



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

NOT REPORTABLE

Case no: 577/2021

In the matter between:

MFUNDO GWEJELA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

Govindjee J

[1] The plaintiff has instituted this action to recover damages arising from his alleged unlawful arrest, on or about 14 May 2020, and detention from that date until 11 November 2020, when he was granted bail. The plaintiff claims from both defendants in respect of alleged unlawful detention after the first court appearance

on 18 May 2020 (the period of continued detention). The claim for unlawful arrest and detention prior to the first court appearance (initial detention) is against the first defendant (the Minister) only. The issues to be determined are whether the Minister has discharged the onus to prove that the plaintiff's arrest and initial detention was lawful and whether the plaintiff's continued detention was justified by the defendants or rendered unlawful through unlawful acts or omissions on the part of the defendants' employees that caused harm to the plaintiff.

Lawfulness of arrest and initial detention

[2] Warrant Officer Nokolo (Nokolo) testified as to the circumstances of the plaintiff's arrest. He was the Peddie Station Commander and formed part of a crime prevention operation in Peddie on 14 May 2020. His suspicions were aroused when he observed a grey Toyota Tazz with an 'ND' registration number driving in Peddie. Based on his experience, vehicles without an 'EC' registration had often been stolen elsewhere and used in the province. He communicated with a radio control officer and conveyed the registration details. Approximately 10 to 15 minutes later, he was informed that the registration number was associated with a white Volkswagen, and that the owner was from Durban. Given the discrepancy, he decided to make a follow-up enquiry and requested backup. By this time, he had lost sight of the vehicle, in traffic.

[3] Soon thereafter, Nokolo observed the Tazz again and was able to stop the van he was driving in a manner which blocked the road. He alighted close to the passenger side of the Tazz and, having introduced himself, confronted the plaintiff, who was seated in the front passenger seat. One of his colleagues confronted the driver. A third person was seated in the rear of the Tazz. When Nokolo instructed all three to alight, he noticed a revolver between the plaintiff's legs. When asked, the plaintiff indicated that he did not know who the owner of the firearm was. The other occupants, having alighted, also expressed no knowledge of the firearm. As a result, Nokolo informed the three that they had all been arrested for being in possession of a firearm unlawfully and that they had to be taken to the police station. They were loaded into the police van and the Tazz was driven by a police officer to the station. The purpose was to enquire further about the firearm, which was left untouched in the vehicle to enable members from the police's local criminal record centre (LCRC)

to perform their duties. Their investigation later revealed that the firearm contained no serial number.

[4] After a docket was opened, the police searched the vehicle at the station, in the presence of all three accused, and found 13 rounds of R5 (rifle) ammunition in a blue plastic bag under the driver's seat in the vehicle as well as 35 revolver rounds. Nokolo, who had close to 30 years' experience at the time of the incident, explained that the discovery of the firearm at the scene was the key basis for the arrest, together with his dissatisfaction with the response he received upon enquiry. The firearm was in the vehicle with the passengers, between the legs of the plaintiff, and none of the three accepted responsibility for it. Similarly, none of the three accepted responsibility for the ammunition that had been discovered. The purpose of the arrest was to ensure that the three appeared in court to answer about the firearm and ammunition that had been found. Nokolo's suspicion was that at least one, if not all, of the three must have had knowledge of the firearm, so that he exercised his discretion to arrest.

The legal position

[5] The Constitution of the Republic of South Africa, 1996, (the Constitution) guarantees the right of security and freedom of the person, including the right 'not to be deprived of freedom arbitrarily or without just cause'.¹ A peace officer may, without warrant, arrest any person reasonably suspected of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody, in order to bring the arrested person to justice.² Given that it results in an interference with liberty, and is *prima facie* unlawful, the onus rests on the Minister to justify an arrest.³

¹ S 12(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

² S 40(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (the Act) read with *Sekhoto and Another* 2011 (5) SA 467 (SCA); [2010] ZASCA 141 (*Sekhoto*) para 30. The so-called jurisdictional facts which must exist before the power conferred by this section may be invoked are as follows: (1) the arrestor must be a peace officer; (2) they must entertain a reasonable suspicion; (3) it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than the one offence mentioned); (4) that suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer has a discretion whether or not to exercise that power: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) (*Duncan*) at 818G–I.

³ *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E–F; *Sekhoto* above n 2 para 16; *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC) para 32. The decision to arrest must be based on the intention to bring the accused person to justice: *Duncan* above n 2 at 820D.

[6] While it is wrong to attempt to craft hard and fast rules to address whether the arrest was lawful,⁴ the following principles have emerged through decided cases and may be applied to the present facts:⁵

- a) 'Each case must be decided on its own facts.'⁶
- b) A suspicion, by definition, means the absence of certainty.⁷ In its ordinary meaning it is a state of conjecture or surmise where proof is lacking. The officer in question need not be convinced that the information in their possession was sufficient to commit for trial or convict, or to establish a *prima facie* case for conviction, before making the arrest.⁸ Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.⁹
- c) There must be evidence for the arresting officer to form a reasonable suspicion which is objectively sustainable.¹⁰ The issue is not whether there is evidence admissible in a court available to the arresting officer, but whether there was information available which would cause the officer to reasonably suspect the suspect of having committed the relevant offence. The reasonableness requirement extends inter alia to the reliability or accuracy of the information upon which an arrest is founded, including the quality and ambit thereof.¹¹
- d) This does not imply that the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on the information, the quality of which has not been subjected to scrutiny, will render an arrest unlawful.¹²

⁴ See *Minister of Police v Dunjana and Others* [2023] 1 All SA 180 (ECG) (*Dunjana*) para 18.

⁵ What follows is drawn from this court's decision in *Vitshima v Minister of Police and Another* [2024] ZAEQBHC 37 paras 25, 26.

⁶ *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC); 2007 (10) BCLR 1102 (CC) (*Van Niekerk*) paras 17, 20.

⁷ *Dunjana* above n 4 para 17.

⁸ C Okpaluba 'Reasonable and probable cause in the law of malicious prosecution: A review of South African and commonwealth decisions' PER (2013) vol 16, no. 1, at 249.

⁹ *Duncan* above n 2 at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H; *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) (*Powell NO*) para 37, citing *Shabaan Bin Hussien & Others v Chong Kam & Another* [1969] 3 All ER 1626 (PC) at 1630C–D.

¹⁰ *Mataba v Minister of Police* [2021] ZALMPPHC 4 para 33. This entails the arresting officer investigating the circumstances of the particular offence which is alleged to have been committed before it can be said that there is reasonable suspicion that an offence has been committed.

¹¹ *Biyela v The Minister of Police* [2022] ZASCA 36 (*Biyela*) paras 23, 24.

¹² *Dunjana* above n 4 para 21.

- e) Bearing in mind that the section authorises drastic, invasive action, the suspicion should not be fanciful, ‘far-fetched, misguided or patently mistaken’ but based on ‘sound’ evidence.¹³
- f) A suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.¹⁴ The grounds for a suspicion are not limited to facts which can be proved in court and a reasonable suspicion could conceivably be formed where a person has been seen at the scene of a crime and, upon being questioned, gives a false alibi or refuses to answer questions.¹⁵
- g) Police officers are required to have regard to the facts and circumstances at their disposal and, where reasonably possible, to satisfy themselves of the merits thereof.¹⁶ What constitutes reasonable grounds for suspicion is judged against what was known or reasonably capable of being known at the relevant time.¹⁷
- h) “The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information ... [and] based on credible and trustworthy information.”¹⁸ If, in a particular case, the quality of the information at the disposal of the police officer is so tenuous or conflicting that it cannot objectively sustain a suspicion as envisaged in s 40(1)(b), the police officer may first have to make further enquiries before an arrest is affected.¹⁹
- i) The focus of the enquiry is the information at the disposal of the arresting officer, which information is to be measured against the standard of reasonableness, as opposed to the reasonableness of the conduct of the police officer concerned.²⁰ An arrestor’s grounds for suspicion must be reasonable from an objective point of view.²¹ The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first schedule offence.²² The question is simply whether a reasonable person, confronted with the same information possessed by the arresting officer at the time of the arrest, which would include an exculpatory

¹³ *Powell NO* above n 9 para 38.

¹⁴ *Duncan* above n 2 at 819I – 820B.

¹⁵ *Mawu and Another v Minister of Police* 2015 (2) SACR 14 (WCC) (*Mawu*) para 32.

¹⁶ *Mananga and Others v Minister of Police* [2021] ZASCA 71 (*Mananga*) para 16.

¹⁷ *Okpaluba* above n 8 at 249.

¹⁸ *Biyela* above n 11 paras 34, 35.

¹⁹ *Dunjana* above n 4 para 20. A resultant finding that the police officer could not reasonably have formed a suspicion as required, is because the information at his disposal was insufficient to sustain such a suspicion, and not because there was a failure to investigate information given by an arrestee.

²⁰ *Dunjana* above n 4 para 21.

²¹ *Duncan* above n 2 at 814D–F. The suspicion need not be based on information that would subsequently be admissible in a court of law: *Biyela* above n 11 para 33.

²² *Mananga* above n 16 para 20.

statement of the arrestee, could form a suspicion that the suspect had committed an offence as envisaged in Schedule 1.²³

- j) The SCA has cited the following paragraph of the judgment of Jones J, in this division, with approval:²⁴

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective ... Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of [the schedule 1 offence] ... It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.” (References omitted).

- k) The reasonable person is the person of ordinary intelligence, knowledge and prudence. A mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited.²⁵
- l) The test is not to be applied in a vacuum. It is subject to the facts and the context, which may be crucial.²⁶ The factual context will be provided by matters such as the nature of the crime, the elements thereof, the source and the nature of the information on which the suspicion is said to be based, and its significance in supporting the suspicion entertained by the arresting officer.²⁷

²³ *Dunjana* above n 4 para 21.

²⁴ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) (*Mabona*) at 658E–H as cited in *Brits v Minister of Police and Another* [2021] ZASCA 161 para 20.

²⁵ *R v Mbombela* 1933 AD 269 at 272.

²⁶ *Van Niekerk* above n 6.

²⁷ *Dunjana* above n 4 para 18. In *Mabona* above n 24, the reasonableness of the suspicion of the arresting officer was determined in the context of the fact that the source of the information, on which

[7] On the question of discretion:

- a) 'If one or more of the grounds listed in paras (a) – (q) of s 40(1) of the Criminal Procedure Act, 1977 ("the Act") is satisfied, the discretion whether to arrest arises. The officer must collate facts and exercise their discretion on those facts. The officer must be able to justify the exercise of their discretion on those facts, which may include an investigation of the exculpatory explanation provided by an accused person.²⁸
- b) The arresting officer is not obliged to arrest based on a reasonable suspicion because they have a discretion. The exercise of discretion must be objectively rational and not arbitrary.²⁹ Police officers exercise public powers in the execution of their duties and "rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries".³⁰
- c) That aside, a court will not interfere with the result of the exercise of a discretion that has been bona fide exercised or expressed, the arresting officer duly and honestly applying themselves to the question left to their discretion.³¹
- d) Even a discretion exercised in a manner deemed sub-optimal by the court will not breach the standard: "A number of choices may be open ... all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached."³²
- e) The factors to be weighed in exercising the discretion must be gleaned from a consideration of the Act as a whole, including consideration that an arrest is one step in the process of bringing a suspect to justice, rather than isolated focus on s 40.³³

the officer based his suspicion, was an anonymous informer – a fact that would have caused a reasonable police officer to be more cautious.

²⁸ *Groves NO v Minister of Police and Another* 2024 (1) SACR 286 (CC) para 52.

²⁹ The objective enquiry is to determine whether the decision was rationally related to the purpose for which the power was given: *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of the President of the RSA* 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) paras 85–86 as cited in *Sekhoto* above n 2 para 36.

³⁰ *Pharmaceutical Manufacturers* above n 29 para 90.

³¹ *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651–652, as cited in *Sekhoto* above n 2 paras 34–36.

³² *Sekhoto* above n 2 para 39.

³³ *Sekhoto* above n 2 para 40 and following.

- f) Generally speaking, there is no onus upon the police to carry out a thorough investigation in each and every case before an arresting officer exercises their discretion whether or not to effect an arrest without a warrant.³⁴
- g) Although the purpose of arrest is to bring the suspect to trial, the arrestor's role in that process is limited. In cases of serious crime, including those crimes listed in schedule 1, a peace officer could seldom be criticised for arresting a suspect for that purpose.³⁵
- h) It is for the plaintiff to prove that the discretion was exercised in an improper manner.³⁶
- i) Again, the enquiry is fact specific and it is neither prudent nor practical to formulate a general rule. Police officers have the discretion to arrest and exercise this power in pursuit of their constitutional duty to combat crime. As police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases.³⁷

Analysis

[8] It is part and parcel of the right to a fair trial that witnesses have the opportunity to answer challenges to their evidence, and that parties to the suit know that it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised.³⁸ If a point in dispute is left unchallenged in cross-examination, the party who called the witness who is being cross-examined is entitled to assume that the unchallenged witness's testimony is accepted as correct.³⁹

[9] The plaintiff failed to challenge Nokolo's evidence pertaining to the firearm he had observed at the time the Tazz was stopped, which formed the basis for the plaintiff's arrest. The highwater mark of the cross-examination on the point was the

³⁴ *Lifa v The Minister of Police and Others* [2023] 1 All SA 132 (GJ) para 66.

³⁵ *Sekhoto* above n 2 para 44: 'It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.'

³⁶ *Duncan* above n 2 at 819B–D; *Sekhoto* above n 2 para 49.

³⁷ *MR v Minister of Safety and Security and Another* 2016 (2) SACR 540 (CC) (*MR*) para 42.

³⁸ See PJ Schwikkard and TB Mosaka *Principles of Evidence* (5th Ed) (2023) ch 18 at 413; *S v Boesak* 2001 (1) SACR 1 (CC) para 26.

³⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 37B.

version that the driver had accompanied police officers who searched the vehicle later at the station, absent Nokolo, and had returned and informed the plaintiff that 'a firearm' and ammunition had been found in the vehicle. Nokolo, having not been part of that group of officers, was unsurprisingly not able to comment. By contrast, and in addition, it was put to Nokoyo that, as the occupants of the Tazz had been placed in police vans at the scene, while the Tazz was driven to the station by the police, 'you can agree with me that only the police know that the firearm was not touched...'. Again, the clear implication was that the plaintiff did not contest that there had been a firearm in the Tazz at the time of the arrest. Cross-examination also included the concession that Nokoyo had informed the plaintiff, at the time, that he was being arrested in connection with the firearm. Belatedly, it was suggested that this only occurred at the police station.

[10] The plaintiff's testimony that he had never seen the firearm in the motor vehicle at the time of the arrest must be considered in that light. Leaving aside the failure to put this version clearly to Nokolo, I found Nokolo to be a credible witness, testifying clearly, honestly and with candour about what he could recall leaving aside genuine errors of memory. His testimony was reliable and coincided with the established objective facts pertaining to the reason for the arrest, including the notice of rights signed by the plaintiff at 17h30 on 14 May 2020, reflecting the reason for detention to be 'illegal possession of firearm and ammunition'. On the plaintiff's own version, he was informed by Nokoyo of the firearm and ammunition on the day of his arrest, but only at the reception area of the police station.

[11] The calibre and cogency of Nokolo's testimony was superior to that of the plaintiff. This assessment is grounded upon several reasons. The plaintiff appeared uncertain at times and did not create a favourable impression as a witness, as indicated above. On occasion, he mumbled his responses, laughed and was himself confused about charges he had faced previously, and which of those charges were still pending. His version departed on occasion with what had been put on his behalf, for example in respect of his knowledge as to why the driver had been called by the police at the station. He also attempted to explain why all aspects of his version were not put to the defendants' witnesses by suggesting, on more than one occasion, that he had been outside the courtroom at the time and hence had not heard the

testimony in question. This related to various instances where significant testimony regarding the circumstances of the arrest had not been contradicted during cross-examination and was implausible, including Nokoyo's observation of the firearm at the scene. To cite three examples of his lack of candour, he maintained that he was unable to confirm that his signature appeared in the 'notice of rights' document, despite this being readily apparent. He then testified that he had signed the agreement, but without the contents having been read to him, so that he had read the document himself later in his cell. He also gave multiple conflicting and improbable explanations as to why he had indicated his parental home as his place of residence at the time of his arrest, despite living elsewhere at the material time. As an afterthought, he testified during cross-examination that he had not told Nokoyo that he had been hitchhiking because he had been manhandled at the scene.

[12] Nokolo's evidence as to the circumstances of the arrest and its immediate aftermath also accords with the inherent probabilities. Considering the favourable credibility assessment and the reliability of his testimony, his version is preferred to that of the plaintiff, notwithstanding the fact that he was the only witness to testify on behalf of the defence in respect of the circumstances of the arrest. This favourable assessment of Nokolo's evidence includes the reason for the arrest, so that the plaintiff's suggestion that he was initially informed that he had been arrested for robbery is rejected.

[13] Applying the principles drawn from decided cases, cited above, I am satisfied that there was sufficient evidence for Nokolo, based on his own observances and his engagement with the plaintiff and other occupants of the motor vehicle, to form a reasonable suspicion, objectively sustainable, that the three had committed an offence referred to in Schedule 1 pertaining to possession of the firearm. Nokolo's decision to exercise his discretion and arrest the plaintiff was properly justified on this basis, objectively rational and not arbitrary. On the probabilities, and contrary to his pleaded case, there was no pointing of firearms and the plaintiff failed to inform Nokolo at the material time that he had been hitchhiking, rather than travelling with the other occupants of the vehicle, or to offer any other explanation. As a result, Nokolo had no information to consider other than what he had seen and heard, including the mismatch between the car registration details for a Volkswagen and the

Toyota vehicle in front of him, and in which the firearm had been observed.⁴⁰ The only reasonable conclusion to draw is that Nokolo analysed and weighed the available information to form the reasonable suspicion that the plaintiff had committed a schedule 1 offence and should be arrested.

[14] The jurisdictional facts having been satisfied, and in the circumstances, it would be inappropriate for this court to interfere with the result of a discretion exercised by Nokolo *bona fide* and through determination of a question left to his judgment. His decision to arrest the plaintiff to bring him to trial, in pursuit of the constitutional duty to combat crime, was justifiable on the facts and the plaintiff has failed to prove that the discretion was exercised improperly. Put differently, the arrest amounted to an effective method of initiating a prosecution and bringing the plaintiff before court and, given that a firearm was involved, less drastic means would have been inappropriate.

[15] Once the jurisdictional facts have been satisfied, the peace officer may arrest the suspect and the effect is that the arrested person is considered to be in lawful custody, to be detained until lawfully discharged or released.⁴¹ The arrestee should then be brought before court as soon as possible, but not later than 48 hours after the arrest, provided that if the period of 48 hours expires 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.⁴²

[16] Section 39(3) of the Act provides for the continuity of the lawfulness of the detention of a suspect. It must be read in the context of those provisions of the Act which provide for the release of a suspect from detention.⁴³ Lawful release from custody may occur either before, at or after the detained suspect's first appearance in court, as is required by s 50 of the Act and the Constitution.

⁴⁰ *Duncan* above n 2 at 466D – F.

⁴¹ S 39(3) of the Act.

⁴² Ss 50(1)(c) and (d)(i).

⁴³ *Syce and Another v Minister of Police* [2024] ZASCA 30 para 42.

[17] The plaintiff was arrested on Thursday 14 May 2020 and brought before court on Monday 18 May 2020, within the permissible period, having been lawfully arrested and placed in custody. There are no facts to suggest that he ought to have been released prior to his first court appearance. Considering the provisions of ss 39 and 50 of the Act, read with ss 59 and 59A, and the seriousness of the alleged offences, the Minister has succeeded in proving that the plaintiff's detention until the first court appearance was justified.⁴⁴ There was a constitutionally acceptable reason for the deprivation of liberty, so that the applicable public law duty was not breached in respect of this period of detention.⁴⁵ In the circumstances, the plaintiff's initial detention was lawful. It may be added that Nokolo explained that he did not have the power to release the plaintiff on bail after he had charged him and, in any event, would not have done so given that the plaintiff was facing a pending case involving a firearm. In all the circumstances, the plaintiff's claim for damages for unlawful arrest and initial detention must be dismissed.

Unlawful continued detention

Pleadings and evidence

[18] The plaintiff pleads his case under the heading of 'unlawful continued detention after first court appearance'. It is averred, *inter alia*, that the state prosecutors, acting in concert with the investigating officers owed the plaintiff a duty of care to assess the strength of the state's case and to determine whether a *prima facie* case existed, to ensure that the proceedings were dealt with in accordance with the dictates of justice and to release the plaintiff in the absence of a *prima facie* case. This included a duty not to seek to deny bail in such circumstances, and to place before the court, during bail proceedings, all relevant information, including information in favour of the plaintiff, demonstrating the weakness of the state's case or insufficiency of evidence. Instead, it is alleged that the police and prosecutors acted in concert to oppose bail maliciously in circumstances where continued detention was unnecessary, also postponing the matter on numerous occasions while the plaintiff was in detention. In particular, the plaintiff claims that the prosecutors acted in concert with Sergeant Booi (Booi) by submitting that the plaintiff

⁴⁴ *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC) (*Zealand*) para 25.

⁴⁵ See *Banda v Minister of Police NO* [2021] JOL 50674 (ECG) paras 61 – 64.

was a dangerous criminal charged with schedule 6 offences, and that there was a strong case against him. Booi, it is pleaded, 'falsely and maliciously misled the court by submitting that plaintiff had a pending case at the Bhisho High Court when in fact he had been acquitted of all charges relating thereto'. Plaintiff's bail was denied on 5 June 2020 due to these allegedly false assertions, ultimately resulting in the plaintiff spending 177 days in unlawful custody. The failure to conduct an identity parade prior to the addition of charges is also challenged.

[19] Mr Kili (Kili), the Head Control Prosecutor in Peddie at the time, testified that he had perused the docket and decided that the matter was ready for enrolment on 18 May 2020 on charges of illegal possession of a firearm and ammunition. Before the matter was called, Mr Mgangatho approached Mr Kili and informed him that he appeared on behalf of the accused. When advised that bail would be opposed based on the nature of the charges, Mr Mgangatho advised him that he was meeting the accused for the first time and required time to consult and prepare a formal bail application. The matter was therefore postponed by agreement until 26 May 2020 for a formal bail application.

[20] As is evident from Kili's cross-examination, it is common cause that the plaintiff was initially charged with schedule 5 offences, based on a pending case, which Mr Mgangatho had seemingly confirmed before court on 18 May 2020. In terms of s 60(11)(b) of the Act, where an accused is charged with an offence referred to in schedule 5, the court 'shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release'.

[21] Kili, who was an excellent witness, confirmed that the purpose of the postponement of the matter until 26 May 2020 was to enable the plaintiff's representative to prepare the necessary application to satisfy the court that the interests of justice permitted his release. Kili also gave various instructions to the investigating officer for further investigation to be conducted prior to the envisaged bail application on 26 May 2020. He confirmed that there was no bar to Mr Seithleko (Seithleko), who took over the prosecution from that date, to add charges if new

information emanating from such investigation appeared in the docket and justified this. During cross-examination, he explained that it was good practice for charges to be added before a bail application if there was information at hand supporting their introduction, rather than doing so afterwards. This enabled an accused person to know all the charges they were facing, rather than proceeding piecemeal.

[22] Seithleko testified that the matter could not proceed on 26 May 2020 as two of the three accused persons were not present in court. Mr Mgangatho again represented the accused, and the matter was postponed until 29 May 2020. The accused were remanded in custody again on that date and the bail application postponed by agreement to 2 June 2020 and then again to 3 June 2020. On 2 June 2020, the state, through Seithleko, applied to add three additional charges. The basis for this was that the motor vehicle linked to the initial two charges had since been implicated in a robbery and attempted murder in the Peddie area, the registration number of the motor vehicle having been cited in a statement from the complainant, who averred that he had full, daylight view of the vehicle and was able to describe it. According to Mr Seithleko, this information could not be ignored and there was nothing untoward about the way the three extra charges were added. Considering that the firearm had been discovered in the vehicle, there was a *prima facie* case for the three extra charges to be included against the accused, and it would have amounted to dereliction of duty not to have done so. While the plaintiff's name was not mentioned specifically in those dockets, an inference had been drawn based on the description of the motor vehicle, the use of a firearm and description of events obtained from the complainant. In addition, items found in the motor vehicle were the same as those allegedly stolen. Absent any objection on the part of Mr Mgangatho, the application was granted so that the additional charges were included on the charge sheet prior to the application for bail proceeding. A new charge of robbery with aggravating circumstances lawfully elevated the applicable schedule from 5 to 6 on its own. The charges of attempted murder had the same effect.

[23] Seithleko explained, during cross-examination, that the case against the plaintiff in respect of the additional charges was circumstantial and based on the doctrine of common purpose. Part of what he had considered was that the complainant in the robbery case had made mention of four robbers, so that he

considered a syndicate to be involved. Airtime had been taken and, when confronted about the airtime in his possession, accused no. 1 had lied in informing the police that he was selling airtime. The complainant had been tied up and placed next to the Tazz, which he was able to observe, and which was the same vehicle in which the accused were apprehended a few hours later. Despite no identification parade having been conducted, the plaintiff had been implicated having been found in the motor vehicle associated with the robbery, and allegedly in possession of a firearm likely used in the commission of the offence. Four people had been involved in the robbery and three people were in the vehicle when it was stopped by Nokoyo and the police. Airtime, one of the items stolen, had been discovered in the possession of one of the three. The decision to add the charges had been based on this information, considered cumulatively, and was not unlawful or borne of malice.

Analysis

[24] Every interference with physical liberty, including through arrest and detention, is *prima facie* unlawful, the burden being on the person that caused the interference to establish a ground of justification. A detention constitutes a drastic curtailment of a person's freedom and there should be a justifiable cause for any interference with this right, especially considering the 'traumatic, brutalising, dehumanising and degrading' effect that detention can have on people.⁴⁶ It must also be noted that a remand order by a magistrate does not necessarily render subsequent detention unlawful.⁴⁷ What matters is whether, substantively, there was just cause for the deprivation of liberty, to be determined with regard to the manner in which the remand order was made.

[25] It is evident that the particulars of claim combine a claim for unlawful continued detention with one based on malicious deprivation of liberty. This must be construed in accordance with the principles of law applicable to the determination of the liability of the Minister and the NDPP for the plaintiff's period of continued detention. Both wrongful and malicious deprivation of liberty are *iniuria* actionable under the *actio iniuriarum*. Wrongful deprivation of liberty (detention) takes place

⁴⁶ MR above n 37 para 67.

⁴⁷ *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) (*De Klerk*) para 62.

where the defendant, or their agent or employee, detains the plaintiff. Malicious detention takes place under or in terms of a valid judicial process, where the defendant makes improper use of the legal machinery of the state. As a result, the SCA has held that the NDPP could only be liable for the period of continued detention if the stringent requirements to succeed in an action for malicious detention were proved in respect of the relevant prosecutors.⁴⁸ Where the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person where there is proof on a balance of probability that the culpable and unlawful conduct of the police was the factual and legal cause of the post-hearing detention.⁴⁹

[26] It is therefore necessary to deal with both possibilities and their elements in turn.⁵⁰ It is convenient to consider the claim based on culpable and unlawful conduct first, under the following headings: the addition of charges; the bail proceedings; the various postponements.

The addition of charges

[27] The plaintiff avers that there was no reasonable or probable cause to add the three further charges of robbery with aggravating circumstances and two counts of attempted murder (the further charges). Absent any information linking the plaintiff to these offences, it is argued that the investigating officer and public prosecutor acted negligently and / or maliciously, abused their powers and proceeded in breach of their legal duty to ensure that an accused person is brought to court to face the correct charges.⁵¹

[28] The Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.⁵² Section 20(1) of the National

⁴⁸ *Minister of Police and Another v Erasmus* [2022] ZASCA 57 (*Erasmus*) para 11.

⁴⁹ *Ibid* para 12, including various references to cases involving culpable conduct on the part of the police.

⁵⁰ See *Minister of Police v Nontsele* [2024] ZASCA 137; [2025] 1 All SA 44 (SCA) (*Nontsele*) para 48. Also see *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC) para 44.

⁵¹ Cf *Erasmus* above n 48 para 15, holding that the liability of the NDPP depends on proof that the prosecutors caused the period of continued detention without reasonable and probable cause and *animo iniuriandi*.

⁵² S 179(2) of the Constitution.

Prosecuting Authority Act, 1998⁵³ (the NPA Act) provides that this power vests in the prosecuting authority and, for all purposes, is exercised on behalf of the Republic. Any duly authorised prosecutor is competent to exercise any of these powers in respect of the area of jurisdiction for which they have been appointed.⁵⁴ In terms of s 25(1) of the NPA Act, a prosecutor shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to them under this Act and any other law of the Republic and, if employed as a prosecutor in a lower court, by the Director in whose area of jurisdiction such court is situated.

[29] In terms of s 81 of the Act, any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge. Where several charges are so joined, each charge is numbered consecutively. The Act also regulates the charge where it is doubtful what offence has been committed:⁵⁵

‘If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.’

[30] The Act provides for an accused to object to the charge before pleading and for the court to order that the charge be amended in certain circumstances.⁵⁶ Academics have noted that, in most cases, the person who is responsible for drafting a charge sheet will not, prior to trial, be exactly sure which facts the court will find to have been proven. Given this dilemma, s 83 authorises the drafter of a charge sheet to charge an accused with all the offences that might possibly be proved by means

⁵³ Act 32 of 1998 (the NPA Act).

⁵⁴ S 20(5) of the NPA Act.

⁵⁵ S 83 of the Act.

⁵⁶ Ss 85 and 86 of the Act.

of the available facts.⁵⁷ In *S v TN*, the court explained the effect as follows (own emphasis):⁵⁸

'The prosecution is thus permitted to bring in as many charges as can be justified by the facts to be proved. It ultimately lies with the trial court in the end to decide on the facts whether or not conviction of the offences will constitute a duplication of convictions.'

[31] Considering the evidence presented, I am satisfied that the defendants have shown, courtesy of Seithleko's evidence, which I accept, that the facts available at the time justified the additional charges, and that these charges were not added maliciously, in bad faith, negligently or to ensure that bail was denied.⁵⁹ There was also no objection by the plaintiff's representative, who was consulted prior to the addition of the charges, and both the prosecutor and plaintiff's representative were alive to the consequent change of schedule applicable. Even before the further charges were added, the burden was on the plaintiff to demonstrate that the interests of justice warranted his release from custody.

[32] As indicated, the change of schedule raised the bar so that exceptional circumstances were required. It is so that the Director of Public Prosecution's subsequent decision to proceed in the District Court in respect of only the original two charges lowered the applicable schedule and appears to have contributed to the decision to grant bail 'on new facts'. But this cannot, on its own, and in the present circumstances, justify a claim for damages for the way the charges were formulated prior to that decision being taken. The evidence also reveals that the plaintiff's representative had committed to bring an application on alleged new facts sometime before this eventually occurred, and there is no support for the contention that this did not occur purely because schedule 6 was applicable. The delay in bringing the application for bail on new facts is considered, below.

⁵⁷ S 83: 'If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences ...'; S van der Merwe / M Watney 'The charge' in S Terblanche (ed) Du Toit: Commentary on the Criminal Procedure Act (2025) RS66 (2021) ch14-5,6.

⁵⁸ *S v TN* 2017 (4) NR 1069 (HC) para 11.

⁵⁹ On an assumption justifying the addition of a charge, see *Jansen and Others v Minister of Police and Another* [2015] ZAECPHC 17 para 39.

The bail proceedings

[33] Section 35(2) of the Constitution provides that everyone who is detained has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. An accused who is in custody in respect of an offence shall be informed by the court of the reasons for his or her further detention or be charged and entitled to apply to be released on bail.⁶⁰ The accused is entitled to be released on bail, subject to the provisions of s 50(6) of the Act, at any stage preceding conviction, if the court is satisfied that this is in the interests of justice.⁶¹ If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.⁶² The arrestor has a limited role in respect of determining whether a suspect ought to be detained pending trial. That is typically the role of the court which, together with the prosecuting authority, fulfils a key function from this point. In *Minister of Police and Another v Du Plessis*, the SCA defined the latter's role as follows:⁶³

'Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 ... the police's authority to detain, inherent in the power of arrest, is exhausted ... As pointed out ... in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest.'

[34] It is common cause that the plaintiff was discharged by Stretch J, having stood trial on charges of statutory conspiracy to murder, murder, and possession of firearms and ammunition in relation to the shooting of one Mr Ndevu in the Peddie district on 2 August 2017.⁶⁴ Seithleko was cross-examined extensively in respect of his questioning of Booi, who testified in opposition to the plaintiff's application for bail on 2 June 2020. The record of the bail proceedings reveals that Booi initially mentioned a number of cases including 'murders, attempted murders and with these firearms', later referring to eight dockets that formed part of the investigation.

⁶⁰ S 50(6)(a) of the Act.

⁶¹ S 60(1)(a) of the Act.

⁶² S 60(1)(c) of the Act.

⁶³ *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 28 (citations omitted).

⁶⁴ See *S v Dingela and Others* [2019] ZAECBHC 12.

Seitlheko, the bail record shows, deliberately focused Booï's attention on the cases at hand and obtained an update from Booï on progress regarding the investigations, including the way the firearm described by Nokolo had been discovered in the Tazz. Booï subsequently testified about several firearms that had been stolen from a police station, adding that some of these firearms had been found in the possession of the plaintiff and different co-accused, and that the related case was pending.

[35] Booï, in testifying during the application for bail, specifically alluded to the case before Stretch J and noted that the plaintiff had been 'released' in that matter. During cross-examination, this was further clarified:

'Mr Mgangatho: It is my instruction from applicant No 3 regarding that matter of Bhisho where you indicated it was withdrawn, he says that matter was finalised, the person who was charged in that matter was sentenced.

Court: Yes.

Mr Booï: Your Worship, applicant No 3 is right what he's saying that only one guy got sentenced in that case...Which is his co-accused, he says – he's continuing with his sentence but on that case, Your Worship, there's him, there's another guy just I've forgot the name, Your Worship, why – the reason why the case was being dropped under them but the case is on and I think you know about that, Mr Mgangatho, the case is on as long as we are still active in our investigation the case is on.'

[36] Seitlheko explained during his evidence that the reference to 'the case is on' pertained to investigation of another individual who had not been charged initially. Seitlheko put to Booï that the plaintiff had admitted that 'he has a pending case of possession of firearms and now he is being found – allegedly found in possession of a firearm again and he is out on bail in that matter...'. Seitlheko highlighted the plaintiff's pending case to Booï and, while concluding examination-in-chief, gave him the opportunity to comment on the strength of the state's case against the plaintiff and his co-accused. Seitlheko also added the following:

'Tell me applicant No 3 he is out in a serious matter on bail and we don't have any evidence to the effect that he has contravened any condition that was given to him, why would you oppose his release on bail if he has that propensity to attend to his matters when required of him to do so?'

[37] As he testified, Seithheko was confident of his case in opposing bail and had satisfied himself based on all the information at his disposal, including the plaintiff's admitted pending case and the statements of witnesses to the robbery and attempted murder matters. He had also considered the doctrine of recent possession in respect of one of the plaintiff's co-accused and the close connection in time of the various alleged offences. While the firearm used in at least one of the additional alleged offences had also been described as a revolver, he was alive to the absence of ballistic reports and lack of certainty that this was the same revolver discovered in the plaintiff's possession. The focus was on rebutting the plaintiff's application for bail and Seithheko was content to leave the decision in the hands of the bail court.

[38] During cross-examination of Booi, Mr Mgangatho, representing the applicants for bail, dealt with the matter as one falling under schedule 6. Booi confirmed that none of the applicants had been charged in respect of the eight dockets he had mentioned, explaining his understanding that anything 'that is of interest in my investigation' could be made known to the court. He remained 'quite positive that the same people are arrested or being the applicants in this bail are the same people with others implicated in those eight dockets that we are investigating.' Booi accepted, however, that the eight dockets did not qualify as either pending cases or previous convictions and, as will be illustrated, the magistrate's decision was not based on matters extraneous to the original two charges.

[39] Although he was initially uncertain about which firearm-related matter had been concluded with the plaintiff's acquittal, Seithheko's position was crystallised during the court's questioning and when he was recalled to testify. It may be added that, in my opinion, he was an honest and forthright witness. In essence, the factual position was that the plaintiff had been acquitted by Stretch J along with one co-accused. One person had been sentenced and the investigation was ongoing in respect of a fourth individual. Separate from the firearm pertaining to that matter in the High Court, there was another firearms-related charge, pertaining to firearms discovered at a bed and breakfast, linked to the plaintiff, and pending in the Peddie Regional Court at the time of the bail application.

[40] Significantly, the plaintiff's affidavit in support of bail had conceded a pending matter involving a firearm, so that Seithleko did not see the need to delve into the issue further in opposing bail. Stretch J's judgment granting the plaintiff a discharge at the close of the state's case in that matter was delivered on 10 May 2019. The plaintiff's affidavit in support of bail, read into the record more than a year later, on 2 June 2020, referred to 'as far as I can remember I have one pending case against me that is the charge of possession of firearm...'. Booi had briefly explained his understanding of this case which, as Seithleko explained, was pending before the Peddie Regional Court. Having himself accepted that he had a pending firearm's charge, it follows that there was little cross-examination on the point during the bail proceedings, so that Booi's explanation was the only evidence on this score before the magistrate.

[41] Despite these indications to the contrary, it was put on behalf of the plaintiff that the pending charge involving possession of a firearm in the Peddie Regional Court was precisely the same as that referred to in Stretch J's judgment. Instead, based on the accepted timeline of events and the plaintiff's own concession of a pending charge at the time of the bail application, the probabilities favour Seithleko's version that the discharge and pending case were separate matters. The effect is that the defendants did not rely on a stale charge, in respect of a matter where the plaintiff had been discharged having been prosecuted, in support of the opposition to bail.

[42] Whereas Booi testified and was subjected to cross-examination, the plaintiff was content to rely on an affidavit in support of the application for bail. As indicated, the plaintiff confirmed in his affidavit that he had a pending case involving possession of a firearm and, in the heading to the affidavit, acknowledged the applicability of schedule 6. Before this court, the plaintiff confirmed, during his own evidence, that the pending case involved two firearms that he had pointed out at a bed and breakfast, and which belonged to a family member. In any event, the plaintiff did not make use of the opportunity before the bail court to add any additional information about either his acquittal or the admitted pending firearm-related case. Unsurprisingly, he was unable to explain in these proceedings why he

would have referred to the Stretch J case as a pending matter during the bail proceedings, despite having long been acquitted.

[43] Booï was challenged on the link between eight dockets and the accused and responded to various questions from the magistrate. Far from being clouded by the various matters linked to the plaintiff by Booï, or by the conduct of Seithleko or Kili, the magistrate had no difficulty in considering the additional charges to be tenuous and ‘not strongly connected’ to the applicants. Importantly, bail was ultimately refused not because the plaintiff was considered to be a dangerous criminal, but based on application of the ordinary schedule 5 test, and considering only the original two charges:

‘[In respect of the added charges] ... there may not be sufficient identification, there is still a lot to be done in regard to those counts and if those counts are brought to court and to be tried as they are there are a lot of chances that now the State could lose its aim of prosecution ... [But] when somebody is found in possession of ammunition for an R5 rifle which is an assault rifle, [and is charged with] possession of an unlicensed firearm that person is not going to a picnic, you do not just possess those things and here it has to be considered that possession is a complex legal principle. If you find a bag of dagga inside this court and there is nobody who explains as to take responsibility for it and there is no explanation we can all be taken in by the police because now this is unlawful, this is what has happened in this matter that the presence of such unlawful items resulted in all of them being arrested and there is nothing else as to what the contestation, what was the objection to their arrest, I did not hear it...’

[44] It was the plaintiff’s failure to demonstrate that the interests of justice warranted his release in respect of the discovery of the firearm in his possession and the ammunition in the Tazz that resulted in the refusal of bail, rather than any undue influence on the magistrate’s discretion occasioned by the representations of employees of the defendants.⁶⁵ Arguments were presented on 4 June and bail was denied on 5 June 2020. Although the magistrate appeared to swop the plaintiff’s pending case involving possession of a firearm with his co-accused’s pending case of housebreaking, the point is that the magistrate considered the pending cases, together with the other relevant factors, in weighing whether the interests of justice

⁶⁵ See *Erasmus* above n 48 paras 13–14.

warranted bail in respect of each of the applicants for bail. Without applying the schedule 6 'exceptional circumstances' test, the court concluded that the plaintiff and his co-accused had failed to discharge that onus. As Seithleko testified, the options available to the plaintiff thereafter were to appeal against the refusal of bail to the High Court, alternatively to move an application for bail on new facts, which was the plaintiff's preferred option.

Subsequent postponements

[45] An application for bail is generally considered to be urgent in nature. Despite repeated suggestions that an application for bail based on new facts was to be brought, after bail was refused, this did not occur, for one reason or another, between 27 July and 11 November 2020. The evidence reveals that none of these delays could be attributed to the conduct of the defendants. The record reflects, and the plaintiff confirmed, that Mr Magqabi, who appeared for the plaintiff on 27 July 2020, indicated that he would pursue a bail application on new facts, and the matter was postponed to 13 August 2020. It stands to reason that the mooted application was to proceed based on new facts within the knowledge of the plaintiff and notwithstanding the various charges he was facing at the time. The matter was then postponed by agreement until 28 August 2020 for the transcription of the record to be made available, and then again until 7 October 2020. The plaintiff understood these postponements to be necessary given that he had replaced his legal representative and his new representative had to familiarise himself with the record of the earlier proceedings, rather than because of the further charges. Following argument, the court granted a 'final remand for investigations' and postponed the matter to 6 November 2020. The prosecutor informed the court that the matter would proceed only in respect of counts 1 and 2, in the District Court, and that a formal letter from the Director of Public Prosecutions was awaited. This change, in other words, occurred sometime after the plaintiff's representative had first indicated that bail on new facts would be sought. The matter was postponed, again by agreement, to 11 November 2020 for 'pre-trial and bail on new facts', it appearing as if the prosecutor was not ready to proceed based on the unavailability of her witness. The record reveals that an application for bail based on new facts was heard on 11 November 2020. What 'new facts' emerged on that date, and the role played by the decision to proceed in the District Court only in respect of the original two charges, is

unclear from the record. Bail was granted with conditions, and the matter was remanded for trial on 25 January 2021. Even if the reduction in charges was the catalyst for bail being granted, it does not follow that the way the charges had been formulated, including the additional charges, was unlawful.

Conclusion

[46] Because detention in custody implicates the freedom of the person concerned, and triggers the corresponding constitutional right in s 12(1)(a), the police and prosecutor may be found to have a public law duty to assist the court in giving effect to, and protecting this right.⁶⁶ The nature of the duty must be determined on the facts in the context of the relevant section of the Act.⁶⁷ The further detention resulted from the order granted by the magistrate.⁶⁸ In appropriate circumstances, however, neither the police nor the prosecutor would be relieved from disclosing to the court that there was an absence of evidence to substantiate the charges, or that the only evidence implicating the accused was very weak, or, for example, entirely dependent upon the admission of hearsay evidence emanating from a co-accused.⁶⁹

[47] Various constitutional provisions oblige police officers to establish, before arresting and detaining a person, the justification and lawfulness of arrest and detention, including any further detention if the underpinning facts are within the knowledge of that official.⁷⁰ It is the duty of the police official who has arrested a person for purposes of having them prosecuted 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'.⁷¹ Where there are no facts which justify further detention, the investigating officer should inform the prosecutor accordingly, the purpose being to eventually place the magistrate in an informed position to determine whether the

⁶⁶ It is a basic component of the rule of law that state functionaries, including the police, are constrained by the principle of legality and may not exercise any power nor perform any function beyond that conferred upon them by law: *Mahlangu* above n 3 para 26.

⁶⁷ *Singatha and Another v Minister of Police and Another* [2015] ZAECHC 19 (*Singatha*) para 42.

⁶⁸ *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) (*Woji*) para 32.

⁶⁹ *Singatha* above n 67 paras 42, 43, as quoted by the full bench in *National Director of Public Prosecutions v Swarts* [2018] ZAECHC 65 (*Swarts*).

⁷⁰ *Botha v Minister of Safety and Security, January v Minister of Safety and Security* 2012 (1) SACR 305 (ECP) (*Botha*) paras 29–30, cited with approval in *Mahlangu* above n 3 para 40.

⁷¹ *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) para 40.

person should be detained further.⁷² The defendants would be liable for post-appearance detention where their wrongful and culpable conduct materially influenced the decision of a court to remand the plaintiff in custody.⁷³

[48] The evidence, as analysed above, does not support the claim that there was an absence of evidence implicating the plaintiff in respect of the charges he faced, or that there were no facts justifying further detention. Substantively, on the facts, there was a just cause for deprivation of liberty. It was the state's prerogative to charge the plaintiff in the manner it saw fit, based on the facts at its disposal, even if there was some uncertainty in this regard.⁷⁴ On the evidence, the defendants have demonstrated that they did not act wrongfully in opposing the application for bail and proceeding as they did.⁷⁵

[49] In any event, and if this analysis is erroneous, the additional charges were, ultimately, not causally linked to the refusal of the application.⁷⁶ Unlike cases such as *Woji*, there is no need to speculate as to what the magistrate would have done had the extra charges not been added. That is how the magistrate approached the matter, so that the conduct of the police and prosecutor was not a *sine qua non* for the continued detention.⁷⁷ The court's decision was based on the strength of the state's case in respect of the firearm and ammunition charges and the plaintiff's failure to discharge his evidentiary burden. Considering that assessment, the pending charge involving a firearm was highly relevant and it was not irregular for the state to lead evidence in respect thereto in the way it did. To the extent that any evidence was confusing or misleading, particularly given the plaintiff's acquittal in a separate matter involving a firearm before Stretch J, this could have been clarified by plaintiff's counsel during Booi's cross-examination. Alternatively, it was open to the plaintiff to appeal the magistrate's judgment if the magistrate was deemed to have over-emphasised this aspect in the enquiry, or to launch a bail application on new facts if the evidence led regarding the pending charge had been erroneous or

⁷² *Botha* above n 70 paras 29–30.

⁷³ *Woji* above n 68 para 27.

⁷⁴ S 83 of the Act.

⁷⁵ *De Klerk* above n 47 para 121, 122.

⁷⁶ *Woji* above n 68 para 32; *Nontsele* above n 50 para 43.

⁷⁷ *Ibid.*

misleading. None of this occurred. Any wrongful conduct on the part of the employees of the defendant was not sufficiently closely connected to the loss for legal causation to be established and for liability to follow as prayed.⁷⁸

[50] In all these circumstances, the plaintiff's continued detention cannot be blamed on prosecutorial misconduct or over-zealousness on the part of the police to ensure that the plaintiff remained in custody. Rather, following fair bail proceedings, the magistrate exercised his discretion to refuse bail on the basis that the plaintiff had failed to discharge the onus of establishing that the interests of justice warranted his release. In any event, that decision, which was subsequently left unchallenged, was not causally connected to the decision to add the extra charges or to the other wrongful conduct alleged.

Malicious deprivation of liberty

[51] Acts done in excess of and without judicial process give rise to an action for damages, without requiring proof of malice, but acts done under the sanction of judicial process improperly obtained do not give rise to an action for damages unless done maliciously and without reasonable and probable cause.⁷⁹ In other words, the interposition of a judicial act is key in distinguishing unlawful and malicious deprivation of liberty. Unlike wrongful deprivation of liberty, malicious deprivation of liberty takes place under the guise of a valid judicial process and therefore involves the improper use of the legal machinery of the state to effect the deprivation of liberty. To succeed requires the plaintiff to prove on a balance of probabilities that the defendant instigated the deprivation of liberty; that the instigation was without reasonable and probable cause and that the person responsible for initiating the prosecution acted with malice or *animo iniuriandi*.⁸⁰ The test of breach of a legal duty, or wrongful conduct, on the part of the defendants plays no part in the inquiry

⁷⁸ Ibid. Also see the recent full court decision in this Division in *Minister of Police and Another v Payi* [2025] ZAECKMHC 74 para 46.

⁷⁹ *De Klerk* above n 47 para 135 and following. The majority judgment took no issue with these sentiments in the context of an omission by the arresting officer at the first court appearance, but held that the prior wrongful, negligent conduct of the arresting officer changed the position: para 19.

⁸⁰ *De Klerk* above n 47 para 136, 137, read with *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) para 19. In *Rudolph*, the court accepted that the proceedings were initiated when the appellants, in that matter, were formally charged.

into allegations of malicious and collusion driven detention.⁸¹ Malicious deprivation of liberty occurs when lawful restraint is inflicted upon a person's liberty by means of an act of law, unjustifiably, with an intention to injure, and with improper motive.⁸²

[52] On this score, the pleadings allege that the police, particularly Sergeant Booï, and prosecutors acted in concert to oppose bail maliciously in circumstances where continued detention was unnecessary. In other words, that the continued detention was driven by improper motive and / or was without reasonable and probable cause, also resulting from a conspiracy between the police and prosecutors. This echoes the pleadings considered by the SCA in *Minister of Police v Nontsele (Nontsele)*.⁸³

[53] As in *Nontsele*, however, the plaintiff never tendered evidence to prove the collusion allegation. There was no evidence of discussions between prosecutors and the police officials aimed at achieving refusal of bail or to secure the plaintiff's further detention. There is no evidence that the police were responsible for the decision to instigate the continued deprivation of liberty. For that reason alone, the claim against the Minister under this heading would fail.⁸⁴ The plaintiff also failed to demonstrate absence of reasonable and probable cause, in the sense that the police and prosecutors never had an honest belief, founded on reasonable grounds, that bail should be opposed and that his further detention was warranted.⁸⁵ The evidence reveals that the relevant employees of both defendants possessed information that would lead a reasonable person to conclude that the plaintiff was probably guilty of the offences for which he was charged, which the defendants believed to be the

⁸¹ *Nontsele* above n 50 para 38.

⁸² *Nontsele* above n 50 para 37, citing *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A).

⁸³ *Nontsele* above n 50 para 36.

⁸⁴ *Minister for Justice and Constitutional Development v Moleko* [2008] ZASCA 43 (*Moleko*) para 17.

⁸⁵ *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 495G–H. Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but their belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence: *Moleko* above n 84 para 20. Whether there was reasonable and probable cause for the prosecution depends on the facts or material which was at the disposal of the prosecutor, at the time that the prosecution was instigated, and the careful assessment of that information: *Ledwaba v Minister of Justice and Constitutional Development and Others* [2024] ZASCA 17 (*Ledwaba*) para 24.

case.⁸⁶ The plaintiff has failed to discharge the burden of proving that the deprivation of liberty was without reasonable and probable cause.

[54] There was also no evidence to support any *animus iniuriandi*, with either dolus directus or indirectus, on the part of either defendant's employees, or proof of consciousness of wrongfulness.⁸⁷ The true intention flowed from the sighting of the firearm in the plaintiff's possession in the vehicle and the discovery of the ammunition, which led to the lawful arrest. On this basis too, the claim stands to be dismissed.⁸⁸

[55] This is no reason to depart from the ordinary position in respect of costs.⁸⁹

Order

[56] The following order is issued:

1. The plaintiff's claim is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 30 November, 1 December 2023; 15-17 April 2024;
23-24 July 2025

Heads received: 17, 26 September 2025

⁸⁶ *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) para 14. This question must not be confused with whether there is sufficient evidence upon which the accused may be convicted, or with the decision to withdraw certain charges: *Ledwaba* above n 85 paras 24, 82.

⁸⁷ *The National Director of Public Prosecutions v Sijoyi Robert Mdhlovu* [2022] ZASCA 85 para 19. See *Weitz v Goodyear SA (Pty) Ltd and Others* (2014) 35 ILJ 441 (ECP) para 27 and the authorities cited there: *animus injuriandi* encompasses dolus, whether dolus directus or dolus indirectus; Cf *Nontsele* above n 50 para 39. Also see *Ledwaba* above n 85 para 22.

⁸⁸ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135–136.

⁸⁹ See *Minister of Safety and Security and Another v Schuster and Another* [2018] ZASCA 112.

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