

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 39639/12

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE	SIGNATURE

In the matter between:

COLLIN MOEKA

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

TEFFO, J:

[1] The plaintiff sued the defendant for damages arising from assaults and an arrest by members of the defendant who were allegedly acting in the course and scope of their employment with the defendant.

[2] It is alleged that the plaintiff was arrested at his house on the night of the 23 April 2012 after he was assaulted by three police officers who were members of the defendant at the time.

[3] The defendant denies the allegations.

[4] The following facts are common cause between the parties:

4.1 The plaintiff was at the time of the incident employed by a certain Mr Tony Mmamogobo (Tony) as a taxi driver.

4.2 On the night of the incident he drove the taxi which belonged to Tony and parked it at his house instead of parking it at the Engen garage.

4.3 Tony phoned the plaintiff several times on his cell phone but did not get hold of him.

4.4 He ultimately went to the plaintiff's house to fetch his taxi.

4.5 Mr Johannes Sefatse ("Aubrey") gave Tony the taxi keys. He drove the taxi which was parked at the plaintiff's homestead in the yard and parked it outside.

4.6 Police were called and the plaintiff and Aubrey were then arrested.

4.7 The charges against the plaintiff were subsequently withdrawn.

[5] Three witnesses were called to testify on behalf of the plaintiff and the plaintiff himself adduced evidence while the defendant also called three witnesses to prove its case.

[6] The evidence led in this matter is briefly as follows: Mr Collin Moeka (the Plaintiff) testified that on 23 April 2012 he was on duty as a taxi driver. He knocked off around 19h00 and then went home. The taxi he worked on that day got a puncture. He then drove it to his house. Normally if the taxi did not have a puncture, he would leave it at the Engen garage, park it there for the night and take public transport to his house.

[7] Upon his arrival at his house he parked the taxi inside the yard and locked the gates as he does not have a garage. His wife, his two daughters and Aubrey were at his house at the time. Around 21h30 he went to bed. Before he went to bed he told Aubrey that he was afraid of Tony because he did not reach a daily target. Aubrey asked him what was going to be done. He told him he was afraid of talking to Tony. He then asked Aubrey to phone Tony and inform him that the taxi was at his home and that it was safe. He also asked his wife to keep the money that he had collected on that day which was an amount of R350,00.

- [8] Aubrey asked him what was he supposed to say to Tony in case he asked him questions. He told Aubrey to inform Tony that he was not at home at the time and that he could come and fetch his taxi. Aubrey asked him if Tony comes to fetch the taxi and request his money what should he tell him. He told him that he will sort out the issue of the money. He wanted to explain to Tony should he come to his house to fetch his taxi and ask him about the money, that he was quitting his job and that the amount of R350,00 that he made on that day was his salary. He also told Aubrey that when Tony asked him about his whereabouts he must tell him that he owed certain people from Chrystal Park some money and he left with them.
- [9] Aubrey phoned Tony and Tony told him that he was coming to his house. Him and Aubrey waited for Tony. He did not come and they went to bed. As he was in bed in his bedroom with his wife, Aubrey came and told him that Tony was at the gate. His children were asleep in their bedroom. He then gave Aubrey the taxi keys to give to Tony and to tell him that he was not there. Subsequent thereto Aubrey came back and told him that Tony was phoning the police. When he heard that Tony was phoning the police, he moved from his bedroom to his children's bedroom where he hid himself between the wardrobe and the bed. His wife immediately woke up and went to the kitchen.

[10] As he was hiding himself in his children's bedroom, he heard Aubrey screaming. Aubrey was being beaten by the police who were asking him where was the plaintiff. Aubrey told them that he was not there. They kept on assaulting him until he told them that he was in the house. They started searching for him in the house. They found him in the children's bedroom where he was lying in between the bed and the wardrobe with his back facing up. They pulled him up thereby beating him. They slapped him on his face and kicked him on his ribs with booted feet. They assaulted him several times and pulled him to the outside of the house. His children were awake when the police were busy assaulting him in their bedroom. His wife was also present in their children's bedroom when he was assaulted. She then removed the children from their bedroom to the other bedroom for them not to see what was happening.

[11] As he was on the passage with the police, they ordered Aubrey to follow them outside. While they were outside, one of the policemen slapped Aubrey while one tripped him. He fell down as the other police officers were busy assaulting him. As he was on the ground, they continued kicking him on his ribs and his head, and he kept on blocking his head. One of them kicked him on his leg and he felt that it was broken. He then told them to leave him alone as they broke his right leg. He cried as he was in pain. He did not see anything any longer. He ultimately found himself at Pholosong hospital where he was transported by an ambulance. He was at Pholosong hospital for a day. He was operated and subsequent thereto, was transported to a police hospital in Tembisa. At that time he was under arrest

for only two days because on his way to Tembisa he was transported to the police station where he was told that charges against him were withdrawn. He was then released before he could reach the hospital in Tembisa.

[12] He felt better after the operation. At the time he was giving evidence he said he cannot stand or sit for a long time. He has to elevate his right leg and when it is cold the leg becomes very painful. When he walks a long distance, the leg gets tired. He cannot carry heavy objects. He does not drive motor vehicles anymore because when he applies the brakes, he gets cramps and the leg locks. He never encountered these problems prior to the incident. He was never locked up in the cells but he was under arrest at the hospital.

[13] Under cross examination he testified as follows: that the taxi he was driving on the night of the incident had a puncture at 19h00 around his knock off time. He did not tell Tony about this as he was afraid of him. When the taxi got a puncture he was close to his house and the Engen garage was very far. He conceded that there were problems with the monies he collected on 18 and 19 April 2012. He also conceded that around 20h00 when Tony called him his phone was off. He conceded that Tony was only able to gain access to his phone around 21h00 when his phone was answered by someone else. He further conceded that the person who answered his phone told Tony that he was kidnapped by people he owed money. He denied that Aubrey also told him that he organised people to drive the taxi to his house. He maintained that he drove the taxi himself from

Chrystal Park to his house and he was the person who told Aubrey to tell Tony all that.

[14] He conceded that Aubrey told the police and Tony that he told them lies to cover up for him. When he was told that Tony will testify that he asked him about the money he collected for the day and why he parked the taxi at his house, he failed to respond to his questions, he said that was the truth. He disputed that he tried to run away from the police while they were outside the house. He maintained that the police were beating him. His leg was broken and they lifted him and put him inside the police van.

[15] He testified that when the police entered the children's bedroom they did not introduce themselves to him. They pulled him up where he was hiding and started to assault him. He disputed ever following Constable Kgare in his socks and underwears to the dining room where Constable Mkhize ordered him to dress. He disputed that the police communicated with him in the presence of Aubrey and Tony. He disputed ever being accompanied by Tony and Constable Mkhize to his bedroom where his wife was found awake and wearing a gown. He also disputed giving Tony the money he collected for that day and said his wife was the person who gave Tony the money. He disputed ever going to his bedroom after being pulled from the children's bedroom. He testified that he was pulled, assaulted from the children's bedroom and then taken out of the house.

[16] He stated that after the police entered the children's bedroom, as they were busy assaulting him, his children heard the noise and woke up. Police assaulted him all over his body and he felt pains. They tripped him while they were outside the house because when his leg broke, he was on the ground. They also assaulted him when he was lying on the grass. He disputed that he sustained a fracture on his leg when he fell on the stairs as he was coming from the kitchen to the outside of the house because he was trying to run away. He disputed that he slipped on the floor because the stoep was wet as it had rained during the day. He further testified that the police stopped assaulting him after he told them to stop as his leg was broken. He denied ever telling the doctor at the hospital that he was assaulted by members of the public. He was 34 years old at the time of the incident. He also denied ever telling a nurse at the hospital that he was assaulted by thugs. He denied that he kept the monies he collected from the taxi on 18, 19 and 23 April 2012 to himself but conceded that Tony came to his house to fetch his taxi and the money he collected from the taxi.

[17] Mr Johannes Sefatsa ("Aubrey") testified that the plaintiff is his friend and a relative as he married at his aunt's family. He spent most of his time with him at the time of the incident. He was with the plaintiff on the day of the incident. He corroborated his evidence to the effect that the taxi had a puncture, plaintiff drove it to his house and parked it in front of the house inside the yard. Further that the plaintiff asked him to phone Tony and explain to him that the taxi was safe where it was. He testified that immediately after he had phoned Tony, Tony came to the

plaintiff's house. When Tony arrived at the plaintiff's house, he was in the kitchen. Tony wanted the money that the plaintiff collected on that day and the taxi. At that time the plaintiff was hiding himself in the house because he did not have the money that Tony wanted and the taxi had a flat tyre.

[18] He told Tony that the plaintiff was not there, he left with certain people from Chrystal Park whom he owed money. Tony informed him that he was not telling him the truth. He continued lying to him until he told him that he was calling the police because the plaintiff was in the house. After checking his taxi, Tony called the police. At that time Tony was in the kitchen moving around and he went outside to his motor vehicle. It was like he was speaking to a friend. When he went out to the motor vehicle, he remained in the kitchen and then went to tell the plaintiff that Tony said he was phoning the police. Shortly thereafter police arrived as the gate and the kitchen door were open.

[19] One of the policemen asked him to speak the truth. He continued lying to them. The police started to assault him and he ultimately told them that the plaintiff was in the house in one of the bedrooms. They found the plaintiff, escorted him and the plaintiff outside the house where they put both of them in the police van. As they left the house to the police van, he could not see what was happening to the plaintiff.

[20] Under cross examination he testified that lied to Tony because the plaintiff said he should do so to protect his job. He conceded that he told Tony that the plaintiff had left with people from Chrystal Park. He denied telling Tony that he was at the police station with the plaintiff. He testified that he gave Tony the taxi keys after telling him that the plaintiff was not there. Tony took the keys and parked the taxi outside. He could not recall whether the gate was opened when Tony arrived at plaintiff's house and whether he locked it after Tony parked the taxi outside.

[21] When told that Constable Kgare put the siren on when they arrived at the plaintiff's gate, he said he does not know anything about that as he was in the house at that time. After it was put to him that both Constable Kgare and Tony will testify that after the siren was blown, he came back to the gate and opened it for them, he disputed that evidence and said the police arrived there immediately after they were phoned and they found him in the kitchen because the kitchen door was opened. He also testified that Tony took the taxi out of the plaintiff's yard in the presence of the police. He disputed ever having a conversation with Constable Kgare in the dining room and maintained that he only spoke to the police officer who asked him to speak the truth and the police then started to assault him. He did not dispute that police confronted him with what he told them and he failed to give them answers. He conceded that he lied to them and later apologised after he finally told them that the plaintiff was in one of the bedrooms in the house. He maintained that the police assaulted him that night and told him

that they were assaulting him because he told them lies about the whereabouts of the plaintiff.

[22] He corroborated the plaintiff's evidence that the plaintiff's children woke up when they heard the noise of the police who were assaulting them. Furthermore, he testified that police did not go to the dining room with the plaintiff. After they found him, they assaulted him, pulled the plaintiff with him outside the house. At that time the plaintiff was only wearing socks and an underwear. When told that Tony will testify that at some stage he went with the plaintiff to his bedroom, he said he cannot remember all the events because the incident happened a long time ago and he did not pay attention to everything that was happening. He testified that he heard the plaintiff's wife telling him to go with the police as she did not want to be disturbed by their presence in the house. He disputed that police did not assault him outside and stated he was assaulted inside and outside the house until he was put inside the police van.

[23] As he was going to the police van, he saw the plaintiff lying on the grass where he was assaulted. The plaintiff was assaulted inside and outside the house. He disputed that as you go out of the kitchen, there are stairs. He said there is a stoep. When asked whether on the night in question the stoep was wet, he said he does not remember but it never rained during the day. He disputed that the plaintiff could have tried to run away as they were going out to the police van with the police as the police were busy assaulting them at the time. He disputed that

the plaintiff was assaulted by thugs and or members of the public. He also disputed that he spoke to Tony about him driving his taxi from Chrystal Park to the plaintiff's house.

[24] Ms Refilwe Sekhoto ("Refilwe") testified that on the night police came to her homestead, she was asleep in her bedroom. She heard the noise of the police. She did not see where the story started but only saw them opening her bedroom door roughly and entering. The police saw the plaintiff, her father, who was lying down on the passage, pulled him and started to assault him. As the police were busy assaulting him, one of them jumped on her bed. Her mother came to her bedroom and took her and her sister to another bedroom as she did not want them to see what was happening. From there she was not able to see what happened thereafter.

[25] Under cross examination she was asked what this noise that she heard was all about. She testified that she heard Aubrey crying from the kitchen as the police slapped him when they arrived. When asked whether she was not awakened by the rough opening of her bedroom door by the police, she said all these woke her up. She testified further that she did not hear her father entering her bedroom. When told that Constable Kgare will testify that he informed the plaintiff that he was a police officer and ordered him to wake up, she disputed that evidence and said when the police arrived, they started to assault the plaintiff. She also denied that he asked him who he was and said when Constable Kgare arrived, he

already knew who the plaintiff was, he pulled him and started to assault him. She further denied that Constable Kgare ordered the plaintiff to follow him to the dining room and said when he entered the bedroom, the plaintiff had covered himself with a white duvet. Constable Kgare told him to dress. She conceded that the plaintiff went to his bedroom to dress before he went out of the house with the police. She disputed that when the police were in her room, she and her sister were asleep and did not wake up.

[26] Mrs Alina Mokoena Sekhoto ("Alina") testified that the plaintiff is her husband and Refilwe is their daughter. On the night of the incident she was from work at 19h30. She arrived at her house, saw Tony's taxi in the yard and asked the plaintiff what was the taxi doing there. The plaintiff told her that he brought it there because it had a flat tyre. He also told her that he was supposed to have made a daily target of R600,00 that day but he could not. She then asked him what should she tell Tony when he comes to fetch his taxi if he is having such a problem. The plaintiff said she should tell Tony that he does not want to see him when he comes, she must give him the little money that he collected on that day and his taxi. He then asked Aubrey to phone Tony and tell him that his motor vehicle was safe at his yard. Around 20h00 they went to bed.

[27] Between past 21h00 and 22h00 Tony arrived at her house. The gates were locked. He knocked at the gate. Where Aubrey was sleeping is next to the gate. Aubrey saw Tony at the gate and came to her bedroom, told her and the plaintiff

that Tony was at the gate. The plaintiff then said to Aubrey, here are the keys, go and give them to him and the money. The money was at that time on the dressing table. Aubrey went to the gate, unlocked it, leaving the money behind. He then gave Tony the taxi keys. She did not hear their conversation outside. Tony came into the house with Aubrey. He asked her where was the plaintiff. She told him that he was not there. He then said how come was the plaintiff not there while the taxi was parked outside, he should be in the house. He then said because they were hiding him, he should call the police. He phoned George from Engen garage and told him that he found the taxi at the plaintiff's house. Suddenly George arrived at her house with three police officers. They found her and Aubrey in the kitchen. At that time the plaintiff was in their bedroom.

[28] They asked Aubrey where was the plaintiff. Before he could respond, they slapped him. He then said the plaintiff was in his bedroom. She went with the police and Aubrey to her bedroom to look for the plaintiff. They did not find him. They proceeded to the children's bedroom and found him sleeping on the passage. The room was dark. They switched on the lights. They asked who was that person sleeping there. He said he was Collin. They then started to slap him. She then told them to stop assaulting him and let him go and get dressed. They continued to assault him. Thereafter they said he should go and get dressed.

[29] She corroborated Refilwe's evidence that as the plaintiff was being assaulted in her bedroom, she took her and her sister to her bedroom in order for them not to

see what was happening. The police left the plaintiff and gave him the chance to get dressed. As he was dressing in his bedroom, they kept on asking where was the money that he collected on that day. The plaintiff told them that the money was inside the box on the dressing table. He took it and gave it to them. After all this the police told him to take out the shoe laces as they were going with him. They left with him. She remained in the house with the children but she heard police saying they were arresting him, they were going with him. At that time she was in the kitchen locking the door. She denied that it rained on that day and that there are stairs outside the kitchen. The plaintiff did not resist the arrest. The stoep outside the kitchen was dry. She never saw the plaintiff falling while he was outside.

[30] Under cross examination she disputed that Tony was never phoned and informed that his taxi was safely parked at the plaintiff's house. She disputed the plaintiff and Aubrey's evidence that there was no communication between the plaintiff and the police. She maintained that when police entered their children's bedroom they asked who was it who was sleeping on the passage. She conceded that the taxi was supposed to have been parked at the Engen garage. She disputed Tony's evidence that he got information from tracker that the taxi was parked at the plaintiff's house and maintained that Aubrey phoned him. She also disputed that after Aubrey had given Tony the taxi keys and Tony had parked the taxi outside, Aubrey locked the gates and maintained that that was the time Tony came to the house and spoke to her. When asked why she did not give Tony the money when

Tony was given the taxi keys as her husband had ordered, she said Tony was already making noise outside. She waited for him to enter the house so that she could give him the money. She further disputed that when the police arrived they found the gates locked while the taxi was parked outside. She testified that she did not hear the siren. She maintained that she was in the kitchen and not in her bedroom when the police arrived. She denied that upon their arrival the police went to the dining room where they had a conversation with Aubrey and maintained that they started to assault him upon their arrival there. She conceded that Aubrey told the police that he was lying when he informed them that the plaintiff had left with people from Chrystal Park whom he owed money. She also conceded that the plaintiff was in one of the bedrooms in the house and the police searched for him and found him. She conceded further that Constable Kgare woke the plaintiff up and told him that they were the police. She denied that the police told the plaintiff to accompany them to the dining room. She disputed that when the police left the children's bedroom with the plaintiff, they left the children sleeping. She corroborated Refilwe's evidence that she took the children to another bedroom. She disputed that Constable Kgare was the only policeman who entered the children's bedroom to search for the plaintiff. She testified that all three policemen entered the children's bedroom. She testified further that Constable Kgare assaulted the plaintiff with open hands on the night of the incident. She disputed the plaintiff's evidence that he was dressed when he came out of the children's bedroom. She disputed that she gave the money that the

plaintiff collected that day to Tony. She stated that she told the police and Tony that it was in the box on the dressing table and they ultimately took it.

[31] When told that the plaintiff testified that he wanted to keep the money he collected for the day as his wage and why did she say the money was given to Tony, she testified that the plaintiff told her to give the money to Tony when he arrived. When told that Aubrey testified that the plaintiff left his bedroom when he told him that Tony was phoning the police, she said it was not true, he left the bedroom when the police arrived. She disputed that the plaintiff was assaulted by members of the public and or thugs. She testified that police came to their house and assaulted him. She disputed Aubrey's evidence that police assaulted him after he had explained to them that the plaintiff was not there. She testified that police assaulted Aubrey while he was trying to explain to them the whereabouts of the plaintiff.

[32] Mr Tony Mmamogobo ("Tony") testified as follows: He is a taxi owner residing at Barcelona in Daveyton. On 24 April 2012 the plaintiff was driving his quantum with registration letters and numbers BL 84 PX GP. He was supposed to have parked it at the Engen garage in Etwatwa after he had knocked off at 20h00. On the day in question at approximately 04h00 the plaintiff took the taxi at Engen garage and resumed his duties. A day prior to the day of the incident, it was a Sunday, the plaintiff did not come to his house to bring the money he had collected that day. On Monday, the day of the incident, he phoned the plaintiff

between 16h00 and 17h00. His phone was off. He left him and waited for his knock off time at 20h00. He phoned him again after 20h00 and still his phone was off. He waited again until 20h30 and around 20h40 he took a bicycle and drove to the Engen garage. He looked for the taxi where it always parked, it was not there. He then bought air time and phoned tracker. The tracker company told him that the taxi was at Railway in Daveyton (that is the place where the plaintiff resides). He then cycled to Railway and when he stopped at the gate, he saw his taxi parked inside the yard of the plaintiff's residence. He knocked at the gate for about half an hour, no one responded. After that Aubrey opened the gate.

[33] When he was knocking at the gate, Aubrey opened the window and told him that the plaintiff was not at home. He asked him why was the plaintiff not there while the taxi was parked inside the yard. He told him to open the gate as he wanted his vehicle. Aubrey took sometime before he opened the gate as he said the plaintiff was supposed to bring the vehicle. As he was not opening the gate, he took the phone and phoned the person who guards their vehicles at the Engen garage by the name of George. He asked him that if he sees the police there, he should ask them to come to the plaintiff's house as he needed assistance. A couple of minutes later George phoned him back and told him that the police were at the garage and that he would be coming with them to the plaintiff's residence.

[34] As he was waiting for the police, Aubrey then opened the gate. He entered the yard and asked for the taxi keys as he wanted to take it outside the yard. He got

the keys, started it and as it was idling, it did not move because it had a flat tyre. He forced it outside the yard and parked it outside the gate. He then took out tools to change the tyre. As he was busy, police arrived. He then explained to them that he found the taxi but it has a puncture. He could not drive it. The police asked him where was the driver of the taxi. He informed them that he was told that he was not at home but the person with whom he was, was present. They then decided to speak to Aubrey. They put the siren on because the gate was locked. Aubrey then came to open the gate. They asked him questions as they were going into the house. Before the police asked him where was the plaintiff, he also asked him and Aubrey told him that the plaintiff was kidnapped by people he owed money. They then entered the plaintiff's house in the kitchen and police started asking Aubrey questions there. He refused to tell them where the plaintiff was.

[35] The police told him that they were going to arrest him as the taxi was in the yard. They then said why did he not report the kidnapping to the police and write down the registration numbers of the vehicle that kidnapped the plaintiff. Aubrey then raised his hands and said they should not arrest him, he will tell the truth. He then told them that the plaintiff was not kidnapped, he was in the house in the bedroom. He pointed to them a bedroom next to the kitchen. When they went to the bedroom, he remained in the kitchen. They found the plaintiff lying next to the bed in the children's bedroom. They woke him up as he was sleeping on the floor. They came with him to the passage between the rooms. He was not dressed. He

was only wearing socks and an underwear. Police asked him where were his clothes. He said they were in his bedroom. They entered the bedroom with the plaintiff while he remained in the kitchen. They asked him where was the money he collected for the day. He showed it to them but it was not all. It was only R350,00.

[36] He started to look for the trouser he was wearing. His wife threw it to him. He took out R350,00 from one of the pockets and put it on top of the dressing table. He then said that was all that he had. The police asked him what was his daily target. He himself told them that it was R600,00. They gave him the chance to dress. After that they came out of the bedroom with him, passed through the kitchen and went outside. He followed them as they went outside. As they were outside, the plaintiff tried to run away. As he was running he fell to the ground. It rained the previous day. When he was on the ground, he started to scream and he told the police that he was injured. The plaintiff and Aubrey were put in the police van. He remained behind next to the plaintiff's gate with his taxi. The police instructed him to follow them to Etwatwa police station after fixing the tyre.

[37] He eventually went to the police station. When he arrived there, he found that the plaintiff was already taken to the hospital. He told the police that he was not laying a charge against the plaintiff. He only wanted his money and the taxi. They informed him that because the plaintiff was injured, he had to open a case. A case was then opened and he left the police station.

- [38] He was not certain about the date of the incident but he said it was on a Monday. He testified that the plaintiff only gave him R200,00 as the money he collected on 18 April 2012 instead of R400,00. The plaintiff did not bring the money he collected on Sunday, the 22 April 2012. He did not give him permission to park his taxi inside his yard. The plaintiff never phoned him on the night of the incident to tell him that his taxi was parked safe at his house.
- [39] He did not see how the plaintiff got injured. Aubrey told him that he was the person who drove the taxi to the plaintiff's house. He did not give Aubrey permission to drive his vehicle. The plaintiff gave him the money that he collected on the day of the incident. He never saw the police assaulting the plaintiff.
- [40] Under cross examination he was referred to the statement that he made to the police in relation to the incident. He stated that he made the statement two months after the incident as one of the police officers called Thulani came to him and took the statement. He gave the statement to him in Sepedi while Thulani wrote it in English. Thulani read the statement back to him. He did not read it himself as he does not know English. He told him everything that he observed with his eyes. There was nothing contentious about his statement except to say that it was put to him that he did not mention that George came with the police at the plaintiff's house and that George would have given light as to whether the gate was locked or opened when the police arrived at the plaintiff's house.

[41] He was asked what happens in the taxi industry if a driver brings less money than the daily target, he said they deduct that shortage from the driver's wage that he is paid every week if he does not get extra money to cover it up. He further said if he is short like that, they cannot say he stole like a criminal. He also stated that when the plaintiff gave him R350,00 on the night of the incident, he did not steal but he was short.

[42] He testified that he knew the plaintiff's house is not in Esselen Street. Further that the tracker company told him that the taxi was at Railway next to Eastlyn. His counsel was not correct when he put it to the plaintiff's witnesses that the tracker company told him that the taxi was in Daveyton in Esselen Street.

[43] He was referred to paragraph 8 line 4 of the statement he made to the police which reads:

"After a few minutes George arrived with the police. I explained the situation to the police. We then went inside with the police at Collin's place. Inside the house we found this friend of Collin who later identified himself as Johannes Sefatsa."

[44] He conceded that he arrived with the police and inside the house they found Aubrey. When asked why did he in his evidence in chief testify that Aubrey opened the gate for him and the police, he said as he explained, when the police

arrived they put the siren on and Aubrey came and opened the gate for them. They then started to ask him about Collin's whereabouts. He conceded that he could be making a mistake as the incident happened a long time ago. He also conceded that because his statement was taken two months after the incident, the version that should be taken as correct should be the one that was given two months after the incident as against his evidence in chief which is given two years after the incident.

[45] He disputed that the plaintiff's wife was in the kitchen when he arrived with the police. He maintained that they only found Aubrey in the kitchen. The plaintiff's wife was moving up and down in the house. She went to the bedroom and came back.

[46] He was not sure how many policemen went to the bedroom to look for the plaintiff but conceded that there were three policemen at the plaintiff's house. He conceded that when they went to the bedroom, he remained in the kitchen and did not see what happened in the bedroom. He disputed ever testifying that police brought the plaintiff to the kitchen and asked him about his clothes. He maintained that they asked him about his clothes while they were on the passage. He further testified that when the police went with the plaintiff to his bedroom to get his clothes, he was not in one place and was moving between the kitchen and the passage. He could see what was happening in the plaintiff's bedroom because the door was opened and it faced the passage. When asked whether it

was true that the plaintiff slipped on the stoep and fell, he said he cannot say whether the plaintiff slipped before he started to run away or not but he took two or three minutes from the house and started to run away. He stated that he saw him slip as after he exited the house, he went to the right and fell on the lawn.

[47] When he was told that the plaintiff said he got injured after he was tripped and kicked by the police, he disputed that evidence and said he never witnessed any of the police officers assaulting him and what he saw was that the police were chasing after him. He conceded that the plaintiff was in pain as he was crying but could not say if he could stand on his own.

[48] Mr Masekela Harold Kgare (“ Constable Kgare”) testified that he was employed at SAPS Etwatwa as a Constable. He was on duty on 23 April 2012 from 17h45 until 06h00. He was patrolling and receiving complaints around sector 4 Etwatwa with his crew members, Constable Mkhize and Warrant Officer Makungu. Around 23h00 they were at the Engen garage where they always buy snacks and fill in petrol. While they were at the Engen garage, George came to them and told them that someone needed help immediately. He told them that the person is a taxi owner, his taxi did not come back, its driver’s whereabouts was unknown, his phone was off and there were rumours that the driver was kidnapped. They then asked George to accompany them to the person and he took them to 22496 Railway section where they found a certain gentlemen who was standing there and a taxi was parked outside. George introduced the man to them as Tony.

They then started talking to Tony. He explained that the taxi did not park where it was supposed to, its driver was nowhere to be found and his phone was off. He explained that he found his taxi after he had phoned tracker which informed him that the taxi was at that address.

[49] He also told them that at that address they did not want to open the gates for him when he was knocking. Ultimately a male person opened the gates for him. The man who opened the gates for him told him that the driver was taken by people from Chrystal Park that day. That was when they started knocking there. He went to the police van and blew the siren. A man then came there and opened the gate for them. They entered the yard, asked him who he was, he said he was Mr Johannes Sefatsa ("Aubrey"). They asked him where was the driver of the taxi. He said he was not there. As they were talking to him they were entering the house. Aubrey pulled out a chair and sat around the table. Him, his colleagues and Tony were just standing. He continued asking Aubrey questions about the driver's whereabouts. He said he was taken by people from Chrystal Park. He also asked him why did he not report the matter to the police or even phone 10111 or ask for help from people who were around. He only told him that he does not know that place and he took the vehicle to the plaintiff's residence. His colleagues also asked him questions as to how many people were there when the plaintiff left, the registration letters and numbers, and the description of the motor vehicle they were travelling in. Aubrey could not answer. He then started apologising. He looked down and said the plaintiff was hiding in the house in one

of the bedrooms. He then left them in the kitchen and went to the bedroom next to where they were. Constable Mkhize, Warrant Officer Makungu, Tony and Aubrey remained in the kitchen while he went to look for the plaintiff in one of the bedrooms.

[50] He knocked once at that bedroom and immediately opened the door. He noticed that it was a bathroom and a toilet and there was no one inside. He went to the next room. He also knocked once and opened. The light was on and he could see that two children were sleeping on the bed. As he was standing at the door, he saw the legs of a person protruding from the bed and the wardrobe. It was clear that the person was hiding as he had covered himself with a blanket and lying down on a mat. He approached him, woke him up and told him that he was a police officer. When he opened his face, he could see that he was a male person. He asked for his name. He told him that he was Collin. He then apologised. He instructed him to get dressed and come with him to the kitchen. He stood up and said his clothes were in another room.

[51] He followed him and when he went out of the bedroom, he spoke to Aubrey. He asked Aubrey as to who he was and Aubrey confirmed that it was Collin. Tony also confirmed that it was him. Constable Mkhize who was going to the direction he came from, ordered the plaintiff to get dressed. The plaintiff told Constable Mkhize that his clothes were in another bedroom. He then entered his bedroom with Constable Mkhize while Tony and Warrant Officer Makungu followed. He

remained with Aubrey in the kitchen and asked him what was actually happening there. Aubrey told him that the plaintiff told him that he should tell them that he was not there. As they were talking Aubrey apologised and said the only person who should tell the truth was Collin. After a while his other colleagues came back with the plaintiff and Tony. Collin and Aubrey were told that they were under arrest. They then started preparing themselves to get out of the house. Aubrey pleaded with them not to arrest him.

[52] As they went out of the house, Constable Mkhize, Warrant Officer Makungu, Tony and the plaintiff were walking in front while he was following them together with Aubrey. At that time he was pulling Aubrey as he did not want to leave. He eventually pulled him with his hand and his trouser belt to force him to go with him. All of a sudden he had someone screaming in Zulu saying “hey you, what are you doing, are you running?” He does not know who was screaming and who was saying so but it was one of his colleagues who were there. When he looked he saw the plaintiff on the ground. He did not see what caused him to be on the ground. Constable Mkhize then ordered him to stand up. He was passing there with Aubrey and he put Aubrey in the van. Collin was helped to stand up by Constable Mkhize and Warrant Officer Makungu. He was limping and could not walk properly. He complained that he was injured. He was also put in the police van. They then left to Etwatwa police station. Tony followed them in his taxi. Aubrey was locked up and a docket was opened. Both Aubrey and the plaintiff were arrested for using Tony’s vehicle without permission. They were also

charged for theft of Tony's money. He took Tony's statement, Constable Mkhize was busy phoning the paramedics while Warrant Officer Makungu was busy preparing other documents in the docket.

[53] Realising that Constable Mkhize was struggling to get hold of the paramedics, they decided to rush the plaintiff to Phillip Moyo clinic in Etwatwa. They found nurses who told them that the doctor was not there and they were not going to be able to assist them. They told them to go to the Far Eastrand hospital in Springs. They also told them that they did not have an ambulance and that they should go to the fire-station. At the fire-station they told them to wait and after sometime an ambulance arrived. The plaintiff was put in an ambulance while they followed him in their vehicle to the Far Eastrand hospital in Springs where the plaintiff was further taken to Pholosong hospital. They guarded him until they finished their shift and other colleagues came to relieve them.

[54] He denied that they assaulted the plaintiff that night. As they were going out of the plaintiff's house to the police van, he lost sight of the plaintiff as he only concentrated on Aubrey. The plaintiff and Aubrey were never assaulted in his presence.

[55] Under cross examination he testified that at the time they spoke to George there was no suggestion that the taxi was stolen or used without permission and that the check in money was stolen. He further testified that when they reached the

plaintiff's residence they found the taxi parked outside and Tony was in control of it as he was already in possession of its keys. He disputed that upon their arrival at the plaintiff's residence the gates were unlocked and maintained that Aubrey opened the gates after he blew the siren. He was then referred to paragraph 4 and 5 of the statement he made to the police which read:

"4

George then took us to address 22496 Railway section where we found Mr Tony Mamogobo who identified himself as the owner of a White Toyota Quantum with registration BL 84 PX GP. He explained to us what his driver known as Collin has done. Collin did not bring the money for the check in and also did not park the vehicle at the usual place. He further informed us that he was informed by Tracker Company where the vehicle was parked.

5

We then went inside the yard and knocked, and a black male came out and identified himself as Johannes Sefatsa. When asked about Collin he told us that Collin was taken by unknown people in Chrystal Park and he brought the vehicle to park it at Collin's place. We went inside with him to check if he was telling the truth. We checked the first bedroom and the toilet and he was not found. We went into another bedroom and there we found a black male hiding between the bed and a wardrobe covering himself with a blanket."

[56] He conceded that if the gate was locked, it was impossible for them to get into the yard. When asked why does he say the gate was locked and that he had to blow

the siren, he said yes, the gate was locked that is why he had to blow the siren. He mentioned that someone then came and opened the gate for them. He also said the person who opened the gate for them took them inside the house.

[57] When asked why he did not mention in his statement that when he arrived there, the gate was locked and he had to blow the siren, he said he does not know how he left that out. He was also told that if he says they were escorted to the house and yard, then it would have been unnecessary to knock. His response to that was that when you enter other people's houses you do not just throw yourself in, you have to knock even if you are escorted by a person from the house. When told that Warrant Officer Makungu also said the same thing in his statement, he said maybe according to him the issue of the gate was not important.

[58] He further disagreed that they found Aubrey and the plaintiff's wife in the kitchen. He stated that they went with Aubrey into the house. He disputed that they assaulted Aubrey in the kitchen. He also disputed that Aubrey pointed out to them where the plaintiff was hiding. He stated that Aubrey just told them that the plaintiff was in the house. When told that the plaintiff said three policemen entered the children's bedroom where he was found hiding, he disagreed and said they were three policemen when they entered the house but he went to the children's bedroom alone. When told that Refilwe testified that she was awoken by the police in her bedroom, he said he would not dispute that but what he can say is that upon his arrival in the children's room, the children were sleeping.

When he was in the bedroom, they were still asleep and he left them sleeping. He disputed that the plaintiff's wife was in the children's bedroom. He disputed ever assaulting the plaintiff and maintained that he never witnessed him being assaulted by his colleagues in his presence. He disputed that the plaintiff was pulled from where he was lying in the children's bedroom. He denied that one of the policemen jumped on the children's bed to get to the plaintiff.

- [59] He testified that other than asking the plaintiff his name and ordering him to get dressed, he did not talk to him about anything. He disputed that Tony did not go to the plaintiff's bedroom when he was going to dress up with Constable Mkhize and Warrant Officer Makungu. When asked why did he not ask the plaintiff as to why was the taxi parked at his yard, he said the question did not come to his mind. He was also asked why did he not ask the plaintiff about the check in money and why did he not meet with Tony to give him the money. He said he believed that the other police officers asked him those questions when they entered the house. He kept on saying his focus was on Aubrey. He conceded that to arrest a person is a serious thing as his liberty is at stake. When told that despite all this he was comfortable to arrest the plaintiff before he had his side of the story, he said it was not that easy as he was not comfortable in doing that. He conceded that without hearing his side of the story, he could not have reasonably arrested him but said his side of the story was heard by his colleagues and all of them as police officers agreed that he should be arrested.

[60] When told that as they were going outside the house to the police van, Tony testified that the plaintiff fell on the lawn, he stated that he did observe that he fell on the lawn but he just saw him on the ground. He was told that the plaintiff testified that he fell because he was tripped by one of the policemen. His response was that he did not see when that happened. He denied that the plaintiff was assaulted in his presence.

[61] On paragraph 7 line 3 of his statement he said the following:

“While coming out of the house with both Collin and Johannes together with Mr Tony, Collin tried to run away from us but did not run a distance as he fell on the ground.”

He was then asked why he wrote all that in his statement while he said he did not see what happened. He said what he wrote was a collection of what his colleagues saw as they were together. He further stated that the incident happened when they were together although he did not see some of the things. He conceded that his evidence was a combination of what he knew and what the colleagues knew. He testified that as he was passing with Aubrey where the plaintiff had fallen on the lawn, he realised that he was injured because he was crying.

[62] Warrant Officer Sibongile Makungu testified that he is a Warrant Officer employed at Etwatwa SAPS. He was also on duty on the evening of the incident with his crew members, Constable Kgare and Constable Mkhize. They were posted at sector, Etwatwa that evening where they were patrolling, assisting the community and dealing with complaints. He corroborated the evidence of Constable Kgare that at 23h00 they went to the Engen garage where they met George who told them about the problem of a taxi owner. They ultimately went to him with George at No 22946 Railway section where they found him and a taxi parked outside the yard. He explained to them how he happened to be there. He also corroborated the evidence of Tony and Constable Kgare that the gate was locked and they blew the siren. Further that after Constable Kgare had blown the siren, Aubrey came to the gate and opened it for them. Constable Kgare then asked Aubrey where was the plaintiff as they were walking to the house. When they reached the house, Constable Kgare knocked at the door, Aubrey, with whom they were, opened the door for them, took a chair and sat next to a table in the kitchen. The three policemen together with Tony entered the plaintiff's house. George remained outside in the motor vehicle. They stood next to the table where Aubrey was sitting and asked him questions.

[63] He also asked him where Collin was. Aubrey told them that Collin was not there, he was kidnapped at Chrystal Park. He also asked him what did he do with Collin's kidnapping, whether he called the police or not and informed them about it. Aubrey could not answer their questions. He also asked him if he had taken

down the registration numbers and letters of the motor vehicle that took Collin. After all this Aubrey apologised and told them that Collin was in the house hiding in one of the bedrooms. He corroborated the evidence of Constable Kgare that he left them in the kitchen and went to search the house. Later on they saw him coming with a male person from the bedroom. He also testified that at that time the plaintiff was wearing his underwear and socks.

[64] When they came to the kitchen they asked him why did he not park the taxi at the garage, why when he was wanted by the owner of the taxi did he switch his phone off and why did his friend, Aubrey, tell them that he was kidnapped whilst he was in the house. He did not say much to them. He just apologised. He also corroborated the evidence of Constable Kgare that when he came out of the bedroom with the plaintiff, he asked Aubrey and Tony who the plaintiff was and they all confirmed that it was Collin.

[65] After the plaintiff had apologised, he together with Constable Mkhize and Tony went with the plaintiff to his bedroom after he had asked to go and get dressed. Inside the room they found a certain lady sleeping. Constable Kgare and Aubrey remained in the kitchen. That lady then gave the plaintiff a trouser, he took out some money from one of its pockets and put it on the dressing table. Tony then took the money and counted it. It was an amount of R350,00. Tony asked him where was the other money, he did not respond. They then went out of the

bedroom. Tony also asked him where was the money for Sunday and he did not respond.

[66] He corroborated Constable Kgare's evidence that at that time Constable Kgare informed the plaintiff and Aubrey that they were under arrest for using the motor vehicle without the owner's consent and for theft. Furthermore that after he had read out their constitutional rights to them, they left the house to the police van. As they were leaving the house at the stoep outside the house, the plaintiff started to run. They chased after him. They were able to catch him while he was still in the yard. He fell next to the gate on the lawn. They lifted him up. After that he complained that he was injured. They went out of the yard to the motor vehicle holding him. He and Constable Mkhize assisted the plaintiff to get into the police van. Constable Kgare also put Aubrey inside the police van. They then drove to the police station and Tony followed them in his taxi. After they did their paperwork, they locked Aubrey in the cells while the plaintiff was taken to Pholosong hospital as Constable Kgare testified.

[67] When asked whether he saw children at the plaintiff's house he said he would be lying if he said he saw them. He corroborated Tony and Constable Kgare's evidence that Aubrey told them that after the plaintiff was kidnapped, he drove the taxi to the plaintiff's residence. He was also asked what caused the plaintiff's fall when they were going to the police van outside. He testified that he was running away, he slipped and fell because the previous day it was raining. He disputed

that Aubrey was assaulted in the house in his presence. He testified that when Constable Kgare went to search for the plaintiff in the house, he remained in the kitchen with Aubrey. From where he was sitting he could not see what was happening in the bedroom where the plaintiff was found as he concentrated on Aubrey with whom he was with. He also disputed that the plaintiff and Aubrey were assaulted outside the house.

[68] Under cross examination he conceded that the occurrence book completed by Constable Kgare only mentioned that the plaintiff and Aubrey were arrested for using the motor vehicle without the owner's consent and not theft. He also conceded that on the warning statement of the plaintiff and the SAP 28 the charge of using the motor vehicle without the owner's consent is only mentioned. He disputed that the plaintiff was only arrested for using the motor vehicle without the owner's consent. He confirmed that Constable Mkhize was still employed by the SAPS when he was giving evidence and that he was in Durban on that day. He also confirmed that when they arrived at the plaintiff's residence the taxi was parked outside the yard and the gates were locked. He conceded that he did not mention in his statement that the gate was locked. When told that Constable Kgare testified that the three of them discussed what they were going to say, he said he did not discuss his statement with anyone.

[69] He conceded that he also did not mention in his statement that Constable Kgare blew the siren to enable people at the plaintiff's residence to unlock the gate. He

was also referred to paragraph 4 line 5 of the statement he made to the police where the following is stated:

“We entered inside house number 22496, found one black male in the kitchen. We asked him where is Collin. He told us Collin is not in the house.”

When asked who was the black male they found in the house, he said it was Aubrey. He testified that Aubrey is the person who opened the gate for them and explained that the reason why he said he found Aubrey in the kitchen was because he was walking behind him from the gate.

[70] He disputed Aubrey’s evidence that he did not unlock the gate for them and that they found him in the kitchen. He also disputed that they entered the kitchen and immediately started to assault him.

[71] He confirmed Constable Kgare’s evidence that he was the one who went to the bedrooms to search for the plaintiff and that while they were in the kitchen, they all asked the plaintiff questions. He disputed that Constable Kgare was with Constable Mkhize when he went to the children’s bedroom where he came back with the plaintiff. He also disputed that the three of them entered the children’s bedroom and assaulted the plaintiff. He testified that he asked the plaintiff when he came out of the bedroom as to where were his clothes, why did he not park

the vehicle at the garage and why did Aubrey lie to them about the kidnapping. He further asked him what was happening that he ended up hiding himself.

[72] The plaintiff then showed him where he left his clothes. He corroborated Constable Kgare's evidence that himself, Constable Mkhize, Tony and the plaintiff went to the plaintiff's bedroom to allow him to dress. He corroborated Constable Kgare's evidence that when they left the plaintiff's bedroom after he had dressed, Constable Kgare told the plaintiff and Aubrey that they were under arrest and explained their constitutional rights to them. After this they left the house. He disputed the plaintiff's evidence that as they were outside, they tripped him and he fell to the ground. Further that while he was on the ground, they kicked him as a result of which his right leg was injured. He testified that he only heard at the hospital that the plaintiff broke his tibia and fibula and that a plaster of paris was put from his leg to the knee.

[73] Under re-examination he testified that he did not read the occurrence book that Constable Kgare wrote and that according to the cover of the docket the plaintiff was arrested for theft and using the motor vehicle without the owner's consent. He further testified that he never entered the children's bedroom.

[74] The following paragraphs of the plaintiff's particulars of claim read as follows:

"CLAIM A

On or about 23 April 2012 and at or near number 22496 Ntsibande Street, Thulani section, Etwatwa extension 1, Daveyton, Ekurhuleni, police officers whose names and ranks are unknown to the plaintiff unlawfully assaulted the plaintiff by inter alia:

- 5.1 punching plaintiff with their fists all over plaintiff's body, and*
- 5.2 kicking plaintiff all over plaintiff's body.*

6

At all material times hereto, the unknown police officers were acting within the course and scope of their employment with the first defendant and were in the unlawful employment of the first defendant.

7

As a result of the assault the plaintiff sustained the following injuries:

- 7.1 a fracture of the right leg;*
- 7.2 he suffered contumelia, pain and suffering, shock and discomfort;*
- 7.3 he had to receive medical treatment at Pholosong Hospital from 23 April 2012 until 26 April 2012;*
- 7.4 he has to undergo future medical treatment.*

8

As a result of the assault the plaintiff suffered damages in the amount of R800 000,00 made up as follows:

- 8.1 Past medical expenses in the amount of R100 000,00*
- 8.2 Future medical expenses in the amount of R100 000,00*

8.3 *General damages in the amount of R600 000,00 for pain and suffering, discomfort, loss of amenities of life, shock and contumelia; and*

CLAIM B

11

On or about 23 April 2012 and at or near number 22496 Ntsibande Street, Thulani section, Etwatwa extension 1, Daveyton, Ekurhuleni, plaintiff was unlawfully arrested without a warrant by police whose names and ranks are unknown to the plaintiff.

12

Plaintiff was thereafter detained at Pholosong Hospital under police guard for 3 days at the instance of the defendant and unknown police officers.

14

Plaintiff was subsequently released as the case against him was marked nolle prosequi without plaintiff having to appear at court.

15

As a result of the conduct of the defendant and the unknown police officers the plaintiff has suffered damages in the sum of R100 000,00 for:

15.1 *Loss of freedom;*

15.2 *Contumelia;*

15.3 *Shock and discomfort.”*

[75] The defendant pleaded as follows to paragraphs 5,6,7 and 8 of the plaintiff's particulars of claim:

"5

AD PARAGRAPH 5

The content hereof is denied and the plaintiff is put to the proof thereof.

6

AD PARAGRAPH 6

The defendant denies the content hereof as if specifically traversed and the plaintiff is put to the proof thereof.

7

AD PARAGRAPH 7 and 8

The content hereof is denied and the plaintiff is put to the proof thereof."

[76] Further to paragraphs 11,12,14 and 15 of the plaintiff's particulars of claim he pleaded as follows:

"the defendant bears no knowledge of this paragraph, hence same is accordingly denied and the plaintiff is put to the proof thereof."

[77] The issues for determination are whether the arrest and detention of the plaintiff were unlawful, whether he was indeed assaulted and whether the injuries allegedly sustained were as a result of the assault by members of the defendant.

[78] Section 40(1)(b) of Act 51 of 1977 (“the Criminal Procedure Act”) provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than an offence of escaping from lawful custody.

[79] As was held in ***Duncan v Minister of Law and Order (1986)2 ALL SA 241(A)at 248*** the jurisdictional facts for a section 40(1)(b) defence are that:

- 79.1 the arrestor must be a peace officer;
- 79.2 the arrestor must entertain a suspicion;
- 79.3 the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and
- 79.4 the suspicion must rest on reasonable grounds.

[80] It is trite that the onus rests on the defendant to justify an arrest. As Rabie CJ explained in ***Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 at 589 E-F:***

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

[81] In ***Zealand v Minister of Justice and Constitutional Development and Another 2008 (6) BCLR 601(CC)*** at **para 25** the Constitutional Court in affirming this principle said:

“It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.”

[82] **Van Heerden JA in *Duncan v Minister of Law and Order* at 248 - 249** referred to *supra* said the following:

*“If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (of **Holgate-Mohammed v Duke E [1984] 1 ALL ER 1054 HL at 1057**). No doubt the discretion must be properly exercised.”*

[83] In ***R v Van Heerden 1958 (3) SA 150 (T)*** the court held that the suspicion must be reasonable and the test for such reasonableness is objective.

- [84] The approach to be adopted in considering whether the suspicion was reasonable is the one followed by Jones J in ***Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658 F-H***:

“It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant; i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will only allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient 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 on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

- [85] At paragraph 25 of its judgment, the court in ***Minister of Safety and Security v Sekhoto and Another 2011(1) SACR 315 (SCA)*** said the following:

“It could hardly be suggested that an arrest under the circumstances set out in section 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause, in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary.”

- [86] The court in the **Sekhoto** matter (*supra*) went on at paragraph 44 of the judgment to say:

“While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime and those listed in Schedule 1 are serious, not only because the legislature thought so- a peace officer could seldom be criticised for arresting a suspect for that purpose.”

- [87] Innes ACJ articulated the following principle in **Shidiack v Union Government (Minister of Interior) 1912 AD 642 at 651-652:**

“Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie, and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or substitute its conclusion for its own... There are circumstances in which interference would be possible and right. If for instance an officer acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he has disregarded the express provisions of a statute – in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.”

[88] In ***Charles v Minister of Safety and Security 2007(2) SACR 137(W)*** Goldblatt J at p144 B-D said the following:

“The Legislature having granted a peace officer the right to make an arrest in the circumstances set out in S40 has created a situation where due compliance with such section by a peace officer is lawful and affords such peace officer protection against an action for unlawful arrest. In my view, the court has no right to impose further conditions on such persons. To do so would open a Pandora's box where

the courts would be called upon in cases of this type to have to enquire into what is reasonable in a variety of circumstances and further where peace officers would be called upon to make value judgments every time they effect an arrest in terms of section 40. These judgments which they would have to make would later have to be considered and tested by judicial officers attempting to place themselves in the shoes of the arresting officer.”

- [89] The three police officers, Constable Kgare, Constable Mkhize and Warrant Officer Makungu went to the plaintiff’s residence after being summoned by a member of the public, George, from the Engen garage that Tony had a problem with the driver of his taxi. They met with Tony who informed them of his problem and they then entered the plaintiff’s homestead as a result of which Aubrey was questioned about the whereabouts of the plaintiff. Issues relating to whether the gates at plaintiff’s residence were locked or open when the police arrived and the allegations of assault of Aubrey by the police are not relevant except to assist the Court in determining the credibility of the witnesses. After the plaintiff who was alleged to have been kidnapped by people from Chrystal Park was found in the house, the money collected on the day of the incident in the amount of R350,00 was given to Tony. It was clear from the evidence that the money collected on that day was supposed to have been an amount of R600,00 but Tony only received R350,00 and the plaintiff did not account for the shortage. Tony testified that the reason he started calling the plaintiff during the day was because the plaintiff did not bring the money he collected on Sunday, a day prior to the

incident. It is also common cause that on the night in question the plaintiff did not park the taxi at the Engen garage where it was supposed to have been parked. Tony was not told anything as he tried to phone the plaintiff but to no avail. The plaintiff was then arrested for theft and for using the motor vehicle without owner's consent. A docket was opened. Tony's statement and those of the three members of the defendant were taken.

[90] An issue was raised with the police officers that when they arrived at the plaintiff's residence they found Tony already in control of the taxi, why then did they arrest the plaintiff. Tony was also asked what happens when a taxi driver is short of his daily takings, whether that is theft or not. There were also issues of the occurrence book not mentioning the charge of theft, etc. These issues are irrelevant to the questions whether the arrestor who arrests a suspect without a warrant entertained a suspicion that a Schedule 1 offence was committed and whether the suspicion was based on reasonable grounds. As was held in ***Mabona*** (*supra*), it is not required that the information at the disposal of the arrestor must be of sufficient high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty and the suspicion must be based on solid grounds. Furthermore the plaintiff and his witnesses' evidence differed as to whether the police spoke to him. His evidence and that of Refilwe was that the police did not speak to him but just started to assault him while his wife testified that they asked who he was and he said he was Collin. Even though the witnesses of the plaintiff disputed that the

plaintiff was taken to the dining room where the police were asking him questions regarding the issue of the taxi and the check in money, I find this version of events improbable that the police could have just assaulted him when they found him where he was hiding as alleged without asking who he was, introducing themselves to him, explaining the purpose of their visit and verifying the information they had at the time. The evidence of the police officers to a large extent corroborated each other and that of Tony. They did not seem to be bad witnesses except to say that Constable Kgare at some stage was evasive when he responded to certain questions to the extent that he ended up saying that his evidence was a combination of what he observed and what his colleagues observed as they discussed what their evidence was going to be. His evidence cannot on this basis be relied upon as it was not logical and credible. The court found Warrant Officer Makungu to have been a candid, logical, credible and good witness who was able to give a full account of what transpired on the evening of the incident. There were minor discrepancies between his evidence and that of Tony, which cannot be regarded as material. For instance, issues of whether Tony entered the plaintiff's bedroom with them when the plaintiff went to dress. Such discrepancies are acceptable taking into account that the incident happened in 2012. It cannot be expected that witnesses will be able to remember everything that happened after a period of two years has lapsed since the incident. I find the evidence of the defendant that they asked the plaintiff as to why he hid himself, lied that he was kidnapped, parked the taxi at his residence and not it at the

engen garage, after confirming that he was the person they were looking for, probable.

[91] It is clear from the evidence that the police officers followed the information given by George which led them to the plaintiff's house where they met the complainant, Tony, who confirmed the information George gave them. From that information they got further information from Aubrey, they found the taxi at the plaintiff's premises and were able to find the plaintiff who was hiding in the house for them.

[92] The plaintiff under cross examination conceded that there were problems between him and Tony regarding his daily takings. The amount of R350,00 that was given to Tony in the presence of the police was also short. He testified that he was supposed to have collected R600,00. From this evidence and looking at the test referred to in Duncan (*supra*) in relation to the four jurisdictional facts for a s40 (1)(b) defence, I find that the defendant was able to prove all the jurisdictional facts. I also find that members of the defendant, whether Constable Kgare or the three of them had sufficient information which they were able to analyse and assess critically before they decided to arrest the plaintiff. They did not accept it lightly or without checking it where it can be checked. No evidence was led that they were *mala fide* in the exercise of their discretion. I therefore cannot find any reason to criticise them for arresting the plaintiff. I find that the arrest and the detention of the plaintiff were justified under the circumstances.

[93] Further evidence was led that plaintiff was assaulted all over his body by members of the defendant by slapping and kicking him with booted feet which allegations were disputed by the defendant. According to the defendant, the plaintiff slipped and fell when he attempted to run away from his members in the yard. The plaintiff alleges that he was tripped and assaulted by members of the defendant. Although the plaintiff and his witnesses maintained that he was assaulted by members of the defendant, Pholosong Hospital records where the plaintiff was treated after the incident, state on pages 31 and 41 that he was assaulted by members of the public and thugs and on page 35 it is stated that he was assaulted by the police. This aspect was not dealt with by the plaintiff except to say that evidence was led to the effect that the plaintiff and his witnesses disputed that he was assaulted by members of the public and /or thugs.

[94] Counsel for the plaintiff submitted that the allegations made in the medical records from Pholosong Hospital are hearsay and were not corroborated by evidence. The defendant intended calling the doctor and the nursing sister who treated the plaintiff at Pholosong Hospital but the witnesses were not called to testify. No evidence was led that the plaintiff laid charges against the members of the defendant for assault. No J88 was produced except the medical records from Pholosong Hospital and the medico-legal report by Dr E Gants, the orthopaedic surgeon. Pholosong Hospital records were discovered by plaintiff. They contradict plaintiff's evidence. The plaintiff did not deal with the discrepancies as alluded to above. I do not agree with plaintiff's counsel's submission that the

information from Pholosong Hospital is hearsay and that it should therefore be ignored because no witness was called to deal with it. The onus did not rest on the defendant to prove the alleged assault on the plaintiff.

- [95] The plaintiff has to prove his case on a balance of probabilities. This degree of proof required by the civil standard of proof involves a comparative rather than a qualitative test. What is weighed in the comparative balance is not a quantity of evidence but the probabilities arising from that evidence and all the circumstances of the case. In ***National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199*** the following statement was made:

“Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false.”

- [96] The plaintiff has therefore failed to discharge the onus that rested on him to prove on a balance of probabilities that he was assaulted by members of the defendant.

- [97] In the result I make the following order:

97.1 The plaintiff's claim is dismissed with costs.

M J TEFFO

Judge of the High Court South
Gauteng Local Division,
Johannesburg

Appearances:

For the Plaintiff	:	Advocate J.T. Zitha
Instructed by	:	HC Makhubele Inc
For Defendant	:	Advocate D.J Erasmus
Instructed by	:	The State Attorneys
Heard on	:	11 August 2014
Judgment delivered	:	26 September 2014