



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 01753/11

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

26 May 2015

E J Francis

In the matter between:

MANTJIU MOTIANG JOSIAS

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

1<sup>st</sup> Defendant

DIRECTOR OF PUBLIC PROSECUTIONS

2<sup>nd</sup> Defendant

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JUDGMENT

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FRANCIS J

*Introduction*

1... The plaintiff has instituted an action for damages against the first defendant – the Minister of Safety and Security and the second defendant – the Director of Public Prosecutions, for wrongful arrest and detention and malicious prosecution. This was after he was arrested on 23 January 2008 for being in possession of a suspected hijacked motor vehicle. He had applied for bail which was refused and on 18 June 2009. On 6 March 2009 he was acquitted in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the CPA).

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2. The plaintiff has withdrawn his action for malicious arrest, detention and prosecution at the commencement of arguments.
3. The plaintiff called Tembelihle Matrina Dlamini his attorney of record as his first witness. She was admitted as an attorney in 1996. She testified that during June 2008 she received instructions from the plaintiff to bring a formal bail application on his behalf. This was her only involvement in the criminal trial. She consulted with the plaintiff at the Boksburg prison and the bail hearing was set down for 18 June 2008. She had prepared an affidavit in support of the bail application which he signed on the morning of 18 June 2008. The affidavit which appears at A238 to 243 was read into the record. The plaintiff's bail application was opposed by the prosecutor who had read into the criminal trial record an affidavit that was deposed to by the investigating officer, Cornelius Maphumulo. That affidavit appears at pages A245 to A246. She is not certain whether the prosecutor who had opposed the bail application was the same prosecutor who appeared at the criminal trial since she did not represent the accused at his criminal trial. The bail was opposed on the grounds that the plaintiff was being investigated in other matters for armed robberies that had taken place in Alberton and that he was a suspect. Further that he was a suspect in an attempt to hijack a motor vehicle. She was not given a copy of the affidavit which was handed into court. Bail was thereafter refused by a magistrate. The plaintiff was represented by an attorney appointed by Legal Aid South Africa at the criminal trial.

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4. During cross examination Ms Dlamini said that the plaintiff told her that he was arrested on 23 January 2008 and she had consulted with him only in June 2008. She does not recall when the plaintiff had made his first appearance at the Tembisa Magistrate's court but had told her that he had applied for bail which was refused on the grounds that it was a Schedule 6 offence. She made his first formal bail application on 18 June 2008. The prosecutor said that he was opposing bail because the plaintiff was a suspect in bank robberies in Alberton. The magistrate then refused bail. The plaintiff remained in custody until his acquittal. He had previously requested bail and it was refused and he then instructed her to bring a bail application. He complied with the formal bail application only in June 2008. During re-examination Ms Dlamini said that she had made a mistake and said that the prosecutor had said that bail was opposed since the plaintiff was a suspect in bank robberies and not armed robberies as she had testified to in her examination in chief.
5. The plaintiff Motiang Josias Mantjiu testified that he was arrested on 23 January 2008 and had applied for bail on 18 June 2008. He had deposed to an affidavit in support of his bail application which is at A238 to 243. He said that on 23 January 2008 he went to visit his child Nhlanhla at Emfihlweni section in Tembisa. He found her and from there he went to Siziba section also in Tembisa and found that his friend Ndini was not there. He then drove to Esangweni section in Tembisa to see Mzwakhe Mahlangu but there was no one there. He then telephoned Mzwakhe who told him that he was at one Zab's place to cut a key. He went there to fetch him and drove with him back

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to his place. On their way back he met one Samuel who was driving a motor vehicle. Mzwakhe stopped Samuel. One Sizwe was with Mzwakhe. Mzwake got out of his car and went to Samuel's car and Sizwe remained with him in his car and they followed each other. When they got to Mzwakhe's place, he got out of his vehicle and spoke with Mzwakhe in his yard. He then told him that he was leaving to watch a soccer match and then left. When he was about 500 meters away from Mzwakhe's place, he was stopped by the flying squad police. They took out firearms and a black policeman switched off his car and told him to get out of the car and he lay in the street whilst they were pointing their firearms at him. He was handcuffed with his hands behind his back. There were three policemen in a Jetta flying squad, two black males and a white policeman. The police vehicle was driven by the white policeman. Another policeman set in front and another at the back. His vehicle was switched off by a policeman who sitting at the back of the police vehicle. It was a marked police vehicle. Whilst he was laying in the road, other police came in vans and he was asked where Mzwakhe was and he told them that he was at his parents place. He the plaintiff was driving a Mazda 323 vehicle. He had visited his daughter at 15h00 and was stopped by the police between 16h30 and 17h00. The other police then went to Mzwakhe parents place and they had known where it was and he was left with the flying squad policemen. After the other police had left, the flying squad police lifted him up. They searched him and his car and nothing was found or removed. He was then put into the back of flying squad vehicle and another policeman drove his car and they went to the old Esangweni section. He was stopped at the new

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Esangweni section. When he was stopped, the police had spoken about a hijacked vehicle. They told him that he had hijacked the car and he had asked him what car they were referring to and they said that he knew about which car they were talking about. They did not say anything else to him. When they got to old Esangweni section the police stopped next to a light green Toyota Corolla and the white policeman told him that he had hijacked that vehicle. He told him that he did not know that car and was seeing it for the first time. The police arrived in many police vans and he saw Mzwakhe, Sizwe and Samuel. The three of them came out of one police van and were put into a police Venture. A policeman drove the Toyota Corolla and they were taken to the Tembisa police station. He was in the flying squad vehicle when he was taken to the Tembisa police station.

6. The plaintiff testified further that when they arrived at the Tembisa police station, where he was taken to a toilet by a white and black policeman. He was assaulted by the two policemen. It was the same police who had handcuffed him and pointed firearms at him at the place where he was arrested. He was hit on his body and he fell down and was kicked by both policemen. The white policeman then asked his colleague if he did not want to urinate. He told him that he wanted and urinated in his face. This was whilst he was laying on his back with his hands cuffed behind his back. He was beaten with their hands and was also kicked with their boots and the beating lasted for between 30 to 45 minutes. Whilst he was been beaten, they told him to tell the truth and he said that he knew nothing about the car. The

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white policeman took out a pocket knife from his waste inside a key holder and tore of his belt and trouser. Another black policeman came in with Mzwakhe and took his belt and the three policemen beat Mzwakhe in his presence. When they tore his belt and trouser, he was holding his trouser at his back and was still wearing it. When they assaulted Mzwakhe, he the plaintiff was laying on the floor and after they had finish assaulted him they took them to an office inside the Tembisa police station. They found three other black officers in that office. They were working at the Tembisa police station. They wrote down their details and showed them papers which contained their rights which document he recognised as the one at A206. He signed the documents that he was informed of his rights. He did not read the contents of the document. They filled it in and read it to them and told them to sign it. They told them that they could get lawyers if they wanted to and that is all that they told them. On top of page A206 the heading is Notice of their Rights in terms of the Constitution and the reason for their detention. They were told that they were being detained due to the hijacked vehicle. After they had signed page 206 they were taken to the Tembisa police station cells where they were detained.

7. The plaintiff testified that the toilet in the holding cell was not flushing. They were given dirty blankets to sleep on. They were 16 people in the cells. He made use of the toilet. It had a bad smell and the other inmates told them that once they had used the toilets they should place a blanket over the seat to cover the toilet since it did not flush. He did not receive any food on 23

January 2008. He received water and food on 24 January 2008. They were taken out of the cells where they were given food and went into the cells to eat the food. He was given bread and tea in the morning at 7h00 and at 12h00 he was given porridge with mince. They got nothing in the evening. He was not taken to hospital or to a doctor for the injuries that he had sustained. He was not taken to hospital or to a doctor for the injuries he had sustained in the assault. When he had asked that he be taken, he was asked what prisoner knew of a doctor. He was bleeding from his anus. The medical condition that he had when he was arrested was gout and nothing else. Whenever he gets gout he takes medication and would drink 3 tablets a day. When he was arrested, he had no gout. He was taken to the Germiston Magistrates Court on 25 January 2008 and his case was remanded for seven days. He had asked for bail but the prosecutor told him that he could apply for bail at his second appearance. He was sent to the Boksburg prison. There were 30 inmates at the Boksburg prison and they were given a sponge and sheets for bedding. The sheets came from the laundry and the sponge was dirty. There was a toilet in the cells and it was working and flushing and all 30 inmates had to use it. They had a shower and there was hot water at 3h00. They ate twice a day, in the morning at 7h00 and at 12h00. In the morning they received bread, porridge and tea. At 12h00 they had porridge with fish or meat. He said that A199 to 200 is a warning statement that he had made to Maphumulo who wrote it down on 24 January 2008. It states that he was being investigated for carjacking and said that he does not know whose handwriting appears at A200. The statement was written by the inspector. It is stated at the end of

A199 whether he understands the alleged crime mentioned and the warning and the answer given is yes. He said this was written by the inspector. He the plaintiff's signature appears on the right side of the page. He was not given an opportunity to read it before he signed it. He signed it after he was told to do so. He told the inspector what had happened on 23 January 2008.

8. The plaintiff testified that seven days after 25 January 2008, he again appeared in court. The case was remanded and he raised his hand and was asked by the magistrate what the problem was. He told him that he was asking for bail and the prosecutor said that it was a schedule 6 offence and that he would not get bail and should return to the Boksburg prison. He said that he was not certain whether it was the same prosecutor who had appeared on 25 January 2008 and also at the criminal trial, since the courts were changed where he had applied for bail to another court for trial. It was however the same prosecutor who had appeared on 25 January 2008 and seven days later when he appeared again in the Germiston Magistrate's court. The conditions were the same at the Boksburg prison as before and he was kept in the same cell. He was allowed to receive visitors at the Boksburg prison. He does not remember on which day his third appearance in court was and they kept on postponing his matter. When his wife came to visit him in prison in March 2008, he told her to get him a lawyer for his bail application. He had appeared in the Germiston Magistrate's court about five times and on the sixth occasion, it was for the bail application. The reason given for the various postponements was that they were still investigating the matter. Whilst he was in prison his attorney of



record came to visit him in May 2008 and he gave her his statement. He told her what had happened. She left and he later received a court date. He went to court on 18 June 2008 and she came to see him in the cells with a policeman. She read to him his statement which he signed in the presence of the policeman who was a commissioner of oaths. The affidavit is at A238 to 243 and his signature is at A242. He then appeared in court. The matter proceeded and the prosecutor said that he would not get bail because the investigating officer said that he was involved in bank robberies and there were outstanding bank robbery cases. His attorney had first addressed the court and was followed by the prosecutor. He said that he does not have any outstanding bank robbery cases. The magistrate then ruled that bail was denied and that he must return to the Boksburg prison. He later went back to court when his matter was remanded. His trial commenced on 8 November 2008. They were four accused at the trial. He was accused 2. Accused 1 was Mzwakhe Mahlangu, accused 3 was Sizwe and accused 4 was Samuel. The charge against them was the robbery of a Toyota vehicle with aggravating circumstances in that on 23 January 2008 they assaulted van Niekerk and robbed her off her vehicle, her cellphone and her handbag was taken and a firearm was used. He pleaded not guilty to the charge. Van Niekerk testified in court on 5 November and had only identified Mzwakhe in court as the person who had robbed her. She said that she had only been robbed by one person. She testified that Mzwakhe entered her yard and she saw him through the rear mirror and he came running and held a gun and when he got to the vehicle, he opened it and pointed her with the firearm and told her to get out of

it. She got out of the vehicle and he reversed out and closed the gates whilst she was inside the yard. He left with her remote gate keys and house keys. The next person who testified was Magoedie who is an inspector at the police. He testified that he found the four of them inside the Toyota Corolla. Mzwakhe was in the front driver seat and the cellphone was found at this place and the keys in his pocket. He said that they had also found a handbag at Mzwakhe's place. He said that he had found the plaintiff at the back seat of the vehicle but was not sure on which side. He did not testify that he had spoken to him. He said that they had arrested people in the hijacked vehicle. The prosecutor had asked Magoedie about him and he said that he was searched by another policeman from Tembisa police station, Netshivhodza who had passed away. Magoedie was not part of the flying squad police. The state then closed his case and his attorney applied for his acquittal which was not opposed by the prosecutor. He, Sizwe and Samuel were acquitted

9. The plaintiff testified that he was born on 17 May 1963 and will be turning 52 years on 17 May 2015. In January 2008 he was 44 years old and was and is still married with two children who are 29 years and 22 years old respectively. He said that when he was arrested, he can say that his wife and children were depended on him. He is not working but was doing odd jobs. He was driving school children to school and would go to the Johannesburg market. His wife is a nurse and his children are employed. He went up to standard 9. He said that when he was arrested he had gout and during his detention he had gout. The prison did not have medication for gout and his wife brought him

medication. He had no special diet for gout at his house. He was acquitted on 5 March 2009.

10. During cross examination the plaintiff said that he was saying that he was unlawfully arrested and detained by members of the South African Police and that he is also claiming that he was maliciously prosecuted. He agreed that at B5 in paragraph 12.1 he was claiming that he suffered loss of income in an amount of R100 000.00 and it is stated in paragraph 1 of his particulars of claim that he was employed. When the particulars of claim were drafted, he was not working and at the time of his arrest he was not formally employed but did piece jobs. He was asked how the sum of R100 000 was computed and he said that the jobs depended on how long he did them. He agreed that he did not provide the court with payslips and bank statements to show how much he earned since he did not know that he would be arrested. When it was put to him that he did not tell the court how much he was earning, he said that the court did not ask him how much he was earning. No one had asked him how much he was earning when he did piece jobs. He had no response when it was put to him that the court would be asked to dismiss his claim for loss of income. He agreed that in paragraph 12.2 at B5 he is claiming R20 000.00 for legal costs and that he did not provide any proof of the fees from his attorney and that there was nothing before court about it. He said that he was not asked the question about how much he had paid his attorney and was only answering the questions that were put to him. He said that he does not know that his claim for legal costs should be dismissed and does not know that there is

nothing before court about how much he had paid as legal costs. He confirmed that he testified that he was charged with aggravated robbery and that there were four accused and that they all had pleaded not guilty. The charge was that they had hijacked a complainant at gunpoint on 23 January 2008. He confirmed that he was questioned about his bail affidavit and that he had signed it before a commissioner of oaths. He had told his attorney everything about how he was arrested and she wrote down everything. She prepared his affidavit and he read it before signing it. He agreed that at A241 at paragraph 12 he said that he was in custody since 23 January 2008 to date and is suffering from gout and high blood pressure and had received medical treatment for it at Prime Cure, Ebony Park, Midrand. He agreed that when he testified he did not say that he has high blood pressure but he has it. When asked why he did not tell the court about it, he said that he became aware of it at Boksburg. It was put to him that this was something new which he did not tell the court and said that he was expecting the court to ask if he had any sickness when he was in prison. Prime Cure is outside prison. When asked why he did not mention high blood, he said that he was telling himself about other illness and he became aware of it whilst he was in prison. He was asked if he received medication for high blood at Prime Cure before he went to prison. He said that he may have made and had forgotten about it. It was put to him that it is not clear whether he was dishonest at the time when he made his affidavit or when he testified in court. He said that he was honest. He was asked why he said that maybe he made a mistake and had forgotten about it. He said that it refers to the high blood. He was asked what mistake he was

referring to and said that when he made the affidavit, he was at the Boksburg prison. It was put to him that high blood is an illness that you would not forget easily and takes medication to control it. He said that he knows that and when it starts he did not know that he had it and he became dizzy and was sweating. He denied that he received medical treatment for it at Prime Cure but got it at prison. He was getting treatment for the gout. He was asked why he had referred to both in his affidavit and he said that it was maybe his mistake and it was not put in the correct way. It was put to that he was not honest to this court and the court *a quo* about his sickness and he said he could maybe bring his records to see when he had started to suffer from which illness.

11. The plaintiff said that the statement at pages A200 and 201 was wrong and that his signature is on it and is dated 24 January 2008. It was signed at 11h04. He signed it after he was arrested and he wanted to make a statement. It is recorded that he wanted to make a statement and that the decision to do so was his own choice and he made it out of his own choice and he said that he was not threatened or assaulted. He agreed that he testified in court that he was assaulted and in his statement he said that he was not assaulted. He was asked why he said that he was not assaulted. He said that the problem was that when he was arrested, he was not asked the question and he was told where to sign and he did as he was told. It was put to him that the investigating officer would testify and said that he read everything and wrote it down and he had said that he was not threatened or assaulted. He said that when he was

assaulted, the investigating officer was not there and came there the next day with the form and told him where to sign which he did. It was put to him that he was not assaulted. He repeated that he was taken to the toilet where he was assaulted. It was put to him that in his warning statement at A201 he did not mention that he was assaulted and failed to tell his lawyer that and this suggest that he was not assaulted. He said that he did not write the statement at A201 but it is his. He was told where to sign and does not know what he signed. It was put to him that he testified that it was read to him after it was taken down and he said that he did not say that but it is his signature. He could not point out where in his warning statement it was stated that he was assaulted. He was alone when he gave his warning statement. (The parties reached an agreement that the transcript of the criminal proceedings in the Regional court which is at A10 to A147 is admitted as evidence between the parties). He confirmed that the signature at A201 is his. He was asked whether he had said in his statement that he was assaulted and said that he was not the author of the statement. It was put to him that in his statement he does not say that he was assaulted by the police. He said that he does not know what the author of it had written down. It was put to him that he did not say that he was assaulted and that he was not assaulted. He said that even if he was assaulted by the police, they did not agree that he was assaulted by them. He said that he does not know why no amount was claim for assault in his particular of claim or there is no reference made that he was assaulted. He said that if he was allowed to see a doctor, there would have been evidence that he was assaulted but he was denied that opportunity. It was put to him that if he was assaulted

he would have told his attorney who would have claimed for it and it was not there so it was an afterthought. He repeated that he was assaulted and knows that he was and Mzwakhe would come and testify that he was assaulted. He did not lay criminal charges against the police for assaulting him. It was put to him that there was no J88 medical report from the doctor about the fact that he was assaulted. He said that it was not there and he had not seen a doctor. It was put to him that he did not lay criminal charges since he was not assaulted. He said that he wanted to see a doctor but was refused to do so. It was put to him that he was not assaulted and that is why he did not open criminal charges against the police for the assault. After a long pause and with no answer he said that he was not being asked a question. It was put to him that he was not assaulted and it does not appear in his warning statement and he signed that he had not been assaulted. He said that he does not know how to answer it but does not agree.

12. It was put to the plaintiff that he testified that he was from Mzwakhe's place and was with Sizwe and Samuel when he was arrested. He said that he did not say that and had said that when he was arrested he had left Sizwe, Samuel and Mzwakhe at Mzwakhe's place and was about 600 meters from Mzwakhe's place when he was arrested. He was asked how he was stopped. He said that the police did not flicker their lights. They were hiding and as he was driving, they drove in front of him and he had to apply brakes and they pointed guns at him. There were no other cars in front and behind him. When the police arrived there, he did not know them and was surprised. He was asked where

Mzwakhe was and he said that he was at his mother's place. He was asked how police who did not know him, stopped him and had asked him about Mzwakhe. He said that the police stopped him and ordered him out of the car and told to lie down and he was handcuffed and other police came and asked him about Mzwakhe. He was initially stopped by three police one of whom opened his door and told him to get out and lay down and then handcuffed him. The other police came in many police vans and he did not count them. He then heard voices asking where Mzwakhe was and he also did not count the voices that enquired about Mzwakhe. He did not know the police who were in the vans. He was asked how they had asked him about Mzwakhe. He said that the police were called because they had seen his car at Mzwakhe's place and they then asked him where Mzwakhe was. After they had asked him about Mzwakhe, the police left and went to Mzwakhe's place and the other police picked him up and put him into the flying squad police vehicle. He saw the police driving towards the street where Mzwakhe was staying and he assumed that they went to his place. It was put to him that police officer Magoedie was involved in his arrest and would say that he was found in the hijacked vehicle. He said that he would not be telling the truth. It was put to him that he would further say that he was searched and in his pocket they found a live ammunition. He said that he will not be telling the truth and if he had found a live ammunition, it should have been taken to the Germiston Magistrate's court. It was put to him that Magoedie would further say that he was involved in his arrest and that he was not assaulted. The plaintiff said that he arrested Mzwakhe and left with the flying squad police and they had



assaulted him. He was asked if he knows Magoedie and he said that he saw him in court when he testified in the criminal trial and was the second state witness. He was referred to A247 and was told that warrant officer Maphumulo, the investigating officer in the armed robbery case would testify that A247 indicates that item 3 at paragraph 3.2 indicates that a live bullet and other items in Tembisa case number 961/01/2008 was found and he said that he saw it. Six items were recovered from Mzwakhe and the plaintiff. He said that on what was written on A247, the police said that they found those items on Mzwakhe and at his place. It was put to him that this was proof that one live bullet was found on him and he said that he disagreed. He agreed that his name appears on page A247 and that accused 3 and 4 names are not on it. The author of A247 was Netshivhodza and his affidavit is at A210 and he is deceased. (There was an objection about the affidavit and it was contended that they could not cross examine on it. I ruled that the evidence can be provisionally be allowed but that at the end of the trial the parties could argue about what weight could be placed on it). The plaintiff said that the statement was not read to him. He agreed that he sees that at A247 reference is made to a live bullet and that the investigating officer was told what was found on them by the arresting officer. He said that he could see that it is mentioned that a live bullet was found and that what he was told was not true. It was put to him that a live bullet was found in his pocket as mentioned by Netshivhodza but he said that it was not true. He said that the cross examiner believed what he was saying. The affidavit of Magoedie that was read into the criminal trial at A57 to A58 was also read into the record. He said that he noticed that his

name was mentioned. He said that he saw that he stated that a life bullet was found in his pocket but that was not true.

13. The plaintiff agreed that he testified that he had applied for bail and that in March 2008 he had spoken to his wife to get him a lawyer. The bail application was made on 18 June 2008. He agreed that he testified that at his second appearance he raised his hand and wanted to apply for bail and that the prosecutor said that it was a schedule 6 offence and that he would not get bail. He did not tell his wife at the second appearance to get a lawyer since he did not see her often. His family members came to court when he appeared in court. He did not tell them in court to get a lawyer to apply for bail because he was not allowed to speak to them. From January 2008 to March 2008 his wife came to see him and in March they decided that she must get a lawyer. His attorney only got instructions in June 2008 but he does not know when his wife spoke with the attorney. The bail application was heard on 18 June 2008 and bail was refused by the magistrate after the prosecutor had objected to bail been granted. The Toyota Corolla was about 1km away from where he was arrested. It was in the township and parked on the pavement in front of the houses. It was put to him that it was strange that they chose to arrest him and left the others at house number 54. He said that he does not know and he was arrested and the others were arrested too and he was somewhere else when he was arrested and the car was at another place. It was put to him that it did not make sense that they targeted him and it means that he was found in the vehicle when he was arrested and he said that it was not correct. During re-

examination he said that the live ammunition that was allegedly found in his possession was not produced at the criminal trial and he was not charged with being in possession of it.

14. The first witness called by the defendants was Cornelius Bongani Maphumulo. He testified that he is working at the SAPS Benoni vehicle crime investigation and has been in the police for 26 years. He is a warrant officer and is still based in Benoni. His duties are investigations. When he investigated the plaintiff and three other accused, he was still at Benoni and they were charged with armed robbery. He found statements in the docket and obtained his own statements. The first statement that was in the docket was that of the complainant of the car and the statements of the police who arrested the suspects and documents dealing with their constitutional rights. The arresting officers were Magoedie and Netshivodhza whose statement is at A210 and is deceased. He was shot and killed. This is one of the statements that he found in the docket. He had an opportunity to investigate the complaint in this matter. He had read Netshivodza's statement which is at A210 whilst he was investigating the matter. It states that he got a report that the vehicle was taken at gunpoint in Kempton Park. He was at work and whilst patrolling in Tembisa, they came across a vehicle and found people in the car that was reported hijacked. He and his assistant approached the car and saw it was the vehicle that was stolen and they introduced themselves. They then searched the persons in the vehicle. The person who was in the driver's seat had car keys on him and they found a live bullet on the person who sitting in front of

vehicle in his trouser pocket. That person was accused 2 who is the plaintiff. They arrested them and took them to the police station and booked in the exhibit book (SAP 13) that they had found the exhibits and the investigators were then called since they were dealing with vehicles to investigate the matter. A247 is what according to Netshivhodza was booked in that was found on the suspects. He said that it could be Netshivhodza's handwriting and the person who signed it in but he is not sure who competed that. (This is hearsay since he does not know who the author of the entry on A247 is). He also read the statement of Magoedie who explained and corroborated what Netshivhodza said in his statement. Magoedie's statement appears at A67 and the plaintiff applied for bail. He produced an affidavit that is at A245 when the plaintiff applied for bail and his signature appears at A246 and had opposed bail. He did so due to the nature of the case because the motor vehicle was taken at gunpoint and a short while later persons were found in possession of the complainant's vehicle with her belongings. With his experience people who get bail do not attend the trial so it is better if they remain inside and they finish the case and they then have to look for them after the court issued a warrant of arrest. Where a person is charged with a schedule 6 offence, any suspect has the right to get bail but he must apply for bail in court which is then set down for a hearing. The plaintiff did not apply for bail at his first appearance. The prosecutor told him that he is given 7 days to investigate to see if he was involved in other cases. He finally applied for bail which was denied. It was put to him that the plaintiff said that he was arrested in his own car and not in front of the hijacked car and was asked what

his view was. He said that he cannot dispute that since he was not there and he was relying on the affidavits of the police. According to their statements, he was arrested in the hijacked vehicle. He said that if a suspect was arrested in his vehicle and has a passenger, the arresting officer would allow the person to take the suspect's vehicle back home or take it to the police station. If the car is taken to the police station, it should be booked into the SAP13 or in the occurrence book. He has no idea if any entry was made in the SAP13 or in the occurrence book. It is standard police rules and regulations that it be recorded and the person who took the car is accountable for it. He said that he does not agree that the plaintiff was unlawfully arrested and detained due to the nature of the case. After he was found in the hijacked car which had been hijacked in less than a few hours in it with live ammunition, he was lawfully arrested and detained.

15. During cross examination Maphumulo confirmed that on 24 January 2008 the plaintiff made a warning statement before him. He wrote down the statement in his own hand. In it the plaintiff said that he visited Mzwakhe during the afternoon of 23 January 2008 and that Mzwakhe had told him that he bought some keys at a shop. He and Mzwakhe then came across Samuel as they were going to Mzwakhe's place. They then went to Mzwakhe's home and the plaintiff then left Mzwakhe's place to go to his home. On his way to his house he was stopped by the police. He was handcuffed and asked about the hijacking. Mzwakhe, Samuel and Sizwe were also arrested. The plaintiff, Mzwakhe, Samuel and Sizwe were taken to the Toyota which is the hijacked

vehicle and were told that it was hijacked. The plaintiff said that he did not hijack it and it was the first time that he had seen it. He agreed that the warning statement contained information that he was not involved in the hijacking. It also states that he was not in possession of the Toyota. He investigated the contents of his warning statement by looking at the statements of the people who arrested him and the suspects' statements. Based on the statements of the arresting police officers and of the suspects he decided that the plaintiff's statement is a lie. He was asked what in the other warning statements indicated to him that the plaintiff lied. He said that he looked at the statements of the police who arrested them and he listened to what the plaintiff told him and it was totally different. It was put to him that he was changing his version and had said that he looked at the statements of the arresting officers and the suspects and he was now saying that he only looked at the police statements. He said that he relied on the statements of the police who arrested them. It was put to him that he was changing and had said that he was relying only on the statements of the arresting officers and not of the accused. He said that he was changing nothing and he only relied on the statements of the arresting officer. It was put to him that in deciding that the plaintiff lied, he only relied on the arresting officer's statement and the warning statement of the other suspects and that is what he testified. He said that he want to repeat that he relied on the affidavit of the arresting officer and he decided that the plaintiff is lying and not telling the truth. He was asked what the purpose of a warning statement is. He said that it warns and tells him of his rights and if he wants to give an explanation, he could do so and write it down and explain it

in court. That statement is not under oath. He was asked if he should not investigate whether his statement is true or not. He said agreed and he said that there was a time when he said that there was no collaboration. He was asked if he said in his statement that he was travelling in his own vehicle. He said that he does not remember. He said that there was a discrepancy between their versions namely the police said that they found him in the hijacked car and the suspect disputed this and said that he was found in his own vehicle. He did not look at what had happened to the plaintiff's vehicle. He said that he only believes what the police officers tell him. He said that the role of a police investigating officer is to identify how the crime happened and it depends on the case at the time. He agreed that he must be objective and it would depend on the case that was being investigated at that time. In this case, he accepted the police version as the gospel truth. He agreed that he saw that Magoedie said that there were 4 suspects and Netshivodza said there were 3. He was asked if he asked them to clarify it. He said that he spoke to him and by the time he clarified it. He did not record what he had said. He agreed that he would agree as an investigating officer had a duty to investigate all the information relevant to the plaintiff's guilt in this matter. He agreed that his investigations must be noted in his investigation diary or pocket book or statements under oath. He said that he does not remember whether after he had written down the warning statement if anybody could verify his whereabouts at the time of the hijacking and if he did so he would have noted that. He said that he would not deny if it is stated that there was no such a note in the docket if anybody could verify his whereabouts in the hijacking. It

was put to him that there are no such notes since he did not ask him about his whereabouts during the hijacking. He said that he does not remember if he asked him and would not dispute the question. He was asked whether he was saying that he did not ask him and said that he does not remember if he did not ask him or not. He does not remember speaking with any of the plaintiff's relatives to verify his whereabouts during the hijack. He agreed that there was no note in the investigating diary or docket that he interviewed the relatives since there was no reason to do so. It was put to him that he had to do so since it was his duty to investigate all information relevant to the plaintiff's guilt or not. He said that he investigated the information that he gave him and concluded that it was not true. He had read the statements of the arresting officers and spoke with them and did the investigations and after that he said that there was no vehicle pointed at the police or on the SAP13. It was put to him that he did not testify that and when he was asked if the entries made on the SAP13 or occurrence book and he said that he had no idea about his vehicle and had said not. He said that if the car was there he would know but he has no idea. He was asked what he has no idea of and he said that it was because no car was booked in on the SAP13 only the bullets and cellphones were booked in. It was put to him that he said that he had no idea if an entry was made onto the SAP13 or occurrence book but he was now saying that there was nothing. He said that as an investigating officer if a person thing is disposed and as an investigating officer he must be involved in such disposal and there was no car when it was disposed. It was put to him that he was not testifying about but what is supposed to be done. He said that he was not



contacted by the police that a car was given to the friend or relative. The only thing that he was informed was about the belongings and was informed about what he has testified. It was put to him that the plaintiff told him in the warning statement about the car. He agreed and said that the police told him of it. It was put to him that it was his duty to investigate. He said that if the police told him that he was in the car, he would have asked what happened to the car. It was put to him that he was admitting that he did not investigate whether the plaintiff's car was there and he said that he investigated and all the necessary information was in front of the court and he believed the information that he found from the police. He was asked how he investigated the whereabouts of the plaintiff's vehicle. He said that he heard people saying that he was arrested and was a suspect in the car and that there was no other car. It was put to him that the plaintiff informed him that he was not arrested with Mzwakhe, Samuel and Sizwe and he was asked if he tried to trace the other police who might have arrested the plaintiff. He said that in the docket there was the statement of the arresting officers who said that they arrested 4 suspects inside the vehicle. He said that he does not know whether the flying squad was involved and if they were involved they would have been involved as manpower. Mogoedoe could testify about whether if they were involved there would have been records of it. It was put to him that according to the plaintiff he said that he was arrested by flying squad members and he was asked what they were supposed to do. He said that they were supposed to put statements in the docket and they would have made statements. The two arresting officers were from the Tembisa police station. He agreed that he had

to note the investigation in his investigating diary or pocket book or statements. He agreed that he interviewed Netshivodza and Magoedie about their statements. It was put to him that there was no mention made in the docket of such an interview with the two of them. He said that he cannot deny it but he interviewed them and he needed to communicate with them since they were his witnesses. He was asked whether he had asked the plaintiff to substantiate what he said in his warning statement. He said that he does not recall that but it is his right to tell him to give him proof about what had happened. He agreed that he spoke with Mzwakhe, Sizwe and Samuel and Mzwakhe's warning statement is dated 24 January 2008. He agreed that Mzwakhe said that he was with Samuel and Sizwe when he was arrested. It was put to him that that supports the plaintiff's statement that he was not with the others when he was arrested and he agreed. He agreed that Sizwe made his on 24 January 2008 and he also indicated that he, Mzwakhe and Samuel were arrested separately from the plaintiff. He agreed that he testified about the statement of Netshivhodza who was the arresting officer who found a life bullet in his trouser pocket. He was asked to look at A210 and was asked where in it does it mention that it was found in his pocket and where did he get the information that it was found in his right pocket. He said that he had said that he had some doubts but had said that the ammunition was found in his right pocket but was doubtful and they were talking.

16. Maphumulo was referred to A245 which was his affidavit opposing bail in the third paragraph where it is stated that unknown black males pointed and

threatened the complainant with firearms and was asked whether that was correct. He said that it was. It was put to him that it was stated that the complainant was pointed with firearms by unknown males. He said that he can explain black males and she said that she was approached by one male. It was put to him that he knew that she was hijacked by only one male but in his affidavit he said that by unknown males. He agreed and said that the *modus operandi* of hijackers is that there would be other people around and that the complainant saw only one person. It was put to him that he was not required to testify about how the system worked but how she was hijacked. He said that it was true but he had to tell the court how they operate and there were others with him. In that area there were many people who were hijacked and they use the system and do not approach the victim alone. He was asked how many people had approached the complainant in this matter and said that he does not have any idea about how many of them were involved but the complainant said that she was approached by one person. He was asked why he had stated in his affidavit that she was approached by unknown black males with firearms. He said that it was clear to him when she told him that she said that she was approached by one black male and had heard other voices. He was asked if the question of other black males was correct as stated on A245 and he said that it could have been a mistake in English but he believes that others were involved. He was asked why he had included that in his affidavit opposing bail. He said that he erred when he said that they pointed her with firearms and was made aware that others were helping him. He was asked why he did that and what his intention behind that was. He said that in terms

of the *modus operandi* Mzwakhe was there with other suspects. He agreed that Netshivhodza said that Mzwakhe was seated in the Toyota's driver's seat when he was arrested. It was put to him that that fact was not put in his affidavit when he opposed bail. He said that he might have left it out. He agreed that the complainant's cellphone and handbag was found at Mzwakhe's house and that he did not mention this in his affidavit. He agreed that the two accused said that the plaintiff was not with them when they were arrested and this was not stated in his affidavit. It was put to him that there was no evidence in the docket that linked the plaintiff to the hijacking and he said that there was and this was because he was found in the hijack vehicle with a bullet and the car was taken at gunpoint and he may have used that ammunition in the gun. He was asked if he knows where the firearm was that was used in the hijacking. He said that he did not find it. He agreed that he did not state that the plaintiff had given him an exculpatory warning statement that he was not involved in the hijacking. He agreed that he said that he got some information from other police departments about the suspects. That information is contained at A244 and is correct. He had concentrated on this in his affidavit. In the letter it is not clear what his surname was but this did not prevent him to inform the court. He realised that he was involved in robbery activities but he had to give this information to the court. Josias name appears on it and he had to tell the court so that it could take a decision. He agreed that he is not the only person with the name of Josias but he had a suspect with the name Josias. On 24 January 2008 he was investigating him for carjacking.

17. During re-examination Maphumulo said that the name on A244 is Majitisa which is the same as on B1. The case number on the bail application is 706/01/2008 which is the same case number on A148 and on A244. The charge sheet was drafted by the prosecutor.
18. The defendants second witness was Nelson Mahlangu who testified that he is a regional prosecutor based in Pretoria and has been a prosecutor for 17 years. When he dealt with the criminal matter, he was at the Germiston Regional Court where he was the prosecutor in a robbery with aggravating circumstances involving the plaintiff. He had received the docket before he proceeded with the matter. The docket had already been screened by one of the other prosecutor and there was a bail application that was done by a Mr Snyman and he dealt with the criminal trial in the regional court. He always had statements and there were a couple of police statements and the complainant who had been hijacked. They had the statements of the police who had arrested them and one of them was Netshivodza who is deceased. His statement is at A210 and he read it. He read those statements. He does not know when he had passed away. He also consulted with Magoedie and the complainant and other witnesses. Magoedie testified as reflected at A67. When he consulted with Magoedie, he said that he had arrested the suspects in the hijacked Toyota Corolla and found Mzwakhe who was convicted and sentenced to 17 years. In the plaintiff's pocket one life ammunition was found and all four persons were free of injuries. All four accused stood trial. The evidence was based on the statement of Magoedie, Netshivodza, the plaintiff

and the statement of the investigating officer in the bail application. Mzwakhe was convicted and sentenced to 17 years and the others were acquitted in terms of section 174 of the CPA. He said that when he received the docket it was trial ready. If a docket comes to court as a new matter, it goes to the control office and they read it and screen it to see if everything is ready to proceed with and if they believe that they have something against the arrested person they would place it on the roll for investigation etc. like legal aid and investigation and not put it down for trial. It is not a trial court and they do everything that is necessary and investigations and when it is trial ready it is sent for trial. The control prosecutor was Ms Persunce who is now a magistrate in Orlando. The ranking is a control or acting control prosecutor, and then a chief prosecutor. There is a senior prosecutor and a control prosecutor. He was on the same level as a control prosecutor. The control prosecutor does admin work and he does trials. She enrolled that it be prosecuted after the investigations. The control prosecutor takes the decision to prosecute. The docket lands on her table and she peruses it and decides what to do. If the matter is certified ready for trial, the trial prosecutor can still decide if the matter should proceed. If he is not happy he can go to the senior public prosecutor or the control prosecutor and tell them of the shortcomings and they will decide on it. He is not a rubber stamp and needs authorisation and he will give them input on the matter. By the time that he had received it, it was ready for trial and he reasonably believed that he could proceed with the matter for trial. He had seen the bail affidavit and he believed that it was a fruitful case to proceed with and if he read the arresting officer's statement, he

had something to work on and also Magoedie's statement. Due to the recent possession theory, and that he was arrested in a recently hijacked vehicle they could convict them on that and they had something to work on. He was asked what he had against the plaintiff and said that he was found in the car with a life ammunition and a case for that was opened at Kempton Park. He said that he does not have the date when it was opened. When asked how he knew about it, he said that there was a unit of trio that was investigating bank robberies and hijackings and he knew later about it but he has not seen the docket. He has no idea what the outcome of that case was. He said that A163 under 34, if the person was arrested in Tembisa it is the first police station and because it is a trio matter it is taken to Kempton Park. He was asked the entry at 34 is about and he said that he was referring to entry 33 at A163 and does not know what entry 34 at A163 relates to. He said that A247 which has a handwritten note of Kempton Park is the same page as A163. He was referred to A120 where it is common cause that the plaintiff and accused 3 and 4 were acquitted. He was asked why after the two state witnesses had testified, he had no objection to them being acquitted. He said that you are as good as your witnesses and they had to reconsider and he was not suggesting that they did not do something. One must not only do justice but it must be seen to be done. On paper they were involved but the *viva voce* evidence was something else and he was not given enough ammunition to fight them on for accused 2, 3 and 4. He said that he had read the warning statement of Maphumulo and they must institute litigation and must proof the offence. He does not use the warning statement of the suspects until they have passed the section 174 stage.

If the three accused were not acquitted, he would have used the warning statement. He was asked what the position would be if the plaintiff was arrested in his vehicle and it was towed away by the police. He said that if he was arrested in his car and it was driven, the car should go to the police station and be booked on the SAP13 but his car was not booked in and it means that the car was taken by the police and it was not there. This is a procedure to be followed. Any item found on the accused and even if money was found, it must be booked in. They must record the vehicle at the police station. It is standard police rules that they must record the vehicle on the SAPS. It was put to him that the plaintiff said that he was maliciously prosecuted. He said that there is no need for the state to prosecute maliciously and there is no jungle law and there is no truth that he was maliciously prosecuted. In some cases they refuse to prosecute. The plaintiff was not maliciously prosecuted and they went on the statement, the affidavit and the evidence and in criminal matters the guilt must be proven beyond reasonable doubt and they could not prove it beyond a reasonable doubt.

19. During cross examination it was put to Mahlangu that he did not know if the procedure was followed when property is seized by the police. He said that the procedure was followed and on A247 they wrote down what was found. It was put to him that he does not know if that procedure was followed with the plaintiff's vehicle. He said that if it is not written on A247, it means that they did not have the car. If the police took the car, he does not know whether a theft of car was opened against the police but he was not there. It was put to



him that he testified about recent possession and was asked what it entails. He said that it is when he was recently found in possession of the stolen item or what was robbed. He was asked what possession means. He said that it was something in your possession i.e. actual or otherwise. He was asked what otherwise means. He gave an example that where a person has a key to the house, he has control over that house and the stolen property found in it and it is recent possession. He agreed that at A67 which is the statement of Magoedie that he said that four suspects were found in the Toyota and that he interviewed him. He said that Mzwakhe was found in the driver's seat. He told wrote and told him that Mzwakhe had the Toyota's keys on him. It was put to him that the plaintiff was merely a passenger in the vehicle on Magoedie's version. He said that he was in the car but said that he would not say that he was not a passenger but part of the group who had hijacked it. He said that although he was not driving it, it does not mean that he was not part of the hijackers. It was put to him that there was no other evidence that linked him to hijacking. He said that if you go to the statement of the complainant, she remembered one person and heard voices in the back and they acted in tandem and the police found three other persons in the car. It was the plaintiff and three others. He said there was no evidence that they heard the person's voice. It was put to him that to be in possession means to be in control. He said that when people go to hijack, they hijack the car and take money and get away with the car and found 4 to 5 people and the practicality tells him that they were part of the robbers. It was put to him that there was no evidence that the plaintiff knew that the car was hijacked. He said that he was in a recently

hijacked car. It was put to him that he does not know if he knew. He said that they go to recent possession. It was put to him that he was not answering the question and that he does not know that he knew. He said that is what they put down. It was put to him that there was no evidence in the docket that the plaintiff ever received the Toyota in his possession. He said that he did not say that he had received it. It was put to him that at the trial that no evidence was led or deposed to that went outside the parameters of the statement that they had. He agreed that some evidence was based on the affidavit. It was put to him that after that evidence was led and he had addressed the court and he was referred to A77 where he said that the car was hijacked around 15h30 and it was put to him that this evidence supplementary evidence to that effect in the docket. He agreed. It was put to him that the state did not have any objection to the three accused to be acquitted and that he concluded that there were no reasonable prospects that they would be convicted. He said that he proceeded based on the affidavit. There was supplementary evidence at the bail application. It was put to him that he said that there was no supplementary evidence. He said that there was a policeman who testified and based on that evidence he had a challenge at the trial. They had a reason to prosecute and it does not mean that they were malicious. They just want justice and they do not always get convictions and sometimes there are acquittals. It was put to him that he said that there were no problems. He said that there were no problems before they started with the trial. He said that Magoedie's evidence was the same as it was on the affidavit. He was asked whether the problems with Magoedie started at the trial. He said that he will

have to explain but the problem started at cross examination. He was asked what the problem in cross examination was and he said that they had a problem with the ammunition. He was asked what that problem was. He said that he spoke about the other one person and did not know what he did and Netshivhodza had dealt with the ammunition. It was put to him that his problem started with the criminal trial with Magoedie testifying about the ammunition in the plaintiff's possession and that all four were detained free from injuries. He said that evidence would have been led by the deceased when he arrested the plaintiff and he is deceased. He is the person that they wanted but he could not give him the plaintiff. He was under the control of Netshivhodza. He said that if the plaintiff was driving a vehicle under the influence and the vehicle was confiscated and he was taken to the police station it would be booked there. During re-examination it was put to him that evidence was led outside the parameters of the statement and he said that she testified about the voices that she heard and she described Mzwakhe in court and this did not appear in her affidavit.

20. The defendant third witness was Thomas Mokoro Magoedie. He testified that he is a policeman in the South African Police Service and is a warrant officer based at Tembisa South police station. He is a police for 26 years and on 23 January 2008 he was based at Tembisa. He was on duty doing tracing. He does not wear uniform. They arrested four suspects but does not remember their names. One of them was Mzwakhe. He said that when they left the police station, they received a message through the radio that a Toyota Corolla

was hijacked. Whilst they were moving around someone called him that a certain vehicle was parked at Esangweni on the side of a street in front of a certain house and there were four people in it. They were travelling in an unmarked car and drove to Esangweni and in the street they saw people in the vehicle. They approached the vehicle and found four people in it. He was travelling with constable Netshivhodza who is deceased. They were followed by a police Venture but they came first to the scene before the Venture. They parked on the side of the Toyota Corolla and he got out of the driver's side of the BMW vehicle and Netshivhodza on the left. He told the occupants of the vehicle to stay as they were in the vehicle and he was behind the Corolla on its right hand side. He opened the right side of the rear door and took out the occupant who was seated behind the driver. He searched him and found nothing on him and he made him to lie down on the side. He then approached the driver of the vehicle and took him out of the vehicle. When he searched him, he was wearing a jacket and felt keys in the right hand side of the jacket. He asked him what was inside his jacket and he told him that it was keys. He asked him what the keys were for and he said it was keys for a vehicle that got stuck in Alexandra. He took out the keys and after he looked at it saw that they were the keys of a Toyota Corolla. They had a remote control and he put the key into the ignition of the Corolla and was able to start it. He then asked why he had said that it belonged to a vehicle that was stuck and that it started the vehicle and he did not respond. There was also a remote control amongst the keys for the gate. Netshivhodza was busy with the other passengers. He the witness did not handcuff the first person that he had found in the Toyota but

had only instructed him to lie down. He then instructed Mzwakhe to lie down after he had found the keys on him and did not cuff him. He said that whilst Netshivodza was searching the others, he heard him ask one of them where he got the bullet and when he looked at him he saw him holding a bullet in his thumb and fourth finger. He had found this from a certain person who was heavy built and it was the plaintiff. It was the person that he was busy with. He then told Mzwakhe that they had found the bullet and that they would have to go to his place as the vehicle was hijacked using a firearm. He then asked him where the firearm was and he said that he left it with a person who resides in Alexandra but does not know where he resides. The plaintiff and the 2 others were placed in the Venture and Mzwakhe in their BMW. They went with Mzwakhe to his residential place and they were followed by the police in the Venture where they found cellphones in his room with a female handbag. He then asked him if he had documentation for the cellphones and he said that he did not have. They told him that he was under arrest for hijacking and for the cellphones that they had found inside the house. The other three were informed that they were under arrest as they had been found inside the hijacked vehicle and Netshivodza explained to the other person that he was under arrest for being in possession of life ammunition. They were taken to the Tembisa police station where they were detained. At the police station they have an SAP 13 register book and the life ammunition and cellphones were booked in. He does not know who registered them. A247 lists three items and cellphones. Netshivhodza's signature appears on it but he does not remember if it is his handwriting. The cellphones were found at Mzwakhe's

place but he does not remember how many were found but they also wrote down a brown bag and under 3.2 the life ammunition and Netshivhodza's name appears on it. He testified in the criminal trial his affidavit was read into the record which appears at A67 to A68. All three suspects were informed about their constitutional rights. He gave their names as Samuel Manyu, Mzwakhe Mahlangu and Josias Matjiu on whom a life ammunition was found. The fourth suspect was Sizwe Matlopo and they were detained all free from injuries. He was asked why he referred to three when they were four. He said that he spoke to three and said that they were under arrest and explained their rights to them. It is stated that constable Netshivhodza found ammunition in his pocket and he the witness did not find it and he did not explain his rights to him so he excluded him. He then said that all 4 were detained free from injuries. They were four who were detained free from injuries. He denied that the plaintiff was arrested in his own car 500 to 600 meters from Mzwakhe's place. He did not know the accused before he was arrested. There was no flying squad and the plaintiff was not put in it. The plaintiff and the two others were placed in the Venture and Mzwakhe in the BMW that he was driving in. He denied the plaintiff's version that the three were placed in the Venture and he in the flying squad vehicle. He said that they went to the police station where they were taken to the cells and a case of being in possession of life ammunition was opened and possession of a hijacked vehicle. He was not involved in the opening of those cases but wrote down an arresting statement for Mzwakhe after he had found the keys on him. He denied that the plaintiff was taken to the toilets where he was assaulted and

said that no one was assaulted in his presence. They were not taken to the Tembisa police station toilets.

21. During cross examination Magoedie testified that he said that the plaintiff was under the control of Netshivhodza and he was arrested by him. He agreed that he testified at the criminal trial and during his evidence in chief that he had received information that the Toyota was hijacked by two people. He was not told that those two people were in the Toyota Corolla. He agreed that he said in his evidence in chief that he arrested four suspects. It was put to him that in cross examination he said that the plaintiff was arrested by Netshivhodza. He agreed and said that he was the one on whom a life ammunition was found. It was put to him that he could not have arrested four suspects since there were four suspects and Netshivhodza arrested the plaintiff. He said that there were 4 suspects in the vehicle and Netshivhodza found ammunition on the plaintiff. He said that he did not arrest 4 suspects. He agreed that his evidence in chief was not factually correct. He said they arrested four suspects and he did not arrest all four suspects. It was put to him that he testified in chief that the person who told him that said that there were four persons in the hijack car. He said yes and said that the person did not know that the vehicle was hijacked. He said that the person was parked in a certain spot with four people parked in it. What that person said about the four people in the car was important in the context of the criminal trial. It was put to him that he did not at the criminal trial testify about this person telling him of the four persons. He agreed and said that he does not remember if he mentioned it. He drew a

plan which was handed in as exhibit C which is a sketch of the scene showing how the Toyota Corolla and their vehicle was parked when they got there. He agreed that after they had stopped, him and Netshivhodza got out of the vehicle and there was police Venture behind the BMW. He got out and went to the driver's side on the right hand side and there was a driver in it and Netshivhodza went to the left side of the vehicle and there were two passengers there. He took out his firearm and it was obvious and he held it. He pointed it downwards in a 45 degree and did not point it at the vehicle. He got out holding the firearm in his hand. He took out first the passenger behind the driver and then Mzwakhe. It was put to him that he testified that he took out Mzwakhe from the vehicle. He said that he did not start with Mzwakhe and he was the second person that he took out. It was put to him that at the criminal trial, he testified that he instructed Mzwakhe to get out of the vehicle. He said that when he said that he took him out of the car it does not mean that he grabbed him and pulled him out of the vehicle. It was put to him that he said that he instructed him to get out of the car and to lay on the ground and in court he was saying that he instructed him to lie down after he had searched him. He said that this happened a long time ago and he mentioned in 2009 and it will not be exactly the same like today. He agreed that he said that he found the keys with the remote in his right hand side pocket. It was put to him that at the criminal trial he said that it was at the left back pocket. He said that this is what he said happened in 2009 and he cannot exactly say today. It was put to him that he cannot use that as an excuse as he testified that these are the facts today. He said that he cannot dispute what was being put to him. He



agreed that at the criminal trial, he said that he found the registration plates when he searched Mzwakhe and he agreed that he did not testify about it because he had forgotten. He agreed that he saw Netshivhodza holding a bullet in his hand after searching the plaintiff and it was crucial at the criminal trial. He said that he does not remember whether he testified about that at the criminal trial. It was put to him that he did not say at the criminal trial that he heard Netshivhodza asking the plaintiff where he got the bullet from. He said that he cannot say whether he mentioned that or not. It was put to him that at the criminal trial he said that he got the number plates on Mzwakhe and that he had placed it in the boot of the BMW. He said that he does not remember if he said so. It was put to him that he said that it was not registered on the SAP13 and the reason it was not entered was that no case was opened about it. He said that he agrees with that. It was put to him that not all items in the police possession were entered in the SAP13. He said that he does not know that. He was asked what he meant with that and said that what he found he registered in the SAP13 even if he was a suspect. It was put to him that he did not register the registration plates in the SAP13. He said that there was no case against them. It was put to him that the reason is that it was important and it is the plaintiff's case that his car was driven by the police to Tembisa police station and the state's version is that the fact that it was not entered means is that they never received it. He said that he did not speak about his vehicle because he did not see that vehicle. He agreed that the SAP 13 on A247 there is no mention about the registration plates but only the life ammunition, cellphones and brown bag. It was put to him that this meant that

the number plates never went into his possession. He said that he does not remember what happened to them and where they ended up. It was put to him that it must be true that it was not registered on the SAP13. He said that it was not his handwriting and he did not write the items that appear on SAP13. It was put to him that he testified in court about the firearm that was used in the hijacking and that Mzwakhe said that it was with someone in Alexandra. He agreed and said that the reason he had asked him for the firearm was that it was alleged that the complainant was hijacked with a firearm and he said that the person resides in Alexandra. It was put to him that he did not testify about this in the criminal trial and he said that he does not know whether he had mentioned that. It was put to him that he had not testify about it at the criminal trial and he said that he did not see his transcript and the cross examiner had seen it.

22. During re-examination it was put to him that he said that he dealt with three suspects and he was asked about how many he dealt with. He said that he dealt with 2 and Netshivhodza. When he approached the Toyota, he dealt with two persons on his side and Netshivhodza with the other two and he had arrested 3 of them.

*Analysis of facts and arguments raised*

23. The plaintiff has abandoned his claim for malicious prosecution and is only persisting with his claim for wrongful arrest and detention. The plaintiff contended that the arrest was unlawful since he was not arrested in the

hijacked vehicle but in his own vehicle. It was contended further that even on the defendants' version no case had been made out for the arrest and detention because the offence that the plaintiff was arrested for or that is referred to in his Rights relate to being in possession of a stolen vehicle and is not contained in Schedule 1 of the CPA. It was contended further that even if the arrest was lawful it does not follow that the detention was lawful. It was contended that the subsequent detention of the plaintiff's arrest was unlawful in that the investigating officer and or the prosecutor should have placed facts before the magistrate that would have indicated that there was no case against the plaintiff.

24. It was further contended that the investigating officer did not place all the relevant information at the plaintiff's bail hearing which prompted the magistrate to deny bail. Had the prosecutor or investigating officer placed all the relevant information before the magistrate, bail may have been granted.
25. The test whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA is objective: would a reasonable man in the defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of the offence for he sought to arrest him. 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 allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.

26. Before dealing with the issues before me, there is the issue of hearsay evidence that relates essentially to the affidavit of Netshivhodza who is deceased and the SAP13 document that is at A247. The second issue that I will have to decide is which version of the events is more probable.
27. It is the defendants' version that Netshivhodza was in the presence of Magoedie when the plaintiff and three other persons were found in vehicle that had been hijacked. Netshivhodza deposed to an affidavit on 23 January 2008 at 19h45 where he *inter alia* stated that he was on duty on 23 January 2008 and was in the company of Magoedie when at 16h00 they received a report of a hijacked vehicle in Kempton Park. They did patrol duties when they came across the suspected motor vehicle with three males inside. They stopped next to the vehicle in Esangweni section in Tembisa and approached it and

introduced themselves to the occupants of the vehicle. He circulated the vehicle and discovered that it had been hijacked. They asked them about the vehicle and they failed to give an explanation. They asked them to come out of the vehicle and on one of the suspects, Mzwakhe who was in the driver's seat, he was in possession of the car keys. They explained to them that they were arrested for being in possession of a hijacked vehicle and explained to them about their rights and on the plaintiff they found a life ammunition in his right pocket. They took Mzwakhe to his place and they found four cellphones in his room and one brown handbag and he failed to produce a slip. He took them to the Tembisa police station for detention and they were free from injuries. The exhibits were booked into the SAP13 81/08. A247 is the SAP13 which contains the items that were found on Mzwake and the plaintiff in it. It was signed by Netshivhodza. Netshivhodza was murdered before the criminal trial.

28. Section 3 of the Law of Evidence Amendment Act 45 of 1988 deals with hearsay evidence and provides as follows:

*(1) Subject to the provision of any other law, hearsay evidence shall not be admitted at criminal or civil proceedings unless –*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.*

*(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings, or*

*(c) the court, having regard to –*

*(i) the nature of the proceedings;*

*(ii) the nature of the evidence;*

46.

- (iii) *the purpose for which the evidence is tendered;*
- (iv) *the probative value of the evidence;*
- (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
- (vi) *any prejudice to a party which the admission of such evidence might entail; and*
- (vii) *any other factor which should in the opinion of the court be taken into account.;*

*is of the opinion that such evidence should be admitted in the interest of justice.*

(2) *The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.*

(3) *Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.*

(4) *For the purpose of this section –*

*‘hearsay evidence’ means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;*

*‘party’ means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”*

29. It is common cause that Netshivhodza is deceased and can therefore not testify in these proceedings. These are civil proceedings. Whilst it is so that he cannot be cross examined, what is contained in his affidavit has been corroborated by Magoedie who testified that the plaintiff was one of the persons found in the police vehicle. He saw the bullet that was in

Netshivhodza hand which he said he had found on the plaintiff. He also deposed to what is contained in the SAP13 which are the items that were found on Mzwakhe and the plaintiff. In my view it is in the interest of justice that such evidence be admitted. This matter can also be determined without the statement of Netshivhodza. This would depend on which version I would accept between that of the plaintiff and that of Magoedie. If I accept the version given by the plaintiff that he was not found in the hijacked vehicle, it follows that the police were telling lies and that they had arrested an innocent person. If the plaintiff's version is rejected, it follows that the version of the defendants are correct and that the plaintiff's version was concocted.

30. This court is faced with two diametrically opposed versions only one of which can be correct. On the one hand, the plaintiff alleges that he had met with Mzwakhe, Samuel and Sizwe earlier on 23 January 2008 and had left them at Mzwakhe's home. About 500 to 600 meters, he was stopped by three members of the flying squad and was told to lie on the grounds. Other members of the police arrived including those in police vans who had asked him where Mzwakhe was. He told them that he was at his parental home. The police drove to Mzwakhe's place and he was then told by the members of the flying squad to get into their vehicle and they drove with him to Mzwake's parental home. He was then taken to the Tembisa police station where he was assaulted in a toilet and later locked up in the cells. His vehicle was also taken to the police station. He did not lead any evidence about what happened to his motor vehicle.

31. The police version on the other hand is that they had received information about the Toyota vehicle that had been hijacked about 2 to 3 hours earlier. They were informed where the vehicle was. They drove to the place where they were told where the vehicle was. The police were travelling in a BMW vehicle and was followed by other police travelling in a police Venture. There were no other police involved nor was the flying squad involved. They approached the vehicle and found four occupants in the hijacked vehicle. The plaintiff was one of the persons in it. The occupants were ordered out of the vehicle one at a time. On the plaintiff they found an unused bullet. The car keys and remote control gate was found on Mzwakhe. They drove with him to his house where cellphones were found and other items. They were then driven to the Tembisa police station where they were detained. They denied that any assaults had taken place and that members of the flying squad were involved.
32. Since the defendants have admitted the arrest and detention, the onus is on the defendants to prove on a preponderance of probability that their version is the truth. This onus is discharged if the defendants can show by credible evidence that their version is the more probable and acceptable version. The credibility of the witnesses the probability and the improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of a defendant's version, an investigation where questions of demeanour and impression are measured against the content of a witness's evidence, where



the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and maybe rejected with the safety. In this regard see *Mabona and Another v Minister of Law and order and others* 1988 (2) SA 654 SECLD.

33. The first question that arises is which version is more probable. It is common cause that the complainant's was robbed of her vehicle at gun point on 23 January 2008 at about 15h30. She had only seen the gunmen whom she later identified as Mzwakhe in the criminal trial. She did not see any other persons who were with Mzwakhe but had heard some voices but she could not say whose voices they were. Maphumulo testified that the *modus operandi* of hijackers is that they do not operate alone but are always in a group. A few hours after the vehicle was hijacked police received information about the vehicle and where it was to be found. The vehicle was found and four occupants were in it. The occupants were arrested.
34. The plaintiff's version as stated earlier was that on the day in question he went to visit his daughter earlier that day. He then went to look for Mzwakhe but did not find him. He then called him on his cellphone and told him where he could be found. He went there and found him and drove with him back to his place. They were traveling in one car and on their way they stopped Samuel

and Mzwakhe got into the car and they followed each other. He later went to his place to go and watch soccer. About 500 meters away he was waylaid by police in a flying squad vehicle who stopped him. Other police arrived and asked where Mzwakhe was. The police were unknown to him and he was unknown to them. The first question that arises is why the police had stopped him in the first place. The explanation that he gave was that the police must have seen him at Mzwakhe's place. If that is the case, why was he not arrested there? The defendants denied that the flying squad was involved. Why would they lie about it? The plaintiff said that he was arrested in his own vehicle. His vehicle was taken to the Tembisa police station. He did not testify what happened to his vehicle thereafter. He remained in custody for more than 14 months and we still do not know what happened to his vehicle. It certainly was not confiscated by the police. He did not testify about what steps he had taken to recover his vehicle. He did not testify whether he notified his family members to go and fetch his vehicle at the police station. There is no claim for his vehicle in his particular of claims. He was extremely vague about his vehicle. The testimony about his vehicle was crucial. Evidence was led that that if an exhibit is found on a suspect, that exhibit would be recorded on the SAP13. There is no such recording on the SAP13. If it was taken to the police station it should have been so recorded but most importantly he has taken no steps to retrieve that vehicle.

35. The plaintiff wants this court to believe that he was brutally assaulted by two members of the South African police in a toilet at the Tembisa police station

who were part of the flying squad police. Evidence was led that there were no such police and they were not the arresting officers. The plaintiff gave a warning statement to the police a day after he was arrested. In the warning statement he did not state that he was assaulted by the police. Most importantly he did not pursue any claim for unlawful assault. He was assaulted on his version for more than 30 minutes. Two days later when he appeared in court he did not bring it to the attention of the court that he had been assaulted. He did not seek any medical attention and the simple reason for not doing so was that he was not assaulted.

36. The plaintiff testified that he was suffering from gout when he was arrested and was not given any medication for it. In his bail application he referred to both hypertension and gout. When confronted about the contradictions he struggled to give a coherent answer about the discrepancy. The plaintiff did not call Samuel, or Sizwe or Mzawkhe as a witness in his case about where he was arrested and about his assault. He had indicated that he was going to call witnesses to back his version about where he was arrested but failed to do so. No reason was proffered why he did not call those witnesses.

37. If I consider the version of the defendants, I do not find any inherent discrepancies in their version. The plaintiff was unknown to them. They had no reason to implicate him. They had no reason to tell lies about where he was found. They had no reason to assault him.

38. It is my finding therefore that the plaintiff's version about where he was arrested and that he was arrested in his vehicle is highly improbable and is rejected as false. He was one of the four persons who was found in the hijacked vehicle. He lied about his vehicle and the reasons for doing so are obvious. He wanted to distance himself from Mzwakhe and the others.
39. The question that then follows is whether the defendants have proven that the arrest and detention was lawful. This court was referred to a number of judgments where the courts have stated what the duty of an arresting officer is. Part of his duty is to investigate whether the plaintiff's version might be true. The question is what more was the investigating officer required to do in the plaintiff's case. He had read the complainant's statement. He saw the two arresting officers' statement that the plaintiff was arrested in a vehicle that was hijacked a few hours earlier. An unused bullet was found in his possession. There was no evidence of a vehicle that he was allegedly in. They had received information that the plaintiff may have been involved in other matters.
40. The police were criticised that they had not put an exact charge to the plaintiff when he was arrested. They are after all police and not prosecutors who are required to formulate the exact charges to an accused. Much was made that the charge that the accused was informed he was faced which is not contained in Schedule 1 to the CPA. The evidence indicated that the plaintiff was found in a hijacked vehicle. It was not clear if he was an accomplice but a firearm

had been used and he was found in possession of the vehicle. The charge that he was eventually faced with was armed robbery which falls under schedule 1 of the CPA.

41. Parties are bound to prove their pleaded case. The other side should know what case it has to meet. An attempt was made in closing arguments for the plaintiff to plead a case which was not foreshadowed on the pleadings. This was along the lines that the defendants are liable because they had failed to place facts that would have shown the plaintiff's innocence. What those facts are that indicates his innocence is not clear. That is not the pleaded case before me and any such attempts should be rejected. Even if it is allowed, what more was the police supposed to do? The suspicion that the arresting officer harboured when arresting the plaintiff was reasonable and based on objective facts.

42. I am satisfied that the defendants have discharged the onus that rested on them that the plaintiff's arrest and detention was lawful.

43. The action stands to be dismissed. There is no reason why costs should not follow the result.

44. In the circumstance I make the following order:

44.1 The action is dismissed with costs.

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FRANCIS J

HIGH COURT JUDGE

FOR PLAINTIFF : L J DU BRUYN INSTRUCTED BY THEMBI  
DLAMINI ATTORNEYS

FOR DEFENDANTS : L LIPHOTO INSTRUCTED BY STATE  
ATTORNEY

DATE OF HEARING : 20 – 23 APRIL 2015

DATE OF JUDGMENT : 26 MAY 2015