

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
(EASTERN CAPE DIVISION – MAKHANDA)**

Reportable

CASE NO: 2384/2020

2385/2020

Matter heard on: 13 September 2024

Judgment delivered on: 08 October 2024

In the matter between:

SONGEZO MANGALA

First Plaintiff

NTUTHUZELO MANGALA

Second Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

BRODY AJ:

The facts

- [1] On Tuesday, the 21st of July 2020, during the COVID-19 pandemic lockdown, and at about 9h55, in broad daylight, a white Toyota Avanza motor vehicle parked on the side of a street in Kwazakhele, (a township that surrounds New Brighton), Gqeberha.
- [2] Shortly thereafter and whilst the late Mr Siyabonga Wakula and the late Mr Mputhumi Notyepisi were having a conversation inside a garage at 357A Nosidima Street, (near Mathew Goniwe hostel) two unidentified men with firearms shot both of them, multiple times.
- [3] The late Mr Siyabonga Wakula was a South African Police Services member at Kabega (“the deceased”).
- [4] Numerous witnesses heard the gunshots, and a number of witnesses saw two unknown men fleeing the scene, after the shooting, who then fled in the white Toyota Avanza. The one suspect was described as being much taller than the other.
- [5] A witness recorded the registration number of the white Toyota Avanza as being C[...].
- [6] After the suspects fled the scene Mr Vusumzi Notyepisi went to assist the severely injured men by transporting them initially to the Mercantile Hospital in Gqeberha. At the time they were both still alive.
- [7] While transporting them, and on enquiry, the deceased did not answer Mr Notyepisi and the other deceased advised him that it was “Songezo and Ntuthuzelo Mangala.”
- [8] Mr Notyepisi was also advised that “the two Mangala brothers” were from Xhongorha Administrative Area, Kwasabe. This is an administrative area which is approximately 51 kilometres west of Mthatha, close to the R61 national road.

- [9] Shortly after the second deceased's dying declaration both men tragically died of their wounds.
- [10] A postmortem subsequently found that both had died of their injuries and these were described as "complications following gunshot wounds to the body, with subsequent intra-abdominal sepsis and surgery and anaesthesia performed... Multiple gunshot wounds to the body."
- [11] When the South African Police Services were called to the scene and inspected the scene, they discovered nine MT cartages at the scene and another six MT cartages with "six projectiles".
- [12] Statements were taken from various witnesses, and these formed the subject matter of the docket for the investigation of the murders of the deceased and the other victim.
- [13] Warrant Officer Shane Kuhn ("WO Kuhn") was appointed to investigate the dual murders and he immediately began investigations.
- [14] On investigating the registration number given by the one witness, namely C[...] he ascertained that this belonged to an old lady in Durbanville, Cape Town, and was in fact an Opel vehicle.
- [15] After further investigation he obtained the identity numbers of Mr Nthuthuselo Mangala and Mr Songeso Mangala and established that they had several vehicles registered in their names. Several of these vehicles were Toyota Avanza's and were being used as "taxis" in the Cape Town area.
- [16] He also established that the vehicles belonging to both Mr Nthuthuselo Mangala and Mr Songeso Mangala had trackers fitted to them and the responsible company, Cartrack, could not place any of the vehicles at the scene of the crime in Gqeberha, on the date of the shootings.

- [17] On the 31st of July 2020 WO Kuhn was contacted by a South African Police official with information that an informant in Xhongora had advised the police that the two suspects, from Cape Town, were in the Eastern Cape, and were armed. The further information was that they were driving a white Toyota Avanza with registration number C[...].
- [18] After further investigation he ascertained that this vehicle was owned by Mr Songeso Mangala and according to the informant, this was the vehicle allegedly utilised in Gqeberha.
- [19] At the time, South Africa was experiencing the COVID-19 lockdown and WO Kuhn then went to the various COVID-19 roadblocks to ascertain whether the suspect vehicle had been registered as passing through between Cape Town and the Eastern Cape. This did not reveal anything, however, the COVID-19 roadblocks were not on every road in the Eastern Cape, at the time, between Cape Town and Gqeberha.
- [20] WO Kuhn then established that the two suspects were brothers and were from Cape Town.
- [21] After investigation of various cameras at the scene of the shooting, it was impossible to identify the suspects given the poor quality of the video footage.
- [22] According to a South African Police Service Criminal Record System Profile Report Mr Nthuthuselo Mangala had an endorsement for “murder” on the 30th of November 2014 and “Arms and Ammunition Act” for the 3rd of July 2019. Although this was not conclusive evidence of convictions for those offences, it did indicate that Mr Nthuthuselo Mangala was implicated in the offences of murder and arms and ammunition.
- [23] On the 31st of July 2020 an informant advised WO Kuhn that he was aware of the whereabouts of the two suspects.

- [24] On Saturday, the 1st of August 2020, at midday, Crime Intelligence advised members of the South African Police Services in Queenstown that a white Avanza with registration number C[...] was travelling towards Queenstown and that the suspects were in the motor vehicle, and were in possession of a firearm. Crime Intelligence indicated that they wanted the vehicle stopped and searched.
- [25] WO Pitt (WO Pitt”) together with Constable Nteteleli Katu (“Constable Katu”), together with the Canine Unit, the Flying Squad, and the Organised Crime Component (“OCC”) arranged for a roadblock on the N6 highway between East London and Queenstown shortly after the information was received.
- [26] At approximately 14h30 the white Avanza motor vehicle was stopped and the two suspects were identified as Mr Songeso Mangala and Mr Nthuthuselo Mangala. Mr Songeso Mangala was the driver at the time and the owner of the motor vehicle.
- [27] The vehicle was searched with the use of latex gloves and eventually a firearm, and fourteen live rounds in the magazine, was found in one of the panels of the boot area, which was hidden. This was a 9mm pistol, namely, a Sarsilmas, and its serial number had been unlawfully filed off.
- [28] The suspects were questioned as to who the owner was of the unlawful firearm, and both denied that they were the owners of the firearm, or had anything to do with the firearm.
- [29] Constable Katu then placed both suspects under arrest for possession of a firearm and the ammunition. Both suspects were then taken to the Queenstown Police Station and placed under detention. The necessary docket was opened and WO Kuhn then received a telephone call from Brigadier Govender of the provincial office to advise him of the arrest of the two suspects. Brigadier Govender had conveyed to WO Kuhn that a 9mm pistol had been found in the suspects’ possession and that a docket had

been opened under case number CAS5/8/20. WO Kuhn was instructed by Brigadier Govender to proceed to Queenstown and investigate further.

[30] WO Kuhn then travelled to Queenstown and took possession of the unlawful firearm and detained the suspects. He then arranged for them to be transported to the Mount Road Police Station at Gqeberha.

[31] WO Kuhn's superior, Captain Rhynholdt Swanepoel ("Captain Swanepoel"), at 14h30 on the 2nd of August 2020 read the suspects their rights and advised them that they were being investigated for the alleged offence of:

"Murder and attempted murder at Nosidima street, Mathew Goniwe Hostel, on 21 July 2020 at ±09:35"

[32] Captain Swanepoel was assisted by an interpreter. Mr Nthuthuselo Mangala then gave the following statement:

"I do not know anything about this case against me. I was never in my life in Port Elizabeth. I did not even drove through Port Elizabeth at any stage of my life. It is now the first time ever to be in Port Elizabeth. I grew up in Xhongorha AE and went to Cape Town in 2016 to go and work there as a taxi driver. Myself and Songezo Mangala, and Annebongo – do not know her surname but she is my girlfriend and my sister, Sarah Mangala left Cape Town on Wednesday, 29 July 2020 at ± 05:00. We drove in Songezo's Avanza and went to my hometown to attend a ceremony at my uncle who passed away. It was the second time in July 2020 that I went to my hometown in Xhongorha on that occasion. I was driving Songezo's Quantum. Songezo also drove with me but in his white Avanza. We left Cape Town on the 2nd of July 2020 as my brother Luwanda Gqolozo was shot dead at my hometown. The funeral was the Saturday and we all returned on the Monday in Cape Town.

On the Tuesday, 28 July 2020 before we left Cape Town I bought myself an illegal firearm, the suspect is warned that he is to make himself guilty to a crime as he is telling this to an officer in the SAPS.

The suspect is informed as follows:

Q. Do you know its illegal to buy an illegal firearm

A. Yes

Q. Why did you buy it?

A. To protect myself as I was robbed before and there was shot at my vehicle

Q. Do you still want to continue even now that you know that you are going to incriminate yourself in a crime of illegal possession of a firearm

A. Yes I want to continue.

I bought the firearm for R800.00 from Tivila, a guy I saw 3 times. I do not know where he stays nor do I know his surname. I decided to take it with me to my hometown as I do not have a place to leave it at my home. Songezo does not know about the gun. We attended the ceremony on Friday and returned to Cape Town on Saturday. We were stopped at Queenstown and me and my brother were arrested when we travel between my hometown and Cape Town, we drove through Queenstown, Tarkastad, Cradock, Graaff-Reinet, Beaufort West, Prince Albert to Cape Town. That's all I can say about this incident. My brother did not know about the firearm it was found in the vehicle as is."

- [33] This statement was signed under oath with the assistance of an interpreter and in the presence of Captain Swanepoel. Mr Nthuthuselo Mangala also confirmed that the statement had been read by him and that it was a true and correct version of the interview conducted with Captain Swanepoel. The interpreter also signed the statement.
- [34] Mr Songezo Mangala was also cautioned that he was a suspect in the murders, however, he declined to give a statement and stated only that “Mr Nqakumbana will be my lawyer” and “I will talk in court”.
- [35] The ballistics results for the illegal firearm were received and these indicated that the illegal firearm found in the possession of the suspects was not the firearm utilised to murder the two deceased.
- [36] On the first available court date the suspects were taken to appear in court and the matter was postponed.
- [37] On the 7th of August 2020 an instruction was received from advocate Swanepoel (no family of Captain Swanepoel) to provisionally withdraw the charges against the suspects.
- [38] The charges were then withdrawn, and the accused were released from custody.

The Pleadings

- [39] On the 5th of November 2020 Mr Songezo Mangala instituted action against the Minister of Police in case number 2384/2020 and Mr Nthuthuzelo Mangala instituted an action against the Minister of Police on the 5th of November 2020 in case number 2385/2020.
- [40] Songezo Mangala’s claim was based on a wrongful and unlawful arrest and a wrongful and unlawful detention, and his claim was for R750 000.00 together with interest and costs.

- [41] Mr Nthuthuzelo Mangala's claim was also for a wrongful and unlawful arrest and a wrongful and unlawful detention in the sum of R750 000.00 plus interest and legal costs.
- [42] Both matters were subsequently consolidated and after an initial plea, the defendant served and filed an amended plea on the 19th of October 2023.
- [43] The defendant's plea was essentially that the arrest on 1 August 2020 on the N6 near Queenstown was lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("CPA"). The plea went further to state that the plaintiffs "were suspect in a murder involving a firearm that occurred on 21 July 2020...".
- [44] The plea went further to state that the plaintiffs were further arrested on 1 August 2020, "and booked-out at the Queenstown Police Station by Warrant Officer Khan, a police officer, on a reasonable suspicion that they committed a schedule 1 offence, namely, murder involving a firearm on 21 July 2020."
- [45] The plea also stated that "the reasonable suspicion held by Warrant Officer Kahn was based on reasonable grounds that the plaintiffs had been identified as suspects in the commission of the abovementioned murder and was fortified by the recovery of the unlicensed firearm and ammunition in the possession of the plaintiffs immediately prior to their initial arrest."
- [46] It was common cause on the pleadings that the plaintiffs were detained for a period of seven days from the 1st of August 2020 to the 7th of August 2020.
- [47] The plea went further to state that the plaintiffs were brought before a lower court within the requisite "48 hours, on 03 August 2020."

- [48] In the rule 37 minute the parties could not agree on the duty to begin and this court was required to determine that at the outset of the trial.
- [49] There was a further amendment to the plea and a replication was served and filed shortly before the trial which took issue with the amended plea in material respects.
- [50] The amended plea, however, alleged that the “first arrest” was in terms of section 40(1)(b) of the Act and so too was the “second arrest”.
- [51] After hearing argument at the commencement of the trial I ruled that the defendant had the duty to begin, and the onus, and directed that the defendant should commence with giving evidence.

The Evidence

- [52] Warrant Officer Pitt (“WO Pitt”) was called by the defendant and testified that he had been employed for twenty-seven years by the South African Police Services as a reservist and on a voluntary basis. He testified that a roadblock was established on the 1st of August 2020, at midday, after information had been received from Crime Intelligence involving a white Avanza with Cape Town number plates, (C[...]) and was occupied by two persons, and who were in possession of an unlawful firearm.
- [53] He further testified that he was accompanied by Constable Katu, the Canine Unit, the Flying Squad, and OCC.
- [54] At approximately 14h30 the suspect vehicle was stopped after the traffic had been diverted and Mr Songezo Mangala, together with his brother, Mr Nthuthuzelo Mangala, were identified, after which the motor vehicle was searched.

- [55] According to him Constable Katu used gloves and searched the motor vehicle and eventually found a firearm on the righthand side of the motor vehicle.
- [56] The driver of the motor vehicle, Mr Songezo Mangala, was asked to produce a firearm licence, which he could not. When asked who the firearm belonged to, both Mr Songezo Mangala and Mr Nthuthuzelo Mangala denied that they knew anything of the firearm. It was then noticed that the firearm's reference number had been filed off and there was now no doubt that the firearm was illegal.
- [57] The firearm was placed in a plastic bag for fingerprinting and ballistic tests and fourteen live rounds of ammunition were found in a magazine of the firearm.
- [58] Constable Katu then placed them under arrest for possession of a firearm and the ammunition and without the necessary licence.
- [59] The two suspects were then taken to the police station in Queenstown after which a docket was opened.
- [60] In evidence, it became clear that Mr Songezo Mangala, the brother of Mr Nthuthuzelo Mangala, and a co-plaintiff, had passed away before the trial and that the trial only proceeded in respect of Mr Nthuthuzelo Mangala. The evidence was that Mr Songezo Mangala was the owner of the motor vehicle, and the driver, while Mr Nthuthuzelo Mangala ("the plaintiff") was a passenger.
- [61] Mr Badli vigorously cross-examined WO Pitt as to whether there was indeed a roadblock or a diversion of motor vehicles. Nothing turned on this as WO Pitt indicated that the roadblock was set up as a result of the information received about the suspects and the firearm. What was established in the cross-examination was that the police officials at the roadblock, including WO Pitt, did not rely on any reasonable suspicion of a

murder having taken place, and only relied on the information given to them from the Crime Intelligence officials, that there were suspects in a white Avanza with registration numbers C[...], that had an illegal firearm. Much was also made of how the plaintiff was arrested and why WO Pitt did not enquire about the plaintiff after he had handed over the plaintiff to the officials at the police station. This too is of no moment as it is not relevant to any triable issue between the parties.

[62] I found WO Pitt to be a reliable and good witness, who was not shaken under cross-examination. He did confirm that neither of the occupants of the motor vehicle, including the plaintiff, confirmed that they knew anything about the illegal firearm which was eventually found.

[63] Constable Katu was then called as the next witness, and he essentially confirmed the evidence given by WO Pitt. He also testified that both the occupants were afforded an opportunity of seeing the firearm before it was put away for ballistic testing and that neither of them could give an explanation for the firearm.

[64] He further confirmed that the firearm and ammunition was handed in at the Queenstown Police Station and that the SAP14 form was read to both the suspects.

[65] He also testified that it is important for a firearm to have a serial number so that the authorities can identify the owner of the firearm, failing which, it is unidentifiable. Mr Badli once again vigorously cross-examined Constable Katu and dealt with issues such as the roadblock, and reasonable suspicion, and why Constable Katu did not enquire about the accused after they were handed over to the police officials in Queenstown.

[66] At no stage did Mr Badli put to any of the two witnesses that the firearm was not found in the panel of the motor vehicle, or that it had been planted by a police official. In other words, it was common cause, that the firearm was found in the panel of the motor vehicle, with the ammunition, however,

it was not common cause as to who was the owner of the firearm and who was in possession of the firearm.

[67] In re-examination by Ms Sidlai, Constable Katu testified that the occupants of the motor vehicle were unknown to him before the roadblock and that the accused's rights were read to them.

[68] In questions put to him by this court, Constable Katu confirmed that the vehicle in question was a white Toyota Avanza, with four doors, and that the illegal firearm and ammunition were found in the hatchback panel, (as confirmed by WO Pitt). Constable Katu was an impressive witness and his testimony was consistent.

[69] The next witness to be called on behalf of the defendant was WO Kuhn who confirmed that he was the detective in charge of the murder investigation and the Director of Priority Crimes Investigative Unit in Gqeberha. He further confirmed that he had thirty-six years of experience and was in possession of the docket, including all the statements taken from the eyewitnesses, (including the dying declaration).

[70] He confirmed that he had perused the video footage at the scene of the crime and it was impossible to determine who the suspects in fact were from this footage.

[71] He followed up on the identity numbers of Mr Songezi Mangala, and the plaintiff, and from this he was able to ascertain that both had numerous vehicles in the Western Cape.

[72] He further confirmed that he had checked all the COVID-19 roadblocks, and the white Toyota Avanza was not recorded, with Mr Songezi Mangala as a driver, at any of those roadblocks. His further testimony was that this was not proof that they had not travelled from Cape Town to the Eastern Cape as every entry road was not controlled at the time.

- [73] In fact, it was common cause in this matter after all the witnesses were called that Mr Songezi Mangala and the plaintiff did in fact travel from Cape Town to the Eastern Cape for a ceremony and a funeral, during the relevant period.
- [74] When he went on to the police systems, he discovered that the plaintiff was involved in a “murder” and an offence involving “ammunition”.
- [75] He also established that Mr Songezi Mangala’s motor vehicles all had trackers installed and after investigating the issue with Tracker there was no evidence that any of the vehicles, fitted with a tracker, had in fact gone to Gqeberha on the day of the murders.
- [76] He confirmed that his superior was Captain Swanepoel and that he worked with Captain Swanepoel during the investigation and especially when he was required to travel to Queenstown to arrange transport for the accused back to Mount Road Police Station in Gqeberha.
- [77] He testified that he had received a telephone call from Brigadier Govender of the provincial office to advise that the accused had been arrested at a roadblock in Queenstown and that they were found in possession of an illegal firearm.
- [78] He further testified that he then travelled to Queenstown, with Captain Swanepoel’s permission, to arrest the accused and arrange for their transport to Mount Road Police Station in Gqeberha.
- [79] His further evidence was that he was present when the warning statement was given by Captain Swanepoel to the accused and that the plaintiff willingly and without any duress made the statement, as summarised above. This formed part of the docket and was given freely and voluntarily by the plaintiff.

- [80] He further testified that after ballistic tests it was ascertained that the illegal firearm was not the firearm utilised to murder the deceased's and that after the initial appearance in the Magistrate's Court, and on the instructions of advocate Swanepoel of the NPA, charges were withdrawn against the two accused.
- [81] Mr Badli cross-examined WO Kuhn extensively and most of the cross-examination was in regard to whether WO Kuhn in fact transported the plaintiff to Gqeberha, or not.
- [82] There was also extensive cross-examination about whether a case docket had been opened in Queenstown and another in Gqeberha.
- [83] It was also put to WO Kuhn that the plaintiff's statement was given under duress as he was "beaten" repeatedly by the South African Police Services before he gave the statement. This evidence was never pleaded in the plaintiff's particulars of claim and will be dealt with more fully below.
- [84] As with the previous witnesses for the defendant, WO Kuhn was cross-examined at length about the status of the Queenstown matter and why this had not been followed up.
- [85] What was put to WO Kuhn was that the reasonable suspicion in the second arrest was the unlawful firearm and the dying declaration. WO Kuhn gave full reasons why the charges were probably withdrawn against the plaintiff as the late Mr Songezo Mangala's motor vehicle could not be placed at the scene of the murders and also the ballistic results indicated that the illegal firearm found was not the murder weapon.
- [86] WO Kuhn also confirmed that the number plate seen on the suspect vehicle in Gqeberha belonged to an old lady in Durbanville, Cape Town, and was not a number plate relevant to the Mangala brothers. WO Kuhn demonstrated remarkable credibility and reliability. His testimony was clear, consistent, and delivered with a calm demeanour, showing no signs of

hesitation, or evasion. His attention to detail and straightforward responses under both direct and cross-examination were particularly impressive, further reinforcing his trustworthiness in the eyes of this court.

[87] The defendant then closed its case and immediately thereafter the plaintiff brought an application for “absolution from the instance”, in favour of the plaintiff.

Absolution from the instance

[88] Mr Badli argued that the defendant had not discharged the burden of proof and that therefore absolution was relevant. He argued that there was no *prima facie* case, on the defendant’s evidence, for an arrest and that there was no reasonable suspicion at the time when the arrests occurred.

[89] During argument, and when it was put to Mr Badli that the plaintiff’s particulars of claim relied only on one arrest, instead of two, he brought an application to amend the plaintiff’s particulars of claim to make reference to two arrests.

[90] After argument, a ruling was given that the plaintiff could amend his particulars of claim to make reference to two arrests as the evidence up to that point in the trial was conducted by both parties as if there were two arrests. This was in fact put to the witnesses by both Mr Badli and Ms Sidlai.

[91] The absolution argument then continued, and Ms Sidlai argued against absolution being granted.

[92] After an adjournment, I handed down an *ex tempore* judgment, dismissing the application for absolution and the reasons for my decision are contained in that judgment.

The Plaintiff’s evidence

- [93] The plaintiff then elected not to close his case and to lead evidence. The plaintiff gave evidence personally and gave extensive detail in regard to the trip that he and the late Mr Songezo Mangala had undertaken from Cape Town to the funeral and also the subsequent arrests by the South African Police Services.
- [94] The plaintiff's evidence was that they did not see a firearm, however, that they were stopped at a roadblock near Queenstown and a firearm was then retrieved from the back of the white Toyota Avanza.
- [95] Although the plaintiff essentially corroborated the defendant's witnesses in regard to the two arrests, he gave contradictory evidence of how he was arrested and also alleged that he was severely tortured in Komani (Queenstown) by members of the South African Police Services, and then again at Gqeberha. These allegations related to an assault with a police baton, teargas, and suffocation. To the point where, after the second arrest, in Gqeberha, the plaintiff became unconscious. None of the allegations of torture and physical assaults were pleaded in the plaintiff's case although the plaintiff testified that these facts were given to his attorneys, prior to the issue of summons.
- [96] After cross-examination by Ms Sidlai the plaintiff confirmed that an illegal firearm, with ammunition, was in fact found in the late Mr Songezo Mangala's motor vehicle, however, alleged that neither of them knew anything about this illegal firearm.
- [97] Under cross-examination the plaintiff could give no valid reason why his attorneys would not plead the vicious torture and assaults that he alleged had occurred, the details of which, he had conveyed to them prior to the issue of summons. In fact, his evidence went further under cross-examination to the extent that it was also the late Mr Songezo Mangala that was allegedly tortured and assaulted by the South African Police Services.

[98] Under cross-examination he confirmed that he and his brother had grown up in Xhongorha Administrative Area and that they were in the Eastern Cape for the funeral during the lockdown period.

[99] The plaintiff could also give no reason why the dying declaration was given and especially, as the allegation was accurate in regard to the plaintiff's names, and that of his brother, and also the area where they came from.

[100] In answer to questions put by this court, the plaintiff confirmed that the trip from Cape Town to the funeral took a few days and that the plaintiff did not know the deceased, and the other victim. When asked when his brother left Cape Town, he could not recall the exact date.

[101] The plaintiff also testified that the manner in which he and his brother were able to get through the COVID-19 roadblocks was as a direct result of them being in possession of a permit to attend a funeral.

[102] The plaintiff also testified that his brother was much taller than him and that there was no reason why anyone would mention them in a dying declaration. He could give no explanation for this.

[103] The plaintiff then closed his case without calling any further evidence.

[104] The plaintiff's evidence proved to be unreliable as he frequently strayed beyond the scope of the pleaded case by introducing numerous exaggerations that were never pleaded by his attorney, or supported by the facts. The plaintiff's tendency to embellish details further undermined his credibility, casting doubt on the reliability of his account of events.

The amendment by the Defendant

[105] During argument the defendant brought an application to amend its plea by referring to the first arrest as an arrest in terms of section 40(1)(a) of the CPA.

[106] Mr Badli opposed the application on the basis that this would be highly prejudicial to the plaintiff and after hearing argument the matter was adjourned.

[107] I then ruled that the amendment could be brought and on the understanding that the plaintiff could re-open his case if he believed there was any prejudice. An *ex tempore* judgment was given and I do not intend repeating what is stated in that judgment.

[108] Argument then continued and Mr Badli elected not to re-open his case, which then finalised the argument on behalf of both parties.

[109] After argument I requested both parties to furnish me with short heads on the Firearms Act and what the consequences are of a person being found in possession of an illegal firearm, (relevant to the facts of this matter).

[110] I am grateful to both counsel for their extensive argument and the copies of the judgments handed in, in support of both their arguments.

The applicable legal principles

[111] Section 40(1)(a) of the CPA provides that a police officer may, without a warrant, arrest any person:

“(a) Who commits or attempts to commit any offence in his presence.”

[112] This section accordingly allows police officials to take immediate action when they personally witness a crime being committed, without needing prior judicial authorisation in the form of a warrant.

[113] Section 40(1)(b) of the CPA allows police officers to arrest a person without a warrant:

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

[114] This section grants police officials the power to make an arrest if they have a reasonable suspicion that a person has committed a serious offence listed in schedule 1 of the Act. Schedule 1 offences include serious crimes such as murder, rape, robbery, and assault with intention to do grievous bodily harm, amongst others.

[115] The defendant pleaded that both arrests were lawful in terms of section 40(1)(a) and section 40(1)(b) of the CPA.

[116] Section 12(1)(a) of the Constitution enshrines the right to freedom and security of a person, which includes the right not to be deprived of freedom arbitrarily, or without just cause.

[117] Where it is alleged that a plaintiff has been unlawfully detained, the defendant bears the burden to justify the deprivation of liberty¹

[118] Section 205(3) of the Constitution provides:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of a republic and their property, and to uphold and enforce the law.”

[119] The jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a police officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence

¹ Zealand vs Minister for Justice and Constitutional Development and Another [2008] ZACC3; 2008(6) BCLR 601(cc); 2008(2) SACR1 (cc); 2008(4) SA458(cc), paragraph 24

referred to in schedule 1; and (iv) the suspicion must rest on reasonable grounds²

[120] In *Dunkin vs Minister of Law and Order* (1986) 2 All SA 241(a) at 243 the court found:

“The question whether a police officer “reasonably suspects” a person of having committed an offence within the ambit of section 40(1)(b) of the Act is objectively justifiable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion.”

[121] There can be no doubt that the test for reasonable suspicion is an objective one, which requires reasonable suspicion, but not certainty. The suspicion must be based on factual grounds relevant to the arrest.

[122] Section 50 of the CPA deals with the detention of an arrested person as follows:

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

(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 –

² *Minister of Safety & Security vs Sekhoto and Another* (2010) ZASCA 141; (2011) 2 All SA 157(SCA); (2011) 2 All SA 157 (SCA)

- (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.”

[123] Section 50 of the CPA allows the police to lawfully detain an arrested person for a period not exceeding 48 hours before bringing him/her before a court or releasing him.³

[124] The defendant has relied on section 40(1)(a) in regard to the first arrest of the plaintiff at Komani on the 1st of August 2020. Both WO Pitt and Constable Katu were informed by Crime Intelligence that a white Avanza with registration number C[...] was travelling towards Queenstown and that there were two suspects in the motor vehicle, who were in possession of a firearm.

[125] At the roadblock set up by the police officials on that day, the plaintiff, and his brother, were in fact in a white Avanza, with the CA registration number, and after a diligent search, an illegal firearm was found in the back panel of the suspect motor vehicle, with rounds of ammunition.

[126] When both the plaintiff and his brother were asked about the firearm they denied any knowledge of the firearm.

[127] This arrest is on “all fours” with the matter of the Minister of Police vs Shawn Bosman and Others [2021] ZASCA172 where Saldulker (the acting Deputy President of the SCA at the time) stated the following:

³ Minister of Safety and Security vs Sekhoto and Another supra at paragraph 42

“[6] Goeda testified that he questioned the respondents at the scene of the arrest, but none of the respondents “owned up” to possessing the firearm. He decided to arrest all respondents for further investigation and because of the fact that a firearm was found.”

and further:

“[15] The respondents were questioned on the scene about the firearm and they all denied any knowledge thereof. It was reasonable in the circumstances to suspect that one of the respondents, including Ms Claasen, the fourth respondent who was 16 years old, a minor, and who was an occupant in the bakkie, was involved in the shooting incident and that they had possessed an illegal firearm and ammunition.”

[128] Objectively considered, and taking into account that Crime Intelligence had informed Constable Katu, (and WO Pitt) that suspects were travelling in a white Avanza and were in possession of a firearm, the necessary roadblock was a reasonable precautionary step to take by the officials of the defendant in combatting crime. Once the firearm was found, and which had its identification numbers filed off, with fourteen live rounds of ammunition in the magazine, an offence was committed in terms of section 40(1)(a), namely, in the presence of a police official. After questioning the plaintiff, and his brother, in circumstances where his brother was the owner and driver of the motor vehicle, and after denials by both the plaintiff and his brother that they knew nothing about the illegal firearm, and ammunition, Constable Katu had the necessary right to arrest both the plaintiff and his brother. In view of this, the jurisdictional facts for the arrest of the plaintiff in terms of section 40(1)(a) of the CPA was present. Constable Katu had a discretion which, in my view, was properly exercised, in good faith, and rationally.

[129] The apprehension of the plaintiff and his brother in terms of section 50 of the Criminal Procedure Act, for the reasons set out in this judgment, was also lawful.

[130] In regard to the second arrest, it is clear that a second docket was opened in respect of the murder charges, and where both the plaintiff, and his brother, were clearly implicated. In the docket, the following facts are relevant:

[130.1] the dying declaration gave the full names of the plaintiff and his brother;

[130.2] the dying declaration mentioned accurately where the deceased, and his brother, came from, namely, Xhongora near Mthatha;

[130.3] the plaintiff, and his brother, were travelling in a white Toyota Avanza, which belonged to the plaintiff's brother;

[130.4] the plaintiff and his brother were found in possession of a firearm which was illegal, together with ammunition.

[131] WO Kuhn testified, in chief, and under cross-examination, that the dying declaration together with the possession of the illegal firearm were the main reasons why he had reasonable suspicion that the plaintiff was implicated in the murders of the deceased.

[132] Other factors in the docket also pointed to the plaintiff as one of the assailants in the murders, namely:

[132.1] they were in the Eastern Cape during the period of the COVID-19 lockdown;

[132.2] they had travelled from Cape Town to the Eastern Cape for the ceremony;

[132.3] the plaintiff was previously implicated in a murder and of being in possession of ammunition;

[132.4] the plaintiff's brother was much taller than him, as testified by witnesses at the scene of the murders; and

[132.5] the false number plate on the motor vehicle utilised by the assailants was from an area in Cape Town, where the plaintiff and his brother lived.

[133] In view of the aforesaid facts, I find that the jurisdictional facts for the "second" arrest of the plaintiff in terms of section 40(1)(b) of the CPA was present and that a discretion arose. This discretion was on a conspectus of all the evidence in the docket, and the arrest of the plaintiff in Komani, in my view, was properly exercised, in good faith, rationally and not arbitrarily.⁴

[134] In addition to the above, the plaintiff gave a sworn statement confirming his purchased possession of an illegal firearm, (as set out in the facts above), and I find that the plaintiff was brought to a Magistrate's Court in regard to the second arrest as soon as possible by WO Kuhn.

[135] I agree with Ms Sidlai that the decisions to arrest and detain the plaintiff could not, on the basis of the factual circumstances be wrong or inequitable. There was no evidence given whatsoever that the arrests, or detentions of the plaintiff, had an ulterior motive, and that the arresting officers acted irrationally, or arbitrarily. The plaintiff was released on the instructions of advocate Swanepoel as soon as possible and I find no *male fides* in detaining the plaintiff for the periods referred to in the evidence.

⁴ Duncan vs Minister of Law and Order 1986(2) SA 805(A) at 818G - H

[136] Although the investigations by WO Kuhn indicated that the plaintiff could not be placed at the scene of the murders, nor could the illegal firearm found in his possession, be linked to the murder weapon, no criticism can be levelled against the police officials for arresting and detaining the plaintiff, and his brother. The docket was sent to advocate Swanepoel to determine whether there was sufficient evidence to bring charges against the plaintiff and immediately upon being advised by advocate Swanepoel that the charges should be provisionally withdrawn, the plaintiff and his brother were released. Although the plaintiff was detained for longer than 48 hours I find that the plaintiff was brought to the Magistrate's Court as soon as possible, given the intervening weekend.

[137] I also find that the conduct of the police was within lawful parameters of detention as provided for in section 50 of the CPA. There can be no doubt that WO Kuhn, who was charged with the final investigation, acted with alacrity and the required sense of urgency after he was instructed by advocate Swanepoel.

[138] The finding by Saldulker J in the Minister of Police vs Shawn Bosman and Others matter is apposite to this case:

“[32] Our constitutional dispensation has brought about a primacy on individual human rights, particularly the right not to be deprived of freedom arbitrarily or without just cause. However, to place unreasonable constraints on the SAPS would hamper their law enforcement functioning. Even though there may be circumstances where criticism may justifiably be levelled against the efficiency of the SAPS, the SAPS ought to be allowed the proper scope to arrest, detain and conduct necessary investigations, all within the lawful bounds as provided for by the legislature through, *inter alia*, S50 of the CPA. The police are thus in terms of the law entitled to arrest and detain and release a person within 48 hours, as happened in this case.”

[139] No reason was given by any witness as to why the charges, relating to both arrests, were provisionally withdrawn by the National Prosecuting Authority (NPA). This court can only speculate that, in the view of advocate Swanepoel, the ballistic test and the dying declaration meant that the proof of the murders was insurmountable. The first arrest, however, relating to the possession of the illegal firearm, and ammunition, and based on the Minister of Police vs Shawn Bosman authority appears to have stronger prospects of success, than the murders.

[140] The facts given in this trial, and the evidence produced, raises the need for the NPA to reassess the evidence in regard to both arrests, and the initial charges.

[141] In the interests of justice, and in view of the horrific murders of the deceased, as a police official, and the other deceased, this court will refer the matter to the NPA for reconsideration of a possible prosecution.

[142] In the result, the following order is made:

- [1] The plaintiff's claims for the unlawful arrests and detention are dismissed;
- [2] The plaintiff is ordered to pay the costs of the defendant on scale A, as contemplated by rule 69 (7);
- [3] This matter is referred back to the National Prosecuting Authority in Makhanda to consider the evidence in the civil trial and to determine whether it is in the interests of justice whether a criminal prosecution in terms of the Criminal Procedure Act is appropriate.

B.B. BRODY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff	:	Adv. Badli
Instructed by	:	Netteltons Attorneys High Street MAKHANDA
Counsel for the Defendant	:	Adv. Sidla
Instructed by	:	Zilwa Attorneys African Street MAKHANDA