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Africa Transcriptions (Pty) Limited/AP

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 33714/06

2011-06-17

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In the matter between

O MAGAGULA

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

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ZONDO J:

[1] In this matter the plaintiff has sued the defendant, the Minister of Safety and Security, for damages for unlawful arrest and detention. The claim arises out of events that occurred in August 2004 when the plaintiff was arrested by the South African Police and detained. The arrest occurred on the 25th August 2004. On or about the 30th August 2004 the plaintiff appeared in the

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Magistrate's court in connection with a charge of murder. His case was postponed several times in the next few months until August 2005 the charges against him were withdrawn. He was not charged alone in regard to that charge of murder, but was charged with a friend of his, Mr Ndimande, who had also been arrested on 25th August 2004. They were both released in August of 2005 after the prosecutor had declined to prosecute them.

[2] I have indicated that the date on which both the plaintiff and Ms Ndimande were arrested was the 25th August 2004, but it was Mr Ndimande who was arrested first. He was initially arrested by the police at Krugersdorp in connection with a case of housebreaking, but, after he had been arrested in connection with that case, he was told to wait at the reception at Krugersdorp Police Station because, so he was told, there was somebody who was going to come and fetch him. That was Inspector Gordon. In due course Inspector Gordon did arrive at the Krugersdorp Police Station. Inspector Gordon fetched Mr Ndimande from the reception at the police station in Krugersdorp. In fact he did not fetch Mr Ndimande only but he also fetched somebody else who had also been arrested in connection with the housebreaking case. His name was Obakeng.

[3] It would appear that Inspector Gordon had received some reports to the effect that Obakeng and Mr Ndimande may have had information concerning or were suspects in the case of, the

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murder of a certain white lady in the Chanclyff area. After Inspector Gordon had arrived at the reception at the police station in Krugersdorp, he took off the handcuffs that Mr Ndimande and Obakeng had, and put another set of handcuffs that he had brought with him around the wrists of each one of the two. He put both Obakeng and Mr Ndimande into a car and drove with them to Roodepoort Police Station.

[4] Once Inspector Gordon and the two men had arrived at the Roodepoort Police Station, Inspector Gordon took the two men to his office for an interview. Mr Ndimande in his evidence testified that, while he was being interviewed by Inspector Gordon, Obakeng waited outside the office so that they were not interviewed at the same time in the same office. This was accepted as correct by counsel for the defendant. What happened at Inspector Gordon's office on that day when Mr Ndimande was there is very important for this case, because the defence put up by the defendant against the plaintiff's claim is to the effect that Mr Ndimande voluntarily and freely gave information to Inspector Gordon on that occasion and implicated himself and the plaintiff, i.e. Mr Magagula in the murder of the white lady to whom I have referred. The white lady was a Ms Alberts.

[5] It is common cause that at some stage on that day Obakeng was taken back to Krugersdorp Police Station. Evidence given by Inspector Gordon was to the effect that Obakeng was taken back

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to Krugersdorp Police Station because, when Inspector Gordon interviewed him, it became clear that Obakeng had nothing to do with the murder of Ms Alberts. Inspector Gordon testified that he retained Mr Ndimande at Roodepoort Police Station because Mr Ndimande had given him information that implicated himself as well as the plaintiff in the murder. According to Inspector Gordon, after some time, he took Mr Ndimande to the plaintiff's workplace because Mr Ndimande told him that he could show him where the other person was whom he had implicated in the murder.

10 According to Inspector Gordon he and Mr Ndimande then went there together with one inspector Nel and the plaintiff was arrested at his place of work. It would appear that, when the police tried to get information from the plaintiff, they were unsuccessful because he chose to exercise his right to remain silent.

[6] It is common cause that at some stage on the 25th August, the police went to the place of residence of the plaintiff to search for a firearm but could not find any firearm. Indeed, it appears that they

20 may have gone there for the second time and at some stage even called the Dog Unit of the South African Police to help them find the firearm that they believed had been used in killing Ms Alberts. On each occasion that they went there, they did not find the firearm.

[7] The picture that one gets from the evidence given by Inspector

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Gordon surrounding his interaction with Mr Ndimande at his office on 25th August 2004, is a picture that suggests that Mr Ndimande, of his own, and without any pressure whatsoever from anybody, decided, when being interviewed by Inspector Gordon, to say that he and the plaintiff had been involved in the murder of Ms Alberts. However, when one has regard to the evidence that was given by Mr Ndimande, the picture is very different. Mr Ndimande testified that Inspector Gordon asked him about the murder of the lady I have referred to and he told him that he knew nothing about it, or that he had heard about that murder one day after the day on which the murder had occurred. Mr Ndimande says that Inspector Gordon was not prepared to take his answer that he had nothing to do with the murder of Ms Alberts and did not know anything about it.

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[8] Mr Ndimande's evidence was that, since he continued to say that he did not know anything about the murder, Inspector Gordon assaulted him repeatedly in his office. Mr Ndimande testified that Inspector Gordon took a plastic bag that was clear in colour, and had a blue South African Police badge, and was written "South African Police Service" and put that plastic bag over his head and face, and made him lie on his back and sat on his chest, and closed the plastic bag with the result that Mr Ndimande would suffocate and not be able to breath properly. Mr Ndimande says that Inspector Gordon told him that if, while he had the plastic bag

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over his head and face, he i.e. Mr Ndimande wanted to talk, he should shake his head. Indeed, Mr Ndimande says that, when he was suffocating and was running out of breath, he shook his head and Inspector Gordon would then pull out the plastic bag, and would then ask him whether he was prepared to speak the truth. In this regard I need to point out that during Mr Ndimande's evidence, Mr Ndimande was giving his evidence in his own vernacular language, and his evidence was interpreted into English for the benefit of the Court. However, when Mr Ndimande gave evidence about Inspector Gordon asking him whether he was prepared to speak the truth whenever he had been suffocating because of the plastic bag being closed over his head and face, Mr Ndimande quoted what Inspector Gordon said in Afrikaans. Mr Ndimande testified that Inspector Gordon asked him in Afrikaans: "Wil jy die waarheid praat?"

- [9] Mr Ndimande said that each time his response to the question whether he wanted to speak the truth would be that he could not tell him anything new because he did not know anything about the murder, and Inspector Gordon would once again put the plastic bag over his head and face and continue to sit on his chest and close the plastic bag thereby suffocating him. When Mr Ndimande could not take it anymore, he would once again shake his head and then Inspector Gordon would pull off the plastic bag and once again would ask him: "Wil jy die waarheid praat?"

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[10] Mr Ndimande's evidence was that at a certain stage he was feeling very dizzy, and when Inspector Gordon pulled out the plastic bag from his face and head, he found that there were three other men in the office who were also assaulting him. He said that they were kicking him. He said that he did not know their names, but he indicated that he could identify them. Mr Ndimande testified that at some stage he was crawling under a table in Inspector Gordon's office, because, as all of this was happening, his hands were still handcuffed behind his back. He testified that at some stage while he was being assaulted in Inspector Gordon's office, somebody knocked on the door, and there appeared a white lady and when he screamed to try and get her to help him, the lady just looked at him and walked away.

[11] Mr Ndimande's evidence was to the effect that he told Inspector Gordon that on the night on which it seems that Ms Alberts was killed, he and the plaintiff were in a tavern called 777 and were watching a soccer match on TV. He indicated that that tavern used to close around 20:00 in the evening and that on that night they left before it could close. He said that he took a taxi home.

[12] The evidence given by Mr Ndimande with regard to what happened in Inspector Gordon's office when he was there was given in a manner that was very logical and understandable. He was cross-examined at some length on his evidence in this

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regard. I will revert in due course to certain aspects of his cross-examination in regard to the evidence on what happened in Inspector Gordon's office. I do not propose to go into all the details about the evidence that was given in this matter, because, in my view, the focus ought to be determined by what the issues are between the parties. To a very large extent the main issue between the parties is whether or not Mr Ndimande gave any information to inspector Gordon that implicated himself and the plaintiff in the murder of Ms Alberts freely and voluntarily.

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[13] Later on in the day or early evening, or in the evening, Mr Ndimande was taken from the cells in Krugersdorp, it would seem, because at some stage after the plaintiff had also been arrested, Mr Ndimande was taken back to Krugersdorp police cells. This was in the night and the plaintiff was also taken from Roodepoort Police Station to Krugersdorp Police Station. The two of them were kept in different cells.

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[14] A while later Inspector Gordon returned and took Mr Ndimande out of the cells at Krugersdorp Police Station to a certain lady who, it transpired, was Colonel Eksteen. Colonel Eksteen prepared a statement which she said was prepared on the basis of information that was supplied to her by Mr Ndimande. She, together with about three or four others, went to the murder scene of the late Ms Alberts, as well as to the 777 tavern. Colonel

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Eksteen and her team took Mr Ndimande with them to the murder scene and to the 777 tavern. The purpose of the trip was, according to Inspector Gordon and Colonel Eksteen, to give the opportunity to Mr Ndimande to a pointing out because, according to them, he had indicated that he was prepared to do that. Photographs were taken which depict Mr Ndimande pointing at certain objects or areas as well as photographs which depict Mr Ndimande which were intended to show whether he had any visible injuries.

[15] During the cross-examination of Mr Ndimande by counsel for the defendant, Mr Ndimande indicated that the pointing out occurred after the plaintiff had been arrested, and counsel for the defendant conceded that that was true. If that is so, it seems to me, therefore, that the pointing out cannot be taken into account for purposes of determining whether the suspicion that the police say they had, that the plaintiff had committed a schedule 1 offence, namely murder, was based on reasonable grounds. That is because, if the plaintiff had already been arrested by the time the pointing out happened, then the decision to arrest and detain the plaintiff can only be justified with reference to the information that was available to the arrestor at the time of the arrest. It seems that such information as the police might have had at the time that they arrested the plaintiff, would have been the information that Mr Ndimande is said to have given to Inspector Gordon during the

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time that the two of them were in Inspector Gordon's office.

[16] When the defendant presented its case, Inspector Nel also gave evidence relating to what, according to him transpired when he, i.e. Inspector Gordon and Mr Ndimande were in Inspector Gordon's office, and he interviewed Mr Ndimande before they proceeded to the plaintiff's workplace to arrest the plaintiff. I need to point out that, when Ndimande was in the witness stand, it was never put to him what he told, or may have told Inspector Nel. Indeed, when Mr Ndimande was cross-examined, no reference was made to Inspector Nel having had any discussions with Mr Ndimande at all.

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In accordance with the normal rules of cross-examination, evidence that has not been put to a witness to enable the witness to defend himself against it or explain it cannot be used against that witness. If one then has regard to that, it follows that, indeed, the only evidence that will have to be considered in determining whether or not the police had reasonable grounds for the suspicion contemplated in section 40(1)(b) of the Criminal Procedure Act of 1977 will be such information as may be properly said to have been given to Inspector Gordon when Inspector Gordon and Mr Ndimande were in Inspector Gordon's office on the 25th August 2004.

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[17] Before I focus on the evidence of what occurred between Inspector Gordon and Mr Ndimande when the two were in the latter's office on the 25th August 2004, it is important to point out

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that after a few days, that is in the week following the week of the arrest of the plaintiff and Mr Ndimande, Mr Ndimande was taken to a Senior Magistrate in Krugersdorp, Magistrate Visagie, for purposes of him making a confession statement. However, once Mr Ndimande was in the Senior Magistrate's office, together with two other people, including an Interpreter, and he was asked whether or not he wanted to make any statement, whether or not he had been attacked, and whether he would make such a statement freely and voluntarily, he told the Senior Magistrate that he was not prepared to make a confession statement or words to that effect, and that he had been assaulted by Inspector Gordon who effectively wanted him to make a confession statement.

[18] The Senior Magistrate prepared a report or statement of her interview with Mr Ndimande. I do not propose to go into the details of that statement, but once this judgment has been transcribed, I might quote some parts of that statement. What I can say is that a reading of that statement shows that Mr Ndimande complained that he had been treated very badly by Inspector Gordon, that he had been assaulted and, indeed, what he told the Senior Magistrate included his complaint that in his office Inspector Gordon had used a plastic bag to put over his head and face and suffocated him. Indeed, Mr Ndimande referred also to vulgar language that had been used by Inspector Gordon. In his evidence before this court, Mr. Ndimande had also referred

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to very vulgar language that he said had been used against him by Inspector Gordon to try and force him to do what Inspector Gordon wanted him to do.

[19] I must indicate, going back to what I have already said earlier on relating to a statement that was prepared by Colonel Eksteen, that Mr Ndimande testified that he was not given a chance to read that statement, nor was it read back to him. He indicated that he gave some information to Colonel Eksteen, like where he lived and so on but he indicated that a lot of information that was contained in that statement is not information that Colonel Eksteen got from him. When he was asked where Colonel Eksteen would have got that information, because it is information that only Mr Ndimande would have known, Mr Ndimande's response was that Colonel Eksteen would have been told that information by Inspector Gordon, who had got it from him after assaulting him. There was much controversy about whether or not, when Ndimande was taken to the Senior Magistrate Visagie, he was taken there by Inspector Gordon. Ndimande insisted that he was taken there by Inspector Gordon. He said that Inspector Gordon had first left the plaintiff in the cells downstairs in the building where Senior Magistrate Visagie was, and took Ndimande to Senior Magistrate Visagie.

[20] Ndimande testified that the Senior Magistrate asked Inspector

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Gordon to leave the room, obviously because she wanted to be able to speak to Ndimande without Ndimande being under any pressure with regard to what to say, but the defendant said that it was not Gordon who took Ndimande to the Senior Magistrate. I do not think that much turns on this. The fact of the matter is, once he got a chance to tell the Senior Magistrate what had really happened, Mr Ndimande told the Senior Magistrate information that is very similar to the evidence that he presented to this court on the witness stand about assaults on him by Inspector Gordon.

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[21] Before I proceed further, I do need to refer to a statement which appears in EXHIBIT BD72, that is at page 72 of that exhibit, a statement by Inspector Gordon. This statement is particularly relevant to what Inspector Gordon says in the statement he was told by Ndimande. I shall read paragraphs two and three of that statement which is in Afrikaans, Paragraph 2:

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"Op 25 August 2004 om ongeveer 14:20 het ek inligting ontvang dat daar twee op Krugersdorp MAS896/08/04 gearresteer is. Ek het twee verdagtes, Jeffrey Ndimande en Obakeng uitgeboek en na my kantoor te Roodepoort geneem vir ondervraging."

Paragraph three

"Tydens ondervraging met Jeffrey Ndimande het hy 'n rapport aan my gemaak. Ek het hom volgens

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artikel 35 gewaarsku en ek het my vergewis dat hy sy regte verstaan. Hy het voortgegaan en my meegedeel dat hy en ene Owen 'n huis te Chanclyff wou roof. Dinge het egter skeef geloop en hy het die vrou nege maal geskiet, waarna hy en Owen weggehardloop het."

- [22] The question which arose with regard to this statement when Inspector Gordon was cross-examined, related to the use of the word "hy" in paragraph 3 which I have just read. Actually, it is in the last sentence of paragraph 3, namely, "dinge het egter skeefgeloop en hy, (that is the "hy" that I am referring to), het die vrou nege maal geskiet, waarna hy en Owen weggehardloop het". It was suggested to Inspector Gordon that what he says in that sentence read with the previous sentences in that paragraph and the paragraph before is that Ndimande told him that he and Owen wanted to rob a house in Chanclyff, but that things did not go well, and he shot that woman nine times and that he, that is "hy", referred to Ndimande and not to Owen Magagula, or the plaintiff. If that understanding of that sentence in that paragraph is correct, it would mean that Inspector Gordon, according to him, had been told by Ndimande that it was Ndimande who had shot Ms Alberts. This would be contrary to the evidence that Inspector Gordon gave because he testified that Ndimande had told him that it was the plaintiff who had shot the lady. Inspector Gordon resisted

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vigorously the understanding that the word "hy" in that last sentence of paragraph 4 referred to Ndimande and he sought to say that when he was writing that paragraph or that sentence, he meant the plaintiff. It seems to me that, upon a reading of that paragraph, the word "hy" is a reference to Ndimande and not Owen Magagula or the plaintiff, and that the basis upon which Inspector Gordon tried to escape that conclusion, is not justified by a proper reading of paragraphs 2 and 3 of that statement.

10 [23] The plaintiff and Ndimande were taken to court on the 30th August 2004 and they appeared before a Magistrate. It would appear that they applied for bail, which Inspector Gordon opposed, and the matter was remanded to another date when Inspector Gordon was to check certain information relating to the bail application that needed to be checked, relating to the plaintiff's residential address. When the matter once again came before the Magistrate's Court, Inspector Gordon opposed the application, and the Magistrate refused Mr Ndimande's and the plaintiff's application for bail.

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[24] There was no appeal against the Magistrate's decision refusing bail, and the murder case kept on being postponed. It is common cause that at a certain stage blood samples were taken from the plaintiff and Ndimande by the police with a view to ensuring that some DNA tests were conducted in connection with the murder

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case. It took a long time before the results were received. The DNA results did not implicate the plaintiff and Mr Ndimande. The Prosecutor or Senior Public Prosecutor subsequently applied his mind to the case against the plaintiff and Ndimande. The material he had before him included the report or statement taken by, or prepared by the Senior Magistrate in Krugersdorp in which Mr Ndimande indicated that he had been assaulted by Inspector Gordon. The Senior Public Prosecutor, in the light of this, took the decision not to prosecute the plaintiff and Mr Ndimande in regard to the murder case. It may be of course that that was not the only issue that the Senior Public Prosecutor considered. He may also have considered the results of the DNA test, but the long and short of it is that he or she declined to prosecute, and this led to the plaintiff and Ndimande being released. As I have indicated, that was in August 2005. That means that the plaintiff and Mr Ndimande had been in detention for about a year by the time that they were released from police custody.

[25] In the light of the importance of what happened at the office of Inspector Gordon between himself and Ndimande on the 25th August 2004, it is appropriate that I return to that issue. In doing so I wish to point out that during the cross-examination of Mr Ndimande, what was put to him, with regard to his evidence about assault, was in effect a bare denial. It was put to Mr Ndimande that Inspector Gordon would deny having assaulted him or

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suffocated him with a plastic bag such as the one that was described by Mr Ndimande, or having suffocated him in any way. It was never put to Mr Ndimande and no evidence was led that the South African Police Service do not have any plastic bag that would fit the description that he gave in court, namely a plastic bag that is clear in colour, that is written South African Police Services, and that has a blue South African Police badge. No evidence was led to say no such plastic bag is kept by the South African Police Service. It was also not put to Mr Ndimande that there were no other people who came into Inspector Gordon's office while he was with Inspector Gordon. In this regard I am talking about the three or four people, because he testified that at some stage when Inspector Gordon pulled out the plastic bag from his head and face, he found that there were three people in the office in addition to Inspector Gordon and they were kicking him.

[26] Mr Ndimande also gave evidence that he was made to sit on a chair at same stage by Inspector Gordon. This was not denied. It was also not put to him that this was not true. His evidence that at a certain stage there was a knock on the door and there appeared a white lady whose attention he tried to catch, but who looked at him and walked away was also not challenged. The vulgar language that Mr Ndimande testified was used by Inspector Gordon to him during the time that they were in Inspector

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Gordon's office, was also not denied and it was never put to him that Inspector Gordon did not use such language. Indeed, Mr Ndimande's evidence in terms of which he quoted Inspector Gordon, as having asked him in Afrikaans: "Wil jy die waarheid praat?" was never challenged. It was also never put to Mr Ndimande that Inspector Gordon never asked him such a question even in a different context.

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[27] On the defendant's counsel's submission, Ndimande's evidence in relation to assault and what happened in Inspector Gordon's office was a fabrication. I must point out that I observed Mr Ndimande as he gave evidence, and he made a good impression on me and I think that on the whole, his evidence about what happened at Inspector Gordon's office was very detailed. If the South African Police Service do have plastic bags which fit the description that Ndimande gave, the question that would arise is: how would Mr Ndimande have known about the existence of a clear plastic bag which bore a badge of the South African Police. If the position was not that he was telling the truth. If he was fabricating this story, why would he choose to say that Inspector Gordon used a plastic bag that had the South African Police Service badge that was clear in colour? The kind of details that Mr Ndimande gave in his evidence about what happened in Inspector Gordon's office suggest to me that his version has a ring of truth about it. On the other hand, if one looks at the fact that what was put to him was

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simply a bare denial, it becomes difficult to accept that he was fabricating all of this evidence about having been assaulted and having been suffocated with a plastic bag bearing a South African Service badge, about Inspector Gordon asking him in Afrikaans: “Wil jy die waarheid praat” and about a white lady who knocked at the door whose attention he tried to catch but who simply walked away.

[28] As I have indicated, Mr Ndimande even quoted Inspector Gordon, asking in Afrikaans whether Mr Ndimande wanted to speak the truth. There is another aspect to the matter. That is that, when Mr Ndimande got the first opportunity of telling somebody outside the South African Police Service that he had been assaulted by Inspector Gordon, he did so. He told senior Magistrate Visagie that he had been assaulted repeatedly by Inspector Gordon, and that was the first person outside of the South African Police Service that he met since his arrest. Actually I must go back to the day when the plaintiff and Mr Ndimande appeared before the Magistrate’s Court. Both Mr Ndimande and the plaintiff testified that, when they were told in the Magistrate’s Court that their case was being remanded, they said that they raised their hands to indicate to the Magistrate that they had something to say, and when the Magistrate asked them what they wanted to say, they said that they did not want to go with Inspector Gordon. They indicated that they feared that he would assault them or ill-treat

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them. This part of their evidence was never challenged. Inspector Gordon was specifically asked about this piece of evidence, and he said that he did not remember. Of course, if the defendant wanted to challenge that, they could easily have sought the transcript of the proceedings at the Magistrate's Court to see whether on that day the plaintiff and Ndimande had said this to the Magistrate. First it was Ndimande who gave this evidence and it was not challenged and when the plaintiff gave his evidence, he also said the same thing and again it was not challenged. They said that the Magistrate said to them Inspector Gordon would not do anything to them and effectively forced them to go with him. He might not have assaulted them after that or ill-treated them in any way after that.

[29] I must refer to another aspect of the case which I should have referred to earlier on. That is that Ndimande also testified that Inspector Gordon tried to get him to agree to be a state witness against the plaintiff, and promised him that he would be free if he agreed to that. Of course Ndimande did not agree and Ndimande did disclose this to Senior Magistrate Visagie as well when he appeared before her in her office.

[30] When all the evidence is taken into account in its totality, one finds that the two parties in this case have very different versions as to what happened.

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On Mr Ndimande's version he and Inspector Gordon had a very bad relationship from the start because Inspector Gordon who wanted him to confess to something he had not done and wanted him to implicate himself and the plaintiff in something that neither of them had done, and because he resisted doing what Inspector Gordon wanted him to do, Inspector Gordon assaulted him repeatedly. On Mr Ndimande's version, ultimately because of the assaults Ndimande tried to soften his stance, but, at the first opportunity he got to report to somebody who was independent of the South African Police, that he had been assaulted, he did so. That is the one picture. The other picture is the picture that Inspector Gordon sought to paint, namely, that he and Ndimande had a very good relationship from the start because, when he interviewed Ndimande in his office, Ndimande voluntarily and freely implicated himself and the plaintiff in the murder of Ms Alberts without any assault, without any pressure and without any promises. Inspector Gordon could not explain how come, if that was true, Mr Ndimande reported all the things that he reported to Senior Magistrate Visagie because, if one takes the picture that emerges from the evidence of Ndimande, then his behaviour in reporting the assaults on him to Senior Magistrate Visagie is logical, because, before that, he could not report to anybody, since everybody that he came in contact with other than his co-suspect, the plaintiff, was a member of the South African Police Service. In this regard Mr Ndimande had been asked why he did not tell

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Colonel Eksteen that he had been assaulted, but the fact of the matter is that Colonel Eksteen was part of the South African Police Service.

10 [31] There were photographs that were also put up and it was contended that mostly they did not show any injuries, on Mr Ndimande. In this regard I refer to the fact that in the report or statement prepared by Senior Magistrate Visagie, some kind of injuries on Mr Ndimande were referred to. Even if most of the injuries were not shown, the fact of the matter is that the manner in which Mr Ndimande was assaulted was a manner which would not make it easy for him to have visible injuries. Obviously, any police officer knows that, if he assaults a suspect in a certain way as a result of which there are visible injuries, that suspect may have proof of the assault, but a suspect who is assaulted in such a manner that there are no visible injuries will find that he or she is confronted with the contention that there were no visible injuries and therefore it is highly unlikely that he or she was assaulted.

20 [32] When the plaintiff gave evidence, he also indicated that he was assaulted by Inspector Gordon, but I do not propose to go into any detail about his evidence about being assaulted, because there is no claim for damages for assault on him, and the assault on him does not have much of a bearing on the issue whether or not the information that the police had when they arrested him which they say they got from Mr Ndimande, provided them with reasonable

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grounds for the suspicion that he had been involved in the commission of a schedule 1 offence, namely the murder of Ms Alberts.

On a balance of probabilities I am satisfied that Mr Ndimande's version with regard to his evidence that he was assaulted in Inspector Gordon's office by Inspector Gordon and other colleagues of his, is the version that must be preferred between the two versions, and the matter must be decided on the basis that, indeed, Inspector Gordon did assault Ndimande in that office and there are other colleagues of Inspector Gordon who assaulted Mr Ndimande, and that Inspector Gordon's denial of that evidence must be rejected.

[33] This leads to the question: what is the effect of this conclusion on whether or not the police had a reasonable suspicion as required by section 40(1) of the Criminal Procedure Act. Two matters need to be emphasised in this regard. First, when one looks at the evidence given by Mr Ndimande about the interactions that he had with Inspector Gordon at Inspector Gordon's office, and one must remember here that one must leave out the pointing out that was done later, it does not appear that there is much that Mr Ndimande gave to Inspector Gordon to implicate either himself or the plaintiff. In this regard I particularly want to point out that I have looked very carefully at the evidence that was given by Mr Ndimande and

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I looked very carefully at what was put to him by counsel for the defendant. In this regard I want to state that a lot of the evidence that was subsequently given by Inspector Gordon and Inspector Nel was not put to Ndimande, and as I have indicated, it cannot be used against him when he was never given a chance to comment upon it or explain it or defend himself. Accordingly, the conclusion is that there was not much on the information that Mr Ndimande gave Inspector Gordon which implicated Mr Ndimande or the plaintiff, or both, but even if there was, the fact of the matter is that such information was obtained by the illegal use of force or violence by a police officer against a suspect who was defenceless and had his hands handcuffed at the back, and that information could not justify the conclusion or suspicion that the plaintiff had committed the murder of Ms Alberts. The DNA results did not implicate the plaintiff and Ndimande and there was no evidence whatsoever that the police obtained against the plaintiff and the defendant. If the position is that Mr Ndimande did actually implicate the plaintiff or the plaintiff and himself in the murder of Ms Alberts, it can only be that he gave that information because it was clear that the assault would not stop unless he gave Inspector Gordon information that would implicate the two of them and under those circumstances the police could not have acted, or cannot be said to have had reasonable grounds for the suspicion that the plaintiff had committed the murder of Mrs Alberts where, as a result illegal assault by the police on somebody, that person

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ends up giving information to the police that is false, and he gives such information so as to save his life, or save himself from beatings by the police. When the person who is beating a suspect in those circumstances acts on the information given by such a person under those circumstances, he knows that that information may have been given simply to ensure that the assaults stopped, and it can't be said that he has reasonable grounds for that suspicion in those circumstances. That being the case, it seems to me that the requirements of section 4 (1) of the Criminal Procedure Act 1977, were not met and that, therefore, the arrest of the plaintiff was unlawful.

[34] With regard to the claim for damages arising out of detention, counsel for the defendant said that the matter must be approached on the basis that there are two periods involved with regard to the detention of the plaintiff and Ndimande. That is the period prior to their appearance before court and the period after the appearance before court. He said that with regard to the period prior to their appearance in court, if the arrest was unlawful, then the detention was also unlawful if there were no reasonable grounds for the suspicion. He submitted that with regard to the period after their appearance in court, the lawfulness or otherwise of that detention depended on the fact that their further detention after that was based on an order of the Magistrate's Court refusing them bail and remanding them in custody. He submitted that that

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detention was lawful by reason of the fact that it was authorised by an order of court.

[35] Counsel for the plaintiff's approach was that, if the arrest was unlawful, then the entire detention was also unlawful. I am inclined to agree with counsel for the defendant that a distinction does need to be made, because one cannot pretend that, after the Magistrate's Court had refused bail, their detention after that date was not because of the order of the Magistrate's Court. It may well be that, if the plaintiff had pleaded his case differently, namely that he had not relied on the actual detention, but had relied on the opposition of the bail application by the police, and had contended that he suffered damages, because the police had chosen to insist that they should not be given bail, irrespective of what the court decided, it may well be that there may have had a case, but I speculate now. The fact of the matter is that there is an order that was made by the Magistrate's Court. That order was not appealed against, nor was it subjected to a review and that order stood right throughout until the matter was finalised by way of the withdrawal of the charges. That order governed their detention after their appearance in court.

In those circumstances, therefore, I am of the opinion that in respect of the period from the 25th August 2004 to the date when they appeared in court for the first time, that detention was

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unlawful, because the arrest was unlawful, but with regard to the detention from the date that they appeared for the first time in the Magistrate's Court to the time that they were released, I am of the opinion that it has not been shown that that detention was unlawful, because the order of the Magistrate's Court has not been attacked in any way, and it is that order that governed their continued detention.

10 [36] The conclusion that I have reached as outlined above has the result that the plaintiff has not been 100% successful, and it may well be that it cannot be said that he has been substantially successful either, if one has regard to the fact that in relation to the detention period after the first date of appearance in court, I have held that that detention was not unlawful. This affects the issue of the quantum of damages as well as the issue of costs. The parties' counsel did not get an opportunity to address me on the issue of costs in this kind of scenario. I believe that it is a scenario that is very different from what they may have had in mind when the matter was argued earlier. They both had argued
20 the matter on the basis, I think, that it would be clear which party was substantially successful if we did not have a situation where one party was 100% successful.

[37] In those circumstances before I can make any decision on the issue of costs, I would like to give counsel on both sides an opportunity to make submissions as to whether this conclusion

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10 that I have reached means that the plaintiff has been substantially successful or not, or whether it is the defendant who has been substantially successful. I say this at this stage, before I say anything about the issue of quantum, because I thought that if I am going to invite counsel to submit supplementary heads addressing this issue of costs, I may as well give the parties an opportunity in the light of this conclusion to try and see whether they cannot reach an agreement on the issue of the quantum of damages. It seems to me that the conclusion I have reached may well make it very easy for the parties to reach an agreement on the quantum of damages for unlawful arrest and detention prior to the first day of appearance in court.

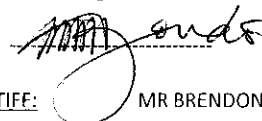
[38] The order that I am going to make, therefore, is the following:

1. It is hereby declared that the arrest of the plaintiff by the South African Police on or about 25 August 2004 was unlawful.
2. The detention of the plaintiff by the South African police from 25 August 2004 to the first date of appearance in court was unlawful.
3. The plaintiff's claim for damages for unlawful detention from the date of his first appearance in court in August 2004 to his release in August 2005 is dismissed.
4. The plaintiff is entitled to such damages for unlawful arrest and detention between the 25th August 2004 and the first date of appearance in court as maybe agreed upon between the parties or as may be decided by this court if the parties are not able to reach

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agreement.

5. Should the parties not reach an agreement on the quantum of damages within the next 20 calendar days from Monday, 20th June, 2011 the parties may approach the court with a request that I determine the quantum.
6. Both parties are invited to submit written argument on the issue of costs in the light of the limited success of the plaintiff with special reference to the question whether or not it can be said that the plaintiff has been substantially successful, and in this regard the plaintiff must deliver and serve written argument on the issue of cost, within 14 calendar days from Monday, 20th June 2011, and the defendant must deliver its written argument within seven days thereafter.



ON BEHALF OF THE PLAINTIFF: MR BRENDON GEACH SC & MR SEIMA

INSTRUCTED BY: A.P. PHEFADU INC, PRETORIA

ON BEHALF OF THE DEFENDANT: K M MOKOTEDI

INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA

DATE OF HEARING: 11 FEBRUARY 2011

DATE OF JUDGMENT: 17 JUNE 2011
