s home telephone number, he could have searched for the physical address. He said that he had about 10 years’ service in the detective branch. It was put to him that he could have approached Telkom for the address.

[143] Captain Ngwenya later acknowledged that at the time of this incident he was not yet a qualified detective, in the sense that although he had been a detective for 10 years, he had not attended the detectives' course. Hence, he had regarded himself as being not yet a qualified detective.

[144] Captain Ngwenya further agreed that this was not the type of case where the arrest without the warrant of arrest was justified. He conceded that this was not the type of case which warranted detention of the suspect, namely the plaintiff.

[145] He was asked whether the second defendant had said that the plaintiff had sworn at or insulted him. He replied that if it was so, he would have put it in his statement. He further said he did not say that the plaintiff was abusive. In other words, his evidence was that the plaintiff had neither sworn at him nor been abusive to him.

[146] It was put to Captain Ngwenya that the second defendant told the court that he (Captain Ngwenya) had said the second defendant was the only person who would recognise the plaintiff and that the second defendant should therefore arrest the plaintiff when he saw him. Captain Ngwenya disputed this, saying that it would have amounted to the second defendant involving himself in his own case. He further said that even in the diary he had noted that the second defendant should ask his colleagues to arrest the plaintiff and not the second defendant himself.

[147] Sergeant Ramachandran Moonsamy testified that he saw the plaintiff for the first time on the day of his arrest on 11 February 2004. On that day he and his colleagues met with Captain Ngwenya at his office at the Verulam police station. He informed them of a suspect to be arrested in a theft case in Amanzimtoti. At the time Sergeant Moonsamy did not know that the second defendant was the complainant.

[148] Sergeant Moonsamy said the reason the POP was going to do the job was because Captain Ngwenya had informed them that he had a shortage of motor vehicles at the police station. Sergeant Moonsamy said he and Captain Naidoo were travelling in Captain Naidoo's Mazda bakkie, a marked police bakkie without a canopy. He, Captain Naidoo and W/O Nxumalo got into the bakkie and proceeded

to the plaintiff's address. Upon arrival they sounded the siren outside the plaintiff's residence and the plaintiff came outside to the driveway. Sergeant Moonsamy said he was the one who pressed the siren. He did not notice whether people from the neighbourhood came out of their houses. When the plaintiff came outside, he (Sergeant Moonsamy) was at the gate with W/O Nxumalo. He said he informed the plaintiff that he was looking for Ashley against whom a theft case had been opened. After the plaintiff indicated that he was Ashley, he (Sergeant Moonsamy) informed the plaintiff that he was under arrest in respect of that case. Sergeant Moonsamy then asked the plaintiff to open the gate but the plaintiff refused. The plaintiff said he was not going to open and turned towards the door of his house. The plaintiff did not say that he was going to change his clothes. Sergeant Moonsamy said he asked the plaintiff to stop but the plaintiff, as Sergeant Moonsamy put it, "*jogged and ran to his house*".

[149] Sergeant Moonsamy further testified that he then jumped over the gate and effected the arrest on the plaintiff. He said he tried to handcuff the plaintiff but the plaintiff resisted and tried to reach for his (Sergeant Moonsamy's) service pistol in his right hand holster. He said he managed to get the plaintiff under control by using his arrest techniques.

[150] Sergeant Moonsamy further said that during his scuffle with the plaintiff, W/O Nxumalo jumped or pushed the fence to come and assist him. The plaintiff was then handcuffed behind his back and placed in the back of the van and taken to Amanzimtoti police station.

[151] When asked how the plaintiff jumped onto the back of the van whilst handcuffed behind his back, Sergeant Moonsamy said that the tailgate of the bakkie was pulled down and the plaintiff was assisted to climb onto the back of the vehicle. He confirmed that all this happened in front of the plaintiff's gate in broad daylight at approximately between 12h00 and 13h00. He could not say if there were people around who witnessed the incident. He confirmed that they had left the second defendant at Amanzimtoti police station, although the second defendant knew that they were going to arrest the plaintiff in connection with his case.

[152] Sergeant Moonsamy further said that other than refusing to open the gate, he could not recall what else the plaintiff had said. He said Sergeant Thaver had remained at the police station and did not accompany them to the plaintiff's house. He further said that the second defendant was instructed by Captain Naidoo to follow them in the bakkie and meet them at Verulam police station because they did not want to have the complainant and the accused (referring to the second defendant and the plaintiff, respectively) in the same vehicle. At Verulam the plaintiff was handed over to the commanding officer, not sure who it was and he was detained. He said he did not see the plaintiff again until the trial at the high court.

[153] Under cross-examination, Sergeant Moonsamy said it was Captain Naidoo and himself who entered Captain Ngwenya's office at Verulam police station and that the second defendant was outside in the Inyala. It was put to him that the second defendant had said in his evidence that it was himself who approached Captain Ngwenya and the latter asked him to assist with the arrest of the plaintiff. Sergeant Moonsamy insisted that the second defendant was not present in Captain Ngwenya's office. He said that when he and Captain Naidoo spoke to Captain Ngwenya, the second defendant was not present. Sergeant Moonsamy further said that when he and Captain Naidoo went to Captain Ngwenya, they were only going to enquire if there were any tasks for their attention and not necessarily about this case.

[154] It was put to Sergeant Moonsamy that Captain Naidoo testified and made no mention of him (Sergeant Moonsamy) being present in Captain Ngwenya's office. Sergeant Moonsamy said he did not know why. It was further put to him that the second defendant also did not mention his presence in Captain Ngwenya's office. Sergeant Moonsamy said he did not know why.

[155] Sergeant Moonsamy said that the plaintiff came to the gate and he (Sergeant Moonsamy) asked him to open the gate. The plaintiff refused to open and he turned around and started to run towards his house. It was put to him that both Captain Naidoo and W/O Nxumalo never said that the plaintiff ran to his house. He insisted that the plaintiff ran to the house.

[156] Sergeant Moonsamy confirmed his statement. In paragraph 5 thereof he mentioned that *“Whilst trying to handcuff the suspect, he started to kick and punch at me”*. It was put to him that in his evidence he never mentioned that the plaintiff kicked and punched at him. In response, he said that the plaintiff punched and kicked at him but he avoided all blows. Sergeant Moonsamy further stated that when the plaintiff grappled with him he tried to reach for his (Sergeant Moonsamy's) firearm, which was tucked in his holster.

[157] Sergeant Moonsamy further said that the plaintiff was already handcuffed when W/O Nxumalo came on the premises. When it was put to him that W/O Nxumalo had said that he separated the plaintiff and Sergeant Moonsamy as they were grappling, Sergeant Moonsamy said that could have happened. Indeed there would have been no need for W/O Nxumalo to separate them if plaintiff was already handcuffed.

[158] It was put to Sergeant Moonsamy that the plaintiff had testified that his name had been called and he had exited the house wearing a pair of shorts and a vest. Sergeant Moonsamy said he could not be sure about that. He further stated that the plaintiff did not say he was going to the house to change. It was put to him that Sergeant Thaver had jumped over the gate, to which he replied that Sergeant Thaver was not there. He stated that those present were himself, Captain Naidoo and W/O Nxumalo. At no time was the plaintiff assaulted at the back of his head. It was further put to him that when the plaintiff's wife tried to intervene, she too was slapped on the face by Sergeant Thaver. Sergeant Moonsamy disputed this.

[159] Sergeant Moonsamy further disputed that the plaintiff was handcuffed at the rear bar of the bakkie. He said that he had accompanied the plaintiff from Amanzimtoti to Verulam and plaintiff was not abused during the entire journey. He said that he could not remember what the plaintiff was wearing. He disputed that the plaintiff was assaulted at any stage in his presence.

[160] Sergeant Moonsamy said that when he arrested the plaintiff he read him his constitutional rights, but he was not sure whether he (Sergeant Moonsamy) signed the relevant document. He further said he read the plaintiff his constitutional rights

at his house after he had handcuffed the plaintiff. He could not explain why he had not mentioned this aspect both in his statement and in his evidence-in-chief. He said he must have forgotten to mention it. It was put to him that he never mentioned this simply because it did not happen, which he disputed.

[161] Sergeant Moonsamy further stated that before he arrested the plaintiff he explained that a case of theft was opened against him and then arrested the plaintiff. He further informed the plaintiff that the charge was theft by false presences in that he did not complete the work at the second defendant's residence, the second defendant being his colleague at the time. He said that as the arresting officer he had to satisfy himself about the allegations. He held the view that it was indeed a theft by false pretences matter. He further said that when he explained the charge to the plaintiff, the plaintiff did not point out to him that this was a civil matter. Initially, he said if the plaintiff had indicated to him that this was a civil matter he would not have arrested the plaintiff. However, when he was asked why he would not arrest the plaintiff if he still believed that the crime of theft by false pretences had been committed by the plaintiff, he then retracted and said he would still have arrested the plaintiff.

[162] Sergeant Moonsamy told the court that he had been in the police service for 20 years but at the time of this incident he had 11 years' service. He further stated that he discussed the case with the second defendant shortly after the arrest of the plaintiff. It was either at Verulam or Marianhill. He could not be sure what they had discussed. He said he only informed the second defendant that the suspect had been arrested and that the court would decide the matter. He was asked if the second defendant had not seen that the plaintiff was under arrest when brought to the Amanzimtoti police station. He said the second defendant had seen that. He was then asked why he had to inform the second defendant again about the plaintiff's arrest. He said he saw no harm in doing that.

[163] He was further asked to comment about the fact that Superintendent Reuben Govender had agreed with the plaintiff that this case was a civil matter and that the plaintiff should never have been arrested in the first place. He conceded that he felt embarrassed that Superintendent Govender had agreed with the plaintiff. He said

that he was embarrassed because he did not know why Superintendent Govender had done what he did. He further said it showed a lack of consultation on the part of Superintendent Govender to make a decision like that. In his view, Superintendent Govender should have consulted with the second defendant and the investigating officer.

[164] That concluded the case for the defendants.

The law

[165] Sections 10, 12 and 35 of our Constitution provide, to the extent relevant, as follows:

“10. Human dignity. – Everyone has inherent dignity and the right to have their dignity respected and protected.”

“12(1) Everyone has the right to freedom and security of the person, which includes the right–

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

“35(2)(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of the right promptly;”

[166] It is trite that any deprivation of a person’s liberty, such as arrest and/or detention at the hands of a law enforcement agency, is *prima facie* unlawful. In *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 153D-E the Appellate Division (per Hoexter JA) stated as follows:

“The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal.”

[167] In an action for wrongful arrest and detention a plaintiff only bears the onus of proving the arrest and detention or, put differently, the deprivation of his or her liberty. Recently, in *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA) the Supreme Court of Appeal (per Malan AJA) reiterated this position as follows (at par 6):

“To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.”

[168] The Appellate Division in *Minister of Justice v Hofmeyr*, above, further held: ‘Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.’ This pronouncement was in approval of the AD’s decision in *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) where the Court (per Rabie CJ) stated as follows (at 589D-E):

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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.”

[169] Although the cause of action for damages arising from alleged wrongful arrest and detention is based on the *actio iniuriarum* (*Whittaker v Roos & Bateman* 1912 AD 92 at 122 – 123), liability for the delict is strict, in the sense that neither *culpa* nor awareness of wrongfulness on the part of the arrestor is prerequisite. In *Relyant Trading (Pty) Ltd v Shongwe and another*, above, the Court stated as follows (at paragraph 4):

“Wrongful arrest consists in the wrongful deprivation of a person’s liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor’s conduct being required. An arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty. In both

wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity."

[170] In other words, a plaintiff is not necessarily required to prove that the defendant had an intention to injure (*animus injuriandi*). In *Tödt v Ipser* 1993 (3) SA 577 (A) the Appellate Division (per E M Grossgopf JA) stated (at 586G-F):

"[A]n action for wrongful arrest does not require proof of *animus injuriandi* in the full sense of the term as including consciousness on the part of the defendant that he is acting unlawfully. In the recent judgment in *Minister of Justice v Hofmeyr* . . . this Court expressly approved the following passage from *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139D:

'In die geval van die *actio injuriarum* het die skuldbegrip met twee oorwegings te maak. Die eerste is dat die verweerder opsetlik (intentionally) gehandel het en die tweede is dat hy geweet het dat die handeling onregmatig is. In die geval van onregmatige arrestasie, hoewel dit uit die *actio injuriarum* ontwikkel het, is die tweede oorweging nie 'n vereiste vir aanspreeklikheid nie.'

It follows that the allegation in the particulars of claim of an intention to injure (which would include consciousness of unlawfulness) went beyond what was required to disclose a cause of action for unlawful arrest. In respect of such a cause of action, this allegation may be regarded as surplusage."

[171] Consequently, a defendant cannot argue that he or she genuinely believed the detention or deprivation to be lawful. In *Tsose v Minister of Justice* 1951 (3) SA 10 (A) the Appellate Division (per Schreiner JA) stated as follows (at 18C-G):

"As I have indicated above, the Transvaal Provincial Division held that even if no offence was committed in the presence of Sergeant Gentle, the third respondent, who effected the arrests on the 21st and 23rd July, 1949, the arrests were nevertheless legal because the sergeant "entertained the honest and reasonable belief that at the time of the arrests the law was being contravened". This proposition was not supported by counsel for the respondents in this Court and it is sufficient to say that the English decisions on which MALAN, J., relied are not authority for any

generalisation that in English Law an honest and reasonable belief that the law is being contravened justifies an arrest without warrant. The scope of each statute relied upon as rendering an arrest lawful must be deduced from the language of its provisions, read in their proper context. . . . The context here is the codification of a peace officer's powers of arrest contained in secs. 26 and 27, which specially authorise arrest on reasonable suspicion in certain cases only. Those sections make ample provision for summary arrest where there is danger that a suspected wrong-doer may disappear and so escape prosecution. In the present case if no offence was committed in the presence of Sergeant Gentle, the arrests were unlawful.”

Analysis and Evaluation

[172] It is common cause that on 11 February 2004 the plaintiff was arrested at his home in Amanzimtoti by members of the South African Police Service (the SAPS) and that on the same day he was transported to Verulam police station where he was detained in a police cell until the following day (12 February 2004), when he was then released.

[173] It is also common cause that the second defendant was at all material times a member of the SAPS attached to the Public Order Policing Unit and stationed at Marianhill. It is also not in dispute that on or about 4 September 2003 the second defendant, acting in his personal and private capacity, concluded a contract of service with Ace Driveways CC which carried on the business of tarmac driveway construction, in terms of which, on payment of an agreed sum of money, the close corporation undertook to construct a tarmac driveway at the second defendant's home in Verulam.

[174] Whilst the close corporation was registered in the name of the plaintiff's wife, it is clear from the evidence that its business was, in virtually every practical respect, being physically managed by the plaintiff. For this reason, it was no surprise and, indeed, reasonably understandable that the second defendant assumed or believed that the close corporation was owned by the plaintiff. However, it seems to me

nothing turns on that issue, which clearly has no bearing on the outcome of this matter.

[175] The issue before the court is whether the arrest and detention of the plaintiff was wrongful and unlawful to the extent as to render the defendants liable to the plaintiff for delictual damages. The defendants' defence is that the plaintiff's deprivation of liberty was lawful in that it was a sequel to a lawful criminal charge of theft by false pretences which the second defendant had lawfully laid against the plaintiff.

[176] The plaintiff and his wife impressed me as being honest and truthful witnesses. They gave coherent and corroborative evidence which endorsed on what is, in my view, an objectively civil nature of the dispute between the plaintiff and the second defendant. On the other hand, the second defendant was a poor, untruthful and unreliable witness who sought to secure corroboration from his colleagues who, in turn, also sought to insulate themselves from responsibility in relation to the plaintiff's wrongful arrest and detention by generally fabricating evidence against the plaintiff to fit in their cover up of the truth.

[177] It is common cause that the so-called criminal charge arose out of a dispute between the plaintiff and the second defendant over the fulfilment of the contract aforesaid by either party. On the one hand, the plaintiff alleged that the second defendant repudiated the contract by proceeding to hire another contractor, Mr Richards of Tri-Star construction firm, to complete the second defendant's driveway construction, whilst the second defendant, on the other hand, claimed that due to the delay in the plaintiff's workmen completing the job, he was entitled to hire Mr Richards to complete the work and that he was thus entitled to a refund of the specified portion of the amount he had paid to the plaintiff. When the plaintiff refused to pay back to the second defendant the amount so demanded, the second defendant construed the plaintiff's conduct as amounting to and constituting the crime of theft by false pretences.

[178] In Snyman, “CRIMINAL LAW”, 5th Edition, at page 543, the learned author defines the crime of theft by false pretences as follows:

“A person commits theft by false pretences if he [or she] unlawfully and intentionally obtains movable, corporeal property belonging to another, with the consent of the person from whom she obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates it.”

[179] Notwithstanding protestations to the contrary by the second defendant and the other police witnesses for the defendants, there was not a shred of evidence adduced by, or on behalf of, the defendants to the effect that the close corporation misrepresented itself to the public and, in particular, to the second defendant, that it carried on the business of tarmac driveway construction when in fact it did not. Nor was there any evidence submitted by the defendants to the effect that the plaintiff or his wife or anyone acting in a representative capacity of the close corporation intentionally, or otherwise, made any false representation to the second defendant that the tarmac driveway would be constructed at the second defendant’s home when the person making such representation knew that the representation was false. Indeed, the close corporation had, as at 2003, been in operation for some 22 years, having started in 1981.

[180] It is clear to me that had there been no heavy rainfall over the weekend preceding Monday of 15 September 2003, the plaintiff and his workmen would have reported for duty at the second respondent’s home and done the tarring of the driveway. In that event, this dispute would not have arisen. The fact that the plaintiff might have charged the second defendant more than what other contractors could have charged him, such as for the price of the kerbs, did not render the issue between the parties criminal. It remained a contractual and civil dispute.

[181] Indeed, if at all there was any legal basis warranting the arrest of the plaintiff, there was simply no justification in the circumstances of this case, to arrest him without having first obtained a warrant for his arrest. Section 40(1)(b) of the Criminal procedure Act 51 of 1977 provides that *‘[a]ny peace officer may without a warrant arrest any person ... whom he reasonably suspects of having committed an offence*

referred to in Schedule 1, ...' The defendants submitted that, since the crime of theft by false pretences was an offence listed in schedule 1 to the CPA, the plaintiff could lawfully be arrested without an arrest warrant. I do not agree. The second defendant laid the criminal complaint during September 2003 but the plaintiff was only arrested on 11 February 2004. It could not be disputed that throughout this period he was at his home at Amanzimtoti with his family.

[182] The second defendant's averment that the plaintiff's physical address was all along unknown is, in my view, disingenuous and factually incorrect. At the outset the second defendant got to know the plaintiff's business through an advertisement in a newspaper which would have borne, at least, the contact number of the plaintiff's business. Apparently the contact number furnished in the advertisement was the plaintiff's home landline telephone number through which the second defendant contacted the plaintiff and/or his wife for the first time.

[183] In any event it was admitted by the second defendant that at all times he was in possession of the plaintiff's home telephone number, albeit not the physical address. Indeed, even Captain Ngwenya was in possession of the plaintiff's telephone number as he also testified that he had phoned the plaintiff and asked him to report at the police station.

[184] The second defendant reluctantly admitted that on the basis of the information he had in his possession at the earlier time, even before the dispute arose, he would have been in a position to locate the physical address of the plaintiff's residence or the location of the close corporation's office. Therefore, the alleged lack of the plaintiff's physical address could not be the reason why a warrant of arrest was not applied for.

[185] In any event, the fact that an offence in question was one listed in the first schedule to the CPA was, in my view, not an excuse not to apply for and obtain a warrant of arrest in circumstances where this was possible and practicable to do, such as in the present case. There was simply no urgency in the matter. This was conceded by both Captain Naidoo and Captain Ngwenya. In fact, according to Captain Naidoo, he also regarded the matter as a "relatively minor offence". Of course, there was no criminal offence at all, in the first place.

[186] Furthermore, the arrest was not the only practicable method at the disposal of the police to secure the attendance of the plaintiff in court. (Section 38 of the CPA.) In fact, in the circumstances of this case and presuming there was a valid criminal charge against the plaintiff, arresting him would still have been the most undesirable and inappropriate method of securing his attendance to court. Considering the nature of the alleged criminal charge, the personal circumstances of the plaintiff, including the fact that he was a settled family man with a fixed abode, serving him with a criminal summons (section 54 of the CPA) or a written notice to appear in court (section 56 of the CPA) would have been sufficient, effective and appropriate to ensuring his attendance in court. Indeed, both Captain Naidoo and Captain Ngwenya ultimately conceded, under cross-examination, that the arrest of the plaintiff was not necessary in the circumstances of this case.

[187] It is clear to me that the only explanation why the investigating officer Ngwenya and/or the second defendant did not seek to have the docket in this case sent to the local senior public prosecutor for a decision and, if necessary, authorisation of the warrant of arrest against the plaintiff, was simply because they were aware that the public prosecutor would probably not have authorised the arrest warrant because, in all probability, he or she would have declined to prosecute the plaintiff of any crime on the ground that the dispute between the parties was a civil dispute and not a criminal matter.

[188] Although the plaintiff and his wife persisted in their evidence that the team of police officers who came to arrest the plaintiff included Sergeant Thaver, whom they alleged played the most active role in physically manhandling and assaulting both the plaintiff and his wife, this averment was denied by the relevant witnesses for the defendant. Instead, they stated that Sergeant Thaver was not present during the arrest, but only present when the police confronted the plaintiff on the N2 freeway on the previous day of the arrest. I believe the plaintiff and his wife on this point. On the previous day (10 February 2004) in broad daylight they had seen and recognised Sergeant Thaver's name by his name badge and there was no reason that they could have mistaken his identity only 24 hours later, again in broad day light.

[189] It was only for some reason better known to the defendants' witnesses as to why these witnesses tried to shelter Sergeant Thaver from blame. Or was it because they were all aware that Sergeant Thaver was the number one culprit in subjecting the plaintiff to torture and humiliation? This proposition appears to be the most probable answer to the question. Furthermore, it is significant to note that in the pre-trial minute signed by attorneys for both parties the following appears at paragraph 3.1 thereof: *'It is agreed that the plaintiff was arrested by Constable J Thaver, Captain L Naidoo and Sergeant R Moonsamy on 11 February 2004.'*

[190] In any event, it did not matter whether the plaintiff was tortured and humiliated at the hands of Sergeant Thaver, or the second defendant or any of the other police officers mentioned in this saga, or all of them. The fact of the matter is that, on the evidence, it is clear beyond any doubt that every police officer who dealt with the plaintiff, in one way or the other, did so in the course and scope of his employment with the first defendant. They all acted in the fulfilment of a common objective, namely, to 'fix' and humiliate the plaintiff, which was also in fulfilment of the veiled threat that the second defendant had previously made to the plaintiff.

[191] It was the evidence of Sergeant Moonsamy that when they arrived at the plaintiff's house in the police bakkie, they not only blew the hooter but they also sounded the police siren. This conduct on the part of the police was extremely unnecessary in the circumstances. It clearly showed the police motive of humiliating and degrading the plaintiff. There was no way that the plaintiff's neighbours did not get out to witness the Hollywood-style drama at their doorsteps. As if that was not enough, the police proceeded and placed the plaintiff at the back of the open bakkie, handcuffed to the metal iron bars behind the rear window of the bakkie and drove him away to the police station. From Amanzimtoti police station where he was 'positively identified' by the second defendant as the wanted suspect, he was placed in the Inyala truck, whether handcuffed or not, and driven to Verulam police station. During the fairly long journey from Amanzimtoti to Verulam the plaintiff was taunted and severely humiliated. He spent the whole night in the police cell under horrible and dreadful conditions, when he should not have been arrested in the first place.

[192] In the first place there was no justification for the second defendant to involve himself personally in the matter, when he clearly should not have done so. His protestation that he did not is not factually correct. It is common cause that he was present when they all proceeded to Amanzimtoti to have the plaintiff arrested. The fact that he remained at Amanzimtoti police station when some of his colleagues proceeded to the plaintiff's house, did not separate him from the group. Thereafter, when the plaintiff was being conveyed to Verulam police station in the Inyala truck by other officers (including Captain Naidoo, Sergeant Moonsamy, W/O Nxumalo, Sergeant Thaver and Inspectors or W/O's GS Naidoo, Joseph and Perumal) the second defendant was accompanying them, albeit driving separately in the police bakkie, which was obviously the same vehicle in which the plaintiff was conveyed from his home to Amanzimtoti police station. Further, on his own version, the second defendant and Captain Naidoo went into Captain Ngwenya's office at Verulam to discuss about the case. Why would he do all these things if he was not part of the group targeting to arrest the plaintiff?

[193] According to the defendant's case, the officers who went to arrest the plaintiff were Captain Naidoo, W/O Nxumalo and Sergeant Moonsamy, of whom Sergeant Moonsamy was the one who actually effected the arrest of the plaintiff. A close scrutiny of their evidence revealed several material discrepancies which clearly showed that they were untruthful and unreliable in a number of respects.

[194] Among other things, W/O Nxumalo testified that after Sergeant Moonsamy had jumped over the plaintiff's gate to arrest the plaintiff who was inside his premises, he had then seen the plaintiff *'going for Moonsamy's firearm'* and he (W/O Nxumalo) also jumped over the gate to assist Sergeant Moonsamy after he was instructed by Captain Naidoo to do so. Sergeant Moonsamy also claimed that the plaintiff tried to grab his firearm. However, what is strange is the fact that Captain Naidoo who confirmed that he instructed W/O Nxumalo to go and assist Sergeant Moonsamy, did not say that he had seen the plaintiff trying to grab Sergeant Moonsamy's firearm. The only conclusion I can draw from this discrepancy is that at no stage did the plaintiff ever attempt to go for Sergeant Moonsamy's firearm as alleged. This allegation was only a smokescreen by these police officers to try and justify the brutal and inhumane manner in which they mistreated the plaintiff.

[195] Sergeant Moonsamy also testified that after they had confronted the plaintiff at the gate, the plaintiff had turned and run towards the house. However, he was the only one to make this allegation that the plaintiff ran towards the house. Strangely, both Captain Naidoo and W/O Nxumalo did not mention it. The reason for them to omit mentioning it is clearly because such a thing never happened.

[196] Further, in his written statement in the docket Sergeant Moonsamy stated, amongst others, the following: *'Whilst trying to handcuff the suspect [the plaintiff], he started to kick and punch at me.'* However, in his evidence in court he never mentioned anything about the plaintiff having kicked and punched at him, or even attempting to do so.

[197] It was also significant that in his evidence-in-chief Sergeant Moonsamy never mentioned that at some point the plaintiff tried to grab his firearm which was tucked in the holster on his (Sergeant Moonsamy's) waist. He only mentioned it during his cross-examination and when it was clear that he was simply trying to corroborate W/O Nxumalo (who had previously testified) on the issue. Surely, this was a very important aspect of Sergeant Moonsamy's evidence because it would have somewhat mitigated the police conduct towards the plaintiff.

[198] Further, W/O Nxumalo testified that after he jumped over the gate he separated Sergeant Moonsamy and the plaintiff as they were grappling. However, Sergeant Moonsamy testified that when W/O Nxumalo climbed over the gate he (Sergeant Moonsamy) had already handcuffed the plaintiff, which would then mean that there was no need for W/O Nxumalo to have separated him from the plaintiff. This also clearly shows that the plaintiff never engaged in any physical scuffle with any of the police officers who came to arrest him.

[199] It is therefore evident that the evidence adduced on behalf of the defendants mostly consisted of blatant lies on the part of the witnesses concerned which proved, on a balance of probabilities, that the motive of the police, the second defendant in particular, was not to deal with the plaintiff in terms of constitutional due process, but

rather to humiliate and degrade him in front of his family and neighbours. Indeed, this objective was achieved by the second defendant.

[200] The plaintiff testified that his constitutional rights at the time of arrest were never explained to him. Both in his written statement and evidence-in-chief Sergeant Moonsamy, who claimed to be the arresting officer, did not mention that he explained these rights to the plaintiff. He only said he did it when he was being cross-examined. In the circumstances I am convinced that the plaintiff's constitutional rights at the time of his arrest were never explained to him. If these rights were explained to him he would, most probably, have told the court, as he did in relation to the stage when he was handed over to the Verulam police for his detention. He acknowledged that at that stage his Constitutional rights were read out and explained to him as per the SAP14A form.

[201] In doing all what he did, the second defendant, in collaboration with, and assisted by, his colleagues, abused his authority as a police officer. The evidence abundantly demonstrates that the second defendant abused his authority as a police officer in that he improperly and maliciously and, with intent to deprive the plaintiff of his liberty and violate his human dignity, caused the plaintiff to be arrested and detained for no reasonable and just cause.

[202] I am satisfied that the defendants did not have any reasonable cause for believing that the plaintiff had committed the crime of theft by false pretences or any other offence listed in schedule 1 to the CPA, or at all. The defendants have, therefore, failed to discharge their onus of proving that the plaintiff's arrest and detention were justified and lawful. Consequently, the plaintiff has made out his case against the defendants on liability. This was indeed, an unlawful, wrongful and malicious arrest and detention for which the defendants must be held liable. There is no reason why the defendants should not be ordered to pay the plaintiff's costs in respect of all the dates of hearing of this matter on liability.

[203] In the result, the following order is made:

(1) The defendants are jointly and severally liable for damages sustained by the plaintiff arising from the unlawful, wrongful and malicious arrest and detention of the plaintiff on 11 February 2004, in the amount which the plaintiff is able to prove or which may be agreed between the parties.

(2) The defendants are to pay the plaintiff's costs for the dates of hearing on liability, namely:

10, 11 and 12 August 2010;

20, 21, 22, 23 and 24 June 2011;

18, 19 and 20 April 2013;

18 and 19 February 2013;

14 and 16 October 2013; and

27 November 2013.

Appearances:

For the plaintiff: Mr L Singh
 c/o Hlongwa Singh and Associates, Durban

For the defendants: Adv NM Naidoo
Instructed by: State Attorney, Durban

Date of judgment: 27 November 2013