



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable
Case no: 2142/2023

In the matter between
TOKO JACOB JASON

APPLICANT

and

THE MINISTER OF POLICE

RESPONDENT

Neutral citation: *Jason v The Minister of Police* (2142/2023) [2026] ZAFSHC 60
(17 February 2026)

Coram: GREYLING-COETZER J

Heard: 16, 17 and 19 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 17 February 2026 at 10h00.

Summary: Unlawful arrest and detention – warrant of arrest – pleadings – issues for trial – onus of proof – discretion to arrest – Criminal Procedure Act 51 of 1977–s 43.

ORDER

1 The claim is dismissed with costs.

JUDGMENT

GREYLING-COETZER AJ

[1] The plaintiff instituted an action against the defendant for unlawful arrest and detention. He alleges that he suffered damages in the amount of R500 000.00. The plaintiff's case is that he was wrongfully and unlawfully arrested without a warrant of arrest and thereafter detained for approximately five hours in the court holding cells at the Thaba Nchu Magistrate's Court. The defendant opposed the action and whilst admitting the arrest, denied that said arrest was unlawful pleading that a warrant of arrest was issued on 28 January 2001, directing and authorising the arrest. The plaintiff did not file a replication to the defendant's plea. The parties thus adopted diametrically opposed positions: the plaintiff alleged an unlawful warrantless arrest, and the defendant contended that the arrest was lawfully effected in terms of a warrant.

[2] By agreement between the parties, the plaintiff assumed the duty to begin. In summation the plaintiff's evidence was that on 6 December 2019, and after a dispute with his wife, he took the keys of their co-owned Mercedes-Benz motor vehicle and proceeded to the Thaba Nchu Police Station. Whilst at the police station, his wife also arrived. The issue was discussed, and he left the Thaba Nchu Police Station with the Mercedes-Benz vehicle. Approximately two hours later he was stopped by the police who advised him that a court order has been issued against him. In terms of the court order he was prohibited to go to his lodge named Legae La Khumo, situated in Thaba Nchu. He then proceeded to his house in Tweespruit.

[3] The following day on 7 December 2019, two police officers arrived at the said home in Tweespruit. They indicated that they were there to arrest him, he asked for the warrant, but they were unable to show him one. He was arrested and taken to the Thaba Nchu Police Station and kept in the holding cells. According to the plaintiff a certain detective explained to him that the matter related to a stolen Mercedes-Benz vehicle. On the Monday morning, 9 December 2019, he appeared in court and was granted bail. This arrest does not form the subject matter of the present claim.

[4] The plaintiff testified that this matter dragged on for a long period of time and he appeared in court on several occasions. According to him, when he appeared in court for his bail hearing, the only charge professed was that of domestic violence. He testified that on one specific day after the court adjourned, he was advised to appear in court again on a future date. He left for Kimberley where he was residing at the time. Whilst travelling he received a call from the prosecutor, Mr Mojapelo. According to the plaintiff, the prosecutor advised him that he was supposed to be at court. The plaintiff disputed this, indicating that the matter had been adjourned and that he was on his way to Kimberley. He testified that the prosecutor then told him to carry on, but to come on a specific day, to which the plaintiff agreed. The plaintiff was unable to provide any detail in respect of the specific days, nor was he able to provide the case number under which he was charged as per his aforementioned evidence.

[5] The evidence revealed that the plaintiff was involved in two matters. The one being for domestic violence under case number 767/2019, per an application made by the plaintiff's wife and order granted on 6 December 2019. The other pertaining to a charge laid by the plaintiff's wife on the same date under CAS 28/12/2019 and prosecuted under case number A593/2019. The plaintiff however testified that he was never charged with theft of a motor vehicle. Pertaining to the motor vehicle, he confirmed that the Mercedes-Benz motor vehicle was taken in accordance with a court order and registered in the SAP13 register under CAS 28/12/2019, which according to him was for assault.

[6] The plaintiff confirmed that there was a further appearance on 10 July 2020 and that the matter was then postponed to 11 September 2020. The documentary evidence revealed that there were two cases involving the plaintiff, remanded to 11

September 2020, one in the district court (A593/2019) and the other in the domestic violence court (767/2019). He testified that he appeared in court on 11 September 2020, without indicating which of the two courts he appeared in. The plaintiff confirmed that he left after the matter was postponed. He was again called by the prosecutor, who informed him that he was supposed to be in court. The plaintiff indicated that he had already left for Kimberley but that he could come back. The plaintiff testified that the prosecutor then indicated that it was not necessary, and that he should be at the next hearing date, which was on 27 November 2020. With reference to the plaintiff's evidence bundle, the plaintiff was shown a warrant of arrest (J165) and confirmed that on face value it appeared to have been issued on 28 August 2020 and cancelled on 28 January 2021.

[7] The arrest founding the subject matter of the current claim took place on 17 March 2022. On the preceding day being 16 March 2022, the plaintiff was at the Thaba Nchu Police Station when he was confronted by two SAPS members, of which one was Constable Mogoera. The plaintiff testified that Constable Mogoera said to him that he was a criminal and that she was going to arrest him. The plaintiff responded to her, saying 'show me your warrant', which she did not do, but told him to report to Seloshesha Court, being the Thaba Nchu Magistrates Court, the following day on 17 March 2022, to which the plaintiff agreed.

[8] At this time, he was still residing in Kimberley. On 17 March 2022, he telephonically engaged Constable Mogoera who told him to meet her at the police station. He refused, indicating that the arrangement was that they would meet at court. He proceeded to the Thaba Nchu Magistrates Court. At about 08h30 Constable Mogoera arrived and he was taken to an office in the building where he was told that he was under arrest. He again asked for the warrant but was not shown a warrant. According to the plaintiff, he was told that he knows too much and that they were busy with the paperwork as he had to appear in court. The plaintiff testified that he was shackled and placed in a holding cell with 15 other people. The cell was, three metres by three metres, inhumane and contained no benches, no roof nor any running water. No one enquired whether he had any medical condition, his cell phone was not taken, nor was he searched. He was able to call family members.

[9] He remained in the cell from approximately 08h30 until 14h00. He testified that he started vomiting, whereafter the court orderly came to see what was going on. The court orderly opened the cell for him and escorted him to an office. There his shackles were removed and the court orderly told him that he was free to go and that there was no court appearance on that day. He testified that the experience was painful and caused him an enormous amount of stress. He believed the charges were trumped up, explaining that 'the same officer will come and seek things from me and now because I have integrity it became a witch hunt'. The plaintiff testified that since the event, he has been seen as a wife-beater and a thief by the larger community. He testified that he is a known person in the community, as he owned the lodge where various of the South African Police Service functions takes place.

[10] The plaintiff was then asked to comment on the validity of a warrant of arrest dated 28 January 2021 (J50). The defendant's legal representative objected on the basis that the plaintiff's case was clearly delineated in the pleadings to be that no warrant existed, and no challenge has been levelled against the validity of the J50 warrant. The objection was sustained on the basis of relevance. During cross-examination the plaintiff was confronted with the various entries contained in the investigation diary, as well as the court notes which demonstrate the two matters brought against him and his failure to appear in court. The plaintiff denied the entries, insisting that the investigation diary relates to a police matter and that he was dealing with what he termed to be 'a court matter' and not a police matter. On a question whether, having regard to the entries, he was at court on the specific dates indicated, the plaintiff indicated that he would have to check, as he was unsure, considering that there were so many court appearances.

[11] With reference to the plaintiff's evidence bundle, the plaintiff confirmed that an inscription appeared on the charge sheet under case number A593/2019, indicating that a J50 was issued. Confronted with the court notes reveal that on 28 August 2020 the plaintiff was not present and a warrant was authorised for his failure to appear, on 11 September 2022 the plaintiff again failed to appear. The same position is reflected per the notes of 27 November 2020 and on 11 December 2020 with the direction that the issued warrant to remain in circulation, the plaintiff denied that he was not present and indicated that per the court note of 11 September 2020 it stated that he was not

present at 13h20 which is lunch time. Confronted with the defendant's version that the various entries resulted in the J165, and later the J50, the plaintiff denied same. Confronted with the defendant's version that he was provided with a warrant and his constitutional rights on the date of the relevant arrest, the plaintiff denied same, albeit that the plaintiff admitted his signature on the constitutional rights notice.

[12] The defendant call Sergeant Mogoera. She testified that she has 13 years' service in the SAPS and works as a detective. She confirmed that she arrested the plaintiff on 17 March 2022 on the strength of a J50 warrant dated 28 January 2021. She testified that she took over the matter from a colleague and that on considering the docket content, it appeared that the matter was already in court, but that the plaintiff failed to appear in court, whereafter a J165 was issued by the magistrate on 28 August 2020 and under case number A593/2019. She explained that the J165 lapsed, resulting in the application for the J50 warrant, which was made on 27 January 2021 and issued by a magistrate on 28 January 2021.

[13] She testified that on 16 March 2022 and whilst at the Thaba Nchu Police Station, she was advised by the former investigating officer, Sergeant Lenkoe, that the plaintiff was present in the police station. She approached the plaintiff and indicated that there was an arrest warrant out for him due to him failing to appear in court. According to Sergeant Mogoera, the plaintiff indicated that his mother had died recently and that he was busy with funeral arrangements, hence his presence at the police station to certify funeral documents. She testified that the plaintiff was very emotional and even started crying, pleading with her to afford him time before the warrant is executed. They agreed that he will be allowed to attend to the funeral arrangements and agreed that he will contact Sergeant Mogoera on finalising the funeral arrangements.

[14] On 17 March 2022, the plaintiff called Sergeant Mogoera and said that he was at the Thaba Nchu Court building. She took the docket containing the J50 warrant, and the constitutional rights book and proceeded to meet the plaintiff. They utilised the court orderly's office where she showed the plaintiff the J50 warrant and read his rights to him, whereafter the plaintiff signed the notice of rights document at 09h00. Sergeant Mogoera left the plaintiff with the court orderly, as according to her, she had

executed the J50 warrant which was because of his failure to appear in court. He was now present at court and in the custody of the court orderlies.

[15] Sergeant Mogoera denied the plaintiff's version of events pertaining to the failure to show him the warrant as well as being shackled and placed in the holding cells. She further denied the plaintiff's version pertaining to the conditions of the holding cells, stating that when she left him, he was seated on a chair in the court orderly's office. She generally remarked when the cells are dysfunctional, such as when there is no water, no one is placed in those holding cells. Sergeant Mogoera testified that as the basis for the J50 was the failure to appear in court, her duty was to ensure that the plaintiff attends court, which she complied with when she executed the J50 at the Thaba Nchu Court and left him in the court orderly's office. The only purpose for the arrest was to execute the J50 and to bring him before court.

[16] Sergeant Mogoera further testified that after leaving the plaintiff with the court orderly, she took the docket and handed it to the prosecutor. Confronted in cross-examination with why the plaintiff in such circumstances never appeared in court, she indicated that that was a decision that was made by the prosecutor and that she had no knowledge as to why the matter was not placed on the court roll, having provided the prosecutor with the docket. The docket indicated that a decision was taken not to prosecute due to the absence of prospect of success.

[17] The plaintiff's legal representative then sought to introduce the issue of validity of the J50 warrant. The defendant's legal representative again objected thereto based on relevance. Pursuant to an extensive debate regarding the entitlement of the plaintiff to cross examine on such basis where it was not the pleaded case for the plaintiff and the need for a replication alternatively an amendment as acceptable foundation for such cross examination, cross examination on the validity was provisionally allowed and the issue of the plaintiff's entitlement to place reliance on invalidity of the warrant of arrest was reserved for argument.

[18] It appeared from the cross-examination that the point which the plaintiff's legal representative intended to establish was that the warrant did not comply with s 43 of the Procedure Act 51 of 1977 (CPA), in that the plaintiff's address is stated to be

Tweespruit which is outside the area of jurisdiction of the Thaba Nchu Court, the application did not mention the magisterial district within which the offence was alleged to have been committed and states suspect is known or suspected on reasonable grounds to be within the district of Tweespruit. Further that, corrections were made to the application for the warrant pursuant to its being granted by the magistrate. Sergeant Mogoera denied any invalidity of the warrant.

[19] She confirmed that she fully understands her discretion in respect of arrest, and that generally an officer has a discretion to arrest highlighting that in the present instance she had a J50 warrant which she was tasked with to execute. She thus exercised her discretion on the strength of the J50 warrant and only arrested the plaintiff for the purpose of ensuring the attendance at court. Therefore, she arrested him at court but denies that he was ever shackled or detained as per the plaintiff's version. Sergeant Mogoera was the only witness for the defendant.

[20] Resultant from that which transpired during the trial, and undoubtedly the most contentious point, an appropriate starting point is the question whether the case pleaded by the plaintiff entitled him to contend that the J50 warrant was invalid for want of compliance with s 43 of the CPA.

[21] The plaintiff in his particular of claim alleges that on/or about 17 March 2022 and at Thaba Nchu in the Free State province, the plaintiff was wrongfully and unlawfully arrested without a warrant of arrest by a member of the SAPS who identified herself as Detective Mogoera. In its plea the defendant admitted the arrest and pleaded that the plaintiff was arrested pursuant to a warrant of arrest issued on 28 January 2021. Informed per the plea of the defendant's reliance on a warrant, the plaintiff did not file a replication or seek to amend his particulars of claim prior to the hearing nor during the hearing. It was argued on behalf of the plaintiff that a replication was not necessary as the effect of failing to file same was that the allegations is denied. It was further contended that as the plaintiff pleaded the arrest was unlawful it matters not that it was with or without a warrant and the court stands to assess such unlawfulness without bounds.

[22] The defendant argued that the attempt to introduce a claim based on defects in the warrant of arrest during the hearing in said circumstances was nothing but litigation by ambush to the prejudice of the defendant. It was contended that the defendant was called upon to answer a specific case and it is not open to the plaintiff to attempt to establish a different case at trial, which case could not be gleaned from the pleadings.

[23] The purpose of 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 intends to rely. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial.¹ The Supreme Court of Appeal in *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11, held:

'It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

[24] In *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) at paragraph 28, it was restated when the court held as follows:

'One knows that such address can never be a substitute for pleadings. In any event, it did not serve to forewarn the respondent of the evidence that would eventually be relied upon. What is important is that the pleadings should make clear the general nature of the case of the pleader. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case he or she is called upon to meet. These requirements in respect of pleadings are the very essence of the adversarial system. The prime function of a judge is to hear evidence in terms of the pleadings, to hear argument and to give his decision accordingly.'

[25] The Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4)

¹ *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 102A; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107D-E; *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* [2013] ZASCA 142; 2014 (1) SA 212 (SCA); [2014] 1 All SA 158 (SCA) para 39 and *Gusha v Road Accident Fund* [2011] ZASCA 242; 2012 (2) SA 371 (SCA) para 7.

BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) held that the judicial function of a judicial officer is to confine the judgment to the issues before the court, by deciding matters that are germane or relevant by not creating new factual issues or by making gratuitous findings against persons who were not called upon to defend themselves and by failing to distinguish between allegation, fact and suspicion. The principle relied upon by the Supreme Court of Appeal concluding as aforesaid is a foundational principle of the South African legal system, that justice can only be achieved if the procedure leading to a decision is fair.

[26] The current situation draws attention to the important interplay between the substantive law and procedure to the fore. Substantive law defines the rights, duties, and obligations of parties, while procedural law provides the framework through which those rights are enforced or defended in court. The two operate in tandem: substantive law establishes what a party is entitled to, and procedure dictates how that entitlement is pursued, ensuring order, fairness, and equality between litigants. While courts interpret procedural rules to facilitate the effective vindication of substantive rights, procedural requirements cannot be disregarded to the detriment of any party, as they exist to protect due process and maintain the integrity of the judicial process. The proper interchange lies in harmonising both, thus applying procedure to uphold fairness and predictability, while ensuring that substantive rights are meaningful and capable of being fully exercised.

[27] There are however circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. But same is only justified in circumstances where the question has been appropriately and fully canvassed by both sides at trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714E-G, the court held that:

'On the foregoing analysis it is in my view clear that the plaintiff, by its claim that the defendant failed to deliver at Matadi (and by its absence of replication) was denying that the cargo reached Matadi or, if it did, that there was delivery to Otraco as pleaded. If the plaintiff had wished to rely on the point that, if the cargo reached Matadi, and was delivered to a Otraco, it was, when taken out of the ship, so mixed with other goods that *in law* there was no delivery to Otraco, the plaintiff should have replicated to this effect. It is a matter of confession and avoidance. However, the absence of such an averment in the pleadings would not necessarily

be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue...'

[28] The circumstances are somewhat similar in the present matter where reliance in respect of the invalidity came to the fore during cross-examination and resulted in an objection by the defendant. The result was that the issue was not properly ventilated during the trial. The defendant, in the absence of a replication, alternatively a timeous amendment of the particulars of claim, was not called upon to answer the invalidity of the warrant. It was led to believe that the plaintiff's case remained that no warrant was utilised in executing the arrest. The plaintiff contended that the allegation that the arrest was unlawful is sufficient to justify this Court to scrutinise and make a finding pertaining to the validity of the warrant of arrest. The defendant in contrast called upon the court to constrain itself to the issues per the pleadings and disregard the evidence which went beyond the pleaded case on the basis that it is impermissible for the plaintiff to plead one case and attempt to establish another during the trial.

[29] As already stated, the defendant's plea raised the issue of the existence of a warrant as basis for the arrest. The parties exchanged their respective discovery affidavits in 2024. The defendant's discovery affidavits specifically included the full case docket of Thaba Nchu under CAS 28/12/2019. The parties further exchanged evidence bundles prior to the hearing date. The existence of the J50 warrant was within the plaintiff's knowledge and even discovered by the plaintiff himself. That said, it is unclear where this copy originates from if regard is had to the plaintiff's evidence that he was never shown or given a copy and the defendant witness who testified to the addition made after execution. The parties also engaged in a pre-trial early in 2025, from the minute nothing was raised about the validity or lack thereof of the warrant to forewarn the defendant of the intention of the plaintiff to raise a validity challenge.

[30] As alluded to above, it was only once the plaintiff was in the witness box that the issue of invalidity of the warrant of arrest came to light and was on first mention neutralised through an objection. Undeterred and without any evidence on the issue being led by the plaintiff himself or cross examination on the issue, the focus was shifted to introduce the validity challenge during cross examination of the defendant witness. In litigation one of the most fundamental imperatives, as a necessary corollary

of fairness and the rule of law, is procedural order. The concept of fairness in s 34 of the Constitution of the Republic of South Africa, 1996, lies at the heart of the rule of law. Thus, rules of court ought to be interpreted and applied in a way that would render court proceedings fair.² Section 34 entrenches the principles of natural justice. This encompasses, at a minimum, the requirements of justice that parties be treated equally before the courts, that the *audi alteram partem* principle be observed, and that proper notice of the allegations be afforded.

[31] In *Msimango v Minister of Police* [2023] ZAECMHC 50 at para 58, the court in respect of an invalid warrant of arrest for non-compliance with s 43(1)(a) of the CPA held that the question of the validity of a warrant is a matter of law and where it does not comply with the section, it is invalid. I find myself in agreement provided that the validity is an issue before the court, properly raised and fully canvassed by both parties. That did not happen in the present matter. Moreover, for the question of validity to be a matter of law, it should be confined to compliance with s 43 of the CPA and not be based on factual considerations, such as in the present matter.

[32] An arrest or detention is *prima facie* wrongful. It is not necessary, therefore, to allege or prove wrongfulness. It is for the defendant to allege and prove the lawfulness of the arrest or detention.³ It is trite that once the arrest and detention are admitted the onus of proving lawfulness rests on the State as defendant. However, if the arrest took place pursuant to a warrant, the onus of proving the wrongfulness of the arrest by showing that the warrant was irregular rests on the plaintiff.⁴

[33] For the reasons set out above I find that the issue of validity of the warrant of arrest is not an issue before this Court for determination. Had the plaintiff taken the opportunity when it presented itself before or even during the hearing by seeking a postponement and an amendment of his particulars of claim alternatively to introduce a replication, affording the defendant an opportunity to respond thereto, and for the

² *De Beer NO v North-Central Local Council and South-Central Local Council and Others* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (110 BCLR 1109 (CC) para 11.

³ *Lombo v African National Congress* [2002] 3 All SA 517 (SCA), 2002 (5) SA 668 (SCA) para 32.

⁴ *Cresto Machines (Edms) Bpk v Die Afdeling Speur-Offisier, SA Polisie, Noord-Transvaal* 1972 (1) SA 376 (A) 394G; *Minister van Polisie v Goldschagg* [1981] 3 All SA 321 (A), 1981 (1) SA 37 (A) at 40.

issue to be properly ventilated at trial, the position might have been different. This matter will thus be adjudicated within the confines of the pleaded case between the parties.

[34] It is common cause between the parties that the plaintiff had two pending cases against him, that he was at Thaba Nchu police station on 16 March 2022 and engaged Sergeant Mogoera and told there is a warrant for his arrest. Further that the plaintiff called Sergeant Mogoera on 17 March 2022 and they met at the Thaba Nchu Court, where they proceeded to an office, where he was arrested. He never appeared in court on that day.

[35] But for aforesaid there are two mutually destructive factual accounts as to why the plaintiff was at Thaba Nchu police station on 16 March 2022, whether he was arrested with or without a warrant of arrest and that which ensued after he was arrested. The approach to resolving two irreconcilable but mutually destructive factual versions is well established. There is no reason to restate the law.⁵ It is equally true that findings of credibility cannot be judged in isolation but are required to be considered in light of the proven facts and the probabilities of the matter under consideration. 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 the latter will be. But when all factors are equipoised, probabilities prevail. It is against the backdrop of these principles that an assessment of the evidence is undertaken.

[36] The initial enquiry is whether the arrest was effected with or without a warrant, as this dictates whether the arresting officer was required to exercise a discretion to arrest, or not. The evidence on behalf of the defendant together with the contemporaneous evidence of the J50 warrant, established that the arrest took place on the strength of a warrant of arrest. The arrest was executed at the Thaba Nchu Court for the purpose of ensuring the plaintiff's presence at court. The subsequent enquiry is whether Sergeant Mogoera enjoyed a discretion to arrest, which discretion, if present, was required to be exercised before the plaintiff was arrested. It was argued

⁵ *Stellenbosch Farmers' Winery Group Ltd and Another v Martel & Cie SA and Others* (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para 5.

on behalf of the plaintiff that even where a warrant of arrest has been obtained, this in itself does not necessarily justify an arrest to secure the attendance of the plaintiff in court.

[37] The question whether a police officer has a discretion when executing a warrant not to arrest was the subject matter before the Constitutional Court in *Groves N.O. v Minister of Police* [2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC). The apex court clarified the legal uncertainty occasioned by the dictum in *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; [2011] 2 All SA 157 (SCA). In *Minister of Safety and Security v Sekhoto* para 28, the Supreme Court of Appeal found:

‘Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this Court in relation to s 43 in *Groenewald v Minister of Justice*.’

[38] Considering the aforesaid finding for which reliance was placed on *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G-884B, the Constitutional Court in *Groves N.O. v Minister of Police* at para 51 held that the statement was an obiter dictum and constitutes an error in law, as the court in *Groenewald v Minister van Justisie* did not decide that a peace officer making an arrest on the strength of a warrant has a discretion, but dealt with the discretion of the magistrate or peace officer authorising the warrant of arrest. The Constitutional Court in *Groves N.O. v Minister of Police* at para 52 to 53 reasoned that:

‘[52] A warrant of arrest issued by a peace officer is to be distinguished from a warrantless arrest. The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.’

[53] An authorised warrant has been subjected to a process that involves the participation of other role players such as a commissioned police officer or a prosecutor (who applies for the warrant) and the Magistrate or justice of peace (who considers the application and issues the warrant). The point is that this process ensures that it is not only the decision of the arresting officer that determines the fate of the suspect.'

[39] The Constitutional Court *Groves N.O. v Minister of Police* at para 56 to 57 held that:

'[56] Section 43(2) of the CPA places a positive duty on an arresting officer to arrest the person identified in the warrant with the use of the word "shall". There is no scope to interpret section 43(2) of the CPA as granting the arresting officer a discretion whether to arrest or not. The "shall" relates to execution of the warrant and does not expressly or by implication create room for a discretion. Section 44 of the CPA determines that a warrant of arrest issued "may" be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof. Taking into account the ordinary grammatical meaning and rules of construction, the "may" relates to who has the power to execute the warrant (a peace officer) and does not confer a discretion when executing the warrant. There is no disjuncture between these sections: section 44 of the CPA determines who may arrest and section 43(2) of the CPA places an obligation on the arresting officer to arrest in terms of the warrant.

[57] A warrant is issued and served in the manner prescribed by statute and circumscribes the terms of the arrest. The person mentioned in the warrant is the person that the arresting officer is authorised and directed to arrest. Once arrested, such person must be brought before a lower court in accordance with the provisions of section 50 of the CPA.'

[40] Sergeant Mogoera thus acted as she was duty bound to act in arresting the plaintiff in terms of the warrant and did so at the court for the purpose of securing the plaintiff's appearance in court. The fact that the plaintiff then never appeared as a result of the decision taken not to prosecute does not have the result that the arrest was unlawful as was contended for by the plaintiff.

[41] The Constitutional Court in *Groves N.O. v Minister of Police* at 60 went on to explain that:

'[60] Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and "[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other

functionaries". An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.'

[42] It is common cause that the plaintiff was at the Thaba Nchu police station on 16 March 2020 and engaged Sergeant Mogoera, she did not arrest him on 16 March 2020. It's further common cause that the plaintiff then called her on 17 March 2022 and they met at the Thaba Nchu Court and proceeded to an office. Sergeant Mogoera exercised a value judgment on 16 March 2022 by not immediately arresting the plaintiff. Having established that the arrest was pursuant to a warrant of arrest, and that Sergeant Mogoera was duty bound to arrest in execution of the warrant, the arrest was prima facie lawful. The onus of proving the wrongfulness of the arrest by showing that the warrant was irregular or non-compliance with s 43 of the CPA rests upon the plaintiff. As already dealt with earlier in this judgment, no validity challenge was raised on the pleadings, and it thus marks the end of the determinable issues.

[43] In the result, the plaintiff's claim cannot succeed. No circumstances exist which would warrant a departure from the established principle that costs should follow the event.

[44] The following order is made:

1 The claim is dismissed with costs.



D GREYLING-COETZER
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:

Instructed by:

M Litheko

Litheko Motsoeneng Incorporated,
Bloemfontein

For the defendant:

Instructed by:

N M Phakama

State Attorney,
Bloemfontein.