

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 3390/2016
1636/2016

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
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DATE	SIGNATURE
07/06/2024	[Redacted Signature]

In the matter between:

MAMATHUNCHA CALEB KGANAKGA

FIRST PLAINTIFF

MOYAHABO EDWIN MAMETJA

SECOND PLAINTIFF

MATOME LAZARUS MAMETJA

THIRD PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

JUDGEMENT

- [1] At the beginning of the trial parties indicated that the onus now rest with the defendant to prove that the arrest of the plaintiffs was justified and further that the defendant must lead its evidence first upon which the plaintiffs will reply. On that basis the defendant led its case in justification of the plaintiffs' arrest.
- [2] The allegations are that the plaintiffs were arrested on the 19th July 2015 at Mooketsi Filling station, by the Police Officers from Modjadjiskloof SAPS. The plaintiffs alleges that the arrest was unlawful while on the other hand the defendant alleges that the arrest was lawful and in term of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("The CPA).
- [3] The plaintiffs were arrested and charged of robbery with aggravating circumstances and classified under schedule 6 offence.
- [4] The defendant's version of the incident is briefly summarized hereunder. Only one witness was called by the defendant under the name Warrant officer Malesela France Mashai who indicated that he was in the employ of the defendant at the time of the arrest, and he is still employed by the same employer.
- [5] The officer alleges that on the 17th July 2015 they received a complainant to the effect that there was an armed robbery at Mooketsi Wholesalers at around 18hrs

- [9] He was further informed about the reasons for his arrest and the combi was left where it was parked. The alleged driver of the Combi was identified as the first plaintiff (Mamathuncha Caleb Kganakga). The witness further alleges that while waiting at the garage between 17h30 and 18h00 another vehicle entered the garage, and the occupants approached the parked combi and peed inside it. It is at this point that the Officer was able to identify one of the occupants of the car as the person identified on the CCTV footages.
- [10] He then approached both the second and third plaintiffs who were also informed of their rights and reason for their arrest after which they were arrested. The witness further indicated that the first plaintiff was arrested on the basis that he matched the description of the driver of the run-away vehicle and on the day and he was also driving the same vehicle which was identified by the informer. The third plaintiff was arrested on the basis that he also matched the description of the person identified on the camera while the second plaintiff was arrested on the basis that he was in the company of the suspected robbers.
- [11] The witness further indicated that based on their further investigation, the second plaintiff was released on the 20th July 2015 as there was no evidence linking him to the crime. However, the first and the third plaintiffs were properly assessed and appeared in court on the 21st July 2015. They were further detained by the court as they faced a schedule 6 offence and were therefore supposed to make a formal bail application.
- [12] The witness (Police Officer) further indicates that he was not called to come and give evidence during the bail hearing and he does not know the reasons thereof. He

further indicates that he was later also transferred to another Police station. This issue was also not put to this witness by the defendant during cross examination.

- [13] It is on the above submissions that the defendant still insist that their arrest was justified in term of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977. The provision of this section will be discussed later as both the plaintiff and defendant refer to the same provision of the Act.
- [14] During cross examination, the witness was asked if a statement was ever taken from the alleged informer. He indicated that, the information was received from the informer and was used to investigate the crime and do the arrest and that the information of the informer could not be provided to protect the identity of the informer. The counsel for the plaintiffs indicated that on the basis that the identity of the informer was not disclosed it's a clear indication that there was no such informer.
- [15] The witness indicated that despite the information obtained from the informer, he also used the information from the witnesses and the CCTV on how the culprits looked like. The counsel wanted the witness to explain on how they looked like, and the witness indicated that they are sitting inside the courtroom. The counsel insisted that their identity be explained to the court. I must indicate that I did not see where this question was leading as the plaintiffs were sitting inside court as the witness was saying. The best the counsel could have done was to ask the witness to identify them inside court.
- [15] The witness further indicates that after the arrest, his rights were read to him, and he was then put under arrest and was immediately transported to the police station. The

- [19] The witness further indicated that, the plaintiffs were also taken on identification parade, and they were identified during parade by the complainants namely, Mohamed Omar, Feroz Omar as well as a cashier by the name Thembi Makhumela. He further indicated that, the charges against the plaintiffs are provisionally withdrawn and that they can be reinstated at any time as the investigation is still ongoing.
- [20] After the close of the case for the defendant, the plaintiff made an application for absolution from the instance in which case they wanted the court to confirm the application so they can proceed with the matter unopposed. After both parties have addressed the court, the judgement was reserved for the following day. However, the court was later informed that the application was withdrawn and on that basis the court did not continue to give judgement on the issue and the matter was therefore to proceed. The plaintiff then called its first witness who is the first plaintiff.
- [21] The first plaintiff alleges that he used the Maroon Mitsubishi Combi as a taxi and that on the 17th July 2015 he was hired to transport a Brass Band to Maphalle Village. He further testified that at the time the combi had not been registered in his name despite that he has bought it from the previous owner. He then went back again on the 18th to fetch them. He indicates that he was never at the scene of the accident even though, he passed the place where the robbery occurred while transporting the Brass band.
- [22] The plaintiff further alleges that, he was not told the reason for his arrest at the time of his arrest and further indicated that, they refused to tell him the reasons thereof until he was told by another officer after having spent 4hours in the cells.

- [23] He further indicates that the Police informer might have seen his vehicle passing the area on the 17th, 18th and 19th July 2015. He alleges that they were mistreated in the cells in that they were ordered to take off their shoes and to make push-ups. He was also sent to the shop to go and buy a cooldrink while inside the cells where no such shop exists. Was therefore made to run inside the cells as if he was going to the shop.
- [24] Over and above, he was made to drink 5 liters of water and hit on the ankle with boots. They were provided with food which was not in good condition and that they did not have blankets to sleep on as they were only using sheets. The food was mal-nutritional food and no food in the evening.
- [25] The first plaintiff further alleges that they tried to make a bail application which was denied in that, Officer Mashai gave evidence in opposition of the bail application. However, it is indicated that the third plaintiff was given bail in September 2015 after which he was also given bail automatically. The first plaintiff further alleges that he was unlawfully arrested and feels that the justice system has failed him and that he is now forgetful and continue to drink the sleeping tablets to be able to sleep.
- [26] He indicated that, the whole situation has a serious psychological impact on his life in that, the news around their arrest was on the Mopane news. As a result, friends, neighbors as well as family no longer trust them. As a result, he is claiming R450 000.00 in damages against the defendant
- [27] During cross examination, counsel for the defendant firstly asked the witness regarding the new evidence which was not put to the defendant's witness and the

answer was that even though, he could not hear everything, it is not his duty to follow the proceedings and he did not have to ask. When confronted with evidence not put to the defendant witness, he indicated that even if he did not explain that to his counsel, but whatever he said did took place.

- [28] The witness was also asked about the guns which were held by the Police officers and how they were presented as well as the alleged time(13hrs) which was not put to the state witness after having indicated to the court as to what time the Combi arrived at the garage. Also, the fact that they were informed of the reason for the arrest immediately. The witness agreed with the counsel, however, indicated that the fact that the questions were never put to the state witness does not means it's not true.
- [29] Of importance again is when asked about his failure to deal with the maroon combi upon which he indicated that it was not his duty to deal with the identity of this combi even after hearing the evidence of the state witness around the combi which he answered in the positive. He however indicated that the state witness could not answer his counsel questions around the combi as he was dodging.
- [30] The witness further indicated that he did not know the plaintiff number 2 and 3 which the counsel again indicated that it only came out during cross examination and not at anytime during the trial. The issue around the torchers in the cells were also not put to the state witness to comment about that and the witness agree. No evidence was also let disputing the fact that the witness was earlier at the wholesaler trying to change the cheque.

- [31] With respect to the identity of the Combi and being put at the scene of the accident, the witness indicated that the reason was that his combi is an old model and different from other cars and not because it was at the scene. However, he confirmed that he was in the vicinity of the crime scene on the day as he passed there transporting the brass band to the funeral. Again, the evidence around the whereabouts of the combi on the 17th, 18th and 19th was also never put to the state witness.
- [32] When confronted during cross examination about the fact that the car was sported at the scene of the accident by witnesses, he indicated that, his combi is unique, old and different model, that may be the case they decided to identify it as being the car at the scene of crime. The witness further confirm that he was there at the scene of crime as he was passing to go and fetch the brass band at the funeral.
- [33] The counsel for the defendant further indicated that the evidence of the witness that, you were seen on the video initially when going to try and change the cheque on the same day of robbery is not challenged. In re-examination, he confirmed that the combi belongs to him even though ownership had not changed and that it was changed after sometimes.
- [34] Evidence of the second plaintiff is to the effect that on the 19th July 2015 they were from Davelokloof when they received a call from his brother's wife that she needed money to travel back to Johannesburg. They then decided to wait for her at Modjadjaikloof filing station where they waited for 2 to 3 hrs. before she could arrive. On her arrival she called them upon which they drove to where she was around the market area. After giving her the money they drove back to the garage as their

vehicle was running low on fuel. They were therefore arrested at the garage while trying to fill fuel in their car. He disputed the fact that at any stage they peered inside the combi and further alleges that the combi was not at the shop at the time they were arrested. Again, the issue of the whereabouts of the combi was never put to the state witness.

[35] The plaintiff alleges that they were arrested between 14hrs and 15hrs but only taken to the Police cells around 17hrs to 18hrs. I must also indicate that the issue of time was also never put to the witness regarding what the defendant has already alleged. He further indicates that they were put inside the cells where the treatment was very bad and was sent to do the errands around the cells including attending to things which did not exist.

[36] The plaintiff further indicate that he met the first plaintiff for the first time in the charge office and they started talking. It is at this time they realised; they were arrested for the same offence. On arrival in the cells, they were instructed to go clean the toilets with their hands and asked to go buy matches even though the shops were closed. When asked questions he was assaulted on the basis that he talked too much.

[37] He further indicated that they were given food around 20hrs to 21hrs and were given bread and eggs. It is also important to again note that the time they received food is different between the witnesses. He also indicates that other inmates took their food as well as blankets as a result they slept on the floor. They also used cold water to bath.

- [38] However, the witness alleges that he was released on the 20th July around 16hrs30 after the principal from the school he worked at had come to the police station to interfere. The witness indicate that the principal was able to come to school because when he was given a phone to call, he called him instead of his family. He further indicates that this was his first experience and that it affected him psychologically that he was forced to take 08 days leave as he was not able to concentrate.
- [39] The witness further indicated that his family was worried about his whereabouts as they did not know where he was. This experience devastated him and could not concentrate at work and had sleepless nights until his brother was also released. He used sleeping tablets to get some sleep. Family wanted to know if he really committed crime while on the other hand, he had to face the rejection from members of the community.
- [40] When asked where he was on Friday the 17th July, he indicate that he was attending a funeral. I must again indicate that, this is some of the issues never taken with the defendant when being cross examined by the plaintiff's counsel. In closing the plaintiff indicates that he is claiming an amount of R450 000 for loss of freedom for two days.
- [41] In cross examination, the plaintiff agrees that the fact of him being paraded for 3hrs to members of the public by the police officers as criminals was never put to state witness. The plaintiff was further confronted about his statement which is contrary to what he is saying in evidence before court. In his evidence he alleged that he was arrested by other officers who were driving an unmarked VP200 and after they were

arrested that is when warrant officer Mashai arrived in a marked vehicle. The witness failed to clarify this issue.

- [42] In trying to clarify the issue around the arrest by warrant officer Mashai the witness now indicated that they were not arrested for the first 1 hour and that they were only arrested after 1 hour on Mashao instructions after his arrival on the scene. He further indicates that there were no hand cuffs and the police used cables to tie their hands. Further to this again he now indicates that the combi was not at the scene and that there were no cars. He could not explain this as he indicated earlier that there were cars at the garage but the combi.
- [43] The plaintiff was further questioned around his communication with the first plaintiff in the charge office and further that does he not see it strange that out of all the people in the charge office, he chose to speak to the first plaintiff who he alleges not to have known him before and happened to be a co-accused in the same offence. He indicates that what attracted them together was the language they were using.
- [44] When asked about his decision to call the school principal instead of his family, he indicated that the school was going to re-open the following day and he wanted to alert the principal. However, he also agrees that this issue is only coming for the first time during cross examination. The witness was also cross examined about his washing the toilet which the first witness did not testify on as they were on the same area. The issue around the sleeping arrangements was also raised in that Mr Khanakga indicated that they slept on the sponge and linen which is contrary to his evidence. He now indicate that Mr Kganakga was testifying for himself and not for

the witness. When asked about the claimed amount and how he arrived at it he indicated that he would leave that with his legal team.

[45] Witness number 3 Mr Lazarus Mametja also testified in the case. He confirmed that on the day he had spoken to his wife to give her transport money to travel back to Gauteng. They agreed to meet at Moketsi Garage. They waited for her at the garage and she did not take time to arrive. When latter asked what time did she took before arriving from the time they arrived at the garage, He indicated 15 to 20min.(2 to 3 hrs by the second plaintiff). He indicated that on his wife's arrival he went to their car to give her money and then went back to the car after which they went to the garage to fill fuel in the car. Note is also taken of the second plaintiff evidence that, they drove to where his wife was and gave her money there before driving back to the garage.

[46] The plaintiff further indicates that, after they were searched and found nothing, the Police refused to give them the car keys and told them to wait. They waited until the other police vehicle arrived and that is when they were arrested and left in the bakkie for about 2hours before being taken to SAPS Charge office. He further indicated that they were handcuffed by using the steel handcuffs. This is again contrary to what the second witness testified on. When asked where he was on the 17th, he indicated that he was at his sister's place waiting for his brother-in-law.

[47] The witness further to indicates that on the day they were arrested, they never slept as they sing the whole night after they were told to take off their shoes and clothes and only left with under wear. He further indicated that, at around 5am the following day, the boss in the cell indicated that he needed their BBDs, Socks and T-shirts. He

further indicates that the following morning he was taken to Cell 3. When given food, the bosses took the meat, and they were left with pap and soup only. Again, this is contrary to what the other two witnesses testified on. He further indicated that they would be awoken every day at around 2am to go take cold shower.

- [48] The plaintiff further indicated that while in the Police custody, he got fever and he was shivering when the magistrate ordered that he be taken to hospital immediately. He was then diagnosed with stroke because he was thinking a lot and his eyes were always teary. It was his first time to experience stroke and he is still not healed to date.
- [49] He further testified that Warrant officer Mashao took them to the identification parade when they were pointed out by the witnesses. He further testified that after the identity parade, they were taken to court for bail application when warrant officer Mashao refused them with bail indicating that he is still investigating. He was only granted a bail of R10 000.00 on the 18th September 2015. He further indicates that he stayed in Prison for 62 days after being released on bail.
- [50] He indicated that he was heart broken by his stay in prison as this was his first time. His sister cried a lot because of this ordeal. The family also did not take it well as they thought he did not commit the crime. He lost all his friends except his brother the second Plaintiff. He confirmed that he claimed R1.8 million.
- [51] During cross examination the plaintiff indicated that, after arriving at the garage, they waited for about 20 to 30 minutes before his wife arrived. He indicates that he denied the fact that they waited for 2hrs as indicated by the second plaintiff. He

further indicated that after they were arrested by the two Police officers it took about another 20 to 30min before officer Mashao could arrive at the scene. (second plaintiff indicated about 1hr) he further indicated that Officer Mashao only came after they were thrown in the Police Bakkie (first plaintiff, they were thrown in to the van after the arrival of officer Mashao)

[52] He further denies the fact that, they were arrested after they peered into the combi and indicated that the combi was not at the garage. When questioned about the unmarked Police vehicle, he conceded that it might have been there but he did not see it. He denied ever entering the shop where the robbery happened in his life. When told why was this never put to officer Mashao when giving evidence, he indicated that he is just trying to show that it was not him.

[53] The witness again testified about the identity parade and indicated that in the first round him and the first plaintiff were pointed and in the second round only him was pointed out. He further indicated that he did not report what was happening in the cell to the Police or anyone and did not even open a case with the Police. It was also put to the witness that officer Mashao was never told about their attending a funeral during his cross examination and that this issue comes for the first time, he replied that, he does not know why his counsel did not ask him. He also confirmed that he started knowing the first plaintiff on the day of arrest in the charge office.

Analysis of the evidence

- [54] I have to indicate that, this is one of those cases where per the arrangement of the parties, the defendant has to lead the evidence first to justify the arrest and detention of the plaintiffs. It is very important in litigation that when a party start and you must respond to the case of the party who started the giving of evidence, it is not just about listening and writing notes. The opposing party must make sure that, they meet the standard set by the party starting in that they must properly take notes and put their case to the witness and allow the witness to commend on their client's case before being called as a witness.
- [55] The difficulties which I find in this matter is that when one listen to the evidence let by the defendant and the one let by the plaintiffs later, it feels like the plaintiff was not in court and was not listening to the evidence let by the defendant. In every case the party starting to lead evidence normally set the pace for the answering party. It is always important for the other party to making sure that his or her case is put to the opposing party. It becomes difficult and impossible for the court to consider the evidence which was never put to the other party. The court is not able to determine whether such evidence is correct or not correct as the other party was never given a chance to answer to such allegations. Now the big question is what the court should do or how should such evidence be treated. This will become clear hereunder when the evidence let by the parties is being fully analyzed.
- [56] It is common cause that the plaintiffs were arrested by members of the defendant on the 19th July 2015 for an armed robbery which was committed on the 17th July 2015 at Mooketsi Supermarket. The defendant indicated that they were informed by an informer that the same people who committed Robbery at mooketsi Suppermarket

are planning to do another robbery at the fillings station in davelaskloof on the 18th July 2015. When that did not happen, they received another tip that it will now happen on the 19th July 2015. Officer Mashao organized a group of officers on both days to go and guard the filling station in anticipation of the arrival of the robbers.

- [57] On the 19th July 2015, the arrest was made for all the plaintiffs in this matter at a filing station as per the information from the informer. As a result, all the plaintiffs spent some time in prison for the crime as alleged. I must indicate that the crime did not occur as the police has arrested the plaintiffs in this matter before the actual crime could occur on the 19th July 2015.
- [58] The counsel for the plaintiff emphasized that the fact that after the plaintiffs were arrested, the Police continued to do the investigation is an indication that the arrest was unlawful in that one can does not arrest and then later do the investigation. He indicated that the court should ignore any other or further investigations and its findings after the arrest. The question is whether the police had enough information at the time to effect the arrest.
- [59] What again was emphasized by the plaintiff was that the information received from the informer should be ignored on the basis that the informer does not have an identity and as such police could not have acted on the information received from an unknown person. Wherefore in the opinion of the plaintiff there was no reasonable suspension for the police to have effected the arrest.
- [60] It is also important to note that, the police acted on the information which they received from the informer and as a result, they effected the arrest. It has not been

put to the attention of the Police officer that the information received from the informer was wrong but that the informer does not have an identity and the counsel for the plaintiff tried to find out if the Police knew the identity of the informer and challenge the police acting on the information from an unknown person.

[61] The plaintiff has provided the court with reference to number of case laws, however I have to indicate that, what the plaintiff has provided to the court is a mass of documents which the court is not able to make up what such documents are and their order. There is about and over 200 pages not stapled and not paginated. The court is not able to go through all this documents to look for the referred document by the plaintiff. It is the plaintiff's duty when providing the court with papers of that volume to make sure they are properly index and paginated. For that reason, the court is not able to page over almost 200 unstapled and unpaginated if not more pages for the plaintiff.

[62] The plaintiff made reference to the case of *De Klerk v Minister of Police*ⁱ in particular reference to paragraph G thereof which state the following “ *The high court rules the arrest and subsequent detention to have been lawful and dismissed the claim. In an appeal the Supreme Court of appeal unanimously ruled the arrest unlawful but was split on whether the police minister could be held liable for the unlawful detention after the magistrate's court appearance. The majority found that an unlawfully arrested claimant could not hold the police liable for his continued detention after the magistrate's court appearance. The majority found that an unlawfully arrested claimant could not hold the police liable for his continued detention after a magistrate had ordered a remand in custody*”

- [63] Both the plaintiff and the defendant referred the court to Section 40(1)(b) of the criminal procedure Act 51 of 1977 which makes the following provisions “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;*”
- [64] Further to that the plaintiff submitted that for the purpose of this case the court should also ignore the results of the identification parade where the accused were identified by the employees of the shop which was robbed as the people who robbed them. In other words, the plaintiff alleges that the Police could not have arrested the plaintiffs with the information from the victims of crime and that they should have investigated and satisfied themselves. The plaintiff emphasized that one can does not arrest in order to investigate.
- [65] It was further held that In *Duncan v Minister of Law and Order*ⁱⁱ the jurisdictional facts for lawful arrest under Section 40(1)(b) are:
- (i) The arrestor must be a peace officer;
 - (ii) The arrestor must entertain a suspicion;
 - (iii) The suspicion must be that the suspect committed an offence referred to in schedule 1;
 - (iv) That the suspicion must rest on reasonable grounds.

[66] Reference was further made to the case of *Mabona v Minister of Law and Order and Others*ⁱⁱⁱ *"Would a reasonable man in the second defendant's position and in possession of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the conspiracy to commit robbery or possession of stole property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analysis and assess the quality of information at his disposal critically and 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 the suspicion which will justify an arrest. This is not to say that the information at his disposal must be 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 on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion"*

[67] The counsel for the plaintiff further indicated that no reasonable man would have arrested based on a photo where a person was looking down and his face is not clearly visible. In this case the counsel was referring to a photo which was pointed to the witness where the person in the photo was looking down. It is also worth mentioning that at the time the Police officer executed an arrest, they were not in possession of the photos, however, he indicated that he used the Video camera to identify the plaintiffs. As such I am of the view that this photo is irrelevant. The

plaintiff further indicated the fact that the Police officer had to go to the cameras after the arrest to satisfy themselves regarding the identity of the people arrested. He emphasizes that if you re-look it means you were not sure and as such you should not have executed arrest.

[68] I therefore do not agree with the submission by the plaintiff in this regard. Reference is made to the case referred to by the plaintiff counsel "*Mabona*" *suprar* in that it set out clearly what should be considered reasonable ground one can arrest or be arrested. The police officer is not supposed to be completely sure that the arrested person indeed committed a crime there must just be a reasonable suspicion. The question which one must answer is whether such suspicion was reasonable considering the merits of this case.

[69] The defendant in closing argument indicated that the police officer does not have to have all the evidence before effecting an arrest and that full information is not the test. Reference was again made to Section 40(1)(b) as indicated above, as well as the *Duncan case supra*. The issue around the photo used during the hearing was also challenged on the basis that the officers did not use the photo but the actual video. The defendant further indicated that, there is no statement from the Informa as submitted by the plaintiff and there will not be same. What the court need to assess is to look at the information given by him or her and then check if same was proved. In this case the information gave rise to the arrest of the plaintiffs in this matter as per the information from the Informa.

[70] The counsel for the defendant further raised the point indicated above regarding the use of evidence which was never put to the witness of the opponent in court. It was

submitted by the defendant that such evidence must be ignored as it has not been tested. Wherefore evidence not put to defendant witness evidence should be ignored.

[71] The arrest of the 2nd and third plaintiffs were on the basis that on their arrival at the garage, they peered into the taxi and the third plaintiff was also recognized as the person from the video at the shop where the robbery took place. The counsel for the defendant further indicated that, there was no evidence that they were at the funeral on the day of the robbery as such was never put to the defendant witnesses. Issue around the time they waited at the garage before the third plaintiff's wife arrived at the filling station as either 20min or 2hrs was also put on record.

[72] Reference is made to the case of *Duncan supra and Minister of Safety and Security v Sekhoto and another*^v where the following was cited "if the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect. In other words, he then has a discretion as to whether to exercise that power. No doubt the discretion must be properly exercised. But the grounds on which the exercise of such discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case".

[73] It is well established that, for the suspicion to be reasonable, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a schedule 1 offence. *R v Van Heerden*^v. In *Sekhoto supra* at paragraph 30 it was reiterated that, "the exercise

of the discretion will clearly be unlawful if the arrestor knowingly invokes the power to arrest for the purpose not contemplated by the legislator”.

- [74] The counsel for the defendant further indicated that when the warrant officer went back to view the video at the shop, it was to confirm, the person he has previously saw on the camera and he confirmed that the same person was appearing on the camera. This was clearly indicated on paragraph 8 of the warrant officer Mashao statement.
- [75] The Counsel confirmed that the second plaintiff was arrested on the basis that he was found with the person they were looking for. However, after the arrest, investigations were done urgently and he was released within 48hrs when nothing was found on him. The counsel for the defended submitted that based on him being found with people who were wanted by the police, there were reasonable suspicion that he was also involved in the crime and as such his arrest was justified.
- [76] The defendant further referred the court to the case of *Minister of Safety and Security v Seymour^v*, where the following was stated, “*The assessment of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are...comparable. They are useful guide to what other courts have considered to be appropriate, but they have no higher value than that.*”
- [77] What is important with the information from the Informa is whether the Police arrested solely based on the information from the Informa. It is well known in the country and our practice that, there is a free line where when people suspect that a

crime has been committed or is about to be committed, they can call the police on anonymous basis and inform them of the allegation. It is not a requirement that the identity of the Informa must be revealed for the evidence to be accepted. The question is whether, events occurred as the Informa informed the police. In other words, the police must satisfy themselves of the information received from the Informa. The next question will be whether the police solely used the information from the Informa without making their own investigations, it is very clear that the police used the information received to do their own investigation and to effect the arrest.

[78] I am therefore of the view that the plaintiffs counsel, got it wrong by indicating that on the basis that the identity of the Informa is not known, this court must then ignore all the information from such Informa including the decisions based on such information. The Informa gave the police the information that the car with which the robbers used to rob the supermarket, and which will be used to rob the filling station is a combi with only one registration in the front. The Informa was also aware of the movements of the plaintiffs in this case in that the occurrence occurred as per the information given to the Police.

[79] The question which this court should answer is whether the Police with the information they had from the Informa as well as from the CCTV had a reasonable suspicion to arrest the plaintiff at the time. Is there anything the police still needed to do before effecting the arrest of the plaintiffs. In considering the answer to the above question we need to be mindful that, the police should not be allowed to use the powers to effect arrests where there is no need to arrest, and the police could do

their proper investigation before arresting simply because there may be no life at threat and or someone's freedom. In this case the Police were faced with an eminent situation where an armed robbery was about to be committed as per the information received. The officers where therefor in between and had to decide as quickly as possible since people's lives might have been in danger.

[80] Upon their attendance at the filling station where the robbery was alleged to have been arranged to happen, they found the combi as described by the Informa and latter there was someone who came accompanied by another person arrived at the garage and they investigated the parked combi to check who are the people in the car. On that basis an arrest was affected. Also take note that the first plaintiff was already arrested and taken to the charge office.

[81] R v Van Heerden 1958 (3) SA 150(T) 152 and S v Reabow 2007(2) SACR 292 E at 297 C-E where it was indicated that *"it is well established that in order for the suspicion to be reasonable, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form a suspicion that the arrestee has committed a schedule 1 offence"*. In the case under discussion a crime has already been committed and the police were provided with further information that another crime like the one committed the previous day was to be committed. Based on that information police moved their resources which resulted in the arrest of plaintiffs in this case.

[82] The next important question will be whether the police in arresting the plaintiffs in this case exercised their discretion and if so whether it was exercised reasonably or not. This will also depend on the information at their disposal and the time of crime

they were about to experience and also try to arrest before people's lives could be at risk. The question is not whether the people arrested were subsequently found guilty of the crime they were suspected of or not but whether the police had reasonable suspicion that a crime has been committed and or is about to be committed. Should the arrested person later found not to be guilty does not automatically translate that the police were negligent in arresting the suspect.

[83] In the current case, a crime was committed, the police were informed by an Informa that the same people who committed the crime the previous day they are about to commit another crime, on the basis of that the Police mobilized their resources and that resulted in the arrest of the plaintiffs with the exact information as provided for by the Informa. It is also important to note that, the identity of the vehicle the plaintiffs were travelling in was explained by the Informa before the arrest. After the crime was committed, the plaintiffs (1st and 3rd) were also identified during the identity parade by the people who were at the shop on the day of the robbery. What makes it worse was the fact that the third plaintiff was also identified on the video camera as one of the person who was at the scene of the accident. This is despite the plaintiff alleging that he was never anywhere near the scene of crime.

[84] I am therefore of the view that the Police officers under the circumstances should enjoy the protection of Section 40(1)(b) of the CPA and has proved the jurisdictional facts as indicated in the case of *Duncan v Minister of Law and Order* supra. Wherefore I found no ground upon which to fault the defendant in this case on the basis that the Police abused their powers and discretion at the time when the plaintiffs were arrested, in particular the first and third plaintiffs.

- [85] The plaintiffs were also found to contradicting themselves in more than one occasion when giving evidence with respect to their experience on the day of arrest and what they were doing at or near the scene of crime.
- [86] The plaintiffs indicated further that they continued to receive the assault from members of the SAPS and at this stage they did not know the reason for the arrest. They were at times on Monday after the arrest taken to another place which they could only identify the writing on the building as "Detective office". It is not clear from the evidence of the plaintiffs as to what were they doing at this area. However, they were returned to the Police station.
- [87] if one has to deal with some of the contradicting evidence by the plaintiffs which is material can be indicated in that the first plaintiff indicated that on the day of arrest they slept on the floor with no blankets while the second plaintiff alleges that they slept on the sponge and linen and the third plaintiff indicating that they did not sleep the entire night as they were made to sing the whole night. The second plaintiff indicated that they were handcuffed with cables while the third plaintiff indicated that, the police hand cuffs were used.
- [88] It is also important to note that, despite the plaintiffs indicating that they were never near the scene of the accident, they also did not dispute the evidence of the witnesses that they were at the supermarket on the day of robbery and tried to exchange a cheque for R18 000.00. Further to that, the first and the third plaintiffs were also identified at the identity parade by the victims of crime. The counsel for the plaintiffs indicated that the court should ignore the outcome of this parade and am not sure based on what reasons.

[89] The combi they were using was identified by the Informa. What is again important and constituted contradicting evidence was with respect to the second and the third witnesses. The second witness indicated that upon their arrival at the garage, they waited for about 2 hours before the 3rd plaintiff's wife could arrive upon which they drove to where she was to give her some money. While the third plaintiff indicated that, they waited for about 15 to 20 min before she arrived upon which he alighted from the car went to give her money. After giving her money he returned to the car and they drove to the filling station.

[90] I have also dealt with the evidence around their experience inside the court upon their arrest. It is very clear that the plaintiffs were not telling the truth in that they can not experience three different things if kept in one cell, particularly the night they were arrested. Wherefore in the following paragraphs I will deal with judgement in respect of each of them.

The first plaintiff (Mamathuncha Caleb Kganakga)

[91] With respect to the first plaintiff Mamathuncha Caleb Kganakga I am of the view that the Police officers who arrested him had a reasonable suspicion to arrest. The vehicle which he was driving was positively identified by the police Informa and the particulars matched. It would have been reckless of the Police when they got information that the crime was committed and that a second crime is about to be committed by the same offenders in another place for them not to act accordingly.

[92] The counsel for the plaintiffs made his reliance on the basis that they were ultimately released from prison in that charges against them were withdrawn. I must indicate

that, the fact that they were later released is not the test whether the police had reasonable suspicion that a crime was committed and or is about to be committed. With all the circumstances and the evidence, the Police had at the time of arrest, I am of the view that any reasonable Police officers would have effected an arrest. There is still no evidence before court to convince the court that the arrest of the first plaintiff was unjust and it should not have happened.

[93] It is also important to remember that the first plaintiff was also identified during identity parade. The first plaintiff's counsel also did not deal with this issue but only made a submission that the court should disregard the outcome of the Identity parade. I see no reason why such should be ignored if the test is whether the police at the time of arrest had reasonable suspicion to arrest the plaintiffs.

[94] Under the circumstances the Police officers with the information they had, had reasonable suspicion that a crime was about to be committed by the first plaintiff and his friends and that they were the same culprits who committed armed robbery in the past two days. Wherefore the first plaintiff fails to prove that the arrest was unlawful and that there was no reasonable suspicion that they had committed a crime as such his claim against the defendant stand to be dismissed.

Second Plaintiff (Moyahabo Edwin Mametja)

[95] With respect to the second plaintiff, the State witness conceded that, they made a mistake by arresting him and that is the reason that he was released the following day upon realizing that he did not form part of the people who committed armed robbery the previous day. On that basis he was then released the following day after

spending some time in prison. It is not clear the number of hours he spends in Prison. However, the evidence before court is that he was arrested on the 19th July 2020 at around 17hrs and was released the following day around 16hrs30. Which confirms that he spends a little under 24hrs.

[96] Under the circumstances I am of the view that the defendant should be liable to compensate the second plaintiff for the time spend in prison. To date it cannot be proved that the plaintiff received bad and inhuman treatment in the cell. There has been contradicting evidence from the three plaintiffs as to the type of treatment and the type of food they were provided with in Prison. I am therefore not satisfied that they were subjected to any inhuman treatment as this court will not be able to explain what treatment the plaintiffs was exposed to.

[97] In the matter of Tsele and Another v Minister of Police 2021 (8K6) QOD 115 (NWM).
"The plaintiffs in this case were brothers and the first plaintiff was arrested around 08:00 in the morning and the second plaintiff at around 14hours on the 29th November 2018 and both of them were released on the 3rd December 2018 around 10am after the case against them was withdrawn. The condition of the cell they were kept was not good, they had to sleep on the floor sharing one blanket. Meals were served but the food were not good which was mainly porridge and beans, as well as, tea and bread. They did not have toiletries and shared one face cloth which they got from a fellow inmate. Upon release the first plaintiff was not treated well by the community because of the arrest. The first plaintiff was detained for just over four days while the second plaintiff for less than 4days. Having regard to all the

circumstances of the case, the circumstances under which the plaintiffs were arrested, the humiliation experienced and the effect of the arrest and subsequent unlawful detention of the plaintiffs, as well as the appalling circumstances in the cell over the weekend, the court deemed that it would be fair, reasonable, just and appropriate to award damages in the amount of R15 000.00 per day, or part thereof as the case may be".

- [98] I see no reason why the same principle should not be applied with respect to the second plaintiff in this case. The second plaintiff spent little less than a day in prison and under the circumstance's compensation in the amount of R25 000 will by just under the circumstances.

Third Plaintiff (Matome Lazarus Mametja)

- [99] With respect to the third plaintiff, the witness for the state indicated that, he was identified on the camera as the person who was in the shop at the time the crime was committed. Not only was the third plaintiff identified through the cameras, an identification parade was held where the plaintiff was identified by more than one victim of the armed robbery. The plaintiff's counsel used a photo apparently taken from the camera of the shop robbed on the day of robbery. The counsel alleges that the person in the photo is looking down and can not be identified as the third plaintiff. However, the Police officer indicated that he was using the video camera to identify the culprits of robbery. It is not clear why counsel decided to use the evidence which was not used at the time of arrest as an indication that the police had no reasonable suspicion that the third plaintiff had committed a crime.

[100] With the above submission and the evidence led during the trial, the third plaintiff fails to convince the court that there was no reasonable suspicion upon which the police could have effected the arrest. On that basis, I am of the view that the third plaintiff's claim should be dismissed.

[101] In the circumstances the court makes the following order

- (1) The first plaintiff's claim against the defendant is dismissed with no order as to costs.
- (2) The second plaintiff is awarded an amount of R25 000.00 as compensation.
- (3) The third plaintiff's claim against the defendant is dismissed with no order as to costs.
- (4) The defendant is to pay the second plaintiff's costs on scale B of the costs.

Acting Judge T C Maphelela

**JUDGE OF THE HIGH COURT, POLOKWANE;
LIMPOPO DIVISION**

APPEARANCES

FOR THE PLAINTIFF : Adv Maree

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FOR THE DEFENDANT: Adv L A Nkoana