IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Case no: EL18/2012
ECD 318/2012
Date heard: 9-10, 30 Sept
Date delivered: 15 Oct 2013

In the matter between

VELILE TINTO **Plaintiff**

Vs

THE MINISTER OF POLICE **Defendant**

JUDGMENT

PICKERING J:

[1] This is an action based, initially, on defamation, injuria and on invasion of privacy in which plaintiff claims the sum of R500 000,00 as and for damages. The defamation claim was jettisoned during the course of the trial. With regard to the remaining claims plaintiff pleaded that the police, including a certain warrant officer Smith ("*Smith*"), wrongfully and with the intent to injure him, "*demanded to search the plaintiff's motor vehicle without a search warrant nor just and lawful cause; said that all lawyers deal with criminals when the plaintiff introduced himself as an attorney; and asked what the plaintiff was hiding when the plaintiff refused to accede to the search of his motor vehicle without a warrant.*"

[2] Plaintiff pleaded further that this conduct "*humiliated and degraded*" him and "*invaded his constitutional right to privacy*."

[3] Defendant in his plea admitted that Smith did not have a search warrant when he requested plaintiff to allow the police to search his vehicle and admitted further that when plaintiff refused such permission Smith had asked him "*why, if he had nothing to hide, he did not allow his vehicle to be searched.*" Defendant denied, however, that Smith had "*demanded*" to search the vehicle and denied that he had said that all lawyers deal with criminals.

[4] Defendant pleaded further that Smith had requested plaintiff to allow the police to search his vehicle because he held the reasonable belief that there was an article referred to in section 20 of the Criminal Procedure Act, no 51 of 1977, in his vehicle and believed on reasonable grounds that a search warrant would have been issued to him if he had applied for one but that the delay in obtaining such a warrant would have defeated the object of the search. The defendant pleaded further that after Smith had requested plaintiff to allow the policemen to search his vehicle, plaintiff had requested the police to allow him to drive his vehicle to his office where it could be searched, but that on arrival at the office, plaintiff had refused to allow any search to be conducted.

[5] Plaintiff is an attorney of this Court, having been admitted as such during 1999. He is presently residing and practising in Pretoria as Velile Tinto and Associates although he also has what he termed as being a "*national footprint*" with offices in Johannesburg, Cape Town, Kwa-Zulu Natal and East London.

[6] During November 2010 he was practising in East London with his offices at 5 Pine Park. His firm at that time was on the panel of attorneys for Standard Bank, First National Bank ("*FNB"*) and Nedbank.

[7] On the morning of 11 November 2010 he was working in his office until lunch time. He needed to deposit money at Standard Bank in Frere Road in the vicinity of the Vincent Park shopping mall. Before going there, however, he wished to withdraw money from the ATM at the FNB which was situated at Vincent Park mall. He accordingly proceeded in his red Volkswagen Polo GTi motor vehicle to the particular section of the mall where, it is common cause, Nedbank, FNB and Absa banks are situated.

[8] He had with him in the car two male passengers. One of the passengers was a certain Tamsanqa Mafa, the "*cousin brother*" of a friend of plaintiff's who was employed as an attorney in the office of the State Attorney, Mthatha. The other passenger was a friend of Tamsanqa's. Tamsanqa had come to plaintiff's offices to borrow money and plaintiff intended to draw cash for this purpose from the ATM at FNB.

[9] All the parking spaces next to FNB were full. Plaintiff accordingly double-parked his motor vehicle but left Tamsanqa in the driving seat in case his vehicle had to be moved. He withdrew the money from the ATM and returned to his vehicle. According to him he was parked at the mall for no more than 5 minutes. From the mall he drove to the Standard Bank in Frere Road. The parking lot in front of the bank was full and he therefore proceeded to the Balfour Park parking lot in the next block where he parked in front of a shop known as Rama's. He sent Tamsanqa to deposit his money at the Standard Bank whilst he waited in his motor vehicle. He was still waiting, checking his petrol slips, when he noticed a police vehicle park next to him. A policeman, whom it is common cause was Smith, came up to his window. Plaintiff assumed that Smith was admiring his car but, instead, Smith knocked on his window. He asked plaintiff what he was doing to which plaintiff replied that he was "auditing". Smith then asked plaintiff where he had been during the last 30 minutes. Plaintiff explained to him that he had come from his office via Vincent Park mall. Smith then informed plaintiff that he wished to search the motor vehicle. Plaintiff asked why. Smith replied that the police had received a call from Nedbank to the effect that a silver Mercedes Benz and a brown Jetta were suspected of being involved in the planning of a robbery. Plaintiff pointed out that he was driving a red Volkswagen to which Smith added "*and a red Polo*."

[10] Plaintiff then told Smith that he was a practising attorney. He produced a card with his picture on it identifying him as such and he also showed Smith his identity document. According to plaintiff Smith then stated "*I know the lawyers – they are dealing with criminals.*" He insisted that he wanted to inspect the boot of the motor vehicle. According to plaintiff Smith also asked him what it was that he was hiding by refusing to accede to his request to search the motor vehicle. Plaintiff denied, as was put to him under cross-examination by Mr. Bloem S.C., who appeared for defendant together with Mr. Mpahlwa, that Smith had uttered these words at a later stage at plaintiff's offices.

[11] Plaintiff stated that as a law-abiding professional man he was deeply insulted by both these statements which implied, so he said, that he was not only associating with criminal activities but was himself involved in such activities.

[12] Smith then told plaintiff that he did not have "*all the time*" which plaintiff construed as meaning that Smith intended to search the motor vehicle whether or not plaintiff agreed thereto. Plaintiff did not want Smith to conduct what would be an embarrassing search in public. He accordingly told him that if he wanted to do anything he could do it at plaintiff's offices which were close to Balfour Park. He denied having requested to be allowed to drive his vehicle to his offices. Smith agreed to follow him to the offices. In this regard plaintiff also denied that he had agreed that his motor vehicle could be searched at his offices. He was intending on arrival at the offices to reason with Smith in the hope that he would accept his word and abandon his prospective search.

[13] On the way to the offices he telephoned Mr. Nico du Plessis ("*du Plessis*") who was then, according to plaintiff, his candidate attorney, and told him what had happened. On arrival du Plessis was waiting for him outside and spoke to Smith. Smith was told that if he wished to proceed with the search he should get a search warrant. Plaintiff initially denied that it was at this stage that Smith had asked him what it was that he was hiding. Under cross-examination, however, he stated that the police "*continued to ask me what I was hiding.*"

[14] After some further discussion, plaintiff had a change of heart. He told Smith that he could go ahead and search the vehicle, saying that he had nothing to hide. The police, however, said it was "*too late*" and left the scene without searching the vehicle.

[15] Nico du Plessis stated in his evidence that at the time of the incident he was in fact a practicing attorney in the employ of Velile Tinto and Associates. He is presently a director of Tinto, du Plessis Incorporated. He confirmed having been telephoned by plaintiff who asked him for assistance. At that time du Plessis's father was Deputy Director of Public Prosecutions in Mthatha. He telephoned his father to reassure himself as to the circumstances in which the police could search a motor vehicle without a warrant. His father duly advised him of the legal position.

[16] Plaintiff then arrived in his motor vehicle followed by the police motor vehicle. Plaintiff told him what had happened in front of Rama's and also stated that whilst at Rama's he had asked the police to follow him to his office. Du Plessis discussed the matter with Smith and asked what the problem was. Smith told him that he believed that plaintiff's motor vehicle was "*a suspected vehicle involved in bank robberies.*"

[17] According to du Plessis he was extremely embarrassed by the spectacle unfolding in the office parking lot in front of clients and staff who had begun peeping out of the windows. He asked Smith whether he had a search warrant. Smith replied that he did not. Du Plessis then told him that they would not consent to a search of the motor vehicle without a warrant to which Smith answered that he could go to court and get one. He told du Plessis, however, that, as du Plessis well knew, it would take a long time to obtain one. Du Plessis replied that, to the contrary, Smith could obtain one as a matter of urgency within an hour.

[18] The discussion continued for, in du Plessis's estimation, approximately 20 to 30 minutes. Plaintiff suddenly told the police that they could search the motor vehicle. Du Plessis thought that plaintiff had become frustrated and tired of the matter. The police, however, did not search the vehicle but just left. Du Plessis had no idea why they should have done so after having been so insistent about searching but surmised that they had realized that they had made a mistake. He denied having been belligerent or having bullied the police as was put to him by Mr. Bloem.

[19] Warrant Officer Smith testified that he had been a policeman since 1988, firstly with the Flying Squad and then with the Robbery Response Unit in which latter unit he dealt, *inter alia*, with bank related robberies and offences.

[20] On the day in question he was patrolling the city area in his marked police motor vehicle, together with two colleagues, when he received a call from Warrant Officer Boatwright of the Crime Intelligence Unit. Boatwright informed him that he had been contacted by Mr. Webb ("*Webb*") a former policeman now working for Coin Security and contracted to Nedbank in East London. It is not in dispute that Webb

employed a number of informers who were tasked with observing the people and vehicles in the parking area in the vicinity of the banking complex at Vincent Park shopping mall and with reporting any suspicious behavior to Webb.

[21] According to Smith the police worked "*in close contact*" with Webb and the informers and would, on receipt of reports, go out and check them because, so he said, there had been numerous robberies at the banking area of the mall and people were being robbed "*every single day"* at the banks*.* He described the banking mall as being a "*high crimes area*".

[22] He stated that it was the *modus operandi* of certain criminals to park their vehicles near the banking area and to then walk backwards and forwards between the various branches of the banks, looking for likely victims, especially those who had withdrawn large sums of money. If a particular vehicle was parked in the area for longer than an hour the informers would keep an eye on its occupants and, if their conduct was suspicious, they would then note the registration letters and number of the vehicle and contact Webb.

[23] This evidence was not disputed.

[24] On the day in question Boatwright informed Smith that certain informers had reported to Webb that the plaintiff's motor vehicle, a red VW Polo GTi, had been observed parked in the banking area of the mall for "*approximately an hour and a half*" and that, whilst the driver remained in the vehicle, the other two occupants had been walking "*backwards and forwards*" to the vehicle. Smith stated that it was conveyed to him that the informers "*saw the vehicle parked and two guys walking backwards and forwards to the car, then they would go to Nedbank and then they would come back to the car, then they would go to FNB, then they would come back to the car, then they will go to the ABSA branch, so it was they were commuting between the banks, basically that in my aspect (sic) they are looking for potential clients, people that were drawing out large sums of money."* He was given the registration letters and number of the vehicle.

[25] Smith stated that he did not know the identity of the informers who had furnished the information to Webb but said that he had to act upon the information because the mall was a "*high crimes area*". Furthermore, so he said, Webb's informers were "*sharp*" and their information was correct "*nine times out of* ten." He believed, on the strength of that information, that the occupants of the vehicle had committed or were intending to commit an offence. He wished accordingly to search the vehicle for items such as illegal firearms, bank cards, bank statements "*that do not fit the profile, all of that stuff we normally find in the vehicles when we search, as well as large sums of cash sometimes.*"

[26] He could not find the red motor vehicle at Vincent Park and accordingly conducted a grid search of the area surrounding Vincent Park. Shortly thereafter he came across the vehicle in question at Balfour Park where it was parked alongside Rama's shop, facing Balfour Road. He parked his motor vehicle next to the driver's side of the motor vehicle in which plaintiff and one passenger were sitting. Plaintiff was busy with paperwork.

[27] Smith knocked on the window and identified himself. He asked plaintiff where he had been in the last 30 minutes. Plaintiff replied that he had come from Vincent Park mall. Smith informed him that there had been numerous robberies at Vincent Park and told him that his motor vehicle had been seen parked there for one and a half hours. Plaintiff denied this.

[28] Plaintiff produced a card identifying himself as an attorney. According to Smith he then explained the situation to plaintiff and asked for permission to search the motor vehicle. In reply plaintiff asked whether he could rather follow him to his nearby offices where he would let them conduct a search. Smith acceded to this request. He denied that he had uttered any words to the effect that lawyers dealt with criminals.

[29] Although he admitted having asked plaintiff what he was hiding by refusing to allow the vehicle to be searched he denied that he had said this at Rama's and stated that he had said it whilst at plaintiff's offices after plaintiff had refused to let him search the vehicle there.

[30] He then followed plaintiff's vehicle to plaintiff's offices. On arrival du Plessis came out of the door of the offices. He was visibly upset and was talking on his cell phone. According to Smith he heard du Plessis saying "*your worship – so they have to have a search warrant.*"

[31] Smith told du Plessis to calm down. Du Plessis responded that the police could not come and search plaintiff's motor vehicle without a warrant. Smith was taken aback by what he described as being du Plessis's arrogant attitude. It was at this stage, according to him, that he asked plaintiff why, if he had nothing to hide, he would not allow them to search the vehicle.

[32] Smith stated that he did not want to apply for a search warrant because to do so would have taken a couple of hours. He also did not want to leave his colleagues alone to guard the motor vehicle whilst he drove off to apply for a warrant. He stated that du Plessis was belligerent and that he had felt "*bullied*". Although he believed that plaintiff's motor vehicle was somehow concerned with the commission or intended commission of an offence he especially wanted to avoid a confrontation as both plaintiff and du Plessis were attorneys. He decided to just walk away. He conceded that in so doing he had not properly carried out his duties and stated that he felt bad about this. He denied that plaintiff had told him that he could search the vehicle.

[33] The defendant also adduced the evidence of the aforementioned security official Webb. He stated that his security firm was contracted to Nedbank. He confirmed Smith's evidence that the banking area at Vincent Park mall was a so-called crime hotspot, notorious for what he termed were associated bank robberies. In order to combat this he employed a number of reliable informers to watch the area and to identify possible suspects.

[34] On 11 November 2010 two of his informers advised him that they had observed a red Volkswagen GTI with three occupants parked outside Nedbank for a period of one and a half hours. During this period the two passengers would visit FNB and ABSA banks, returning to the motor vehicle for a few minutes before again

going back to the banks without performing any transactions whilst there. This conduct, so he testified, was consistent with the *modus operandi* of criminals preying on innocent visitors to the banks. He accordingly contacted Boatwright and relayed this information to him.

[35] That was the evidence led before me.

[36] I should state at the outset that, having closely observed plaintiff in the witness box and having listened to his testimony, I have no doubt whatsoever that he was not in any way involved in any nefarious activity on the day in question and that his evidence that he had been parked for no more than 5 minutes at the Vincent Park mall can be accepted in preference to the allegations of the anonymous informers. His evidence in this regard was, in any event, not seriously challenged by Mr. Bloem under cross-examination and it is clear, in my view, that the information given by the informers to Webb was either false or gravely mistaken. It is unfortunate to say the least that both Smith and Webb should have persisted during their evidence with their slurs against plaintiff's character by stating that they still believed that he had somehow been involved in the commission or planning of an offence at the Vincent Park mall.

[37] As will have been seen from the above exposition of the facts there are a number of issues in dispute which it is necessary to resolve before turning to consider the legal principles involved. These disputes relate more specifically to plaintiff's averment that Smith had stated that all lawyers deal with criminals; where plaintiff were when Smith asked him what he had to hide by refusing to allow a search of the vehicle, the circumstances under which plaintiff and the police came to proceed to plaintiff's offices, and whether plaintiff had, at his offices finally agreed to the vehicle being searched.

[38] Only one of these conflicting versions can be correct. The onus is on plaintiff to prove that his version is the truth. In order to discharge this onus plaintiff must show by credible evidence that his version is more probable and acceptable than that of Smith. In these circumstances what was said in National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 432 (E) at 440 D – G is apposite:

"*It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that 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 a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.*"

[39] As I have said above I am satisfied that plaintiff was an entirely honest witness who was not in any way involved in any criminal activities. I am also satisfied that he was, to the best of his ability, attempting honestly to recount the circumstances of the incident. He was, however, an emotional witness, perhaps understandably so, whose evidence was at times confused and somewhat difficult to follow.

[40] Du Plessis, Smith and Webb were generally good witnesses who made a favourable impression upon me.

[41] With regard to the issue of whether Smith had stated that lawyers deal with criminals when plaintiff introduced himself as an attorney, the probabilities, in my view, if not evenly balanced, tend to favour Smith's version.

[42] Plaintiff's evidence as to why they moved from the parking lot in front of Rama's shop to his offices was somewhat vague and confusing, possibly because of plaintiff's shock at being confronted by Smith. Apart from plaintiff's averments concerning Smith's alleged statements the rest of the discussion at the Rama parking lot appears to have been relatively civil in nature. Once plaintiff had expressed his objection thereto Smith did not insist on searching the vehicle there and then. Although plaintiff denied having requested Smith to follow him to his offices du Plessis stated to the contrary that plaintiff told him he had asked the police to do so. In these circumstances it is, in my view, improbable that Smith would have made pejorative remarks about lawyers dealing with criminals at that stage. He had no reason to do so. That being so I cannot find that Smith's denial of having uttered the words in question is false.

[43] In the light of what I have said above it is also, in my view, more probable that the statement admittedly made by Smith as to what plaintiff had to hide was in fact uttered at plaintiff's offices as was testified to by Smith. He had no reason to make that statement at the Rama Parking lot. That statement is, in my view, also consistent with Smith, who was under the impression that plaintiff had agreed to the vehicle being searched at the offices, having become frustrated once plaintiff had refused him such leave and having accordingly lost his patience. Furthermore, plaintiff himself stated that at his offices the police "*continued to ask me what I was hiding*" before stating that he could actually no longer remember this clearly.

[44] The dispute as to whether plaintiff had eventually agreed to his vehicle being searched is rather more difficult to resolve. On the one hand, plaintiff's evidence to this effect is corroborated by that of du Plessis and is also consistent with plaintiff himself having lost patience at the lengthy discussion. On the other hand, as Mr. Bloem submitted, if consent had been given, it was improbable that Smith, after having been so insistent on searching the vehicle would have spurned such consent and merely left the scene. The relevance of this issue, so Ms. Da Silva, who appeared for plaintiff, submitted, was that it indicated that Smith did not *bona fide* believe that he had reasonable grounds to search the vehicle. I will return to this issue hereunder.

[45] Ms. Da Silva submitted further that Smith's actions on the day in question were unlawful inasmuch as he had no reasonable grounds for believing that if he were to apply for a search warrant it would be granted to him. She submitted, if I understood her correctly, that in the event of it being found that Smith had no such reasonable grounds then his conduct in accosting plaintiff and demanding to search his motor vehicle constituted an unlawful invasion of plaintiff's right to privacy, despite the fact that Smith had not actually carried through with a search of the motor vehicle.

[46] Section 20(b) and (c) of the Criminal Procedure Act no 51 of 1977 provide that the State may seize any article:

> *"(a) …*
> *(b) which may afford evidence of the commission or suspected commission of an offence…; or*
> (c) *which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.*"

[47] Section 21 of the Act provides that subject, *inter alia*, to the provisions of section 22, an article referred to in section 20 "*shall be seized only by virtue of a search warrant issued –*
(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction…"

[48] Section 22, with which section 20 must be read, provides that a police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:

> "*(a) if the person concerned consents to such search for and the seizure of the article in question…; or*
> *(b) if he on reasonable grounds believes –*

(i) that a search warrant will be issued to him under paragraph (a) of s 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[49] In terms of s14 of the Constitution everyone has the right to privacy, which includes the right not to have:

"*(a) Their person or home searched;*

(b) Their property searched;

(c) Their possessions seized…"

[50] This right to privacy is, in terms of s 36 of the Constitution, subject to reasonable and justifiable limitation. In determining whether an individual's right to privacy has been infringed a balance must be struck between the protection of that right on the one hand and the State's constitutionally mandated task of prosecuting crime on the other. See: Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others, 2001 (1) SA 545 (CC).

[51] In Magajane v Chairperson, Northwest Gambling Board and Others 2006 (5) SA 250 (CC) reference was made in para 70 to Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) [1990] 1 SCR 425 where La Forest J stated as follows at 508:

"*The suspicions cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the State has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of*

the powers of search and seizure by those responsible for the enforcement of the criminal law."

[52] In Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2008 (2) SACR 421 (CC) Langa CJ, having stressed the importance of an understanding of the range of protections for the right to privacy at the different stages of a criminal investigation and trial, added at para 80:

"*Courts must take care that in ensuring protection for the right to privacy, they do not hamper the ability of the State to prosecute serious and complex crime, which is also an important objective in our Constitutional scheme.*"

[53] See too: Magobodi v Minister of Safety and Security and Another 2009 (1) SACR 355 (Tk) where at 358 H Miller J stated that "*the Courts are duty-bound to critically regard search and seizure actions, which invariably entail an invasion of privacy, to ensure that such action was reasonable and justifiable in the circumstances."* See too Ayob and Others v DPP and Others [2011] JOL 27349 (GSJ) at para 70 – 71.

[54] I bear these principles in mind.

[55] In Toich v The Magistrate, Riversdale and Others 2007 (2) SACR 235 (C) Thring J referred at 243 c – e with approval to the following comments by Steytler Constitutional Criminal Procedure (1998) at 87 – 8:

"*Prior to a search there must be reasonable grounds for belief relating to three issues: first, that an offence has been committed, second, that the articles sought may afford evidence of the commission of that offence, and third, that the articles are likely to be on the premises to be searched. With regard to the second issue, it has been held that it is an insufficient standard merely to ask whether the articles are only possibly concerned with the offence. On the other hand the constitutional standard should not be as high as whether the articles* will *be used as evidence. The appropriate test is that set by s 20(b)*

CPA: articles may be seized 'which may afford evidence of the commission or suspected commission of an offence.'"

[56] In the present matter Smith stated that he was given information, emanating from informers, which caused him subjectively to suspect the involvement of the occupants of plaintiff's motor vehicle in the commission of an offence and that he therefore *bona fide* believed on reasonable grounds that the motor vehicle contained articles which might afford evidence of the commission of that offence. But, as stated in Ndabeni v Minister of Law and Order and Another 1984 (3) SA 500 (D) at 511 D-E, the subjective belief of the policeman concerned is by the way. In terms of s 20 reasonable grounds must in fact exist and whether they exist must be determined objectively.

[57] In Watson v Commissioner of Customs and Excise 1960 (3) SA 212 (N) Milne J, as he then was, stated at 216 G-H:

"*There can only be reasonable cause to believe … where, considered objectively, there are reasonable grounds for the belief…(I)t cannot be said that an officer has reasonable cause to believe … merely because he believes he has reasonable cause to believe*."

[58] It is necessary therefore to consider whether Smith's belief that a search warrant would have been issued to him had he applied for such was based on reasonable grounds and, in this regard, the onus is obviously on the State. In considering this issue the fact that the information given to Smith emanated from informers comes to the fore.

[59] In Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SECLD) Jones J stated at 658 I – 659 D that:

"*Every reasonable policeman knows that our courts regard the evidence of informers with caution. Informers are categorized with accomplices, quasi – accomplices and police traps as witnesses whose evidence must be subjected to close and careful scrutiny before it is accepted at all unless it is*

corroborated. The reason is plain. This sort of witness has a motive to misrepresent the facts, and he is frequently in a position to give circumstantial detail which may give his false implication of an accused person a misleading ring of truth. See for example the remarks of Holmes JA in S v Malinga and Others 1963 (1) SA 692 (A). The second defendant ought to be aware of the possible danger of an uncritical acceptance of the word of an informer, and, indeed, he agreed with the proposition put to him in cross-examination that inaccurate or false information is from time to time given to the police by informers. If the courts are cautious about accepting evidence given on oath and subject to cross-examination, all the more reason for the police to be cautious about believing an informer's unsworn and untested information. Ordinarily, a police arrest is based upon a sworn complaint supported, perhaps, by sworn statements from witnesses. In the case of an informer, however, who insists upon anonymity and whose anonymity is jealously protected by the police, this safeguard is missing. The informer makes no formal statement or complaint. I do not suggest that the police cannot or should not arrest a suspect without a warrant in the absence of sworn statements implicating him. The circumstances of a particular case may justify their doing so. But I am of the view that where no sworn statement is available a reasonable policeman will less readily entertain a suspicion."

[60] At 660 D – F the learned Judge continued:

"*In evaluating the lawfulness of the police actions I must bear in mind that at times it is necessary to strike while the iron is hot. If swift, effective action is not taken, but instead ponderous enquiries, suspects may be forewarned and evidence may disappear.*"

[61] In Minister of Safety and Security v Ndiniso [2007] JOL19534 (SCA) the respondent's motor vehicle was seized by the police without a warrant. The police officer who seized the vehicle stated that he saw it being driven by a person whom he thought was too young to "*own the vehicle*" and so he suspected that there was something amiss. He radioed to the local police station and asked that the vehicle registration be checked. He received a "*report*" from an unidentified person that the

model of the vehicle that he enquired about was different from the model appearing on the record of registration. He suspected, then, that the vehicle had been stolen and might afford evidence of the commission of an offence. It was argued by the State that the belief of the police officer who seized the vehicle was reasonably held because of the report which he had received to the effect that the vehicle model did not match that on the registration document. The Court below (Petse J as he then was) found that the police official's belief that he would obtain a search warrant was not based on reasonable grounds.

[62] On appeal, Lewis JA stated as follows at paragraph 8:

> "*The real difficulty with the state's case is that no evidence is proffered by it as to the nature or the status of the 'report' made to Somana [the police official]; there is no information provided by the State as to who made the report; what the capacity and status of the person was; where the information had been obtained or why it should be regarded as reliable. There is a mere assertion that a report indicated that there was a difference between the model of the vehicle seen by Somana and its description on the registration papers. Would that satisfy the magistrate or judge apprised of an application for a search and seizure warrant under section 21? I think not. No facts were advanced to justify a finding that Somana's belief was based on reasonable grounds."*

[63] In Sigwebedlana v Minister of Police, (TK,GD) unreported case no 27/94, dated 10 March 1994, applicant's motor vehicle was seized by a Sergeant Qiqimane without a search warrant on the basis that "*he had information (from a source or sources which he declined to disclose because it would involve disclosing evidence to be led in a pending criminal case), that the vehicle had been used by two named suspected robbers, presently facing criminal charges, in committing a robbery*" and that he therefore reasonably believed that the vehicle had been used in the commission of the offence of robbery.

Davies AJ stated as follows in this regard at p 3 of the judgment:

"*The question then is whether averments made by Sgt Qiqinane suffice to establish objectively reasonable grounds for the belief that the vehicle was used in the alleged robbery. In my view they do not. The reason put forward for not giving more details does not, it seems to me, hold water. What was required at least was for the sergeant to allege that the information came from a reliable source and to explain in some detail what it was and why it would be contrary to public policy or the interests of the administration of justice to disclose more details. All that he says, in effect, is that it would interfere with the administration of justice. On this first point then I conclude that respondent, who admittedly bears the burden of proof, has not shown that the vehicle fell within the terms of section 20 of the Act.*"

[64] See too: Mnyungula v Minister of Safety and Security and Others 2004 (1) SACR 219 (TKH) in which the Court held that the existence of a reasonable belief was absent because the policeman, who seized the motor vehicle in question, had formed his belief on the basis of a "*tip*" from an unnamed informer to the effect that the applicant was in possession of a stolen vehicle but thereafter, despite becoming aware of the fact that the vehicle's chassis was stamped with letters indicating that it had in fact been purchased at a police auction had "*recklessly*" failed to check this information on the National Traffic Information System and the police auction register prior to taking action.

[65] The Canadian case of Regina v Zammit [1993] 15 CRR (2d) 17 is instructive. At 23 - 24 the following is stated:

"*The factors to be considered in assessing confidential information as the basis for reasonable grounds were reviewed in R v Debot (1986), 26 C.R.R. 275, 30 C.C.C. (3d) 207 (Ont. C.A.), affirmed (1989), 45 C.R.R. 49, (1989) 2 S.C.R. 1140, 52 C.C.C. (3d) 193. In Debot, the informer had identified all the participants in the drug transaction. He also provided the name of the supplier, the quantity of drugs to be involved, and the location where the transaction was to take place. The informer had proved to be reliable on at least one previous occasion. All participants in the transaction were known by the police to have had involvement with drugs and two of them had previous*

drug-related convictions. Finally, police surveillance demonstrated what appeared to be a drug deal.

On the basis of this evidence, both Martin J.A., speaking for this court, and Wilson J., speaking for the majority of the Supreme Court of Canada, rejected the conclusion of the trial judge and concluded that the police had reasonable and probable grounds to carry out the search.

In assessing confidential information as the basis for reasonable grounds, Martin J.A. Stated at pp 284 – 85 C.R.R., pp. 218 -19 C.C.C.:

> *'*Consequently, a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found at a certain place would be an insufficient basis for the granting of the warrant. The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged. I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search or for making an arrest without warrant. Highly relevant to whether information supplied by an informer constitutes reasonable grounds to justify a warrantless search or an arrest without warrant are whether the informer's "*tip*" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance. I do not intend to imply that each of these relevant criteria must be present in every case, provided that the totality of the circumstances meets the standard of the necessary reasonable grounds for belief.'

In the Supreme Court of Canada, Wilson J. laid down the concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. At pp. 71- 72 C.R.R, p. 215 C.C.C., she said:

> 'In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Secondly, where that information was based on a "*tip*" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "*totality of the circumstances*" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.'"

[66] In the present matter it is not in dispute that the banking area of the Vincent Park shopping mall is a crime "*hot spot*". Indeed, it is for this very reason that Nedbank has employed the services of Webb and that he in turn has employed a number of informers.

[67] It is clear from Smith's evidence that he was well aware of the problems relating to the high incidence of crime at the mall and that bank associated crimes were an almost daily occurrence. He had previously worked with Webb and the informers and he described the latter as being "*sharp*", by which he obviously meant that they were efficient and reliable. He stated that their information had in the past been correct "*nine times out of ten*".

[68] The information given to him was not based on mere gossip or rumors nor was it merely conclusory in nature. Unlike the information relied upon in Sigwebedlana's case, *supra*, it consisted of a detailed report of what can only be described as being highly suspicious conduct on the part of the occupants of the motor vehicle in question, which conduct was consistent with the known *modus operandi* of criminals preying on innocent victims at the banking mall. This, in my

view, serves to differentiate the situation in the present case to those which pertained in the Ndiniso and Mnyungula cases, *supra*.

[69] Ms. da Silva, however, criticized the failure by Smith to have corroborated the information by means of an investigation, such as checking CCTV cameras at the mall, instead of merely accepting it at face value. In my view, however, the information given to Smith was such that swift, effective action was called for lest the evidence which was believed to be in the vehicle disappeared. In these circumstances the police were, in my view, obliged to act upon the information received. Unfortunate as the result may be for the plaintiff I am satisfied that the plaintiff's constitutionally protected right to privacy was outweighed by the State's constitutionally mandated task of combating and prosecuting crime.

[70] Ms. da Silva submitted further that the fact that Smith did not search the vehicle, despite plaintiff having eventually consented thereto, justified the inference that he had never entertained a genuine belief that he had reasonable grounds for being granted a search warrant.

[71] I am prepared to accept in this regard that plaintiff did in fact eventually consent to the search. His evidence in this regard was corroborated by du Plessis who had clearly been taken aback by plaintiff's sudden decision to consent thereto.
In my view, however, Smith's failure to conduct the search has nothing to do with the issue of whether, objectively viewed, he had reasonable grounds at the time of receiving the information for believing that he would be granted a search warrant.
In any event, I am satisfied, as stated above, that Smith did genuinely believe that he had reasonable grounds to search the vehicle and that such belief persisted until after his arrival at plaintiff's offices. In my view, despite Smith's protestations to the contrary, the probabilities are that, once at plaintiff's office premises, and during the course of his discussions with du Plessis and plaintiff, he realized that he was in fact dealing with a reputable attorney and that his information might well be wrong. It is otherwise inconceivable that he would have just walked away. In this regard, Smith's claim that he, an extremely experienced policeman, felt "*bullied*" by plaintiff and du Plessis, cannot, in my view, withstand scrutiny. The probabilities are instead

that it was his realization that his information might be wrong which caused him to abandon his attempts to search the vehicle.

[72] Be that as it may, I am of the view that Smith's actions were not reckless or overzealous. Having regard to the totality of the circumstances in the case I am satisfied that his conduct meets the standard of reasonableness and that the defendant has therefore discharged the onus of proving that his aforesaid belief was based on reasonable grounds.

[73] This conclusion renders it unnecessary to deal with the further submission by Ms. da Silva to the effect that, in the absence of reasonable grounds for his belief, the mere request by Smith to search the vehicle was an unlawful invasion of plaintiff's right to privacy. I would merely add that the case of Magobodi*, supra*, relied upon by Ms. da Silva, is in my view, entirely distinguishable. There the police were engaged upon a "*fishing expedition*" with no "*probable cause*" whatsoever to suspect the involvement of the applicant in any criminal activity. Miller J stated at 360 F that "*the mere asking for permission to search in those circumstances constituted an unjustifiable invasion of privacy.*"

[74] Ms. da Silva submitted further that in any event the statement admittedly uttered by Smith to the effect that why, if plaintiff had nothing to hide, did he not allow the police to search the vehicle, was insulting and demeaning of plaintiff carrying with it, as it did, the imputation that plaintiff did indeed have something to hide. For his part Mr. Bloem submitted that Smith's question was superfluous and meaningless and was not injurious in its ordinary meaning. Inasmuch as plaintiff had attributed a special meaning to the words it had been incumbent upon plaintiff to allege and prove the circumstances in which the words were said to bear such meaning. (Walker v Van Wezel 1940 WLD 66 at 70). This, so Mr. Bloem submitted, plaintiff had not done.

[75] I disagree. It is clear, in my view, on a reading of the particulars of claim in their entirety, that the special meaning attributed to the words arose, as pleaded, from "*the context of the police's conduct as a whole"* including the alleged demand to

search the plaintiff's motor vehicle "*without a search warrant nor just and lawful cause.*"

[76] Even were I to be wrong in this finding the circumstances in which the words came to be spoken by Smith were exhaustively canvassed during the course of the trial and the special meaning attributed thereto was clearly proved.

[77] Plaintiff was lawfully entitled to withhold his consent for the search to be undertaken. Once consent had been refused Smith had two options open to him if he wished to continue with the search. He could either have applied for a search warrant, leaving his two colleagues to guard the vehicle whilst he did so, or he could have proceeded to search the vehicle despite the absence of consent.

[78] It is clear, however, that he had come to the conclusion at plaintiff's offices not to proceed with either option. As I have said, he probably did so because of his realization that plaintiff was a reputable attorney and that his information might well be wrong. That being so he should have left the scene. Instead, he gave vent to his obvious frustration by uttering the gratuitously insulting remark which, in my view, constituted a violation of plaintiff's dignity. Compare Ryan v Petrus 2010 (1) SA 169 (E).

[79] In assessing what an appropriate award of damages would be, it must be borne in mind that plaintiff is a well known reputable attorney of good standing in his community. Furthermore, not only was no apology forthcoming from the defendant but Smith maintained in his evidence that he was still suspicious about the vehicle "*in the back of my head*."

[80] On the other hand I must bear in mind the somewhat overheated circumstances in which the remark came to be made and the fact that no-one other than plaintiff heard it.

[81] Plaintiff's claim as initially pleaded by senior and junior counsel was for damages in the sum of R500 000,00. As was submitted by Mr. Bloem this was clearly a grossly inflated and exorbitant amount especially when regard is had to the

matter of Raliphaswa v Mugivhi and Others 2008 (4) SA 154 (SCA) where the appellant, the sheriff of the magistrate's court, had not only been defamed by the police by being called a "*tsotsi*" had also been subjected to an "*invasive and humiliating search*" done without probable cause. He was awarded the amount of R25 000,00 as damages.

[82] In my view, in all the circumstances, an appropriate award of damages would be one of R5 000,00.

[83] Ms. da Silva did not contend that, in the event of plaintiff succeeding in his claim, he should be awarded costs on the High Court scale. I am satisfied in the exercise of my discretion that plaintiff should be awarded costs on the magistrate's court scale, such costs to include the costs of only one counsel.

The following order will issue:

1. Defendant is ordered to pay the plaintiff
   (a) the amount of R5 000,00.
   (b) interest on the said amount at the legal rate from date of judgment to date of payment,
   (c) costs of suit on the magistrate's court scale.

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. Da Silva
Instructed by: Tinto Ngumle Inc

Appearing on behalf of Defendant: Adv. Bloem S.C. with him Adv. Mpahlwa
Instructed by: State Attorney, Mr. Ngwenya