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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Reportable
Case No: 18320/2019**

In the matter between:

HYMIE ZILWA

PLAINTIFF

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR THE
DEPARTMENT OF TRANSPORT AND PUBLIC WORKS FIRST DEFENDANT**

MINISTER OF POLICE SECOND DEFENDANT

Coram: ANDREWS AJ

Heard: 10, 16 – 17 October 2024; 9 - 13 June 2025; 31 October 2025

Delivered: 9 January 2026

Summary: Unlawful arrest and Detention - Arrest without a warrant of arrest for a traffic offence – no admission of guilt fine determined – Section 40(1)(b) of the Criminal Procedure Act - reasonable suspects of having committed an offence referred to in Schedule 1 - offence of exceeding the speed limit does not fall within

the listed schedule 1 offences – jurisdictional threshold not met – The onus remains on the First Defendant to justify the arrest – National Road Traffic Act and Code Book does not authorise an arrest of a suspect - Any act performed without a lawful source, contravenes the rule of law and the supremacy of the constitution - An arrest is a drastic measure invading a personal liberty and must be justifiable - a traffic officer, in circumstances where there is no admission of guilt fine determined, cannot usurp the function of a court even in circumstances where the possibility exists that imprisonment without the option of a fine may be imposed - arrest unlawful.

Detention - procedure to detain cannot be a mere formality - can only follow if the arrest is lawful - A member of the South African Police Service can refuse to accept a person in terms of Section 50 of the CPA if he /or she is satisfied that the person did not commit the offence and that the arrest is unlawful – A failure to exercise this discretion, as in the case of an *arrest*, renders the detention unlawful.

Special plea (non-joinder NPA and NDPP) - The causal responsibility for the prosecution itself lies with the prosecutor acting under the authority of the NDPP - the relief sought against a party plays a central role - no malice or negligence against the prosecutor alleged - prosecutor's decision to proceed with prosecution not challenged - no evidence on record to suggest that the "causal nexus" for the prosecution was broken by the prosecutor's independent exercise of discretion - prosecutor's acts not central to the Plaintiff's claim – no factual basis to conclude that it was the prosecutor who had instituted the prosecution without reasonable and probable cause - Special Plea dismissed.

Malicious prosecution - mere negligence or error of judgment does not suffice to meet the threshold of malicious prosecution – Plaintiff failed to show that – (a) First Defendant foresaw the possibility that he was acting wrongfully, but nevertheless continued to act reckless as to the consequence of his conduct and/or; (b) intended to cause harm and appreciated that instituting or pursuing the prosecution was wrongful and/or (c) that the Plaintiff succeed to show proof of improper motive or that his arrest and detention was for an illegitimate purpose – Onus for proving all the elements for malicious prosecution not discharged by Plaintiff – Claim dismissed.

ORDER

1. In respect of Claim A, judgment is granted in favour of the Plaintiff for the agreed or proven damages in respect of his unlawful arrest and subsequent detention on 28 March 2019 from between the time of 17h50 and 18h00 to 23h50, with costs including the cost of Counsel to be taxed on Scale B.
 2. The Second Defendant's Special Plea is dismissed with costs, including the cost of Counsel to be taxed on Scale B.
 3. In respect of Claim B, the Plaintiff's claim for malicious prosecution is dismissed with costs, including the cost of Counsel to be taxed on Scale B
 4. The trial on quantum is postponed *sine die*.
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JUDGMENT

ANDREWS, AJ:

Introduction

'Malicious prosecution, along with wrongful arrest and unlawful detention ... is one of the foundational common law causes of action that vindicates breaches of personal liberty and human dignity rights.'

Chuks Okpaluba¹

[1] In this matter, Mr Hymie Zilwa ("the Plaintiff") instituted an action for damages against the First and Second Defendants in their nominal capacities as the political

¹ Quantification of damages for malicious prosecution: A comparative analysis of recent South African and Commonwealth case law (1) 2018 SACJ 235.

heads of the relevant departments in terms of the State Liability Act², under various heads of damages. The Plaintiff asserted that he was unlawfully and wrongfully arrested on 28 March 2019 by a member of the First Defendant on a charge of exceeding a speed limit and thereafter detained by members of the Second Defendant. The Plaintiff further averred that the members of the Defendants unreasonably and without any valid or justifiable reason or probable cause set the law in motion and, as such, are liable based on malicious prosecution.

[2] The First Defendant denied that the arrest was unlawful and relies on the provisions of section 40 of the Criminal Procedure Act 51 of 1977³ ("the CPA") and a Code Book promulgated in terms of section 59(4)(b) of the National Road Traffic Act 93 of 1996⁴ ("the NRTA") to justify the arrest. The Second Defendant admitted the detention but denied that the detention was unlawful and asserted that the Second Defendant detained the Plaintiff on the lawful instructions of a member of the First Defendant. The Second Defendant also raised a Special Plea of non-joinder of the National Prosecuting Authority and/or the Director of Public Prosecutions.

[3] The parties agreed that the issues of liability and *quantum* be separated as envisaged in Uniform Rule 33(4). The trial proceeded in respect of liability only.

The burden of proof

[4] The decision in *Pillay v Krishna*⁵ is the *locus classicus* for the principles governing the burden of proof in South African law, where the Appellate Division established the fundamental distinction between the "true" onus of proof and the evidentiary burden, clarifying that the party who makes an assertion must satisfy the court that they are entitled to succeed on their claim or defence. According to Voet (22.3.10), the legal position is: '*He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute.*'⁶

² State Liability Act No. 20 of 1957.

³ Criminal Procedure Act 51 of 1977.

⁴ National Road Traffic Act 93 of 1996.

⁵ *Pillay v Krishna* 1946 AD 946 952- 953.

⁶ See also *Salamolele v Makhado* 1988 (2) SA 372 (V) at 374.

[5] It is commonplace that an arrest and detention without a warrant is *prima facie* wrongful and unlawful, and thus, the First and Second Defendants bore the onus to prove the grounds of justification, namely the lawfulness of the arrest and detention as articulated in *Minister of Police and Another v Du Plessis*.⁷ Conversely, the Plaintiff bore the onus to prove the elements of malicious prosecution.

The evidence

[6] The evidence of the Plaintiff and Mr Ncedisa Nkala ("Mr Nkala") was led in the Plaintiff's case. The First Defendant led the evidence of Mr Dezel Lee Gertse ("Mr Gertse") and Mr Bismarck Oosthuizen ("Mr Oosthuizen"). The Second Defendant, in turn, called Constable Cakwe, Sergeant Jefthas, Constable Sentane, and Warrant Officer Lukas to give evidence.

Evidence for the Plaintiff

[7] In summary, Mr Nkala, who is a practising attorney in Pretoria and a friend of the Plaintiff, narrated that he was travelling in an MBW X5 motor vehicle from Bloemfontein with the Plaintiff, which was driven by a mutual friend, Luvo Cingo ("Mr Cingo"). They were travelling in convoy with four other vehicles. He orated that they stopped at Colesberg and then at Laingsburg. When they arrived in Laingsburg, they drove to where the Plaintiff's vehicle, a Mercedes S63 Coupe AMG, was parked. The Plaintiff's driver brought his vehicle from the Eastern Cape to Laingsburg. Mr Nkala orated that he was aware of the arrangement between the Plaintiff and his driver. This is because, as they were approaching Beaufort West, the Plaintiff gave his driver instructions to wait for him in Laingsburg.

[8] The Plaintiff and his driver drove off to the taxi rank. While waiting for the rest of the convoy that they had passed along the road, he heard a siren and noticed blue

⁷ 2014 (1) SACR 217 (SCA) at paras 14 – 17 where Navsa ADP stated as follows:

'[14] Police bear the onus to justify an arrest and detention'. In *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F the following is stated:

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

lights. He observed that the vehicle belonging to Mr Mbhele, one of the persons in the group, was being escorted by traffic officers. They proceeded to follow the rest of the vehicles to the police station.

[9] Mr Nkala recounted that when they arrived at the parking lot of the police station at around 14h00, Mr Mbhele was arrested and handcuffed. While they were in the process of ascertaining the reason for Mr Mbhele's arrest, other police officers arrived at the police station and demanded to search the vehicles. They were informed that a complaint was received of plastic being thrown out of the vehicles, presumably containing drugs.

[10] Despite the fact that the police failed to produce search warrants, their vehicles and luggage were searched in an aggressive manner in plain view of the entire town watching them, and this caused him embarrassment because of the manner in which the police conducted the search. After the vehicles were searched, the Plaintiff arrived, being escorted by a white GTI (an unmarked vehicle). His vehicle, too, was searched. During the search, traffic officers and police officers made certain derogatory and racist utterances, which triggered a response from the Plaintiff along the lines that they were not going to be apologetic for the cars they are driving, as "we have worked hard for these cars".

[11] One of the traffic officers, whom he thought to be a supervisor, looked at his tablet and remarked that the Plaintiff's vehicle was also speeding. On his instructions, the Plaintiff was arrested, placed in handcuffs and taken into the police station. Mr Nkala further explained that their attempts to reason with officials were unsuccessful.

[12] Mr Nkala further recalled that when they followed about 10 minutes later, he observed that the Plaintiff was behind the counter in leg chains, which was perplexingly embarrassing. They went back to the parking lot at around 15h00, after their attempts to reason with the police came to nought. According to Mr Nkala, the traffic officers were the cause of the hostile atmosphere as they were the first people with whom they had interaction. They did not provoke them.

[13] Mr Hymie Zilwa (“the Plaintiff”), who is a practising attorney, provided an account of his commute from Johannesburg with his colleagues, leading up to his arrest in Laingsburg on 28 March 2019. He described the makes, models, and drivers of the respective vehicles that were part of the convoy. In this regard, Luvo Cingo was driving a BMW X5; Cebo Chaza was driving a Porsche; Ncedisi Mbhele was also driving a Porsche, and Masixole Ngqumshe was driving a Jaguar, F-Type.

[14] The Plaintiff narrated that when he left Bloemfontein, his vehicle was in Mthatha. He and Mr Nkala were passengers in Mr Cingo’s vehicle. According to the Plaintiff, he arranged with his driver, Rasta, to bring his vehicle either to Beaufort West or Laingsburg. He called Rasta when approaching Beaufort West to ascertain how far he was and arranged to meet in Laingsburg.

[15] He explained that when he spotted his vehicle close to a garage in Laingsburg, he alighted from Mr Cingo’s vehicle and dropped off Rasta at the taxi rank. The Plaintiff recounted that he went back to the same garage where he initially met Rasta to refuel, whereafter he joined the main road towards Cape Town to wait outside town for his colleagues. He stated that he noticed an unmarked white GTI vehicle following him with a siren and blue lights. The Plaintiff explained that he was stopped at around 14h00, but did not get out of his vehicle. The traffic officer, who was dressed in uniform, approached his vehicle and asked him for his driver’s licence.

[16] The traffic officer also informed him that he wanted to search his vehicle. Upon requesting the reason for the search, he was informed that a complaint was received from other travellers that some things were thrown out of the vehicle. He was requested to follow the traffic officer so that his vehicle could be searched at the police station. The Plaintiff testified that he could not refuse and considered himself to be under arrest at that stage. He complied and followed the traffic officer to the police station.

[17] The Plaintiff further testified that when he reached the police station, he was surprised to see his friends and their vehicles parked in the parking lot in front of the police station. He noticed that the boots of the vehicles were open and that the police were ransacking the vehicles. When he alighted from his vehicle, he heard derogatory and racist remarks being uttered.

[18] The Plaintiff explained that he opened the boot of his vehicle, whereupon the search was conducted by a police officer. He further observed that the traffic officer who accompanied him was talking to his colleagues. He stated that the utterances were repeated, and he got annoyed and retorted with words to the effect that he does not feel sorry about driving these cars, as they have worked for it. The traffic officers, according to the Plaintiff, were not pleased with his remarks. He observed that one traffic officer had a tablet with him, and it looked to him like he was scrolling on the tablet. This traffic officer orated words to the effect that the driver of this car was speeding and that he should be arrested as well, and pointed at him (the Plaintiff).

[19] The Plaintiff informed the traffic officer that he was not the driver of the vehicle and that he had just taken possession of his vehicle, but the same was disregarded. Thereafter, while still in the parking lot, he was handcuffed by the traffic officers in the presence of police officers, other traffic officers, his friends, and members of the public. The Plaintiff further explained that his friends protested and enquired about the reason he was being arrested. Attempts to reason with the police were unsuccessful. He was then taken into the police station. The Plaintiff further related that the officers created a scene in the presence of everyone passing. Inside the police station, he was processed. The handcuffs were taken off, and they were replaced with leg chains. He described that he proceeded to another room in the police station, where they took pictures of him. He recalled that it was just after 15h00. He was taken to the holding cells with Mr Mbehle and remained there until midnight.

[20] The Plaintiff confirmed that he signed his warning statement at 23h15 and indicated that he would speak in court; however, the statement was presented

when he was released, just before midnight. The warning statement recorded that the offence was committed at 18h00.⁸ According to the Plaintiff, he was not shown any warrant of arrest. He testified that he was not informed of his constitutional rights. The Plaintiff testified that he was given a Notice to Appear in Court. The case was postponed to a further date. After making written representations to the prosecutor, the charge was withdrawn against him.

Evidence for the First Defendant

[21] Dezel John – Lee Gertse (“Mr Gertse”) testified that he is a traffic officer in the employ of the Department of Mobility. In 2019, he held the rank of Provincial Inspector. He placed his qualifications on record and stated that he worked at Laingsburg for 8 years. His collective years of experience are 12 years. He narrated that he was on duty on 28 March 2019. His shift started at 14h00. Mr Gertse elucidated that his duty entailed the monitoring of speed by using the speed over distance cameras (ASOD). On the day in question, he was working alone and was stationed at N1-4 Voortrekker k81, in the district of Laingsburg.

[22] Mr Gertse explained that the Plaintiff was arrested because he received a speed alert (“the alert”) on his handheld device. He clarified that the information revealed that a white Mercedes-Benz was driving at a speed of 188km per hour (“km/h”), which is in excess of the speed limit of 120km/h, between Dwyka and Leeu Gamka. He recounted opening the alert and looking at the photo images of the vehicle, which appeared one above the other on the device.⁹ He verified that it was the same vehicle by way of the letters reflected on the number plate, which was A[...]. He further explained that this alert stays visible at the top of the device and shows up as red.

[23] Mr Gertse testified that he stopped the vehicle that was moving in the direction of Cape Town, at approximately 17h50. He proceeded to introduce himself to the driver, who was alone and informed him that he was stopped because a speed alert was received. According to Mr Gertse, he showed the Plaintiff the photos of the

⁸ Joint Bundle, Exhibit C, page 16.

⁹ Joint bundle C, page 21.

vehicle on his handheld device. The Plaintiff did not say anything but held his head with both his hands.

[24] Mr Gertse further recounted that he informed the driver that he was going to arrest him for exceeding the speed limit by driving at 188km/h in a 120km/h zone. When he showed the Plaintiff the footage, he did not deny that it was his vehicle. He placed his hand on the driver's shoulder and told him that he was arresting him and explained his rights to him in English, and the driver understood it. He then asked the Plaintiff to accompany him to the police station. Mr Gertse testified that the Plaintiff did not tell him that someone else was driving the vehicle, and neither did he make a call. The Plaintiff did not speak to anyone. The Plaintiff drove his own vehicle to the police station.

[25] Mr Gertse further recounted that he stopped in front of the police station in the parking lot. When he stopped, he noticed a group of people who were in the parking lot speaking to the Plaintiff from a distance. He asked the Plaintiff if he knew them, and the Plaintiff informed him that they were his friends that he was travelling with. There were no police officers in the parking lot, and there were also no other traffic officers. He did not place handcuffs on the Plaintiff.

[26] Mr Gertse recalled that he went into the police station and handed the Plaintiff over to Constable Cakwe at 18h10. He stated that after opening a docket, he handed the docket over to Constable Cakwe, who placed the Plaintiff in a holding cell inside the police station.

[27] Bismarck Oosthuizen ("Mr Oosthuizen"), who is a civil engineer with 45 years of working experience, placed the extent of his experience and qualifications on record. He stated that he still worked for his former company, Zutari, on a contractual basis despite being on retirement since 2019 after working there for 31 years. Mr Oosthuizen explained that he commenced working in the Intelligence Transport Systems in 2000 and has been working in this field for the last 25 years.

[28] He elucidated how the average speed over distance (“ASOD”) system functions, which, in simple terms, calculates the speed of a vehicle over a known distance. The distance between 2 cameras divided by the time will essentially calculate the average speed travelled by a vehicle over a known distance. Mr Oosthuizen explained that the system is autonomous with no human intervention other than at the end of the process. The first pilot site was launched in October 2011, and this specific section between Leeu Gamka and Dwyka was launched in 2013.

[29] He further testified that the system will indicate whether a fine could be issued, and if it indicates that a fine could not be paid, it is a no 'admission of guilt' case. This means that the traffic officer cannot issue a fine and must arrest the driver.

Evidence for the Second Defendant

[30] Constable Cakwe testified that he was the CSC commander on the day at Laingsburg Police Station. He recounted that Sergeant Jefthas was posted outside as the vehicle on duty and that the other two shift members were not at work. He stated that he was not allowed to leave the Police Station.

[31] Constable Cakwe explained that after a traffic officer arrests someone and opens a docket, he would have no discretion in respect of the detention of the arrested person, and neither was there a duty to engage with the traffic officer. He explained that the normal operating procedure is simply for the traffic officer to open the docket and hand the arrested person over to the police for detention, whereafter the arrested person has to be charged by a detective. He also stated that he did not, at the time, hold the requisite rank to issue a warning or police bail to an arrested person. Ordinarily, a detective would attempt to process and release as fast as possible, as the offences such as which the Plaintiff was charged were common in that jurisdiction. Constable Cakwe could, however, not specifically remember the Plaintiff and his friends. Neither could he recall participating in any search on any vehicle.

[32] Sergeant Jefthas testified that although he was on duty on the day in question, he was not called to the police station by Constable Cakwe to assist in the searching of motor vehicles, nor was he called to manage and/or deal with any incidents of “*chaos*”. He had no recollection of any interaction with the Plaintiff. He stated that he does not remember him. He denied uttering any racist remarks towards him.

[33] Constable Sentane confirmed that he was the member on duty and that he had processed the Plaintiff through the official registers. He also confirmed that it was a practice of his that if there was a person arrested for speeding, he usually sent a WhatsApp message to the standby detective and requested that the standby detective attend as fast as possible to release that person. He had no independent recollection of the Plaintiff. Constable Sentane, however, confirmed that the times and dates as recorded in the various registers were accurate, including the cell registers.

[34] Warrant Officer Lukas testified that he was the standby detective on the day in question. At the time of the incident, he held the rank of Sergeant. He recounted that he worked on a tracing operation after which he attended the police station. Warrant Officer Lukas stated that he immediately processed the Plaintiff and released him as per the times reflected in the registers.

[35] Warrant Officer Lukas confirmed during cross-examination that the traffic officer did not have discretion and was obliged to open a docket. He also confirmed that it is the duty of the detective to send the docket to the court for a determination.

Facts that are common cause

[36] It is common cause that:

- (a) The Plaintiff was arrested on 28 March 2019 by members of the First Defendant.

- (b) Subsequent to the Plaintiff's arrest, he was detained by members of the Second Defendant.
- (c) The Plaintiff was released from detention on 28 March 2019 and warned to appear in court at a later stage on 29 April 2019.

[37] The parties are *ad idem* that the issue of vicarious liability has been resolved in that the Second Defendant admitted that the members of the South African Police Services acted within the course and scope of their employment with the Second Defendant when they detained the Plaintiff.

Issues for determination

[38] The issues that call for determination are:

- (a) whether the arrest of the plaintiff was lawful;
- (b) whether the detention of the plaintiff was lawful;
- (c) whether the subsequent prosecution of the plaintiff was malicious;
- (d) special plea of non-joinder and
- (e) the time of the Plaintiff's arrest.

Ad Claim A

The arrest

[39] The First Defendant does not dispute that the arrest took place and that the arrest was effected without a warrant of arrest. However, the First Defendant denies that the arrest was unlawful. The First Defendant relies on, *inter alia*, the provisions of section 40 of the CPA.

[40] The Plaintiff asserted that the traffic officer did not have any justifiable reason to arrest him, especially in view of the contestation by him that he was not the driver at the time when the speeding alert was triggered. He ought not to have been arrested without a warrant in the absence of any reasonable, justifiable ground to suspect that the Plaintiff had committed a schedule 1 offence.

Applicable legal principles

[41] It is trite law that section 40 of the CPA endows peace officers with extraordinary powers of arrest. In terms of section 40 (1)(b) of the CPA,¹⁰ an arrest without a warrant is lawful if, at the time of the arrest, the arresting officer had a reasonable belief that the Plaintiff had committed a Schedule 1 offence. There are, however, jurisdictional facts that must exist in order for the arrestor to effect an arrest without a warrant. These jurisdictional facts for a section 40(1)(b) defence as articulated in the seminal judgment of *Duncan v Minister of Law and Order*¹¹ are that (i) the arrestor must be a peace officer, (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.¹²

The arrestor

[42] It is not disputed that the Plaintiff was arrested by a traffic officer. This was confirmed when Mr Gertse testified. Since issue was taken that the Plaintiff identified the arresting officer as Jermaine Evandor Abrahams in his Particulars of Claim¹³, this challenge does not, on this point alone, amount to non-compliance, as the First Defendant's version that Mr Gertse effected the arrest meets the requirement that the Plaintiff's arrest was indeed effected by a peace officer. The relevance and materiality of the identity of the arresting officer, as pleaded by the Plaintiff, will be dealt with later in this judgment.

Reasonable suspicion

[43] It is trite that the suspicion that must be held must, in order to be a reasonable one, be objectively sustainable, in the sense that it must rest on reasonable grounds.¹⁴ The jurisdictional factor for an arrest without a warrant in terms of these provisions remains a suspicion. In *Mabona & Another v Minister of Law and Order and Others*¹⁵, the following was said in relation to how a reasonable suspicion is formed:

¹⁰ Section 40 (1)(b), 'A peace officer may without warrant arrest any person, whom he reasonably suspects of having committed an offence referred to in Schedule 1...'

¹¹ 1986 (2) SA 805 (A).

¹² At 818H-I; See also *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA).

¹³ Updated Index to Pleadings, para 8, page 7.

¹⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) para 818H.

¹⁵ 1988 (2) SA 654 (SE).

*'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 conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? 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, i.e. 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 upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'*¹⁶

[44] It is unrefuted that the Plaintiff was arrested for exceeding the speed limit for which no admission of guilt fine was determined. The First Defendant went into great detail through the evidence of Mr Oosthuizen to explain that the vehicle of the Plaintiff was indeed the vehicle that triggered the speed alert and how the image and information that was ultimately sent to the handheld device was projected.

[45] Mr Oosthuizen explained that the important part of the system is that all the cameras should be in time synchronisation; and in order to achieve that, two systems are used, one is the global positioning system, or GPS, and in that system, the camera makes use of satellites to get the correct time for the camera.

[46] Mr Oosthuizen, in response to a question posed to him by the court, explained that even in circumstances where the internal clock drifts out, the GPS does the correction regularly. The court's understanding of his explanation is that there are mechanisms in place, such as the Network Time Protocol ("NTP"), that ensure that the times on the devices are always synchronised, thus rendering it

¹⁶ para 658 E-H.

unlikely that the time indicated may be subject to compromise. Furthermore, Mr Oosthuizen explained that information is encrypted to ensure the accuracy of the ASOD calculation.

[47] Turning to the aspect of whether the vehicle model is correctly reflected. The Plaintiff testified that his vehicle model was a S63 Coupe and not C217 as depicted on the handheld device. Mr Oosthuizen explained that the NATO systems work with two aspects of the model the one is the model number and the other is the model description. This information is provided by the manufacturer of the vehicle. Mr Oosthuizen clarified that if a search on the Mercedes-Benz website is done for model C217, it will return a description of a Coupe. The system is ultimately designed to limit the information projected to the handheld device, as it only uses the model number and not the long description.

[48] Mr Oosthuizen explained that the cameras on the road are special cameras, called ANPR cameras, an acronym for “automatic number plate recognition”. He explained that when a vehicle passes the camera, it takes an image and an overview of the two images to match the plate with the vehicle. Further to that, additional technology is in place, called OCR, which is an acronym for “optical character recognition”, which captures the plate image and returns the text, which is the vehicle registration number on that plate image. Mr Oosthuizen described a further procedure that happens in the back office, which is to retrieve the vehicle’s details from the National Traffic Information System (“NATIS”), such as, *inter alia*, the make and colour of the vehicle; a vehicle category and the owner’s details. When the back-office system detects a violation of any of the regulations that it can check against, it will send that information to the traffic officer’s handheld in the area where the violation occurred.

[49] The explanation of how the system operates was not seriously challenged, if at all. Thus, in the absence of any evidence to gainsay the evidence of Mr Oosthuizen regarding the efficacy of the protocols and systems in place, this court accepts that the information relayed to the handheld device was accurate in

relation to the times captured by the respective cameras and that the vehicle reflected on the alert was indeed that of the Plaintiff.

[50] Mr Gertse's evidence suggests that he stopped the Plaintiff because of the alert he received that the vehicle exceeded the speed limit, which, on his evidence, raised a reasonable suspicion that an offence was committed. This raises the question as to whether the Plaintiff should have been arrested for an offence of exceeding the speed limit in terms of section 59 (4)(b) of the National Road Traffic Act.

Should the Plaintiff have been arrested?

[51] In dealing with this issue, four critical aspects require addressing. First, whether the offence for which the Plaintiff was arrested falls within the ambit of offences listed in Schedule 1. Second, whether the First Defendant could rely on the Offence Code Traffic Book¹⁷ to effect the arrest of the Plaintiff. Third, whether Mr Gertse had a discretion to arrest the Plaintiff. Fourth, the conflicting evidence regarding whether an exculpatory statement was made at the time of the arrest and the reasons for the Plaintiff's arrest.

Was a Schedule 1 offence committed?

[52] Section 40(1)(b) permits a peace officer to arrest any person without a warrant whom he or she reasonably suspects of having committed an offence referred to in Schedule 1 of the CPA other than the offence of escaping from lawful custody. This established legal principle enunciated in *Mabona* has been rearticulated by the Supreme Court of Appeal ("SCA") in *Biyela v Minister of Police ("Biyela")*¹⁸, that the arresting officer at the time of arrest must harbour a reasonable suspicion at the time of the arrest that a schedule 1 offence was committed.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting

¹⁷ Joint Bundle, Exhibit C, NRTA 93/96, NLTA 5/2009, NRTR 2000, 12 February 2014, page 58.

¹⁸ 2023 (1) SACR 235 (SCA) (1 April 2022) para 35.

officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.'

[53] There are similarities between the matter of *Egerer v Minister of Police and Others* (“*Egerer*”) ¹⁹ and the matter *in casu*. The facts were that the Plaintiff was arrested without a warrant of arrest by traffic officers at a traffic light at Range View Road, Benoni, for allegedly exceeding the speed limit. The Plaintiff asserted that the traffic officers did not comply with the guidelines as requested by the technical committee for speed prosecution, which constituted an inaccurate measurement of the speed the Plaintiff was travelling at. The Plaintiff contended that he was detained at the Brakpan Police Department without just cause. Similar to the matter *in casu*, the Plaintiff was released on warning to appear in court. The Plaintiff appeared several times in court, and the matter was ultimately withdrawn against him. He asserted that the police officers who effected the arrest and detention were acting under the scope and cause of employment. It was submitted that the Metro Police failed to take the necessary steps to ensure his release, had no justification to arrest and detain him, and passed unsavoury and derogatory remarks in the presence of the plaintiff’s family members, members of the first and second defendant, and members of the public.

[54] The court in *Egerer* was required to determine the lawfulness of his arrest and subsequent detention, as well as his claim for damages, more particularly whether the arrest without warrant for exceeding the speed limit was lawful under section 40(1)(b) of the CPA, and whether the subsequent detention violated the Plaintiff’s constitutional rights to liberty under section 12 of the Constitution. The court found his arrest and detention to be unlawful, for which he was awarded monetary compensation.

[55] It is trite that Schedule 1 of the CPA lists numerous offences for which an arrest may be effected without a warrant.²⁰ It is noteworthy that Sections 89(5) –

¹⁹ (1679/2018) ZAGPPHC 77 (1 February 2024).

²⁰ They are listed as follows: Treason, Sedition, Public violence, Murder, and Culpable homicide. Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, respectively. Sexual assault compelled sexual assault

(6) of the NRTA sets out that penalties are imposed relative to the seriousness of offences. For moderate offences such as exceeding speed limits, a court could impose a fine or imprisonment up to three years in terms of section 89(3) of the NRTA.²¹ It is, however, noteworthy that Schedule 1 includes ‘...*Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.*’ This provision, in my view, envisages the more serious type of offences for which there is no option of a fine, whereas section 89(3) of the NRTA provides for the payment of a fine or imprisonment for a period not exceeding three years. It is also trite that a magistrate’s court shall be competent to impose any penalty provided for in this Act in terms of section 89(7) of the NRTA.

[56] The ultimate imposition of the penalty will be in the discretion of the court. Therefore, a traffic officer in circumstances where there is no admission of guilt fine determined cannot usurp the function of a court, even in circumstances where the possibility exists that imprisonment without the option of a fine may be imposed.

or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively. Trafficking in persons as provided for in section 4 and involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013. [Item substituted by s. 48 of Act 7 of 2013 (wef 9 August 2015).] Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. Robbery. Kidnapping. Childstealing. Assault, when a dangerous wound is inflicted. Arson. Malicious injury to property. Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence. Theft, whether under the common law or a statutory provision. Receiving stolen property knowing it to have been stolen. Fraud. Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage. Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine. Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody. Offences referred to in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013.

²¹ ‘... Any person convicted of an offence in terms of subsection (1) read with section 3A(3), 17(4), 17(5), 18(5), 59(4), 61(2), 66(3) or 68(1), (2), (3), (4) or (6) shall be liable to a fine or to imprisonment for a period not exceeding three years.’

[57] Ordinarily, a speeding offence under the National Road Traffic Act²² (“NRTA”) is not an offence listed in Schedule 1 and thus does not meet this jurisdictional threshold. It follows that a peace officer, albeit a traffic officer or police officer, cannot arrest a suspect for driving at an excessive speed under the provisions of section 40(1)(b). Consequently, the arrest of the Plaintiff was unlawful on that ground alone as the issue of discretion, which will be discussed later in this judgment, only finds application once all the jurisdictional factors for an arrest without a warrant have been established under section 40(1)(b) of the CPA.

The Offence Code Book

[58] The First Defendant contended that Mr Gertse arrested the Plaintiff under the authorisation of the Code Book issued in terms of section 59(4)(b) of the NRTA. It is pellucid from Mr Oosthuizen’s evidence that the system will indicate whether an admission of guilt fine could be sanctioned. In a scenario such as the present, both Mr Oosthuizen and Mr Gertse interpret this to mean that the driver caught speeding, where no admission of guilt is prescribed, must be arrested. Of seminal importance is the fact that the system does not indicate arrest; it simply states “no admission of guilt,” as is evident from the Code Book.

[59] The onus remains on the First Defendant to justify the arrest. Section 39 of the CPA prescribes the manner and effect of an arrest.²³ It is trite that an arrest can only be effected in terms of the CPA. In considering the factual matrix of the matter *in casu*, it is uncontroverted that the Plaintiff’s vehicle was flagged as having exceeded the speed limit between Leeu Gamka and Dwyka. There is no evidence to suggest that the Plaintiff was still speeding at the time when he was pulled over by Mr Gertse. Thus, the offence was not committed in the presence of Mr Gertse. An

²² Act 93 of 1996.

²³ Section 39 of the CPA:

‘Manner and effect of arrest.

(1) *An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body;*

(2) *The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant; and*

(3) *The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.’*

arrest without a warrant would only be lawful if the conduct amounts to a schedule 1 offence, such as reckless or negligent driving under section 63 of the NRTA.

[60] Of seminal importance is the fact that there is no other statute in South African law that authorises an arrest of a suspect. The NRTA does not make provision or confer powers to the traffic officers or police officers to arrest, and simply sets out the law which, if transgressed, would trigger the provisions of section 39 or 40(1)(b) of the CPA as previously elucidated. It therefore follows that the Code Book does not authorise an arrest which is supported by the evidence of Mr Oosthuizen. It merely records that for an offence above 160 km/h, there is no admission of guilt. To reiterate, it does not stipulate that an offender is to be arrested. “No admission of guilt” is not the same as nor equivalent to “arrest”. I am therefore in agreement with the contention by Counsel for the Plaintiff that to the extent that Mr Gertse believed that the Code Book authorised him to arrest the Plaintiff, he was wrong.

[61] It was mooted that Mr Gertse acted outside the law, which on its own is unlawful. Section 1(c) of the Constitution declares that South Africa is founded on the supremacy of the Constitution and the rule of law. The Constitutional Court has consistently held that any exercise of public power must be authorised by law and must comply with constitutional standards of rationality, lawfulness, and procedural fairness. It means that an official performing his or her duties in the capacity and scope of their authority must act within legal bounds (*intra vires*). Arbitrariness in official decisions, in the exercise of power, or any function performed beyond that conferred on the official is unlawful and invalid. This is predicated on the doctrine of legality, which prescribes that power should have a source in law, and is applicable whenever public power is exercised.²⁴

[62] Hiemstra²⁵ states that:

²⁴ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), established that legality is an incident of the rule of law and that public power is legitimate only where lawfully sourced; See also *AAA Inv (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) 373 A.

²⁵ Criminal Procedure Commentary: Hiemstra referred to *Olivier v Minister of Safety and Security and Another* 2008 (2) SACR 387 (W) where Horn J reviewed the authorities on arrest without a warrant.

*'[a]lthough arrest is a necessary weapon in the fight against crime, it is an infringement of personal liberty and often also of human dignity. The courts will carefully scrutinise whether the infringement is legally in order (Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A) at 38C). At such an infringement of personal freedoms and rights it is important to bear in mind that one is here concerned with the exercise of state power which, according to the principle of legality, has its source in the Constitution'*²⁶

[63] Thus, any act performed by Mr Gertse without a lawful source could be interpreted as contravening the rule of law and the supremacy of the Constitution, thus rendering the arrest of the Plaintiff unlawful.

Lawfulness of the arrest

[64] In terms of section 39(1) of the CPA²⁷ an arrest is effected either by touching the body of the person or forcibly confining their body, unless the person submits to custody voluntarily. Therefore, physical restraint is not necessary where the person complies with an official directive that restricts their liberty under the officer's control.

[65] Mr Gertse testified that that was indeed what he did; he placed his hand on the driver's shoulder and told him that he was arresting him and explained his rights to him in English, and the driver understood it. He then asked the Plaintiff to accompany him to the police station. Although the Plaintiff was allowed to drive his own vehicle to the police station, he regarded himself to be under arrest from the time he was asked to accompany the arresting officer to the police station, as, according to him, he had to obey the instruction, whether it was lawful or unlawful.

²⁶ (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) pars [56]– [59] ; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para [148] ; and *Pharmaceutical Manufacturers Association of South Africa and Another in re: Ex parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC) par [20]. See also Plasket 'Controlling the discretion to arrest without warrant through the Constitution' 1998 2 SACJ 173).

²⁷ **39. Manner and effect of arrest.**

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.'

[66] On a conspectus of the evidence, based on the First Defendant's own witness's testimonies, I find that Mr Gertse had no authority to arrest the Plaintiff as the only lawful source upon which he could rely would have been section 40(1)(b) of the CPA.

Discretion to arrest

[67] Mr Gertse claimed that he had no discretion and was obliged to arrest the Plaintiff because no admission of guilt was sanctioned. This cannot be correct as the SCA in the matter of *Biyela*²⁸ established the following useful guidance:

'[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.'

[68] It has been repeatedly held that an arrest ought to be used as a measure of last resort, which must be considered together with the object of arrest as succinctly enunciated in the case of *MacDonald v Khumalo*²⁹ where Graham JP stated that:

'The object of an arrest of an accused person is to ensure his attendance in Court to answer to the charge and not to "punish/intimidate" him for an offence he has not been convicted.'

[69] It is trite that there are numerous methods of securing the attendance of an accused person in court for purposes of trial, which include arrest, summons, written notice, warning, and indictment in accordance with the provisions of section 38 of the CPA.

²⁸ para 36.

²⁹ 1927 EDL 293 at 301.

[70] If regard is had to the provisions of section 54 of the CPA, which deals with a summons as a method of securing an accused person's attendance in court, it is evident that this method was available:

'[w]here the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge'. (my emphasis)

[71] A written notice to appear in terms of section 56 of the CPA makes provision for an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court. In light of the fact that no admission of guilt could be fixed for the offence with which the Plaintiff was charged *in casu*, this method of securing his attendance could not have been considered. It is, however, my view that by process of reasoning, it does not preclude a traffic officer from considering other alternative means of securing the Plaintiff's attendance at court, as an arrest must be a measure of last resort.

[72] An arrest is a drastic measure that invades a personal liberty, and it must be justifiable according to the demands of the Bill of Rights.³⁰ This constitutionally enshrined right was restated by Bertelsmann J in *Louw v Minister of Safety and Security*.³¹ Therefore, to say that no discretion was available to Mr Gertse conflicts with the entrenched rights guaranteed by the Constitution and the legal authorities, which authoritatively have held that an arresting officer is not obliged to

³⁰ Section 12 of Act 108 of 1996.

³¹ 2006 (2) SACR 178(T) at p 186a-187e, '*I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith. An arrest, being as drastic an invasion of personal liberty as it is, must be justifiable according to the demands of the Bill of Rights...[P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.*'

arrest because he or she has discretion. It does not follow that once the jurisdictional factors are present, the arresting officer must arrest, as he is not obliged to do so.³² He has the discretion whether or not to exercise the power to arrest.³³

[73] Mr Gertse testified that he effected the arrest of the Plaintiff. This evidence does not accord with the Plaintiff's pleaded case that he was arrested by traffic officer Jermaine Evandor Abrahams. To my mind, the radical infringement of the Plaintiff's right to liberty was neither necessary nor justified, whether the arrest was effected by Mr Gertse or traffic officer Abrahams, as the arrest is common cause.³⁴ The death knell for the First Defendant remains that the offence of exceeding the speed limit is not a Schedule 1 offence and, therefore, the Plaintiff ought not to have been arrested.

[74] It is plain and clear that traffic officers do not have the powers to determine police bail in terms of section 59 of the CPA and/or to release a person on warning in terms of section 72 of the CPA. It is trite that the only manner in which an arrested person can be lawfully dealt with is by way of section 50 of the CPA. By implication, the traffic officer is required to bring the person to the police station to be dealt with further. Mr Gertse articulated that this is what he did. He opened a docket for registration. The evidence on record in so far as the involvement of the member of the Second Defendant is concerned, confirmed that the Plaintiff was handed over

³² *Minister of Safety and Security v Sekhotho* 2011 (5) SA 367 SCA at 379 D-E:

'While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court... The purpose of the arrest is no more than to bring the suspect before the court... so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court... Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime- and those listed in Schedule 1 are serious, not only because the Legislature thought so- a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest...'

³³ *Duncan* (supra) para 818 H-I; see also *Sekhoto* para 6; *Diljan v Minister of Police* (746/2021) [2022] ZASCA 103 (24 June 2022) para 7:

'...If these factors are established, the arrestor becomes vested with a discretion as to how best to secure the attendance of the suspect to face the charge. The peace officer may warn the suspect to appear in court, may summon the suspect or may arrest the suspect...'

³⁴ *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC).

to Constable Cakwe and processed. The only person with the necessary rank and authority then ultimately released the Plaintiff on a section 72 Warning.

[75] This all appears to be in alignment with the procedure outlined in the Standing Orders. Since members of the South African Police Services do not hold the power to refuse to accept a person in terms of section 50 of the CPA if an offence is committed, such refusal is premised on the fact that the person had to have been lawfully arrested. In fact, the arresting officer is required to justify an arrest.

[76] This court is ever mindful that the arrest and detention of the Plaintiff was admitted and that this court is called upon to determine the lawfulness thereof. I am therefore of the view that the reasonable suspicion that may have existed as at the time of the Plaintiff's arrest, based on the First Defendant's version, cannot be sustained, as on the First Defendant's own version, the jurisdictional factors have not been proven for reasons already articulated in this judgment. I am enjoined to apply an objective test to ascertain whether the suspicion held by Mr Gertse was reasonable. Regardless of the inconsistencies in the Plaintiff's evidence which will be dealt with at some length later in this judgment, I stand by my earlier finding that all the jurisdictional factors necessary for an arrest without a warrant were not met; more particularly that the offence for which the Plaintiff was arrested was not a Schedule 1 offence and that Mr Gertse failed to exercise his discretion to arrest the Plaintiff. Consequently, I am satisfied that there was no lawful justification for his initial deprivation of liberty absent a warrant of arrest, which renders his arrest unlawful.

The Detention

[77] The lawfulness of the Plaintiff's detention was challenged. It is manifest from the evidence that the Second Defendant was only involved in the Plaintiff's subsequent detention. Thus, the only issue relevant for consideration with reference to claim A is the Second Defendant's involvement in the Plaintiff's subsequent detention. In terms of the Plaintiff's pleaded case, he considered himself to be detained at 17h00. In considering the Plaintiff's pleadings, it is apparent that no

factual allegations in relation to the unlawfulness of his detention are pleaded. It is, however, evident that the Plaintiff's case is grounded on the basis that, because his arrest was unlawful, his subsequent detention is equally unlawful. It, therefore, behoves this court to consider the evidence as a whole and the pleadings pertaining to the Plaintiff's detention.

[78] The Second Defendant, in its amended plea, denied that the Plaintiff was unlawfully detained and put the Plaintiff to proof thereof. It seems to me that the Second Defendant based its reasoning on the onus that would rest on a Plaintiff to prove the elements under the *actio iniuriarum* for unlawful arrest and detention as set out in *De Klerk v Minister of Police*.³⁵ Namely that:

- (a) his liberty was interfered with;
- (b) this interference occurred intentionally;
- (c) the deprivation of liberty was wrongful, with the onus falling on the Defendant to show why it is not; and
- (d) the conduct of the Defendant must have caused, both legally and factually, the harm for which compensation is sought.

[79] This is a misinterpretation of the law, as there is no duty on the Plaintiff in circumstances where the Second Defendant admitted the arrest and detention but denied that the detention in so far as its members' involvement goes, was unlawful. The law in this regard is clear, that the onus to justify the Plaintiff's detention rested on the Second Defendant in circumstances where the Defendant pleaded that the detention was lawful

[80] The evidence on record is that the Plaintiff was handed over to Constable Cakwe by Mr Gertse at the police station. It is not in dispute that the members of the South African Police Services acted within the course and scope of their employment with the Second Defendant. However, the Second Defendant, in its plea, denied that the subsequent detention of the Plaintiff was unlawful. The Second

³⁵ (CCT 95/18) [2019] ZACC 32.

Defendant alleged that the Plaintiff was detained on the lawful instructions of the arresting officer, Mr Gertse.

[81] Constable Cakwe testified that he had no discretion as to the detention of the Plaintiff, and neither did he hold the requisite rank to issue a warning or police bail for the Plaintiff, who was under arrest. His understanding that there is no further discretion, or duty to engage with the traffic officer at that stage as per the normal operating procedures, is, to my mind, a dogmatic approach, predicated on an acceptance that the Plaintiff was lawfully arrested. The procedure, as described by Constable Cakwe, cannot be a mere formality. The fact that every effort is made to process and release an arrested person does not, in my view, overcome the initial fundamental enquiry as to the lawfulness of the arrest.

[82] What is further evident is that Constable Sentane also seemed to just follow the formalities of processing the Plaintiff through the relevant official registers. It is noteworthy that he had no independent recollection of doing so. Likewise, the procedure as described by him to inform the standby detective to attend to the release of an arrested person as soon as possible does not detract from the obligation of ensuring that the arrested person has been lawfully arrested.

[83] In considering Warrant Officer Lukas's involvement as the standby detective who testified that when he arrived at the police station, he immediately processed the Plaintiff and released him, according to the times reflected in the registers, it is also apparent that he, too, held the view that he did not have discretion. Even if he was the only police official holding the requisite rank who was permitted to process and/or release the Plaintiff, he was nonetheless enjoined to exercise discretion.

[84] Assuming, *arguendo*, that Constable Cakwe detained the Plaintiff on the lawful instructions of Mr Gertse, the police officer would still be duty-bound to exercise a discretion whether or not to detain. This is because section 12(1) of the Constitution³⁶

³⁶ The Constitution of the Republic of South Africa, Act 106 of 1996.

entrenches a person's right to freedom and security and states that '[e]veryone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause'. It is therefore implicit that an arrest and detention encroach on a person's right to freedom. In *Zealand v Minister of Justice and Constitutional Development and Another* ³⁷ ("*Zealand*"), the court held that section 12(1)(a) of the Constitution does not only require the procedure to be fair, but it must be substantively fair on just cause with acceptable reasons. It follows that if the detention does not meet these requirements, it becomes unlawful and attracts liability on the Minister of Police under the common law principle of causation on the premise that the breach of that constitutional right to freedom was predicated by the unlawful arrest.³⁸

[85] This matter *in casu* involves 2 distinct branches of law enforcement with their own operating procedures regulated to work in tandem with each other. It is apparent from the evidence and the contestations of the Second Defendant that members of the South African Police Services do not have the power to refuse to accept a person who has been arrested by a traffic officer, which is presumably predicated on Standing Orders issued relating to the procedure to be employed once someone has been arrested for an offence for which no admission of guilt fine has been set. Although it was argued that the conduct of the First Defendant, or lack thereof, cannot and should not be used to judge the Second Defendant's involvement in the subsequent detention of the Plaintiff, it is my view that the procedures delineated in the Standing Orders cannot be interpreted with rigidity and require two distinct considerations:

- (a) Whether an offence has been committed and
- (b) Whether the person has been lawfully arrested.

[86] Consequently, a member of the South African Police Services can refuse to accept a person in terms of section 50 of the CPA if he or she is satisfied that the person did not commit the offence and that the arrest is unlawful. Even though the Plaintiff's Particulars of Claim lacks particularity in so far as facts surrounding the

³⁷ 2008 (4) SA 458 (CC); 2008 (2) SACR 1 (CC) at para 43.

³⁸ See also *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C).

lawfulness of his detention are concerned, it is clear that his cause of action is rooted in the trite legal principle that ‘...in most cases the lawfulness of the arrest and subsequent detention are intertwined and that the lawfulness of the detention ultimately depends on the lawfulness of the arrest.’³⁹ It is trite that even in circumstances where an arrest is lawful, a police officer must still apply his or her mind to the arrestee’s detention.⁴⁰ This includes considering whether detention is necessary at all.⁴¹ Therefore, a failure to exercise this discretion, as in the case of an arrest, renders the detention unlawful.⁴² These fundamental applicable legal principles were restated in the matter of *Diljan v Minister of Police (“Diljan”)*,⁴³ where the SCA held that:

[9] ...Once the jurisdictional facts are established, the peace officer has the discretion [of] whether or not to arrest the suspect. However, if the suspect is arrested, a peace officer is vested with a further discretion whether to detain the arrestee or warn him or her to attend court. The arrest and detention of the suspect is but one of the means of securing the suspect’s appearance in court.’

[87] Thus, the Second Defendant’s argument that the members of the South African Police Services acted lawfully and detained the Plaintiff purely for purposes of processing him, whereafter he was released, on the same day, on a warning and was warned to appear at a court on a later date cannot be sustained. This is because the consideration is not that the Plaintiff was detained for a protracted period, but rather whether he had to be detained at all.

[88] The Second Defendant did not lead evidence to justify the Plaintiff’s detention, more particularly, whether Constable Cakwe exercised a discretion to detain the Plaintiff. He simply relied on the instructions of Mr Gertse without applying his mind to whether the Plaintiff could be lawfully arrested and subsequently detained for an offence that is not a schedule 1 offence without a warrant of arrest. In any event, the Second Defendant’s witnesses do not have an independent recollection of what

³⁹ *Minister of Safety and Security v Sekhoto & Another* 2010 (1) SACR 388 para 18.

⁴⁰ See *Minister of Police v Fourie & another* (unreported, ECG case no CA59/2020, 9 March 2021) at para 37.

⁴¹ See *Mvu v Minister of Safety and Security & another* 2009 (2) SACR 291 (GSJ) at para 10.

⁴² Du Toit Commentary, Criminal Procedure Act, 2023, at RS 69, 2022 ch5-p44A.

⁴³ (746/2021) [2022] ZASCA 103 (24 June 2022).

transpired on the day in question and other than indicating that they had no power to refuse to accept the Plaintiff, on their own evidence, no discretion was exercised insofar as it related to the Plaintiff's detention. The Second Defendant's witnesses were also under the mistaken belief that once an arrest is made by a traffic officer, and the traffic officer opens a docket, they are not permitted to interfere and are merely meant to detain the arrested person until the earliest possible release time. This is a misapprehension of the Standing Orders and the law in general in so far as warrantless arrests are concerned, as it was incumbent on the members of the Second Defendant to exercise a discretion whether or not to detain for reasons articulated earlier in this judgment.

[89] Therefore, in keeping with the legal principle expressed in *Diljan*, Constable Cakwe, and Constable Sentane, as well as the standby detective, Warrant Officer Lukas, who has been a detective for 17 years, had an obligation to exercise discretion whether to detain the Plaintiff or not. Consequently, on a conspectus of the evidence, I am not persuaded that members of the Second Defendant exercised a discretion whether to detain the Plaintiff. Ultimately, it follows, axiomatically, that the Plaintiff's detention was unlawful because his arrest was unlawful.

[90] I deem it necessary to mention that although various factual disputes were identified, which will be discussed later in this judgment, my findings on the unlawful arrest and detention are predicated on the applicable legal principles relating to the jurisdictional facts required for a warrantless arrest, as well as the failure by members of the Defendants to exercise their discretion to arrest and detain the Plaintiff, bearing in mind that the arrest and detention was admitted by the Defendants and that they bore the onus to prove the lawfulness thereof.

Ad Claim B

Applicable legal principles

[91] It is trite that a claim for damages caused by malicious prosecution is the *actio iniuriarum*. In order to succeed with his claim for malicious prosecution, the

onus rests on the Plaintiff to prove all the jurisdictional facts of *iniuria* on a balance of probabilities.⁴⁴ These jurisdictional facts include:

- (a) that the Defendant(s) set the law in motion;
- (b) that the Defendant(s) acted without reasonable and probable cause;
- (c) that the Defendant(s) acted with “*malice*” or *animo iniuriandi*; and
- (d) that the prosecution(s) failed.⁴⁵

Special Plea of Non-Joinder

[92] The Second Defendant raised a special plea of non-joinder of the National Prosecuting Authority (“NPA”) and/or the Director of Public Prosecutions: Western Cape (“DPP”) because they have exclusive purview over any and all prosecutions and/or criminal proceedings, including the decision to prosecute and/or institute and initiate proceedings. As such, it was asserted that the NPA and/or DPP has a direct and substantial interest in the relief sought by the Plaintiff.

[93] The Plaintiff opposes the special plea on the basis that the First Defendant set the law in motion, arguing that the Public Prosecutor did not set the law in motion without probable cause and, in fact, declined to prosecute. In addition, the Plaintiff submitted that he did not institute an action against the National Prosecuting Authority because there was no malice on its part.

[94] The First Defendant submitted that based on the content of the police docket, the prosecutor had facts at her/his disposal from which a reasonable prosecutor in her/his position concluded that the Plaintiff committed an offence on which he was charged. In addition, it was argued that if there was no such evidence, it was the prosecutor who had instituted the prosecution without reasonable and probable cause and as such ought to have been joined and/or cited as a party to the proceedings. Moreover, the First Defendant highlighted that the prosecutor who decided to prosecute the Plaintiff did not testify during the trial.

⁴⁴ *Rudolph & Others v Minister of Safety & Security* 2009 (5) SA 94 (SCA).

⁴⁵ See also *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47(SCA), 2009 (2) SACR 585 (SCA); *Minister of Safety & Security v Lincoln* 2020 (2) SACR 262 (SCA).

[95] In augmentation of this contention, the First Defendant referred the court to the matter of *Clarke and Others v the Minister of Police and Others* (“*Clarke*”)⁴⁶ where the court rearticulated the legal position in relation to malicious prosecution and, in particular, the duties of a prosecutor when deciding to institute prosecution, quoting from the matter of *Boshoff v Minister of Safety & Security & Another*⁴⁷:

‘In Boshoff v Minister of Safety & Security & another... the court specifically set out the duties of the prosecutor when deciding to institute prosecution. In short: the prosecuting authority must observe the policy directives in the prosecution policy determined by the National Director of Public Prosecutions (‘NDPP’) in deciding whether or not to prosecute an accused.’

[96] The court in *Clarke* recognised that it is the duty of a prosecutor, when deciding whether or not to prosecute, to take into account, *inter alia*, the strength of the state's case, the admissibility of the evidence and availability of the state witnesses, the strength of the defence's case, the interests of the community, the seriousness of the offence and the circumstances of the offender.⁴⁸ The court also emphasised that once the NPA or a public prosecutor independently evaluates the docket and exercises a discretion to prosecute, that discretionary act constitutes a new and independent decision (*novus actus interveniens*) that breaks the chain of causation between the police conduct and the ensuing prosecution. The court referenced the established position in *Minister of Justice and Constitutional Development v Moleko* (“*Moleko*”)⁴⁹ and subsequent case law, such as *Woji v Minister of Police* (“*Woji*”)⁵⁰, where it was held that the mere act of arresting or charging does not, on its own, amount to initiating a prosecution. The causal responsibility for the prosecution itself lies with the prosecutor acting under the authority of the NDPP.

[97] Although the court in *Clarke* ultimately found that the prosecutor's independent evaluation broke the chain of causation between the police's

⁴⁶ (120/2016) [2023] ZANHC 56 (22 September 2023), para 16, page 7.

⁴⁷ [2005] JOL 15310 (W) para 18.

⁴⁸ *Ibid* para 18.

⁴⁹ 2009 (2) SACR 585 (SCA).

⁵⁰ 2014 (1) SACR 409 (SCA).

investigative acts and the subsequent prosecution, each matter is to be decided on its own merits, as stated by the Constitutional Court in *De Klerk* ⁵¹

‘...The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically to determine liability.’

[98] This matter is distinguishable from the seminal judgment of *De Klerk*, which dealt with the principles of legal causation and, therefore, in keeping with the sentiment expressed, I am enjoined to consider the unique merits of this case as the concept of legal causation has been shown to be flexible in its application.

[99] When considering joinder, the relief sought against a party plays a central role.⁵² This court is mindful that the Minister of Police and the NDPP are distinct legal entities with separate constitutional mandates. To my mind, unless the Plaintiff can show that the traffic officer and/or police supplied false information, withheld exculpatory evidence, or acted in collaboration with the prosecutor for an improper purpose, the Minister of Police cannot be held vicariously liable for the prosecutor’s decision.⁵³ Thus, in circumstances where the prosecutor decides to continue with prosecution, the causal chain may involve both government actors.

[100] In considering the merits of the matter *in casu*, no adverse order is being sought against the NPA or the NDPP by the Plaintiff. It is settled law that joinder is required if a party has a “direct and substantial interest” in the subject matter of the litigation. This legal interest is defined by whether the party may be

⁵¹ At para 63.

⁵² *Pule and Another v Minister of Police* (1575/2023) [2025] ZANWHC 104 (20 June 2025) at para 12: ‘The question of whether all necessary parties have been joined does not depend on the subject matter of the suit, but rather on how, and to what extent the court’s order may affect the interests of third parties. The test is whether a party has a direct and substantial interest in the subject matter of the action, meaning a legal interest, that may be prejudiced by the court’s judgment.’

⁵³ See *Minister of Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) referenced in *Clarke* at para 20, page 8: ‘With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, namely to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.’

prejudiced by the court's judgment. Although the special plea was raised by the Second Defendant, nothing precluded the Second Defendant from invoking Third Party Procedures in terms of Rule 13 of the Uniform Rules. There is no obligation on the Plaintiff to join a particular party against whom no relief is being sought.

[101] It is an accepted legal principle that liability depends on who had control of the conduct complained of.⁵⁴ The Plaintiff's case alleges no malice or negligence against the prosecutor, and neither does he challenge the prosecutor's decision to proceed with prosecution. The Plaintiff asserted in his amended Particulars of Claim that as a result of the charge, he was caused to appear at Laingsburg Magistrate's Court on 5 June 2019. As a consequence, he had to leave his practice at a financial loss to him, which included the loss of income for the day, legal costs, travelling and accommodation. It is the contestation of the Plaintiff that the employees of the Defendants, either individually, alternatively jointly and severally, participated in the course of the prosecution; set the law in motion unreasonably and without any valid and justifiable reason and/or probable cause.

[102] However, for the purposes of considering the special plea of non-joinder, there is nothing on record to suggest that the First and/or Second Defendant(s) either individually or jointly misled the prosecutor. There is also no evidence on record to suggest that the "causal nexus" for the prosecution was broken by the prosecutor's independent exercise of discretion. Consequently, the special plea of non-joinder cannot be sustained as the prosecutor's acts are not central to the Plaintiff's claim and fall to be dismissed.

[103] Even if I am wrong, and there was a break in the causal chain, justifying the joinder of the NPA and/or the NDPP, the Plaintiff would have needed to prove *animus injuriandi*, and not malice, on the part of the NPA and/or the NDPP before they or either of them can be liable for malicious prosecution. Thus, the likelihood on the probabilities that the Plaintiff would have been able to prove all the elements for malicious prosecution, on the facts of this matter, appear to be

⁵⁴ *Minister of Police v Miya* 2025 (3) SA 130 (SCA).

inconclusive as I can find no factual basis to conclude that it was the prosecutor who had instituted the prosecution without reasonable and probable cause and as such ought to have been joined and/or cited as a party to the proceedings. In any event, the prosecutor decided to withdraw the charges against the Plaintiff, meaning that the prosecution failed.

Deviation from the pleadings

[104] The Second Defendant argued that the Plaintiff's pleaded case with reference to malicious prosecution is different to the Plaintiff's argued case and referred the court to the matter of *Minister of Safety & Security v Slabbert* ("*Slabbert*")⁵⁵. The Plaintiff was criticised by the Second Defendant for having deviated from his pleaded case, in particular with specific reference to the Second Defendant, intimating that members of the South African Police Services had a hand in performing a search on his vehicle at the time of arrest and contributing to the "*chaos*" and making a scene.

[105] It is trite law that the purpose of pleadings is to define the issues. It is accepted in our law that it is impermissible for a Plaintiff to plead a particular case and seek to establish a different case at the trial, which legal principle was aptly enunciated by the SCA in the matter of the *Slabbert* (*supra*) as follows:

'[11] The purpose of the pleadings is to define the issues for the other party and the Court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

[106] It is a fundamental legal principle that a litigant is required to plead material facts that are necessary to support his right to judgment. This is because a Defendant must know the case he needs to meet and plead to it. Whilst the matter of *Trope v South African Reserve Bank*⁵⁶, which was cited with approval by Heher J in the decision of *Jowell v Bramwell*,⁵⁷ primarily deals with the general principles

⁵⁵ [2010] 2 All SA 474 (SCA).

⁵⁶ 192 (3) SA 208(T) at 211.

⁵⁷ *Jones v Bramwell* 1998 (1) SA 836 (W).

regarding exceptions; it is my view that the principles relating to pleadings in general are appropriately crystallised as follows:

'(a) minor blemishes are irrelevant;

(b) pleadings must be read as a whole; no paragraph can be read in isolation;

*(c) a distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;*

(d) only facts need be pleaded; conclusions of law need not be pleaded;

(e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them. implied allegations and the pleading must be so read: cf Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 37 1 (D) at 377, 3798. 3790- -H.' at 9021 – 9030'

[107] The scene in the parking lot, as described by both the Plaintiff and Mr Nkala, which is a factual dispute, was not pleaded, which raises the question whether all the *facta probanda* were pleaded or whether it should have been regarded as matters for evidence. It will be apposite to consider whether the incident in the parking lot is to be regarded as primary allegations that the Plaintiff should have made, or whether it is secondary because the Plaintiff sought to rely on it to support his primary factual allegations.

[108] The Plaintiff seeks no relief for the unlawful search of his vehicle. However, it is apparent that the alleged manner in which it was executed not only drew the attention of the public, but that, on the Plaintiff's version, his arrest for the speeding violation was predicated on a remark he allegedly made. The Plaintiff asserted that his exculpatory utterances were disregarded.

[109] This appears to be the malice alluded to by the Plaintiff, presumably that if it had not been for those utterances, he would not have been arrested. In considering the pleadings as they stand, more particularly in so far as they relate to the claim of malicious prosecution, not much is asserted, other than the fact that he had to appear in court because the Defendants either individually, alternatively jointly

and severally, participated in the course of the prosecution, the consequence of which caused him to incur financial loss as pleaded.

[110] It is however trite that the court is enjoined to consider the pleadings as a whole, which includes the proverbial elephant in the room pertaining to the conflicting evidence and inconsistencies in the Plaintiff's case. It is settled law that in instances where there are two diametrically opposed versions, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false or mistaken. In this regard, the court is to be satisfied that the version of the litigant upon whom the onus rests is the true version and that absolute reliance can be placed upon the story as told by the party on whom the onus rests.⁵⁸

[111] The correct approach to be adopted when dealing with mutually destructive versions was set out in *National Employers General Insurance Company v Jagers*,⁵⁹ which was quoted with approval in *Stellenbosch Farmer's Winery Group LTD and another v Martell et Cie and Others* ("*Stellenbosch Farmer's Winery*")⁶⁰.

⁵⁸ *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.

⁵⁹ 1984 (4) SA 437 (E) at 440E-G, 'Where there are two mutually destructive versions the party can only succeed if he satisfies the court on a balance of probabilities that his version is true and accurate and therefore acceptable, and the other version advanced is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case, and if the balance of probabilities favours the plaintiff, then the court will accept his version as probably true.' 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as –

- (i) the witnesses; candour and demeanour in the witness-box,
- (ii) his bias, latent and blatant,
- (iii) internal contradictions in his evidence,
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,
- (v) the probability or improbability of particular aspects of his version,
- (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on

- (i) the opportunities he had to experience or observe the event in question; and
- (ii) the quality, integrity and independence of his recall thereof.

The test, as distilled in *Stellenbosch Farmer's Winery*, requires the court to make findings on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities. Reliable evidence should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities. The considerations articulated in this matter have been quoted with approval in a plethora of subsequent judicial authorities.⁶¹ It is therefore incumbent on this court to consider the aforementioned principles in evaluating the evidence.

Evaluation of evidence

Time of arrest

[112] Since the First Defendant admitted the Plaintiff's arrest, there are varying versions in relation to when and where the Plaintiff was arrested. In summary, the Plaintiff's version is that he arrived in Laingsburg at 14h00 and was stopped when he was about to exit Laingsburg and asked to accompany Mr Gertse to the police station. He went to the police station with Mr Gertse, and at approximately 15h00, he was taken into the police station by traffic officers after the incident that unfolded in the parking lot.

[113] Mr Gertse, on the other hand, testified that he came on duty at 14h00 on the day of the Plaintiff's arrest. He testified that he stopped the Plaintiff at 17h50, showed him the photo on the handheld device and explained to him why he was stopped. Mr Gertse remained steadfast that he arrested the Plaintiff at 18h00 on the main street and not in the parking lot of the police station, which he noted in his statement and made an entry in the Occurrence Book at the traffic office. According to Mr Gertse, he handed the Plaintiff over to Mr Cakwe at 18h10.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the later. But when all factors are equipoised probabilities prevail.

⁶¹ *Sanlam Beperk v Biddulph* 2004 (5) SA 586 (SCA) para 5 and 20; *De Beer v Road Accident Fund* ZAGPJHC 124 (28 March 2019). *Ntsele v Road Accident Fund* (2017) ZAGPHC (1 March 2017) para13-14.

[114] Mr Nkala's account was that the Plaintiff was behind the counter in leg chains at around 15h00. However, the Cell Register of the Second Defendant indicated that the Plaintiff was booked into the cell by 18h00 and not at 15h00 as he testified.

[115] The "Alert – Evidence"⁶² on record, as clarified by Mr Oosthuizen, is that the vehicle passed the first camera in Leeu Gamka at 16h19. The second photo was captured at Dwyka when the vehicle was at Dwyka at 16h39. He opined that the time that Mr Gertse mentioned is more consistent with how the system operates. He reasoned that if regard is had to the distance from Dwyka to Laingsburg being approximately 70 kilometres, a vehicle, travelling at normal speed, namely at 120 km/h, would have taken 35 minutes to reach Laingsburg. Therefore, by way of calculating that time and adding it to the time of 16h39 as depicted in the photo, the vehicle would have arrived in Laingsburg at around 17h14. Mr Oosthuizen, after being apprised of the Plaintiff's version, opined that Mr Gertse's version was more consistent with the time depicted on the photographs. There is nothing on record to gainsay this evidence.

[116] It is noteworthy that the Plaintiff's amended particulars of claim⁶³, and his written representations,⁶⁴ asserted that he was detained and remained in detention from 17h00 until 23h00. The Plaintiff's *viva voce* evidence does not align with his pleaded case. The departure of the Plaintiff's pleaded case further extends to the atmosphere surrounding the arrest, as it appears there were 2 instances of arrest on the Plaintiff's version. One in the main road and the other is in the parking lot. The Plaintiff pleaded that:

'In full view of the Plaintiff's colleagues, friends and members of the public, on 28th March 2019 and at the main street in Laingsburg, the Plaintiff was unlawfully and wrongfully arrested ("the arrest") by the First Defendant's traffic officers and thereafter detained by the members of the South African Police Services...purportedly on a charge of exceeding a speed limit and thereafter

⁶² Joint Bundle, C, page 21.

⁶³ Pleadings bundle, para 9, page 8.

⁶⁴ Joint Bundle C, para 10, page 42.

*detained ("the detention") at the Laingsburg Police Station within the jurisdiction of this Court...*⁶⁵

[117] It is apparent that the Plaintiff conflates the two instances of arrest in the Particulars of Claim. On his version, largely corroborated by Mr Gertse, the first instance of arrest in the main road did not attract the attention of his colleagues, friends and members of the public as per his pleadings. In fact, when he arrived at the parking lot of the police station, he was surprised to see his colleagues and friends there. Absent the Plaintiff's pleaded case, is the incident that played itself out in the parking lot, which, on his oral testimony and that of Mr Nkala, attracted the attention of onlookers. Their version, which is refuted by both Defendants, suggests that the Plaintiff's arrest on a charge of exceeding the speed limit followed from utterances that were allegedly made by the Plaintiff.

[118] It is apposite to mention that Mr Nkala testified that the Plaintiff was arrested at around 15h00 and released just before 12 pm. His evidence differs markedly from the Plaintiff's pleaded case that he was detained from 17h00 until 23h00. Thus, Mr Nkala's evidence, in my view, is not sufficient to dispute the time of the alleged contravention as depicted on the alert photo. Thus, by way of logic and reasoning the Plaintiff could not have been arrested for speeding before the times reflected on the alert photo.

[119] It must also be borne in mind that Mr Nkala testified that Mr Mbhele's vehicle was also escorted by traffic vehicles just after the Plaintiff left to drop Rasta at the taxi rank, which was approximately 14h00. On Mr Nkala's version, the rest of the convoy followed the procession to the parking lot at the police station. It also came to light that Mr Ngqumshe's vehicle also popped up on the handheld device, but he was not arrested. The inconsistencies in the Plaintiff's case are significant. The Plaintiff's pleaded case, depicting the time of 17h00 as the time when he was allegedly detained, brings the timing of his arrest closer to the time that Mr Gertse stated he stopped the Plaintiff. Mr Gertse's evidence is that he opened a docket at the police station and he arrested the Plaintiff at 18h00.

⁶⁵ Pleadings bundle, para 8, page 7.

[120] The time of arrest recorded on the SAPD 14 is 18:18⁶⁶, and the time of release is reflected as 23:50.⁶⁷ Mr Gertse's version remained undisturbed in relation to the time and place where the Plaintiff was arrested, despite thorough cross-examination. His evidence is supported by the alert photo depicting the time the Plaintiff's vehicle was captured by the cameras. Mr Oosthuizen testified that it was not possible to tamper with the system as it is an autonomous system. He furthermore explicated that the procedures that the traffic officer follows on the handheld device do not permit him to change any of the information that was sent to the device. To reiterate, this evidence remains unrefuted.

[121] Mr Gertse made a good impression on the court and did not deviate from his version that was thoroughly tested during cross-examination. Mr Oosthuizen, the expert witness, gave formal evidence, which remains unrefuted. Similarly, the remaining witnesses for the Defendants remained steadfast. Their evidence, despite cross-examination, remained undisturbed.

[122] In considering the probabilities, based on the evidence of Mr Oosthuizen, I am satisfied that the times reflected on the alert photo printout accurately reflect the times that the Plaintiff's vehicle was captured. I am also satisfied that it was Mr Gertse who stopped the Plaintiff's vehicle on the main road. As to what time he was stopped, again on the probabilities, I am inclined to accept Mr Oosthuizen's calculation, which supports the time Mr Gertse stated he stopped the Plaintiff in the main road. I find that it was improbable for Mr Gertse to have stopped the Plaintiff at around 14h00, as he only commenced his shift at that time. This finding is concretised by the independent, tamper-proof evidence of the time recording on the alert evidence printout. There is no other evidence to refute this evidence other than the evidence of the Plaintiff and Mr Nkala, whose evidence was not in harmony with each other and the Plaintiff's pleaded case. The Plaintiff's evidence regarding the time when he asserted he was arrested, therefore, falls to be rejected.

⁶⁶ Joint bundle B, page 290.

⁶⁷ Joint Bundle B, page 292.

[123] The matter of *R v Mazima*⁶⁸ defines that a person is under arrest as soon as an arresting officer assumes control over their movement and freedom. The Plaintiff is legally considered to be under arrest when he was no longer free to leave, and the arresting officer, by word and conduct, asserted his authority over him with the intention of depriving him of his liberty. On a conspectus of the evidence, the Plaintiff is presumed under arrest from the moment the traffic officer directed him to accompany him to the station under compulsion. I am therefore satisfied that the Plaintiff submitted to Mr Gertse's authority in the main road between 17h50 and 18h00. I am further satisfied that the Plaintiff was released at 23h50 as per the SAPD 14 Register.

[124] Out of an abundance of caution, and for the sake of completeness, I will deal with whether the Plaintiff succeeded in discharging the onus for malicious prosecution, as the Second Defendant's witnesses had no independent recollection of their interactions with the Plaintiff and the circumstances surrounding his arrest, but denied that the incident in the parking lot occurred.

Malicious Prosecution

(a) Set the law in motion

[125] The Plaintiff asserted that the traffic officer set the law in motion by arresting him and contended that the admission by the Defendants that the Plaintiff was arrested is sufficient to meet this requirement.

[126] The Second Defendant denied setting the law in motion, instituting and/or initiating the criminal law proceedings against the Plaintiff, and acting with malice. The First Defendant, as earlier mentioned, argued that it was the prosecutor who set the law in motion. I have already provided reasons why I was not persuaded that this argument can be sustained. The arrest and detention of the Plaintiff are not in dispute, as the employee of the First Defendant arrested him and the employees of the Second Defendant detained him.

⁶⁸ 1948 (2) SA 152B at 154.

[127] Counsel for the Plaintiff contended in argument that the traffic officer's persistence with the arrest of the Plaintiff was malicious in that no schedule 1 offence was committed, and thus set the law in motion in the absence of probable cause for arrest. It was argued that Mr Gertse, by opening a docket, instigated or instituted the proceedings against the Plaintiff. This contestation was regarded by the Second Defendant as a concession that the members of the South African Police Services did not set the law into motion and that the Second Defendant accepted this concession.⁶⁹ Notwithstanding, the Plaintiff seeks to hold both Defendants liable for his alleged malicious prosecution as per his pleaded case.

[128] The First Defendant contended that Mr Gertse opened a docket based on the information he received on the handheld device that the Plaintiff's motor vehicle exceeded the speed limit. He deposed to a statement which he placed in the police docket, and it was taken to court.

[129] It is therefore irrefutable that the First Defendant set the law in motion by arresting the Plaintiff and opening a docket. However, this factor alone is not sufficient to satisfy the requirements of malicious prosecution, as it was further submitted that there is no evidence that Mr Gertse withheld evidence from the prosecutor or misled the prosecutor. This is further underscored when the Public Prosecutor declined to prosecute.

(b) Malice ("animus injuriandi")

[130] The Plaintiff submitted that the traffic officers acted with malice and the intention to injure the Plaintiff. In augmentation of this contention, it was asserted that the court is to have regard to the evidence of the Plaintiff, more particularly that the traffic officers remarked that the Plaintiff and his friends think that since they are driving big cars, they would do as they please and that the people from Eastern Cape and Gauteng think they would do as they please in the Western Cape. They would

⁶⁹ See para's 56 – 57 of the Plaintiff's heads of argument.

teach them a lesson. These remarks were made after the Plaintiff had indicated that they are not apologetic for driving expensive cars, as they had worked for them.

[131] It was mooted that this retort irritated the officers, and hence they began to arrest him at the police station. The Plaintiff furthermore suggested that the police officers did not really have a genuine intention to prosecute and wanted to teach the Plaintiff and his friends a lesson that “this is not Gauteng or Eastern Cape”.

[132] The Second Defendant argued that the Plaintiff’s submissions were focused on an exchange of words between the Plaintiff and members of the First Defendant. Notably, the Plaintiff’s assertions in this regard excluded involvement of the members of the Second Defendant and, as such, have failed to discharge his onus and establish the elements for a claim for malicious prosecution against the Second Defendant.

[133] In *Relyant Trading (Pty) Ltd v Shongwe and Another*,⁷⁰ the Supreme Court of Appeal clarified the meaning of “malice” in the context of a claim for malicious prosecution. The court held that although the term “malice” is commonly used, it carries a specific legal meaning within the South African law of delicts. It denotes *animus iniuriandi*, that is, the intention to injure another unlawfully. In this regard, the court stated that:

*‘Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.’⁷¹ The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with ‘malice’ or *animo iniuriarum*.⁷² Although the expression ‘malice’ is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*.⁷³*

⁷⁰ 1 All SA 375 (SCA) at para 5.

⁷¹ *Heyns v Venter* 2004 (3) SA 200 (T) 208B.

⁷² *Thompson & another v Minister of Police & another* 1971 (1) SA 371 (E) 373F-H; *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A) 196G-H.

⁷³ *Heyns v Venter* above 208EF; *Moaki v Reckitt & Colman (Africa) Ltd and another* 1968 (3) SA 98 (A) 104A-B; and see the discussion in J Neethling JM Potgieter and PJ Visser *Neethling’s law of personality* 2 ed (2005) 124-5.

[134] The court, citing *Moaki v Reckitt & Colman (Africa) Ltd and Another*,⁷⁴ reaffirmed that *animus iniuriandi* involves an awareness of wrongfulness combined with an intent to cause harm (*dolus directus* or *indirectus*). Mere negligence, gross negligence, or error of judgment does not suffice to meet this threshold. The Defendant must have consciously disregarded the unlawfulness of his or her conduct and proceeded to act with the intent to harm the Plaintiff by putting the criminal process in motion for an improper purpose.

[135] The court thus distilled two key principles, namely:

- (a) “Malice” in malicious prosecution claims means intentional wrongdoing, not spite, hostility, or recklessness, and
- (b) Proof of improper motive or an illegitimate purpose may assist in establishing intent, but subjective awareness of unlawfulness remains essential.

[136] This standard, reaffirmed in later cases (earlier referred to), such as *Moleko*⁷⁵ and *Woji*⁷⁶, ensures that liability for malicious prosecution arises only in cases of deliberate abuse of the criminal process. The SCA in the matter of *Moleko*⁷⁷ (*supra*) clarified that in the context of a claim for malicious prosecution, *animus iniuriandi* involves more than simply intending to injure another person. It also requires a consciousness of wrongfulness; that is, the perpetrator must know that the prosecution is unjustified and nevertheless proceed with it. The court stated:

'The intention to injure (animus injuriandi) includes not only the intention to injure the plaintiff but also consciousness of wrongfulness—consciousness of the fact that the prosecution is wrongful.'

⁷⁴ *Ibid* at para 5, *Moaki v Reckitt & Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) 104B-C. Wessels JA stated: ‘Where relief is claimed by this actio the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the quantum of damages, the motive of the defendant is not of any legal relevance’.

⁷⁵ 2009 (2) SACR 585 (SCA).

⁷⁶ 2014 (1) SACR 409 (SCA).

⁷⁷ 2009 (2) SACR 585 (SCA): ‘In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.’

[137] The conflicting versions, as earlier discussed, relating to the parking lot incident, are a pivotal consideration in determining whether the incident occurred based on the probabilities, bearing in mind that no mention thereof was made in the Plaintiff's pleaded case. In further consideration of the credibility and reliability of the evidence, the disparity regarding the number of members who were on the scene who seemingly contributed to the alleged atmosphere of chaos requires a closer look. Mr Gertse testified that when he took the Plaintiff to the police station, there were no police or traffic officers in the parking lot, except for the friends of the Plaintiff. There was one traffic officer inside the police station. The Second Defendant contended that there were only two members of the South African Police Services present on the day in question. The evidence elicited during the trial in this regard revealed that these police officers were Constable Cakwe and Constable Jefthas, respectively. The other two members were on leave and attending a course, respectively. Constable Jefthas was busy patrolling, and Constable Cakwe was at the police station. Warrant Officer Lukas, the standby detective, arrived later.

[138] The Plaintiff's misidentification of the person who effected his arrest, as pleaded brings his recollection of events into question and cannot exclude the probability that his account was exaggerated.

[139] I have previously identified that the manner in which the Plaintiff pleaded the *facta probanda* suggested that he was arrested in the main road, seemingly in full view of the Plaintiff's colleagues, friends and members of the public. Thus, on a reading of the Plaintiff's pleadings the parking lot incident was a secondary allegation which was a matter for evidence as there is no mention made thereof at all. It became apparent during the Plaintiff's evidence that he relied on these facts to support the primary allegations. However, the Plaintiff placed significant emphasis on the parking lot events which appears to have ultimately given rise to the Plaintiff's apprehension for the speeding violation pursuant to utterances exchanged.

[140] It is furthermore apposite to mention that the Plaintiff's *viva voce* evidence describes two distinct events: one in the main road and one in the parking lot. The particulars of claim appear to conflate the two events. Therefore, to my mind, the parking lot incident is central to the Plaintiffs case insofar as it relates to the allegations upon which the Plaintiff's various heads of damages are predicated and should have been specifically pleaded. The Defendants were therefore not provided with an opportunity to respond thereto in the pleadings, which stratagem the Second Defendant argued was tantamount to a trial by ambush.

[141] The reliability of the Plaintiff's evidence to my mind is questionable, as I have already found that the time pleaded that he was arrested was different to his oral testimony in court and also different to that of Mr Nkala. Furthermore, the evidence on record that Mr Gertse effected the Plaintiff's arrest was not seriously challenged, if at all. Notably, the Plaintiff pleaded that one Jermaine Evandor Abrahams arrested him. No supporting evidence in this regard was tendered; thus, his version was not corroborated fully by Mr Nkala, and neither did the information contained in the docket assist the Plaintiff insofar as factual evidence is concerned. This has been demonstrated when the court went into significant detail earlier as to why the time the Plaintiff stated he was arrested was rejected.

[142] To my mind, these differences are material. Constable Cakwe could not remember the Plaintiff, his friends and/or their vehicles, nor participating in any search on any vehicle. The veracity of Sergeant Cakwe's evidence was not seriously challenged. His evidence remained undisturbed. Sergeant Jeffthas testified that he was not called to the police station by Constable Cakwe to assist in searching the motor vehicles, nor was he called to manage and/or deal with any incidents of "*chaos*". He further testified that he had no interaction with the Plaintiff, and much like Cakwe does not remember him, nor uttered any racist remarks towards him. The veracity of Sergeant Cakwe's evidence was also not seriously challenged. His evidence also remained undisturbed. Constable Sentane, although he had no independent recollection of the Plaintiff, confirmed that the times and dates as recorded in the various registers were accurate, including the cell registers. Similarly, the veracity of Constable Sentane's evidence was also not seriously challenged. His evidence also remained undisturbed.

[143] The Plaintiff, when confronted during cross-examination about the factual contradictions, at times argued points of law and refused to make any concessions on irrefutable documentary evidence. The Plaintiff's evidence was contradicted by his own witness. Therefore, it brings into question the credibility and reliability of the Plaintiff's evidence. More especially because it is improper for a party to plead one case and seek to establish a different case at trial, and it is equally impermissible for the court to have recourse to issues falling outside the pleadings when deciding a case.⁷⁸ Inasmuch as the Plaintiff wanted the court to accept that the parking lot scene should be regarded as *facta probantia*, the fact that there are inconsistencies in the Plaintiff's pleaded case and the *viva voce* evidence does not assist the Plaintiff. The inconsistencies are material and, as such, no reliance can be placed on them.

[144] It also behoves this court to consider whether the Plaintiff succeeded in proving that Mr Gertse had an awareness of wrongfulness combined with an intent to cause harm. In other words, whether he foresaw that he was acting wrongfully, but nevertheless continued to act, recklessly as to the consequences of her or his conduct. To my mind, Mr Gertse genuinely (albeit mistakenly) believed that if no admission of guilt fine was determined that he had to arrest the Plaintiff. The Second Defendant witnesses also slavishly believed that they could not refuse to accept an arrested person. However, as per my earlier findings, such an arrest had to be lawful. The cited authorities clearly illuminate that negligence, or error of judgment, does not suffice to meet this threshold of malicious prosecution.

[145] On the evidence before me, I am not persuaded, on a balance of probabilities, that any of the Defendants' members proceeded to act with intent to harm the Plaintiff by putting the criminal process in motion for an improper purpose. To suggest that the police officers did not really have a genuine intention to prosecute and wanted to teach the Plaintiff and his friends a lesson is not supported by any objective evidence.

⁷⁸ *Minister of Safety & Security v Slabbert supra*

[146] Thus, on a conspectus of the evidence, I am not persuaded that the Plaintiff succeeded in proving that there was a deliberate abuse of the criminal process. I am unable to find that there was consciousness of wrongfulness on the part of any of the members of the Defendants for reasons articulated earlier in this judgment. Consequently, the Plaintiff has failed to prove the requirement of malice against both the First and Second Defendants.

(c) Reasonable and probable cause

[147] The Plaintiff argued that there was no probable cause for setting the law in motion. The Second Defendant pleaded that it merely detained the Plaintiff on the auspices of his arrest by members of the First Defendant, as such, on reasonable and probable cause. The First Defendant argued that even if it is accepted that the First Defendant set the law in motion by instigating the prosecution, the Plaintiff did not show that there was no reasonable and probable cause to prosecute him. Furthermore, regard is to be had to the fact that the prosecutor's reason for prosecuting the matter remains unknown as she/he were not called to testify.

[148] The First Defendant referred the court to the matter of *Beckenstrater v Rottcher and Theunissen*,⁷⁹ where the classic test for absence of reasonable and probable cause was crystallised. The court explained that the test combines both an objective and a subjective component:

- (a) Objective element: whether the facts available to the defendant would have led a reasonable person to believe the plaintiff was probably guilty of the offence.
- (b) Subjective element: whether the defendant genuinely believed in the plaintiff's guilt based on those facts.

⁷⁹ 1955 (1) SA 129 (A) at 136A-B 'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'

[149] As correctly pointed out on behalf of the First Defendant, this means that there must be both actual belief on the part of the prosecutor, and that belief must be reasonable in the circumstances.⁸⁰ If either component is lacking, particularly where the Defendant did not honestly believe in the Plaintiff's guilt or acted without objectively reasonable grounds, reasonable and probable cause is absent, satisfying that element of malicious prosecution. Later cases, such as *Moleko (supra)* and *Woji (supra)*, have refined the locus classicus *Beckenstrater v Rottcher and Theunissen* test by clarifying both the mental element expected of the Defendant and the evidentiary threshold for proving the absence of reasonable and probable cause in malicious prosecution.

[150] The fact that this court found that the arrest was unlawful does not mean that Mr Gertse's mistaken belief that he had to arrest the Plaintiff amounts to there being no probable cause. In fact, the First Defendant submitted that the Plaintiff was arrested based on the evidence, the statement of Mr Gertse, and the alert picture of the handheld device. For reasons earlier articulated in this judgment, I am satisfied that the Plaintiff's vehicle exceeded the speed limit. Although the First Defendant believed that those considerations were sufficient to meet the threshold of reasonable and probable cause for instituting prosecution, the Plaintiff indicated that he made an exculpatory statement that he did not drive the vehicle.

[151] The question then arises whether the Plaintiff in fact made such a statement, more especially as this court has already identified issues of credibility and reliability in the Plaintiff's version. The nuance in relation to the assertion that an exculpatory statement was made differs in that the Plaintiff pleaded that the First and Second Defendants members "*did not have any reasonable and justifiable ground/s to suspect that the Plaintiff had committed an offence especially in the light of contestations by the Plaintiff that he was not the driver of the vehicle at the alleged time of commission of the offence*".⁸¹

⁸⁰ See also *Relyant Trading (Pty) Ltd v Shongwe* [2006] ZASCA 162, [2007] 1 All SA 375 (SCA).

⁸¹ Index to pleadings, Amended Particulars of Claim, para 10.6, page 8.

[152] The Plaintiff's evidence conflicts with the evidence of Mr Gertse, who testified that no exculpatory statement was made to him and that the Plaintiff's reaction was to hold his head in his hands when he pulled the Plaintiff over. The Plaintiff did not inform him that he was not the driver. He testified that if the Plaintiff had informed him, he would have followed the following procedure, namely, that he would have called his supervisor to explain the situation to her/him; thereafter, the Plaintiff would have made a statement to confirm it in writing that he was not the driver. The person who drove the vehicle would have given a statement to confirm he was the driver.

[153] In *Minister of Police v Dhali*⁸² the court remarked that:

*'It is trite that police officers purporting to act in terms of Section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest. It is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify on arrest.'*⁸³

[154] The Plaintiff's version is largely supported by Mr Nkala, who corroborated the version of the Plaintiff insofar as it pertains to Rasta having brought the vehicle to Laingsburg and the attempts by the Plaintiff to inform those who arrested him that he was not the driver. In this regard, Mr Nkala stated that as the Plaintiff was being arrested, during the process of being handcuffed, he repeatedly said that he was not the driver of the vehicle. According to Mr Nkala, they did not seem interested in the explanation.

[155] This version, as previously indicated, accords with that of the Plaintiff, who testified that even his friends were protesting before he was handcuffed, explaining that he was not the driver. The Plaintiff clarified that he, too, told the traffic officer when he was arresting him that he was not the driver and that the person who was driving the vehicle was still in town. He requested permission to call him so that

⁸² (CA327/2017) [2019] ZAECHC 16 (26 February 2019) para 13.

⁸³ See also *Louw & Another v Minister of Safety and Security & Others* 2006 (2) SACR 178 (T); *Liebenberg v Minister of Safety and Security* [2009] ZAGPPHC 88 (18 June 2004).

he could “account for his deeds”. This to some extent accords with what the Plaintiff pleaded in replication to the First Defendant’s amended plea dated 4 April 2022:

‘1.1 The Plaintiff denies that he was the driver of the vehicle at the time of the alleged commission of the offence.

1.2 The Plaintiff further contends that the vehicle was driven and in lawful possession of one Rasta, a Zimbabwe National, who was his employee as a domestic worker at the time.

*1.3 In amplification thereof the Plaintiff further contends that he offered to call Rasta (who was the driver) to come to the police station and account, **but the First and Second Defendant’s officials refused** and proceeded with the arrest of the Plaintiff.’⁸⁴ [my emphasis]*

[156] It is, however, apposite to mention that during the Plaintiff’s evidence, he specifically stated that he asked Rasta two questions when given the opportunity to call him. This is a departure from the replication as the Plaintiff averred that the First and Second Defendant’s officials refused to allow him the call, and notwithstanding, proceeded with the arrest of the Plaintiff. So, here again, the Plaintiff’s pleaded case differs from his *viva voce* evidence. It is also noteworthy that the Plaintiff’s warning statement makes no mention of the fact that he was not the driver of the vehicle and simply records that “*I am going to speak in court*”.⁸⁵ The Plaintiff, who is an attorney with notable experience and seniority, in my view, is presumed to know the law, even though he was processed as a civilian. The mention of Rasta, therefore, appears to be an afterthought as it was advanced, seemingly for the first time, when representations were made to the Public Prosecutor.

[157] Indeed, the Plaintiff’s version suggested that he dropped Rasta off in town for him to commute back by way of public transport. Rasta could not have been too far, on the probabilities, if regard is had to the Plaintiff’s narrative that he was stopped shortly after dropping Rasta off. Rasta could have been requested to attend the police station to explain to the traffic officials that he was the driver of the vehicle in question and not the Plaintiff, which was not done, and neither was Rasta called to testify at the hearing.

⁸⁴ Updated Index to Pleadings, pages 21 – 22.

⁸⁵ Bundle C, Pages 16 – 20.

[158] On the Plaintiff's version, the traffic officer did not investigate his explanation despite being obligated to do so. It has been held that such failure is a clear dereliction of duty as he ought to have analysed the information critically.⁸⁶ Mr Gertse articulated the procedure he would have employed if an exculpatory statement had been made to him.

[159] I am not persuaded, on a conspectus of the evidence, that an exculpatory statement was made as regard is to be had to the manner in which the Plaintiff framed his pleaded case versus the oral account of the events. To reiterate, the Plaintiff's version suggests that he was requested to accompany Mr Gertse because of a complaint received, so that his vehicle could be searched. On his own evidence, the issue of speeding was not yet raised. The court has earlier rejected the Plaintiff's version as his version after evaluating the conflicting evidence and pleadings. Mr Gertse had a clear recollection of the Plaintiff's reaction, namely that he held his hand in his head. This presupposes that the Plaintiff was not outside of his vehicle. The Plaintiff himself stated that he did not alight from his vehicle until they reached the police station. Thus, on the probabilities, the opportunity to raise the issue of Rasta would have presented itself at the time when the Plaintiff was stopped, and again when his warning statement was being completed. There is radio silence on the documents about the existence of Rasta, who only featured when written representations were made to the prosecutor.

⁸⁶ See *Xulu v Minister of Police and Another* (21/52147) [2023] ZAGPJHC 1030 (13 September 2023) where the court held:

'[90] Sgt Motena was under an obligation to investigate exculpatory explanations before he could form a reasonable suspicion for purposes of a lawful arrest. The failure to investigate a suspect's explanation is a clear dereliction of duty. ...

[91] Furthermore, where there are witnesses available who profess to be eyewitnesses, an investigating officer should listen to them and analyse and assess critically the quality of their information before arresting a suspect.

[92] In Lapane v Minister of Police and Another, The Court found that the arresting officer had not considered the reasonableness of the suspect's explanation and had not tried to evaluate its authenticity. It found that the arresting officer had failed to show that he had reasonable grounds for suspicion justifying arrest and had acted overhastily and imprudently. In this regard, it is stated as follows:

The case law is clear that, in arresting, it is not only the arresting officer's mindset and his objective approach that count; he must also look at the explanations given by the arrestee. He must strike a balance between the two.'

[160] Even if I am wrong, and even if an exculpatory statement was made, it now behoves this court to consider whether the Plaintiff has succeeded in proving the key factors of malicious prosecution in circumstances where the Plaintiff suggested that the Defendant(s) were abusing their power.

[161] To reiterate, mere negligence or error of judgment does not suffice to meet the threshold of malicious prosecution. In applying the trite legal principles for malicious prosecution, I am not persuaded that the Plaintiff succeeded in proving that:

- (a) First Defendant foresaw the possibility that he was acting wrongfully, but nevertheless continued to act recklessly as to the consequences of his conduct and/or;
- (b) intended to cause harm and appreciated that instituting or pursuing the prosecution was wrongful and/or
- (c) that the Plaintiff succeed in showing proof of improper motive or that his arrest and detention were for an illegitimate purpose.

[162] Thus, the Plaintiff has not succeeded in proving reasonable and probable cause in respect of both the First and Second Defendants to the extent that it satisfies the aforementioned considerations.

(d) ***The prosecution failed***

[163] The First Defendant contended that the Plaintiff did not prove on a balance of probabilities that the prosecutor lacked an honest belief, based on reasonable grounds, that the institution was justified. The First Defendant submitted that the prosecutor instigated the prosecution based on the content of the docket. It is not in dispute that the charge was ultimately withdrawn against the Plaintiff after representations were made by the Plaintiff. Thus, it was argued, the termination of the proceedings in favour of the Plaintiff because the prosecutor declined to prosecute is indicative that this requirement was proven.

[164] As previously indicated, the reasons for the withdrawal of the charges were not explained, which, the First Defendant contended, could have been elucidated if the prosecutor had been called to testify. Although it was argued that the actual reason for the prosecutor's withdrawal of the charge was not clarified, it appears, on the probabilities, that it was upon the strength of the representations that the charge was withdrawn against the Plaintiff.

[165] Even though the prosecution failed, I am not persuaded that the prosecution was instigated by going further than providing a fair and honest statement of the relevant facts to the prosecutor, for reasons already articulated. For all the reasons earlier enunciated, I am of the view that the Plaintiff has failed to discharge the onus for proving all the elements for malicious prosecution and falls to be dismissed.

Conclusion

[166] This matter should serve as a useful guide that a person cannot be arrested for exceeding the speed limit in circumstances where no admission of guilt has been determined. *Egerer (supra)* provides an updated judicial confirmation that ordinary speeding, without more, does not justify a warrantless arrest. It aligns with prior precedent articulated in *Sekhoto*, reinforcing that arrest powers must be narrowly construed, and the constitutional right to freedom and security must remain paramount. Thus, even where the jurisdictional facts of section 40(1)(b) exist, arrest should only be exercised where necessary, proportionate, and consistent with constitutional constraints, not as a matter of routine. Consequently, detention can only follow if a person has been lawfully arrested.

Costs

[167] It was submitted on behalf of the Plaintiff that the court should show its displeasure towards the Defendants for defending an action because there was no basis to defend. Further contending that the court should award costs on scale C, which costs shall include costs of Counsel.

[168] Counsel on behalf of the First Defendant submitted that a punitive cost order is only granted in exceptional circumstances where the court is unhappy about the conduct of a party. It was contended that the opposition was not without merit, especially in respect of the claim for malicious prosecution. It was further contended that the issues were not complicated, such that they could have been litigated in the Magistrate's court, thereby warranting the cost of Counsel on Scale A.

[169] Counsel on behalf of the Second Defendant contended that the request for punitive costs on scale C is fundamentally flawed. This is because it is trite that matters where courts awarded costs of counsel on scale C are reserved for those matters that are inherently complicated with complex legal considerations. Further contending that this matter does not fall within that category because there is nothing complicated or complex about the matter *in casu*.

[170] The court's attention was also drawn to what Counsel for the Second Defendant referred to as the Plaintiff's "own shortcomings", in particular the delay in the compilation of the trial bundle despite the agreement in terms of the pre-trial. It was furthermore contended that the Plaintiff's claims, especially the claim for malicious prosecution against the Second Defendant, are vexatious, inflammatory and amounted to an abuse, given that the Plaintiff only conceded in its submissions that the claim for malicious prosecution is limited to the First Defendant's involvement.

[171] In furtherance, of this contention, it was submitted that the case presented on the pleadings and the oral evidence, amounted to a trial by ambush in respect of the evidence lead relating to the Second Defendant, which in following the Plaintiff's request the Second Defendant prayed that costs be awarded on scale C, alternatively on a scale that the above Honourable Court deems just and equitable.

[172] It is trite that costs ordinarily follow the result. I find no reason to depart from the accepted legal principle. Consequently, in the exercise of my discretion, I order that Counsel's fees be taxed on a Scale B given the clearly identified features

of this case that were sufficiently complex, important and valuable to the respective parties.

Order

[173] In the result, I grant the following orders:

1. In respect of Claim A, judgment is granted in favour of the Plaintiff for the agreed or proven damages in respect of his unlawful arrest and subsequent detention on 28 March 2019 from between the time of 17h50 and 18h00 to 23h50, with costs including the cost of Counsel to be taxed on Scale B.
2. The Second Defendant's Special Plea is dismissed with costs, including the cost of Counsel to be taxed on Scale B.
3. In respect of Claim B, the Plaintiff's claim for malicious prosecution is dismissed with costs, including the cost of Counsel to be taxed on Scale B.
4. The trial on quantum is postponed *sine die*.

ANDREWS AJ

**Acting Judge of the High Court of
South Africa, Western Cape Division,
Cape Town**

Appearances

Counsel for the Plaintiff: Advocate M Gwala (SC)

Instructed by: Zilwa Attorneys

Counsel for the First Defendant: Advocate T Ruiters
Instructed by: State Attorney: Mr S Appalsamy

Counsel for the Second Defendant: Advocate S Naidoo
Instructed by: State Attorney: Mr S Appalsamy