



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 735/2019

In the matter between

LUBABALO ZITHA

Plaintiff

and

**MINISTER OF POLICE
NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

First Defendant

Second Defendant

JUDGMENT

HARTLE J

Introduction:

[1] The plaintiff seeks damages against the first defendant arising upon his claimed unlawful arrest on 30 November 2018 on a charge of robbery and his detention pursuant thereto “*until his release from custody*” on 8 July 2019 when that charge was withdrawn. He alleges that by virtue of certain conduct committed by members of the first defendant (at times acting in concert with members of the second defendant) he was unlawfully detained throughout the entire period both pre and post first court appearance. In consequence of the loss of his liberty, he claims to have suffered a violation of his right to dignity and *contumelia*. He asserts the right to be compensated in damages for the full period of his detention.

[2] It is apposite to mention the specific misconduct relied upon in respect of Claim 1.

[3] Firstly, it is alleged that when they arrested the plaintiff, the relevant members of the South African Police Services (“*SAPS*”):

- “8.2.1 failed to produce a warrant,
- 8.2.2 failed to exercise a discretion whether to arrest the plaintiff or not,
- 8.2.3 did not possess reasonable suspicion that the plaintiff committed robbery.”

[4] For these reasons the plaintiff asserts that his arrest was wrongful in consequence of which he was unlawfully detained at the Mdantsane Police Station until his first court appearance.

[5] Further the plaintiff alleges that subsequent to his first court appearance he was unlawfully detained at the instance of the employees of both defendants until “charges” were withdrawn on 8 July 2019. He asserts that his continued detention was wrongful and unlawful by virtue of the following:

“8.5.1 The first defendant’s members acting in concert with the prosecutors maliciously and/or recklessly opposed the granting of bail or release of plaintiff on warning without considering the merits of the charges against the plaintiff and without any lawful basis.

8.5.2 The members of both defendants perpetuated the plaintiff’s unlawful detention by withholding relevant information and misleading the court and failing to disclose that there was no evidence that the plaintiff had committed offence.

8.5.3 Members of both defendants failed to assess the strength of the State case against the plaintiff and to consider and place before court relevant factors which would determine whether the plaintiff’s further detention was warranted in circumstances.

8.5.4 The members of the second defendant failed to withdraw charges against the plaintiff on each of the court appearances prior to his release notwithstanding that his detention was not warranted and there was no prima facie against him.

8.5.6 The members of the defendants acting in concert failed to place before court on each of the plaintiff’s court appearances all relevant information as to the strength and weaknesses of the State case against him and information in the plaintiff’s favour, which was relevant for consideration by court in deciding whether to release the plaintiff from custody.”

[6] Also pressed against the defendants is a second claim of alleged malicious prosecution relating to the aforesaid robbery charge framed under Inyiba CAS

130/11/2018 and flowing from two further counts of robbery said to have been committed by the plaintiff under an earlier docket that had been opened against him and other suspects under Inyiba CAS 93/07/2018.

[7] It transpired that effective with his arrest on 30 November 2018 the plaintiff was charged with three counts of robbery. The first count emanates from CAS 130/11/2018. In this respect he was arraigned before the district magistrate's court in Mdantsane under case no. A1830/18 for the first time on 3 December 2018.¹ The further two counts arose under the earlier docket in which he was also implicated as a suspect. By the date of his arrest the case concerning the last two counts against him had already been enrolled in the Mdantsane district court on 6 August 2018 against a co-accused under case number A1218/18.²

¹ The particulars of claim allege that the plaintiff's first appearance was on the 4 December 2018 but the J15 and annexures indicate that this happened on 3 December 2018. The charge sheet reflects that the plaintiff as accused no. 2 together with Mr. Siyabonga Piyo were charged with robbery with aggravating circumstances it being alleged that on 28 November 2018 at NU 14, Mdantsane they unlawfully and intentionally assaulted Lindela Majavu and did then and there by force take certain items from him, his lawful property, aggravating circumstances being present in that they stabbed the complainant with a knife. The items taken were said to be a Nike jacket and "tekkies" plus a gold wristwatch, total value R2 140.00. The charge is certainly one included in schedule 1 of the Criminal Procedure Act, No. 51 of 1977 ("CPA"). It also, by obvious implication, resorts under Schedule 6 for bail purposes.

² In this matter the accused are charged with "*aggravated robbery*" according to the face of the J15 (which case record only made an appearance before this court mid-trial on 17 November 2022) but no charge sheet features. The record of these proceedings show that the charge/s were considered by the presiding officer (even before the plaintiff was added as an accused) to be "*schedule 6*". The page of the record which would have signified when the plaintiff was added to the mix is missing but the next entry recorded is on 11 December 2018 on which date it is written that "*both accused are before court. Both accused abandoned bail*". The accused were remanded in custody to 14 December 2018. On that date both were present again when the case was transferred to the regional court in terms of section 75 (1) of the CPA. It appears from the corresponding docket under CAS 93/07/2018 that a third person by the name of Ayanda April was added as an accused on 13 January 2019. Also discovered relative to these proceedings after the plaintiff had testified is the regional court record case no. RC1/01/19. The J15 and annexures in it reflect that the accused were charged with two counts of robbery with aggravating circumstances. The first count alleges that on 20 July 2018 at or near 21 NU 16, Mdantsane, the accused assaulted Ms. Siyuvile Sonqwelo and with force took monies (R200.00) and a cell phone from her, the aggravating circumstances being that the complainant (incorrectly described as a male person) was stabbed with a knife. Count 2 reads that on 21 July 2018 and at or near NU16, Mdantsane, they assaulted the same person and forcibly took R100.00 cash off her, the aggravating circumstances alleged being that they stabbed her with a knife.

[8] The plaintiff claims that the initiation of all three charges against him was effectuated maliciously and without reasonable or probable cause.

[9] Further to establishing the elements of the claim of malicious prosecution, the plaintiff pleads that the charge preferred against him under CAS 130/11/2018 was withdrawn due to poor prospects of success and a lack of sufficient evidence against him and - in respect of the two counts preferred against him under CAS 93/07/2018, that he was tried before the regional court and discharged at the close of the State's case.³

[10] It is common cause that the plaintiff was held in custody from 30 November 2018 until the last date of his release on 5 July 2019 in respect of the robbery charge framed under CAS 130/11/2018.

[11] Whilst admitting that the arrest of the plaintiff was effected without a warrant on 30 November 2018, the first defendant pleaded that it had ensued on the basis that the police were "*armed with information linking him to the offence*" of robbery and that the arresting officer had entertained a reasonable suspicion, undergirded by information placed at their disposal which was verified by the complainant. The latter was himself present at the moment of arrest to point out the plaintiff as one of the perpetrators who had robbed him.

[12] The plaintiff's continuing detention, until the said count of robbery was withdrawn by the second defendant in terms of section 6 (a) of the Criminal Procedure Act, No. 51 of 1977 ("*CPA*") on 5 July 2019, was also defended as lawful

³ The regional court case record, discovered late in the proceedings confirms that the plaintiff and his co-accused Mayikana were discharged pursuant to an application in terms of section 74 of the CPA on 13 March 2019.

on the basis that the plaintiff and his co-accused had been “*legally*” and “*correctly*” charged.

[13] The first defendant further asserts, in response to the bald allegation in the plaintiff’s particulars of claim that the members of the South African Police Service “*failed to exercise a discretion whether to arrest (him) or not*”, that his members indeed properly applied their discretion in carrying out the arrest, and that they respected the plaintiff’s constitutional rights in the process. As for the suggestion that his members compromised the plaintiff’s right to be released on bail, it was noted that the latter had been charged with “*schedule 5 offences*”⁴ (sic) which required him to remain in custody unless he satisfied the court as to his entitlement to be released on bail. Further, so it was pleaded, the plaintiff in any event voluntarily withdrew his bail application.

[14] To the allegations of malicious prosecution, the defendants pleaded that the plaintiff was lawfully and correctly charged with robbery under the aforesaid dockets with objective evidence linking him to the offences and that no malice existed. From the point of view of both defendants, reasonable prospects of success in the three charges preferred against him were said to have existed as well as “*clear evidence*” to sustain their prosecution of them.

[15] The plaintiff testified first.

[16] In order to justify his arrest (admittedly carried out without a warrant) and detention over the whole period and to refute the allegations of misconduct,

⁴ The official records reveal that schedule 6 offences were on the table. This is an obvious mistake in the pleadings.

malicious prosecution etc., the defendants led the evidence of the arresting officer Sergeant Siviwe Ngcatshe as well as the two prosecutors who had enrolled and/or endorsed the robbery charges in the respective courts.

[17] Documentary evidence, including the contents of the two relevant police dockets and the separate court records concerning the plaintiff, was also entered into evidence by consent.⁵ I point out that the court records in respect of the proceedings under CAS 93/07/2018 were discovered during the trial only in November 2022 and were only referenced by the last witness for the second defendant when he gave his testimony.

[18] Since the defendant relied on the statutory justification for the arrest made provision for in section 40 (1)(b) of the CPA, one of the questions which arises is whether the suspicion that the arresting officer harbored that the plaintiff had committed the offence of robbery, which led to his arrest in the first instance, was reasonable in the circumstances. It is common cause that the plaintiff's apprehension on 30 November 2018 provided an opportunity to additionally charge and add him as a co-accused to the already enrolled case in the Mdantsane district court under case no. A1218/18. The reasonableness or not of him being charged by the South African Police Services on the two counts arising under CAS 93/07/2018 is however not under contention in respect of Claim 1.

[19] Additionally, the substantive legality of the plaintiff's ensuing detention is under scrutiny. If found proven that the first defendant's members conducted

⁵ The parties agreed in the pre-trial processes that the documentation discovered would serve as evidence of what those documents purported to be without admitting the contents thereof. No challenges emerged at the trial as to the authenticity of any of the documents that served before court.

themselves unlawfully in the respects contended for, the further question which begs itself is whether such culpable conduct materially conduced to the plaintiff's fate of remaining in custody during the entire period as a result of his wrongful arrest.⁶

[20] Although the plaintiff purported to make out a case in his testimony that his arrest was procedurally wanting as well, no complaint appears from his particulars of claim in this respect.

[21] The soundness of all the charges in respect of both dockets is further in contention. The question arises in this regard whether in instigating these charges the defendants' members entertained an honest belief founded on reasonable grounds that their institution was justified. The question whether the charges carried with them reasonable prospects of success and evidence to sustain them is further in my view also entirely relevant to the legality review.

Plaintiff's testimony:

[22] The plaintiff related the circumstances under which he came to be arrested on 30 November 2018. He and a friend Koloba had been asleep upon the arrival of Sergeant Ngcatshe's at his home in the morning. He says that the latter kicked open his door. He was in the company of a second police officer as well as the complainant, Mr. Majavu.

⁶ See *De Klerk v Minister of Police* 2020 (1) SACR (1) (CC) at para [63]. See also *Mahlangu & Another v Minister of Police* 2021 (7) BCLR 698 (CC) where it was not hard to envisage that the egregious conduct of the police (who obtained a false confession from the plaintiff through torture and coercion to justify the arrest in the first place and then "*cunningly engineered*" their continued detention by misrepresenting the true state of affairs to the prosecutor) materially led to the plaintiff's further detention.

[23] The complainant took the lead and questioned him regarding the whereabouts of his belongings which he had complained to the police he had been robbed of by the plaintiff and one Siyabonga.⁷ Sergeant Ngcatshe however at the outset himself announced to him that he had been looking for him for a long time, this with reference to the two robbery charges under CAS 93/07/2018. The plaintiff says that he told Mr. Majavu then and there that his property, that is the cap and hoodie and sneakers that had been taken from him, were with Siyabonga.

[24] He professed not to have known why he was asked to produce these items and provided some background story about how it came to happen that Siyabonga after a scuffle had dispossessed Mr. Majavu of his clothing as “*security*” for a music system that he, the complainant, had purportedly taken from the latter. According to him this had happened some two or three days earlier and when he had last seen Mr. Majavu, he (the plaintiff) has sent him on his way wearing a pair of his own “*push-shoes*” so that he would not go barefoot, this information ostensibly offered in support of his claim of innocence and insistence that he was uninvolved in the whole debacle but aware that the complainant’s possessions had been taken from him.

[25] He insisted that he had not been informed at the time why he was being arrested, yet related that he had been handcuffed. The police also searched his shack. Between leaving his house and arriving at the Inyiba Police Station ultimately, he was first driven in a police car to look for another man, one “*Fire*”, at NU14. (The

⁷ It is common cause that this was his co-accused, Mr. Siyabonga Piyo, referenced in the charge sheet in case no. A1830/18.

witness did not explain the relevance of this person or link him to the matter at hand.)⁸

[26] At the Inyiba Police Station he was held for almost three hours after “*being given a paper*” by police officers on duty at reception on which was written “*robbery*”. The document identified by him during his testimony is the constitutional warning colloquially referred to as the SAPS 14A form which on the face of it was administered by Sergeant Ngcatshe himself. He was thereafter taken to the NU1 Police Station where he was held in detention.

[27] He was aware that he had been arrested for more than one case. He acknowledged knowing that the second case involved a complainant by one Sivuyile Sonqwelo but denied being involved in such a matter except for the fact that he had been named by her as a suspect.

[28] Asked if he had applied for bail after his arrest, he claimed that Sergeant Ngcatshe had informed him that he would not get bail because he had a pending case. He conceded that his legal representative had abandoned his bail application in court but suggested that he would not have done so but for what Sergeant Ngcatshe had told him.

⁸ The *alias* of Ayanda April is “*Fire*” according to the SAPS 14A form filed concerning such accused in CAS 93/07/2018. The latter suspect was arrested on 13 January 2019 according to the docket, but his name does not feature in the court record after as being a participant in the trial, even though the witnesses in their police statements spoke of “*Fire*” as being the primary perpetrator of the robberies. This anomaly is however not something I need enquire into or resolve.

[29] As an aside he did not take the court into his confidence concerning the nature of the pending case except to relate that it had been withdrawn.⁹

[30] Under cross examination he conceded to knowing the reason why Sergeant Ngcatshe had arrested him, namely regarding the complaint against him by Mr. Majavu of the robbery of his clothing. He however refuted (on his version of how Mr. Majavu had come to be dispossessed of his property) that he had threatened him with a knife or that he had been complicit in the incident contended for by Mr. Majavu.

[31] He denied having been pointed out by Mr. Majavu (on the occasion of his arrest) as the person who had robbed him. Asked why he thought Mr. Majavu had suggested that he was complicit with Siyabonga in committing robbery, he blamed it on everybody smoking “*tik*”. According to him Siyabonga was responsible for the robbery. He acknowledged though that he had been present at the time of the incident and had in fact tried to intervene when Siyabonga wanted to stab the complainant.

[32] Asked why he had not at the outset asserted his innocence that he was not involved in the robbery on Mr. Majavu’s version, he claimed to have not known at the time he left his shack with the police that he was in fact under arrest for this offence.

⁹ In his evidence in chief he and Mr. Ngcatshe appear to have been at cross purposes about the so-called pending case. In my opinion the plaintiff understood the pending case to be the one pre-referred under CAS 93/7/2018 because it was on 13 March 2019 when he was discharged in those proceedings. He suggested that the hindrance of the pending case persisted until “*14 March 2019*” (sic).

[33] He claimed that on the day of his arrest he had not conversed with Sergeant Ngcatshe in his shack at all as if to suggest that the latter went about the exercise of effecting the arrest without saying a word to him.

[34] As to how he supposedly responded to Sergeant Ngcatshe's opening gambit that he had been looking for him for a long time, and quite forgetting that he had said that they did not converse at all during their brief exchange, he related that he had questioned him at the time how it was possible that he could have been looking for him since he (the plaintiff) regularly sees him on the streets.

[35] Although denying that Sergeant Ngcatshe had informed him of his constitutional rights, he yet agreed that he had signed the SAPS 14A. He denounced that any discussion between him and Sergeant Ngcatshe had preceded his signing except that the latter had supposedly told him to sign the document. He also emphasized that the search of his shack had happened without his permission.

[36] According to him he only spoke with the police about the charges implicating him the following day. He agreed that he was known by the nickname "*Buga*" who is the person Mr. Majavu referenced in his statement as the one who had robbed him together with Siyabonga. He added that he was known by his nickname not only by Mr. Majavu, but also by Ms. Songwelo.

[37] As for the second case, involving the earlier charges under CAS 93/7/2018, he denied having been involved in the claimed robberies but set the record straight that he was absolved of any liability for these claimed incidents by the regional court when the matter went on trial before it.

[38] Concerning the question of bail in the regional court he conceded that it had been properly recorded there as well that he had abandoned his application, but he added again that it was because of Sergeant Ngcatshe's remarks to him about a pending case.

The arresting officer's testimony:

[39] Sergeant Ngcatshe testified that after becoming seized of the matter in his capacity as police officer, he read the docket and then interviewed the complainant, Mr. Majavu, in order to obtain further information. Mr. Majavu had complained in his statement to the police that on 28 November 2018 at NU 16, Mdantsane he had met up with Siyabonga and the plaintiff, Buga, who had complimented him on his attire. They invited him back to the plaintiff's shack to smoke. There the two of them drew knives on him. The complainant fell down. Siyabonga stabbed him while the plaintiff dispossessed him of his clothing and wrist watch which they ran off with. (As an aside this narrative of what happened conforms to the complainant's founding statement filed in the docket that he made shortly after the incident.)¹⁰

[40] At the time there was a pending case in which the plaintiff had been accused of robbing someone else and he related that he was looking for the plaintiff in this matter that he had been investigating as well. He disclosed that the complainant in that instance was Sivuyile Sonqwelo and that four suspects were implicated in respect of those offences. In statements made by the complainant and a witness (in CAS 73/09/2018 which he referenced during his testimony)¹¹ the plaintiff had been

¹⁰ This is included amongst the documentation entered into evidence. See Bundle A at pages 57 – 58.

¹¹ Bundle A at pages 97 – 99, 113 – 115 and 116 – 117.

identified by name as a co-perpetrator in respect of two consecutive robberies perpetrated against her at knifepoint on 20 and 21 July 2018.

[41] Mr. Majavu offered to take the witness to where he knew the plaintiff to be staying with Siyabonga.

[42] On his arrival at the plaintiff's shack, he proceeded to the door which was ajar. After knocking two men came out, but before he could address the complainant, Mr. Majavu exclaimed "*Hey Buga, I need my clothing items from you!*" He acknowledged that it had been inappropriate for Mr. Majavu to interpose himself as he did but confirmed that he immediately retook charge of the visit.

[43] He and the plaintiff were already known to one other. He explained the reason for his presence there which entailed him acting principally on Mr. Majavu's robbery complaint. He informed him of his plan to arrest him and of his constitutional rights as an arrested person even as he was handcuffing him. He asked permission to search his shack but the plaintiff offered the explanation that the items he was looking for were with Siyabonga who was in fact wearing them. They proceeded accordingly from the plaintiff's home to look for Siyabonga in NU 16, but to no avail. Later they drove to the police station and he registered the matter in the books there, gave the plaintiff his constitutional rights in writing on SAPS 14A, and left him to be detained.

[44] He identified his own statement in the docket made contemporaneously with the arrest which conformed to his oral testimony.¹²

¹² Bundle A at pages 60 – 61.

[45] He also alluded to the statements made by Ms. Sonqwelo in the other docket in which the plaintiff was being sought as a basis for his secondary interest in arresting him. He related the gist of her complaint and that the plaintiff had been named by her and a witness as being complicit in the two robberies perpetrated against her.

[46] He denied that he had been undermined by Mr. Majavu at the point of entering the plaintiff's shack or that he had supposedly not said a word to the plaintiff during his arrest encounter. Indeed, he added that it was on the basis of the plaintiff conversing with him and the information which that discussion had generated, namely that Siyabonga was wearing the complainant's clothes, that they had driven around looking for Siyabonga.

[47] He confirmed that he officially administered the plaintiff's constitutional rights to him at the station per SAPS 14A in addition to having informed him during the arrest encounter of his rights as an arrestee. He had also asked his permission to search his shack.

[48] Asked to justify why he had arrested the plaintiff, he asserted that it was because Mr. Majavu had identified him as the suspect who had robbed him together with Siyabonga and because he would be failing in his duty as a police officer if he had not. He added that he had previously visited the plaintiff's home several times before (following up on leads from informants) in order to find him but had been informed by his mother and neighbors that he was unavailable.

[49] He explained that he had not personally gone to court when the plaintiff appeared after his arrest because he went on leave, but he learnt from a colleague that his personal attendance at a bail hearing would in any event have been unnecessary because the plaintiff abandoned his bail application.

[50] Under cross examination he emphasized that he had been intent on properly exercising his discretion hence the fact that prior to arresting the plaintiff he had sought verification from the complainant, Mr. Majavu, of the facts written in his statement.

[51] As for the allegation in the docket that the complainant had supposedly been stabbed and had sustained open wounds in the debacle, he acknowledged that he had not seen the wound for himself because Mr. Majavu, when he had consulted with him, was wearing a bandage around his head. He conceded that insofar as the J88 was concerned, the doctor had not recorded that he had seen any injury himself but had merely noted the history given to him by Mr. Majavu that he had been assaulted on 28 November 2018. (As an aside the J88 could evidently not have been to hand when Sergeant Ngcatshe made the decision to arrest.)¹³

[52] He denied that when Mr. Majavu had challenged the plaintiff in his presence, that is concerning the whereabouts of his property, that the latter had offered the explanation that his property was with Siyabonga. Instead, according to him, it was only when he asked to search the plaintiff's premises (that is after arrest) that this explanation was forthcoming. He adverted to his arrest statement in which he recorded exactly his claimed interaction with the plaintiff on this basis. He added

¹³ This is because the covering affidavit of the doctor was only commissioned on 7 December 2018.

that before arresting the plaintiff he had also expressly indicated in what capacity he was visiting his home and his intention thereby. Siyabonga was not present, so he had established, or at least the person in the plaintiff's company was not the suspect he had gone looking for at the plaintiff's home.

[53] He was evidently unaware of the plaintiff's version that Siyabonga purportedly took the complainant's property as a kind of "*surety*" and he bore no knowledge concerning Siyabonga's music system having been stolen.

[54] He explained that he did not delve into any further explanation because the presence of the complainant and what he had stated in his affidavit satisfied him enough that the arrest of the plaintiff was appropriate in all the circumstances. He did not believe that it was necessary, as was suggested to him under cross examination, to have enquired further in order to satisfy himself that indeed an offence of robbery had been committed.

[55] He agreed that he had prepared a bail information form pertaining to the plaintiff which he identified in the court bundle. He conceded that in it he confirmed his objection to the plaintiff being released on such a basis. According to him much of the information or answers recorded in the form at the date of its completion on 1 December 2018 were obtained from the plaintiff himself, such as for example the confirmation that he was on bail in another case of theft.¹⁴ He explained that the customary process is ultimately to verify details provided on such a basis before a bail application ensues. His colleague would have had to attend to any verification

¹⁴ It was coincidentally put to the witness that the plaintiff never volunteered to him that he had a pending case of theft suggesting that the notion of a case of theft had emanated from Sergeant Ngcatshe himself.

on his behalf while he was on leave but in this instance the plaintiff had abandoned his request for bail, rendering it unnecessary in the end.

[56] He readily conceded that his positive recordal of the questions whether the plaintiff had escaped or attempted to escape and whether he had evaded/resisted arrest were misconceived, based on a misunderstanding on his part. In his view his having looked for the plaintiff for a long time before arresting him and his running away and avoiding the objective of his arrest was a sure indication that he should answer positively to the question whether the plaintiff had attempted to escape or resist arrest.

[57] He also considered that having been told by the plaintiff that he was staying at his home, whereas he could not be found there, was tantamount to him providing false information to the police which is why he answered “yes” to this question stipulated in the bail information form.

[58] He also explained that his understanding of the question whether the plaintiff was a member of a gang or syndicate had to be answered in the positive because he was among a group of suspects allegedly committing the offences perpetrated against Ms. Sonqwelo. He added that he also knew them (the plaintiff and the co-accused) to be “*always together*” when they commit such offences.

[59] With reference to the constitutional warning statement which the witness took from the plaintiff re CAS 130/11/2018, he conceded that it is incomplete regarding the election made by the plaintiff to remain silent but he was not in agreement that this meant that he had failed to inform the plaintiff of his constitutional rights. He

explained that he had simply not gone further in administering the warning statement once the plaintiff had informed him of his desire to remain silent.

[60] He denied especially that he had given the plaintiff blank warning forms to sign. He further clarified regarding the warning statement taken by him from the plaintiff under CAS 93/07/2018 that he had followed the exact same approach, that is of not making any further entries in it once it had been made clear to him by the plaintiff that he formally did not wish to say anything in a statement.

The testimony of Mr. Mazibuko:

[61] Mr. Vumani Mazibuko, who came with 17 years of prosecutorial experience at the time of his testimony, was employed as a senior public prosecutor with the The National Prosecuting Authority stationed at the Mdantsane Bail Court when the plaintiff made his first appearance in court under CAS 130/11/2018. He received the docket in that matter and read it to determine whether probable cause existed for the enrolment and was so satisfied. He identified in court the founding statement of the complainant, Mr. Majavu. He especially considered that all the elements for the offence of robbery were in place and was also satisfied that there was no issue as to identity. Firstly, the plaintiff and the complainant were known to each other and, secondly, the incident had occurred during the day.

[62] It was under these circumstances, and in the exercise of his professional duties as a prosecutor and holding the view that there was a *prima facie* case of robbery made out against the suspects in the founding statement, that he had decided to enroll the matter.

[63] He heard later that the case had been withdrawn against the plaintiff by a colleague. He expressed concern in this regard because he firmly believed that there had been enough evidence to have prosecuted him. He added that it was indeed his intention to place the matter back on the court roll because there was indeed sufficient evidence in his view to revive the prosecution against him. (As an aside it appears from a notification in the docket that the complainant had not wanted to proceed with the prosecution which puts an entirely different spin on the matter than that the prosecution was objectively doomed for want of probable cause.)¹⁵

[64] He clarified that when his view was formed as to the enrolment of the case, it was on the basis of what he had read at first appearance. This was ostensibly before the J88 report had been obtained.

[65] Asked to reflect on the cogency of Mr. Majavu's founding statement since the J88 report does not provide objective confirmation of the injuries contended for him, he was not inclined to change his mind that it had not been a proper case to enroll and prosecute.

[66] He assumed that because the complainant had gone to the doctor late that this might explain why the latter found an absence of any visible injuries. He readily

¹⁵ Why the charge had been withdrawn was glossed over in the evidence. In the original docket provided at the court's insistence however (the contents of both had been discovered), Sergeant Ngcatshe had filed the customary letter to the complainant reporting on the outcome of the matter in which it is explained that the "*complainant withdrew at court*". What is recorded in the court record on that date is as follows: "*PP: State is withdrawing charges no prospect of successful prosecution*". The fact that the charge was withdrawn at court is also indicated on the face of the J15 with no elaboration provided. This indication in the documentary evidence does not detract from the admission made in the plea (without any elaboration) that the prosecution in respect of this charge was terminated in the plaintiff's favour but it does go to the elements of malice and reasonable and probable cause because objectively there was evidence to sustain the prosecution until the complainant withdrew it at court. It also goes to the reliability of the witnesses' view that the charge in his opinion otherwise had objective merit.

conceded however that if there had been an injury to the complainant's head and a wound to his wrist that the doctor would surely have seen and recorded those on 29 November 2018 when he had examined him. He volunteered his view though that even in the absence of any injuries, the mere wielding of a dangerous weapon mentioned in the complainant's statement would have satisfied him that the element of force was present to substantiate a charge of robbery with aggravating circumstances.

[67] Further even if the plaintiff's co-accused (as outlined in the complainant's founding statement in the docket) had been the primary aggressor, he laid emphasis on the fact that it was the plaintiff who had removed the complainant's property whilst he was stabbed by Siyabonga, suggesting to him that common purpose had evidently been at play according to his take on the matter.

[68] The plaintiff's supposed defence that he had not been complicit in the dispossession of the complainant of his property was certainly not known to him at the time of deciding the case on first appearance.

[69] He was further unmoved by the suggestion that because the complainant and the plaintiff were purportedly friends that this detracted from the veracity of the founding affidavit that the plaintiff and Siyabonga had actually perpetrated a robbery against him.

[70] As an aside there is nothing else in the docket that records any defence raised by the plaintiff to the charge such as emerged during his oral testimony regarding Siyabonga supposedly having retained the complaint's property as security for the

loss of his own music system. Ironically though, in the statement of the officer who arrested Mr Piyo, he/she reports the latter's denial that he had taken Mr. Majavu's belongings yet reveals a defence that their whereabouts was rather known to the plaintiff.¹⁶

The testimony of Mr. Jack:

[71] Mr. Thamsanqa Jack, also a seasoned prosecutor employed by the National Prosecuting Authority as a district prosecutor based at the Gqeberha Magistrate's Court at the time of his testimony, related that he had been a regional court prosecutor in court 2 at Mdantsane when the docket under CAS 93/07/2018 came up for consideration before him as a first appearance there. The practice according to him is to first postpone matters referred to the regional court to a date for consultation but before doing so he had also satisfied himself upon a reading of what was contained in the docket that there was enough evidence that the suspects mentioned therein (which included the plaintiff referred to in two statements as "*Bhuga*") had committed the offences in question. He thereupon consulted with both Ms. Sonqwelo and a Ms. Sinethema Gcongo to confirm as much and the matter was, on the basis of him supporting that there was a proper case to be answered by the plaintiff on both counts, postponed for trial in the regional court.

[72] On 8 March 2019 the trial ensued and was postponed to 13 March 2019 for further testimony at which juncture the defence successfully applied for a discharge

¹⁶ This statement would have been available to the witness at the time of the plaintiff's first appearance and would have been a further indicator that there was merit in enrolling the matter.

in terms of section 174 of the CPA.¹⁷ He was yet satisfied, despite the discharge, that the state's case was adequate.

[73] With reference to the court proceedings, he laid emphasis on what he had argued before the regional court after the State had submitted that there was no *prima facie* case in respect of count 1 and, with regard to count 2, that the evidence was that accused 1 and 2 were not present during the robbery:

“... After the State's case was finished, the defence applied for 174, stating that there is no *prima facie* evidence before the Court. So there is no need for the accused to stand trial. And my response was that in respect of Count 1, yes, we have evidence of a single witness. But if a single witness meets the requirements of Section 218 and by saying that, I was saying that the accused that are before Court are well known to the complainant and she is placing them on the scene on the day in question. And she tried to fight with them and they took her phone and the money away on the day in question. Coming into evidence in Court 2. The State had two witnesses that were placing the accused in question on the scene, by the evidence of Sinethemba as well as the evidence of the complainant. But the 174 was granted ...”

[74] The court only recorded its judgment that the application for discharge had been successful without furnishing any reasons in this regard.

[75] As for the question of bail he identified where in the court record it is evident that after the plaintiff had been arrested and joined to the proceedings, bail was noted to have been “*abandoned*” on both counts on which the plaintiff had stood arraigned on charges of robbery with aggravating circumstances. He observed that these were

¹⁷ There was no transcript available of the proceedings. The magistrate's notes are sketchy.

Schedule 6 offences where the number of accused involved and the severity of the offence would in his view have featured prominently as factors standing in the way of the plaintiff having been granted bail. Further, so he explained, the onus would have been on the latter to show to the court that exceptional circumstances existed which permitted his release in the interests of justice. In this instance the plaintiff had elected not to make such an application.

[76] He readily conceded under cross examination and with hindsight that it was of concern that the complainant in her initial founding statement in the docket had not mentioned the plaintiff by name – on the assumption that he was involved on count 1, since he was purportedly known to her.¹⁸

[77] He also conceded that there was a fine discrepancy between the complainant and her eye witness in their police statements regarding the number of assailants.

[78] He agreed with the assertion put to him by Mr. Ngumle (that is in the light of this discrepancy pointed out to him) that it was then no surprise that the plaintiff was acquitted because the State had a “*terrible case*”.

[79] According to him at no time did it come to his mind that he should have gone beyond the plaintiff’s election not to pursue bail for himself or to examine why that was the case. He agreed that he would have had regard to Sergeant Ngcatshe’s bail

¹⁸ Ms. Songwelo did not testify in the present matter so the extent of her acquaintance with the plaintiff was not interrogated neither the reason why she did not name him until her second statement clarifying the events. Mr. Jack however had both statements at his disposal when he enrolled the matter for trial and there was evidently nothing sinister in the fact that the clarifying statement had been somewhat delayed because the complainant was working away from home at the time.

instruction form in making his decision regarding the issue of bail which, objectively, confirms a valid basis to have opposed his release on such a basis.

The bail proceedings in the district and regional court under CAS 93/07/2018:

[80] Mr. Jack confirmed that the plaintiff remained in custody on these charges from the moment of his first appearance in the regional court as accused no. 2 and that the obvious reason suggested by the court record for this fact is because the accused had intimated to the court that they did not wish to apply for bail.

[81] He emphasized in this respect however that the plaintiff and his co-accused had been arraigned on two counts of robbery with aggravating circumstances and that these are schedule 6 offences. Asked what impact this would have had on the plaintiff's entitlement to be released on bail, he testified as follows:

“MR NGADLELA: So up until this day, 8 March, up until the date of the application for 174, the accused, the plaintiff was in custody. Is that what you are saying:

MR JACK: Yes, sir.

MR NGADLELA: And what was he charged for?

MR JACK: He was charged for two counts of robbery with aggravating circumstances.

MR NGADLELA: What is that? What schedule is that?

MR JACK: It is Schedule 6, sir

MR NGADLELA: What does it say, the schedule? Can you just tell the Court what is Schedule 6, what does it say?

MR JACK: Schedule 6, it also depends on the seriousness of the crime. In this instance when the complainant was robbed, he was robbed by more than two persons. So we formulate the charge as to the severity of the offence as well as what was done to her on the day in question. In both these incidents, the complainant is mentioning the issue of

knives. In the first incident of the 20th as well as the second incident of the 21st. And then due to the fact that the knives were taken and after that her cell phone as well as her money was taken from her by force, and in both these incidents. That is what the State is alleging.

MR NGADLELA: So Schedule 6 is more of serious offences committed.

MR JACK: Yes

MR NGADLELA: With aggravating circumstances.

MR JACK: Yes, and the aggravating in this one is that a knife was used to threaten, in fact in Count 1, the complainant is alleging that she was stabbed on the finger. There is a statement, she mentioned that she was stabbed in the finger. She did not go to hospital for treatment. And in that count, she also tried to fight because of the number as well as the weapons that were there. That is why they were able to take her item.

MR NGADLELA: What other principle does Schedule 6 has in regard to the onus? What does it say, what does it tell?

MR JACK: It says that the accused must, bears the onus in the fact that the accused must show the Court whether are any exceptional circumstances that permits his release in the interest of justice. So the accused must come with reasons which are not ordinary in order for the Court to grant him or her bail.

MR NGADLELA: Did the accused exercise that right?

MR JACK: He did not exercise, according to what I saw in the records here.”-

[82] In his view and as far as his role was concerned, if the plaintiff had insisted on applying for bail “*he was definitely going to be granted that opportunity*”.

[83] As for what had preceded his appearance in the regional court, he adverted to the record of the district court proceedings which reflect the same election on the part of the plaintiff not to have wanted to pursue an application for bail.

[84] As an aside, Mr. Jack’s testimony is entirely consistent with the documentary evidence comprising the records in respect of both these courts.

The bail proceedings in the district court under CAS 130/11/2018:

[85] These reflect that the plaintiff first appeared on 3 December 2018 and that the magistrate informed him and his co-accused of their right to apply for bail. The public prosecutor in addressing the court noted that Schedule 5 (sic) was implicated and that bail for both was to be opposed. Also recorded is a request by the defence that the case be transferred for a formal bail application to 4 December 2018, to which date the matter was postponed, with both accused being remanded in custody.

[86] On 4 December 2018, the magistrate's notes read as follows:

“PP: New matter from A Court. Sch 6 offence, and state opposed to granting of bail for the applicants.

R/I/C to 20/122018 for bail application.”

[87] On 20 December 2018 the court noted on the occasion of the appearance of both accused as follows:

“Both applicants before court.

Def: to lead viva voce evidence in the matter.

Case thus is crowded out, and R/I/C to 08/01/2018 for bail application.”

[88] On 8 January 2019 the record indicates as follows:

“Both applicants before court.

Def: New in the matter – and has not had enough chance to consult with the applicants and is thus applying for a remand of the case. Applicants to still lead viva voce evidence in the matter.

PP: No objection to the application.”

[89] On 29 January 2019 the plaintiff again appeared with his co-accused when the following was record:

“Applicants (1 & 2) before court.

Pp: I/O has already filed the affidavit.

Def: Has taken sick and thus not able to proceed with the matter, and has not yet consulted with the applicants.

R/I/C to 12/02/2019 for bail application.

Case marked: Preferential.”

[90] On 12 February 2019 both appeared before the court again when the plaintiff indicated his election not to apply for bail. The magistrate’s notes read as follows:

“Both applicants before court in custody.

Matter on the roll for bail application.

Due to loadshedding, the State and defence apply for a postponement.

Defence – Applicant No. 2 is abandoning bail at this stage. Acc. No. 2 confirms the information.

Case is postponed to 18.02.2019 for bail application of applicant No. 1

Both accused in custody.”

[91] On 18 February 2019 the bail application of the plaintiff's co-accused was not dealt with due to the "*lateness of the hour and roll congestion*". The court repeated the status that "*accused no. 2 bail abandoned.*"

[92] On 14 March 2019 the record reflects that the following happened:

"No. 2 Applicant before court

PP – Before court for formal bail application. Schedule 6 – State is opposing bail and proceeding in motion.

Def – Confirms appearance and pending case was withdrawn on the 07th/03/2019.

PP – Applies for short adjournment to 19th/03/2019 to verify this information.

By court – RIC to the 19th/03/2019 to verify any withdrawal of pending case."

[93] On 19 March 2019 both the plaintiff and his co-accused appeared again when the following was noted by the court:

"Applicant before court

PP – applies for the matter to be rolled over for I/O to 01st /04/2019.

Def – confirms appearance and no objection.

By court – both RIC to the 20th/03/2019 for I/O."

[94] On 20 March 2019 the following is noted:

"Both acc appear ...

Both schedule 6 offence

Bail opposed.

Def – applies for pp not feeling well.

Rem I/C to 8/04/2019 & FBA at defence request

Sergeant Ngcatshe warned to appear.

Both accused I/C.”

[95] On 8 April 2019 the following is noted:

“No. 2 applicant before court

PP – May the matter be pp to 09th/04/2019 for formal bail application.

State is opposing bail.

Schedule 6

Def – confirms appearance and date is suitable.

By Court – No. 2 RIC to the 09th/04/20219 for formal bail application.”

[96] On 9 April 2019 the record indicates that the following happened:

“Applicant before court

PP – Before court for formal bail application. Schedule 6 offence and State is opposing bail by way of affidavits.

Def – confirms appearance confirms and the Schedule – by way of affidavit.

Digitally recorded.

By court – RIC to the 12th/04/2019 for investigating officer to check the status of applicant with Department of Correctional Services.”¹⁹

[97] On 12 April 2019 the record shows as follows:

“Acc No. 1. Applicant before court

PP – before court for further evidence.

Def – confirms appearance and ready to proceed.

Digitally recorded.

By court – RIC to the 24/04/2019 for bail judgment.

¹⁹ It was evident that the proceedings on this date did not relate to the plaintiff.

(Acc. No. 2 – in custody bail abandoned.)”²⁰

[98] On 24 April 2019 it is noted that:

“Applicant before court

PP – before court for bail judgment.

Def – confirms appearance.

Digitally record.

Judgment – bail denied.

Main case – RIC to 03rd/06/2019 at “A” Court further investigations.

(Bail denied)”²¹

[99] On 3 June 2019 the record reflects that the accused were remanded in custody (bail refused and abandoned respectively) for further investigation to 8 July 2019 and to obtain two witness statements. The defence did not object.

[100] The culminating entry is on 8 July 2019 when the charges were withdrawn.

[101] Coincidentally the docket under CAS 130/11/2018 reveals that on 18 December 2018 supportive information for bail report was downloaded from SAPS’ criminal record system. This reflects, in respect of the plaintiff, not only that he had previous convictions for housebreaking and robbery, but that there were several cases awaiting trial besides the two dockets under scrutiny in this matter. The list is as follows:

²⁰ It was conceded that this application related to the plaintiff’s co-accused.

²¹ The appearance self-evidently did not relate to the plaintiff.

“CASES AWAITING TRIAL

2011 EYG067	193/3/2011	INYIBIBA	HOUSEBREAKING
2018 RZB505	93/7/2018	INYIBIBA	ROBBERY
2018 RZB319	35/11/2018	INYIBIBA	THEFT
2018 SCK769	36/11/2018	INYIBIBA	THEFT
2018 RZB506	130/11/2018	INYIBIBA	ROBBERY”

[102] As indicated in the outline of the plaintiff’s testimony above, he failed to enlarge upon the issue of his pending cases at the time, preferring to lay the blame squarely on the arresting officer for influencing his decision to abandon bail and for having conjured up the concept of a pending case of theft which was not later verified.

Evaluation of the evidence:

[103] When there are irreconcilable versions before the trial court it must draw conclusions on disputed issues based on findings in respect of the credibility and reliability of the various witnesses, considered together with the probabilities.²²

[104] The plaintiff sought to create a sensational hype around his arrest that the arresting officer behaved like a scoundrel, forced his way in through the door, failed to give recognition to or respect his constitutional rights as an arrestee, kept him in the dark as to the fact of his arrest, prevailed upon him to sign documentation without explanation, and that he then purportedly influenced or misled him into abandoning his application for bail. Not only is this against the general probabilities and

²² *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 – 441; *Stellenbosch Farmer’s Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14 H – J.

inconsistent with the contemporaneous documentation completed by Sergeant Ngcatshe evidencing a proper and rigorous process adopted by him in the course of his arrest and detention of the plaintiff, but it is also inconsistent with the plaintiff's own pleadings.

[105] There is not a murmur in them as to the supposed gross procedural illegalities or that his constitutional rights were forsaken in carrying out the arrest as he testified to. There is also no mention of the seminal defining complaint that Sergeant Ngcatshe had influenced his decision to abandon his bail application on some pretext that did not exist or which had not been verified. Indeed, the allegations in paragraph 8.5 of the particulars of claim, at the height of the claimed culpable conduct, suggest the reckless promotion of a case absolutely lacking in any merit rather than the case the plaintiff opportunistically sought to impress upon the court in his testimony which was to the effect that Sergeant Ngcatshe had supposedly told him he would not get bail because of a pending case of *theft*.²³

[106] Over and above the pending charge under CAS 93/7/2018, the plaintiff was vague or silent about the impediments facing him that by obvious implication would not have conduced to a successful bail application.

[107] He was ambivalent about the supposed defence which he suggested ought to have persuaded Sergeant Ngcatshe to investigate further rather than resorting to the drastic option of arrest. On the one hand he claimed to have said that Mr. Majavu's belongings were taken in lieu of security for Siyabonga's loss of his music system.

²³This is not the "*misleading*" contended for in the particulars of claim. Evidently what the defendants were purportedly being mum about (so the particulars of claim allege) is that the case against the plaintiff was bad to the core.

But he also happened to mention in his testimony that the complainant was dispossessed of these in a “*scuffle*”. He further added, forgetting what he had said about Siyabonga’s music system, that he had tried to intervene when Siyabonga wanted to “*stab*” the complainant, acknowledging in my view that the plaintiff had been violently dispossessed of his property.

[108] One would have expected the plaintiff to lay the evidentiary basis for his claim that his further detention was not justified or was without just cause and legally caused the harm suffered by him on the premises heralded in his particulars of claim, but this fizzled out to the insinuation that Sergeant Ngcatshe had supposedly influenced him not to apply for bail on the basis of a pending charge. Further, whereas it was required of him to be clear about the pending charge which he says damned him to remain in detention he was hopelessly vague about this aspect in his evidence in chief. It was ultimately argued on his behalf that the notion that there was a charge of theft was absolutely false, yet the police’s database in fact confirmed two cases awaiting trial on theft charges.

[109] Sergeant Ngcatshe by comparison made a favourable impression on the court. He is clearly a stern minded individual who takes his job very seriously and who goes the extra mile. His evidence made logical sense and was entirely consistent with every record produced in court that showcased his meticulous handling of the plaintiff’s arrest.

[110] Inasmuch as his version differed from the plaintiff’s on the points that essentially matter, I accept his denial that he told the plaintiff that he would not get bail on account of a pending charge of theft. Indeed, on his version, he was on leave

at the time of the plaintiff's initial appearance in court and left the matter to be dealt with by a colleague.

[111] The two prosecutors who testified also incidentally delivered satisfactory accounts of how they dealt with the prosecutions. They were alive to the niceties of the law in this respect and also mindful and sensitive of the accused's personal rights. They readily made concessions where these were necessary. Indeed, both prosecutors impressed me as the archetype of the competent and conscientious public prosecutor that one can have public confidence in.

The plaintiff's pleadings:

[112] Before addressing the plaintiff's claims, it is necessary to say something about his pleadings.

[113] There is a similarity in the allegations in his particulars of claim with those that were at the crux of the matter in *Mahlangu*,²⁴ this apart from the generalized allegations that at their worst seem to suggest the deliberate or reckless disguise of a hopeless case. In *Mahlangu* those facts carried the day and were especially egregious. In the plaintiff's case one is left to wonder what exactly the police and prosecutors did to allegedly cause his post appearance detention.

[114] In every matter where there is a legality enquiry into an arrest and detention, the facts are always unique and it is important that their relevance is consciously framed in the particulars of claim from the outset. That is because a defendant needs

²⁴ *Supra*.

to know what the case is that he/she is required to meet. This is a basic rule of pleading.

[115] Although detention as a distinct separate act from arrest is by itself *prima facie* unlawful, detention on its own (especially past court appearances) does not necessarily attract scrutiny unless there is something about it that is claimed to render it unlawful. There is in my view no automatic obligation on the Minister of Police to have to justify detention consequent thereto in a vacuum or as a general coverall in every claim for unlawful arrest and detention except where a proper basis is laid in the pleadings that invokes the obligation on him to do so.

[116] Whilst every alleged intentional deprivation of liberty (speaking in the context of an action for damages) puts an onus on the arrestor to show why the arrestee's deprivation should not be regarded as wrongful in law, a plaintiff who wishes to rely on extraneous circumstances that his arrest and subsequent detention was unlawful (such as for example where it is alleged that an arresting officer failed to exercise his discretion or that there was a procedural irregularity in carrying out the arrest) is required to plead a basis therefor.²⁵

[117] There is also an obligation on a pleader to allege a basis for and establish that the conduct of the defendant (such as is under scrutiny by way of the required legality review) must have caused, both legally and factually, the harm for which compensation is being sought under the *Actio Iniuriarum*.²⁶

²⁵ See *Jacobs v Minister of Safety and Security* CA 327/2012 [2013] ZAECHGHC 95 (23 September 2013) at para [41].

²⁶ See *De Klerk Supra* at para [14] where the elements of the delict are listed.

[118] The CPA has its own unique provisions in Chapter 5 that deal with the manner and effect of arrest that brings an arrestee's right to liberty into tension. In section 39 (3) for example, concerning its legal effect, it is provided that:

“(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.”

[119] Section 40 provides for defined circumstances in which a peace officer may arrest any person without a warrant. Section 40 (1)(b) of the CPA has been invoked for present purposes.

[120] Section 50 deals with the procedure after arrest that must be adhered to so as to ensure that one who has been deprived of his liberty on the basis of an official arrest is not unnecessarily restrained by the detention that is naturally consequent upon such arrest.

[121] So, for example, section 50 (1)(a) provides that:

“(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.”

[122] More significantly, section 50 (1)(b) and (c) provides as follows regarding an arrestee's right to apply for bail:

“(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.”²⁷

[123] In terms of section 50 of the CPA, once an arrestee is brought to court the police’s authority to detain, inherent in the power of arrest, is said to be exhausted.²⁸

[124] Chapter 9 of the CPA deals with the procedures to obtain bail and the rigors facing an accused who is charged with a Schedule 6 offence.

[125] In this regard it is necessary to state the obvious hurdle that the plaintiff faced in this instance, made provision for in section 60 (11)(a) of the CPA which provides, in peremptory terms, as follows:

“60 (11) Notwithstanding any provision of this Act, where an accused is charged with an offence—

(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;”

[126] The issue of liability for unlawful arrest and detention (especially the element of causation necessary to be established) is made more complex by the fact that there

²⁷ It is common cause that section 59 or 59A are not of application in this instance.

²⁸ *Minister of Safety and Security v Sekhoto & Another* 2011 (1) SACR (1) (SCA) at para [42].

are other role players in the mix than just the Minister's members who by obvious implication do the arresting which in turn factually conduces to the detention implicating the deprivation of liberty.

[127] Before a court makes a deliberative decision on the continued detention of an arrested person first comes the decision of the prosecutor to charge such a person.²⁹ The prosecutor in endorsing the prosecution must act with objectivity and must protect the public interest in this process.³⁰

[128] A magistrate, as an officer of court, can also in egregious cases be held accountable for dereliction of constitutional duties. They are required to apply their minds to the question of bail, which is of utmost constitutional significance.³¹

[129] Amidst the public law duties on all of these role players who bring their bit in the administration of justice and pursuit of prosecution there is admittedly over- or under-reach but the multifarious nature of the trajectory that follows upon arrest highlights the need to be quite specific as to who did what and when concerning what facet of that travail as well as why and how each special feature conduces to the harm complained of for which compensation is being sought.

[130] Since the CPA provides in section 39 (1) that following a lawful arrest the ensuing detention is also lawful and expected to remain lawful throughout the entire period of an arrested and detained person's deprivation of liberty, a plaintiff should

²⁹ See E du Toit, FJ de Jager, A Paizes, A St Quintin Skeen & S van de Merwe *Commentary On the Criminal Procedure Act* (2013) at 1-40.

³⁰ See *Carmichele v Minister of Safety and Security and Another (centre for Applied Legal Studies Intervening)* 2002 (1) SACR 79 (CC) para 72.

³¹ *De Klerk Supra* at para [88].

therefore be astute to plead (and ultimately prove) the circumstances on which he/she relies to suggest that the detention was unlawful, or rather the moment from when and the circumstances under which it became unjustified so to speak, and to state what exactly constitutes the factual basis for the claimed infringement.

[131] Where the suggestion implied by the facts in question is that there was a breach of a public law duty in a particular respect (by a police officer or prosecutor or magistrate) that has especially conduced to the harm, given the complexity of the issue of liability and the various role players who are co-responsible, the court will ultimately have to determine where the cause for the harm lies and whether such conduct along the trajectory might not be considered sufficient to break the chain of causation *vis-a-vis* the arrest and consequent detention. This should also be preempted in the pleadings.

[132] This obligation on the pleader to be quite specific accords with the approach adopted by the Supreme Court of Appeal in *Sekhoto*³² to the effect that the general rule is that a party who attacks the exercise of a discretion where the four jurisdictional facts are present bears the onus of proof.

[133] The court in *Sekhoto* carefully considered the incidence of onus and explains why it should be on a plaintiff in such a situation:

“[49] Does the Constitution require another approach? I think not. A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof. This is the position whether or not the right to freedom is compromised. For

³² *Supra* at para [49]

instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue.

[50] Onus in the context of civil law depends on considerations of policy, practice and fairness and if a rule relating to onus is rationally based it is difficult to appreciate why it should be unconstitutional. Hefer JA also raised the issue of litigation fairness and sensibility. *It cannot be expected of a defendant, he said, to deal effectively in a plea or in evidence with unsubstantiated averments of mala fides and the like, without the specific facts on which they are based, being stated. So much the more can it not be expected of a defendant to deal effectively with a claim (as in this case) in which no averment is made, save a general one that the arrest was 'unreasonable'. Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding that the onus has not been discharged, may ensue. Such a state of affairs, said Hefer JA, is quite untenable.*

[51] The correctness of his views in this regard is illustrated by the judgment of the court below (para 35) where the court listed matters it thought the arrestor should have given attention to without his having had the opportunity to say whether or not he had done so. This amounts to litigation by ambush, something recently decried by this court.⁴⁵

[52] One can test this with reference to the rules of pleading. A defendant who wishes to rely on the s 40(1)(b) defence traditionally had to plead the four jurisdictional facts in order to present a plea that is not excipiable. If the fifth fact is necessary for a defence it has to be pleaded. This requires that the facts on which the defence is based must be set out. If regard is had to para 28 of the judgment of the court below it would at least be necessary to allege and prove that the arrestor appreciated that he had a discretion whether to arrest without a warrant or not; that he considered and applied that discretion; that he considered other means of bringing the suspect before court; that he investigated explanations offered by the suspect; and that there were grounds for infringing upon the constitutional rights because the suspect presented a danger to society, might have absconded, could have harmed himself or others, or was not able and keen to disprove the allegations. But that

might not be enough because a court of first instance or on appeal may always be able to think of another missing factor, such as the possible sentence that would be imposed.”

(Emphasis added)

[134] It follows of course that this would properly attract an onus on the first defendant to justify the plaintiff’s detention caused *by the pleaded feature* rather than him being expected to amorphously justify the obvious interference with the plaintiff’s liberty.³³

[135] To return to the plaintiff’s pleadings these do not in my view complain of any illegality other than in the generalized terms set out in paragraph 8.5, which were certainly not given any cogent flesh in the plaintiff’s testimony.³⁴

[136] Although the defendant should have asked what relevant information was withheld and how the court was purportedly misled, the tenor of the allegations seem to be prefaced on a hopeless case against the plaintiff that is devoid of reasonable and probable cause, nothing more and nothing less.

[137] It was in my opinion not surprising that the defendants pleaded broadly that the plaintiff’s detention throughout was lawful and that this was predicated on the arrest and pre-court detention having been justified on the founding premise that the arresting officer reasonably suspected that the plaintiff had committed a first

³³ *Mahlangu supra* at para [31].

³⁴ In the present instance although the allegations made in paragraph 8 of the particulars of claim as to breaches suggest distinct delictual acts, the details expounded upon in section 8.5 seem to rather be in support of the issue of legal causation and speak to why the continuing detention should not be found to be too remote from the damages claimed. It is however confusing (if the individual allegations are read with the introductory paragraphs that allude to the defendants owing the plaintiffs a duty of care) that the second defendant is not alleged in the particulars of claim to be liable under Claim 1, yet this is what the plaintiff argued for ultimately. In my view these pleadings should have been challenged before the trial proceeded in order to better understand and appreciate the plaintiff’s case. The allegations were generic and the plaintiff’s testimony very superficial.

schedule offence. The first defendant has added that this *status quo* (namely that the charge continued to maintain its objective merit) remained in place through the entire period of the plaintiff's detention.

Unlawful arrest and detention:

[138] The customary approach to be adopted in determining the issue of the legality of the arrest itself and the circumstances under which an arrest without a warrant might in principle be justified is made provision for *inter alia* in section 40 (1)(b) of the CPA which the defendant invoked in this instance to justify the plaintiff's arrest:

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

(a) ...

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

[139] The requisite jurisdictional facts which must be in existence to justify an arrest without a warrant are: (1) the arrestor must be a peace officer; (2) the peace officer must entertain a suspicion; (3) the suspicion must be that the suspect committed an offence referred to in schedule 1; and (4) the suspicion must rest on reasonable grounds.³⁵

[140] It is not in contention that Sergeant Ngcatshe is a peace officer within the meaning and contemplation of section 1 of the CPA and that, according to him, he suspected that the plaintiff had committed the offence of robbery. (He was equally

³⁵ *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 8181 G – H and *Minister of Safety and Security v Sekhoto & Another* 2011 (1) SACR 315 (SCA) at paras [6] and [28].

persuaded that the plaintiff had committed the two counts of robbery under CAS 93/07/2018 but the reasonableness of those charges is not in issue under claim 1.) It is furthermore not in contention that the offence of robbery is an offence listed in Schedule 1 to the CPA.

[141] The test whether a suspicion is reasonably entertained within the meaning of s 40 (1)(b) of the CPA is objective.³⁶ In this instance, would a reasonable man in Sergeant Ngcatshe's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff, together with his co-conspirator, had committed robbery.³⁷

[142] In *Mabona and Another v Minister of Law and Order and Others*³⁸ the court expounded upon the expectation of such a reasonable man effecting an arrest without a warrant.

“The reasonable man will therefore analyze and assess the quality of the information at his disposal critically, and he will not accept it lightly without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.”³⁹

[143] Jones J in *Mabona* goes on to state what the threshold of such an examination is:

³⁶ *Minister of Safety and Security & Another v Swart* 2012 (2) SA SACR 226 (SCA) at [20]; *S v Nel & Another* 1980 (4) SA 28 (E) at 33H.

³⁷ *R v Van Heerden* 1958 (3) SA 150 (T) at 152; *S v Reabow* 2007 (2) SACR 292 (E) at 297 c – e.

³⁸ 1988 (2) SA 654 (SE).

³⁹ At 658 G.

“This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”⁴⁰

[144] Mr. Ngumle on behalf of the plaintiff urged upon the court to find that a duty in fact existed on Sergeant Ngcatshe to have gone beyond what was stated in the complainant’s founding statement because the three parties involved were supposedly friends and this might therefore have suggested that the robbery complaint was not a real one. Also, the plaintiff had said that the alleged stolen property was in Siyabonga’s possession, this supposedly pointing to an exculpatory explanation which Mr. Ngumle submitted Sergeant Ngcatshe ought to have followed up on.

[145] Mr. Ngumle in his closing argument rightly jettisoned the further intimation by the plaintiff given in his testimony that he had informed Sergeant Ngcatshe about Siyabonga holding the complainant’s possessions as security for removing Siyabonga’s music system.

[146] As an aside, I repeat that am satisfied that this was a fabrication that falls to be rejected out of hand. Sergeant Ngcatshe denied that such an explanation had been furnished to him by the plaintiff at all. In weighing up which of the two versions to accept in this respect the plaintiff’s version is improbable against the background that he said nothing of the sort when he was formally charged and made his warning statement. Siyabonga notably did not offer such a defence himself either but instead suggested that the one who was in the know as to the whereabouts of the

⁴⁰ At 658 H.

complainant's property was the plaintiff. The fact that Sergeant Ngcatshe drove around to find Siyabonga (not "*Fire*" as the plaintiff said he had), was already an accommodation to find the complainant's possessions purportedly with his co-perpetrator. Sergeant Ngcatshe had, however, already by then, arrested the plaintiff on the basis of his role and complicity in the matter.

[147] For the rest Sergeant Ngcatshe carefully considered the complainant's statement, appraised that all the elements of robbery were in the offing, had checked the facts with Mr. Majavu personally and had given thought to the idea that even if the complainant's clothes were to be found with the Siyabonga, that the both of them were in any event involved and were equally culpable (i.e. common purpose was at play).

[148] There was therefore in my view no need to substantiate his suspicion reasonably formed on the basis of what he had been told by the complainant by any further investigation.

[149] In summary, Sergeant Ngcatshe formed his own suspicion after having read the complainant's statement, which he also verified with the latter. His explanation for why he arrested the plaintiff reveals that he carefully applied his mind to the question whether the complainant had properly implicated him in the commission of the offence. He weighed up the necessary elements of the offence and also understood the concept of common purpose and its relevance to the factual scenario pertaining. Even though the plaintiff had intimated that the stolen property was in the possession of Siyabonga, it made no difference to him because in his view the plaintiff had also played a role in dispossessing the complainant of his clothing and

wrist watch at knife point. Objectively he cannot be criticized for including the plaintiff as a suspect on the basis of the complainant's statement even if the stolen property was purportedly in Siyabonga's possession.

[150] The subsequent withdrawal of the charge against the plaintiff is also neither here nor there and does not affect the lawfulness of the plaintiff's preceding arrest.⁴¹ All that was required to be established for Sergeant Ngcatshe's purposes was whether there was a suspicion based on solid grounds, not a basis that established proof beyond a reasonable doubt.

[151] In the result I conclude that Sergeant Ngcatshe entertained a reasonable suspicion that the plaintiff had committed the offence of robbery with aggravating circumstances, which justified the arrest of him without a warrant under all the circumstances at least until his first appearance in court. (The issue of his detention pre-court arrest accordingly bears no further scrutiny since no allegations extraneous to the arrest were made that his detention, up until that point, was unjustified or without just cause.)

The discretion to arrest:

[152] It is so that the matter does not end there because once the required jurisdictional facts are present a discretion whether or not to arrest arises.⁴² Although section 40 (1) (b) of the CPA gives peace officers extraordinary powers of arrest and such powers necessarily avail in the fight against crime, these must be sensitively counterbalanced against the arrested person's constitutional rights of personal liberty

⁴¹ *Victor v Minister of Police* (unreported GP case no. 39197/2011, dated 22 October 2014 at [49] – [50]).

⁴² *Minister of Safety and Security v Sekhoto and Another* 2011 (5) 367 (SCA) at para [25].

and dignity. A court will therefore carefully scrutinize in each case whether the infringement of these rights was legally in order.⁴³

[153] The purpose of an arrest is to bring a suspect before court. If the arrest is effected for a purpose other than this, or for another purpose which does not fall within the jurisdictional framework of section 40, the arrest will be unlawful for that reason alone.

[154] The plaintiff in his particulars of claim vaguely asserted that the arresting officer had failed to exercise his discretion. In argument Mr. Ngumle submitted that it was “*patently clear*” that Sergeant Ngcatshe did not exercise his discretion at all with regard to the “*less invasive means*” than the warrantless deprivation of the plaintiff’s liberty and freedom of movement, but this overlooks the serious nature of the offence with which the plaintiff was charged.

[155] The general tenor of Sergeant Ngcatshe’s evidence went exactly about achieving the legitimate purpose of bringing the plaintiff to justice for that offence by taking him to court. He also implied that there was no less invasive means of doing so given that the plaintiff had successfully managed to avoid arrest for a considerable period under CAS 93/07/2018 despite having a fixed address.

[156] I find no overreach or any improper exercise of his discretion by failing to have considered less invasive means of bringing the plaintiff to justice.

⁴³ *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 38 C.

[157] In this regard peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of good faith and rationality. This standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court.⁴⁴

[158] In a rationality enquiry, the critical enquiry, as suggested by Harms JA in *Sekhoto*,⁴⁵ should not be focused on the manner of the arrest but rather the rationale for the arrest. He made this clear when he remarked upon the limited role of the peace officer in the process of making an arrest as follows:

“While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or, in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose.”⁴⁶

[159] As in *Sekhoto*, the opinion was formed in the present matter concerning a serious offence (robbery with aggravating circumstances) and one in respect of

⁴⁴ *Sekhoto Supra* at para [39].

⁴⁵ *Supra*.

⁴⁶ *Sekhoto Supra* at para [44].

which the legislature has deemed it proportional to arrest without a warrant.⁴⁷ Therefore, the mere nature of the offence justified the arrest of the plaintiff for purposes of bringing him to justice.

The suggested procedural illegalities:

[160] In the light of my preferring Sergeant Ngcatshe's testimony to that of the plaintiff's, I find no breach of any procedure on the part of Sergeant Ngcatshe in effecting the plaintiff's arrest. To the contrary I consider that he was very much focused on doing things properly and respecting the plaintiff's constitutional rights.

The plaintiff's continued detention:

[161] I have elsewhere reflected on the limited and/or confusing nature of the pleaded grounds for the action set out in paragraph 8.5 of the plaintiff's particulars of claim.

[162] The plaintiff, when he testified, did not even bother to identify in the record what had in fact happened at each appearance in court. A synopsis of the court record, however, reveals that he was legally represented when he made the decision to abandon his bail application on 12 February 2019. Although between the 3rd of December 2018 and the 12th of February a bail application could notionally have been pursued by him, he did not seek to suggest in his particulars of claim that his detention at that time was especially occasioned by any breach of public duty.

⁴⁷ As was stated in *Sekhoto* at para [25] it could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights.

Further and in any event, it seems to have been accepted that the fact that he had been arrested under CAS 93/7/2018 for robbery with aggravating circumstances and appearing in court under the constraint of his being in custody in those proceedings constituted a pending case and an objective reason on its own as to why he would not succeed in getting bail. Once those charges were withdrawn, it appears that he again elected not to pursue any bail application in the case under contention. His co-accused went ahead without him. He did not elucidate in his testimony why he made that election (except again to put the blame on Sergeant Ngcatshe), but again, objectively speaking, there were other cases mentioned in the SAPS report which were marked as pending cases that would also have impaired his chances of succeeding in a bail application.

[163] For this reason, no fault can be attributed to any representative of the State for his being held in custody.⁴⁸

[164] The highwater mark of the plaintiff's case is that Sergeant Ngcatshe supposedly influenced the plaintiff not to apply for bail because of a supposedly non existing pending case of theft, but as I have indicated above, I do not accept this as plausible.

[165] Neither can Sergeant Ngcatshe's concession made during cross examination that he may have misconceived the question in the bail information form that resulted in him suggesting that the plaintiff was a flight risk opportunistically *ex post facto* be taken to be the foundation of the plaintiff's case underpinning the claimed

⁴⁸ *Minister of Safety and Security & Another v M Schuster & Another* [2018] ZASCA 112 (13 September 2018) at para [15].

illegality of his detention since this feature was not pleaded as being proximal to his continued detention.

[166] The plaintiff's evidence does not establish the legal causation contended for on his behalf. Further and in any event, it was not anything contained in the form that conduced to the plaintiff's continued detention. By his own admission he abandoned his bail application (duly represented). He was further objectively precluded from being released by reason of the case prosecuted against him under CAS 93/07/2018.

[167] The circumstances in this matter are certainly not on par with the egregious ones that hampered the fate of Messrs. Mahlangu and the late Mr. Mtsweni in the *Mahlangu* matter from being able to be released on bail. The premises for the plaintiff's arrest and detention in this instance were founded on a real charge (not an engineered one as in *Mahlangu*) that carried with it reasonable and probable cause throughout. There was, objectively speaking, nothing tenuous about the underlying reason for his arrest, or further detention.

[168] There is further, as I have found, no culpable misconduct on the part of Sergeant Ngcatshe that led to the plaintiff's ongoing detention.

[169] On both scores then, claim 1 ought to fail.

The malicious prosecution claim:

[170] The plaintiff bore the onus resting on him in respect of this claim to allege and prove that the defendants instigated the proceedings; that in doing so they had no reasonable and probable cause; that they acted *animo injuriandi*, and that the prosecution failed.⁴⁹ The last of these elements is not in dispute.

[171] Reasonable and probable cause in the context of this claim means “*an honest belief found on reasonable grounds that the institution of proceedings is justified*”. The concept involves a subjective and an objective component.⁵⁰

[172] Where reasonable and probable grounds for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful.⁵¹

[173] The contemporary approach is that although the expression “*malice*” is used, the remedy in a claim for malicious prosecution lies under the *Actio Injuriarum* and what has to be proved is *animus injuriandi*.⁵²

[174] This element may be proven by establishing that despite an appreciation that his actions were wrongful a defendant acted recklessly although not negligently.⁵³ The degree of culpability required was expounded upon in *Minister of Justice and Constitutional Development v Moleko* as follows:

⁴⁹ *Minister of Justice and Constitutional Development v Moleko* 2008 (3) SA 47 (SCA).

⁵⁰ *Moleko supra* at 53 C.

⁵¹ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 at 382a.

⁵² *Rudolph v Minister of Safety and Security* 2008 (5) SA 94 SCA at par [18].

⁵³ *Rudolph supra* at par [28]

“The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice”.⁵⁴

[175] There is simply nothing of the kind in this instance. The records speak for themselves and I accept the evidence of the prosecutors that they exercised their discretions objectively on the basis of the information that was before them in the dockets.

[176] The evidence failed in my view to establish that the defendants acted with malice (*animo iniuriandi*) in leaving it up to the court to determine the plaintiff’s fate pending the trial and, even if the outcomes ultimately went in his favour, this does not detract from the objective soundness of both charges.

Conclusion:

[177] In the premises I make the following order:

1. The plaintiff’s claims are dismissed, with costs.

B HARTLE

JUDGE OF THE HIGH COURT

⁵⁴ Para 64.

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DATE OF JUDGMENT : 26 April 2024

Appearances:

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For the defendants: Mr. N D Ngadlela instructed by The State Attorney, East London (Ref. Mr Isaacs)