

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/20014

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
I STRYDOM	13 MARCH

In the matter between:

SIDU, BENJAMIN

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

Strydom, AJ

Introduction

- [1] The matter before me is a claim for damages resulting from the wrongful arrest on 31 January 2020 and detention until 3 February 2020.

- [2] The arrest of the plaintiff was in terms of Section 40(1)(b) of the Criminal Procedure Act¹ (the CPA). The cause of action for a wrongful arrest and detention lies in the fact that a person's liberty was restrained without lawful justification.
- [3] The evidence given must be assessed in light of the jurisdictional factors stated in section 40(1)(b) of the CPA. As the plaintiff was arrested for being in possession of stolen/hijacked goods, section 37 of the General Law Amendment Act² is also applicable. At some stage the charge was changed to section 36 of the General Law Amendment Act, but that is not the offence the plaintiff was arrested and charged with on 31 January 2020.

Jurisdictional Facts for a Lawful Arrest in Terms of Section 40(1)(b) of the CPA

- [4] It is important not to lose sight of the requirements for a lawful arrest as the evidence of the plaintiff on being an informer can easily cloud the true issues in this matter.
- [5] Section 40(1)(b)³ authorises a peace officer to arrest a person without a warrant.
- [6] The requirements for a lawful arrest are:
- I. A peace officer must execute the arrest;
 - II. The officer must entertain a suspicion that
 - III. the suspect committed an offence as tabled in Schedule 1; and
 - IV. that the suspicion is on reasonable grounds.⁴

¹ 51 of 1977.

² 62 of 1955.

³ 40 Arrest by peace officer without warrant

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

(a) who commits or attempts to commit any offence in his presence;

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

⁴ *Duncan v Minister of Law and Order* 1986(2) SA 805 at 818 G – H.

- [7] It is trite that an arrest and/or detention without a warrant is prima facie wrongful and once it is established that a person was arrested and/or detained, the police carry the onus to prove the lawfulness of the arrest.
- [8] There is an allegation in the particulars of claim that members of the Flying Squad failed to exercise a discretion in respect of both the arrest and detention.
- [9] However, the exercise of the discretion of the two members of the Flying was not properly pleaded and ventilated in the hearing.
- [10] Specifically, save for the allegation in para 30.3 of the particulars claim, nothing further is pleaded. The allegation made is that the Flying Squad members failed to exercise a discretion. It is not clear what was expected of the members and in what manner it should have been exercised.
- [11] Ultimately, the plaintiff carries the onus of proving, in the circumstances of the case, there was a discretion to be exercised by the two members of the Flying Squad.

Section 37(1) of the General Law Amendment Act, Act 62 of 1955

- [12] Section 37(1)⁵ indicates that a person found in possession of stolen goods, where there is an absence of reasonable cause for believing the goods were properly acquired, shall be guilty of an offence.

Pleadings

- [13] The latest amended particulars of claim indicate that, at all material times, the plaintiff was an unregistered police informer and his handler was Col Phago from Vosloorus Police Station.

⁵ 37 Absence of reasonable cause for believing goods properly acquired

(1) (a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

[14] In the amended particulars of claim, the plaintiff pleaded that his arrest and detention were wrongful and unlawful as the Flying Squad members breached their duty towards him. These alleged breaches are listed under the heading of submissions.

[15] Where it is alleged that the police have a legal duty to act positively, such a duty must be alleged and properly pleaded. I would have expected the plaintiff's heads of argument to deal with such a breach of duty, if he intended to plead such a case. I will thus accept that the cause of action is based on the *actio iniuriarum* where the plaintiff alleged that he was unlawfully arrested and detained and that the reference to a breach of duty was not properly pleaded. The list of alleged breaches by the members of the Flying Squad and other police officers are:

- (a) They did not take heed that plaintiff was working for Col Phago and further that he was undercover, and they failed to confirm the aforementioned with Col Phago.
- (b) Plaintiff was arrested before they formulated a reasonable suspicion and failed to exercise their discretion regarding the plaintiff's arrest and detention.
- (c) The members failed to exercise a discretion in respect of his arrest and detention.
- (d) Col Khoza failed to intervene in that he did not inform Col Phago of plaintiff's arrest.
- (e) Col Phago was negligent in that he failed to intervene on plaintiff's behalf.
- (f) Alternatively, the detention of plaintiff could have been avoided had the police officers involved heeded plaintiff's disclosure that he was an informer and working undercover.
- (g) Col Phago failed to induct plaintiff into the workings of informers.

- [16] The defendant in the amended pleadings in short denied that the arrest and detention of plaintiff were wrongful and unlawful. It was also denied that the plaintiff was an unregistered informer, with Col Phago as his handler, and the plaintiff was put to the proof thereof.
- [17] The defendant pleaded that the arrest was conducted in terms of section 40(1)(b) of the CPA read together with section 36 of the General Law Amendment Act. It was further pleaded that
- (a) The arrestor was a peace officer.
 - (b) The arrestor entertained a suspicion.
 - (c) The arrestor's suspicion was based on plaintiff's possession of a hijacked vehicle.
 - (d) The suspicion was based on reasonable grounds.
- [18] The defendant further pleaded that the plaintiff was detained from Friday, 31 January 2020 until Monday, 3 February 2020 when he was taken to court. The arresting officer exercised his discretion to arrest and detain the plaintiff after interviewing him and noticing that the particulars of the vehicle were changed.

Common Cause Facts

- [19] It is common cause that on 31 January 202 plaintiff was in possession of a Hyundai i20 (the vehicle) which was hijacked on 26 January 2020 in Wattville, Germiston.
- [20] At the time that the plaintiff was confronted, it was known that the vehicle was a hijacked/stolen vehicle.
- [21] The two police officers, Sgt Moloto and Sgt Lebina from the Germiston Flying Squad attended the scene. Tracking security officers were also at the scene.
- [22] A person named Mandla was arrested at the scene on a charge of hijacking of the vehicle.
- [23] The plaintiff and Mandla were removed from the scene to the Vosloorus Police Station. The plaintiff was provided with a document setting out his rights as a

detainee and was in custody until Monday, 3 February 2020, when he was taken to court.

[24] At the court, the plaintiff was released without appearing in court.

[25] By 10 February 2020, the plaintiff was registered as an informer for the Crime Intelligence branch of Germiston.

Issues to be Decided by Court

[26] The first issue to be decided is whether the arrest and detention of the plaintiff was lawful. Should it be found that the arrest and detention was not lawful, then the amount of damages must be determined.

[27] Further, the issue of the plaintiff being an unregistered undercover informer, as this relates to whether the explanation provided by him for his possession of the vehicle was reasonable.

[28] Damages in the amount of R1 209 000 are claimed and it is made up of the following:

(a) Estimated medical expenses of R150 000.

(b) Monies disbursed being R4 000 paid to an advocate and R5 000 to D/Sgt Molefe as “*entrapment to facilitate his release.*”

(c) Replacement value of plaintiff’s vehicle in the amount of R50 000.

(d) General damages in the amount of R1 million.

[29] General damages as indicated in the pleadings relate to the plaintiff having suffered humiliation and anxiety, and resulting in the plaintiff having to withdraw his candidacy as a member of the Democratic Alliance (DA). He further stated that he lives in constant fear for his safety and he suffered reputational harm.

[30] The remaining damages are special damages as the plaintiff indicated that he suffered patrimonial loss in the mentioned amounts due to the actions of the employees of the defendant.

Background

- [31] The two members of the Flying Squad were on duty on 31 January 2020 and busy patrolling the Vosloorus area when they received information that a hijacked Hyundai i20 (the vehicle) was driving around in Vosloorus.
- [32] They arrived at the scene where the vehicle was parked and Sgt Moloto approached the plaintiff who was seated in the driver's seat, whilst Sgt Lebina provided cover.
- [33] The plaintiff was asked where he got the vehicle from and he explained that he bought the vehicle from Mandla and he could not give the surname. Whilst busy at the scene, the plaintiff's wife arrived, accompanied by a man, and the plaintiff pointed the man out as Mandla, being the person who he got the vehicle from.
- [34] When Mandla was confronted with the version of the plaintiff, he denied any knowledge about the vehicle, but he was at that point arrested for the hijacking of the vehicle, whilst the plaintiff was arrested for possession of a stolen or hijacked vehicle.
- [35] Sgt Lebina testified that when the plaintiff indicated that he bought the vehicle from Mandla, they asked him to show them proof of such purchase, but he couldn't. The plaintiff was then arrested for being in possession of a hijacked/stolen vehicle.
- [36] Sgt Lebina indicated that they made sure that the vehicle was the hijacked vehicle. Both the policemen denied that they were informed by the plaintiff that he was an informer and requested to contact his handler, Col Phago. They further indicated that they did not know a Col Phago.
- [37] Both policemen were asked whether the tracker security or if they were first on the scene. Sgt Moloto indicated they arrived first and Sgt Lebina indicated that they arrived together.
- [38] They acknowledged that they provided a second affidavit at the request of the prosecutor. They both indicated that their first statements were complete and that the statements were made for purposes of dealing with the arrest of the

plaintiff. Both denied that they failed to include reference to the plaintiff being an informer.

- [39] Sgt Molefe was called, who indicated that he was the investigating officer in the matter until he was removed. He took a warning statement from the plaintiff on 2 February 2020. The statement was handed in as an exhibit.
- [40] Sgt Molefe indicated that although the statement was taken on 2 February 2020, he dated it 31 January 2020 at Vosloorus Police Station. The statement was however taken at Katlehong Police Station, which it appears that the plaintiff and Mandla were taken to at a later stage.
- [41] The plaintiff in his statement indicated that he did not know that the vehicle was hijacked. In cross-examination, it was put to Sgt Molefe that he failed to record everything the plaintiff told him; he denied this allegation.
- [42] Sgt Molefe indicated the plaintiff wanted "*station bail*" but he advised him that the charge was very serious and he should obtain the services of a lawyer. The plaintiff then indicated that he already obtained the services of a lawyer and had already paid the lawyer.
- [43] In cross-examination, it was stated to Sgt Molefe that he elicited a bribe of R5 000. He denied that he would have stated to the plaintiff that should he be paid R5 000 he would not oppose bail and he and a prosecutor at the court would make the case disappear.
- [44] The plaintiff's wife had apparently paid D/Sgt Molefe the R5 000. According to the plaintiff, Molefe had gone to the plaintiff's house where the R5 000 was handed over to him by his wife. Molefe denied that he went to the plaintiff's house for the bribe money and indicated that he went to the plaintiff's house to fetch the registration papers of the vehicle.
- [45] The plaintiff contacted IPID and laid a complaint against D/Sgt Molefe in respect of the bribery. D/Sgt Molefe indicated he was acquitted on it, whilst the plaintiff indicated that he was found guilty and given a final written warning.

- [46] The plaintiff called Sgt Sylvester Maphela who was subpoenaed to appear in court. He is attached to Crime Intelligence, Germiston.
- [47] Sgt Maphela indicated that he was introduced to the plaintiff by Brig Denge from Vosloorus Police Station at a meeting, inter alia, with his superior Capt Khalishwayo at the offices of Crime Intelligence on 6 February 2020.
- [48] It was stated by Brig Denge that the plaintiff had good information on car hijackings and that he had already participated in providing information. Sgt Maphela indicated that he had no personal knowledge and could only relay what he was told by Brig Denge. The witness was unwilling to register the plaintiff as an informer at that time as he felt that the plaintiff had his criminal case to deal with, but he was instructed to do so by his superiors. He was the plaintiff's handler until he deregistered the plaintiff as an informer.
- [49] The plaintiff was coached on his role as an informer and it was explained to him that he was only to provide information, the information is to be provided to the handler only, and that should it be found that he committed an offence then his status as a registered informant would not help him.
- [50] Sgt Maphela testified that a civilian informer would not be used to do undercover work as the police use trained police officers to conduct undercover operations. He does not know how the Vosloorus Police Station dealt with their informers. No information was placed before the court on the manner of dealing with informers by Vosloorus Police Station.
- [51] The plaintiff testified that he realised that his tenant was part of a group of young men who were carrying firearms and he overheard them discussing the hijacking of vehicles. He first approached a friend who is a policeman and explained that he has information on these men. His friend in turn referred him to Col Phago.
- [52] He approached Col Phago during September or October 2020. He informed Col Phago of what he saw and overheard but Col Phago indicated that he required more solid evidence and that the plaintiff should provide more concrete information before the young men could be locked away permanently. Col

Phago apparently warned him not to discuss this issue with his wife as she may tell others in the event of them arguing.

- [53] As his evidence progressed, the suggestion/request of Col Phago became an instruction. He was not given any contact details of Col Phago and he testified that he could not be seen going to the police station regularly as it would raise suspicion. When he was asked why he did not contact his friend in the police to obtain the telephone number of Col Phago, he indicated that he could have.
- [54] The plaintiff's evidence is that he left and decided that he was an informer and that Col Phago was his handler. He decided in furtherance of his "employment contract" with the police as an informer that he would infiltrate the gang and he would also investigate.
- [55] At some stage, Mandla, who was one of the gang members, showed an interest in his wife's Peugeot 206. The Peugeot had mechanical problems – problems with its ball bearings - but that did not deter Mandla as his father was a mechanic and they would sort out the ball bearings issue of the Peugeot.
- [56] On 26 January 2020, after the plaintiff dropped his wife off at church, Mandla came to his house and said that they secured a vehicle for the plaintiff, which vehicle was standing across from his house. As the Peugeot could not be driven, it was pushed out of his yard by the young men and the other vehicle was parked in his garage.
- [57] After the vehicle was left in his garage, Mandla indicated that they would come and remove the tracker from the vehicle the next day and the vehicle would be taken to "clean" the engine. The plaintiff did not elaborate on what it meant to clean the engine, but he had to pay for the engine to be cleaned.
- [58] Up and until the plaintiff's arrest, he accompanied some of the gang members with the vehicle to have the engine cleaned and collect documents to allow him to transfer ownership into someone else's name. The plaintiff paid some R5 000 to obtain the documentation to register the vehicle in some other person's name.

- [59] He went so far as to pay the outstanding traffic tickets of the owner to allow the transfer of ownership to go through. The plaintiff was at pains to explain that despite the gang wanting him to provide his ID to register the car in his name, he would not allow this and someone else's identity was used for ownership transfer of the vehicle.
- [60] On 31 January 2020, Mandla indicated when he handed him the keys of the vehicle for the first time that he must not drive the vehicle in the Wattville area until he had repainted the vehicle and tinted the windows, as the Wattville area was where the vehicle was from. The plaintiff indicated to Mandla that he was going to have the windows tinted. It is not clear whether this was indeed done.
- [61] At that stage, he felt that he had enough information for the arrest of the gang members and he was going to go to Col Phago with the vehicle.
- [62] He, however, decided to prioritise the collection of rent before going to Phago. Whilst he was at the house of his tenant, he was called to the vehicle. At the vehicle, he was apprehended and handcuffed by the tracker security, and it is his evidence that he was arrested by them. He informed the tracker security that he was an informer and working undercover; they did not do anything about it.
- [63] After 3 to 4 hours, the police arrived and, despite him informing them that he was an informer and they must call his handler, Col Phago, they "colluded" with the tracker security to continue his arrest.
- [64] He indicated to the police that he got the vehicle from Mandla, he provided a description of Mandla, and that Mandla and his friends brought the vehicle to him, the boys were criminals and gangsters. He denied informing the police that he bought the vehicle as no money changed hands. In cross-examination, the plaintiff conceded that he also told his wife that he had bought the vehicle, but he did this so that she would not know about him being an informer and ask too many questions.
- [65] The plaintiff's wife and Mandla arrived on the scene although they came separately and from different directions. Mandla went directly to Sgt Moloto and

tried to negotiate for the plaintiff's release; the police said they were not the investigating officer and the plaintiff must speak to the investigating officer.

- [66] Mandla and the plaintiff's wife left to fetch clothes and medication for the plaintiff. The plaintiff viewed the aforementioned that they were making a deal with the devil as he had already indicated to the police that Mandla was the person he got the vehicle from. The police apparently said that they did not realise that it was the same Mandla that the plaintiff got the vehicle from.
- [67] Mandla was arrested upon his return with his wife and his medication and some clothes. He gave his wife the registration papers of the vehicle for her for safekeeping.
- [68] The plaintiff's evidence is that he was arrested by the security officers and not the police; his rights were not read to him, but at the police station he was arrested and his rights were explained to him by the police. He explained that there is a difference between being arrested and detained.
- [69] In cross-examination, he explained that he sued the police because they colluded with the security officers to have him arrested and they must be held liable for that. The police, instead of remedying the situation, colluded with the security in respect of his wrongful arrest.
- [70] He indicated that he found himself in this situation because of the instructions of Col Phago. The plaintiff indicated that he knew that the persons who gave him the vehicle had no rightful (lawful) ownership of the vehicle and he realised this from his investigations.
- [71] The plaintiff indicated that when he explained to the police that he was an informer, it was not that he should not be arrested, but that they should contact Col Phago, who was to confirm that he was working undercover for him and he would then have been released. He then stated that informers do not get detained and that their handlers are to be contacted so that they can be immediately released.

- [72] The plaintiff indicated that he could not provide proof of purchase as no money changed hands. He exchanged the Peugeot for the vehicle and was not going to keep the vehicle as he was on duty, as an undercover informer for the police.
- [73] The plaintiff indicated that he was in the employ of the Minister of Police, he indicated that it is common knowledge that when people give the police information, they are informers, as he grew up with people being burnt in the township for providing information to the police.
- [74] Plaintiff indicated there is a clause in law which he could not remember at that time, but it says that even if you are not a registered informer, that you are protected by the law. I have not been provided with any law stating the aforementioned.
- [75] He was not released but taken to Vosloorus Police Station where he at some stage met with Colonel Khoza who similarly was not interested in his status as an informer but assisted in calling for an attorney. Apparently, Col Khoza phoned Col Phago but could not get hold of him. An attorney did approach him but nothing came from that.
- [76] The plaintiff was removed to Katlehong Police Station where he and Mandla were approached by Advocate Khethelo. The advocate indicated that he could assist them in that he would speak to the prosecutor and the IO (investigating officer). He indicated that his fee was R8 000 but they can pay him each R4 000.
- [77] The plaintiff then arranged with his wife, who agreed to pay “R4 000 and R4 000” and it appeared that he also paid for Mandla to be represented. Advocate Khethelo, however, disappeared after being paid and nothing came from acquiring the services of the advocate.
- [78] The investigating officer, D/Sgt Molefe came on 2 February 2020. The plaintiff then indicated that he already saw D/Sgt Molefe on the Friday after his arrest when another policeman came to introduce himself as the IO.

- [79] D/Sgt Molefe indicated that Adv Khethelo failed to give him his cut of the R4 000 and therefore demanded R5 000 from the plaintiff and Mandla to ensure that he does not oppose bail and promised to make the case “disappear” with the assistance of a senior prosecutor. D/Sgt Molefe indicated that cases do not just disappear as it is registered on the system where it can be accessed.
- [80] The plaintiff indicated that he was prepared to take a bullet for his country and decided to pay the bribe to expose D/Sgt Molefe. He arranged with his wife, who, due to safety reasons, was not willing to come to the police station for payment of the R5 000.
- [81] The plaintiff's wife apparently paid the R5 000 bribe at their house. Mandla separately arranged for his bribe money. They were taken to the court on 3 February 2020 after some delays, where, according to the plaintiff, he was then deprived of his constitutional right to appear in court. He and Mandla were released from the police cells without appearing in court.
- [82] D/Sgt Molefe informed them that he had to share the money with a prosecutor called Rose. Whilst being at the holding cells of the court, D/Sgt Molefe and Adv Khethelo came to them informing them that it was their lucky day as the prosecutor said it was okay, as they were being released, and once released, they left.
- [83] He claims damages for reputational harm as before his arrest he was registered for the legislature of Gauteng for his party, which appears from the pleadings to be the DA.
- [84] After his release, he went to speak to Col Phago who made him wait for a long time and did not eventually get the opportunity to speak to Col Phago. He thereafter approached Brig Denge who was the station commander and reported Col Phago to his superior. It was arranged with Crime Intelligence that he be registered as an informer.
- [85] The plaintiff indicated that since his arrest and detention, Mandla and his friends accused him of being an impimpi and he lives in fear. He was able to convince

them that he wasn't one as he was also arrested. The word in the community is, however, that he is an informer to the police.

- [86] His health is affected as he forgets, and previously he would go out to parties, but now he is indoors, fearing for his life. He is short-tempered, and feels he was betrayed by the system.
- [87] The last time he registered for his party was in 2021, he now has financial problems as some of his properties are empty. He further suffers due to the lack of support from the police. The plaintiff also testified in evidence in chief that he is a career politician.
- [88] The plaintiff indicated that he reported to ten police officers that he was an informer of Col Phago, and only Col Khoza attempted to contact Col Phago
- [89] In re-examination, the plaintiff indicated that he received no training from Col Phago, but he was of the view that there was an employer-employee relationship as only an employer can give his employee an instruction to get information.
- [90] The plaintiff confirmed that he made a further statement on 18 February 2020 to indicate to the police that he was working with them.

Discussion

- [91] The Flying Squad members involved in the arrest have several years of experience as police officers, and there is nothing to indicate that the arrest of 31 January 2020 was anything out of the ordinary.
- [92] The events of the 31st of January 2020 were typical in the day of a Flying Squad member, there was nothing particularly memorable about the incident. Which is why the arrest statements are so important, as the officers' recollections would likely depend on the details provided in the arresting affidavit. It seems to me that a suspect claiming to be an informer and working undercover would be a notable detail that should have stood out in their memory.

- [93] The contradiction in the evidence of the Flying Squad members as to who first arrived at the scene does not detract from the value placed on their evidence around the arrest, and the aforementioned does not affect the credibility of the two policemen. I do not find it strange that they cannot remember such details, having regard to the fact that the arrest took place some 5 years ago, where, according to their evidence, nothing eventful took place. Sgt Lebina, for example, could not remember that medication was brought for the plaintiff. It is further clear that Sgt Moloto in all probability forgot who arrived first on the scene.
- [94] Much was made of a further statement at the request of the prosecutor, I, however, find nothing untoward in a request for such a further statement nor in providing a further statement. The two Flying Squad members' evidence is that anything left out was not done to intentionally keep material facts out of the statement, but that it seemed not of importance.
- [95] The pleadings do not indicate that the plaintiff was arrested by the security officers. It is only in the plaintiff's evidence that he indicated the alleged "collusion" between the Flying Squad members and the security officers to perpetuate the unlawfulness of the arrest is to be placed before the defendant's door.
- [96] If the plaintiff wanted to prove the unlawfulness of his arrest by the security officers and to hold the defendant liable for that, then it should have to be pleaded. This was not done. The plaintiff's statement of February 2022 does not indicate an arrest by the tracker security.
- [97] The evidence of the plaintiff revolves around him being an informer and how he went undercover to acquire information of criminal activities. The aforementioned must be assessed in the light of the undisputed evidence of Sgt Maphela. Sgt Maphela is in Crime Intelligence and is a handler dealing with informers.
- [98] The plaintiff testified on the role, function, and manner of conduct of an informer, which information he could not have had at the time of his arrest. He indicated when asked how he obtained his knowledge on informers and he referred to

the apartheid times, when informers or impimpis were burnt for providing information, and what everyone in the community would know about impimpis.

[99] He could not have known the routines, duties, and advantages of being an informer at the time of his arrest as it is his case that “Col Phago failed to induct the Plaintiff into the workings of informers.” There is no evidence that prior to the meeting with Col Phago that he was an informer or that he had any knowledge of informers other than what is stated above.

[100] It is important to understand what happened between him and Col Phago, as this, according to plaintiff, is the reason for the situation he finds himself.

[101] In his particulars of claim, it is stated that it was suggested by Col Phago to the plaintiff to find something more concrete. In his statement in February 2022, he stated that Col Phago told him to get something concrete so that the young men could be put away permanently. It should be noted that it was Mandla’s father who initially told the plaintiff that Mandla and the young men were criminals.

[102] In his evidence, the suggestion by Col Phago changed from a request to an instruction. At the end of his evidence, the nature of the instruction was such that he became an employee of the Minister of Police. In fact, he considered this instruction to be one that made him an informer, that could go undercover and commit various crimes in the name of being an undercover informer. All of the aforementioned was in furtherance of his employment with the Minister of Police.

[103] Adv Leeuw argued that plaintiff, at the time that he was arrested, on 31 January 2020, provided information on criminal activities to the police and more particularly Col Phago.

[104] At the time he approached Col Phago, the only information he had was that his tenant and his friends walked around carrying firearms. In the particulars of claim, it was stated that he believed they did not possess the necessary licenses for these firearms.

- [105] The aforementioned was the totality of information on criminal activities that he provided. I am not surprised that Col Phago thought that the information was very thin and that he needed something more substantial before the police go and arrest people. There is however nothing in the aforementioned indicating that he was requested to be an informer. Col Phago's failure to provide his contact details to the plaintiff in my view is an important indicator that the plaintiff was not considered an informer.
- [106] The experience of the plaintiff on informers up to that stage was that he grew up in the township where people were killed for being informants or an impimpi. The plaintiff received no training on informers and he was at no stage informed that he had a handler and that he was now an informer, in fact, he did not even have the contact details of his "handler", Col Phago
- [107] By his own testimony, there was not a hint of a request or a suggestion to investigate, go undercover, or assist a gang in any criminal activities, to the plaintiff by Col Phago.
- [108] Sgt Maphela, the witness for plaintiff, testified that the police would not use a civilian, like the plaintiff, to go undercover. The police will use trained police officers to go undercover. He further testified that he told the plaintiff that if he is arrested for any crime, the fact that he is an informant will not help him, he will still be arrested.
- [109] The plaintiff testified that he has an employment contract with the Minister of Police as it is only an employer that can give you an instruction to do certain work. There is no allegation in the pleadings that the Minister of Police or any of his servants contracted with the plaintiff regarding a position as an informer or any other work.
- [110] Paragraph 6 of the particulars of claim states: "*Col. Phago suggested to Plaintiff to find something more concrete which will send the gang to prison for a long time.*" [my emphasis]. There is no instruction nor any suggestion that the plaintiff entered into a contract with the Minister of Police.

- [111] There is nothing in the pleadings to suggest that the plaintiff on 31 January 2020 was an informer for the police. The evidence provided to prove the plaintiff's case contradicts his evidence as Sgt Maphela indicated that a civilian, which the plaintiff is, would not be used to perform undercover work. Further, he is not a policeman who could investigate any criminal activities, and as an informer, all he would have to do is to give his handler information on criminal activities.
- [112] The plaintiff's case is that when he attended the offices of Crime Intelligence he had already been giving information to the detectives of Vosloorus and it was good information. The aforementioned cannot be true for the period up to 31 January 2020, and there is no evidence that the plaintiff gave information which was good before 6 February 2020. It is not clear what was told to Brig Denge and what Brig Denge told anyone else, as he was not called. Col Phago was not called either.
- [113] It is thus clear that whatever knowledge the plaintiff acquired in respect of informers was done after the fact. The evidence of the plaintiff as to informers is also not correct, for example, that civilians would be used to go undercover.
- [114] The evidence around the procurement of the vehicle is also contradictory. The particulars of claim indicate in paragraph 8 that plaintiff *"made a deal with the gang to swap his Peugeot 206 for another car."*
- [115] In his statement of 18 February 2022, it is stated that he initiated the exchange of the Peugeot and the vehicle. He was the one who indicated to the gang that the Peugeot was giving him problems, he needed a car, and enquired whether they could make a plan.
- [116] He testified that Mandla was interested in his wife's Peugeot 206 and this was how it came about that the vehicles were exchanged. In his statement of 18 February 2020, he indicated the following: *"I got to know these people and later told them my car is giving me problems and I needed a car I asked them to make a plan and they agreed to help me in getting another car. On 2020/02/26 all five of them arrived and told me they got a car for me. They told me to park my Peugeot outside and I did. They all left and came back after about 15*

minutes with a white Huydai i20. We parked it in the garage and Mandla took my Peugeot and left.”

[117] The aforementioned differs materially from his evidence-in-chief. The impression from his evidence-in-chief was that he did not solicit the procurement of a stolen/hijacked vehicle but Mandla’s interest in the Peugeot provided an opportunity.

[118] The statement of 18 February 2020, in my view, indicates that the plaintiff intentionally requested a car from the gang. It should be remembered that the plaintiff’s evidence was that the *modus operandi* of the gang was to hijack cars and he could have come to no other conclusion that if he requested the gang to procure a car for him it was hijacked and possibly stolen.

[119] In cross-examination of the plaintiff, he denied that he knew that the vehicle was hijacked but conceded that it was not obtained by honest means. The plaintiff was very clear that the gang hijacked vehicles but was not prepared to state that this vehicle was hijacked.

[120] The pleadings indicate that the gang hijacked cars as it stated in paragraph 7 of the particulars of claim “*Plaintiff then decided to infiltrate the gang and established that they hijack motor vehicles.*”

[121] In the statement of February 2022, he indicated that the vehicle was in his garage for a week when he, on 31 January 2020, started the vehicle and went to see his tenant to collect the rent. It was whilst he was with the tenant that he was called to the vehicle and the tracker security confronted him.

[122] Up to that stage, there is no indication that he was on his way to Col Phago to deliver the vehicle. It was only after he was confronted by the tracker security that he then indicated that he took the vehicle from Mandla to give to Col Phago.

[123] In his evidence, the plaintiff indicated the engine was cleaned and the vehicle registered to another owner, but before the windows could be tinted and the vehicle painted, he decided to give the vehicle to Col Phago on 31 January

2020.⁶ He, however, prioritised the collection of rent before taking the vehicle to Col Phago. It was then that he was confronted by the security.

[124] The plaintiff's explanation was that 31 January 2020 was the day that he had enough evidence to take the vehicle to Col Phago. It is not clear what was sufficient information.

[125] The Flying Squad members' evidence, despite their inconsistencies around who arrived first at the scene, is clear in that the plaintiff did not report to them that he was an informer. There is no reason why they would not report that was the explanation given for the possession of the vehicle. Having regard to the particulars of claim, where he would have whispered to them that he is an informer seems absurd in the light that he had already told the tracker security that he was an informer. The aforementioned is an indication that he did not inform the tracker security that he was an informer.

[126] The Flying Squad members indicated that they arrested and handcuffed plaintiff on the scene and read him his rights. The plaintiff indicated in his evidence that he was arrested by the tracker security. The particulars of claim do not disclose this fact as it is stated that he was confronted by the tracker security, and neither does the statement of February 2022 confirm an arrest by the tracker security. The plaintiff's basis for holding the defendant liable for the arrest, alleging the Flying Squad members colluded with the security to arrest him, appears to be a version created after-the-fact.

[127] The arrest of the plaintiff was effected by Sgt Moloto who is a peace officer. The plaintiff indicated under his list of breaches of duty that the Flying Squad members arrested him before formulating a reasonable suspicion.

[128] The vehicle was being tracked by the tracker security and the police, and it was known to both the policemen and the security that this vehicle was a hijacked vehicle. There was no need to form a suspicion that the vehicle might be stolen, they knew the vehicle was hijacked. Sgt Lebina indicated that they made sure that the vehicle was indeed the hijacked vehicle they were looking for.

⁶ It is not clear whether the tracker was removed the same day of the cleaning of the engine.

- [129] The policemen asked the plaintiff for an explanation for his possession and the explanation was not a satisfactory explanation for the reasons given by the Flying Squad members.
- [130] The plaintiff was arrested for being in possession of a hijacked vehicle and this is evident from the two Flying Squad members' evidence and is reflected in the Notice of Rights in terms of the Constitution given to the plaintiff. Sgt Lebina indicated that the explanation, being that he purchased the vehicle from Mandla, was not reasonable as he could not show that he had purchased the vehicle.
- [131] Section 37(1) requires that there must be a reasonable cause for believing the vehicle was properly acquired. The lack of proof that the vehicle was purchased was enough for the police officers to arrest the plaintiff.
- [132] Section 37(1) establishes an offence that is tabled in Schedule 1 of the CPA. The grounds on which the police officers based their arrest were that they knew the vehicle was hijacked, the plaintiff was found in possession of the vehicle, and the reasons for his possession did not disclose a reasonable cause.
- [133] The plaintiff did not call any other witnesses except for Sgt Maphela to corroborate any of the issues around him being an informer.
- [134] The plaintiff is either extremely naïve for a 53-year-old career politician or he fabricated the evidence as an informer to cover up his involvement with the hijacked vehicle. I am not convinced that the plaintiff obtained the vehicle under the guise of being an undercover informant, and neither am I convinced that he felt that he had enough information to go to Col Phago on the 31st of January 2020.
- [135] The arrest of the plaintiff was the reason for this elaborate narrative presented. The plaintiff needed a narrative to explain his possession of the hijacked vehicle.
- [136] I further find it highly improbable that he would report to 10 policemen that he is an informer and not any of them did anything. It is clear that the plaintiff was

at no stage an informer until he was registered as one in February 2020 and Col Phago or any of the employees of the defendant could not have been negligent regarding the induction or registration of plaintiff as an informer. Had any of the police officials gone to confirm that the plaintiff was an informer, could investigate, go undercover, and solicit a hijacked vehicle only to commit various crimes to obscure the identity of the vehicle, then they would have found that he could not.

[137] The plaintiff at paragraph 31 of his particulars of claim indicated the rights he alleged were violated. The plaintiff carries the onus of proving the violation of these rights. He indicated that he had a right to be protected as an informer and his right to dignity was violated by his arrest. It is a fact that the plaintiff was not an informer, and it is not clear how the plaintiff had to be protected and on what basis plaintiff had to be protected when he was participating in a crime.

[138] Brig Denge would have made certain disclosures which constitute hearsay and no exceptions were pleaded or argued. Brig Denge was not called as a witness and no explanation was given for the failure to call him.

[139] The third right alleged to be violated relates to plaintiff's right to earn a living as he had to withdraw his candidacy to the legislature as DA candidate due to the pending criminal matter.

[140] The plaintiff's evidence was that he did not withdraw his candidacy but did not proceed with it as the DA would not have allowed him to stand as a candidate. There is no evidence that the plaintiff had any chance of reaching such a position. He has further not provided any evidence regarding his right to earn a living or any loss in that respect.

[141] I am not persuaded that plaintiff on the strength of an alleged suggestion from Col Phago, decided that he is an informer who may investigate criminality as if he is a policeman, infiltrate a gang of hijackers, and then start committing crimes all in the name of being an informer.

[142] The plaintiff at no stage went back to Col Phago in the 4 or 5 months since his first and only encounter with his “handler” requesting assistance, guidance, or even money to fund his undercover work.

[143] Furthermore, as indicated earlier, the discretion pleaded regarding the arrest and detention of plaintiff by the members of the Flying Squad draws an onus to be discharged by plaintiff and I am not satisfied that he discharged the onus.

Conclusion

[144] Having considered all the facts before me, I find plaintiff's version of events wholly unsatisfactory and improbable and reject his version of the event as it relates to his arrest and detention.

[145] I am satisfied that defendant proved the lawful arrest and detention of plaintiff.

Order

[146] The plaintiff's claim is dismissed with costs.



I STRYDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Dates of hearing: 11, 12 & 13 February 2025

Date of judgment: 13 March 2025

Appearances

For the Plaintiff: Adv. L. Leeuw

Instructed by: E. Talane Inc

For the Defendant: Adv. M. Boko

Instructed by: State Attorney - Johannesburg