

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE NORTH GAUTENG HIGH COURT, PRETORIA (Republic of South Africa)

Saakno: / Case number: **58034 / 2008**
Datum verhoor: / Date heard: **16 – 20 / 04 / 2012**
Datum gelewer: / Date delivered: **01 / 06 / 2012**

In the matter between:-

OPULENT LESIBA MOLOPA

Plaintiff

and

MINISTER OF SAFETY & SECURITY
JOHN BENJAMIN JONES

First Defendant
Second Defendant

Coram: Lacock, J

JUDGMENT

LACOCK, J

[1] The plaintiff, a 32 year old male, residing in Atteridgeville, Pretoria, and employed as a judge's clerk at the High Court, Pretoria, had a summons issued against the first and second defendants for payment of an amount of R2.5

million in respect of damages allegedly suffered by reason of his unlawful arrest and detention and being unlawfully assaulted by members of the South African Police Service (SAPS). The first defendant is the Minister of Safety and Security, and the second defendant was at all relevant times the investigating officer in respect of an armed robbery and murder case investigated by SAPS under police docket CAS 44/057/2007. Both defendants denied liability for payment of the damages claimed.

[2] At the commencement of the trial and at the request of counsel for all parties, I ruled that the trial will proceed on the issue of liability only, and that the question of damages be separated for later determination if necessary.

[3] The following factual circumstances were not in dispute:

3.1 During the evening of 2 May 2007, a certain Mr Feng was robbed and fatally wounded at this home in St Andrew's Street, Edenvale. During the robbery gun shots were exchanged between Feng and the robbers. During this encounter one of the robbers, know as Surprise, was shot and removed to the Thembisa Hospital for treatment. He did not survive the gunshot wound and died in hospital.

3.2 During the same evening of 2 May 2007, a cousin of

the plaintiff, one Gideon, was hospitalized and treated for a gunshot wound at the said Thembisa Hospital.

- 3.3 Subsequent to Gideon's admission to Thembisa Hospital, the plaintiff, Mr Howick Mashaba Molatedi (Mashaba) and one Bridgitte (also a cousin of Gideon), arrived at the said hospital in a Volkswagen Citi Golf vehicle. Only the plaintiff was allowed to see Gideon.
- 3.4 On 3 May 2007 Gideon discharged himself from the Thembisa Hospital. The police were unable to locate Gideon after he had left the hospital.
- 3.5 At approximately 02:00 on 15 May 2007 a number of police officials arrested Mashaba at his home in Atteridgeville and ransacked his abode in search of a firearm. They did not find a firearm.
- 3.6 At approximately 03:00 on the same day the aforesaid police officers and Mashaba arrived at the home of the plaintiff in Atteridgeville where he lived with his parents. Here the plaintiff was arrested and held in custody by warrant officer Beneke of SAPS whilst the other members of SAPS searched the plaintiff's house for firearms. No firearm was found.

No warrant of arrest or a search warrant was issued in respect of these police actions.

3.7 The plaintiff and Mashaba were taken to the Wierdabrug police station where they arrived at approximately 05:00 that morning.

3.8 At approximately 11:10 the same morning the plaintiff and Mashaba were removed by a police official, one Khumalo, and the second defendant respectively to the Edenvale police station in Edenvale.

3.9 On the instructions of the plaintiff's mother, attorney Mkhabela went to the Edenvale police station on 15 May to see the plaintiff. Although Mr Mkhabela arrived at the said police station at approximately 15:30, he was only allowed to see the plaintiff at about 20:00. He immediately noticed that the plaintiff was seriously injured, and he arranged with the station commander to have the plaintiff taken to a hospital and to assist him to lay a charge of assault against the people who allegedly assaulted the plaintiff. These requests were however ignored.

3.10 During the early hours of 16 May 2007, the second defendant and Khumalo removed the plaintiff from

his holding cell at Edenvale police station. They went to the home of Gideon in Centurion as pointed out by the plaintiff, but no one was at home at this address. From there the plaintiff took them to Gideon's mother's house, his sister's house and the house of Gideon's girlfriend, Phepha, but they were unable to locate Gideon.

3.11 On the same day (16 May) attorney Mkhabela addressed a letter to SAPS at Edenvale, the contents whereof read,

"RE: S v OPULENT LESIBA MOLOPA

- 1. The above matter has reference.*
- 2. We confirm having visited at Edenvale Police Station instant regarding the murder charges that our client is facing.*
- 3. Our client was assaulted by members of the South African Police Services during and after his arrest.*
- 4. One of the assaulting officers is personally known to him as Godfrey and can be easily pointed out during an identification parade.*
- 5. We humbly request that he be taken for medical observation and a proper J88 Medical Report be compiled.*
- 6. We also request that you assist our client in opening a criminal charge of assault with intent to do grievous bodily harm.*
- 7. We trust you find the above in order."*

3.12 On 17 May 2007 the plaintiff was taken to the Regional Court, Germiston, where he was officially charged for *inter alia* robbery and murder. The case

was remanded to 24 May 2007.

3.13 After the case was postponed, the plaintiff was taken to the Boksburg Correctional Centre, but was refused admission because of his injuries. He was again taken to Edenvale police station where he was locked into a holding cell.

3.14 On 18 May 2007 the plaintiff was taken by the police to Thembisa Hospital where he received some pills and ointment for his eyes. From here the plaintiff was taken again to the Boksburg Correctional Centre where he was admitted to the prison hospital. He was treated and remained in this hospital for approximately three months.

3.15 On 31 May 2007 the plaintiff and Mashaba brought a bail application before the Germiston Regional Court. Both were represented by counsel. The plaintiff and Mashaba testified; and the second defendant testified on behalf of the State in its opposition to the application. Bail was refused.

3.16 Following upon a successful appeal against the aforesaid refusal of his application for bail, the plaintiff was released from custody on 26 October 2007.

3.17 Twelve (12) days later, on 7 November 2007, all charges were dropped against the plaintiff.

[4] In their plea the defendants denied that the plaintiff was assaulted by members of SAPS as alleged in the particulars of claim, and further pleaded that the arrest of the plaintiff was lawfully effected in terms of section 40(1)(b) of the Criminal Procedure Act of 1977 (the CPA).

4.1 Adv van Nieuwenhuizen SC, on behalf of the defendants, conceded that, should it be found that the arrest of the plaintiff was unlawful, it follows that his detention from the time of his arrest till the date on which bail was refused, was likewise unlawful.

4.2 The defendants deny any liability for the time the plaintiff was incarcerated since the date on which bail was refused by the regional magistrate. It is submitted that the dismissal of the application for bail was a judicial function performed by the presiding magistrate, and no fault can be attributed to the defendants for any wrongful exercise of such discretion by the magistrate.

[5] It is common cause that the *onus* of proving the alleged

assault rests on the plaintiff, whilst the *onus* to prove the lawfulness of the arrest and detention rests on the defendants. See **MINISTER OF LAW AND ORDER AND OTHERS v HURLEY AND ANOTHER** 1986 (3) SA 568 (A) at 589 E to F. I will deal separately hereunder with the question of *onus* in respect of the plaintiff's detention following upon the refusal of bail.

It is further common cause that the second defendant at all relevant times for purposes of this case was an employee of the first defendant and acted within the course and scope of his employment as such.

[6] I shall first deal with the alleged assault.

[7] The plaintiff testified that at about 03:00 in the morning on 15 May 2007, approximately 11 members of SAPS came to his house and after gaining entry, demanded him to hand over his firearms and further wanted him to disclose the whereabouts of Gideon. The police refused to accept his explanation that he did not possess a firearm and did not know where Gideon is, whereafter they searched his (parental) home for firearms, tied his hands behind his back and took him to a nearby piece of deserted open veld where he was severely assaulted. He testified that he was suffocated with a plastic bag over his head, slapped and

kicked, and that he was threatened that his private parts would be cut off with a bolt cutter, and that he would be shot. All the time while the plaintiff was assaulted, and which assault lasted for about one hour, the police wanted to know where Gideon was and where the firearm was.

7.1 The plaintiff's evidence of this assault was corroborated by Mashaba who was present and witnessed the entire event.

7.2 Further uncontested corroboration of the assault on the plaintiff is to be found in the evidence of attorney Mkhabela who testified that when he visited the plaintiff at the Edenvale police station on 15 May 2007, the latter was seriously injured.

7.3 Warrant officer Beneke testified that he was present when Mashaba and the plaintiff were arrested at their respective homes, but denied that either Mashaba or the plaintiff was assaulted by the police as alleged. He further testified that the plaintiff, when arrested, had no visible injuries on his person.

[8] Ms van Nieuwenhuizen conceded, correctly so, that particularly in view of the evidence of attorney Mkhabela, no inference can be drawn other than that the plaintiff was assaulted by members of the SAPS in the period between

his arrest at his parental home and his arrival at Edenvale police station later during that day. In the absence of any evidence to the contrary there is no reason not to accept the evidence of the plaintiff and Mashaba in this respect. It therefore follows that the plaintiff has succeeded in proving on a balance of probabilities that he was unlawfully assaulted by members of the SAPS whilst in police custody on 15 May 2007.

[9] It is common cause that the second defendant was neither present nor involved when the plaintiff was assaulted, and cannot be held liable for any damages the plaintiff may have suffered as a result thereof. Since it is common cause that, at the time when plaintiff was assaulted by members of SAPS, these members who assaulted him were employed by the first defendant and acted in the course and scope of their employment, the first defendant is liable towards the plaintiff for any damages he may prove to have suffered as a consequence of that assault.

[10] Section 40(1)(b) of the CPA relied upon by the defendants as justification for the alleged lawful arrest of the plaintiff, reads,

“(1) A peace officer may without warrant arrest any person-

a) Who commits or attempts to commit any offence in his

- presence;*
- b) *Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"*

In **DUNCAN v MINISTER OF LAW AND ORDER** 1986 (2) 805 (AD) it was held,

"The so-called jurisdictional facts which must exist before the power conferred to by s 40 (1) (b) of the present Act may be invoked, are as follows:

- 1) *The arrestor must be a peace officer.*
- 2) *He must entertain a suspicion.*
- 3) *It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).*
- 4) *That suspicion must rest on reasonable grounds."*

(at 818 G to H).

The only jurisdictional fact in issue in this matter is whether the arrestor, warrant officer Beneke (Beneke) had reasonable grounds or a reasonable suspicion justifying the arrest of the plaintiff. It is trite that the *onus* rests on the defendants to prove the presence of this jurisdictional fact. Although Adv Botha SC, appearing for the plaintiff, initially submitted that, on the strength of the judgment in **LOUW AND ANOTHER v MINISTER OF SAFETY & SECURITY AND OTHERS**, 2006 (2) SACR 178 (T) and other provincial judgments that followed the Louw judgment, the defendants had to prove a fifth jurisdictional fact, i.e. "if

there is no reasonable apprehension that the subject will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest" (Louw at 187 (d) to (e)), he abandoned this submission when the judgment of the Supreme Court of Appeal in **MINISTER OF SAFETY & SECURITY v SEKHOTO** 2011 (5) SA 367 (SCA) was brought to his attention. The aforesaid approach in **LOUW (supra)** was explicitly rejected by the SCA.

" *The four express jurisdictional facts for a defence based on s 40(1)(b) have been set out earlier, but, to repeat the salient wording: 'a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1'. Schedule 1 offences are serious offences.*

With all due respect to the different High Court judgments referred to, applying all the interpretational skills at my disposal and taking the words of Langa CJ in Hyundai seriously, I am unable to find anything in the provision which leads to the conclusion that there is, somewhere in the words, a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law."
(at 377 D to F).

[11] What therefore needs to be determined is whether Beneke had reasonable grounds to suspect that the plaintiff committed the crimes of murder and robbery and for which he was arrested. The test to be applied for this purpose is

an objective one.

"And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion."

(DUNCAN v MINISTER OF LAW & ORDER (supra) at 814D). See further **MVU v MINISTER OF SAFETY & SECURITY**, 2009 (2) SACR 291 (GSJ) at 298 C.

- [12] The plaintiff impressed me as an honest and reliable witness. He had a clear recollection of the ordeal he was subjected to by the members of SAPS during the early hours of 15 May 2007, and was able to describe the chain of events during his arrest and his detention in particularity. He did not contradict himself in any material respect, and did not revert to conjecture and speculation during his testimony. I do not agree with Ms van Nieuwenhuizen's submission that the plaintiff appeared to be uneasy in the witness stand. To my mind he came across as a confident and self-assured young man who knew what he testified about and who believed in the veracity of his evidence. His evidence, and more particularly that he was brutally assaulted by the police, was convincingly corroborated by Mashaba and attorney Mkhabela. Warrant officer Beneke however was, to say the least, an untruthful and pathetic witness. He blatantly and deliberately falsely

denied that the plaintiff was assaulted in his presence whilst in police custody after his arrest. He was extremely vague and uncertain and did not hesitate for a moment to adjust his evidence whenever the shoe pinched. For instance:

12.1 He testified that, when he arrested the plaintiff, he handcuffed him with police cuffs. When he realized that the plaintiff's testimony viz that his hands were tied behind his back with a cable tie was not disputed, he immediately backed down and said that he was now not certain any more.

12.2 On page 170 of the record Mr Beneke testified as follows:

"Meneer u is baie vaag oor wat gebeur het. U het op 'n stadium ook gesê jy het die afleiding gemaak toe Mashaba sê dat Gideon en ...[tussenbei] --- Hulle was saam.

En Molopa was saam ... [tussenbei] met die roof is. Was die vraag spesifiek gevra aan Mashaba wie was saam met jou tydens die roof? --- Ek het nie die vraag gevra nie nee.

Het u gehoor iemand vra daardie vraag? --- Daar was baie mense saam met my.

Nee, nee luister na my vraag. Het u gehoor een van die beamptes vra daardie vraag? --- Ek verstaan nie 'n swart taal nie. Ek het geen kennis van swart tale nie so ek kan nie sê daar is iemand wat daardie vraag gevra het nie.

HOF: Maar wat u verstaan het, het u in 'n taal wat u verstaan

het gehoor of iemand daardie vraag gevra het? --- Nee."

12.3 At first he testified that he obtained information regarding the robbery and murder from an unknown police official at Edenvale police station. Later on he adjusted his evidence by stating that he could have obtained this information from the investigating officer or his commanding officer.

Other instances of Beneke's evasive evidence will become apparent from his testimony quoted hereunder.

Mashaba too made a good impression on me as a witness, and I have no hesitation to accept his evidence as reliable and credible. It is correct, as pointed out by Ms van Nieuwenhuizen, that his evidence differed from that of the plaintiff in respect of whether on their way to the hospital where Gideon was hospitalized they first met other people at the Edenvale offramp, and who dropped who off first after their return from the hospital, but I do not think that Mashaba or the plaintiff lied about these events. Since the plaintiff was the person with whom Gideon made the telephonic arrangements to come to the hospital, and Mashaba was merely asked to accompany him, one would expect that the plaintiff would have remembered the chain

of events in more detail than Mashaba. The fact that Mashaba did not remember all detail does not mean that his evidence should be regarded as unreliable.

By reason of the aforesaid I am satisfied that this matter should be resolved on the strength of the evidence of the plaintiff as corroborated by Mashaba and attorney Mkhabela. The evidence of Mr Beneke as far as it differs from that of Mashaba and the plaintiff, is rejected.

- [13] It is common cause that, on the day when Mashaba and the plaintiff were arrested, Gideon was the main suspect in the robbery and murder of the late Mr Feng. This is evident from the undisputed evidence of the plaintiff in respect of his first encounter with the second defendant after his arrest, as well as from the contents of the record of the bail application. Therefore, had Beneke made enquiries at Edenvale police station about this incident, he would probably have been told or alerted to the name of Gideon as one of the suspects. This probability is strengthened by the evidence of Mashaba and the plaintiff who testified that, when confronted by the police in the early hours of the morning of 15 May, they (the police) demanded to know where Gideon is. Beneke also knew that the police were looking for a firearm used during the robbery. It is improbable that, when making enquiries about the case, he

would not have been given the name of the main suspect. I therefore find that after Beneke received information from an informer as testified by himself and he followed up that information at Edenvale police station, he knew that the main suspect in the case was a certain Gideon and that the police were still looking for a firearm used at the crime scene. His denial that the police was after Gideon's blood and that he heard the name of Gideon for the first time from Mashaba, during his arrest, is therefore rejected.

[14] If, as testified by Beneke, that, according to his information received from an informer, Mashaba was a suspect in the murder and robbery case, and that Mashaba tendered the names of the other culprits involved, why then was it necessary to assault Mashaba and the plaintiff? The evidence of Mashaba and the plaintiff viz that they were assaulted in an effort to compel them to reveal the whereabouts of Gideon, is far more probable.

[15] Beneke explained the grounds on which he suspected that the plaintiff was one of the perpetrators involved in the murder and robbery of the late Mr Feng in the following terms:

"Ek het inligting ontvang van 'n betroubare bron soos ek sê dat hy aan my inligting kan verskaf ten opsigte van 'n moord en gewapende roof wat in Johannesburg omgewing plaasgevind het waarby 'n

redelike prominente Sjinees, 'n Sjinese besigheidsman doodgeskiet is. Dit het my 'n wyle gevat om uit te vind dat dit in Edenvale Polisiestasie omgewing was en ek het met, ek kan nie onthou met 'n polisiebeampte by Edenvale Polisiestasie kontak gemaak en sekere aspekte rondom die inligting wat ek ontvang het bevestig ten opsigte van die redelike prominente Sjinees wat doodgeskiet is."

(Record p. 150)

"Hierdie saak was nie u, u was nie ondersoekbeampte in hierdie saak nie, is dit korrek? --- Glad nie. Ek was glad nie, ek het inligting ontvang ten opsigte van hierdie saak, dit is nie, dit hou glad nie verband met enige sake van Wierdabrug nie. Ek het net behulpsaam, ek het basies die ondersoekbeampte behulpsaam gewees om die verdagte te arresteer."

(Record p. 156)

"Maar u het nou spesifiek vir die eiser daardie dag gearresteer. Hoekom op sterkte van watse inligting het u hom gearresteer? --- Ek het net inligting gehad ten opsigte van Mashaba en Mashaba het aan my, het te kenne gegee dat daar was vier mense wat saam met hom was en toe hy sê saam met hom was het ek afgelei dat hulle saam was tydens die roof daarom het ek die tweede verdagte ook gearresteer."

(Record p. 157)

"So as dit dan korrek verstaan het u 'n redelike vermoede gevorm op sterkte van wat Mashaba gesê het en die inligting tot u beskikking dat die eiser ... [tussenbei] --- Moontlik ook kon betrokke wees by die gewapende roof."

(Record p. 157)

"HOF: Ek probeer net verstaan hoe die polisie se hele ondersoek in hierdie aangeleentheid geloop het. Verstaan ek dit reg dat u was nie deur 'n ondersoekbeampte gekontak en gesê wees my asseblief behulpsaam met hierdie moord en roof nie? --- Edelaagbare ek het hulle vir Edenvale Polisiestasie na 'n proses het ons by Edenvale Polisiestasie uitgekom."

Ja-nee ek verstaan dit ek gaan nou terugkom daarnatoe. Maar voordat u nou die inligting ontvang het? --- Nee ...[tussenbei]

Is u nie gekontak deur 'n ondersoekbeampte? --- Nee.

En te sê luister hier is roof en moord en ek soek die mense wat daarby betrokke was nie? --- Nee.

U het inligting gekry? --- Ek het inligting van 'n betroubare bron gekry.

Ja en op sterkte van daardie inligting gaan u heen en u kontak vir wie? --- En ons begin, ek val nie net in die pad en sê right ons gaan nou die man arresteer, want ek hoor dat die advokaat sê vir my ons moet daardie man gaan arresteer nie. Dit werk ongelukkig nie so nie, want dit is waar die eiser vandaan kom.

Nee ek verstaan dit. --- Ons probeer om soveel inligting as wat ek kan kry ten opsigte van die saak ek moet iets bevestig. Die beriggewer het na my toe gekom en gesê daar is 'n prominente Sjinees in Johannesburg doodgeskiet. En hierdie en hierdie of net hierdie man, net een man is betrokke by die voorval.

Goed ek verstaan dit. Nou probeer u vasstel? --- Korrek.

Wat was die omstandighede waaronder die man ...[tussenbei] --- Korrek.

Gedood is. --- Korrek.

En wie is die logiese persoon met wie u behoort te praat? --- Die polisiestasie, ondersoekbeampte of die bevelvoerder van een van die ondersoekbeampte.

Dit is tog logies die ondersoekbeampte nie waar nie? En u kontak nie die ondersoekbeampte nie? --- Dit kan die bevelvoerder van die ondersoekbeamptes gewees het.

Maar meneer is die logiese, ek probeer net u werkswyse verstaan. --- Ja.

Want as die polisie op hierdie tipe van inligting mense gaan arresteer in die middel van die nag dan ys ek waar ek hier sit. --- Nee korrek.

Die logiese is tog u kontak die ondersoekbeampte, nie war nie? --- Korrek.

Maar u het dit nie gedoen nie? --- Ek kan nie sê of ek met, soos ek sê kan nie sê of ek met ondersoekbeampte gepraat het of met wie ek gepraat het nie, maar ek het met iemand van Edenvale gepraat wat sekere dinge bevestig het. Soos wat is die saaknommer."

(Record p. 173 to 175)

"Kom ons vat nou net hierdie hele gebeurde. Julle is by Mashaba hy word onder bedwang gebring. Die vraag word nooit pertinent wat u gehoor het vir hom gevra nie u maak 'n afleiding dat op Opulent is betrokke by 'n roof. Gaan huis toe, na Opulent se huis toe die eiser sertifiseer huis toe, u staan so u weet nie of hulle die huis binne is of nie u het dit nie gesien nie, iemand bring hom en sê dit is Opulent ons het niks gevind nie, een vuurwapen gevind nie? Is ek reg nog? --- Korrek.

En op grond daarvan arresteer u hom en plaas hom in hegtenis? --- Mashaba het vir my gesê hy was saamgewees.

Het u vir mnr Molopa een vraag gevra voor u hom gaan arresteer het? --- Nee ek het vir Mashaba gevra is dit die man en hy het gesê ja dit is die man.

Meneer u weet julle gaan na 'n man se huis toe in die middel van die nag 'n betroubare bron se inligting. Daar word 'n huis se deur afgeskop, hy word op die grond platgedruk in die vroeë oggendure 02:00 – 03:00. Hy sê net Opulent en Gideon en Surprise of wie ook al was saam. Hy word gearresteer daardie tyd. U gaan na 'n ander huis toe en net dit, u vra die gearresteerde persoon nou die eiser nie een vraag nie en u arresteer hom? --- Ek het vir die man wat in my voertuig was gevra die man? Toe sê hy dit is die man wat saam was.

Herhaal die een nou, u het watse voertuig? --- Mashaba wat in my voertuig was het vir my aangedui dat dit is die man wat saam was.

Ja dit was u getuienis. My vraag aan u is u vra mnr Molopa nie een vraag nie? --- Ek is nie die ondersoekbeampte nie.

Maar u is die arresterende beampte? --- Ja.

U doen geen moeite om hom 'n paar vrae te vra om u te vergewis ek het redelike gronde om hierdie man vir so 'n ernstige misdaad van sy Vryheid te ontnem nie? --- Meneer ek kan nie vir u sê wat ek vyf jaar terug op een spesifieke dag gedoen het, presies gedoen het so laat het ek opgestaan, so laat het ek my tande geborsel, so laat het ek dit gedoen, so laat het ek dat gedoen nie. Ek kan nie dit vir u sê nie.

HOF: Nee mnr Beneke dit is nie die punt nie. Ek kan dit verseker ook nie doen nie. Die pertinente vraag van die advokaat was u, uself wat daar in die getuiebank staan wat die arresterende polisiebeampte was, u gaan arresteer 'n man op 'n baie ernstige klagte van roof en moord? --- Korrek.

Op inligting van iemand wat bloot sê ons was saam, die eiser was ook saam? --- Korrek.

Dit is al inligting wat u het? --- Korrek.

En u vermoed hy verwys na die roof en die moord? --- Korrek.

Gaan arresteer u hierdie man, u vra hom nie 'n enkele vraag of hy betrokke was stem jy saam met wat Mashaba sê jy was saamgewees, u vra hom nie 'n enkele vraag nie en dit is nie asof u nie kan onthou nie, dit is u eie getuienis is dat u hom geen vrae gevra het nie? --- Ek kan nie vir u sê of ek hom vrae gevra het nie. Ek kan nie sê wat ek hom gevra het nie. Ek kan nie ...[tussenbei]

Nou kan u dan ... [tussenbei] --- Ek kan nie onthou dat ek het daar was so 'n voorval nie.

Ekskuus ek is jammer. --- Ek kan nie onthou.

Maar kan u onthou of u enige ander vermoede of gronde gehad het waarop u vermoed het dat die eiser betrokke was by hierdie misdryf behalwe dit wat Mashaba vir u gesê het? --- Ek hoor wat, ek hoor wat die advokaat vir my sê ek hoor wat u vir my sê, ek kan nie dink dat ek hom net gearresteer het nie. Nee ek kan dit nie dink nie, maar ek kan nie vir u sê watse vrae of ek hom vrae gevra het hoeveel vrae ek het hom gevra het, watse tipe vrae ek hom gevra het nie, maar ek sal hom nie net arresteer op gronde van iets wat uit die lug uit val nie.

Maar u weet dit is nie heeltemal so eenvoudig nie mnr Beneke laat

ek net vir u verduidelik. Hierdie dis 'n siviele eis. --- Korrek.

En die bewering wat namens die polisie in hierdie pleitstukke gemaak is, is dat die polisie het redelike gronde gehad om te vermoed dat die eiser by 'n misdryf betrokke was. --- Korrek.

Nou by wie anders as die arresterende beampte kon die verweerders daardie inligting gekry het. --- Ja.

Miskien kan u vir my help. --- Ek kan nie, soos ek sê ek weet nie wat ek vir die man, wat ek vir wie gevra het nie. Ek weet nie wat ek gesê het nie, ek weet nie alles wat gevra is nie. Ek weet die man is gearresteer vir 'n gewapende roof en 'n moord. Ek weet ek het gesê ek is van die polisie ons kom hierdie huis visenteer. Daar was beweging binnekant, daar was 'n gewapende roof gewees, ek het die deur oopforseer by die eerste huis. Ek het die man wat binne was, hy was besig om in 'n kas in te klim. Ek weet nie wat is binne-in die kas nie. Ek het hom uit die kas uitgetrek, hy het homself, hy het hom geïdentifiseer as die man wat ek soek. Daar is gesê dat die mense was saam ek het dit genoem in my verklaring, ek kan nie onthou of ek die vrae gevra het nie en of iemand anders die vrae gevra het nie. Of die ene so gesê het of daardie so gesê het nie, ek kan nie, ek kan nie vir u dit sê nie dit is vyf jaar terug. Dit is een aand in vyf jaar terug waar ek op daardie, ek het vir die advokaat gesê ek het in die 80 arrestasies gemaak, watter een spesifiek die ene is ek kan nie onthou nie. Ek weet daar was 'n voorval ek weet daar was 'n ding van Edenvale wat ek op gewerk het. Dit kan wees dat ek met Jones gepraat het. Dit kan wees dat hy vir my Surprise se naam genoem het en daarom het ek die man gearresteer omdat die man sê maar daardie ene en daardie ene en Surprise was saam en dat ek die naam Surprise gehad het. Ek kan nie onthou nie. Dit is nie, ek weet dit is nie in my verklaring nie."

(Record p. 181 to 184)

"Die advokaat het nou aan u gestel dat die polisie toe hulle by die eiser kom mnr Mashaba ook, maar terwyl ons met die eiser se saak is kom ons konsentreer op wat daar gebeur het. Hulle wou nommer 1 by hom weet waar is 'n vuurwapen, hulle het 'n vuurwapen gesoek? --- Korrek.

Stem u daarmee saam? --- Korrek.

Nommer 2 en dit is wat hy getuig het, het hy gesê hulle wou by hom weet waar is ene Gideon? --- Korrek.

Is dit so? --- Dit kan so wees, dit is seker so ja. Heel moontlik, ja.

Ja maar nou gee u vir my 'n klomp antwoorde? --- Ja dit is so.

Dit kan so wees, heel moontlik. --- Dit is so.

Ja ek is is nie seker wat is u antwoord nie? --- Dit is so, maar ek was nie daar nie so ek kan nie vir u sê dit is wat daar gesê is nie.

Goed. Kom ons wees dan billik teenoor uself. As die eiser getuig dat dit is primêr die twee dinge wat die polisie by hom wou weet waar is 'n vuurwapen en waar is Gideon? --- Korrek.

Dan kan u dit nie betwis nie? --- Ek kan nie."

(Record p. 188)

I have already found that, on a balance of probabilities, Mashaba and the plaintiff were arrested and tortured not because they were suspects in the murder and robbery case, but to assist the police in their efforts to locate Gideon. But even if I am wrong in my assessment of the evidence, I am convinced that, on the version of Beneke, no reasonable grounds, objectively considered, were present justifying the arrest of the plaintiff.

15.1 Beneke was not the investigating officer in the Feng case, neither did he arrest the plaintiff on the instructions of the investigating officer. He merely acted upon information received from a "betroubare bron" without revealing either the identity of the

informer or the nature and contents of the information received.

15.2 His efforts to confirm this information appears to be extremely cursory. The least one would have expected was for him to share this information with the investigating officer and to obtain his views on the necessity to arrest the plaintiff without a warrant. This was not done.

15.3 The only information Beneke had that the plaintiff might be involved in the murder and robbery case, was the alleged statement by Mashaba that he (Mashaba), Gideon, Surprise and the plaintiff were together. From this information Beneke inferred that Mashaba meant that they were all involved when the deceased was robbed and killed. He never established or even attempted to establish from Mashaba whether he thereby meant or implied that the four of them committed the crime.

15.4 When the plaintiff was arrested Beneke did not even ask him a single question to ascertain whether the plaintiff was involved in the alleged offence. See his evidence quoted above.

15.5 No firearm was found in the possession or under the control of the plaintiff.

15.6 Beneke did not even know that Gideon had left the hospital in the same vehicle driven by the plaintiff when he had visited Gideon at the hospital on the evening of 2 May, the day after Mr Feng was shot.

[16] For these reasons I find that the first defendant failed to prove that the plaintiff was lawfully arrested.

[17] Although Ms van Nieuwenhuizen conceded that, should I find that the plaintiff was unlawfully arrested, it follows that he was unlawfully detained till the date of his application for bail was refused, I nevertheless find it necessary to deal with this period of detention since the second defendant as the investigating officer surfaced for the first time and came on the scene shortly after the plaintiff was arrested, and since then Beneke was no longer involved or responsible for the plaintiff's further detention.

17.1 The second defendant did not testify. Save for his testimony in the bail application, no evidence was tendered on behalf of the respondents justifying the detention of the plaintiff subsequent to his arrest.

17.2 In the absence of any evidence justifying the plaintiff's further detention, and in view of my aforesaid finding that the plaintiff was unlawfully arrested, it follows that no other inference can be drawn but that the respondents failed to discharge the *onus* of proving the lawfulness of the further detention of the plaintiff for the period since he was arrested until the date on which his bail application was dismissed.

[18] It will be noted that I have not dealt with the issue of the exercising of their discretion by Beneke and the second defendant (see **MINISTER OF SAFETY & SECURITY v SEKHOTO (supra)**,) since this issue, by reason of my aforesaid finding, did not arise. This cause of action was in any event not pleaded and relied upon in the plaintiff's particulars of claim.

[19] What remains to be decided is whether the defendants are liable for the (unlawful) detention of the plaintiff for the period since the date his bail application was dismissed till the date of his release from custody.

[20] This cause of action was pleaded as follows in the plaintiff's particulars of claim:

"4.7 The 2nd Defendant was the Investigating Officer. He opposed

bail well knowing that:

4.7.1 He had no sworn statement connecting the Plaintiff to any of the alleged crimes;

4.7.2 There existed no extrinsic evidence against the Plaintiff like fingerprints, ballistics, etc.

4.7.3 He had no evidence that the Plaintiff assisted a certain "Gideon" to discharge himself from hospital.

4.7.4 As a result of the 2nd Defendant's opposition to bail, the bail application of the Plaintiff was refused and was the Plaintiff incarcerated until 24 October 2007 when bail was granted on Appeal by the WLD.

4.9 On 7 November 2007 all charges were withdrawn against the Plaintiff.

4.10 The aforesaid detention was unlawfull and was done on the instance and insistence of the 2nd Defendant."

[21] To my mind Ms van Niewenhuizen is correct in submitting that the *onus* rests on the plaintiff to prove on a balance of probabilities that the second defendant's conduct caused or at least contributed to the magistrate's decision to refuse bail. The plaintiff's further detention since bail was refused except to the limited extent referred to hereunder, falls outside the ambit of section 40 of the CPA and, once an arrestee is charged and brought before a court of law,

"... the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court."

(SEKHOTO (supra) at 383D).

[22] This however does not mean that the investigating officer is, once a suspect is brought before a court and charged, off the hook. The legal duty owed by the State and its organs to members of the public in terms of the Constitution had been comprehensively dealt with by the Constitutional Court in **CARMICHELE v MINISTER OF SAFETY & SECURITY AND ANOTHER**, 2001 (4) SA 938 (CC). It will be presumptuous of me to attempt to traverse the legal principles developed in that judgment, and I will therefore confine myself to quoting from the judgment those extracts applicable to this matter.

"Under both the IC and the Constitution, the Bill of Rights entrenches the right to life, human dignity and freedom and security of the person. The Bill of Rights binds the State and all of its organs. Section 7(1) of the IC provided:

'This chapter shall bind all legislative and executive organs of State at all levels of government.'

Section 8(1) of the Constitution provides:

'The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.'

It follows that there is a duty imposed on the State and all its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."

(at 957 D to F)

"The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

In the present case the complaint against Klein (the investigating officer in Eureka's case) is not that he was guilty of a mere omission. Coetzee was in custody and Klein had a clear duty to bring to the attention of the prosecutor any factors known to him relevant to the exercise by the magistrate of his discretion to admit Coetzee to bail. He made a positive recommendation that Coetzee should be released on warning in the clear knowledge that the prosecutor would act on such recommendation."

(at 965 A to C)

"The evidence is, in our view, sufficient to justify a conclusion that, if bail had been opposed and if all relevant information pertaining to Coetzee's background and sexual problems had been placed before the magistrate, bail might have been refused. That is sufficient to put the respondents on their defence in relation to this issue."

(at 969 G to H)

Although the Constitutional Court dealt in **CARMICHELE** with a case in which bail was allegedly unlawfully granted or the suspect released on his own recognizance, the aforesaid principles are, to my mind, *mutatis mutandi* applicable to the present matter.

22.1 The aforesaid principles were applied by Tshiki J in **BOTHA v MINISTER OF SAFETY & SECURITY AND OTHERS**, 2012 (1) SACR 305 (ECP). Having

regard *inter alia* to the statutory duties of members of SAPS in accordance with section 13 of the South African Police Service Act, 68 of 1995, and relying on the following *dictum* in **FASE v MINISTER OF SAFETY & SECURITY**, 1997 (3) SA 786 (CC),

"[60] Notwithstanding these differences, it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law..."
(Botha 314(b)),

Tshiki J concluded,

"It follows from what I have stated above that our constitutional provisions referred to above make it obligatory for police officers to first establish the legal justification for the further detention of a person so as to relay such information to the public prosecutor and the latter would then, after applying his mind to the matter, be in an informed position whether or not to apply for the further detention of the person in custody. In my view, and in practice, it is the police official investigating the case who should be in a position to, and must, inform the prosecutor about the strength or otherwise of his or her case. Failure by the police officer to apply his mind in the manner suggested supra, could result in the further detention being contrary to the constitutional provisions and liable to be declared to be unlawful."

(at 317 e to g).

22.2 In view of the **SEKHOTO** judgment (**supra**), it would appear that Tshiki J's exposition of the *onus* of proof in paragraphs [29] and [30] of the judgment, may not be correct. I therefore do not intend to follow same.

[23] By reason of the aforesaid, I conclude that there is a legal duty on an investigating officer to disclose to a prosecutor and/or the presiding judicial officer, whenever the release of a suspect on bail is considered, all relevant information and/or evidence that may impact on the court's exercising of its discretion to grant or refuse bail; irrespective of the section of the CPA under which bail is considered. A willful or negligent failure to comply with this duty may give rise to a liability for payment of damages. I can think of no reason why the well established test for liability for negligent conduct as laid down in **KRUGER v COETZEE**, 1966 (2) SA 428 (AD) at 430 E to F, should not apply in matters such as this.

[24] It is common cause that the plaintiff was charged and brought before court for the first time on 17 May 2007 and that he was remanded in custody on the request of the prosecutor acting on the advice of the second defendant. It is further common cause that the plaintiff's subsequent

application for bail was opposed by the prosecutor acting on the advice and testimony of the second defendant. Although not pleaded by the plaintiff in clear terms, the parties approached the matter in the trial on the footing of whether the second defendant willfully or negligently breached his legal duty as stated above. Question is whether the plaintiff succeeded on a balance of probabilities to prove that the second defendant unlawfully breached that duty, and whether such breach (if any) caused or contributed to the further detention of the plaintiff since his first court appearance on 17 May 2007. To my mind the reply hereto is an affirmative one.

24.1 I have already found that the plaintiff was unlawfully arrested on unreasonable grounds. No evidence was tendered for justifying the continuous detention of the plaintiff subsequent to his arrest. The defendants did not even attempt to reveal the grounds on which the prosecutor was requested to move for the further detention of the plaintiff on 17 May and until his bail application was heard.

24.2 The plaintiff testified that, since his first interview with the second defendant, the latter wanted him to assist the police in finding Gideon. He testified that he took the second defendant to Gideon's home, his

mother's house and to his girlfriend's house, but Gideon was nowhere to be found. He further testified that, on the day he was charged and brought to court (17 May) the second defendant *"told me that he was going to charge me with murder because he thinks that if I am in prison Gideon will bring himself in,"* and further, *"So that I stay in prison because if I am in prison he thinks Gideon will bring him in. I asked him why do you think he will bring himself in he tells me that according to what he sees I am Gideon's trustee and he does not want to get me hurt."*

This evidence was not disputed by any evidence to the contrary, and I have no reason not to accept same. The probabilities that this was the motive of the second respondent not to release the plaintiff, favours the plaintiff. No other grounds for detaining the plaintiff had been tendered by or on behalf of the defendants, and the second defendant knew by then that the plaintiff denied any involvement in the relevant crimes investigated by the second defendant and that he was not in possession of a firearm.

24.3 On page 17 of the record of the bail application, the following is put by the prosecutor to the plaintiff,

"Do you know the police, why Mashaba took the police

to your house? --- I am not well aware why he brought them to my house.

Let me tell you why he brought them to your house. Because the police had information that accused 2 was involved in this crime and when they questioned him, and this will be the evidence, he admitted everything and he even told us who is involved in this crime. He implicated himself and this was made to a commissioned officer it is not a non-commissioned officer. He told the police that you were involved that Gideon was involved, the person that was shot, and that he will assist the police to take them to your place and that you would actually tell the police where Gideon is and you would also tell the police where the firearm is?"

On page 19, the prosecutor confronted the plaintiff with the following:-

"You see sir, that is now where the interesting part comes into because on the scene when they confronted you with Mashaba's evidence, that is when you also started admitting to the crime? --- I have never admitted to any crimes."

"There are sworn statements in the dockets I can even mention the names. Booysen will testify that there were commissioned officers, that you actually said that you were involved in this robbery and you fully knew that Surprise is dead, you admitted that sir?"

"You see sir, when these admissions were made there were commissioned officers – it was a group of people that came to fetch you that night – it was commissioned officers it was not non-commissioned officers. These people, they will all testify that you made those admissions."

It is common cause that the police, and more particularly the second defendant, had no such evidence at their disposal when the bail application was heard. The prosecutor could only have received

such (false) information from the second defendant. There is no suggestion that the prosecutor received such information from any other person but the second defendant. Not surprisingly, no such evidence, except the second defendant's hear-say version, was tendered either at the bail application or in this trial. The aforesaid statements were clearly made to the prosecutor by the second defendant and by the prosecutor to the plaintiff to persuade the magistrate not to release the plaintiff on bail.

- 24.4 In his evidence led at the bail application the second defendant deliberately created the impression that the plaintiff assisted Gideon to abscond from hospital. He testified thus:

"Do you have reason to believe that accused – in particular accused 1 – might be involved in them moving Gideon from hospital? --- Yes, I have reason to believe that.

Why do you say that captain? --- Because he was using the vehicle as he confess to me – he was using the vehicle the previous night when he visited Gideon, and according to Bridget he only received the vehicle back the next day at 08:00 after Gideon was removed from hospital.

So as I understand it correctly. The person that later died, Surprise, he was at police custody, and incidentally in that same ward, or in the same hospital Gideon was also admitted unbeknown to the police? --- That is right sir.

Okay. Did this act of removing, or assisting Gideon to leave the hospital; did that frustrate your investigations? --- Yes.

Is he also a suspect in your case? --- That is right

your worship.

All right. And that is why there is also the charge of defeating the ends of justice? --- That is right.

Now do you have reason to believe that the accused once if they get bail would frustrate your investigations further? --- Yes your worship, because already helped the – according to me they already helped Mr Gideon Manzini to get away from hospital, and get away from the police.”

The defendants at no time whatsoever attempted to corroborate this bold allegation that, according to Bridget, the plaintiff had the latter’s vehicle in his possession at the time when Gideon left the hospital. In fact, it was not disputed in the bail application that the plaintiff was at work at the time Gideon left the hospital. Once again, it is clear that the second defendant tendered this false evidence in an attempt to persuade the magistrate not to release the plaintiff on bail.

24.5 It would further appear that the second defendant did not hesitate to lie under oath in his testimony tendered in the bail application. On page 44 of that record the plaintiff is recorded to have testified as follows:-

“Correct. So how was accused 1 arrested? --- He was pointed out, according to the information he was pointed out by accused 2, and the police officer was taken to his house by accused 2.

Why did accused 2 – according to the statements in your docket – why did accused 2 point out accused 1? --- Because he said that accused 1 was also involved, and he can show where Gideon and the firearms were.”

On page 54 it is recorded that he testified as follows under cross-examination:

“Ja.. Now let us recap now again. What have you got against accused 1 that links him to the crime except, except the so called testimony or evidence of accused 2; which is inadmissible, you know that? --- That information from the informer and the handler from the the informer, the state’s and ...(interjection).

No. The informer informed on accused 2? --- That is right ja.

Ja, so you have got nothing regarding an informer against accused 1? --- No, the informer mentioned the name of accused 1 also and Gideon, and ...(not completed).

Sir, you are altering your testimony now. This is the first time you or the prosecutor says the informer informed on accused 1. This is the first time? --- No, the informer informed about accused 1, 2, Surprise and Gideon.

Would you agree it is the first time you are telling the court this now? --- Yes.

Why. Why was it not put to accused 1 that the informer informed on him, indicated him or implicating him, and why did you not testify it when you were giving your evidence-in-chief? --- I do not know.

I tell you what, because you are altering your testimony now to suit your case? --- No, that is not for it.

I put it to you that is what happening now? --- No.

When I put to you, you only got the informer’s information against accused 2, and accused 2 what he said to the police, which is inadmissible. Now all of a sudden the informer informed on accused 1? --- No, the informer informed about all four. That is Surprise, Gideon, accused 1 and accused 2 here.”

In the absence of an explanation by the second

defendant for his aforesaid conduct, one is driven to the conclusion that he deliberately adjusted his evidence to prevent the release of the plaintiff on bail.

[25] For these reasons I conclude that the second defendant intentionally or at least negligently tendered false evidence during the plaintiff's bail application for purposes of preventing the plaintiff's release on bail, whilst knowing that the magistrate would rely on such evidence for purposes of considering bail. I further conclude that the plaintiff has successfully proved on a balance of probabilities that such unlawful conduct led to or contributed to the refusal of the plaintiff's application for bail and his further detention until the date of his release from custody.

[26] Although Mr Botha submitted that the circumstances of this matter justify a cost order in favour of the plaintiff should I find in his favour on the merits, I do not think that there are sufficient reasons for not following the normal route of ordering that the costs should follow the final result.

[27] Therefore the following declaratory order issues:

A. THE FIRST DEFENDANT IS LIABLE TO

COMPENSATE THE PLAINTIFF FOR ANY DAMAGES HE MAY PROVE TO HAVE SUFFERED AS A RESULT OF HIS UNLAWFUL ARREST ON 15 MAY 2007 AND THE UNLAWFUL ASSAULT PERPETRATED ON HIM BY MEMBERS OF SAPS ON 15 MAY 2007.

B. THE FIRST AND SECOND DEFENDANTS ARE JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED, LIABLE TO COMPENSATE THE PLAINTIFF FOR ANY DAMAGES HE MAY PROVE TO HAVE SUFFERED AS A RESULT OF HIS UNLAWFUL DETENTION FOR THE PERIOD 15 MAY 2007 TILL 24 OCTOBER 2007.

C. THE COSTS OF THE ADJUDICATION OF THE MERITS WILL BE COSTS IN THE CAUSE.

For the Plaintiff:	Adv. Botha SC oio Johan van Zyl Attorneys, Pretoria
For the 1st and 2nd Defendants:	Adv. Van Niewenhuizen SC oio The State
Attorney -	