

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 11742/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED:
DATE	SIGNATURE

In the matter between:

JACOB MOKGATLA MTHETHWA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

GAUTENG PROVINCIAL COMMISSIONER OF SAPS

Second Defendant

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Defendant

JUDGMENT

The judgment and order are published and distributed electronically.

VAN NIEKERK N, AJ:

INTRODUCTION:

- [1] This matter came before me on the 28th and 29th of August 2024 as a trial.
- [2] It is a claim for damages based on the unlawful arrest and detention of the Plaintiff by the Defendants.
- [3] At the commencement of the trial, it was recorded by all relevant parties' counsel, that the matter is proceeding on the merits only and the quantum is postponed *sine die*.
- [4] It was also confirmed that the relief sought against the third defendant was withdrawn and that references in the pleadings to the third Defendant should as such be ignored.
- [5] As a result, only the plaintiff and the first and second defendants were before court and represented.
- [6] It was common cause between the parties that the defendants had the onus to prove that the arrest without a warrant was a lawful arrest and that the subsequent detention was lawful. As a result, the defendants had the duty to begin.
- [7] In the morning of 28 August 2024, the plaintiff was represented by Adv Ngwana TI, who recorded that he is appearing on behalf of the plaintiff with Adv Mosoma DD, who was in another court at the time. After the lunch adjournment Adv Mosoma was present in court and Adv Ngwana continued with the cross examination of the witness for a period of time whereafter he gave it over to Adv Mosoma. On 29 August 2024, Adv Mosoma proceeded with the matter in the absence of Adv Ngwana. The First and Second Defendants were represented by Adv Mokwena MM.

THE PARTIES:

[8] In the particulars of claim the plaintiff is cited as a major male born in 1985 employed by the South African Police Service as a Sergeant, residing at 4[...] K[...] R[...] A, Siyabuswa, 0472.¹

[9] The first defendant is The Minister of Police cited in its official capacity and the second defendant is The Gauteng Provincial Commissioner of South African Police Services cited in its official capacity.²

THE PLEADINGS:

AD PARTICULARS OF CLAIM:

[10] In respect of the merits the plaintiff pleaded that:

10.1 On the 14th of May 2019 at approximately 15h30, at E'skia Mphahlele and Moot Streets, Pretoria, Gauteng Province the Plaintiff was arrested without a warrant of arrest by members of South African Police Service and members of City of Tshwane Metropolitan Municipality whose further and better personal details are unknown to the plaintiff.³ (As mentioned above, the claim against the third defendant, the City of Tshwane Metropolitan Municipality was withdrawn and I will not further in this judgment refer to the third Defendant).

10.2 The members of the South African Police Service were dressed in full official uniforms.⁴

10.3 Plaintiff was arrested on the allegations of possession (sic) of conspiracy to commit business robbery.⁵

¹ See paragraph 1.1, p 003-8.

² See paragraphs 1.2 and 1.3, p 003-8.

³ See paragraph 3.1, p 003-9.

⁴ See paragraph 3.2, p 003-10.

⁵ See paragraph 3.3, p 003-10.

10.4 Subsequent to the aforesaid arrest, the plaintiff was detained at Wonderboomspoort Police Station for one day and never appeared before a court of law for his first appearance.⁶

10.5 The matter against the plaintiff was withdrawn by a relevant officer before plaintiff could appear before the court of law.⁷

10.6 Plaintiff was so detained at Wonderboomspoort Police Station at the instance of the aforementioned police officials, whose names and ranks are unknown to the plaintiff.⁸

10.7 On the 15th of May 2019 at about 14:00, the plaintiff was later released after the case against him was withdrawn by a relevant officer whose full and better particulars are not known to the plaintiff.⁹

10.8 The aforementioned police officers were acting within the course and scope of their employment as police officers of the South African Police Service.¹⁰

10.9 The plaintiff's arrest was unlawful in that, *inter alia*:¹¹

10.9.1. The above-named police officers were not armed with a warrant of arrest.

10.9.2. At the time of his arrest, police officers who arrested the plaintiff refused and/or failed to inform the plaintiff of his rights adequately or at all.

10.9.3. Police officers who effected the arrest merely advised the plaintiff that the reason for arrest was conspiracy to commit business robbery, refusing and/or failing to provide any particulars of the alleged offence.

⁶ See paragraph 4.1, p 003-10.

⁷ See paragraph 4.2, p 003-10.

⁸ See paragraph 4.3, p 003-10.

⁹ See paragraph 4.4, p 003-11.

¹⁰ See paragraph 4.5, p 003-11.

¹¹ See paragraph 5.1, p 003-11 to 003-12.

10.9.4. Police officers unreasonably neglected, failed and/or refused to conduct diligent preliminary investigations prior to arresting the plaintiff.

10.9.5. Police officers unreasonably ignored the plaintiff's exculpatory version.

10.9.6. Police officers could have and/or should have entertained any reasonable suspicion that the plaintiff committed the offence for which he was allegedly arrested (sic).

10.9.7. Police officers failed and/or neglected to exercise adequately and/or at all a discretion required of them to exercise when arresting the plaintiff charged with a schedule 1 offence.

10.10 The plaintiff's detention by or at the instance of the police officers who arrested him was unlawful in that, *inter alia*:¹²

10.10.1. The detention was predicated upon the police's unlawful or wrongful arrest.

10.10.2. No reasonable grounds existed to justify the detention of the plaintiff.

10.10.3. The police officers who detained the plaintiff failed and/or neglected to exercise a discretion adequately or at all as required by law to exercise such discretion in detaining any person in the position of the plaintiff.

10.10.4. The plaintiff was detained in conditions which are unhealthy and not fit for human consumption (sic).

AD PLEA:

[11] In terms of the plea the first and second defendants pleaded as follows:

¹² See paragraph 7, p 003-13.

11.1 The first and second defendants admitted having arrested the plaintiff, but pleaded that the arrest was lawfully executed without a warrant of arrest in terms of section 40(1)(b) and section 50 of the Criminal Procedure Act.¹³

11.2 The arrest that was effected on the very same day was based on section 40(1)(b) of the CPA by:¹⁴

11.2.1. Arresting officer who was an authorised peace officer and had to arrest under the prevailing circumstances at that point on the strength of the quality of information received pertaining to the planned armed robbery that had to take place on the 14th of May 2019.

11.2.2. After the receipt of such information and the short investigation conducted and the suspects traced until at the Engen garage in Wonderboom, the SAPS members had entertained the suspicion of conspiracy to commit armed robbery by the plaintiff and his friend who sat in the Volkswagen Polo with registration FL0[...]. When the plaintiff and his friend were searched a gas gun, holster and three 9mm live rounds were found in their possession and were charged with conspiracy to commit armed robbery which is a schedule 1 offence.

11.2.3. The suspicion rested on reasonable ground in that the information received led to a positive trace from where the blue Volkswagen Polo with registration FL0[...] was parked up to where the plaintiff and his friend were lawfully arrested and taken to the local police station.

11.3 The members of the SAPS were dressed in full official uniform.¹⁵

¹³ See paragraph 3.1, p 003-17.

¹⁴ See paragraph 3.1.1, p 003-17.

¹⁵ See paragraph 3.2, p 003-18.

11.4 The plaintiff was arrested on suspicion of conspiracy to commit armed robbery, a schedule 1 offence.¹⁶

11.5 The plaintiff was detained at Wonderboomspoort Police Station for one day and never appeared before a court of law for his first appearance.¹⁷

11.6 The matter against the plaintiff was withdrawn before the plaintiff could appear before a court of law and defendants pleaded that it was the prosecutor who withdrew the matter.¹⁸

11.7 The plaintiff was detained at the instance of the police officials.¹⁹

11.8 The plaintiff was released on 15 May 2019 at about 14h00 after the case against him was withdrawn.²⁰

11.9 The first and second defendants admit arresting the plaintiff and performing their duties as members of a particular organisation.²¹

11.10 The arrest was lawful in that it was dealt with in terms of section 40(1)(b) of the CPA:²²

11.10.1. The first and second defendants performed their function of following the lead of critical and qualitative information of a crime of armed robbery that was about to ensue and they had to act with speed and precision.

11.10.2. The circumstances of the case demanded that the matter be handled without a warrant of arrest as required under section 40(1)(b) of the CPA.

¹⁶ See paragraph 3.3.1, p 003-18.

¹⁷ See paragraph 4.1, p 003-18.

¹⁸ See paragraph 4.2, p 003-18.

¹⁹ See paragraph 4.3, p 003-18.

²⁰ See paragraph 4.4, p 003-19.

²¹ See paragraph 4.5, p 003-19.

²² See paragraph 5.1.1, p 003-119 to 003-20.

11.10.3. The SAPS members like in this case are from time to time entrusted to arrest a suspect without having obtained a warrant of arrest from the judicial officer. It is inherent in the duties of the SAPS that they are empowered in terms of section 40(1)(b) of the CPA to arrest, in certain circumstances, suspects without such a warrant of arrest.

11.11 Before the plaintiff was arrested on the 14th of May 2019, the plaintiff was spoken and listened to as well as informed of his rights by the members of the SAPS who were peace officers.²³

11.12 The SAPS members involved in this matter complied with section 39(2) of the Criminal Procedure Act by ensuring that after effecting the arrest or immediately after effecting the arrest informed the arrested persons about the cause of arrest.²⁴

11.13 The first and second defendants gave an explicit explanation to the plaintiff that he was under arrest in terms of section 39(2) of the CPA and the constitutional imperatives were explained to the plaintiff. The constitutional rights for an arrested person were explained to the plaintiff and his friend and the plaintiff then signed as a confirmation of having received an explanation for his rights.²⁵

11.14 The motor vehicle in which the plaintiff was travelling was searched and a gas gun, 3x9 mm rounds and live ammunition and a holster were found.²⁶

11.15 The lawful arrest took place after having investigated and traced and monitored the movements of the motor vehicle wherein the plaintiff was driving.²⁷

²³ See paragraph 5.1.2.1, p 003-20.

²⁴ See paragraph 5.1.2.2, p 003-20.

²⁵ See paragraph 5.1.3.1, p 003-20.

²⁶ See paragraph 5.1.3.2, p 003-20.

²⁷ See paragraph 5.1.3.3, p 003-21.

11.16 The plaintiff was arrested for an offence which is recognised in criminal law as an offence in South Africa.²⁸

11.17 Proper investigation, trace and considerations were made by the SAPS members who dealt with this matter involving the plaintiff and his friends who wore SAPS uniform during the arrest.²⁹

11.18 The arrest was made with just cause based on the strength of the information received and the reasonable suspicion formed out of it that the said planned armed robbery was to take place.³⁰

11.19 During the lawful arrest and detention, the plaintiff did not give an exculpatory version or explanation and as a result the plaintiff cannot claim that he was ignored by the first and second defendants.³¹

11.20 The first and second defendants acted based on informer's information about the possible armed robbery that was planned to happen on the 14th of May 2019.³²

11.21 The first and second defendants conducted a short investigation and made a continuous trace of the plaintiff and his friend while driving in a blue Volkswagen Polo with registration no. FL0[...].³³

11.22 The arrest of the plaintiff and his friend at the Engen garage by the first and second defendants was based on the reasonable suspicion that was formed after the receipt of the information on the planned conspiracy to commit an armed robbery which was

²⁸ See paragraph 5.1.3.4, p 003-21.

²⁹ See paragraph 5.1.4.1, p 003-21.

³⁰ See paragraph 5.1.4.2, p 003-21.

³¹ See paragraph 5.1.5.1, p 003-21.

³² See paragraph 5.1.6.1, p 003-21.

³³ See paragraph 5.1.6.2, p 003-22.

preceded by a short and proper investigation and certain considerations.³⁴

11.23 The first and second defendants deny that police officers failed or neglected to exercise adequately and/or at all a discretion required of them to exercise when arresting the plaintiff charged for schedule 1 offence, in that:³⁵

11.23.1. The first and second defendants applied their discretion after a short and proper investigation and had formed reasonable, realistic and well-founded grounds to entertain the suspicion of a possible armed robbery.³⁶

11.23.2. The first and second defendants had to exercise their discretion as to whether to arrest or not arrest the plaintiff and his friend as suspects for the conspiracy to commit armed robbery.

11.23.3. The reasonable suspicion was strengthened by the discovery of the items such as gas gun, holster and the 3x9mm live ammunition in the Volkswagen Polo the plaintiff and the friend were in.

11.23.4. The first and second defendants realised that there were good and sufficient grounds for suspecting that the plaintiff was guilty of conspiracy to commit robbery and thus an arrest without a warrant ensued.

11.24 The plaintiff was not unlawfully detained:

11.24.1. The plaintiff was given his rights after the arrest but prior to him being detained in terms of section 39(2) of the Criminal Procedure Act.³⁷

³⁴ See paragraph 5.1.6.3, p 003-22.

³⁵ See paragraph 5.1.7, p 003-22.

³⁶ See paragraph 5.1.7.1, p 003-22.

³⁷ See paragraph 7.1.1, p 003-23.

- 11.24.2. The matter was properly investigated after the receipt of the information from an informer.³⁸
- 11.24.3. The SAPS members had conducted their short investigation, analysed and assessed the quality of information at their disposal and thereafter they entertained the reasonable and well-founded suspicion which justified the arrest.³⁹
- 11.24.4. The suspicion that was entertained was based on reasonable grounds, since the suspects were followed from Wonderboom up to the Engen garage, Wonderboom as per the information received of a possible “armed robbery” that had been planned.⁴⁰
- 11.24.5. The defendants utilised the exercise of the discretion as required by the section 40(1)(b) of the CPA and other related statutes and policies.⁴¹
- 11.24.6. The plaintiff was detained at the police station cell which is looked after in terms of cleanliness by relevant designated functionaries and being inspected by the SAPS officers on a daily basis.⁴²

COMMON CAUSE:

[12] The following are common cause on the pleadings:

- 12.1 This court enjoys jurisdiction to adjudicate upon this matter due to the fact that the entire cause of action arose within the area of jurisdiction of the court.⁴³

³⁸ See paragraph 7.2.1, p 003-23.

³⁹ See paragraph 7.2.1.1, p 003-23.

⁴⁰ See paragraph 7.2.1.2, p 003-23.

⁴¹ See paragraph 7.3.1, p 003-24.

⁴² See paragraph 7.4.1, p 003-24.

⁴³ See para 2, p 003-9 and para 2, p 003-17.

- 12.2 The plaintiff was arrested by the first and second defendants on the 14th of May 2019.⁴⁴
- 12.3 The arrest of the plaintiff was without a warrant of arrest by members of the South African Police Services.⁴⁵
- 12.4 The members of the South African Police Service were dressed in full official uniform.⁴⁶
- 12.5 The plaintiff was arrested on the suspicion of conspiracy to commit robbery.⁴⁷
- 12.6 The arrest of the plaintiff took place at the Engen garage.⁴⁸
- 12.7 The plaintiff was detained at Wonderboomspoort Police Station for one day and never appeared before a court of law for his first appearance.⁴⁹
- 12.8 The matter against the plaintiff was withdrawn by the relevant officer before the plaintiff could appear before a court of law.⁵⁰
- 12.9 Plaintiff was so detained at Wonderboomspoort Police Station at the instance of the aforementioned police officers, whose names and ranks are unknown to the plaintiff.⁵¹
- 12.10 The aforementioned police officers were acting within the cause and scope of their employment as police officers of the South African Police Services.⁵²

⁴⁴ See para 3.1, p 003-9 and para 3.1, p 003-17.

⁴⁵ See para 3.1, p 003-9 and para 3.1, p 003-17.

⁴⁶ See para 3.2, p 003-10 and para 3.2, p 003-18.

⁴⁷ See para 3.3, p 003-10 and para 3.3, p 003-18.

⁴⁸ See paragraph 5.1.6.3, p 003-22.

⁴⁹ See para 4.1, p 003-10 and para 4.1, p 003-18.

⁵⁰ See para 4.2, p 003-10 and para 4.2, p 003-18.

⁵¹ See para 4.3, p 003-10 and para 4.3, p 003-18.

⁵² See para 4.5, p 003-11 and para 4.5, p 003-19.

12.11 On the 15th of May 2019, at about 14:00, the plaintiff was released after the case against him was withdrawn by the relevant officer whose full and better particulars are not known to the plaintiff.⁵³

WITNESSES CALLED:

EVIDENCE ON BEHALF OF THE DEFENDANTS:

WARRANT OFFICER SAMUEL DLAMINI (“DLAMINI”):

[13] He has been in the employ of the Directorate for Priority Crime Investigation (DPCI) commonly known as the Hawks for 4 years as a warrant officer. His evidence in chief was:

13.1 He was the arresting officer on the day that the plaintiff was arrested.

13.2 On the day of the arrest, whilst on his way to meet an informant in Wonderpark, he saw a parked marked SAPS Golf in blue lights, on the bridge between Pretoria North and Wonderpark.

12.3. It caught his attention, because he could not understand why a uniformed policeman will be alone with a civilian on the bridge as it seemed there was no reason for them to be there.

12.4. After he saw the SAPS marked Golf, he received a telephone call and was informed to meet the suspects (of which he was informed by his informant) at the Engen garage in Wonderboom. He arranged back-up, went to the Engen Garage and parked his Mercedes Vito. (His back-up arrived at some stage, *inter alia*, in the form of his fellow Hawks-member Wynand Herbst (who has since passed), waiting in an Audi vehicle at the Engen station. He got out of his Vito and went into the Engen shop.

⁵³ See para 4.4, p 003-11 and para 4.4, p 003-19.

- 12.5. Whilst in the shop the SAPS marked Golf ("the Golf") arrived and parked (reversed park) in front of the shop. No one got out of the Golf. He received a call from the suspects that they would be arriving in a blue Volkswagen Polo vehicle ("the Polo"). He saw the Polo arriving and went to meet them. When exiting the Engen shop the driver of the Golf (later identified as the plaintiff) nodded at him as if acknowledging him and as if he recognised him. Dlamini did not know the plaintiff.
- 12.6. Dlamini got into the Polo with the suspects. He was pretending to be an uber driver whilst he communicated with the suspects and they told him of their plan to execute a robbery of which he, as the uber driver, would form an integral part. He asked the suspects if they should not rather go somewhere else to discuss the planned robbery, because of the marked SAPS vehicle being present.
- 12.7. The suspects ensured him that the marked SAPS vehicle was part of their plan and that they were working together in respect of the planned robbery. The Golf would have played an integral part in the planned robbery and according to the suspects the police car would have stopped the uber vehicle with the intended victims whereafter the robbery would have taken place by the suspects.
- 12.8. After talking to the suspects, Dlamini got out of the Polo, but because his Mercedes Vito was not a suitable uber vehicle (the suspects would have immediately known that he was lying if they saw his vehicle), he could not go to the Vito and drive off, whilst the suspects were there and as a result he went into the Engen shop again, in the hope that the Polo would leave the Engen station.
- 12.9. Unfortunately, the suspects did not leave the Engen station, but instead drove to the front of the Engen shop and parked right next to and very close to the Golf.

- 12.10. Both vehicles' windows were open and the suspects and the Plaintiff then commenced talking to each other through the open windows, whilst remaining seated in their respective vehicles. This Dlamini witnessed from where he was standing inside the Engen shop at the window. He could not hear what they were saying.
- 12.11. Dlamini became anxious and afraid for his safety, because he could not leave the shop with the suspects outside and he was afraid that the plaintiff would be telling the suspects that he recognised him as a Hawk member and not an uber driver.
- 12.12. As a result, Dlamini remained in the shop and called his back-up to arrest the suspects. Upon his request, his back-up and members of the Metro Police in uniform came in and apprehended the suspects in the Polo and secured them. After they were secured, he exited the shop. The Polo was searched and a firearm and ammunition were found.
- 12.13. The plaintiff and his friend were left sitting in the Golf. After the suspects were apprehended and Dlamini's commander, a certain Colonel Mokwena (hereinafter referred to as "Mokwena") arrived, they started focussing on the Golf and its occupants to find out why they were at the Engen station.
- 12.14. The plaintiff was questioned about what duties he was performing for him to be at the Engen station and according to Dlamini the plaintiff could not provide an explanation. When plaintiff was asked if his commander knew that they were there, he could not provide a proper answer.
- 12.15. After the scene was processed, they moved to the station and called in the commander of the plaintiff in order for him to take statements from the member. According to Dlamini the plaintiff's commander could not give a satisfactory explanation why the

plaintiff was at the Engen station. Thereafter Dlamini placed the plaintiff and his friend under arrest.

[14] During cross-examination the following version was provided:

- 13.1. Dlamini never spoke to the passenger in the Golf, who was in civilian clothes and was never told that he was a police reservist.
- 13.2. Dlamini insisted that they only arrested the plaintiff after they had spoken to his commander. Later in evidence he confirmed that the commander they spoke to was Colonel Motsiri (hereinafter referred to as "Motsiri") and that he did not confirm the plaintiff's version.
- 13.3. He was directed to the affidavit by Motsiri which affidavit was discovered by the defendants. In his affidavit Motsiri stated:

"On the 14th May 2019, I was on duty with other members of TRT performing generic TRT duties. One of the members was Sergeant JM Mthethwa who was assigned to work at the main safe to book firearms out to members and he was also going to be utilised outside on the streets to perform operational duties if and when needed. Sergeant JM Mthwethwa was in full TRT SAPS uniform and was driving a marked SAPS Golf with registration no. BVK283B. Sergeant Mthwethwa was assigned to perform safe duties, but not limited to it or not barred from performing other TRT duties. Sergeant JM Mthwethwa reports directly to me as the unit commander. Though the member was performing the safe handling duties as mentioned above he was not restricted to Pretoria Central Police Station. The member Sergeant JM Mthwethwa could perform other duties than the TRT member can or could perform. This include gathering of information for the team so as for the latter to be certain of what to expect or of what they are going to do. Gathering of information by members of the TRT, this includes Sergeant Mthwethwa, is not restricted to the police

*station or a specific place for the informer to come to. Information can be obtained anywhere in the area where members are stationed. Sergeant Mthwethwa was in his working precinct. That is all I have to say”.*⁵⁴

- 13.4. Dlamini was also referred to his own statement which was commissioned on the 14th of May 2019 and wherein he stated under oath the following:

*“Immediately after passing the same state vehicle Golf 7 under R8 north it followed me towards Pretoria CBD. On my arrival at the meeting point Engen garage when entering Pretoria CBD the name of the garage is E’skia Mphahlela its on the south side towards CBD. In a few minutes the same state vehicle that was following me from Wonderpark mall entered the garage and parked tactically next to the store entrance. Inside there was a member in full uniform and a civilian both African males”*⁵⁵

- 13.5. Further in his statement he stated:

“I then called Sergeant Wynand Herbst and asked him to apprehend the said suspects with the members of the police in the car since I was informed that they are working with them”...

*“I informed the police member of TRT that he was under arrest together with Sgt Herbst and the TMPD members introduced themselves and to the detained two suspects in the blue Polo and one other civilian who later informed us as he is an ex-police was driving with the police in the state vehicle”.*⁵⁶

- 13.6. Further in his statement he stated:

⁵⁴ See p 005-44 and 005-46.

⁵⁵ See para 6, p 005-20.

⁵⁶ See para 12, p 005-21.

“The suspects together with the member of the police were taken to Wonderboompoort SAPS where they were processed and detained.”⁵⁷

13.7. During cross-examination we were requested to watch a video, which was discovered by the defendants, less than a week prior to the trial commencing, showing video footage of the day in question. This video starts with the scene where the marked SAPS Golf vehicle is parked in front of the Engen shop at the Engen station in a reversed position.

13.8. Whilst the video was playing Dlamini gave some commentary. He *inter alia* indicated that:

13.8.1. The plaintiff and his passenger spoke in length to Dlamini and other members to try and explain why they were there and what had happened.

13.8.2. At some stage the plaintiff confronted Wynand Herbst (hereinafter referred to as “*Herbst*”) because he was disputing that he was part of the conspiracy and Dlamini had to keep them apart.

13.8.3. Whilst the suspects were handcuffed and on the floor of the garage, they denied to Dlamini that they had any relationship with the plaintiff and the plaintiff denied that he has ever talked to them.

13.8.4. The plaintiff informed him that they were following up on information from their informant.

⁵⁷ See para 13, p 005-21.

13.8.5. At that stage the plaintiff was not cuffed and he was walking around at the station whilst being questioned by different members and also the commander, Mokwena.

13.8.6. Plaintiff's service pistol was taken by the other members. His cell phone was taken and there was a white Audi standing parked in front of the Golf.

13.9. At the end of the video, it can be seen that the marked Golf vehicle is driven by someone else. The plaintiff and the civilian walks off the screen and then cars are leaving the scene including the marked Golf, the blue Polo, the Mercedes Vito van driven by Dlamini, a white unmarked Golf which according to Dlamini was his commander, Mokwena's Golf and other vehicles. According to Dlamini driving to the station.

13.10. In cross-examination after watching the video Dlamini admitted that:

13.10.1. His previous statement that he never spoke to the civilian and was not told that the civilian was a reservist was incorrect as the video clearly showed that he was talking to the reservist and he then admitted that the civilian told him he was a reservist.

13.10.2. He did not check the civilian's version on that day before arresting the plaintiff.

13.10.3. At the scene the plaintiff's phone was confiscated and nothing was found on it connecting him to the suspects.

13.11. He reiterated that he did not see the plaintiff being handcuffed by Mokwena and that he did not witness it. He confirmed that he later arrested the plaintiff.

13.12. When the court posed some questions, Dlamini stated that:

13.12.1. When he saw the plaintiff again (after leaving the scene) it was at the police station;

13.12.2. Plaintiff was waiting at the back of the police station;

13.12.3. Plaintiff was inside the police station in an office space and he was not cuffed.

13.12.4. When Dlamini arrested him, he cuffed him at the Police station.

13.12.5. The decision to arrest the plaintiff was made by the commander, Mokwena.

13.12.6. After arrest he was detained at the station in a cell.

13.13. After the court's questions, Dlamini was again cross-examined by the plaintiff's advocate and he admitted that Motsiri was at the station and that he did not agree with Mokwena that the plaintiff should be arrested. He confirmed that there was no agreement between the two commanders about the plaintiff's arrest and detention.

13.14. That was the case for the defendants. No further witnesses were called on behalf of the defendants.

EVIDENCE ON BEHALF OF THE PLAINTIFF:

JACOB MAKGATLA MTHETHWA (MTHETHWA)

[15] The plaintiff was the only witness for the plaintiff. His evidence in chief was the following:

15.1 He is a member of the SAPS unit called Tactical Response Team (TRT) and he is working at Tshwane Central police station, since

2013. The gathering of information is part of his duties and they also attend to aggravate robberies, medium to high risk, involving firearms, via the reaction team.

- 15.2 He was arrested on the 14th of May 2019. Prior to his arrest he was on duty and reported at 6am at Pretoria Central Police Station.
- 15.3 On that day he was posted at the main safe where the working members book firearms in and out. He was the safe master.
- 15.4 Some members went to the shooting range and he went with them at the Pretoria West SAPS College. Whilst they were there, he received a phone call from his informant. This was somewhere between 12pm and 1pm.
- 15.5 The informant said that possible suspects were coming from Johannesburg with a machine to makes fraudulent passports and with possible drugs. The informant was at the BMW dealership at the Fountains, Pretoria and requested Mthethwa to collect him because he did not have a vehicle.
- 15.6 The plaintiff went to collect the informant at the dealership. Before he left the shooting range, he told Motsiri, his commander, who was at the shooting range with him, that he was going to meet his informant and Motsiri allowed him to go. He explained that he could not simply leave the firearms that were booked out at the shooting range unattended and he had to tell his commander that he was leaving the shooting range.
- 15.7 He also informed the commander of the reason why he was leaving and requested him that if the information was a positive lead to a possible crime, the other members at the shooting range should be mobilised as back-up. He explained that before an operation commences a member of TRT does Obs. and Rec. (observation

and reconnaissance) and that is what he was going to do. He explained that it is not necessary for two members to do obs. and rec. One can work on his own and meet with his informant alone. He also indicated the Golf is his official vehicle and that he even goes home with it. There is no requirement that there has to be two officers in a marked police vehicle.

- 15.8 He collected the informant and because his informant was waiting on information from another informant ("the second informant") they decided to commence driving to the Wonderpark area, because that was the indicated direction the suspects would go.
- 15.9 At some stage the informant lost communication with the second informant and they did not know where exactly to go.
- 15.10 The informant was trying to reconnect with the second informant and they parked next to the road in the marked SAPS vehicle on the bridge close to Wonderpark. The blue lights of the car were on because it was an official requirement that when driving a marked police car it has to be visible and the blue lights must be on. There was nothing strange about it and it was only for visibility.
- 15.11 He said that it would have been impossible for Dlamini to see who the occupants of the Golf were, because of its darkly tinted windows, specifically so tinted to ensure the safety of the police members in the marked vehicle.
- 15.12 Because they could not reconnect with the second informant, he decided to abort the mission and turn back to the shooting range. They were facing the wrong direction on the high-way and in order to go back to Pretoria they had to proceed on the R80, take the first off-ramp to turn back to Pretoria. When he took the off-ramp he came to a traffic light at the Engen station and at that stage the second informant phoned back. The second informant was on his

way and asked where they were. He then suggested that they meet him at the Engen station. As a result, they pulled into the Engen station and waited.

15.13 When they came into the Engen station area, Mthethwa drove to the Engen shop and he saw Dlamini inside the shop. He recognised Dlamini, because he has worked with the Hawks and he previously acted as a driver for the Hawk's commander. He also noticed Wynand Herbst sitting in a white Audi in the parking lot and he knew that something, involving the Hawks, was going on.

15.14 Because he was alerted to the fact that the Hawks were present, he reversed his vehicle into the parking space in a tactical position to keep observing the area. He was looking at Dlamini in the shop in his mirror. He never saw Dlamini going into the shop and never saw Dlamini inside of the blue Polo. When he got to the Engen station, Dlamini was already inside the shop.

15.15 Dlamini was not standing by the window but he was standing (hiding) behind some of the shelves, looking out.

15.16 He saw Dlamini giving the cashier his holster with his service pistol.

15.17 According to the plaintiff, if Dlamini was standing at the window as he alleged, the occupants of the Polo would have immediately noticed that he was looking at them and that would have been extremely suspicious.

15.18 The Polo pulled in and parked next to the Golf but they were not talking to the plaintiff. The plaintiff was busy with the passenger in his car and on his phone. The suspects were talking to each other.

15.19 The police and the Hawks then apprehended the suspects, whilst the plaintiff and passenger were still sitting in the Golf.

- 15.20 Wynand approached the plaintiff and ordered the plaintiff to get out of his vehicle. The plaintiff was immediately upset about this and he told Wynand that he, the plaintiff, is the one in uniform, whilst Wynand is wearing civilian clothes and that he will not obey Wynand.
- 15.21 He also explained that the situation was extremely tense as there were heavily armed members of the Metro Police standing around. This was also visible on the video.
- 15.22 Wynand then told the Metro Police to take the plaintiff's firearm. Plaintiff co-operated but he did not want to touch his own fire-arm or get out of the Golf for this purpose.
- 15.23 He explained that the situation was tense and he did not want to accidentally be shot by the heavily armed policemen standing around. The one at his driver door was pointing his rifle at a 45 degree to the ground and because of the tense situation he did not want to do anything which might cause the tension to rise. He informed the Metro Policemen that he can take the gun from him and he crossed his arms in front of him whilst the member took his service pistol from him.
- 15.24 Plaintiff stated that he argued with Wynand and Dlamini (this can be seen on the video) because when they questioned him he told them why he was there, but they did not trust him. He said to them that he spotted them before they spotted him. He recognised them and if he was part of some criminal plan, he would not have stayed at the Engen garage whilst knowing that the Hawks were around. (The fact that he recognised Dlamini was also confirmed by Dlamini who indicated that the plaintiff nodded towards him as if he knew him).

- 15.25 The plaintiff went to Dlamini and told him to ask the informant what they were doing there. Dlamini spoke to the informant but decided not to believe them.
- 15.26 At some stage, Mokwena arrived and plaintiff walked with him to explain everything to him.
- 15.27 He even went back to the police car to get a clipboard (this can be seen on the video) because he wanted to write down the information about the people questioning him and make notes in respect thereof. Later, on the video, it can be seen that he returned the clipboard to the Golf.
- 15.28 Plaintiff stated that Wynand requested his cell phone from him and he gave him his cell phone as well as the pattern to open it. It can be seen on the video that a cell phone is handed to Wynand.
- 15.29 The plaintiff stated (this cannot be seen on the video) that he also handed over to Wynand his second cell phone which he was carrying with him and which Wynand did not know about. On neither of these phones any communication between him and the suspects was found.
- 15.30 He explained that whilst on the scene he could not leave because Wynand, Dlamini and Mokwena were in charge. They knew him. They knew where he worked and even if he left they would know where to find him. He had to hand in his cell phone and his service pistol was taken. He was not free to leave.
- 15.31 He asked to call Motsiri, but he did not answer and only later phoned back. Motsiri was requested to meet them at the police station.

- 15.32 At the end of the video, it can be seen that vehicles left the scene. The plaintiff explained that he was leaving in Mokwena's motor vehicle.
- 15.33 He stated that Mokwena told him "*you are a highly trained member and you can harm me*". According to the plaintiff that is when Mokwena handcuffed him and put him in the back seat of his vehicle. The Golf was not driven by him but by another metro policeman. This can be seen on the video.
- 15.34 When he got into the vehicle with Mokwena they went straight to the police station. He was handcuffed and he remained handcuffed at Wonderboomspoort Police Station. He was put at the back of the police station, not in an office, but in an open space where cars are parked and he was watched by other members of the police. He remained handcuffed.
- 15.35 When confronted with Dlamini's version that when he arrested him at the police station, he was not handcuffed, the plaintiff stated that he never saw Dlamini again after leaving the scene and that he did not see him at the station and that Dlamini did not arrest him at the station. He was already in cuffs and transported from the scene to the station in cuffs.
- 15.36 According to him, Motsiri and Mokwena did not agree about him being arrested. His commander informed him that they (the Hawks) took it personally because he argued with them at the scene and Mokwena told him that he must apologise. When he did not want to apologise because he did not do anything wrong, Mokwena said that then they will arrest and detain him. He did not apologise and he was detained.
- 15.37 He even gave evidence that, at the police station, he was never properly booked because no one even searched him. He had

explosives with him, (a stun grenade) that was strapped to his leg and he was detained in the cell with the explosives.

15.38 His rights were not read to him by Dlamini but by the shift commander.

15.39 He was referred to the notice of rights which he signed and from that it is clear that a certain Sergeant Du Toit gave it to him and that this was only signed by the plaintiff at 21:43.

15.40 He gave evidence that he was placed in a cell and the next morning when the other arrestees were taken to court no one wanted to take him with, as they all said he was arrested by the Hawks. It was as if they did not want to touch him. He had to argue with them to take him to court so that he can have his appearance and a decision can be made. At last, he was taken to court and kept in the cell at court until approximately 16:00 when he was released from the cell without ever appearing in court. Whilst at court he still had the explosives on him.

15.41 At the police cell it was a cold winter's night. He had no blanket, no water and no toilet.

[16] The cross-examination did not cast any doubt on the plaintiff's version. The following is relevant:

16.1 The court noticed that whilst the plaintiff gave evidence in chief, Ms Mokwena for the defendants did not make any notes.

16.2 She made incorrect statements to the plaintiff during cross-examination of what he allegedly testified and on what the facts before court was.

16.3 She argued with the plaintiff and failed to ask proper questions.

16.4 In closing argument, Adv Mokwena delivered a carefully worked out argument which did not take into account any of the concessions made during cross-examination by the witness for the defendants or the evidence of the plaintiff and she simply presented her argument as if the trial never took place.

EVALUATION OF EVIDENCE

[17] During the evidence of Dlamini the following concessions were made in respect of the allegations contained in the pleadings, that:

17.1 The plaintiff was never inside the Volkswagen Polo with registration no. FL0[...].

17.2 The gas gun, holster and 3x9mm live rounds were not found in possession of the plaintiff, but in the Volkswagen Polo.

17.3 The police officers did not trace the vehicle that the plaintiff was driving.

17.4 The plaintiff was not followed from Wonderpark up to the Engen garage.

[18] During the trial it became evident that Dlamini had different versions. What he testified in evidence in chief, differed from what he testified under cross-examination, it differed from the contents of the video, his own statement commissioned on the 15th of May 2019 and from the version as pleaded in the first and second defendants' plea. The following is an exposé of the different versions:

- 18.1 Dlamini did not speak to the civilian passenger who was with the plaintiff in the Golf and did not know that he was a police reservist.⁵⁸
- 18.2 He did speak to the civilian who was with the plaintiff and the civilian told him that he was a reservist.⁵⁹
- 18.3 The plaintiff was in / driving the Volkswagen Polo.⁶⁰
- 18.4 The plaintiff was not driving or in the Polo but that he was driving a SAPS marked Golf. This was the evidence of Dlamini.⁶¹
- 18.5 The plaintiff was arrested because he was implicated by the suspects, he did not give a satisfactory explanation of why he was there and his commander did not confirm his story.⁶²
- 18.6 The plaintiff was arrested because he was implicated by the suspects and according to Dlamini they seemed to know each other.⁶³ No mention of the plaintiff's commander is made in the statement by Dlamini. No mention of the plaintiff's commander is made in the defendants' plea.
- 18.7 The plaintiff was arrested, because the suspicion was strengthened by the discovery of a gas gun holster and 3x9mm live ammunition in the Volkswagen Polo where the plaintiff was in.⁶⁴
- 18.8 The gun and live ammunition were found in the Polo and that was not the vehicle driven by the plaintiff.⁶⁵

⁵⁸ His evidence prior to viewing the video footage.

⁵⁹ This was clear in the video footage and after the video footage he admitted that he spoke to him and that he confirmed he was a reservist. See also Dlamini's statement in par 12 p 005-21.

⁶⁰ See paragraph 5.1.7.3, p 003-22; see paragraph 5.1.6.2, p 003-22.

⁶¹ See also Dlamini's statement, paragraphs 9 and 11, p 005-20 and p 005-21.

⁶² This was indicated in the evidence given by Dlamini in court.

⁶³ See paragraph 11, p 005-21.

⁶⁴ See paragraph 5.1.7.3, p 003-22.

⁶⁵ From Dlamini's evidence and his statement.

- 18.9 The plaintiff's vehicle was continuously traced.⁶⁶
- 18.10 The plaintiff's vehicle was not traced. It was spotted at one place and then spotted at the Engen garage.⁶⁷
- 18.11 In Dlamini's statement it is said that the Plaintiff's Golf followed Dlamini to the Engen garage.⁶⁸
- 18.12 In evidence Dlamini said that when he saw the marked SAPS car on the Wonderpark bridge it was odd to him, but he did not make much of it because he was talking on the phone and arrangements were being made to meet the suspects at the Engen garage. He gave evidence that he did not see the police Golf entering the Engen garage but he only saw them after they were already parked. This confirms that the vehicle was not traced and that no facts exist to state that it followed Dlamini.
- 18.13 The defendants waited to arrest the plaintiff until after they had spoken to his commander Motsiri.
- 18.14 In his statement, Dlamini alleged that the plaintiff was informed that he was arrested at the Engen garage right after the suspects were in custody.⁶⁹
- 18.15 From the plea it is confirmed that the plaintiff was arrested at the Engen garage.⁷⁰
- 18.16 From Dlamini's evidence as well as the plaintiff's evidence it is common cause that the defendants' only spoke to Motsiri at the police station, which was after they left the Engen garage.

⁶⁶ See paragraph 5.1.6.2, p 003-22.

⁶⁷ This was clear from the evidence given by Dlamini.

⁶⁸ See paragraph 6, p 005-20.

⁶⁹ See paragraph 12, p 005-21.

⁷⁰ See paragraph 5.1.6.3, p 003-21.

18.17 Motsiri and the Hawks commander did not agree that the plaintiff should be arrested and detained. This was confirmed by Dlamini and the plaintiff.

18.18 The plaintiff did not give any exculpatory version or explanation and therefore he cannot claim that he was ignored by the first and second defendants.⁷¹

18.19 It is clear from the evidence by Dlamini that the plaintiff attempted to explain and he continued to explain why he was there and what he was doing. He spoke to Dlamini, Wynand, Mokwena and he continued to explain his version. Plaintiff involved the civilian informant and requested them all to speak to the informant.

18.20 Before he was arrested, he was informed of his rights by the members of the SAPS.⁷²

18.21 From the video it can be seen that the plaintiff's service pistol and his cell phone were confiscated at the scene and that he did not drive away in his marked police vehicle but someone else drove it from the scene.

18.22 The plaintiff was deprived of his freedom already at the Engen garage at approximately 15h30.⁷³ He only signed the declaration of rights at 21h43 at the Wonderboom Poort police station.⁷⁴

[19] The plaintiff's version on the other hand seems to be reasonable and believable. The following is relevant:

⁷¹ See para 5.1.5.1, p 003-21.

⁷² See paragraph 5.1.2.1, p 003-20.

⁷³ See paragraph 3.1, p 003-9.

⁷⁴ See page 006-43.

19.1 That he was already arrested/deprived of his freedom at the Engen garage is supported by Dlamini's statement⁷⁵ as well as the defendants' plea as referred to above.

19.2 The plaintiff's version that he was arrested and detained because he argued with the Hawks members and did not want to apologise was not disputed in cross-examination and stands uncontested.

19.3 The plaintiff's version of why he was at the Engen garage seems to be reasonable.

[20] It was not disputed that the members of the Hawks knew his name, his rank and at which police station he worked and at any stage after the incident at the Engen station, after obtaining a warrant of arrest they could have arrested him. No reasonable explanation was provided why it was necessary to arrest and detain the plaintiff that evening and not first do a diligent search and investigation in respect of his alleged involvement in the proposed robbery.

[21] It is clear from the evidence that defendants had the information of plaintiff's commanding officer.

[22] It is a reasonable inference that if the plaintiff was involved with the suspects in the proposed robbery he would have aborted the mission and informed the suspects immediately after recognising Dlamini and Wynand as Hawks members at the Engen garage.

[23] It was not disputed that the plaintiff was told by Mokwena that if he did not apologise for arguing with the members of the Hawks at the scene, they were going to arrest him and detain him. This points to an ulterior motive. It was not disputed that plaintiff became argumentative with Wynand and Dlamini, because Wynand was pointing his finger at him and they wanted him to be afraid because they are the Hawks.

⁷⁵ See p 005-21.

- [24] It was not disputed that plaintiff was angry at the Engen station, because the Hawks endangered his life, he answered all of their questions, he cooperated with them and they did not want to listen to him. He experienced the manner in which he was approached and accused unfair.

APPLICABLE LEGAL PRINCIPLES

- [25] Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as “*the CPA*”) states that a peace officer may arrest without warrant any person whom he reasonable suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.

- [26] It is a well-established principle that the onus rests on the arresting officer to prove the lawfulness of the arrest. The learned Robbie CJ stated in the case of *Minister of Law and Order and others v Hurley and another*⁷⁶ that:

“An arrest constitutes an interference with the liberty of the individual concerned and it therefore seems to be fair and just to require that the person who arrested or cause the arrest of another person should bear the onus of proving that his action was justified in law”.⁷⁷

- [27] In respect of section 40(1)(b) of the CPA the jurisdictional facts which must exist for a section 40(1)(b) offence to succeed were set out in the matter of *Duncan v Minister of Law and Order*.⁷⁸ They are:

- 27.1 The arrester must be a peace officer.
- 27.2 The arrester must entertain a suspicion.
- 27.3 The suspicion must be that the suspect be an arrestee who committed an offence referred to in section 1.

⁷⁶ See *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A).

⁷⁷ See at 589E-F.

⁷⁸ See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818E-H.

27.4 The suspicion must rest on reasonable grounds. In order for the suspicion to be a reasonable one it must be objectively sustainable.

[28] In the matter of *Mabona v Minister of Law of Order and others*⁷⁹ the following was said in relation to how a reasonable suspicion is formed:

“The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or 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. This is not to say that the information at his disposal must be of 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”.⁸⁰

[29] In the matter of *Zealand v Minister of Justice and Constitutional Development and another*:⁸¹

“The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom, arbitrarily or without just cause, as well as the finding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken”.⁸²

[30] It is trite that the police officers purporting to act in terms of section 40(1)(b) of the CPA should investigate exculpatory explanations

⁷⁹ See *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SE).

⁸⁰ See p 658G-H.

⁸¹ See *Zealand v Minister of Justice and Constitutional Development and another* (2008) ZACC 3; 2008 (2) SACR 1 (CC).

⁸² See para 24.

offered by a suspect before they can form a reasonable suspicion for the purpose of a lawful arrest.⁸³

[31] Once the requirements of section 40(1)(b) have been met the discretion whether or not to arrest arises. The peace officer is not obliged to effect an arrest.⁸⁴

[32] As far as section 40(1)(b) is concerned, Judge van Heerden JA said the following in *Duncan* (at 818H-J):⁸⁵

“If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the sub-section, i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power. (Cf Holgate-Mohammed v Duke (1984 (1) All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the sub-section will render an arrest unlawful, need not be considered because it does not arise in this case”.

[33] He proceeded to say that an exercise of the discretion in question will be clearly unlawful if the arrester knowingly invokes the power to arrest for a purpose not contemplated by the legislator. The decision must be based on the intention to bring the arrested person to justice.⁸⁶

[34] In the *Sekota* matter the appeal court referred in paragraph 30 to examples when an arrest is not based on the intention of bringing the arrested person to justice and included to punish the plaintiff by means of arrest. In paragraph 31 the appeal court went on to say:

⁸³ See *Louw and another v Minister of Safety and Security and others* 2006 (2) SACR 178 (T); *Liebenberg v Minister of Safety and Security* (2009) ZAGPPHC 88.

⁸⁴ See *Groenewald v Minister of Justice* 1973 (3) SA 877 (A) at 883G – 884B; *The Minister of Safety and Security v Sekota and another* 2011 (1) SACR 315 (SCA) para 28.

⁸⁵ See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

⁸⁶ See *Sekota* supra, para 30.

“The law in this regard has always been clear. Such an arrest is not bona fide but in fraudem legis because the arrester has used a power for an ulterior purpose. But a distinction must be drawn between the object of the arrest and the arrester’s motive”.

- [35] In *Pharmaceutical Manufacturers Association of South Africa: in re ex parte application of President of the RSA* (2000) ZACC 1 Chaskalson P held that the Bill of Rights required that the exercise of discretion must also be objectively rational. He said the following:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion will place form above substance and undermining important constitutional principles”.

CONCLUSION

- [36] The plaintiff’s version about what transpired the day of the arrest was consistent and reasonable. The defendants’ different versions on crucial aspects of the case makes the truth of it questionable.
- [37] From the evidence of the plaintiff which was not placed in dispute or contradicted, it seems that there was an ulterior motive for his arrest and detention based on the fact that he refused to apologise to the Hawk members for arguing with them and that the reason for the arrest was not to bring him to court.

- [38] It is common cause that the two commanders Motsiri and Mokwena did not agree on the arrest of the plaintiff.
- [39] It is clear that at all times when the arrest took place and the detention commenced, defendants had full knowledge of the name, the rank, the police station and the name of the commanding officer of the plaintiff and if the necessary warrant of arrest was obtained and/or a summons needed to be served it could have been served upon the plaintiff after an investigation into the suspects' allegation.
- [40] The decision to arrest was based on the word of suspects in a conspiracy to commit robbery, which was later, on the same day retracted.
- [41] The decision to arrest was made by choosing to accept the word of the suspects over the word of the police officer which was confirmed by the reservist/civilian.
- [42] The decision to arrest was also opposed by the plaintiff's commanding officer.
- [43] In my view the fact that the charge against the plaintiff was dropped even before he appeared in court the next day and he was released without appearing in court, confirms that the decision to arrest him based on the alleged suspicion that the plaintiff committed an offence referred to in schedule 1, did not rest on reasonable grounds and was not objectively sustainable.
- [44] Based on the facts of this matter and the legal principles applicable, I am of the view that the arrest and detention of the plaintiff was unlawful.

COSTS

- [45] During closing argument, the plaintiff's counsel argued that if I find in favour of the plaintiff, I should award costs for two counsel. It needs to

be mentioned that at the commencement of the trial, on 28 August 2024, Mr Ngwana TI appeared on behalf of the plaintiff and indicated that Mr Mosana DD was appearing with him, but at that stage Mr Mosana was held up in another court. Mr Ngwana proceeded with the matter in the absence of Mr Mosana.

[46] After lunch, and at about 14:30 on the 28th of August, Mr Mosana took over the cross-examination of Dlamini. The court adjourned at 16:00. On the 29th of August, Mr Ngwana was not present at court and Mr Mosana proceeded and finished with the matter in his absence.

[47] Considering the fact that the two counsel appearing on behalf of the plaintiff were only simultaneously in court for a period of less than 2 hours during the trial, I am not convinced that this matter merits costs of two counsel.

[48] I do however agree that the complexity of the matter merits the granting of costs on scale C.

ORDER

[49] In the result, I make the following order:

49.1 That plaintiff's arrest and detention was unlawful.

49.2 That the first and second defendants must pay the costs on scale C, jointly and severely, the one paying the other to be absolved, in respect of the merits of the plaintiff's claim.

49.3 The quantum of the damages sought by plaintiff together with costs in respect thereof is postponed sine die.

Acting Judge **Van Niekerk, N**
In The High Court of South Africa
Gauteng Division, Pretoria

This judgment was handed down electronically by circulating to the parties and the parties' representative by email and by being uploaded to CaseLines.

The date and time of hand-down is deemed to be 10h00 on Friday, 7 September 2024.

Date of hearing: 28 and 29 August 2024
Date of delivery: 7 September 2024

Appearance

Instructing Attorneys for the Plaintiff: Ramaesele Mphahlele Attorneys
Counsel for the Plaintiff: Adv DD Mosoma
Adv TI Ngwana

Instructing Attorneys for the 1st and 2nd Defendants: State Attorney
Counsel for the 1st and 2nd Defendants: Adv Mokwena MM