REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 7436/2006

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

21 May 2012 **FHD VAN OOSTEN**

In the matter between

THEMBA MANFORD XABA **PLAINTIFF**

and

THE MINISTER OF POLICE **DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

[1] In this action the plaintiff claims damages in the sum of R6,04m from the defendant based on an alleged assault, wrongful arrest and detention and malicious prosecution by two members of the South African Police Service, warrant officer Maphumulo and sergeant Rabosiswana, both stationed at Moroka police station.

[2] The common cause facts arising from the evidence adduced before this court are the following. On 10 July 2005 the plaintiff was arrested by the two police officials at his home in Mofolo South, Soweto. They acted on information furnished to them by Mpumelelo Vilakazi, confirmed by their own investigation that followed to the effect that the plaintiff had gained access to Vilakazi's motor vehicle and that he had removed from the vehicle, and thus stolen, a set of speakers, a radio/cd player and cd's. The police investigation started at Vilakazi's house and from there they, accompanied by Vilakazi, proceeded to the house of the plaintiff, where he resided with his parents. They knocked on the door and entered the house. The plaintiff was in the house. They informed him of their intention to arrest him for the theft of the Vilakazi's property. At some stage, when the plaintiff and the police officials were outside the house, police back-up was summoned and the plaintiff was shot in the lower right leg by Maphumulo. The plaintiff was transported to hospital in an ambulance where he was treated for some 5 days whereafter he appeared in court on charges of theft from a motor vehicle and attempted murder. Some two weeks later the plaintiff was released on bail. Some time thereafter he was re-arrested on a warrant for his arrest having been issued, resulting from his failure to appear in court.

[3] On 18 November 2006 the trial commenced before the Regional Court, in Protea, Soweto. The charges preferred against the plaintiff were, count 1, theft and count 2, assault with intent to do grievous bodily harm. The plaintiff, who was duly represented, pleaded guilty to both charges and a plea statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, was handed in. He confirmed the correctness thereof and the plaintiff was duly convicted on both counts. During argument on sentence, arising from exchanges crossing the floor, it became quite apparent that, in view of the plaintiff's previous convictions, a non-custodial sentence was out of the question. Almost *mero-motu* the Regional Magistrate raised the possibility of this being against the expectation of the accused, apparently following upon plea bargaining, of a suspended sentence being imposed, and the conviction was set aside in terms of s 113 of the CPA. The trial proceeded and the charges were again put to the plaintiff, albeit that count 2 was now a charge of attempted murder, which, incidentally, is a procedure not sanctioned by s 113 of the CPA. The Regional Magistrate having been apprised of the plaintiff's previous convictions should have referred the hearing of the matter to another magistrate, but

nothing turns on this. Maphumulo and Rabosiswana were the only witnesses called to testify for the State. At a resumed hearing on 19 September 2007, Vilakazi was absent and the State's request for a postponement to secure his attendance in court was refused. The case for the State was assumed by the Regional Magistrate as having been closed. An application for the discharge of the plaintiff was made and granted. The reasons for the discharge on count 2, in my view, are anything but satisfactory, but I do not consider it necessary to deal with this aspect any further.

[4] A brief summary of the opposing versions of the parties is the following. The plaintiff admitted having removed the items from Vilakazi's motor vehicle. He testified that Vilakazi in fact was present, albeit inside his house, when this happened. He however proffered justification for his conduct: Vilakazi, he maintained, had owed him R300 for a long time and he decided, on that particular morning, to resort to self-help in removing the items from the vehicle which was parked in the yard where Vilakazi stayed, with its doors unlocked, without the knowledge or consent of Vilakazi. He proceeded home taking the items with him and the police arrived there later that morning. They knocked on the door and entered the house, each carrying a firearm in his hand. One of them threatened to shoot him. The police went outside and he locked the door from the inside. He heard them summoning back-up. He proceeded outside and on his way out was shot in the right lower leg by Maphumulo. The version on behalf the defendant, in a nutshell, is that the plaintiff was arrested on reasonable grounds for suspecting the plaintiff of having committed theft from a motor vehicle, that the plaintiff became aggressive when confronted by the police, that he threatened them with a screw driver, hurled an empty crate at Maphumulo and thereafter attacked him with a knife, and that Maphumulo, in self-defence, fired a shot at him, which struck the plaintiff in the lower right leg.

[5] The crucial issue that arises in this case is whether the arresting police officials, acting on the complaint of Vilakazi, formed a reasonable suspicion that the plaintiff had committed a theft. Section 40(1)(b) of the CPA deals with arrests without a warrant, and provides as follows:

> *'40. Arrest by peace officer without warrant*
> *(1) A peace officer may without warrant arrest any person –*

(b) whom he reasonably suspects of having committed an offence referred in Schedule 1, other than the offence of escaping from lawful custody.'

[6] Of the essential facts having to be present to justify an arrest without a warrant, it is for purposes of the present case, only necessary to consider whether the suspicion was based on reasonable grounds (see *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 818G-H, and *Minister of Safety & Security v Sekhoto & another* 2011 (1) SACR 315 (SCA) para [6]).

[7] It is trite that the *onus* rests on the arresting officer to prove the lawfulness of the arrest. The reasonableness of the suspicion of an arresting officer acting under section 40(1)(b) of the CPA, must be approached objectively. The question, therefore, is whether any reasonable person, confronted with the same information the arresting officers were apprised of, would form a suspicion that the plaintiff had committed a theft, which is a Schedule 1 offence.

[8] Three witnesses testified for the plaintiff: the plaintiff, his life-long friend, Percy Ntuli, and his mother, Ms Maria Xaba. I have already dealt with the plaintiff's version. His mother claims to have been present in the dining room when the police entered. Ms Xaba's evidence except for clearly attempting to advance the cause of her son, was unsatisfactory: it is contradicted *in toto* by the contents of a statement she had made to the police. In that statement she incriminated the plaintiff and clearly, for that reason, changed her version to a denial of those allegations. She moreover denied that Vilakazi was present which is in conflict with all the evidence, including that of the plaintiff. Ntuli testified that he was outside the house. His evidence materially confirms the version of the police, except insofar as they alleged that the plaintiff was armed, or, that he attacked Mahumulo.

[9] Maphumulo and Rabosiswana testified for the defendant. A brief summary of their evidence is the following: they were together on patrol duties in a police motor vehicle when a call was received from the police station, demanding their return in order to attend to a complaint of theft. Upon their arrival at the police station they met Vilakazi who informed them of the theft by the plaintiff, whom he said was known to him. The complaint related to an earlier incident when the plaintiff allegedly had also stolen his

property. They proceeded to the plaintiff's house. On their way there a telephone call was received from Vilakazi's girlfriend/wife informing that the plaintiff was at Vilakazi's house, that he had opened Vilakazi's vehicle and that he was removing "something" from the vehicle. They then instead proceeded to Vilakazi's house, which is within walking distance of the house where the plaintiff stayed. When they arrived there Vilakazi's girlfriend was there but the plaintiff had already left. Vilakazi's vehicle was inspected and it appeared that the items had indeed been removed. They walked to the house where the plaintiff stayed, leaving behind the police vehicle. After knocking on the kitchen door it was opened by the plaintiff. They entered and Vilakazi pointed the plaintiff out as the one who had stolen the items. Maphumulo informed the plaintiff that he intended arresting the plaintiff for the theft of Vilakazi's items. The plaintiff however became recalcitrant and refused to be arrested. He proceeded to his bedroom and informed them that he would fetch his own firearm. Both police officials followed and took out their firearms holding them in their hands. In the bedroom the plaintiff searched on top of a cupboard but could only lay hands on a screw driver. He assumed a stabbing position and turned towards the policemen. They stepped backwards and through the kitchen, proceeded outside. Rabosiswana testified that he had observed the plaintiff taking a knife from the drawer of the kitchen unit. Police back-up was summoned, Rabosiswana proceeded to fetch the police vehicle which was still parked at Vilakazi's house and he soon thereafter returned. The plaintiff came forth from the kitchen door. He was armed with a knife. He grabbed an empty crate containing a few empty beer bottles in it, and threw it at Maphumulo. It struck him on the lower leg. Maphumulo retreated until his back was against a fence. The plaintiff kept on advancing. He fired a shot in the direction of the plaintiff in self-defence and to ward him off. The shot struck him in the lower leg. An ambulance was summoned and arrived. The plaintiff was transported to hospital. The knife the plaintiff had in his possession was handed in that very same day, at the police station, as is evidenced by an entry into the SAP 13 register, a copy of which forms part of the court bundle of documents.

[10] Before assessing the credibility of the witnesses, I propose to dispose of the plaintiff's claims in respect of the alleged unlawful arrest and detention and malicious prosecution. It is common cause that Vilakazi's complaint to the police concerning the theft of his property led to and was the cause of the plaintiff's arrest and detention.

There is nothing before this court to show that the arresting police officers, in any way, acted unreasonably. Nor can it be said that the prosecution was malicious. The contents of the police docket concerning the theft is before me: the prosecution of the plaintiff on at least a charge of theft from a motor vehicle, was fully justified. It follows that the plaintiff's claims in regard to the arrest, detention and prosecution must fail.

[11] It remains to deal with the plaintiff's claim in respect of the alleged assault. The determination of this issue requires me to assess the credibility of the witnesses. Where there are two directly opposing versions before court, as is the case here, the plaintiff can only succeed if he shows that his version, as a matter of probability is true, and that of the witnesses for the defendant, false (see eg *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (A)). In my view the plaintiff has failed to discharge the *onus* on him. The plaintiff's obvious attempts to hide the truth were quite apparent from his evidence. For one, it cannot be accepted, on the probabilities, as the plaintiff would have it, that the arresting officers would for no reason whatsoever firstly, threaten to shoot him and secondly, fire a shot at him once they were outside the house. The evidence of the other witnesses on behalf of the plaintiff, although plainly fashioned to favour him, showed that something untoward was indeed happening and that the plaintiff was causing a disturbance. This is corroborated by the summoning of police back-up. The plaintiff's version concerning the theft is transparently false. His evidence that Vilakazi was at home when he stole his property, is clearly false: Vilakazi at the time was at the police station. I therefore reject the plaintiff's version as false. The two witnesses for the plaintiff didn't take the matter any further: they obviously diverted from the truth in order to support his version. As against this, the evidence on behalf of the defendant, although not entirely free from criticism, is in accordance with the probabilities and nothing has been put before me to justify the rejection thereof. The points of criticism raised concern peripheral aspects and are based on perceived differences and omissions arising from the ever-fertile grounds emerging from a microscopic scrutiny of the police statements the witnesses have made. Nothing substantial has been shown which, in any way, negatively impacts on their credibility. The incident occurred some 7 years ago and the lapse of memory, concerning some minute details, is hardly surprising. I accordingly find that the version on behalf of the defendant is credible and I

accept it. It follows that the plaintiff's claim based on assault, similarly falls to be rejected.

[12] In the result the plaintiff's claims are dismissed with costs.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	***ADV GLM BOKABA***
PLAINTIFF' ATTORNEYS	***SEPAMLA ATTORNEYS***
COUNSEL FOR DEFENDANT	***ADV (MS) P KHOZA***
DEFENDANT'S ATTORNEYS	***THE STATE ATTORNEY***
DATE OF HEARING	***15, 16, 17 & 18 MAY 2012***
DATE OF JUDGMENT	***21 MAY 2012***