

**IN THE HIGH COURT OF SOUTH AFRICAN
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 5006/17P

In the matter between:

NKOSIKANDABA LAWRENCE MDLULI

Plaintiff

and

MEC FOR THE SAFETY AND SECURITY

First Defendant

SERGEANT MABANGA

Second Defendant

CONSTABLE KHWELA

Third Defendant

ORDER

The following order is made:

1. The plaintiff's claim for unlawful arrest and detention (claim1); and malicious prosecution (claim 3) against the defendants is dismissed;
2. The defendants are found 100% liable for the plaintiff's proved or agreed costs in respect of assault, claim 2; and
3. The defendants are ordered to pay the plaintiff's costs of suit including the costs of counsel on scale B.

JUDGMENT

Chithi AJ:

Introduction

[1] This is a claim for delictual damages in which the plaintiff has instituted three separate claims against the defendants, namely for unlawful arrest and detention (claim 1), assault (claim 2), and malicious prosecution (claim 3). The first defendant is cited as the MEC for Safety and Security in the title of all the pleadings, notices and in the particulars of claim. However, on the combined summons the sheriff is called upon to inform the Minister of Safety and Security (which has now been renamed the Minister of Police) that the plaintiff has instituted this action against him and the two other defendants. The second and third defendants are members of the South African Police Service ('SAPS'), who were employed by the Minister of Safety and Security at the relevant time. As soon as I noticed this discrepancy during the preparation of my judgment, I called upon the parties to address me on the issue of whether this discrepancy would have any effect on the judgment I would give if I was inclined to grant judgment against the first defendant. The plaintiffs' further heads of argument on this issue were delivered on 25 September 2024 while the defendants' heads of argument were delivered on 26 September 2024. I will return to the parties' submissions on this issue later in the judgment.

[2] The reason why I asked for further submissions from the parties is that policing has always been a national competency and has never been a provincial competency. In addition, there has never been a provincial portfolio known as MEC for Safety and Security instead there is a provincial portfolio known as MEC for Transport, Community Safety and Liaison. It seems that no one ever picked up this issue until I started preparing judgment or at least the state attorney did not take any issue with it. However, it has implications on whether judgment has been granted against a correct party.

[3] The plaintiff sues the first defendant based on the principle of vicarious liability. However, the plaintiff in his particulars of claim prays for judgment against the defendants jointly and severally with each defendant to pay the other to be absolved, while he did not sue the second and third defendants in the alternative in

their personal capacities if I do not find the first defendant liable. Based on this omission, it seems that the citation of the second and third defendants was unnecessary.

[4] In respect claim 1 the plaintiff claims R500 000.00, in respect of claim 2, R2 560 000.00 and in respect of claim 3, R200 000.00. The plaintiff's claims arise from his arrest on 8 August 2015 and his subsequent detention at Umhlali Police Station before his confinement at Alberlito Hospital. The circumstances relating to how each of these claims arise will become clear during the summary of the evidence.

[5] The issue of liability was separated from the issue of quantum in terms of Uniform rule 33(4) with the issue of quantum standing over for a later determination. Therefore, this case is to be decided only on the issue of liability. In this case, the defendants have admitted the arrest and detention of the plaintiff. Consequently, the defendants bore the *onus* to justify the arrest and detention of the plaintiff. In terms of Uniform rule 39(13), where the *onus* of adducing evidence on one or more of the issues, is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the *onus* is upon him, and may then close his case. However, at the commencement of the proceedings, Mr *Sibeko* who appeared for the defendants advised me that the parties had agreed in their Uniform rule 37 conference that the defendant would lead its evidence first. I allowed the defendants to call their evidence first as agreed to by the parties.

[6] Before leading evidence, the defendant abandoned its special plea in relation to the plaintiff's failure to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

The issues

[7] The court was called upon to determine broadly the following issues:

- (a) whether the arrest of the plaintiff on 8 August 2015 and his subsequent detention was wrongful and unlawful (claim 1).
- (b) whether the plaintiff was wrongfully and unlawfully assaulted by the members of the SAPS (claim 2).

(c) whether the plaintiff's prosecution was malicious (claim 3).

Common cause facts

[8] The following are common cause facts between the plaintiff and the defendants:

- (a) The plaintiff was arrested at Shakashead on 8 August 2015 without a warrant of arrest.
- (b) The plaintiff was detained at Umhlali Police Station
- (c) The plaintiff was admitted at Alberlito Hospital on 9 August 2015.

Bundle of documents

[9] At the outset of the trial, the parties handed in bundles of documents to be used during the evidence of the witnesses. Those bundles are the pleadings bundle comprising the pleadings, the rule 37 bundle comprising the rule 37 minutes, the liability bundle comprising the contents of the docket, a copy of the plaintiffs identity document and his affidavit and the bundle of hospital records comprising the plaintiff's hospital records.

The evidence generally

[10] To justify the arrest of the plaintiff and to disprove the plaintiff's claim for assault and malicious prosecution, the defendant called two witnesses namely Sergeant Petrus Mfakazeli Mabanga and Sergeant Mzwandile Sihle Khwela. On the other hand, the plaintiff was the sole witness to testify in his case.

The defendant's evidence

[11] The first witness for the defendant was Sergeant Petrus Mfakazeli Mabanga who testified that he was a sergeant employed by the SAPS stationed at Umhlali Police Station. He testified that he met the plaintiff for the first time on 8 August 2015. This was when he and his crew member, Sergeant Khwela, were performing patrols and crime prevention duties at Umhlali. They received a complaint round about 20h00 through a two-way radio from Umhlali Police Station of a kidnapping in the vicinity Mirriam's Tavern at Shakashead in Umhlali. They rushed to the scene and upon their arrival at the scene they met an African male person who reported his girlfriend to have been kidnapped by two assailants who were driving a silver Suzuki.

According to the statement in the liability bundle, this African male was Mr Senzo Cedric Langa. In addition, Mr Langa showed them spent cartridges, which were scattered on the ground from the shots, which were fired by the assailants. As Mr Langa reported the incident the motor vehicle concerned was still within eyeshot. They pursued this vehicle and flagged it down to stop by turning on their blue lights, sounding the siren and using a loud hailer but the motor vehicle failed to stop. Instead, what happened is that shots were fired from this motor vehicle towards them. They immediately called for a back-up via the two-way radio.

[12] Fortunately, for them the back-up members of the SAPS quickly responded as they were apparently not far from the scene. The back-up members comprised members of the crime prevention unit, dog unit and the task team. The back-up members were driving an SAPS marked Toyota Quantum ('a kombi') fitted with blue lights and a siren who joined in the pursuit of the silver Suzuki. The shots which were fired towards the police emanated from the back of the Suzuki and were fired through an open window. Sergeant Mabanga did not recall how many shots were fired towards them but he testified that it was several shots. In retaliation they themselves as the police returned fire and struck a tyre of the Suzuki as a result it slowed down and eventually came to a complete stop.

[13] They approached the Suzuki and established that there were two occupants in the motor vehicle who upon being instructed to alight from the motor vehicle refused to do so. However, when they realised that several police were approaching the vehicle they lifted their hands while still seated in the vehicle. The police advanced towards the vehicle and introduced themselves as the police. They opened the driver's door and the rear passenger door of the motor vehicle. A group of members of the police pulled the plaintiff out of the motor vehicle. The plaintiff resisted and held onto the steering wheel. Another group of members pulled the passenger out of the vehicle who was seated at the back and came to be known as Mr Langelihle Ngiba. After the members had pulled the plaintiff and Mr Ngiba out of the vehicle, they handcuffed them. When the plaintiff was pulled out of the vehicle, he fell on his stomach. The plaintiff and Mr Ngiba were heavily intoxicated.

[14] After they had restrained the plaintiff and Mr Ngiba, they proceeded to search the motor vehicle and found a 9mm firearm with an empty magazine and liquor lying around in the motor vehicle. When Sergeant Mabanga enquired from the plaintiff whose firearm it was, the plaintiff confirmed that it was licensed to him. Sergeant Mabanga explained to the plaintiff his constitutional rights, and placed him under arrest for attempted murder. The plaintiff and Mr Ngiba were each taken to the two separate police vehicles and transported to Umhlali Police Station.

[15] During the informal interview, which Sergeant Mabanga had with the plaintiff, the plaintiff informed him that he was not feeling well in his stomach and that he had a scheduled appointment to see a doctor at Alberlito Hospital. An ambulance was called and the plaintiff was taken to Alberlito Hospital. Sergeant Mabanga testified that he never assaulted the plaintiff nor was the plaintiff ever assaulted in his presence. In addition, Sergeant Mabanga stated that the plaintiff did not sustain any injuries at the scene or at the police station. Sergeant Mabanga confirmed that none of the police officers at the scene sustained any injuries. However, their motor vehicle was damaged by the bullet shots. Sergeant Mabanga stated that while it was already dark at the time they attended to the complaint, the street lights were on. In addition, a further source of light was the light from the police vehicles. He further stated that they collected the cartridge cases after they apprehended the plaintiff and Mr Ngiba.

[16] Under cross-examination, Sergeant Mabanga confirmed that he was senior to Sergeant Khwela and so according to the police protocol Sergeant Khwela had to follow his instructions. Sergeant Mabanga further confirmed that when a service pistol had been discharged, a duty officer had to be notified. He stated that he could not identify who among the police officers who came at the scene fired shots, as there were many police officers who came to the scene. He also did not know whether Sergeant Khwela fired shots towards the plaintiffs motor vehicle. However, he himself did not fire any shots towards the plaintiffs vehicle. Sergeant Mabanga stated that he did know how many shots emanated from the plaintiffs motor vehicle but stated that they came in succession. When it was put to him that the plaintiffs magazine was full, Sergeant Mabanga denied that and stressed that the magazine had no bullets. Sergeant Mabanga denied that the plaintiff could possibly have

thought that he was being high jacked at the time he was being flagged to stop. Sergeant Mabanga specifically denied that in the pursuit of the plaintiff and Mr Ngiba the police vehicle, which was immediately behind the plaintiffs motor was the kombi and that kombi was not marked with the SAPS emblem. Sergeant Mabanga stressed that during the pursuit of the plaintiffs motor vehicle the police vehicle, which was immediately behind the plaintiffs motor vehicle was the police van and not the kombi and both vehicles were marked with an SAPS emblem.

[17] When it was put to him that the plaintiff and Mr Ngiba, who was seated on the front passenger, came out of the motor vehicle on their own and raised their hands, Sergeant Mabanga denied this as untrue. Sergeant Mabanga initially denied that he took the plaintiff home after his arrest for the plaintiff to fetch his medical aid card and thereafter took him to hospital. However, when counsel for the plaintiff persisted that Sergeant Mabanga had in fact taken the plaintiff home after his arrest and thereafter to hospital and, he changed to say that he did not remember doing that. Sergeant Mabanga confirmed though that he had heard that the plaintiff was injured but he did not know where the plaintiff got the injuries. He stated that as far as he was concerned the plaintiff had already mentioned to him at the time of arrest that he had a scheduled appointment with a doctor. Sergeant Mabanga confirmed that the duty officer came to the scene and all the stakeholders, including photographers. Sergeant Mabanga testified that they recovered the firearm at the back of the motor vehicle on the floor. Sergeant Mabanga denied that the arrest of the plaintiff was a case of mistaken identity. He pointed out that he was not surprised that he did not find the person who was allegedly kidnapped in the motor vehicle as he had learnt that she had managed to escape and took a different route. Sergeant Mabanga agreed that he did not record it in his police statement that they were following a kidnapping case and that the plaintiff and Mr Ngiba resisted arrest. In addition, he agreed that he did not run a prima residue test on the plaintiff. Sergeant Mabanga stated that he did not know why Sergeant Khwela charged Mr Ngiba with possession of an unlicensed firearm. When Sergeant Mabanga was confronted about why he said in his statement that two shots were fired towards them he testified that this was an oversight on his part. It was not only two shots, which were fired. When it was put to Sergeant Mabanga whether he received his information about the alleged kidnapping and the details of the plaintiff's motor vehicle from an informer or the

complainant he testified that he received the information from the complainant. He stated that the way he wrote his statement may not have conveyed what he wanted to say.

[18] The next witness for the defendants was Sergeant Mzwandile Sihle Khwela. The evidence of Sergeant Khwela was not materially different to that of Sergeant Mabanga in relation to the sequence of events, which resulted in the arrest of the plaintiff. So, it would be unnecessary to repeat Sergeant Khwela's evidence to the extent that it is like Sergeant Mabanga's evidence. Sergeant Khwela testified that he was employed as a member of the SAPS stationed at Umhlali Police Station. At the time of the incident, on 8 August 2015, he held the rank of a constable but had since been promoted to a rank of a sergeant. Sergeant Khwela confirmed that at the time they received the complaint, which resulted in the arrest of the plaintiff, they were performing patrols and crime prevention duties at Umhlali. Sergeant Khwela stated that he was a crew of Sergeant Mabanga at the time. Sergeant Khwela testified that after they got all the information from the complainant, including the description of the motor vehicle and the direction it took, they drove off in the direction the motor vehicle allegedly took. As they entered Shakashead they spotted the motor vehicle fitting the description they were given by the complainant driving at a high speed. It was Sergeant Mabanga, who returned fire when the plaintiff and Mr Ngiba attacked them. The shot Sergeant Mabanga fired landed on the tyre of the plaintiff's vehicle. In addition, Sergeant Khwela stated that there were no shots, which were fired from the back-up police vehicle. Sergeant Khwela testified that they used minimum force when they realised that the plaintiff and Mr Ngiba were resisting arrest. He stated that when he asked Mr Ngiba about the firearm, which was found in Mr Ngiba's proximity, Mr Ngiba stated that the firearm belonged to the plaintiff. He then arrested Mr Ngiba for possession of an unlicensed firearm. Sergeant Khwela denied ever having had anything to do with the arrest of the plaintiff. Sergeant Khwela testified that at the police station after the plaintiff had been arrested, the plaintiff told them that he worked for Transnet and might lose his job if he was detained. At this time, the plaintiff also mentioned that he had a scheduled appointment with the doctor the next day.

[19] Under cross-examination Sergeant Khwela noted the proposition that the plaintiff would persist with his version as set out in his affidavit in the index to the liability bundle. Sergeant Khwela denied as untrue the following propositions which were put to him as part of the plaintiff's version as contained in the plaintiffs affidavit that:

- (a) Mr Ngiba was seated in the front passenger seat of the plaintiffs motor vehicle.
- (b) There was no electric power at Shakashead on the night of the incident and that the streets were dark.
- (c) The plaintiff could have had any reason to possibly think that he was under attack.
- (d) The plaintiff activated his emergency warning lights.
- (e) The plaintiff stopped his vehicle on his own with him and Mr Ngiba coming out of the vehicle with their hands raised.
- (f) The magazine of the plaintiff's firearm magazine was full.
- (g) The plaintiffs firearm was on the driver's seat.
- (h) He ever came close to the plaintiff except when he took the plaintiff to the police vehicle.

[20] Sergeant Khwela persisted with his version. He stressed that the plaintiff was never assaulted in anyway whatsoever and he stated that he did not know why the plaintiff was hospitalized. All he knew was that upon his arrest the plaintiff had informed them that he had a scheduled appointment with the doctor the next day. When Sergeant Khwela was confronted about Sergeant Mabanga having testified that they were shown the plaintiff's vehicle drive away, he pointed out that Sergeant Mabanga was giving his version. Further, Sergeant Khwela testified that he did not know why Sergeant Mabanga denied ever firing shots towards the plaintiff's vehicle. Sergeant Khwela confirmed that cartridge cases were collected from the scene by the relevant experts and he was surprised that Sergeant Mabanga had testified that they themselves had stopped and collected the cartridge cases as that was not consistent with the SAPS protocols. Sergeant Khwela stated that he did not know how it came about that in the defendant's plea he was identified as being the police officer who returned fire. Sergeant Khwela stated that he did not know why the main charges against the plaintiff was not robbery and kidnapping and the person who

was best placed to answer that question was the investigation officer. He further emphasised that while they had initially pursued the plaintiff and Mr Ngiba for robbery and kidnapping, they ultimately arrested them for shooting at them as the police. He stated that the reason why the person who was allegedly kidnapped was not in the plaintiff's vehicle was because she had managed to escape and run into the forest. Sergeant Khwela stressed that he made an error in his statement by saying that the firearm was on the back seat instead of saying it was at the back of the vehicle on the floor. In re-examination, Sergeant Khwela further stressed that he did not arrest the plaintiff but Sergeant Mabanga arrested the plaintiff. Sergeant Khwela emphasised that he was not the investigating officer of the case. This concluded the case for the defendants.

The plaintiff's evidence

[21] Mr Nkosinkandaba Lawrence Mdluli, the plaintiff, testified in his case as a sole witness. He testified that he was 51 years of age and in 2015, he was 42 years of age. He was a senior service driver, employed with Transnet. At the time of the incident, on 8 August 2015, he had been employed at Transnet for 2 years. He lived in Shakashead since 2002. When he entered Shakashead, he had to drive past Mirriam's Tavern. He took two minutes to drive from Mirriam's Tavern to his house if there was no heavy flow of traffic. On 8 August 2015, he was driving from Ntuzuma where he had gone to see his in-laws and along the way on his way back home, he met with his cousin Mr Ngiba. He gave Mr Ngiba a lift as Mr Ngiba wanted to visit his children at Groutville. While he was driving, he was surprised when he suddenly heard gun shots. The gun shots struck the right rear door and the right fender of his motor vehicle. He swerved his vehicle to the street in which his house was. He drew his firearm from his waist and placed it on his seat with a magazine that was intact and fully loaded. He got out of the motor vehicle, with his hands lifted and lay down. Two male persons alighted from a kombi, which had stopped in his immediate vicinity. These two males handcuffed him to his back and started to assault by kicking and punching him. When he enquired as to why he was being assaulted these two male persons asked him where is the woman he had kidnapped. This assault continued until the arrival of a marked police van to which he was taken. He remained at the scene until his wife and children came to the scene. He was thereafter driven off to Umhlali Police Station. The plaintiff denied that:

- (a) He or Mr Ngiba ever fired any shots from his motor vehicle towards the police.
- (b) Mr Ngiba was a back passenger.
- (c) He was intoxicated and he did not observe if Mr Ngiba was intoxicated or not.
- (d) Any shots which were fired by the police ever struck the tyre of his motor vehicle.
- (e) He had any pre-existing health problems relating to his abdomen.

[22] The plaintiff stated that he still had one of the bullet fragments, which were removed by a mechanic from his motor vehicle, which was parked outside the court house. When he got to Umhlali Police Station he was taken to a tin house where Sergeant Mabanga questioned him for 2 hours. Whenever he did not answer questions the way Sergeant Mabanga liked, Sergeant Mabanga threatened to assault him. As a result, he decided to answer the questions according to how Sergeant Mabanga wanted. After the questioning Sergeant Mabanga took him to the charge office to be detained. However, Mr Mthembu, who according to the statement in the liability bundle was the charge office commander, refused to allow that he be detained and insisted that he should be taken to hospital. The reason why Mr Mthembu suggested that he should be taken to hospital is because he was injured and had messed himself up. Sergeants Mabanga and Khwela then took him to the kombi drove off with him to fetch his medical aid card from his house and thereafter took him to Alberlito Hospital, where he arrived at about 02h00 in the morning.

[23] The doctor who examined him at Alberlito Hospital recommended that he should take a bed rest. When the doctor returned at 05h00 he told him to bathe as he intended to operate him. Before the operation, he was put on a machine, which he understood to be a scan. He was thereafter operated and remained confined in hospital for 9 days. During the period of his confinement in hospital, he underwent other therapies for mental distress. During his appearance in court, he was told that he was arrested for shooting at the police, robbery, and kidnapping. He appeared in court on four separate occasions before the charges were withdrawn against him on 16 August 2016 due to the unavailability of state witnesses and the prosecutor complaining about handwriting of the witnesses being illegible.

[24] Under cross-examination the plaintiff admitted that during his appearance in court he was told that he was arrested for robbery and kidnapping. When he was referred to his warning statement in the liability bundle where it is recorded that he was arrested for attempted murder. Based on what is recorded in the warning statement the plaintiff agreed that he was not arrested for robbery and kidnapping but for attempted murder. When it was put to him that according to his evidence in chief, he had said he was not drunk he confirmed that proposition. When the plaintiff was referred to the bundle of hospital records where his doctor had recorded in that bundle that the plaintiff had consumed alcohol, he stated that he did not know why his doctor recorded that in his hospital records. As far as he was concerned, this incident happened a long time ago. The plaintiff admitted that his doctor's recordal on the medical records supported the version of the defendant's witnesses.

[25] The plaintiff further stated that he did not dispute what his doctor had recorded and admitted that he lied when he said he was not drunk. The plaintiff confirmed that he was arrested by Sergeant Mabanga. When it was put to the plaintiff that according to the list of exhibits recovered from him, the magazine of his firearm had one bullet and was not full as he testified, he stated that he does not know why the magazine had one bullet but his magazine was normally fully loaded. He testified that he was assaulted by Sergeants Mabanga and Khwela on his left flank while lying on his stomach. When he was confronted about whether it was possible to have been assaulted on his stomach while he laid on his stomach, he testified that he was assaulted at the back. The plaintiff denied that since he had no injuries at the back it was improbable that he was assaulted. When it was put to the plaintiff that he did not suffer any injuries, he stated that he experienced pain in the ribs and the abdomen and was unable to comment on whether he suffered from any broken or fractured ribs. The plaintiff did not recall ever mentioning that there were three police officers who assaulted him. The plaintiff admitted that he had suffered no visible injuries. The plaintiff testified that although Mr Mthembu did not examine him to check whether he had any injuries Mr Mthembu noticed that his body was skewed towards the left and he had messed himself. The plaintiff admitted that he never mentioned Mr Mthembu and he having messed himself up in his affidavit. The plaintiff denied that the reason why this was not mentioned in his statement is because he was lying. When it was put to the plaintiff that the reason he never

opened charges of assault against the police is because he was never assaulted, he emphasised that the reason he was admitted into hospital is the assault. The plaintiff admitted that he was confined in hospital for 9 days and not 12 days as set out in paragraph 11.1(b) of his particulars of claim. The plaintiff denied that there was any good reason for Sergeant Mabanga to arrest him. This concluded the evidence for the plaintiff.

Conflicting versions

[26] It is common cause that the plaintiff's and the defendant's versions are mutually destructive in relation to the following issues:

- (a) whether the plaintiff and Mr Ngiba were correctly identified as the assailants who had committed a robbery and kidnapping near Mirriam's Tavern.
- (b) whether there were any shots, which were fired from the plaintiff's motor vehicle on 8 August 2015.
- (c) whether Mr Ngiba was seated at the back of the plaintiffs motor vehicle.
- (d) whether Mr Ngiba fired any shots towards the police.
- (e) whether the plaintiff's vehicle was shot on the tyre by the police.
- (f) whether the police vehicle which was immediately behind the plaintiffs vehicle was an unmarked kombi.
- (g) whether the plaintiff and Mr Ngiba failed to stop when they were flagged down to stop by the police.
- (h) whether the plaintiff and Mr Ngiba resisted their arrest.
- (i) whether the firearm was recovered from the back or the driver's seat of the plaintiff's vehicle.
- G) whether the magazine to the plaintiffs firearm was empty.
- (k) whether the plaintiff was assaulted by the police.

[27] The proper approach which must be adopted in resolving factual disputes in respect of two irreconcilable versions was set out by the Supreme Court of Appeal as thus:¹

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the

¹ *Stellenbosch Farmers' Winery Group Ltd. and another v Martell et Cie SA and others* 2003 (1) SA 11 (SCA) para 5 (*Stellenbosch Farmer's Winery*).

disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities ... As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.'

[28] For convenience, I would employ this technique under each of the plaintiff's three separate claims.

Was the arrest of the plaintiff and Mr Ngiba effected in terms of s 40(1)(a) or s 40(1)(b) of the CPA?

[29] This issue is always determined with reference to the pleadings. However, in this case the defendants in their amended plea simply stated that Sergeants Mabanga and Khwela acted in terms of s 40 of the Criminal Procedure Act 51 of 1977 (CPA) to effect the arrest of the plaintiff and Mr Ngiba.² In addition, the defendants further averred that the plaintiff and Mr Ngiba were subsequently charged with attempted murder as they acted with a common purpose to evade their arrest by shooting at the police.³ Section 40 has two paragraphs namely paragraph (1) and (2). Section 40(1) has 17 sub-paragraphs namely sub-paragraphs (a) - (q) enumerating the grounds under which a peace officer may effect an arrest without a warrant. The defendants were required to identify in their plea under which of the 17 sub-paragraphs of s 40(1) did Sergeants Mabanga and Khwela act when they effected the arrest of the plaintiff and Mr Ngiba. The defendants did not specify the sub-paragraph of s 40(1) under which Sergeants Mabanga and Khwela acted when they effected the arrest of the plaintiff and Mr Ngiba. In order to determine the specific sub-paragraph of s 40(1) under which Sergeants Mabanga and Khwela acted for the purposes of establishing whether the relevant jurisdictional facts were established this court had regard to the defendants' plea against the evidence of Sergeants Mabanga and Khwela.

[30] As I said before according to the defendants' plea Sergeants Mabanga and Khwela had tried to stop the plaintiff's vehicle after they received information that the occupants of the vehicle were in possession of firearms. However, when they

² Pleadings Bundle: page 41: paragraph 3.2(a).

³ Pleadings Bundle: page 42: paragraph 3.2(f).

pursued the vehicle, the plaintiff and Mr Ngiba resisted the arrest by shooting at them. Sergeants Mabanga and Khwela returned fire to defend themselves against the attack from the plaintiff and Mr Ngiba. The plaintiff and Mr Ngiba were subsequently charged with attempted murder as they acted with a common purpose to evade their arrest by shooting at the police. When the defendants' contentions as set in their plea are considered against what emerged from the evidence in court it became apparent that, in effecting the arrest of the plaintiff and Mr Ngiba, Sergeants Mabanga and Khwela in fact acted in terms of the provisions of s 40(1)(a) of the CPA not in terms of s 40(1)(b) of the CPA or any other sub- paragraph of s 40(1).

[31] Further, according to the sworn statement of Sergeant Mabanga after the arrest of the plaintiff and Mr Ngiba it is recorded that:

'I proceeded to Umhlali SAPS where I detained both of them for attempted murder.'⁴

If regard is had both to the warning statement of the plaintiff⁵ and Mr Ngiba,⁶ the plaintiff and Mr Ngiba were indeed both charged for attempted murder under Umhlali cas no. 91/08/2015. Additionally, according to the SAPS 14A, which is a notice of rights in terms of the Constitution, which the plaintiff signed at 23h00 on 8 August 2015, the plaintiff was detained for attempted murder.⁷ As a further indication that the plaintiff was indeed arrested for attempted murder even his sworn statement⁸ and his medical report⁹ compiled by Dr BM Visser bore Umhlali cas no. 91/08/2015, which is the police case number that was allocated to the case after the arrest of the plaintiff and Mr Ngiba.

[32] Furthermore, according to the sworn statement of Sergeant Khwela after the arrest of Mr Ngiba it is recorded that:

'I then informed the accused of the charges against him for possession of unlicensed firearm and also discharging of firearm in full of the public. I then placed him under arrest.'¹⁰

⁴ Liability Bundle: page 42.

⁵ Liability Bundle: page 2.

⁶ Liability Bundle: page 37.

⁷ Bundle of hospital records: page 10.

⁸ Liability Bundle: page 3 - 6.

⁹ Liability Bundle: page 7 - 11.

¹⁰ Liability Bundle: page 20.

If regard is had to the warning statement of Mr Ngiba,¹¹ Mr Ngiba, in addition to having been charged with attempted murder, was indeed also charged with possession of an unlicensed firearm under Umhlali cas no. 91/08/2015. During his evidence, Sergeant Khwela had testified that the plaintiff and Mr Ngiba were charged separately for each offence.

[33] Moreover, according to the sworn statement of Constable Patronella Philile Mlambo, the investigating officer, on 10 August 2015 she proceeded to 1[...] S[...] to obtain a statement from Mr Langa and his girlfriend when she learnt that the suspects were already arrested under Umhlali cas no. 91/08/2015 and detained at Umhlali SAPS. At Umhlali SAPS, when she perused the SAPS 14 the cell register, she established that the plaintiff was arrested as per the SAP 14 77/08/2015 and Mr Ngiba arrested as per SAP 14 78/08/2015, were the same suspects who were involved in the shooting at Shakashead. This was the main docket from which everything started. After linking the suspects, she then charged both Mr Ngiba and the plaintiff for attempted murder. She charged the plaintiff in absentia as he was hospitalised at Alberlito Hospital.¹² If regard is had to the warning statement of Mr Ngiba,¹³ above and beyond the charges of attempted murder relating to the police and possession of an unlicensed firearm, Mr Ngiba was also charged with attempted murder relating to Mr Langa and his girlfriend. The plaintiff apparently was not caused to sign any warning statement as he was hospitalised.

[34] From this synopsis, it is clear that the initial complaint of robbery and kidnapping did not found the arrest of the plaintiff and Mr Ngiba. In any event during his evidence Sergeant Khwela specifically pointed out that while they had initially pursued the plaintiff and Mr Ngiba for robbery and kidnapping, they ultimately arrested them for shooting at them as the police. Sergeants Mabanga and Khwela were criticized on why were the main charges not robbery and kidnapping as per the initial complaint. I agree with Sergeant Khwela that the person who was best placed to answer that question was the investigating officer, Constable Mlambo. In any event, while that question might have been relevant in the criminal proceedings, it

¹¹ Liability Bundle: page 18.

¹² Liability Bundle: page 45 - 46.

¹³ Liability Bundle: page 38.

was not relevant for the purposes of these proceedings as, Sergeant Mabanga arrested the plaintiff for attempted murder, which related to the shooting of the police by Mr Ngiba. This happened in the presence of both officers according to their version.

[35] If one has regard to the pleadings in this case at a factual level it was always clear that the arrest of the plaintiff and Mr Ngiba was founded on the provisions of s 40(1)(a) of the CPA not on the provisions of s 40(1)(b) of the CPA. The plaintiff himself refers to the provisions of s 40(1)(a) of the CPA in his replication. It is trite that parties have a duty to allege in the pleadings the material facts upon which they rely and it is impermissible for a party to plead a particular case and seek to establish a different case at the trial.¹⁴ It was desirable for the defendants to specify in their plea the sub-paragraph of s 40(1) under which Sergeants Mabanga and Khwela acted when they effected the arrest of the plaintiff and Mr Ngiba and not to state it in general terms. However, this court is satisfied that the issue of the relevant sub-paragraph of s 40(1) under which Sergeants Mabanga and Khwela acted was sufficiently canvassed in the pleading and during the trial. I will therefore determine this case in terms of provisions of s 40(1)(a).

Applicable law

Unlawful arrest

[36] In terms of s 40(1)(a) of the CPA a peace officer may without a warrant arrest any person who commits or attempts to commit any offence in his presence. The jurisdictional facts which must be established for an arrest without a warrant to be justified under s 40(1)(a) of the CPA are the following:¹⁵

- (a) The arrestor must be a peace officer.
- (b) An offence must have been committed or there must have been an attempt to commit an offence.
- (c) The offence or attempted offence must be committed in his or her presence.

[37] The determination of the question whether an arrest in terms of s 40(1)(a) was reasonable and justified is objective. This provision requires that there must be

¹⁴ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.

¹⁵ *Van Wyk and another v Minister of Police and another* [2016] ZAGPPHC 942 para 16.

in existence of a particular factual situation before the peace officer's power to arrest without a warrant can come into existence. If the circumstances exist, the arrest can be made.¹⁶ The legality of an arrest in terms of s 40(1)(a) requires a determination whether the facts observed by the arresting officer 'as a matter of law prima facie established the commission of the offence in question.'¹⁷ The determination which this court must make can only be made with reference to the question set out below.

Did the plaintiff and Mr Ngiba shoot at the police?

[38] It is common cause that both Sergeants Mabanga and Khwela are peace officers. Both alleged that while they pursued the plaintiff's motor vehicle, the plaintiff had failed to stop upon being commanded to do so by them instead, they were shot at by Mr Ngiba. So, it is indisputable that Sergeants Mabanga and Khwela were present at the scene. Of the three jurisdictional facts, which must be established, two were established. The only outstanding jurisdictional fact is whether there was any offence, which the plaintiff and Mr Ngiba attempted to commit or committed. The question of whether the plaintiff and Mr Ngiba fired shots at the police will be determined with reference to the principles regarding the resolution of disputes of facts, which I alluded to above.¹⁸

[39] Mr *Naidoo* SC, who together with Mr *Brimiah*, appeared for the plaintiff, argued that I should find that the arrest of the plaintiff and Mr Ngiba was a case of mistaken identity. They argued that this was so because if I considered the evidence of Sergeants Mabanga and Khwela against the sworn statement of Mr Langa and his girlfriend, Ms Thembisile Nzimakwe, it supports this conclusion. In their sworn statements, Mr Langa and his girlfriend stated that there were three assailants who were involved in the perpetration of the offences against them on the day in question. Two of those assailants were in possession of firearms and one of them was the driver of the motor vehicle who did not get out of the motor vehicle. While on the other hand, Sergeants Mabanga and Khwela only arrested the plaintiff and Mr Ngiba, and recovered only one firearm. They argued further that if I considered these factors together with the fact that Sergeant Mabanga had testified that the plaintiffs

¹⁶ *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG) para 17 (*Scheepers*).

¹⁷ *Scheepers* para 21.

¹⁸ *Stellenbosch Farmer's Winery* para 5.

motor vehicle was within eyeshot when they arrived at the scene, this can lead to one conclusion and one conclusion only that the plaintiff and Mr Ngiba could not possibly have been the perpetrators of the robbery and kidnaping at Mirriam's Tarven.

[40] Moreover, they argued that had a *prima residue* been run, ballistic examination been done on the cartridge cases, which were recovered at the scene, against the plaintiff's firearm and the identity parade for the identification of the plaintiff and Mr Ngiba been conducted, the police could have established that the plaintiff and Mr Ngiba could not possibly have been the perpetrators of the offences. Mr *Naidoo* argued that based on these failures by the police coupled with the subsequent withdrawal of the charges against the plaintiff and Mr Ngiba, there was only one irresistible inference and it is that the arrest of the plaintiff and Mr Ngiba was a case of mistaken identity.

[41] I disagree with the plaintiff's contentions. First, because they presuppose that the plaintiff and Mr Ngiba were arrested for the alleged robbery and kidnapping as was reported by Mr Langa. This is not correct because both Sergeants Mabanga and Khwela unequivocally stated that they arrested the plaintiff and Mr Ngiba for allegedly shooting at them. I will return to the question of whether Sergeants Mabanga and Khwela were ever shot at later in this judgment. Second, to consider the sworn statements of Mr Langa and his girlfriend against the evidence of Sergeants Mabanga and Khwela in my assessment of the evidence would amount to an admission of hearsay evidence. The plaintiff's contention that I may be able to do so because the parties during the rule 37 conference agreed that the docket may be used is with respect incorrect. The agreement was in relation to the use of the docket as the parties had indeed used the docket during the trial by referring to it. However, this did not mean that the contents of the statements of Mr Langa and his girlfriend were true and contents were suddenly admissible as evidence admissible against the defendants. If that were so, it would not have been necessary to run this trial.

[42] Third, the plaintiffs contention amounts to an invitation that I must consider Sergeant Mabanga's evidence in isolation in relation to the question of whether the plaintiff's motor vehicle was still within eyeshot when Sergeants Mabanga and

Khwela came to the scene. Sergeant Mabanga's evidence in this respect should be considered along with the other evidence. Fourth, the running of a prima residue test, ballistic examination of the firearm and cartridge cases and the identification parade are investigative steps, which are carried out after arrest. The information that is required to be at the disposal of an arresting officer does not have to be of sufficiently high quality and cogency to engender in the mind of the arresting officer that a conviction of the suspect will in fact ensue. The mere fact that the plaintiff and Mr Ngiba were not prosecuted, as the plaintiff suggests in his replication, does not make the arrest unlawful.

[43] On the question of whether the plaintiff and Mr Ngiba fired shots at the police, it would be well to consider the evidence of the plaintiff against that of the defendants. Both Sergeants Mabanga and Khwela confirmed that they were given the full description of the plaintiff's motor vehicle including its registration number, its colour and make as a silver Suzuki. While Sergeant Mabanga said this motor vehicle was within eyeshot when they were at the scene, Sergeant Khwela stated that they spotted the vehicle fitting the description they were given at they entered Shakashead. Considering that the incident happened nine years before Sergeant Mabanga testified in this case it is reasonable to conclude that he was honestly mistaken as to the whereabouts of the plaintiff's motor vehicle when they arrived at the scene. Both Sergeants Mabanga and Khwela corroborated each other that the shots from the plaintiff's motor vehicle emanated from the back. The person who was allegedly seated at the back was Mr Ngiba. If Mr Ngiba was seated on the front passenger seat as the plaintiff suggested and not at the back, I do not see any reason why Sergeants Mabanga and Khwela would have lied about this. If seating on the front passenger seat would have made any difference in Mr Ngiba being unable to fire shots, may be that would have been different. In my view, if Sergeants Mabanga and Khwela wanted to falsely implicate the plaintiff and pin him in respect of an offence he did not commit they could have said that he is the one who fired the shots towards the police. Further and in any event considering that the plaintiff's vehicle was reported to have been driving at a high speed, the plaintiff would not have been able to shoot at the police while he drove his vehicle. It is more probable that he handed his firearm to Mr Ngiba.

[44] The plaintiff portrayed a picture that there was no electricity at Shakashead on the day in question. He testified that as he was driving, he was surprised to suddenly hear gunshots. He immediately realised he was under attack as shots were fired at him from the vehicle that was behind him. He drew his firearm from his waist and placed it on his seat with a magazine that was intact and fully loaded. He got out of the motor vehicle, with his hand lifted and laid down. Two male persons alighted from a kombi, which had stopped in his immediate vicinity.

[45] In my view, the plaintiff's version is not only improbable but was clearly contrived. I say so, first, because he did not say why there was no electricity at Shakashead on the day in question, whether it was due to loadshedding and/or a prevailing electric fault in the area. Second, Sergeant Mabanga was not challenged at all when he testified that the area was not only illuminated by street lights but also by the lights from the police vehicles. While Sergeant Khwela was challenged on the issue of lighting in the area, he corroborated the evidence of Sergeant Mabanga and insisted that the area was well lit by street lights and in addition the police motor vehicles provided further light. Third, it is inconceivable that the plaintiff would have withdrawn his firearm only to place it on the seat and surrender without using it. Fourth, if the magazine of the plaintiff's firearm was intact and fully loaded there is no reason why, when his firearm was recovered, it would have been empty. The plaintiff never suggested that when the police recovered the firearm, they interfered with the magazine in any way whatsoever. Fifth, it is common cause that several members of the police from different units came to the scene. It is impossible that these several members from these different units would have squeezed themselves in the double cab, which was certified to carry only five people while Sergeants Mabanga and Khwela had the kombi to themselves. In addition, it is highly unlikely that this kombi did not bear the SAPS emblem especially when it was used by members from different units and not the members of the detective branch of the SAPS. I find that there is no reason why Sergeants Mabanga and Khwela would lie about this. Sixth, the plaintiff has always known since his arrest on 8 August 2015 that the defendants' version was that Mr Ngiba fired shots at them from his motor vehicle and that they found his firearm on the floor at the back of his motor vehicle. However, in his affidavit, which was sworn to two months after the incident, the plaintiff wisely evaded the issue whether he or Mr Ngiba engaged the police when the police fired at

them. In addition, the plaintiff never mentioned that when he alighted from his motor vehicle, he left his firearm of the driver's seat. The plaintiff mentioned this for the first time during the trial. This is clearly an afterthought of the plaintiffs recent fabrication to bolster his claim for damages against the defendants.

[46] When these improbabilities are taken together with the plaintiff conceding that he lied when he testified that he was not drunk on the day in question they do not only render the plaintiff's version untrue, but also improbable in so far as his arrest is concerned. I therefore find that Mr Ngiba fired shots directed at the police. In doing so, he acted with a common purpose with the plaintiff in that he used the plaintiff's licensed firearm and the plaintiff failed to stop when the police flagged him to stop. In the circumstances, I reject the plaintiffs evidence as untrue as far as it relates to his arrest.

[47] The defendants' case was not on its own without blemish. For example, Sergeant Mabanga had said in his statement two shots were fired towards them, while he said in his evidence several shots were fired towards them. It was not clear from the evidence of both Sergeants Mabanga and Khwela whether the plaintiffs firearm was on the backseat or on the floor at the backseat. It was further not clear if their evidence was considered against their sworn statements, and whether they received the information from the informer or Mr Langa. Sergeants Mabanga and Khwela were also criticised for failing to include certain information in their sworn statements such as the details of the shooting by the plaintiff and Mr Ngiba. As far as the contradictions between the evidence of Sergeants Mabanga and Khwela and their sworn statements are concerned it is important first, not to lose sight of the circumstances under which the statements were made. Second, and most importantly the time factor between the incident and the trial is also of critical importance in the determination of what is to be made of what is said in the statement to underscore the effect of the delay between the taking of the statement and the trial.

[48] Perhaps to underscore the damage inordinate delays do in litigation it is apposite to refer to the dictum of Didcott J when he stated:¹⁹

'Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it.'

[49] Although Didcott J said this in a different context and that context having been in relation to the notices, which have to be given before the institution of any litigation against State entities, his *dictum* holds true for this case. A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court.²⁰

[50] I have considered the sworn statements of both Sergeants Mabanga and Khwela and have weighed it up against their viva voce evidence, and all the other evidence in so far as their evidence relates to the arrest of the plaintiff and Mr Ngiba, I am satisfied that the evidence of Sergeants Mabanga and Khwela is truthful and reliable despite any shortcomings.

[51] In the circumstances, I find that when Sergeants Mabanga and Khwela arrested the plaintiff and Mr Ngiba, they acted in terms of s 40(1)(a) as they fired shots directed towards them.

¹⁹ *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) para 11.

²⁰ *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593E-594H.

[52] Once the jurisdictional facts have been established, the peace officer has a discretion whether or not to arrest. It has not been alleged by the plaintiff that Sergeant Mabanga did not exercise his discretion properly when he arrested the plaintiff and Mr Ngiba. All that the plaintiff did was to dispute that there were any shots, which were fired to the police. In any event, in my view, Sergeant Mabanga exercised his discretion correctly. I say so because from the time the police spotted the plaintiff and Mr Ngiba, they flagged them to stop but they failed to do so instead they fired shots to the police. When they eventually stopped after the tyre of the plaintiffs vehicle was shot, they both resisted arrest. The offences in respect of which the plaintiff and Mr Ngiba were arrested for are serious and are listed in Schedule 1 of the CPA. What aggravated the seriousness of these offences is that when Mr Ngiba fired at the police, he used the firearm which was licensed to the plaintiff. Accordingly, I find that the arrest of the plaintiff and Mr Ngiba was lawful.

Detention

[53] This leads me to the issue of detention. The enquiry into whether the detention was lawful or not, constitutes a separate enquiry from that of the arrest. Justification for detention like arrest rests on the police. If after the arrest it becomes clear to the police that the detainee is innocent there would be no justification for continued detention. In essence a police officer insofar as the issue of detention is concerned is still required to apply his or her mind to the question whether the person's detention is necessary or not.²¹

[54] Any person, whether arrested with or without a warrant of arrest, maybe released from detention in terms of the bail provisions of the CPA. For the purposes of this judgment the relevant provisions as to what must happen to a person who has been arrested whether with or without a warrant for allegedly committing an offence, is section 50 of the CPA. Section 50 provides as thus:

'50 Procedure after arrest

(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police

²¹ *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) para 10.

station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

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

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

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

(ii) bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires-

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day ... '

[55] It is trite that detention like²²

'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 caused the arrest of another person should bear the onus of proving that his action was justified in law.'

[56] It is common cause that after the plaintiff was arrested, he was taken to Alberlito Hospital where he was treated and remained confined until he was discharged on 20 August 2015. At hospital the plaintiff was under police guard. Except to say that after he was discharged from hospital, he appeared in court four times before the charges were withdrawn against him, the plaintiff did not lead any further evidence on this issue. He did not indicate whether he was released on bail or on warning by the court. Even in his particulars of claim the plaintiff says no more than saying, 'he was initially detained at Umhlali Police Station and thereafter at Netcare Alberlito Hospital, for an inclusive period of twelve days,' On the other hand, the defendants in their amended plea stated that when Sergeants Mabanga and Khwela pursued the plaintiff and Mr Ngiba they did so in order to arrest them to

²² *Khumalo v Safety and Security* [2015] ZAKZDHC 48 para 14 quoting with approval from *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) at 589E-F.

secure their attendance at court. As I said before, the offences in respect of which the plaintiff and Mr Ngiba were arrested for are serious offences, which are listed in Schedule 1 of the CPA. What aggravated their seriousness was the fact that when Mr Ngiba fired at the police, he used the firearm which was licensed to the plaintiff. In my view, the police exercised their discretion properly initially in detaining the plaintiff at Umhlali Police Station and later in placing the plaintiff under the police guard in hospital. This is so because the offence in relation to which the plaintiff was arrested is a very serious offence, which involved the use of a firearm against the police in the execution of their duties. Accordingly, I find that the detention of the plaintiff was lawful.

Assault

[57] It is trite that any infringement of a person's bodily integrity is *prima facie* unlawful.²³ The Supreme Court of Appeal (SCA) laid down the general principles that apply in matters involving delicts affecting the bodily integrity of a claimant and in circumstances where the defendant raises a defence or ground of justification, such as self-defence. The court held that ordinarily the defendant bears the overall onus of proving his/her justification for the otherwise unlawful conduct. It is not for the plaintiff who normally bears the overall onus of proof in a delictual action, to disprove the defendant's ground of justification, unless the particular pleadings in the case place this onus on the plaintiff.²⁴

[58] What is equally trite is that the State is liable for the acts of the police who assault a person during an arrest performed by the police pursuant to an exercise of a discretion to arrest.²⁵ Once the plaintiff has established his physical assault by the police the onus then shifted to the police to prove grounds of justification.²⁶

[59] In terms of s 49(2) of the CPA, reasonable force may be used to effect an arrest. Section 49(2) of the CPA provides:

'If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or

²³ *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 34-35.

²⁴ *Mabaso v Felix* 1981 (3) SA 865 (A) at 873E-874E (Mabaso).

²⁵ *Moghamat v Centre Guards CC* [2004] 1 All SA 221 (C).

²⁶ *Mabaso at 874; Zealand v Minister of Justice* 2008 (6) BCLR 601 (CC).

her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing ... '

[60] It is common cause that Sergeants Mabanga and Khwela fired shots at the plaintiff's vehicle not only when the plaintiff failed to stop after they had flagged him to stop but when Mr Ngiba fired shots at them. According to Sergeant Khwela's evidence they used minimum force to effect the arrest of the plaintiff. The defendants aver in their plea that the second and third defendants had no alternative but to return fire and in order to arrest the plaintiff and Mr Ngiba and to further defend themselves against the attack of the plaintiff and Mr Ngiba. Thus, the second and third defendants used reasonable measures to prevent the flight of the plaintiff and Mr Ngiba which was necessary and proportional in the circumstances.

[61] What emerges from the defendants' version is that they used minimum force to achieve two purposes. First, to prevent the plaintiff and Mr Ngiba from evading arrest. Second, to defend themselves against an unlawful attack by the plaintiff and Mr Ngiba.

[62] It is common cause that no one got injured from the shots, which the police fired towards the plaintiff's vehicle in order to defend themselves from the shots, which were fired by Mr Ngiba. However, the plaintiff alleges that he was assaulted after he was apprehended. However, Sergeants Mabanga and Khwela deny that the plaintiff was ever assaulted. This is where the plaintiff and the defendants' versions are mutually destructive. To resolve this factual dispute, I must apply the principles, I have previously alluded to.²⁷

[63] Before I do so it is necessary to consider the other issue, which is relevant on this issue of probabilities and that is the medical report of Dr Visser. At the commencement of the trial Mr *Naidoo* had applied that I accept the medical report, which was complied by Dr Visser, who at the time of the trial was in Madagascar, in

²⁷ *Stellenbosch Farmers' Winery* para 5.

terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. Mr *Sibeko*, for the defendants, opposed this application. He did not advance any reason why. However, the reasons can be gleaned from the defendants' amended plea. First, the defendants allege that the police stamp on the J88 form reflected 10 September 2015 when the plaintiff was allegedly assaulted on 8 August 2015. Second, the J88 form did not reflect that the plaintiff sustained any fractures to his ribs. Third, the J88 form did not reflect that the plaintiff underwent surgery, as a result of any injuries he may have sustained.

[64] As it can be seen the issue of Dr Visser's medical report has been extensively dealt with even in the pleadings. In addition, the plaintiff was also extensively cross-examined in relation to the contents of Dr Visser's medical report, and on his clinical notes, which he took during the examination of the plaintiff. This is what enabled Mr Sibeko to get a concession from the plaintiff that he was indeed drunk. Moreover, the medical report of Dr Visser was accompanied by the relevant affidavit and certificate in terms of sections 212(4), 213(2)(a) and 213(3) of the CPA. Both in the affidavit and in the certificate Dr Visser states that he examined the plaintiff on 9 August 2015 at 03h00. The issue of the police stamp being endorsed on the J88 form later does not mean that the examination was done on 10 September 2015. In circumstances, I admit the medical report of Dr Visser in terms of s 3(1)(c) of the Law of Evidence Amendment Act.

[65] Both Sergeants Mabanga and Khwela testified that when the plaintiff was pulled out of his vehicle he landed 'painfully' on his stomach. Both coincidentally use the word 'painfully.' In addition, both say that the plaintiff told them that he had a scheduled appointment with the doctor the next day. According to the plaintiff, after he was restrained with handcuffs, he testified that he was assaulted by Sergeants Mabanga and Khwela by being kicked with booted feet and punched. While Sergeant Khwela denied ever having dealt with the plaintiff and going as far as to say he never even came close to him except when he was taken to the police vehicle. However, conveniently he was able to see the plaintiff falling on his stomach.

[66] Both Sergeants Mabanga and Khwela could not explain how would it have come about that the plaintiff was not detained in the police holding cells after his

arrest, but had to be taken to hospital where he was confined until he was discharged on 20 August 2015. They could not explain how a man, who according to them was fit enough to resist arrest, would suddenly become infirm. They both denied that they took the plaintiff home for the plaintiff to fetch his medical aid card and thereafter transported him to hospital. However, when Sergeant Mabanga was pressed on the issue, he testified that he does not recall taking the plaintiff home. In my view, there is no reason why the plaintiff could possibly lie about these two police officers having taken him home to fetch his medical aid card and then transporting him to hospital. As the police officers who arrested the plaintiff and who were on duty at the time and had the material resources it made sense and was probable that they transported him home and then to hospital.

[67] While both Sergeants Mabanga and Khwela insisted that the plaintiff had fallen painfully on his stomach and that he had a scheduled appointment with his doctor the next day, they did not record this anywhere in their sworn statements, or at the very least depose to supplementary sworn statements afterwards when they came to know that the plaintiff was hospitalised. The fact that the plaintiff had to undergo laparotomy for an abdominal haemorrhage and bowel resection anastomosis within two hours of his admission at Alberlito Hospital, and within a few hours after his arrest by the police, makes it more probable that his injuries were as a result of recent trauma.

[68] Mr *Sibeko*, for the defendants, in cross-examination contended that it was impossible for the plaintiff to have suffered injuries on his stomach if he was assaulted while lying on his stomach. Further, he contended that since the plaintiff had no injuries at the back it was improbable that he was assaulted at all. Mr *Sibeko*'s contentions failed to consider, first that the plaintiff testified that he was also assaulted on his flanks and that according to the J88 he had bruising on the right side of his stomach. Second, the plaintiff had a perforated bowel. Mr *Sibeko* could not possibly make this proposition without the benefit of a medical opinion on whether bowel perforation was possible if a person was assaulted from the back and the flanks. Third, Mr *Sibeko* ignored that the plaintiff reported to the doctor that he was assaulted by the police and the doctor recorded this on the hospital record and in addition the plaintiff was diagnosed with a blunt abdominal trauma. Fourth, in the

J88, the doctor concluded that the free leaking air out of the hole in the plaintiff's bowel was in keeping with a history of the alleged blunt abdominal trauma.

[69] After having considered all the evidence in respect of this claim and based on what I have set out above, I am of the view that the plaintiff's version is more probable than that of the defendants. While the defendants simply denied having assaulted and put the plaintiff to the proof of the allegations in the light of the nature of the injuries the plaintiff suffered the only inescapable inference which could be drawn therefrom is that the plaintiff was assaulted by the police.²⁸ I therefore reject Sergeants Mabanga's and Khwela's proposition that the plaintiff could have been injured because he fell awkwardly on his stomach and/or that he had a pre-existing condition. I therefore find the defendants liable to compensate the plaintiff for 100% of his proved or agreed damages.

Malicious prosecution

[70] I now turn to consider the third claim of malicious prosecution. It is trite that in order to succeed with a claim for malicious prosecution, a claimant must allege and prove that:

- (a) the defendant set the law in motion (instigated or instituted the proceedings);
- (b) the defendant acted without reasonable and probable cause;
- (c) the defendant acted with malice or (*animo iniuriandi*); and
- (d) the prosecution has failed.²⁹

[71] The plaintiff led very brief evidence in respect of this claim. The plaintiff testified that during his appearance in court, he was told that he was arrested for shooting at the police, robbery, and kidnapping. He appeared in court on four separate occasions before the charges were withdrawn against him on 16 August 2016, due to the unavailability of State witnesses and the prosecutor complaining about handwriting of the witnesses being illegible.

²⁸ *R v Blom* 1939 AD 188 at 202-203.

²⁹ *Minister for Justice and Constitutional Development and others v Moleko* [2008] ZASCA 43; 2009 (2) SACR 585 (SCA) (*Moleko*); *Patel v National Director of Public Prosecutions and others* 2018 (2) SACR 420 (KZD).

[72] It is common cause that on this brief evidence the plaintiff had only established the first and fourth requirements in this case, which therefore meant that I had to determine whether the plaintiff proved his case in relation to the other two requirements.

[73] During the hearing of the matter, I specifically asked both counsel if the plaintiff had proved this claim. They were both agreed that the plaintiff had not proved this claim. However, in their written submissions, which I had directed them to deliver on 26 July 2024 and 2 August 2024, respectively, both counsel seemingly resiled from the position, which they adopted during the hearing and addressed me extensively on this claim.

[74] As I have already expressed my view in respect of this claim that on the evidence that is before me the plaintiff cannot possibly succeed on this claim, however, for completeness I proceed to analyse the further requirements which the plaintiff had to prove.

[75] In *Moleko*³⁰ the SCA explained reasonable and probable cause as thus: 'Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element -

"Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'" (footnotes omitted)

[76] The following from *Relyant Trading (Pty) Ltd v Shongwe and another*³¹ was quoted with approval by the court in *Moleko*:³²

³⁰ *Moleko* para 20.

³¹ *Relyant Trading (Pty) Ltd v Shongwe and another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) para 14.

³² *Moleko* para 57.

'The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted "in the absence of reasonable and probable cause" was explained in *Beckenstrater v Rottcher and Theunissen* as follows:

"When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: 'For it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.'

[77] In respect of the requirement that the defendant must have acted with 'malice' or *animo iniurandi* the SCA in *Moleko*³³ further said:

'[61] In the *Relyant* case, this court stated the following in regard to the third requirement:

"Although the expression "malice" is used, it means, in the context of the *action iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:

'Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or

³³ *Moleko* paras 61-63.

indirectus). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance."

[62] In so doing, the Court decided the issue which it had left open in *Lederman v Moharal Investments (Pty) Ltd* and again in *Prinsloo v Newman*, namely that *animus injuriandi*, and not malice, must be proved before the defendant can be held liable for malicious prosecution as *injuria*.

[63] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

"In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*."

[78] Turning now to the issue of whether the defendants would be liable to the plaintiff for malicious prosecution, as I said the plaintiff led very brief evidence, and the defendants controverted the plaintiffs case to the extent necessary. However, they did not call the prosecutor(s) who dealt with the case from time to time until the charges were withdrawn. This issue must therefore be determined based on the plaintiff's evidence taken together with the pleadings and other documents, which served before the court namely the sworn statements of Sergeants Mabanga and Khwela and the warning statements of the plaintiff and Mr Ngiba.

[79] In paragraph 13, of the plaintiffs particulars of claim he alleges that on or about 8 August 2015, the second and third defendants wrongfully and maliciously set the law in motion by *inter alia* making false statements against the plaintiff alleging that the plaintiff was in possession of an unlicensed firearm and had attempted to shoot at the members of the South African Police Service.

[80] In paragraph 14, the plaintiff alleges that when laying this charge and giving this disinformation, the second and third defendants had no reasonable or probable cause for doing so nor did they have any reasonable belief in the truth of the information given.

[81] The plaintiffs allegations do not have any foundation based on the facts. The plaintiff was not charged for possession of an unlicensed firearm, but it was Mr Ngiba who was charged for possession of an unlicensed firearm. It is correct that the plaintiff was indeed charged for attempted murder on the basis of the statements that were made by Sergeants Mabanga and Khwela. However, I have already found that the arrest and detention of the plaintiff was lawful and do not consider it necessary to repeat the basis upon which I found that they were justified here.

[82] Due to the absence of the charge sheet and the investigation diary, it is unknown who was the prosecutor who formulated the charges and enrolled the matter in court. In *Moleko* it was held that in an action premised on malicious prosecution with regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.

[83] What Sergeants Mabanga and Khwela did after arresting the plaintiff was to depose to their sworn statements. It has not been suggested that after the plaintiff was taken to hospital that Sergeants Mabanga and Khwela had any further role to play in this case. As much as Sergeants Mabanga and Khwela were criticised for certain omissions in their sworn statements, I have however accepted their evidence is so far as the arrest of the plaintiff is concerned. In the circumstances, it would be fair to conclude that their sworn statements gave a fair and honest account of the

relevant facts to the prosecutor and left everything to the prosecutor to decide whether to prosecute or not. Consequently, I find that Sergeants Mabanga and Khwela, after taking the plaintiff to hospital, had no further role to play in this case. Any assertion that they set the law in motion against the plaintiff is unsustainable and must therefore fail.

[84] In the circumstances, I find that the plaintiff has failed to prove that the defendants acted with malice (*animo injuriandi*) and without a reasonable and a probable cause. In the premises, the plaintiffs claim for malicious prosecution against the defendants must fail.

Is it competent to grant an order against the Minister of Police in the light of his misdescription as an MEC for Safety and Security?

[85] The plaintiff, in his further heads of argument on this issue, submitted that in considering the issue I should have regard to the fact that the first defendant in its amended plead alleged that:

'The first defendant admits that he is the Member of the Executive Council for Safety and Security for the Province of KwaZulu-Natal.'

I should consider this along with what the first defendant pleaded in its initial plea where it is alleged:

'Save to state that the first defendant is called the Minister of Police, the Defendants admit the allegations contained herein.'

[86] Mr *Naidoo* submitted that in view of the fact that the Minister of Police was at all material times aware of this case, delivered all necessary pleadings, was not only legally represented during the trial but tendered evidence, the Minister of Police was therefore a party that was appropriately before me. Relying on the case of *City of Tshwane v Afriforum and another*³⁴ he urged me to ensure that I did not allow form to triumph over substance. He urged me not to allow technicalities to frustrate the achievement of real and substantive justice between the parties. Mr *Naidoo* further urged me in determining this issue to have regard to the defendants' initial plea.

³⁴ *City of Tshwane Metropolitan Municipality v Afriforum and another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) para 18.

[87] Mr *Sibeko* on the other hand submitted that in view of the MEC for Safety and Security being a non-existent *persona* the plaintiff was required to bring an application for an amendment of his pleadings in terms of the rules. I have considered the submissions from both parties and the authorities they relied on.

[88] Before I may bring my mind to bear on the issue, it would be useful to give a brief background of this case. This case has been pending before this court since 8 May 2017 when the summons was issued against the defendants. This case was certified as trial ready on 14 March 2023. The trial of this case was allocated to me by Henriques ADJP on 27 May 2024. Upon the allocation of the matter to me Mr *Sibeko* requested me to postpone the case to the next day to enable him to consult with his witnesses. I granted the postponement. Mr *Sibeko* thereafter led the evidence of Sergeant Mabanga and later the evidence of Sergeant Khwela, who are both members of the SAPS, stationed at Umhlali Police Station. When Mr *Sibeko* led this evidence, he did so on behalf of the Minister of Police.

[89] In the defendants' further heads of argument Mr *Sibeko* correctly referred to the case of *Four Tower Investments (Pty) Ltd v Andre's Motors*³⁵ where Galgut DJP stated:

'[29] ... the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a nonexisting entity or indeed to an existing but uninvolved entity.'

[90] The approach in *Four Tower Investments* has been approved in *Barnard and others NNO v Imperial Bank Ltd and another*³⁶ and *Essence Lading CC v Infiniti Insurance Ltd and another*.³⁷

[91] At all material times, the parties in this case have proceeded on the basis that the first defendant was the Minister of Police, then known as the Minister of Safety and Security. When Mr *Sibeko* argued the case, he did so on behalf of the Minister of

³⁵ *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) para 29 (*Four Tower Investments*).

³⁶ *Barnard and others NNO v Imperial Bank Ltd and another* 2012 (5) SA 542 (GSJ) paras 29 - 32.

³⁷ *Essence Lading CC v Infiniti Insurance Ltd and another* 2024 (2) SA 407 (GJ) paras 60 - 70.

Police. In view of the foregoing, I do not foresee any prejudice being suffered by the Minister of Police should I make an order against him. Throughout the various stages of the case the Minister of Police meaningfully participated in the case. Mr *Sibeko* could not possibly represent a non-existent party as such a party would not have been able to give him appropriate instructions. Mr *Sibeko* had argued that the MEC for Safety and Security is non-existent persona and the plaintiff was therefore required to bring an application for an amendment of his pleadings in terms of the rules. It is so I do not have an application for an amendment before me and the cases I have referred to above were concerned with an amendment in terms of Uniform rule 28. Mr *Naidoo* had urged me in determining this issue to have regard to the defendants' initial plea. I am unable to agree with Mr *Naidoo*. I say so because that plea was overridden by the defendants' amended plea. Nothing can therefore resuscitate it. However, I agree with Mr *Naidoo* that I should not elevate form over substance and should not allow technicalities to frustrate the achievement of real and substantive justice between the parties. It is well known that rules are made for the courts and not that the courts are established for rules. The primary function of the rules of courts is the attainment of justice.³⁸ This case is very unique in that the first defendant confirmed in the plea being the MEC for Safety and Security. The MEC for Safety and Security is a non-existent entity. The evidence was led in this case by all the parties and all the issues fully ventilated. It was only after this court raised the issue of the citation of the first respondent that the parties were alerted to the misdescription of the first defendant. I cannot agree with Mr *Sibeko* that the misdescription of the first defendant at this stage has to be corrected through an amendment in terms of Uniform rule 28. The approach as proposed by Mr *Sibeko* will not facilitate the attainment of justice between the parties instead it will frustrate it. Such an approach is one which elevates form over substance. I decline to follow such approach.

[92] In the circumstances, having exercised my discretion in terms of s 173 of the Constitution, I find that reference to the MEC for Safety and Security is in fact a reference to the Minister of Police, who at the time the summons was issued in this case, was known as the Minister of Safety and Security.

³⁸ *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) paras 31 - 32.

Costs

[93] On 5 August 2024, after I had reserved judgment in this matter, I was in doubt whether costs consequent upon the employment of two counsel were called for in this case in the event I found for the plaintiff. I then called the parties to deliver further heads to address me on this issue. The plaintiff filed his heads of argument on 13 August 2024, wherein Mr *Naidoo* urged me to allow costs consequent upon the employment of two counsel having regard to the importance of the issues I had to decide, the complexity of the legal and the factual issues to be decided, the quantum of the claim and the volume of the evidence to be considered.

[94] The defendants only filed their heads of argument on 26 September 2024, more than a month after I requested parties to do so. I have considered the defendants' submissions, as the plaintiff would not be prejudiced by the late delivery. Mr *Sibeko* submitted that this matter was not complicated to warrant the costs of two counsel.

[95] Admittedly the value of the plaintiff's claim is substantial in that the total quantum of the plaintiff's claim is a sum of R3 260 000.00. However, the plaintiff's case was only set down on the issue of liability. So, the value of the plaintiff's claim cannot play a role at this stage. While this case is clearly important to the plaintiff, however, it did not involve complex issues. I am therefore not satisfied that this matter warranted the employment of two counsel and accordingly I will not allow costs consequent upon the employment of two counsel. Mr *Naidoo* argued that I should award costs in this on scale C. In my view, taking into account the peculiar circumstances of the case as alluded to above the most appropriate scale of counsel's costs is scale B. The general rule is that the costs should follow the event. I do not see any reason why I should deviate from this rule. The plaintiff might have been partially successful but I am not convinced that the defendants had any justifiable reason to defend the claim for assault.

Order

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

1. The plaintiff's claim for unlawful arrest and detention (claim1); and malicious prosecution (claim 3) against the defendants is dismissed;
2. The defendants are found 100% liable for the plaintiff's proved or agreed costs in respect of assault, claim 2; and
3. The defendants are ordered to pay the plaintiff's costs of suit including the costs of counsel on scale B.

CHITHI AJ

APPEARANCES

Counsel for the Plaintiff: V.M. Naidoo SC with K. Brimiah

Instructed by: Sergia Brimah & Associates

Counsel for the Defendant : V. G. Sibeko

Instructed by: State Attorney (Durban)

Heard on: 27, 28 May, 17 and 18 July 2024

Date of Judgment: 18 October 2024.