

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

Case No : 8245/07

In the matter between :

Robert van Alphen

Plaintiff

and

The Minister of Safety and Security

Defendant

Judgment

Lopes J

[1] In 1879 W S Gilbert and Sir Arthur Sullivan wrote a song for their new comic opera 'Pirates of Penzance' which contained the following lines :-

'When constabulary duty's to be done, to be done,
a policeman's lot is not a happy one ...'

[2] Not much has changed in the interim as General Booysen, the policeman in this matter, found out. He arrested the plaintiff on the 19th April 2006 on a charge of aiding and abetting the escape of a prisoner in custody. After a number of court appearances, the charges were withdrawn against the plaintiff on the 18th August 2006, and the plaintiff now sues for damages in the sum of R1 543 000.

[3] The plaintiff's claims are for :-

- a) his wrongful arrest and detention; and
- b) the wrongful and malicious prosecution of him on a charge of aiding and abetting the escape of a prisoner in lawful custody.

[4] The history of the matter may be summarised as follows :-

- a) during 2006 the plaintiff was employed as a sales manager by Caxton Newspapers;
- b) working under him was Johanna Adrianna Mostert ("Mostert"), a sales person for the Pietermaritzburg Auto Dealer - a motoring supplement in the Pietermaritzburg Sun;
- c) Mostert had been under the plaintiff since the beginning of 2006, and had introduced her boyfriend, one Jacques du Plessis ("du Plessis"), to the plaintiff;
- d) during March of 2006, du Plessis was arrested and detained at the Pinetown Police Station on a charge of the hijacking of a motor vehicle;
- e) Mostert then became involved in a plan with two police officers from the Pinetown Police Station namely Inspector Maxwell Khumalo ("Inspector Khumalo") and Inspector Simphiwe Welcome Nthetha ("Inspector Nthetha") in order to assist du Plessis to escape from custody;
- f) to this end Mostert smuggled a gun into the police cells and gave it to du Plessis;
- g) an incident occurred on Sunday the 9th April 2006 when du Plessis held a policeman hostage. In the ensuing events, two policemen were shot and wounded, and du Plessis was shot dead by a police sniper;
- h) Mostert had been called to the police station on the night in question, and the plaintiff went there to assist her after the incident. He had previously been made aware of the escape plan by Mostert, but had allegedly not accorded it any credibility. Part of what Mostert had told him was that du Plessis was in fact none other than Casper Kruger

("Kruger"), who had been implicated in the assassination of Samora Machel. He had also worked for the notorious CCB. In the early 1990s, he had been convicted of the murder of three persons, and was subsequently sentenced to death. He had escaped from Leeukop Prison and had been on the run at the time that he was arrested for the hijacking of the motor vehicle by the Pinetown police;

- i) the next day the plaintiff made a statement to a member of the Pinetown police, one Inspector Bhengu, who recorded the statement in writing. In that statement the plaintiff set out what he knew of the matter;
- j) Mostert was questioned by members of the South African Police on, inter alia, the 11th April 2006, and on the 15th April 2006 she deposed to a statement setting out her involvement in the escape plan;
- k) relying on the statement of Mostert, and allegedly in complete ignorance of the fact that the plaintiff had made a statement to Inspector Bhengu, General Booysen arrested the plaintiff on the 19th April 2006;
- l) the plaintiff then appeared in court on five occasions until the 18th August 2006 when the charges against him were withdrawn.

[5] In answer to the plaintiff's claim for wrongful arrest, the defendant pleaded that General Booysen was a peace officer as defined in the Criminal Procedure Act, 1977 ("the Act"), and that he reasonably suspected the plaintiff of having committed an offence referred to in Schedule 1 of the Act, namely conspiring or attempting to aid and abet du Plessis, also known as Kruger, to escape from lawful custody.

[6] With regard to the plaintiff's claim for wrongful and malicious prosecution, it is alleged that he was prosecuted without reasonable and probable cause on the charge of aiding and abetting the escape of Kruger. The defendants have simply denied the allegations in the plaintiff's particulars of claim save for the

allegation that the charges were withdrawn against the plaintiff on the 18th August 2006.

[7] The plaintiff was the only person who testified in support of his claim. He testified that he was employed as the sales manager of Caxton Newspapers. He had approximately seven reporters or photographers under his supervision. Although Mostert was stationed at the office of Caxton Newspapers in Pinetown her job involved the Pietermaritzburg Auto Dealer. Mostert started working under the plaintiff's guidance at the beginning of 2006. Early in 2006 the plaintiff had been introduced to Mostert's fiancé, one Jacques du Plessis. The plaintiff understood that du Plessis worked for a sundecking company.

[8] Early in 2006 the plaintiff received a phone call from Mostert to say a family member or friend had been murdered in Krugersdorp, and that she wanted to attend the funeral. The plaintiff's wife suggested inviting Mostert and du Plessis over for lunch before they went to Johannesburg on the Sunday evening. They all had lunch together and that was the only time that du Plessis ever visited the home of the plaintiff. The plaintiff had met du Plessis on previous occasions when he had come to the offices of Caxton Newspapers to fetch Mostert.

[9] One Saturday evening in March of 2006, Mostert phoned the plaintiff and said that du Plessis had been arrested on a charge of hijacking, and was detained in the Pinetown police cells. She told the plaintiff it was a lie, and that a woman who had a personal vendetta against her had laid a charge against du Plessis, who was not guilty. The next day Mostert asked the plaintiff to accompany her to the Pinetown Magistrates' Court to offer her moral support, and to lend her money for bail for du Plessis. They went to court but du Plessis was not granted bail.

[10] Later on, and because she had no transport having had a car accident,

Mostert asked the plaintiff to take her to Westville Prison to visit du Plessis. He took her there but she was unable to see du Plessis because visiting hours were over. This was the day after the bail hearing.

[11] A few weeks later du Plessis's attorney phoned the plaintiff and said that he wished to have the plaintiff testify on du Plessis's behalf as to the time the plaintiff saw du Plessis fetching Mostert from the office on the day of the alleged hijacking. The plaintiff went to the Pinetown Magistrates' Court, and met du Plessis' attorney, who asked him to confirm that du Plessis had picked up Mostert after 6pm. As the plaintiff was adamant that it had to have been before 5.15pm, du Plessis's attorney told him that he would not be needed as a witness.

[12] On Friday 7th April the plaintiff, in anticipation of du Plessis having been granted bail the day before, enquired from Mostert at work whether she and du Plessis had been for dinner the previous night in celebration. Mostert replied that du Plessis did not get bail because they could not confirm his identity number and she told him that du Plessis did not know his identity number or his date of birth. Obviously perplexed by this answer, the plaintiff asked Mostert if they were hiding anything. Later that afternoon Mostert came into the plaintiff's office, closed the door behind her and closed the blinds so that they could not be seen by the other members of staff on the sales floor. She said she had serious things to discuss with him, and asked if she could lock the office door, which the plaintiff refused to allow her to do.

[13] Mostert then told the plaintiff that du Plessis was in fact a man called Kruger who was one of the people responsible for assassinating Samora Machel and that he had belonged to various underground organisations including the CCB. He had murdered three persons at Emmerentia Dam and had been convicted of their murder. She maintained he had been framed in this regard, and that she had documents to prove that fact. The plaintiff did not believe the story related to him by Mostert. He said this was because she had previously

told him that du Plessis had millions of rands in a bank account which he could not access because his previous girlfriend would be able to track him down. He clearly viewed her as someone with a penchant for invention and exaggeration.

[14] Mostert then told the plaintiff that Kruger was going to escape from the Pinetown police cells with the help of an Inspector Maxwell Khumalo and another police officer. Later that day when he had returned home, the plaintiff's wife suggested to him that they have a braai with friends. This was to include Quinton Ferreira ("Ferreira") a photographer who worked under the supervision of the plaintiff.

[15] The plaintiff then phoned various friends and they arrived. When Ferreira arrived he had a parcel with him which he referred to as 'the pram'. He said the pram had come from Mostert who had asked him to deliver it to the plaintiff. The plaintiff then telephoned Mostert and asked her what the pram was. She laughed and said it was a bag of clothes for Kruger for his use after he had escaped from gaol. She asked the plaintiff if he minded whether Kruger came to his house to pick up the bag of clothes after his escape. The plaintiff told her that it was ridiculous to think that he would get involved in such a venture, and said that she must fetch the bag of clothes or he would return it immediately.

[16] Mostert said that the plaintiff should leave the bag of clothes with her children, and Ferreira accompanied him to her apartment. When he stopped in the parking lot outside the apartment he told Ferreira to carry the bag of clothes up to Mostert's flat, and jokingly said that he did not want his fingerprints on the bag. He said that he had joked in this way because he did not believe the story to be real.

[17] As they were leaving, Mostert pulled into the parking lot and thanked the plaintiff for being honest by saying that he did not wish to be involved. She then asked if he would speak to Kruger on a cellphone which he did. Kruger thanked

him for not getting involved. The plaintiff and Ferreira then left.

[18] On the Sunday morning, the plaintiff recalled a conversation on the occasion when Mostert and Kruger had visited them, and one of Mostert's children had referred to him as 'Casper the friendly ghost'. Connecting this with what Mostert had subsequently told him, the plaintiff asked Ferreira to connect his computer to the Internet. He found a number of articles on the Internet referring to Kruger as a person who had sued the prison services for bad food which he had received in the C-Max prison.

[19] On that Sunday night after Ferreira had gone home, the plaintiff and his wife discussed the matter and his wife was extremely nervous about the situation. Shortly after 11pm Mostert phoned in tears saying that du Plessis had killed himself and could he go to the Pinetown Police Station to help. Because of his wife's concerns, the plaintiff asked Ferreira to go with him and fetched him at his home. Because he was still sceptical about the version of events given to him by Mostert, he unsuccessfully tried to phone the Pinetown Police Station, and then phoned Durban Central Police Station. He asked if they knew about an incident at the Pinetown Police Station which they confirmed. When he and Ferreira arrived there, they went to the front desk where a chaplain asked him if he was Robert van Alphen. He confirmed his identity and was taken through to see Mostert. She gave him a hug and whispered into his ear that he should help her get out of the Pinetown Police Station. The chaplain told the plaintiff that Kruger had taken hostages, two police officers had been shot, and Kruger had been shot by a police sniper.

[20] Realising that all he had been told was probably true, the plaintiff said that he wanted to talk to a senior police officer. He was sent a young police officer and they sat in an interview room where the plaintiff related to him what had happened on the Friday. It was clear to him that the police were totally unaware that du Plessis was in fact Kruger. The policeman asked the plaintiff to bring in

the articles he had seen on the Internet. The plaintiff then left Mostert at the police station and went home. The next day he printed out as many articles as he could find, and returned to the police station, but the police officer he had seen the night before was off duty. He asked to speak to a senior superintendent. He had to translate the documents for the senior superintendent, because she could not speak Afrikaans which was the language in which the articles had been written. She asked him for a statement and he made one to Inspector Bhengu.

[21] Later, the plaintiff was phoned by Inspector Bhengu who asked him to arrange a work meeting in his office with Mostert, so that they could arrest her. The plaintiff did this and she came to his office where the South African Police officers were waiting for her. They questioned her about her visits to the Pinetown Police Station and the food which she had given to Kruger. When questioned, Mostert refused to give up the name of the South African Police members who assisted her. The plaintiff told her that she might as well do so because he had already told the police. She then confirmed to them the names of Inspector Khumalo and Inspector Nthetha. The plaintiff then left the meeting and Mostert was arrested.

[22] On the next Wednesday, the 19th April 2006, the plaintiff was in his office when the group editor phoned him and said that police officials were there to see him. They came to the plaintiff's office via the sales floor and General Booysen introduced himself. He said that they were there to arrest him and asked who Quinton Ferreira was. The plaintiff told them, and he phoned Ferreira who came to his office. As he arrived, a member of the police pushed Ferreira up against a filing cabinet and they then cable-tied the hands of both the plaintiff and Ferreira behind their backs. When the plaintiff was first told he was being arrested he had started laughing, asking General Booysen what he had to do with the matter. They did not inform him of the charge initially, but said he was involved with the Kruger affair. He was not asked to explain anything, and did not resist the arrest.

He and Ferreira were then taken out through the front door of the business. They were driven to the Serious and Violent Crimes Unit at Cato Manor where the cable-ties were cut and they were told to go and sit separately on the grass outside, and that they could smoke.

[23] Whilst there, General Booysen and Inspector Mostert (now Warrant Officer Mostert) stood talking to him, asking him questions about what he knew of the matter. At some stage Warrant Officer Mostert pushed him against a police vehicle and asked him about the gun, of which the plaintiff denied any knowledge. Warrant Officer Mostert said that he would hit the plaintiff's head through a car window if he did not tell the truth. The plaintiff responded by saying that he would lay charges if Warrant Officer Mostert touched him again. Things then calmed down but the plaintiff was asked again and again about the gun.

[24] At some stage during the questioning General Booysen asked the plaintiff about what happened on the Friday evening. He told General Booysen, but omitted to mention the fact that he and Ferreira had gone to the Spar on the way when returning the bag of clothes to Mostert. It became clear to the plaintiff that Ferreira had told the police this. General Booysen then said that he was lying and that Warrant Officer Mostert was to charge him.

[25] The plaintiff then asked whether he could phone his wife. He felt humiliated and scared. Warrant Officer Mostert then said that they had telephoned Steve Thomas his boss, and arranged for him to bring bail money so that the plaintiff did not go to gaol. They told the plaintiff that if he co-operated they would withdraw the charges against him.

[26] They were then taken inside the police station where they saw Inspector Khumalo and Inspector Nthetha being questioned. Ferreira was told to take the plaintiff's car back to the office. Inspectors Khumalo and Nthetha were then handcuffed, but Warrant Officer Mostert told Inspector Peter George (now

Warrant Officer George), the investigating officer, not to handcuff the plaintiff because they knew what was going on. The three of them were then put into an Isuzu double cab and the plaintiff sat against the door at the back. Whilst proceeding along the freeway Inspector George spoke to a lady, whom the plaintiff later established was from the Mercury newspaper, and said that she must be at the back entrance of the court at a certain time.

[27] Because of complaints by the other two prisoners as to why they were handcuffed and the plaintiff was not, the Isuzu vehicle pulled off inside the yellow line on the freeway and the plaintiff was asked to get out, whereupon he was handcuffed. When they arrived at court, Inspector George indicated to the photographers who the plaintiff was, and they ran next to the motor vehicle. When he alighted from the motor vehicle the plaintiff saw the photographers running towards him and he ran into the entrance of the holding cells. Inspector George called him back but he refused to return. Photographs were taken by the journalists present and the plaintiff was escorted to the holding cells.

[28] In the holding cells the plaintiff spoke to Inspector Khumalo whom the plaintiff did not know until he was told his name. Inspector Khumalo asked him what his involvement was and he said that he had no involvement in the matter. They sat in the holding cells for a few hours and were then taken up to court for a few minutes during which time the plaintiff was released on R2 000 bail. He was told not to communicate with State witnesses and to report to the police on Mondays and Fridays. His bail had been apparently prepaid by Steve Thomas.

[29] The plaintiff thereafter made a number of appearances when the matter was remanded from time to time until the 18th August 2006, when the charges against him were withdrawn.

[30] The plaintiff stated that after his initial arrest, he had attempted to set up numerous meetings with General Booysen and Warrant Officer George, who had

told him that he would not be charged further and that the charges would be withdrawn.

[31] On his last appearance in court the magistrate had asked Warrant Officer George who the plaintiff was, and he had replied that he was under the impression that the plaintiff knew that the gun was in the bag which Mostert had smuggled into Kruger's cell. Subsequently the plaintiff spoke to General Booysen about the statement in court, which had been made by Warrant Officer George, and they realised that they were two different bags, and the charges were thereafter withdrawn.

[32] The plaintiff retained an attorney who charged him approximately R40 000 for representing him. He said that the arrest had had a dramatic effect on his life. In addition to having his photograph in the press, his name and work were mentioned approximately three to four times per month in the press. His name was also mentioned on television.

[33] Attention was then drawn to a number of press reports concerning the matter, which are contained in Exhibit A. One report at page 159 of Exhibit A records that :-

'According to information from a source known to the Witness, Kruger obtained a firearm from van Alphen but police are not willing to release any details. It is believed he smuggled it in with food that he brought to Kruger who was in custody for a hijacking two months ago.'

This article had been written by a journalist, Nivashni Nair, who told the plaintiff that she could not disclose the source of her information, but that it was a police officer. This demonstrated the same confusion evidenced by Warrant Officer George when he spoke to the magistrate at the last hearing attended by the plaintiff.

[34] The plaintiff's employment also suffered. He deals with clients every

week, and a number of them questioned him as to what had happened. Some of them did not wish to deal with him any longer. He said that this created very bad repercussions in his workplace. In addition, as a result of the allegations, his wife left him. At some stage Inspector George subpoenaed the plaintiff to give evidence and when he heard that the plaintiff's wife had left him, he offered to speak to her. The plaintiff declined the offer. Because of the exposure which he received in the media, any person who searches for the plaintiff's name on the Google search engine would find the media references to him. They cannot be deleted and therefore endure. Finally, the plaintiff said that although his work was initially affected, matters had soon sorted themselves out.

[35] Relevant aspects of the cross-examination of van Alphen by counsel for the defendant were as follows :-

- a) the plaintiff believed at all times that Mostert was a person prone to exaggeration, and for that reason he did not believe her story initially;
- b) had he taken the effort to do so, the plaintiff could have established that what Mostert told him was probably true. However, he was adamant that his view was simply one of disbelief;
- c) by the Friday night before the incident in question, the plaintiff began to suspect that the escape plan might be real. By the Sunday night he had done the research on the Internet and he then regarded what Mostert had said as confirmed by the incident at the Pinetown Police Station;
- d) the plaintiff was of the view that the clothing had been sent to him by Mostert because she believed he would be sympathetic and help them. This was because he had always assisted her in the past. He was emphatic that he did not agree to help her in this instance;
- e) Warrant Officer George asked the plaintiff to sign a warning statement which appeared from pages 110 and following in the docket, in Exhibit A. The plaintiff said this statement was never read to him, nor did he have time to read it himself;

- f) the plaintiff was adamant that he was subpoenaed, and went to the Pinetown Magistrates' Court, and was interviewed by the public prosecutor in relation to the criminal prosecution of the two policemen. This was emphatically denied by counsel for the defendant;
- g) the plaintiff was also adamant that he was interviewed by Warrant Officer Mostert of the Crime and Violence Unit after his arrest, and that Warrant Officer Mostert told him that he was being charged in order to make sure that he told the truth. This was also denied by the defendant's counsel;
- h) it was put to the plaintiff that both Warrant Officer George and General Booysen would deny being mistaken about which bag had been handled by the plaintiff. The plaintiff was adamant that they had in fact been mistaken and there had been a communication between them to this effect. Later in his cross-examination, counsel for the defendant put to the plaintiff that Warrant Officer George would say that he recalls that he may have given evidence about the bag, and thought he had been wrong, in believing that the plaintiff had carried the bag with the firearm;
- i) counsel for the defendant also put to the plaintiff that Warrant Officer George and General Booysen would deny knowing about the Bhengu statement. The plaintiff was adamant that they did because he said he had mentioned it to Booysen at the time of his arrest in his office. Later when he had been processed by Warrant Officer George he had repeatedly said that he had spoken to Nico and gone on the Monday night and spoken to the senior superintendent. Later he had given a statement to Bhengu at the Pinetown Police Station. The plaintiff also said that he had told Warrant Officer Mostert about this.

[36] The plaintiff's case was then closed.

[37] The defendant called three witnesses, the first of whom was General

Johan Wessel Booysen. He testified that in 2006 he had been a director, but was now a brigadier general. He was in charge of all the Serious and Violent Crimes Units in KwaZulu-Natal. These units dealt with serious crimes involving attacks on SAP officers and other serious crimes allocated by the Commissioner of Police. They had been called in on the Pinetown incident because two officers had been shot and wounded and Kruger had been fatally wounded.

[38] General Booysen said that Mostert had become a s 204 witness after a statement had been taken from her by Captain Smith. That statement was taken on the 15th April 2006 at the Cato Manor offices of the Serious and Violent Crimes Unit. General Booysen said that he was not in possession of, or aware of, the minutes of the meeting of the 11th April 2006. These minutes appear in Exhibit A from page 93 onwards, and record a question and answer session between Mostert and a number of police officers. He was also unaware of the docket which had been opened at the Pinetown Police Station (CAS number 375/04/2006) which contained the statement made by the plaintiff to Inspector Bhengu. He said that he had seen it for the first time on the day on which he testified in this trial.

[39] General Booysen said he had decided to arrest the plaintiff because it was clear from the statement of Mostert that there had been interaction between her, Kruger and the plaintiff. He also considered as significant her statement that the plaintiff initially agreed to keep the bag of clothes in his possession which were delivered to him. He felt that the plaintiff had only later reneged on the agreement because he had been fearful of his wife. He had also considered the fact that Mostert had asked the plaintiff to use his phone, from which she had phoned Kruger, and thereafter given the phone to the plaintiff who had then also spoken to Kruger. He said there was enough to reasonably suspect that the plaintiff was assisting Kruger to escape.

[40] General Booysen denied that when he had arrested the plaintiff at his

office the plaintiff had said that he had made a statement to Inspector Bhengu. General Booysen said if that had been said to him he would have been interested to compare it with what the plaintiff had said after he was arrested. He said that if he had to make a decision on the evidence today he would still arrest the plaintiff. General Booysen conceded that although it did not happen, ideally any information which had been taken down by members of the South African Police, should have been conveyed to him for his consideration prior to making a decision as to whether or not to arrest the plaintiff. He regarded the statement which was made to him, in an interview by Ferreira, as being corroborative of the statement of Mostert. What he regarded as significant about Ferreira's evidence was that :-

- i) Mostert had said to him when she gave him the bag of clothing that he should not ask questions about it and that the plaintiff knew what was in the bag;
- ii) the plaintiff had asked him what the 'parcel' was and he had said that the 'parcel' had come from Mostert, after which the plaintiff kept quiet.

As a result of this General Booysen formed the view that the plaintiff was not telling the truth.

[41] When asked by counsel for the defendant what had happened at the Cato Manor offices after the plaintiff was arrested, General Booysen said that he could not really recall, and simply related what he would have done. He did, however, deny having instructed Warrant Officer Mostert to interrogate the plaintiff. He did not see Warrant Officer Mostert or anyone else mistreat the plaintiff. Nor were there any complaints made to him in that regard.

[42] In reply to a question by the court, General Booysen conceded that it was possible that Warrant Officer Mostert had interviewed the plaintiff outside the building. He also said that Warrant Officer Mostert had been involved in the matter because he had gone along with him to arrest the plaintiff. This was on the basis of his going along as "manpower", without actually being part of the

investigation. He was unable to say whether or not Warrant Officer Mostert repeatedly questioned the plaintiff about the firearm and the plaintiff's role in obtaining the firearm. He simply said that that was not done in his presence.

[43] General Booysen stated that part of his motivation for arresting the plaintiff had been the fact that the plaintiff had omitted to mention the fact that he and Ferreira had visited the Spar on their way to the Pinetown Police Station on the night of the incident. This had been told to General Booysen by Ferreira.

[44] When asked by counsel for the defendant whether the plaintiff had been processed by Warrant Officer George, General Booysen appeared not to be able to remember and said that he would have told Warrant Officer George to do so. He was also unable to remember the process by which the plaintiff was given bail, saying that the plaintiff's boss had agreed to put up the bail.

[45] General Booysen was unable to remember saying that the plaintiff should not be handcuffed when he was driven away from the Cato Manor offices to the Pinetown Magistrates' Court. He confirmed that from time to time he had been told by Warrant Officer George that the plaintiff wanted to see him, and eventually the plaintiff had given a written statement to Warrant Officer George. General Booysen was unable to recollect whether this statement was given a long time after the charges were withdrawn or not.

[46] With regard to the meetings with the plaintiff, General Booysen said there was only one such meeting. He said bail was not discussed, in any event, to the best of his recollection. He did however say that had he corrected Warrant Officer George, with regard to the role of the plaintiff in being associated with the bag in which the gun was smuggled into Kruger's cell, however, he would not have done so in the presence of the plaintiff and his attorney.

[47] General Booysen said that it was true that at the initial stages the plaintiff's

attorney had offered him as a State witness to the police. He conceded that they had established that the firearm originated in Gauteng and was in no way connected to either Ferreira or the plaintiff.

[48] General Booyesen was referred to the investigation diary entry at Exhibit A page 165 dated the 8th May 2006, recording a meeting at his office with the plaintiff and Warrant Officer George. Having read the entry, which records that the plaintiff had arrived with two black eyes and that Warrant Officer George had expressed the view that the plaintiff was 'trying his monkey tricks here and I am not interested in his proposition', General Booyesen said that he could remember the incident.

[49] General Booyesen conceded that there was pressure from the media to provide information about accused persons, but said that he would have taken a dim view of, and launched disciplinary proceedings against, any officer who connived with the press to allow them to obtain information and take photographs, etc.

[50] General Booyesen was of the view that because of :-

- a) the Pinetown Police Station incident when Kruger was killed;
- b) the s 204 statement made by Mostert; and
- c) the interview with Ferreira;

that they had enough to arrest the plaintiff and to present a case to the prosecution.

[51] General Booyesen was then cross-examined by Mr de Beer for the plaintiff who recorded that Warrant Officer George had arrived at the home of the plaintiff the previous evening and had asked him about the whereabouts of his wife. General Booyesen said that he knew about this because at 12 noon on the previous day he had been told by legal services that this matter was in the High Court. He had had a brief discussion with the defendant's counsel and was told

that the plaintiff claimed damages based partly on the fact that the arrest had compounded the problems with his ex-wife, leading to his divorce. General Booyesen had then asked Warrant Officer George to see if he could locate the plaintiff's ex-wife to confirm if that was so. Warrant Officer George had phoned him later that evening and said he had been to the address where he thought he could find her and that the plaintiff and Ferreira had come to the gate. Warrant Officer George had then left the premises and General Booyesen told him that they would locate the plaintiff's ex-wife elsewhere.

[52] General Booyesen said that Warrant Officer George had gone to the plaintiff's home because that was the last known address of the plaintiff's ex-wife. It was put to him by Mr de Beer that it was improper during the progress of a civil case to have the investigating officer visit the plaintiff. General Booyesen said that visiting the plaintiff might be inappropriate but tracing his ex-wife was not. When it was put to him that the parties were both represented, General Booyesen said that if he had had to ask the plaintiff where his wife was, the plaintiff could have misled him or contacted his ex-wife. Mr de Beer placed on record that as a result of the visit the plaintiff had thought he would be arrested and was traumatised by the experience.

[53] Relevant aspects of General Booyesen's cross-examination were :-

- a) that although he had not seen the statement made to Inspector Bhengu, had he done so it would have made no difference to his decision to arrest the plaintiff;
- b) General Booyesen could not dispute or confirm that the plaintiff had gone to the Pinetown Police Station to give a statement which was made to Inspector Bhengu voluntarily;
- c) General Booyesen conceded that at the time of the incident the South African Police were unaware that du Plessis was in fact Kruger, and accepted that the plaintiff had exposed the true identity of du Plessis. He added that that is exactly what he would have done had he been in

the shoes of the plaintiff because it was something which would have come out anyway. He characterised it as an attempt by the plaintiff to cover his own tracks. It was put to him that it was stated in the statement made to Inspector Bhengu that the plaintiff had returned the bag of clothing and that that was not the action of someone who was aiding and abetting Kruger. General Booysen conceded that that would be the case if the statement were true. He disputed that the return of the clothes was an act of dissociation;

- d) it was clear from his cross-examination that General Booysen regarded the plaintiff's actions as being those of a person who was pre-empting a case against himself. He said he appreciated the fact that Mostert was an accomplice and that her evidence should have been approached with caution;
- e) General Booysen placed reliance on the fact that, according to Mostert, the plaintiff had agreed to 'help' Kruger. He appeared to have understood the reference to 'help' in the statement as meaning 'help to escape'. This was despite the fact that Mostert said the plaintiff gave this undertaking after he refused to help in the escape plan;
- f) when it was put to General Booysen that Ferreira had fetched the clothing from Mostert, and that this was a factor inconsistent with the plaintiff's involvement, General Booysen stated that it appeared to him that Ferreira was also involved;
- g) General Booysen said that any surprise exhibited by the plaintiff when he was arrested was a surprise at having been found out and not disbelief at being arrested;
- h) when it was put to General Booysen that he had been accompanied by Warrant Officer Mostert when he arrested the plaintiff he then stated that he was not sure if Warrant Officer Mostert was there at the time of the arrest, although Captain van Tonder was;
- i) General Booysen could offer no real explanation as to why he never confronted the plaintiff with the allegations at the Cato Manor Police

Station. He firstly said it was not a conducive place to interview a witness, and later said that he could not do so in his office because Ferreira was there. However, he had already made the decision at that stage to arrest the plaintiff, and had done so;

- j) in reply to why he had arrested the plaintiff, General Booysen said he had done it in order to get him before a court, and to interview and interrogate him. He said it had been necessary to arrest him because the plaintiff worked with Ferreira, and they could have had time to concoct a story;
- k) General Booysen was of the view that the plaintiff did not mention the incident about visiting Spar on the way to the Pinetown Police Station because he wanted to distance himself from discussions about the bag of clothes. He found it significant that he had kept quiet when Ferreira told him about the bag.

[54] In re-examination he emphasised that any impression that the docket would be revived for a final decision to be made by the public prosecutor, in relation to the continued prosecution of the plaintiff, should be dispelled. General Booysen expressed the view that the public prosecutor still had to make a decision about the continued prosecution against the two members of the South African Police.

[55] A significant aspect of this part of the evidence was that General Booysen gave the impression that at first he thought that the prosecution of the plaintiff should be re-considered by the National Director of Public Prosecutions. When it became clear that that might be viewed as an oppressive step in this litigation, he backed down completely, and then said that there was no intention of continuing the prosecution against the plaintiff.

[56] The next witness for the State was Warrant Officer George who had been an inspector at the time of the incident. He had been in the police services for 25

years and was attached to the Serious and Violent Crimes Unit.

[57] Warrant Officer George testified that he had processed the plaintiff and was not at any stage told about the docket and the statement which had been made to Inspector Bhengu. He said that Inspector Bhengu had used the contents of the docket he had opened at the Pinetown Police Station, as information for the inquest docket.

[58] In contradiction to the evidence which had been given by the plaintiff, he said that the plaintiff's fingerprints must have been taken. He appeared to have no recollection of having done so or having instructed anyone to do so.

[59] With regard to the statement made by the plaintiff and the signed documents appearing at Exhibit A pages 110 to 114, Warrant Officer George maintained that he had informed the plaintiff about his constitutional rights and that the plaintiff had signed the document. He conceded that he had got the impression that the plaintiff wanted to assist the police.

[60] When asked whether Steve Thomas, the plaintiff's boss, had contacted him regarding the bail, he simply recalled that some white gentleman who had an interest in the plaintiff, had contacted him. He denied having handcuffed the plaintiff on the way to the Pinetown Magistrates' Court or having spoken to any journalists in the car, or having pointed out the plaintiff to journalists, all of which had been testified to by the plaintiff. Warrant Officer George however, conceded that people were anxious about the case and that it had generated public interest.

[61] Warrant Officer George thought that at some stage there had been a meeting with General Booysen and the plaintiff's attorney. Although he had made the investigation diary entry at Exhibit A page 161, (recalling that the plaintiff's attorney had proffered to the police a statement by the plaintiff), he

could not recall seeing a copy of any statement on the 23rd April 2006, the day of that entry.

[62] Warrant Officer George conceded that at a bail hearing he had told the magistrate that the plaintiff had been involved with the bag in which the gun had been smuggled. He said that was an error on his part, and he had not realised that there was another bag. He could not recall whether he ever pursued that avenue. He could also not recall having spoken to General Booysen about it, or that General Booysen phoned him and corrected him. He said that he did realise that there had been a misunderstanding. In reply to a question from the court, Warrant Officer George conceded that he had thought all along that the plaintiff had had something to do with the bag which contained the firearm.

[63] Warrant Officer George said that during the internal investigation into the conduct of the two police members, Mostert had given evidence, but that the transcripts of that hearing had been lost. The trial against the two police officers had been stopped because the transcripts were not available and the dockets had to be re-submitted to the senior public prosecutor, after the transcripts were found. They were eventually located and given to the senior public prosecutor where the docket had remained for a considerable length of time.

[64] It was put to Warrant Officer George that he had approached the plaintiff and said he wanted to subpoena him. Warrant Officer George said that he could not remember having issued the plaintiff with a subpoena. He said if there was a subpoena issued, the original would have been given to the plaintiff, and a copy of it would have been stored in the police docket and should be there. It was then put to him that there was no record of any subpoena in both the police dockets. Warrant Officer George said that there would have been a record in the investigation diaries referring to the subpoena had it been issued. It would have referred to either a J32 or subpoena in respect of the plaintiff.

[65] Warrant Officer George denied having offered to phone the plaintiff's wife and tell her that he was innocent, and he said he never expressed an opinion of the plaintiff's innocence.

[66] Warrant Officer George was referred to Exhibit A pages 110 to 114, the warning statement signed by the plaintiff at Warrant Officer George's insistence. He claimed that he had read it out aloud to the plaintiff and that the plaintiff had then read through it. He said that the documents had been generated by a computer.

[67] It was put to him by the court that the original documents must have appeared the same way the documents appearing in Exhibit A appear – i.e. - to a large extent indecipherable. This is clearly because they are documents which were photostatted and there was a problem with the photostat machine. That can clearly be seen on all of the pages. What is significant is that the handwriting of Warrant Officer George and the plaintiff's statement taken down by Warrant Officer George appear clearly from the documents in Exhibit A. Clearly, the original documents were indecipherable. Warrant Officer George conceded that the original documents must have been like that, but maintained that because he knew the documents he had been able to read them to the plaintiff. This, of course, in no way deals with his evidence that the plaintiff had read them. The original documents were produced by counsel for the defendant and it was seen that the originals were as illegible as were the copies in Exhibit A pages 110 to 114.

[68] Warrant Officer George testified that the plaintiff had appeared in court on five occasions, the 2nd May 2006, the 17th May 2006, the 30th June 2006, the 6th October 2006 and the 18th October 2006 when the charges against him were withdrawn. In reply to questions by the court, Warrant Officer George conceded that it was unfair to have asked the plaintiff to sign documents such as those at Exhibit A pages 110 to 114, and to rely on them. Warrant Officer George

referred in the original docket to a notation made by General Booysen, after he had finished giving evidence, that no steps whatsoever were to be taken in the future against the plaintiff. This was in the context of the docket being returned to the senior public prosecutor for decision.

[69] Warrant Officer George then conceded that in fact a subpoena had been served on the plaintiff and that he had signed the mode of service.

[70] Mr de Beer then cross-examined Warrant Officer George and significant aspects thereof are :-

- a) Warrant Officer George said that he knew that the plaintiff and his wife were no longer together, but had gone to his house during the trial because he did not know that she was no longer resident there. He eventually contacted her and spoke to her telephonically the next day. It was put to him by Mr de Beer that he had said to the plaintiff's ex-wife that the police knew that she had been in communication with the plaintiff because they had tapped his cellphone. He denied this;
- b) despite what had gone before, Warrant Officer George reiterated that he had read the statement at Exhibit A pages 110 to 114 to the plaintiff line by line, and that it had taken between eight and ten minutes. He said that he would still have read the plaintiff's rights to him despite the fact that the plaintiff had said in his statement that he would not make a statement then but would only make one later. Warrant Officer George denied that the purpose of the arrest had been to get the plaintiff to make a statement;
- c) Warrant Officer George said that he had made the statement at Exhibit A page 165 that the plaintiff was 'up to his monkey tricks' and that the prosecution could continue, because he had got the impression that the plaintiff was delaying things. He had formed that impression because the plaintiff had not yet made a statement;
- d) with regard to the taking of the plaintiff's fingerprints, Warrant Officer

George was adamant that his fingerprints should have been taken although he had no recollection of having done so. He said that he was unable to locate any record of the plaintiff's fingerprints and denied that there could have been a mistake and the plaintiff's fingerprints may not have been taken;

- e) Warrant Officer George denied that the plaintiff had not been handcuffed when they left the Cato Manor office to go to the Pinetown Magistrates' Court. He disputed that he had stopped on the way to handcuff the plaintiff because of complaints made by the other two accused;
- f) Warrant Officer George conceded that he had used his cellphone on the way to the Pinetown Magistrates' Court but it had not been to any reporters. He denied having said to anybody that they should meet them at the back entrance of the Court. He was unable to comment how it could be that the press were waiting for their vehicle when it arrived at the Pinetown Magistrates' Court. He simply said that the press must have done some research somewhere. He conceded that this was a high profile case and that a photograph of him together with the accused appeared in the media (Exhibit A page 256);
- g) Warrant Officer George conceded that there was a misunderstanding about whether or not the plaintiff had been involved in the smuggling of the firearm into the cell of Kruger;
- h) Warrant Officer George was unable to say how the confusion regarding the two bags was resolved.

[71] The last witness for the defence was Warrant Officer Paul Mostert who testified that he had been employed in the South African Police Services for 33 years and had been attached to the Serious and Violent Crimes Unit at Cato Manor for 14 years. He said that he had made the statement which appeared at Exhibit A pages 123 to 124. In that statement he recorded that he had been present at the arrest of Inspector Khumalo. He arrested the other police member

Inspector Nthetha, and then took him to the Cato Manor Police Station, where he handed him over to Warrant Officer George.

[72] Warrant Officer Mostert denied emphatically that he had accompanied General Booysen to arrest the plaintiff and Ferreira at their workplace. He said that he had gone directly to Newlands East to arrest Inspector Nthetha some time after 10.10am, and had not been with General Booysen and the others at approximately 11am, when they had arrested the plaintiff. He had no idea where the Highway Mail offices were.

[73] Warrant Officer Mostert said that on arrival back at the Cato Manor office he noticed that General Booysen and other members were already there. He said that the plaintiff before court was standing at the side of the building. He had handed over the person he had arrested to Warrant Officer George. He had had no access to the docket and no reason to interview the plaintiff. He had no knowledge of the fact that the plaintiff had been allowed to stand outside at the Cato Manor office and smoke.

[74] Warrant Officer Mostert said that he had no recollection of the plaintiff's allegation that he had repeatedly asked the plaintiff about the gun. He then said that that did not happen. He denied having discussed the merits of the case with the plaintiff at any stage. He also denied having pushed the plaintiff against a car and having threatened to push his head through the window of a car. He also denied having told Warrant Officer George that he should not handcuff the plaintiff. He said that he had no other role in the case.

[75] In cross-examination Mr de Beer for the plaintiff drew attention to the size of Warrant Officer Mostert who was 1,98m tall, and weighed 130 kilograms. He denied that he had accompanied General Booysen to provide a physical presence at the arrest of Ferreira and the plaintiff. He said that he had seen the plaintiff standing in the area between the two offices at Cato Manor and he had

been standing on the grass near the braai area. He said that the plaintiff was just standing there and he could not recall whether he was handcuffed. When further asked why he could recollect this incident after five years he said it had been his birthday, the plaintiff's hair was whiter than it is now, and that the plaintiff had had a pink shirt on.

[76] The defendant then closed its case.

[77] Dealing with the credibility of the various witnesses and the probabilities, I deal firstly with the plaintiff. The arrest of the plaintiff was something which had clearly rankled with him, and which he deeply resented. It was clear from his demeanour when giving evidence that he had been hugely embarrassed by his arrest and appearances in court. It is also clear that because of the effect which the prosecution had had on him, the plaintiff would have had every reason clearly to recollect all the events which occurred. Being arrested and having to appear in court on a charge of a serious crime is a rare event in the lives of most people. This gave the plaintiff every reason to remember in detail all the things that happened to him.

[78] The plaintiff came across as an honest witness. He gave his evidence in a forthright, and sometimes indignant, manner. His indignation stemmed from the attitude of the police and their failure properly to investigate his involvement prior to, and after, his arrest. The plaintiff also made concessions in his evidence where it appeared to be reasonable to do so.

[79] In particular the plaintiff's evidence with regard to the fact that he did not initially believe what he was told by Mostert has the ring of truth about it. Anyone who relates tales of someone who was involved in the murder of Samora Machel, involvement in the CCB and the murder of three people in Gauteng, as well as an elaborate prison escape using the assistance of police officials, can only be expected to encounter a great deal of scepticism.

[80] It is true that by the Friday before the incident, when the bag of clothes were delivered to the home of the plaintiff, he should have suspected that far more was afoot than he had initially believed. Certainly, by late Sunday afternoon, after he had investigated the matter on the Internet, he realised that there was more to the story of Mostert than he believed. At that stage he discussed the matter with his wife who was clearly concerned with the possible ramifications of the plaintiff having anything to do with Mostert.

[81] It was significant that the plaintiff was tackled in cross-examination with two aspects in particular :-

- a) that a subpoena had been issued requiring him to be a witness. It was put to him by counsel for the defendant that no subpoena existed in the court files. This of course turned out not to be the case as the subpoenas were later found and Warrant Officer George testified that he had in fact been responsible for issuing them;
- b) that the fingerprints of the plaintiff had not been taken by the police. Warrant Officer George was adamant that they must have been, and therefore were, taken. However the defendant was unable to produce any evidence, which Warrant Officer George said must exist, that the plaintiff's fingerprints were taken.

[82] Although these aspects are not significant in the greater scheme of the case, they point to the fact that the plaintiff's recollection of matters was accurate and that his persistence in sticking to his story in cross-examination was justified, at least to the extent of these issues.

[83] The evidence which the plaintiff gave of his arrest and subsequent treatment at the Cato Manor Serious and Violent Crimes Unit also has the ring of truth about it. There was certainly nothing inherently improbable in what he said and looking at his version on its own and in the light of the cross-examination to

which he was subjected, there would appear to me, to be no basis not to accept the basic content of his evidence.

[84] The defence witnesses on the other hand, stand on a different footing. It was clear from the evidence of General Booysen that :-

- a) he only became aware that the trial was proceeding on the second day of the trial at approximately 12 noon;
- b) in the preceding five years since the incidents had occurred he had not had occasion to be involved in the matter, and had not applied his mind to the matter whatsoever. This was clearly demonstrated in the fact that the prosecution against the two policemen had not been proceeded with by the State. This was a matter which he clearly found unacceptable, as evidenced by his referral, at the end of the trial, of the docket to the senior public prosecutor for re-evaluation; and
- c) that he had not paid any attention to the matter in the intervening period was also evident from the fact that the matter had laid with the senior public prosecutor for a considerable period of time, probably more than a couple of years, and nothing had been done.

[85] General Booysen, and this applies to the other State witnesses as well, clearly therefore did not have the same motivation as the plaintiff for remembering the events which unfolded. This was clearly evidenced by the failure of General Booysen to recollect many of the events which took place. I do not make this observation as a criticism of his credibility. Given the amount of work which he would have inevitably have done in the interim, together with his very narrow involvement in the arrest of the plaintiff and the subsequent events, he clearly would not have had as much reason as the plaintiff to recall the events which occurred.

[86] The essential areas where the evidence of General Booysen was in conflict with that of the plaintiff were :-

- a) the circumstances of the arrest of the plaintiff at the offices of Caxton Newspapers trading as the Highway Mail. The plaintiff's version is that his response to his arrest was one of disbelief as he regarded himself as a witness. General Booysen did not have an independent recollection of what the plaintiff said, and most of his evidence appears to have been based on his re-construction of events based on the documents which were given to him, when he was told that the matter was proceeding;
- b) that General Booysen was told by the plaintiff that he had made a statement to Inspector Bhengu at the Pinetown Police Station. Once again General Booysen did not have an independent recollection of this. He did say he thought that unlikely, because if the plaintiff had told him that he had made a previous statement, he would have wanted to compare that statement with what he was saying at the time of his arrest. It may well be that there was some misunderstanding in this regard and it is entirely possible that the plaintiff communicated to both General Booysen and Warrant Officer George that he had made a statement to Inspector Bhengu, but they believed that that statement had only been a verbal one. It does seem unlikely that General Booysen would have ignored a written statement if he had known that it existed. The fact that he did not know it existed seems most likely to have been due to a misunderstanding in the communications between the plaintiff and the police officials at the time of his arrest. It seems to me that it would have been a natural and probable thing that the plaintiff told General Booysen of the statement he made to Inspector Bhengu.
- c) the plaintiff's evidence with regard to the involvement of Warrant Officer Mostert was not something which was contradicted in any material way by General Booysen, because he was, on his own version, not present at the times when the plaintiff alleged his exchanges with Warrant Officer Mostert took place;

- d) the plaintiff's evidence also conflicted with General Booysen in relation to the meeting which took place between the plaintiff and General Booysen, at which the plaintiff complained about the fact that Warrant Officer George had alleged at the bail hearing that the plaintiff had been involved in the smuggling of the firearm into the cell of Kruger. General Booysen had only a vague recollection of the events of that meeting, contenting himself with the explanation that he would not have corrected Warrant Officer George's impression in front of the plaintiff and his attorney. That may well be his attitude now, but the events in this matter took place five years ago and General Booysen's inability clearly to remember what occurred at a particular meeting, well after the arrest of the plaintiff, is perhaps not surprising;
- e) General Booysen interpreted the statement made by Mostert to include a suggestion that the plaintiff would have assisted Kruger with his arrest after clearly having told Mostert he would have nothing further to do with it. This is not a reasonable interpretation of the statement of Mostert.

[87] Whilst accepting the credibility of General Booysen as a witness, there is an aspect of his evidence which calls for comment. He came into this matter at approximately 12 noon on the second day of the trial after not having had contact with the matter for a number of years. He clearly formed the view, which he expressed in his evidence, that he still held the belief that the plaintiff had committed a crime and should have been arrested. Indeed, I gained the clear impression from his evidence that he initially thought the matter should be referred back to the public prosecutor for a final decision on the plaintiff's involvement. It was only when it was pointed out that such a step would result in inherent prejudice to the plaintiff after such a long time, and would appear to be an intimidatory tactic during the running of the civil trial, that he backed down and said that the State would no longer proceed against the plaintiff. This was confirmed by the entry which he made in the investigation diary of the docket

after the conclusion of his evidence.

[88] The evidence of Warrant Officer George suffers from some of the same problems as General Booysen. Warrant Officer George was clearly of the view that the plaintiff had participated in the smuggling of the firearm into the cell of Kruger, and this view persisted for a considerable period of time after the arrest of the plaintiff. It no doubt clouded his thinking as the investigating officer in the ongoing conduct of the State in this matter. The origin of his confusion appears to have been an interpretation of the initial statement, made in Afrikaans by Mostert, which Warrant Officer George either incorrectly interpreted or had been misinterpreted to him. With regard to the issue of the subpoena to the plaintiff, and the matter of the plaintiff's fingerprints, for the reasons I have set out above, I prefer the evidence of the plaintiff.

[89] The evidence of Warrant Officer George also conflicted with that of the plaintiff with regard to the taking of the statement which appeared in Exhibit A from pages 110 to 114. The plaintiff's version was that the documents had been written out by Warrant Officer George and that he had been asked to sign them, without having had the documents read to him, or having had a chance to read them himself. Warrant Officer George testified that he had read the documents to the plaintiff and that the plaintiff had had a chance to read them himself before signing them. However, when Warrant Officer George first gave his evidence he clearly did not appreciate the significance of the gaps which appear on the documents which were contained in the court bundle. It was clear from the writing which was superimposed on the documents that the original documents had been as indecipherable as the court copies were. Although Warrant Officer George may have known the contents of the documents very well, as he said he did, I find it most unlikely that he would have read the documents out to the plaintiff in the state they were. I find it most improbable in the extreme that the plaintiff would have read them or would even have tried to do so. There is no indication that the plaintiff would have had a previous familiarity with the

documents, and the illegibility of large portions of the originally printed documents was such that he would not have been able to work out what was stated on them. On balance therefore I would prefer the evidence of the plaintiff in this regard.

[90] Indeed it is a sad indictment of the administrative functions of the police that documents such as these were used in an official capacity and relied upon by police officials in their investigations. Warrant Officer George himself conceded that it was appalling that anyone should be asked to sign documents in the condition that one finds Exhibit A pages 110 to 114.

[91] I am mindful of the fact that Warrant Officer George only came into the matter as the investigating officer after the arrest of the plaintiff, and therefore his evidence is not material to the initial arrest of the plaintiff, but rather to his treatment thereafter.

[92] Of all the witnesses for the State, and on his own evidence, Warrant Officer Mostert had the least reason to remember the circumstances of the plaintiff's arrest and his involvement therein. He flatly denied having been to the plaintiff's business premises at the time he was arrested. This evidence is contradicted by the plaintiff and by General Booysen who said that he had taken Warrant Officer Mostert along with him for 'manpower'. Warrant Officer Mostert was also responsible for the arrest of at least one of the two policemen who were arrested for complicity in the attempted escape of Kruger. Whilst I accept that the statement made by Warrant Officer Mostert as to where he was on the morning when the plaintiff was arrested, this may to some extent be seen as a contradiction to the evidence of the plaintiff and General Booysen, but this matter was not fully explored at the trial. The various possible explanations as to the apparent contradiction were not investigated. In all the circumstances I would prefer the evidence of the plaintiff and General Booysen above that of Warrant Officer Mostert.

[93] Warrant Officer Mostert also denied having treated the plaintiff roughly at the Cato Manor offices of the Serious and Violent Crimes Unit. He denied having continuously interrogated the plaintiff about the gun. Given the general confusion which appears to have reigned in this regard (except perhaps in the mind of General Booysen) the plaintiff's evidence has the ring of truth about it.

[94] In my view Warrant Officer Mostert's evidence was substantially undermined by the reason he gave for remembering the plaintiff before court as the person whom he had seen at Cato Manor offices. The evidence was that he had had nothing whatsoever to do with the plaintiff, and had merely seen him standing there as he had passed by with the other accused. His reason for remembering the plaintiff was allegedly that the plaintiff was simply standing there, the date on which it happened was the witness's birthday, the plaintiff's hair was whiter than it is now, and he had a pink shirt on. This evidence given by Warrant Officer Mostert clearly appeared to be an afterthought. I do not accept it. Warrant Officer Mostert purports to have recollected seeing a man he saw for no more than a few seconds five years previously, simply because it was his birthday! I regard this as grossly improbable. Given the number of accused persons with whom Warrant Officer Mostert must have been involved in the intervening five years, there seems no reason whatsoever for him to have recalled the plaintiff in such detail when he was not an accused with whom Warrant Officer Mostert, on his own version, was involved.

[95] In all the circumstances I have no hesitation in preferring the evidence of the plaintiff above that of Warrant Officer Mostert.

[96] In assessing the evidence of General Booysen in this matter there is an important consideration which I have borne in mind. He relies in large measure on the statements taken by the police from the witness Mostert. It is clear that she was not only an active participant in the bid to assist Kruger to escape, but

she also did not tell the police the whole truth from the outset. This is evident from a perusal of the minutes of the meeting which was held on the 11th April 2006, which appear from pages 93 to 108 of Exhibit A, and the more comprehensive and revealing statement which she made on the 15th April 2006. That evidence is all in the nature of hearsay evidence. If the defendant wanted to rely on the evidence of Mostert, they should have called her as a witness. This is not only because the defendant wishes to rely upon contradictions between what was stated by Mostert and the version of the plaintiff, but also because of the general problems which surround statements taken by police officials.

[97] It is notorious that these statements are written by police officials in a style which police officers are trained to record statements. They record what is stated by a witness in response to prompts or questions by the police official concerned. This makes accepting the veracity of everything that is stated in those documents difficult. In addition, Mostert was a s 204 witness and clearly had a motive to involve others, if for no reason other than to dilute her own involvement in the matter.

[98] In order to establish his claim for wrongful arrest, the arrest or detention of the plaintiff is regarded in our law as *prima facie* wrongful, and the defendant bears the onus of proving the lawfulness of his arrest. The plaintiff need only establish that he was arrested and detained. That much is common cause in this matter. What is in dispute is whether General Booyesen's arrest fell within the ambit of sub-s 40(1)(b) of the Act, 1977 which provides :-

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

...

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

[99] Schedule 1 to the Act includes :-

‘any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.’

Included in the Schedule is :-

‘escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule...’

The offences listed in Schedule 1 include robbery and theft. The conduct of Kruger clearly fell within either or both those offences and accordingly any conspiracy, incitement or attempt to assist him in escaping would fall within the ambit of Schedule 1.

[100] In order to determine whether or not the arrest was justifiable, it is necessary for the defendant to establish :-

- (a) that the arrestor was a police officer;
- (b) that the arrestor entertained a suspicion;
- (c) that the suspicion must be that the arrestor committed an offence referred to in Schedule 1; and
- (d) that the suspicion must rest on reasonable grounds.

See Minister of Safety and Security v Sekhoto 1022(1) SACR 315 (SCA) paras 5 – 7

(neutral citation (131/10) [2010] All ZASCA 1 141 1 (19 November 2010) paras 5 – 7).

[101] It is common cause, as indeed was confirmed by the evidence, that General Booysen was the arresting officer, that he was a police officer who entertained a suspicion that the plaintiff had committed an offence referred to in Schedule 1 of the Act. It was the reasonableness of that decision that was in dispute. In assessing the conduct of General Booysen, I am aware of the difference between the jurisdictional facts which are required to be established and the discretion which General Booysen was entitled to exercise once the jurisdictional requirements were satisfied.

[102] In the light of all this evidence and my views on the witnesses, it is now necessary for me to decide whether or not the conduct of General Booyesen in arresting the plaintiff was reasonable in the circumstances. I do this on the assumption that the offence with which the plaintiff was charged was one falling within the first Schedule to the Act. This was accepted by counsel for both parties, and the basis upon which the plaintiff argued its case.

[103] General Booyesen's evidence was that he relied solely upon the statement of Mostert in arresting the plaintiff. He did not have access to either the minutes of the meeting of the 11th April 2006, nor the statement which the plaintiff made to Inspector Bhengu at the Pinetown Police Station the day following the incident.

[104] In interpreting the statement of Mostert, General Booyesen relied upon the following :-

- a) that Mostert had sent a parcel of clothing to the plaintiff's home. This is a circumstance which, in my view, is not indicative of the involvement of the plaintiff. I say this because it is clear from the evidence of the plaintiff that he was of great assistance to Mostert during her employment under his supervision. His uncontradicted evidence was that he had assisted her on a number of occasions and she clearly looked to him both as a friend and superior who would assist her. This is further evidenced by :-
 - (i) her requests to him to assist in loaning her the necessary money for the release of Kruger on bail (and in this regard it should be remembered that she was a fiancée of Kruger;
 - (ii) the taking of her to the Westville Prison to visit Kruger when her car was unavailable;
 - (iii) the fact that his wife had been compassionate towards her when a relative had been shot dead and had been instrumental in inviting her to lunch, etc.

It is equally possible that Mostert simply assumed that the plaintiff would be sympathetic towards her, and would help her;

- b) General Booysen also relied on the fact that Ferreira had told him that when he had told the plaintiff about the bag of clothes, the plaintiff had not known what was in it. When Ferreira had told the plaintiff, in reply to the plaintiff's enquiry that the bag of clothes had come from Mostert, the plaintiff had kept quiet. General Booysen clearly regarded this as a significant indicator of the fact that the plaintiff knew what was in the bag of clothes and had made a pre-arrangement with Mostert to assist in the escape of Kruger. In my view this was also not a reasonable assumption. I say this because reliance was placed on a statement made by Ferreira who did not give evidence at the trial. A written statement taken by General Booysen in Afrikaans and recorded in English, was placed before the court. The silence of the plaintiff should not reasonably have been interpreted as an indication of guilt in the circumstances. I appreciate in this regard that the members of the South African Police are not obliged to interrogate an accused person prior to arresting him provided that they have a reasonable belief that he should be arrested for a Schedule 1 offence. That the plaintiff's failure to further interrogate Ferreira on the contents of the bag was probably innocent, is reinforced by his own evidence that he telephoned Mostert immediately to discuss the matter with her. I do not believe that it is reasonable to infer from his silence that he had guilty knowledge of the escape, in the sense that he had previously agreed to participate in it;
- c) General Booysen also relied upon the fact that Ferreira had told him that he and the plaintiff had gone to the Spar on the way to return the bag of clothes to Mostert, and the plaintiff had not referred to this. General Booysen clearly interpreted this as the plaintiff being untruthful. The plaintiff's version was that he had simply forgotten about that part of what they had done and in any event regarded it as

insignificant, because they had simply gone to Spar to pick up supplies on the way to the home of Mostert. General Booysen said that he viewed this as an attempt by the plaintiff to distance himself from the conversation regarding the bag. In my view this was not a reasonable interpretation of the plaintiff's conduct because the reason for going to the Spar was not disputed, nor was it disputed that the Spar was on the way to the home of Mostert. There would seem to be no point in distancing himself from the conversation about the bag when on his own evidence he had spoken to Ferreira about the bag when Ferreira told him it had come from Mostert;

- d) combining these factors with what had happened at the Pinetown Police Station on the Sunday night, General Booysen formed the view that Mostert was telling the truth and, despite the fact that she was a s 204 witness, decided to arrest the plaintiff.

[105] In my view, and for the reasons set forth above it was not reasonable in the circumstances for General Booysen to have arrested the plaintiff. It did not follow that simply because of what had taken place on the Sunday night, read together with the suggestions of Mostert and Ferreira as contained in their statements, that the plaintiff was previously involved with Mostert and had agreed to the plan.

[106] Indeed, in Mostert's own statement she states that the plaintiff had sought to distance himself from the plot and had returned the bag of clothes to her, a factor which was confirmed by Ferreira, who himself took the bag of clothes into Mostert's flat. That is hardly consistent with the plaintiff having actively agreed to participate in the planned escape of Kruger. Indeed it flies in the face of any suggestion that he had previously agreed to take part. The fact that Mostert may have believed that the plaintiff would assist her and Kruger because of his previous helpfulness adequately explains the plaintiff's conduct.

[107] In all the circumstances, I find that on a balance of probabilities, it was not reasonable for General Booyesen to have arrested the plaintiff, and the plaintiff must succeed in claim 1. As far as it is necessary to do so, I record that I do not base my decision upon the improper exercise by General Booyesen of the discretion which he had once the jurisdictional facts were satisfied. In my view the fourth jurisdictional fact was not satisfied. I should also make it clear in arriving at my conclusion, I place no reliance on the fact that General Booyesen did not see the statement taken from the plaintiff by Inspector Bhengu. I do so because I do not believe that it is necessary for me to consider what General Booyesen would have done had he been apprised of that statement. The fact is that when he made his decision he did not know about it. It could therefore have played no role in deciding whether or not his decision was reasonable.

[108] In order to substantiate his claim for malicious prosecution the plaintiff was required to prove that:-

- (a) the servants of the defendant set the law in motion – i.e. instigated or instituted the proceedings; and
- (b) the defendants acted without reasonable and probable cause; and
- (c) the defendants acted with malice (or *animo iniurandi*); and
- (d) the prosecution has failed.

See Minister for Justice and Constitutional Development v Moleko 2009(2) SACR 585 (SCA), para 8

[109] It is common cause that the prosecution was set into motion by the arrest of the plaintiff by General Booyesen and the further processing by Warrant Officer George at the instance of General Booyesen. It is common cause that the prosecution failed because the charges were withdrawn against the plaintiff. The initial act of General Booyesen in arresting the plaintiff was unreasonable. The continued conduct of the prosecution against the plaintiff until the charges were withdrawn appear to have been at the instance of both General Booyesen and Warrant Officer George. In this regard I refer to the Occurrence Book entry

which appears at Exhibit A page 161 where, on the 23rd April 2006 he stated 'No decisions are been made at this stage regarding him and we are still proceedings.' On the 8th May 2006 Warrant Officer George was still of the opinion that the plaintiff 'must be prosecuted'.

[110] Although the docket was given to the public prosecutor from time to time for the purpose of the remands, no consideration of the matter and the charges to be levied against the plaintiff appear to have been considered by the public prosecutor. This is further evidenced by the fact that no charge sheet was ever given to the plaintiff, nor was he ever asked to plead.

[111] With regard to the continued prosecution of the plaintiff until the withdrawal of the charges, General Booyesen appears to have relied upon the involvement of, and input given to him by, Warrant Officer George. It is clear that Warrant Officer George was confused about the role which the plaintiff allegedly played in the attempted escape of Kruger. It is clear that until the matter was clarified by the plaintiff when he met with General Booyesen, some considerable period after his initial arrest, Warrant Officer George believed that the plaintiff was actively involved in the smuggling of the firearm into the cell of Kruger. I have no doubt that this contributed to the fact that the State persisted in the allegations against the plaintiff.

[112] General Booyesen and Warrant Officer George must have appreciated the possibility that the plaintiff was innocent. This can be seen in the evidence of the plaintiff and, indeed, the statement of Mostert. Yet they continued with the prosecution of the plaintiff in their zeal for a conviction. In my view the continued prosecution of the plaintiff until the charges were withdrawn was unlawful. I am accordingly of the view that the plaintiff should succeed in claim 2.

[113] With regard to the quantum of damages suffered by the plaintiff, no evidence was led with regard to any loss of earnings. The quantum of the

damages which he has suffered may accordingly be seen under the following heads :-

- a) wrongful arrest for which he claims R500 000;
- b) wrongful and malicious prosecution in the sum of R500 000; and
- c) damages for *iniuria* in the sum of R500 000.

[114] No evidence has been led with regard to the quantum of his other damages. Although he referred to his legal fees no proper evidence regarding this was led, and I accordingly do not consider them.

[115] Given the circumstances of the plaintiff's arrest, I am of the view that justice would be served were the defendant to pay him the sum of R75 000 for the wrongful arrest.

[116] Given the treatment which the plaintiff received after his arrest and the continued prosecution of him by the members of the South African Police, I am of the view that the sum of R75 000 would also be a just recompense for his malicious prosecution.

[117] Given the treatment of him during, and immediately after, his arrest the circumstances of his continued prosecution, his embarrassment, the damage done to him in his job, and the public humiliation of appearing in the press and having his name mentioned on television on the occasions of the continued adjournments of the matter, I am satisfied that he should be paid the sum of R50 000 for the *iniuria*. I am also satisfied that the defendant should pay interest on the total sum of R200 000 from the date of service of the summons being the 31st July 2007, together with costs. I am not satisfied that the conduct of the police officials was such that those costs should be ordered on an attorney and own client scale.

[118] In the circumstances I make the following order :-

1. the defendant is directed pay the sum of R200 000 to the plaintiff;
2. the defendant is to pay interest on that amount calculated at the rate of 15.5% per annum from the 31st July 2007; and
3. the defendant is directed to pay the plaintiff's costs of the action.

Date of hearing : 11th May 2011

Date of judgment :31st May 2011

Counsel for the plaintiff : A de Beer SC (instructed by John Dua Attorneys)

Counsel for the defendant : J Nxusani (instructed by the State Attorney)