

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case No: 34070/2009

Date heard: 6-10/02/2012

Date of judgment: 13/04/2012

In the matter between:

Bernardus Izak Kruger

PLAINTIFF

and

Minister of Safety and Security

1st DEFENDANT

Captain Mashile

2nd DEFENDANT

## JUDGMENT

DU PLESSIS J:

On 11 August 2008 members of the South African Police Service (SAPS) under the command of Captain Mashile (the second defendant) arrested the plaintiff. The police officers were acting within the course and scope of their employment with the first defendant. Arising from arrest and the subsequent detention, the plaintiff now claims damages from the two defendants on four bases.

In the first place the plaintiff alleges that Mashile assaulted him by pushing and shoving him in the presence of "clients and friends of the plaintiff". The plaintiff's second claim is founded on

the allegation that, after the assault by Mashile, unknown police officers assaulted him by hitting him with their fists, cuffing and restraining him and by thereafter continuing to hit and kick him. The third claim is for alleged unlawful arrest and detention. As to the fourth claim the plaintiff alleges that Mashile assisted by other police officers unlawfully and maliciously caused the plaintiffs prosecution on a false charge of illegal possession of a firearm.

The plaintiff testified that he conducts business in Mitchell Street, Pretoria-West. On the afternoon of 11 August 2008 he was at the business with Ms Amanda Delport and a friend by the name of Gustav. It was closing time and the three of them were in the shop behind the counter having a drink. Suddenly, without warning, five or six men in plain clothes charged into the shop. The plaintiff, under the initial impression that they were robbers, stood up. Without a word the men tackled him to the ground. He tried to resist, but they pinned him down. According to the plaintiff he had his firearm, the metric equivalent of a Colt .45, in a holster tucked into the front of his trousers. The hilt of the gun was sticking out. The men undipped the holster and removed the gun and the holster. They also handcuffed the plaintiff.

In the process of overpowering the plaintiff, the men bumped and shoved him. One of the men pushed or kicked the plaintiff on the head with a knee.

With Ms Delport's cellphone the plaintiff's friend, Gustav, took photos of the event.

One of the men, who later turned out to have been Mashile, asked the plaintiff whether he had a licence for the firearm. The plaintiff said yes and shouted to Ms Delport to bring the licence. At that stage Ms Delport was in the office where she had fled when the men tackled the plaintiff. Mashile, however, said that he did not want to see the licence and that the plaintiff could show it to the magistrate. The plaintiff said that Ms Delport later took the licence to the police station but she was again told that it could be shown to the magistrate.

The men then took the plaintiff and Gustav to a police van parked outside. They also took Ms Deipor's cellphone, the holster and the gun. On the way to the police van the men held the plaintiff's arm behind his back, forcing it upwards. He was forcefully pushed into the back of the van.

The plaintiff was taken to the Pretoria West police station where he was held in an office while the necessary paperwork was done. The plaintiff testified that the cellphone and the gun were booked into the SAP13-store but not the holster.

After the paperwork had been done, so the plaintiff testified, he and Gustav were put into a holding cell in the police station. The cell was filthy. One of the other detainees made barely concealed threats.

It is not in issue that from the police station the plaintiff was taken to the Laudium hospital for the purpose of blood/alcohol sampling. It is also not in issue that, on his return from the hospital, the plaintiff was released on bail. As to the relevant times, the plaintiff initially testified that he was taken to the hospital at about 22h00 and that he was released at about 23h30. He then returned home with Ms Delport who had in the meantime arrived at the police station. In cross-examination the plaintiff was confronted with official record entries showing that he arrived at the police station shortly after 18h00, that his blood sample was taken at the hospital at 18h35 and that he was released at 22h01. The plaintiff ultimately conceded that his evidence as to the times must be wrong.

A few days later, on 15 August, the plaintiff appeared in the magistrates' court on charges of possessing a firearm without a licence, of possessing a firearm while under the influence of liquor and of intimidation. He was not asked to plead nor was he asked to do so when he

appeared on two further occasions. At the third court appearance, on 22 September 2008, the charges against the plaintiff were withdrawn. The plaintiff instructed an attorney to represent him and for that he paid a fee of R6000.

As to the charges against him, there are statements in the docket by a Captain Bisone, a Superintendent Khoza and Captain Mashile to the effect that the plaintiff had before his arrest been carrying his firearm stuck in his waist, without a holster and exposed. The plaintiff referred to these statements and denied these allegations.

In cross examination the plaintiff was referred to a letter that he had written and in which he gave an account of the events leading to his arrest. He was also referred to a statement that he had made about the events. Both these documents differ materially from the plaintiffs evidence. When he was confronted with these difference the plaintiff changed aspects of his evidence. I shall deal therewith when discussing the credibility of the various witnesses.

Ms Amanda Delport said that she is the plaintiffs fiancée and that she is in his part time employ. On the day in question she was in the office while the plaintiff and friends were having a drink in the shop. Somebody shouted to her to bring the plaintiffs firearm licence. She went and fetched the licence which was in the plaintiffs identity book in his bakkie. When she attempted to show the licence to the police, they said that she could show it to the magistrate. At that stage the plaintiff was on the ground and under arrest. The police took the plaintiff away. After she had locked the shop, friends took Ms Delport to the police station. There she again tried to show the licence to a policeman but she was again told that she could show it to the magistrate. Ms Delport confirmed the plaintiffs initial version that they left the police station at about 00h00 (about an hour before 01h00, she said.)

For the defendants Captain Mashile testified that he is a policeman with 25 years experience as such, a captain attached to the national inspectorate of the SAPS. On the afternoon of 11

August 2011 he was driving home in a marked police car. He was not in uniform but with him in the car were Captain Bisone and Colonel Khoza both of whom were in uniform.

At about 16h30 the three police officers drove past the plaintiffs business. Mashile, the driver, stopped at a traffic light. He saw a man, whom he later came to know as the plaintiff, on the side walk loading spare parts into a vehicle. The man had a firearm stuck into his belt at the back. The firearm was not in a holster and was exposed. Waiting at the traffic light, Mashile told the plaintiff that by law the gun had to be holstered and concealed. The plaintiffs reply was to challenge Mashile to come and arrest him. Mashile parked the police car and the three officers got out. The plaintiff was by then walking back into his shop. The officers followed the plaintiff.

Mashile's testimony did not present a clear chronological sequence of the further events up to the plaintiffs arrest. What follows is my own reconstruction of the probable chronology of events that Mashile testified to.

When the officers entered the shop they saw a few people there. They were drinking liquor. Mashile could remember seeing, apart from the plaintiff, at least one other man and a woman. Mashile, so he testified, identified himself and the other two officers. They all produced their police identification cards. The plaintiff was aggressive from the outset and shouted that if they wanted to arrest him, they must obtain a warrant. Mashile asked the plaintiff for his firearm licence. The plaintiff neither produced the licence nor did he say that he had one. Instead, he shouted derogatory abuse at the officers and said that he knew high ranking officers. He started to phone and said that he was calling one Brigadier Chetty. The plaintiff apparently did not make contact with Chetty and continued to shout aggressive abuse at the three officers. Mashile stepped closer and smelt liquor on the plaintiffs breath. He told the

plaintiff that he was not allowed to handle the firearm while under the influence of liquor.

Mashile decided that he needed to seize the firearm and again asked the plaintiff for his licence. The plaintiff's response was to shout further abuse and he moved in behind the shop counter. "We", Mashile said, went into an opening in the counter in order to reach the plaintiff. The other man blocked Mashile's way. The latter again asked for the plaintiff's firearm licence but was met with similar aggressive language. The plaintiff and the other man then pushed the police to the outside of the shop, Mashile said. As to his request to be shown the plaintiff's licence, Mashile denied that Ms Delport was either asked to or produced the licence.

Outside Mashile called for police back up. A number of uniformed officers arrived in cars and also in a police van. Mashile briefed them on the situation and told them that he wanted to take the firearm. The police entered the shop (that had in the meantime been closed) through a small door. Inside Mashile again asked for the plaintiff's licence. The plaintiff did not produce his licence. Mashile, convinced by the plaintiff's appearance and conduct that he was drunk, told the plaintiff that if he did not produce his licence, they would take the firearm.

The plaintiff's response was that if they tried to take his firearm, he would "blow their heads off". Mashile explained the plaintiff's rights to him and ordered the officers to take the gun and to arrest the plaintiff. Two officers approached the plaintiff. One removed the gun. The plaintiff was handcuffed and taken to the police van. He was then taken to the Pretoria West police station where, according to the official records, he was detained at 18h10.

Mashile explicitly testified that the plaintiff was arrested for possession of a firearm without a licence, for possession of a firearm while under the influence of intoxicating liquor and for intimidation. The latter charge was based on the plaintiff's threat to blow off the heads of the police officers. Later Mashile told Superintendent Moodley, the station commander who had

been called, that the plaintiff was also arrested for carrying a firearm not in a holster and exposed.

The plaintiff, Mashile said, was not detained in a holding cell. He was kept in the office where the necessary paper work was done. The plaintiff was then taken to the Ladium hospital for blood/alcohol sampling. Mashile confirmed that the charges against the plaintiff were later withdrawn. He was unaware of the reason and was not called upon to testify in the criminal case against the plaintiff.

For the defendants Captian Bisone, a policeman with 18 years' experience, testified that he was in the car with Mashile and Khoza. He and Khoza were in uniform. Bisone confirmed that they saw the plaintiff on the side walk with the firearm, not in a holster, sticking out on his back. He also confirmed Mashile's evidence as to the events outside the shop.

When they entered the shop, Bisone said, Mashile produced his police identity card and identified himself to the plaintiff. The witness and Khoza did likewise. Mashile asked the plaintiff for his firearm licence. The plaintiff told the officers that they were on private property and to get out. Mashile asked for the licence several times but the plaintiff did not produce it. Mashile and Bisone then attempted to remove the plaintiffs firearm but another man who was inside the shop blocked their way. The officers were also pushed out of the shop. Bisone confirmed that the plaintiff was very aggressive and under the influence of liquor. In cross examination Bisone was closely questioned as to exactly how they went about their attempt to remove the plaintiffs firearm. The witness was unable to give a clear and understandable account of those events.

Bisone confirmed the evidence that they called for further police support when they came out of the shop. Bisone confirmed Mashile's evidence as to the further events adding that it was he who later took the plaintiff to the Ladium hospital.

The defendants also called the investigating officer in the case against the plaintiff, one Sergeant Khoza, to give evidence. Khoza said that he was in the charge office when the plaintiff was brought in. He did the paperwork formally to charge the plaintiff with possession of an unlicensed firearm, possession of a firearm while under the influence of liquor and of intimidation. He specifically asked the plaintiff for his firearm licence and the plaintiff told him that he (plaintiff) would make a statement in court. The plaintiff did not produce the licence. The witness was unable to throw any light on the reasons for the withdrawal of the case against the plaintiff.

According to the plaintiff there were essentially two scenes at which the relevant events of 11 August 2008 played themselves out: Inside the shop when the police stormed in and arrested him and at the police station. The version of the defendants is that there were essentially four scenes: Outside the shop on the sidewalk, inside the shop when Mashile, Bisone and Colonel Khoza went in, inside the shop when the reinforcements went in and at the police station. Albeit that he did not deny that he may have been outside to load items into his vehicle, the plaintiff did not admit that Mashile saw him there. I have no hesitation in accepting the police officers' evidence that they saw the plaintiff outside the shop loading something into his vehicle. The evidence cogently explains the train of events that followed.

It is held that Mashile, driving past, saw the plaintiff outside his shop loading something into his vehicle. Something focussed Mashile's attention on the plaintiff. I am satisfied on a



conspectus of the evidence that that "something" could only have been the plaintiffs exposed firearm. In this regard, another issue between the parties can also be dealt with. According to the plaintiff, he wore his bolstered firearm stuck into the front of his trousers. Mashile and Bisone's evidence, however, was that they saw the firearm when the plaintiff bent over to load goods into his vehicle. It is improbable that they would have seen the firearm if it had been carried in the front. I hold that the police officers saw the plaintiff outside the shop, in public, wearing an exposed firearm stuck into his belt.

Accepting as I do that Mashile saw the plaintiff on the sidewalk with his exposed firearm, it is probable that Mashile told the plaintiff that he should not carry an exposed firearm in public. Something prompted Mashile and the other two officers to interrupt their homeward journey, to park and to enter the plaintiffs shop. The plaintiffs version does not explain what that something was. On their version the officers were prompted by the plaintiffs disrespectful reaction to Mashile's cautionary words. Again, the defendants' version affords a cogent explanation for the day's events and it is more probable than that of the defendant.

I hold that Mashile cautioned the plaintiff about his exposed firearm, that the plaintiff disrespectfully challenged Mashile to arrest him and that this prompted the officers to park and to follow the plaintiff.

The plaintiff denied that at first only the three officers came into the shop. His version is that the first entrance took place when the officers and the reinforcements entered the shop, it is not improbable that the three officers, having seen the plaintiff with his exposed firearm and having experienced his dismissive reaction to Mashile's caution, might there and then have decided to call for reinforcements. The officers' evidence that only the three of them entered the shop at first, however, neither detracts from nor adds to their essential version that they

had reason to believe that the plaintiff was carrying an unlicensed firearm, that he was under the influence of liquor and that he intimidated them. Accordingly, the two who gave evidence had no reason to lie about the fact that only the three of them entered the shop at first. In addition, their version that only the three of them first entered the shop is not improbable or inconsistent with their essential version. The plaintiff, on the other hand, had good reason to deny that only the three officers first entered the shop. His essential version is that he had been the victim of an uncalled for attack. The initial entry by only the three officers detracts from that version. For reasons that follow later, I found the plaintiff not to have been trustworthy as a witness. The two officers, on the other hand, were credible and, at least in the present context, I prefer their evidence.

I hold that the three officers followed the plaintiff into the shop and asked him for his firearm licence. The defendants' witnesses testified that instead of producing his licence, the plaintiff reacted with aggression towards them. Ms Delport, like the plaintiff, did not testify to the fact that the only the three officers entered at first. If the plaintiff had during this scene produced his licence, he would certainly have said so and Ms Delport would have done likewise.

I hold that when Mashile asked the plaintiff for his firearm licence on the first occasion he did not produce it.

The evidence of Mashile and Bisone that they then tried to disarm the plaintiff makes sense and can on the probabilities be accepted. It is common cause that by the time the reinforcements arrived, the plaintiff still had his firearm.

It follows that this first attempt by Mashile and Bisone must have failed as they told the court it had.

As for the scene during which a number of police officers entered the shop, the plaintiffs version is inherently improbable: it simply makes no sense that five or six policemen for no apparent reason would have burst into the shop, would have manhandled and would have arrested the plaintiff. In this regard it is of note that according to the plaintiff and to the two officers Ms Delport was present when the men burst into the shop. She, however, testified that she was in the office and did not see the men coming in and tackling the plaintiff. This difference is indicative thereof that Ms Delport knew the true facts and preferred to take herself away from the scene rather than to confirm the plaintiffs false version. The version of Mashile and Bisone that they called for reinforcements as a result of their first experience inside the shop is probable. The defendants' version of how the plaintiff was disarmed and arrested is accepted and that of the plaintiff, as far as it differs from that of the defendants, is rejected as false.

It is common cause that when the reinforcements entered the shop, Mashile again asked for the plaintiffs licence. An important question now arises. Must Ms Delport's evidence be accepted when she said that she fetched the plaintiffs licence but was rebuffed when she tried to show it to the police. The plaintiff supported the evidence while Mashile and Bisone denied it. It is common cause that the plaintiff at all relevant times had a licence for the firearm. It is not common cause, however, that at the time he had it with him or within easy reach. It is improbable, if the licence was available, that Ms Delport would not have shown it to the police when they had arrested the plaintiff. Therefore, the real question is whether the licence was available. The investigating officer, Khoza, testified that later in the evening when he asked the plaintiff about the licence, the latter said that he would produce it in court. That indicates that it was not readily available at the time. Against that must be weighed Ms Delport's further evidence that she took it to the police station. In my view the

inherent probabilities neither show that the licence was available nor do they show the converse.

It follows that this issue falls to be decided on the credibility of the plaintiff and Ms Delport on the one hand and of Mashile, Bisone and Khoza on the other. For reasons that I have given the plaintiff was not a credible witness. In addition to those reasons I might add that he was clearly prepared in evidence to change his version whenever it suited him. I refer, for instance, to the plaintiff's initial attempt to convey that he was held until about midnight. When the records gainsaid that, he simply changed his evidence. His narrative of the events was also inconsistent with a letter that he wrote to the police and with a statement that he had made. In sum, the plaintiff was an unreliable witness. I have pointed out that Ms Delport did not testify to the fact that only the three officers came into the shop. For reasons that I have given, I hold that they did. Mashile and Bisone said that, when they entered, there was a woman in the shop with the plaintiff. On the evidence that could only have been Ms Delport. I can find no reason why the two policemen would have lied about Ms Delport's presence on the first occasion. Accordingly, her evidence that she was in the office at all times is not true. The same applies, for reasons I have given, to her evidence that she was not present when the men tackled and arrested the plaintiff. Also, unaware of the plaintiff's changed evidence, Ms Delport maintained, in the face of recorded times, that the plaintiff was only released by midnight. Her evidence that she, the plaintiff's fiancée, produced the licence must therefore be treated circumspectly: She had reason to be biased in favour of the plaintiff and there are indications that her evidence was biased indeed.

I have pointed out that Mashile's evidence did not give a clear chronological account of events. For reasons that I have pointed out, Bisone's evidence is also not beyond criticism.

Despite these criticisms, I do not regard Mashile and Bisone as having been deliberately untruthful. They generally were good witnesses and the criticism may be due to memory loss as to detail. As for the investigating officer Khoza, his recollection of events was vague and he did not know much about the case. I have, however, no reason to doubt his evidence that the plaintiff told him that he would show his licence to the magistrate.

In summary, I prefer the defendants' version that no licence was produced to that of Ms Delport that she produced the licence. Ms Delport's evidence is rejected as false.

Mashile and Bisone testified that, when the plaintiff did not produce the licence, they first attempted to take the firearm. When that failed, they called reinforcements and when the plaintiff was told that they would take his firearm,

he threatened to blow their heads off. The plaintiff denied all of these but he did not dispute that hard words fell between him and the police officers.

It is held that the plaintiff threatened the police when they tried to disarm him.

It is not in issue that the police ultimately disarmed the plaintiff. In this respect, the plaintiff testified that his gun was in a holster while the police officers said the opposite. For reasons given, I prefer the evidence of the officers. Moreover, the plaintiff testified that the police took his holster with the gun. He said that they did not book it into the SAP 13-store, however. I find this evidence nothing but a transparent attempt to imply that the police did away with the holster for an improper purpose. Although Mashile later said to Moodley that the plaintiff was also arrested for carrying an unholstered and exposed gun, that is not what he was charged with, in the circumstances the police on the night in question had no reason to dispose of the holster. The probable fact is that the plaintiff did not have a holster.

Mashile and Bisone said that they thought that the plaintiff was drunk. They based that on the smell of liquor on his breath and his behaviour. It is not in issue that the plaintiff had been drinking and his breath would have smelt of liquor. His behaviour, as I have held it to have been, certainly was consistent with a man who had drunk too much.

It is held that Mashile and Bisone had reasonable grounds for thinking that the plaintiff was under the influence of liquor.

The plaintiff was taken to the Pretoria West police station where he arrived at about 18h10. Paperwork in connection with his arrest was done. By 18h35 he was at the hospital where his blood/alcohol sampling was done. The plaintiff testified that, at the police station, he was put into a filthy holding cell where other detainees uttered threats. The police witnesses all denied that the plaintiff was detained in the holding cell. Their evidence was that he was kept in an office where the paperwork was done until he was taken to the hospital. Upon his return he was released on bail. In view of the time that he spent at the police station, it is improbable that the plaintiff was detained in a holding cell. His evidence in that regard is, in my view, yet another example of an effort on his part to vilify the police.

To sum up I find the facts as follows: Mashile and the other officers saw the plaintiff in public wearing a gun, not in holster and exposed. Mashile cautioned the plaintiff to cover the gun. The plaintiff aggressively challenged Mashile to arrest him. Mashile, Bisone and Khoza parked their vehicle and followed the plaintiff into his shop. Inside the shop the police officers, two of whom were in uniform, identified themselves and asked the plaintiff for his licence. The plaintiff, drinking a beer, did not produce the licence but hurled aggressive abuse at the officers. Mashile asked him to hand over his gun but the plaintiff refused. Mashile and Bisone tried to take the plaintiff's gun but did not succeed. The plaintiff and his friend pushed them out

of the shop. Outside the officers called for backup. Several police officers, some in uniform, arrived. The police entered the shop again and Mashile again asked for the plaintiffs licence. It was not produced. Mashile again asked the plaintiff to hand over his gun but the plaintiff threatened to shoot them if they tried to take his gun. The police then took the gun and arrested the plaintiff. The police officers had reasonable grounds for believing that the plaintiff was under the influence of liquor. The plaintiff was arrested on charges of possessing a firearm without a licence, of possessing a firearm while under the influence of liquor and of intimidation. They put him into the police van and took him to the Pretoria West police station. There the plaintiff was held in an office and the paperwork pertaining to his arrest was done. The plaintiff said that he would show his licence to the court. He was then taken for blood/alcohol sampling and upon his return, he was released on bail at about 22h01. The plaintiff did have a licence. After a few court appearances the case against the plaintiff was withdrawn.

I shall now consider each of the grounds upon which the plaintiff claims damages.

The plaintiffs first claim is for assault in that Mashile pushed and shoved him in the presence of clients and friends. It may be accepted that that there were pushing and shoving when Mashile and Bisone tried to take the firearm during the first scene inside the shop. This was, however, preceded by Mashile's fruitless request that the plaintiff must produce the licence for the firearm that he was carrying with him. Section 107(1) of the Firearms Control Act, 60 of 2000 provides: "Any person who carries with him or her a firearm must at the request of a police official ... produce the licence, permit or authorisation, as the case may be, in respect of such firearm for inspection." Section 107(3) of the Act provides: "If a person fails to comply with subsection (1)..., the police official ... may seize the firearm without a warrant and keep the firearm in custody until the licence, permit or authorisation is produced or the firearm is

disposed of in terms of this Act." It follows that Mashile was engaged in a lawful attempt to seize the plaintiff's firearm. The pushing and shoving came about because the plaintiff unlawfully resisted the attempt. The plaintiff's first claim cannot succeed.

The plaintiff's second claim is also for assault in that the policemen who arrested him also assaulted him by hitting, kicking and cuffing him. It is common cause that the plaintiff was arrested and handcuffed. It may be accepted that in the process of the arrest some bumping and shoving took place. The plaintiff did not testify that he was hit and kicked although he did mention that somebody pushed him with a knee. Given the fact that the police far outnumbered the plaintiff and his friend, I prefer the evidence of the defendants' witnesses that the plaintiff was arrested without unnecessary force. Therefore, this claim of the plaintiff can only succeed if it is found that he was unlawfully arrested. It is to that question that I now turn.

It being common cause that the plaintiff was arrested, the onus was on the defendants to prove that the arrest was lawful. In their plea the defendants contended that the arrest was lawful in terms of section 40(1)(a) alternatively section 40(1)(b) of the Criminal Procedure Act, 51 of 1977 in respect of or on the three charges that I have mentioned earlier.

Section 40(1)(a) of the Criminal Procedure Act provides that a peace officer (it is not in issue that the police officers are peace officers) "may without warrant arrest any person ... who commits or attempts to commit any offence in his presence". In order to prove that the arrest was lawful, the defendants had to prove on a balance of probabilities that acts performed by the plaintiff in the presence of the arresting policeman actually constituted an offence. The defendants expressly pleaded that the relevant offences are possession of an unlicensed firearm, possession of a firearm while under the influence of alcohol and intimidation.



It is common cause that the actual arrest was not performed by Mashile but by an unknown officer acting on Mashile's orders. On behalf of the plaintiff no point was made of this and I proceed on the footing that the arrest will have been lawful if the offence was committed in the presence of Mashile who ordered the arrest and was present when it was carried out.

The first two alleged offences may be dealt with summarily. While he did not produce it and did not say he had one, it is common cause that the plaintiff had a licence for the firearm he was carrying. On the factual findings that I have made the plaintiff may have committed several offences<sup>1</sup> pertaining to his carrying of the firearm, but he did not commit the offence of being in possession of an unlicensed firearm. Under section 120(4) of the Firearms Control Act it is an offence "to handle a firearm ... while under the influence of a substance which has an intoxicating or a narcotic effect." (Underlining supplied.) I have not been referred to any statutory or other provision that proscribes the possession of a firearm while under the influence of alcohol nor have I found any. The evidence is not that the plaintiff handled the firearm.

The offence of intimidation is created by sections 1 and 1A of the Intimidation Act, 72 of 1982. Section 1A deals with intimidation of the general public, a particular section of the population or the inhabitants of a particular area. The section clearly is not applicable. Section 1 of the Intimidation Act proscribes, among others, threats to kill, assault or injure "any person of a particular nature, class or kind" where such threats are made with the intent to compel such person to "do or to abstain from doing any act". On the evidence only the plaintiffs threat to blow off the heads of the officers could qualify as an act of intimidation. What his intention was

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<sup>1</sup> He carried a firearm in a public place without a holster and not completely covered (Section 80(1)(a) and 80(2) of the Firearms Control Act read with section 120(1)(a) thereof). He contravened sections 107(1) and 107(3) of the Firearms Control Act.

when he uttered the words was, however, not canvassed in cross examination or at all.

Accordingly the defendants did not prove that the plaintiff actually committed the offence of intimidation.

It is concluded that the defendants did not prove that the arrest was lawful under section 40(1 )(a) of the Criminal Procedure Act: The offences that the defendants raised in the plea were not proved.

Section 40(1 )(b) of the Criminal Procedure Act provides that a peace officer "may without warrant arrest any person ... whom he reasonably suspects of having committed an offence referred to in Schedule 1 If the following jurisdictional facts are present, a peace officer has a discretion to arrest a person without a warrant: "(i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule I; and (iv) the suspicion must rest on reasonable grounds". (Minister of Safety and Security v Sekhota 2011 (5) SA 367 (SCA). The jurisdictional facts are set out in paragraph 6.)

Mashile is a peace officer.

Mashile testified that, when the plaintiff did not produce his licence and did not say he had one, he (Mashile) concluded that the plaintiff did not have a licence.

The offence of possession of a firearm is for the following reasons an offence mentioned in Schedule I of the Criminal Procedure Act: In terms of section 3(1 )(a) read with section 120(1) of the Firearms Control Act it is an offence to possess a firearm without a licence for that firearm. In terms of section 121 read with Schedule 4 to the Firearms Control Act a person in possession of an unlicensed firearm can be sentenced to a maximum of 15 years imprisonment without the option of a fine. One of the offences mentioned in Schedule I of the Criminal Procedure Act is an offence "the punishment wherefor may be a period of

imprisonment exceeding six months without the option of a fine".

The remaining question is whether Mashile's suspicion (or, as he put it, his conclusion) rested on reasonable grounds. That must be determined objectively having regard to the circumstances of the case. The fact that the plaintiff wore the gun exposed and in public tends to indicate that he did have a licence. That would have played a role with a peace officer in Mashile's position. Against that must be weighed the plaintiffs conduct, his failure to produce the licence and his failure to say that he has a licence. In my view Mashile was reasonably entitled to assume that the plaintiff did not have a licence and was trying to avoid the consequences thereof by way of his bravado.

It is concluded that Mashile was in terms of section 40(1 )(b) of the Criminal Procedure Act entitled to arrest the plaintiff without a warrant on a reasonable suspicion that he was in possession of a firearm without a licence.

In the result the plaintiffs claim for unlawful arrest and also his second claim for assault must fail.

For the same reasons the plaintiffs claim for malicious prosecution must fail.

Costs must follow the event.

In the result the following order is made: The plaintiffs claims are dismissed with costs.

B.R. du Plessis Judge of the High Court

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