



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

Case number: 21685/2022

In the matter between:

BAXOLELE MAKINANA

Plaintiff

and

MINISTER OF POLICE

Defendant

Case number 21684/2022

And in the matter between:

SIYABONGA MCOTSHANA

Plaintiff

and

MINISTER OF POLICE

Defendant

Coram: Van Zyl, AJ

Heard on: 28-29 May 2025; 7-8 August 2025; 11 February 2026

Judgment: 15 April 2026

Summary: Claim for damages arising from alleged unlawful arrest and detention – not proven on a balance of probabilities that discretion to apply for J50 warrants of arrest improperly exercised – actions dismissed

ORDERS

1. Under case number 21684/2022, the plaintiff's claims are dismissed, with costs, including counsel's fees on Scale B.
2. Under case number, 21685/2022, the plaintiff's claims are dismissed, with costs, including counsel's fees on Scale B.

JUDGMENT

VAN ZYL, AJ:

Introduction

1. These two actions were heard together because they are based on substantially the same set of facts. The claims arose following the plaintiffs' arrests following a kidnapping that had taken place on 5 December 2018 in Khayelitsha, in which it was alleged that the plaintiff were involved.
2. The plaintiffs are both members of the South African Police Service (SAPS). They each seek judgment in the sum of R620 000,00 against the defendant as delictual damages, arising from an alleged unlawful arrest (pursuant to an arrest with a duly issued ("J50") warrant) and detention. Mr Mcotshana was arrested at his home, whilst Mr Makinana, having learnt of the existence of the warrant, handed himself in at the Somerset West police station.
3. Only Mr Makinana testified at the hearing. Mr Mcotshana could not testify, apparently due to ill health.
4. Counsel, who appeared for both plaintiffs, assured the court that Mr Mcotshana's evidence would merely have been a repeat of Mr Makinana's evidence.

The plaintiffs' cause of action

5. The plaintiffs' particulars of claim were substantially similar. They challenged the lawfulness of their arrests, which were effected with a duly issued warrant obtained by Warrant Officer Yolande Te Baerts on 18 January 2019, on counts of kidnapping, robbery and extortion. This was pursuant to investigations conducted after consultation with SAPS members Elton Beal and Virginia Nissen in conjunction with recorded complaints and statements made by victims, including Mr Mahama Labou Boukari, Mr Abdi Aden Mohamed, and Mr Abdi Kariim Hassan Noor. The plaintiffs' involvement was also implicated by a suspect, Mr Nongauza.
6. Although the cases were somewhat widely pleaded, over the course of the trial the issue narrowed solely to whether W/O Te Baerts had reasonable grounds upon which to request the prosecuting authorities to issue warrants of arrest. In other words, should she, instead of having sought warrants, have considered other measures to ensure the appearance of the plaintiffs before a court? The question to be answered, namely whether the plaintiffs' arrests and subsequent detention were unreasonable and unlawful in the circumstances, is thus to be viewed in this context.
7. The plaintiffs' counsel put the issue as follows: the plaintiffs' case is predicated on the failure by the arresting officer to conduct an investigation to establish reasonable grounds and thereafter make a value judgment prior to taking a decision to apply for a warrant of arrest. There are two stages applicable in this matter. The first is the assessment of the evidence to establish reasonable grounds. The second pertains to the decision to choose the manner of arrest. The plaintiffs' case concerns the first stage of the enquiry. The plaintiffs say that, because these cases involved the arrest of SAPS officials by their colleague, she (W/O Te Baerts) should have applied caution. She had a discretion not to apply for the arrest warrants, and she should not have done so without affording them an opportunity of explaining themselves beforehand.

The plaintiff's case and the relevant evidence

8. The pertinent evidence led was that of Warrant Officer Yolande Te Baerts for the defendant, and one of the plaintiffs, Mr Makinana.
9. The plaintiffs' pleaded, and Mr Makinana said so in evidence, that at the time of their arrests, W/O Te Baerts denied them an opportunity to present facts which could have enabled her to exercise her discretion properly to not effect the arrests or, if she had engaged with them on an earlier occasion, she would not even have had to apply for warrants of arrests.
10. W/O Te Baerts testified, however, in detail, that she had made sure to exercise caution precisely because the plaintiffs were SAPS members. She was an impressive witness who came across as a dedicated officer who took her duties seriously. She took care to grant the plaintiffs due procedural considerations as soon as Mr Nongauza mentioned that SAPS members were involved in the kidnapping, robbery and extortion case. She pointed out during her testimony that the plaintiffs failed to provide alibis, and instead chose to state that they would speak to their lawyers. Her evidence was that *"... and like I explained because like I explain when they are saying now I denied them the opportunity to present facts when I obtain a warning statement I specifically explain to them if you give me your version I can follow up on whatever you are telling me."*
11. The warning statements on record bear this out. The plaintiffs were unwilling to given any explanation at the time when W/O Te Baerts gave them the opportunity to do so.
12. The plaintiffs' version, as revealed during cross-examination and put to W/O Te Baerts, was to the effect that the plaintiffs were involved in a crime prevention operation targeted at Somalians, ostensibly the complainants, when the abduction under consideration took place. One wonders why such explanation – which provides both an alibi and an excellent excuse for being

connected to the scene of the crime – was not provided to the SAPS members involved in the investigations, including W/O Te Baerts, whether before or even after she had applied for the issue of the warrants of arrest.

13. In the circumstances, the explanation proffered in court has an air of improbability about it. This is strengthened by the fact that W/O Te Baerts explained why such an operation could not lawfully have been undertaken without the plaintiffs having gone through the proper channels to obtain authorisation therefor. The plaintiffs did not demonstrate compliance with any of the procedural requirements for the approval of such an operation, apart from justifying their conduct by stating that they did not want other SAPS members to steal their thunder when they did manage to apprehend any suspects. W/O Te Baerts testified that the plaintiffs were at least supposed to have been acting under the orders of a commander, and they should have had a coordinated operational plan even when they were involved in an operation whilst off-duty, as the plaintiffs claimed they were. Mr Makinana could not give any satisfactory explanation for the unregulated and unauthorised manner in which he testified they had gone about the alleged secret operation. As far as credibility and probability are concerned, I prefer the evidence of W/O Te Baerts over that of Mr Makinana in this respect.
14. The plaintiffs further averred that the applicant for a warrant was not based on information gathered or emanating from an investigation; rather, it was based on speculation, guesswork, or various machinations between other accused involved. In her evidence, however, W/O Te Baerts was careful to explain the course of her investigation, in particular after Mr Nongauza provided a statement under section 204 of the CPA, as well as a confession, implicating the plaintiffs in the crime.
15. The plaintiffs, however, submit that W/O Te Baerts's actions gave the impression that she did not care about the plaintiffs. They criticised her for completing the warning statements only after their arrests, and asked them to give their version only upon discussing the warning statement with them. She relied to some extent on a photographic identity parade that took place

after the arrest. The complainant himself could not identify the plaintiffs as the perpetrators of the crime. In short, she failed to apply her mind before applying for arrest of the plaintiffs, and her decision was irrational.

16. There is no doubt that W/O Te Baerts, as the SAPS detective tasked with the case, had a duty to conduct investigations regarding the kidnapping and robbery and extortion case. In *Groves N.O. v Minister of Police*¹ it was held 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.”

17. The evidence showed that she did so - she considered the information received from the operation involving Sergeants Beal and Nissen, Mr Nongauza's section 204 statement and confession, and a photographic identification parade. These aspects were not perfect but they provided a basis for what could, in the circumstances, be considered a reasonable suspicion. Mr Makinana in fact conceded under cross-examination that the situation warranted an investigation, and that W/O Te Baerts was performing one.
18. Much was made of the fact that she interviewed crucial suspects (known as Sean and Mike) only after having arrested the plaintiffs. These people could have shared light on whether the plaintiffs were involved in the commission of the crime. It was however no secret that the investigation was continuing. There was never a suggestion that the investigation was complete at the

¹ 2024 (4) BCLR 503 (CC) para 60.

stage of the plaintiffs' arrests. One must be careful not to consider the matter solely with the considerable benefit of hindsight.

The defendant's case

19. The defendant's defence is based upon two statutory provisions, namely sections 43 and 50(1) of the Criminal Procedure Act 51 of 1977 (CPA).

20. Section 43 of the CPA provides as follows:²

“43 Warrant of arrest may be issued by magistrate or justice

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.”

² My underlining.

21. Under section 44 of the CPA a warrant of arrest issued under any provision of the CPA may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof.
22. Section 50(1) of the CPA, in turn, provides as follows:

"50 Procedure after arrest

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

23. It is common cause that following the first appearances in the magistrates' court, they were duly remanded in custody due to the seriousness of the offence, the sensitivity of the investigation at that particular stage, and the fact that investigations were ongoing as other suspects were still to be located. During cross-examination of W/O Te Baerts she was questioned about her initial opposition to the grant of bail. Ultimately, however, it was common cause on the evidence (and in fact pleaded in the particulars of claim) that the State elected not to oppose bail.
24. I agree, however, with the submission made by the defendant's counsel that from the essence of the evidence adduced and the substance of the plaintiffs' attack on the conduct of W/O Te Baerts, it appeared that the plaintiffs contended that an arresting officer such as W/O Te Baerts must, before applying for a warrant of arrest, ensure that there is sufficient evidence to prove the guilt of an accused person. This contradicts the essence of what constitutes a reasonable suspicion as envisaged in the CPA. Although the notion of a "reasonable suspicion" often arises in situations of an arrest without a warrant (under section 40(1)(b) of the CPA), its meaning as considered in various judgments over the years is relevant for the purposes of assessing the issues raised by the plaintiffs.

25. Did W/O Te Baerts, an experienced officer, conduct herself reasonably in the situation she was faced with? In *Minister of Safety and Security v Swart*³ the Supreme Court of Appeal (SCA) held as follows:

"[20] It is furthermore trite that the reasonableness of the suspicion of any arresting officer acting under s 40(1) (b) must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a schedule 1 offence".

26. From the evidence led it is clear that the particular set of facts that W/O Te Baerts was confronted with was that of a complaint involving a series of serious crimes, including kidnapping, robbery and extortion. She was confronted with the contents of Mr Nongauza's section 204 statement, the confession, the results of interviews with the group of SAPS members comprising of Beal and Nissen and their statements, apart from other aspects that arose in the course of her investigations.
27. The plaintiffs say that the confession as it stands could not have been used against the plaintiffs, because of the provisions of section 219⁴ of the CPA. This is of course so, but the fact remains that the confession, implicating the plaintiffs, was but one of the factors that W/O Te Baerts had to consider in the exercise of her discretion whether to apply for a warrant of arrest. The fact that the confession would not have been used in a trial in due course was a different matter, to be considered in a different context.
28. On W/O Te Baerts's application for the J50 warrant, and what is expected of a SAPS member in her position, the following passages from the SCA in *Minister of Safety and Security v Lincoln*⁵ are instructive:

³ 2012 (2) SACR 226 (SCA) para 20. My emphasis.

⁴ "No confession made by any person shall be admissible as evidence against any other person."

⁵ 2020 (2) SACR 262 (SCA) paras 44-45. My emphasis.

"[44] Lincoln (as plaintiff) was required to prove that members of the SAPS – in particular Knipe and Rossouw – had acted without reasonable and probable cause. The phrase has been held to mean an honest belief founded upon reasonable grounds that the institution of proceedings is justified. The concept involves both a subjective and an objective element.

[45] The material portions of the affidavit of Smith which relate to the charges brought against Lincoln are set out earlier. The facts set out in Smith's affidavit which relate to the charges instituted were not seriously contested. What Lincoln set out to achieve in the trial was to establish his innocence. It is to this end that his evidence was directed. But this fell far short of establishing the absence of reasonable and probable cause in respect of which he bore the onus. Knipe and Rossouw had obtained statements from numerous witnesses in respect of each docket. Some incriminated Lincoln but others were favourable to him. All of this – incriminatory and exculpatory – were placed before Bouwer. It was Bouwer's assessment of all the material before him in the dockets that led to the ultimate decision by first the Attorney-General and secondly, the NDPP to proceed with the charges. Objectively reasonable and probable cause can only be gleaned from an analysis of the contents of the dockets. It involved the weighing up of the evidence favourable to Lincoln against that incriminating him and testing the averments contained therein against the objectively established facts and the real evidence contained in the docket. There is no evidence that Knipe and Rossouw actively sought to persuade the Attorney-General to institute the prosecution. To the extent that they may have expressed their views as to the case made in the dockets, there is nothing untoward about such conduct. More was required".

29. In *Lincoln's* case, Knipe and Rossouw were SAPS members who carried out the investigation in which Lincoln was implicated and was charged for certain criminal offences for which he was later acquitted. The SCA concluded as follows:⁶

"[53] Lincoln accordingly failed to establish the alleged conduct attributed to Knipe and Rossouw in his pleadings. It follows that he did not establish that

⁶ *Lincoln supra* para 53. My emphasis.

they had wilfully placed false evidence before the Attorney-General or that they had no honest belief in the credibility of the statements presented. They left the decision to prosecute or not to the Attorney-General. On these additional grounds the Minister cannot be held liable".

30. In *Mabona and another v Minister of Law and Order and others*⁷ the court stated that the reasonableness of a suspicion for the purposes of s 40(1)(b) should be considered objectively: would a reasonable person in the position of the relevant officer presented with the same information, have considered that there were good and sufficient grounds for suspecting that the plaintiff was involved in the crime under consideration:

*"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 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 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".*⁸

31. It cannot, on the available evidence, be said that W/O Te Baerts acted unreasonably or that her conduct was malicious in some way. As a reasonable police officer, in addition to her investigative training, she formed a suspicion that the plaintiffs might be involved in the crime, as they were implicated (whether wrongly or correctly) by Mr Nongauza. In any event, W/O Te Baerts indicated that she was continuing with her investigations as further suspects, known as Mike and Shaun Magoda, were still on the run. Mr Magoda was only located and arrested in 2020, a year and two weeks after the commission of the crimes, and Mike is still at large.
32. The facts that W/O Te Baerts was faced with constituted grounds upon which a reasonable suspicion that the offence was committed could be reasonably

⁷ 1988 (2) SA 654 (SE) at 658E-H.

⁸ *Mabona supra* at 658H. My emphasis.

entertained. She testified that she did not lightly link the plaintiffs with the alleged offences as she harboured no ill feeling towards them (they were, after all, her colleagues) but was guided by the seriousness of the situation she was faced with. She briefed and communicated with the Directorate of Public Prosecutions in the course of applying for assets warrants.

33. W/O Te Baerts testified that the purpose of her application for the J50 warrant was to ensure that the serious allegations and factors already in her possession in the course of her continuing investigation are properly considered by the Director of Public Prosecutions. There was no malicious intent on her part. Under cross-examination Mr Makinana conceded that W/O Te Baerts acted as a reasonable police official would in terms of her training in dealing with the nature of offences that plaintiff was implicated in. His contention was only that “it was supposed to be done correctly” and that “she did not complete the investigation”. This further concession puts paid to the allegations that W/O Te Baerts was not conducting an investigation and that her application for a warrant was “only based on speculation” and on “guess work”.
34. The concession is apt, further, as it was W/O Te Baerts’s evidence that the application for the warrant and arraignment of the plaintiffs was as a consequence of due legal process, as she was firm in her suspicion that the plaintiffs were potentially involved in the incident. The plaintiffs’ insistence that she “should have done more” before applying for arrest warrants is easily said with the benefit of hindsight,⁹ and disregards the delicacy of the situation described by W/O Te Baerts under cross-examination. The involvement of foreign nationals as victims and the potential of imminent exposure to danger to them required that she be considerate and act decisively and carefully. She was very much aware of the delicacies of this situation.

⁹ See *Roman’s Transport v Zihlwele* [2015] ZASCA 13 (13 March 2015) para 11 in relation to the need to guard against adopting an armchair critic approach.

35. In *Mawu v Minister of Police*¹⁰ the court disagreed with the proposition that for a reasonable suspicion to be formed the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on such information if the quality thereof has not been subjected to scrutiny will render the arrest unlawful. Seen in this light, the conduct of W/O Te Baerts displayed reasonableness of the conduct of an officer to entertain a suspicion that a suspect was implicated. Her evidence was candid and consistent with, and indicated that she had conducted herself with the objectives of section 43 of the CPA in mind.
36. I have indicated earlier that it was only during the trial that the plaintiffs raised a potentially exculpatory explanation. This was that the plaintiffs were part of a team conducting a secret crime-busting operation, organised by SAPS, at the time that Mr Nongauza was arrested.
37. This explanation did not withstand scrutiny under cross-examination. Mr Makinana even resorted to testifying that Mr Mcotshana could have been on his own mission when the kidnapping, robbery and extortion took place.
38. In these circumstances, I cannot agree with the plaintiffs' counsel's submission that the discretion to apply for the J50 Warrant was properly not exercised. This is in addition to the clearly disproved allegation that W/O Te Baerts denied the plaintiffs an opportunity to present facts which could have enabled her to exercise her discretion properly to not effect the arrests. The plaintiffs themselves were unwilling to disclose anything exculpatory when they were asked to do so.

Discretion and onus

39. In *Divisional Commissioner of the South African Police, Witwatersrand Area, and others v SA Associated Newspapers Ltd and another*,¹¹ the SCA discussed the intention of the legislature and the onus on a person disputing

¹⁰ 2015 (2) SACR 14 (WCC) para 31.
¹¹ 1966 (2) SA 502 (A) at 512.

that the basis for their arrest was for purposes other than investigations to bring them to court within 48 hours to answer to specific charges:

"All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee".

40. As the plaintiffs' pleaded case and evidence only questioned the exercise of W/O Te Baerts's discretion, the plaintiffs failed to discharge the onus mentioned above. It was not sufficient simply to imply that she should have done more or completed the investigation before applying for the warrants or arresting the plaintiffs.
41. The plaintiffs argued that various methods to secure a suspect's presence in court are contained in section 38 of the CPA. The methods are summons, written notice, indictment, and arrest. The section does not rank the methods in terms of preference. In *Minister of Safety and Security v Sekhoto and another*¹² the SCA stated thus:

"[54] The present debate arose in the high courts by reason of the last sentence (which I italicise below) of a dictum by Schreiner JA in Tsose (at 17G–H) which reads:

'An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal. . . .

What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons

¹²

Supra para 54.

should be used. But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.”

42. The fact remains, however, that W/O Te Baerts had a discretion. *Minister of Law and Order and another v Dempsey*¹³ discussed the general principle as follows:

*"Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegations to prove it. There are in such a case two separate and distinct issues, each having its own onus (*Pillay v Krishni and Another* 1946 AD 946 at 953). The first is whether the opinion was actually formed, the second which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed is whether it was properly formed."*

43. In *Minister of Safety and Security v Sekhoto and another*¹⁴ it was held that *"once the jurisdictional facts have been established it is for the plaintiff to prove that the discretion was exercised in an improper manner. This approach was adopted in *Duncan* (at 819 B-D) as being applicable to attacks on the exercise of discretion under Section 40(1)(b)."*

44. In *Duncan v Minister of Law and Order*¹⁵ the SCA³⁴ stated as follows with regard to the relationship between the purpose of the arrest and the lawfulness and reasonableness thereof:

"I therefore share the view of Van Dijkhorst J that an arrest without warrant is not unlawful merely because the arrestor intends to make further investigation before deciding whether to release the arrestee or to proceed with a prosecution as contemplated by s 50 (1). If the object of the arrestor is to do just that, it cannot be said that he acted with an extraneous or ulterior

¹³ 1988 (3) SA 19 (A) at 38G. Emphasis supplied.

¹⁴ 2011 (5) SA 367 (SCA) para 46, and see the discussion at paras 48-50. Emphasis supplied.

¹⁵ [1986] 2 All SA 241 (A) para 30.

purpose such as Schreiner JA had in mind in Tsose's case. But that was also the law under the old Act. Put negatively, an arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court".

45. In my view, the plaintiffs could not discharge the onus of showing that the purpose of their arrests was anything else but to achieve the ends of justice.
46. Insofar as the plaintiffs suggest that "a less invasive means" to bring an accused person to justice is a further jurisdictional requirement to be considered in evaluating the exercise of a discretion such as the one in the present case, this goes against the prevailing precedent. As stated in *Reynolds v Minister of Safety and Security*¹⁶ the evidence of the arrestor, W/O Te Baerts in this instance, should stand scrutiny and point to a proper exercise of discretion in that the opinion she formed was proper in the circumstances. It was for the plaintiffs to prove through evidence that the opinion was improperly formed.
47. W/O Te Baerts, in justifying her decision to apply for the warrants, testified that due to the nature of the offence she had to take the initiative and present her case to the DPP, to enable the latter to make a decision. To have done otherwise would have exposed potential victims to danger and herself to a dereliction of duty. The present circumstances cannot be said to be within the category of those described in *Minister of Safety and Security v Sekhoto supra*, namely "the apparent abuse by some peace officers of the provisions of section 40 (1)" merely because they have a "right" to do so.¹⁷ The offence in the present matter was not a petty crime, and that potential involvement of SAPS members made the situation all the more serious.
48. In the circumstances, W/O Te Baerts's decision to continue with applying for the warrants of arrest after screening the docket cannot be faulted.

¹⁶ 2011 (1) SA SACR 594 (WCC) para 21. See also *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) paras 45-49,
¹⁷ At para 13.

Detention

49. Insofar as the alleged unlawfulness of the plaintiffs' detention is still an issue, I can do no better than to quote from *Nhlapo-Khumalo v Minister of Police and others*,¹⁸ where the court granted an application of absolution from the instance against the plaintiff who sued the police for unlawful arrest after having been arrested (albeit without a warrant) for carjacking and attempted murder, when the evidence in the docket indicated that he had been pointed out by his co-accused. The court held as follows:

"[20] The evidence presented demonstrates that the police in effecting the arrest had reasonably suspected that the plaintiff had committed the crimes alleged. The evidence demonstrate that he was pointed out as an accomplice by the other 3 accused who, when apprehended confessed to the crimes as committed. On this basis, it is therefore justified to infer on a balance of probabilities that the arrest was based on solid grounds. I therefore, find that the jurisdictional facts for arrest were satisfied.

[21] Once the jurisdictional facts for an arrest are present, discretion arises. The general requirement is that any discretion must be exercised in good faith, rationally and not arbitrarily. The question therefore is whether members of the SAPS' exercise of discretion was within the confines of the enabling legislation. It must be borne in mind that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof.

[22] The Supreme Court of Appeal in Minister of Safety and Security v Sekhoto held:

"... once the jurisdictional facts have been established it is for the plaintiff to prove that the discretion was exercised in an improper manner. ..."

...

[24] On the claim of unlawful detention, it is well established that an arrest and detention are separate legal processes, so much so that while the arrest may be lawful; the detention may be unlawful; the fact that both result in someone being deprived of her or his liberty does not make them one legal process. Having said that, the evidence in this matter demonstrate that the issue of arrest and subsequent detention of the plaintiff are intertwined. I have already concluded that the conduct of

the member of the SAPS caused no harm in arresting the plaintiff, it then follows that detention was justified."

50. I have found that the arrests were lawful. Given the events that follows thereafter as gleaned from the magistrate's notes, and the plaintiffs' release on bail without opposition from the State, I cannot find, on a balance of probabilities, that their detention was unlawful.

Conclusion

51. It is trite that evidence led at a trial has to prove an alleged fact, and the common aspects in the evidence considered in its totality should be of assistance to arrive at a plausible conclusion. The common thread through all of the evidence taken together in these matters, including the evidence in relation to the investigations leading up to the plaintiffs' arrests, shows that Warrant Officer Te Baerts acted reasonably in the context of the nature of the alleged crime, and the indications at her disposal that members of SAPS might have been involved. Her evidence, viewed objectively and in its totality, was detailed and credible.
52. The evidence of the witnesses for the defendant, considered together with the documents submitted into evidence, tips the balance of probabilities in favour of the defendant. On a consideration of the evidence, therefore, I am not satisfied that the plaintiffs' arrest and subsequent detention were brought about as a result of unreasonable conduct on the part of either W/O Te Baerts or any of the other employees of the defendant involved in these matters.

Costs

53. There is no reason to deviate from the general rule that costs should follow the result. Counsel were agreed that their fees should be taxed on Scale B.

Order

54. In the circumstances, I grant the following orders:

3. Under case number 21684/2022, the plaintiff's claims are dismissed, with costs, including counsel's fees on Scale B.
4. Under case number, 21685/2022, the plaintiff's claims are dismissed, with costs, including counsel's fees on Scale B.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the plaintiffs:

Instructed by:

Mr S. Mbobo

Kili Inc. Attorneys

For the defendant:

Instructed by:

Mr D. Nyathi

The State Attorney