IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 24 February 2016

CASE NO:45337/2013

In the matter between:

AUSTIN AOI Plaintiff

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....

DATE SIGNATURE

and

THE MINISTER OF POLICE First Defendant

VAN ROOYEN AP Second Defendant

LUIS FS Third Defendant

BREEDT AF Fourth Defendant

VIVIERS MJ Fifth Defendant

JUDGMENT

MURPHY J

1. The plaintiff has instituted action against the five defendants in respect of four causes of action. The first cause of action comprises a claim for unlawful arrest in relation to the arrest of the plaintiff by the fourth and the fifth defendants without a warrant on 24 March 2011. The second claim is for an alleged second unlawful arrest, detention and malicious prosecution in that it is contended that the second and third defendants actively fabricated evidence for the purpose of opening a police docket, obtaining a warrant of arrest to arrest, detain and institute proceedings against the plaintiff. The third claim is one for the impairment of the plaintiff's good name and dignity arising out of the arrests and prosecution. The fourth claim is one for special damages for legal fees, travelling and accommodation costs incurred by the plaintiff for the purposes of attending court proceedings in Kimberley.

2. The total amount of damages sought is in the amount of R3,745 410 made up of R150 000 for the first arrest; R2,5 million for malicious prosecution; R1 million for defamation; and R95 410 in special damages.

3. The first defendant is the Minister of Police. The second and third defendants are Captain van Rooyen and Colonel Luis, police officers based in Kimberley who were involved in securing the second arrest of the plaintiff on 31 March 2011. The fourth and fifth defendants are Warrant Officer Breedt and Warrant Officer Viviers who effected the first arrest on 24 March 2011.

4. It is common cause that the defendants bear the onus to show that the first arrest was lawful, while the plaintiff bears the onus in relation to the other claims.

5. The plaintiff previously served as a member of the South African Police Services for 32 years. He obtained the rank of Lieutenant-Colonel and was commander of various specialised investigating units including the Murder and Robbery unit, as well as the Vehicle Crimes unit. He was discharged from the SAPS in February 2002 on the grounds of ill-health after it was established that he was suffering from Post-Traumatic Stress Disorder. At about the same time he assumed employment in a group of companies involved in debt collection, most of which had the acronym "SWAT" as part of the name of the company. Some of these companies have been liquidated or restructured. At present, and at the time of his arrest, the plaintiff was the sole shareholder and director of Special Weapons and Tactic Debt Collection Services (Pty) Ltd. This company performs debt collection on contracts with customers, some of whom are banks. In addition to his debt collection business, the plaintiff rendered investigation services in co-operation with attorneys and advocates. The plaintiff has a law degree and is admitted as an advocate but does not practice as such.

6. The plaintiff's arrest arose from his association with two men: Mr Rudi Strydom and Mr Wouter Viljoen. Both of these men were arrested by the Kimberley SAPS for fraud in February 2011. The offences in question were extensive frauds against the public and involved a number of perpetrators, including Strydom and Viljoen, acting as a syndicate. The *modus operandi* of the syndicate was to advertise used or repossessed car sales in the media. It would then invite customers to deposit monies in bank accounts opened in the name of fictitious companies and individuals. The perpetrators would withdraw the money from the accounts to share it among themselves, but would fail to deliver the vehicle to the customer. The basics of the scheme are set out in a confession made by Viljoen to a magistrate in Kimberley on 28 February 2011, shortly after his arrest. Besides incriminating himself in the confession (Exhibit Q), Viljoen incriminated various other persons including Strydom and Mr Roy Lochner. Although the confession does not incriminate the plaintiff, it is evident from it that the plaintiff had some association with Strydom, Viljoen and Lochner.

7. The plaintiff in his own evidence testified that he played a role as a father figure to Rudi Strydom with whom he socialised on a regular basis. He was acquainted with his family and at times assisted him with his employment. The plaintiff was a little more circumspect about his relationship with Viljoen; for good reason. Viljoen has an impressive criminal record. It was put to the plaintiff that Viljoen had nine previous convictions, to which the plaintiff replied that it was more. Exh Z, being the admission form of the Kimberley Correctional Centre, reflects that he has no less than 47 previous convictions. Whatever the correct position, Viljoen has lived a life of crime since the 1980's. At the time of his arrest in February 2011 he was on parole and there were a number of warrants for his arrest issued by various jurisdictions. It appears from Exhibit Q that from time to time he received remuneration as a police informer. It appears further in Exhibit F, a Kimberley police docket, that in 2004 there were reports in the media that a statement made by Viljoen was handed into court in the so-called Boeremag trial in which he sought to incriminate some of the accused in that trial on the basis of what he had overheard them discuss in prison, which the accused claimed was false and aimed at obtaining some benefit.

8. The plaintiff downplayed his relationship with Viljoen, saying initially that he had met him once on a hunting expedition. However, it emerged later in testimony that the association went somewhat further. Viljoen had visited the plaintiff at his home and the plaintiff attended Viljoen's 40th birthday celebration. Moreover, the plaintiff entrusted two of his weapons to Viljoen to transport them to Viljoen's uncle, a weapon smith in Kimberley, for the purpose of repair or refurbishment.

9. The plaintiff's relationships with Viljoen and Strydom led to his being drawn into their situation after their arrest in Kimberley in February 2011.

10. On 8 March 2011 Viljoen and Strydom, appeared in the Kimberley magistrate's court and a bail application was made on behalf of Strydom. Viljoen asked for his bail application to be postponed to a later date in order for him to obtain legal representation. The bail application proceeded in respect only of Strydom. Captain

van Rooyen, the investigating officer, (the second defendant) opposed bail on the grounds that Strydom did not have a fixed residential address or a fixed employment and that he had and would interfere with witnesses. The plaintiff testified on behalf of Strydom and informed the magistrate that Strydom had an office at his (the plaintiff's) office, that he had work installing security equipment and that Strydom would be based at the home of the plaintiff. The magistrate was not persuaded and denied Strydom bail.

11. The plaintiff testified that Strydom instructed him to do "ondersoekwerk" and that he should return to Kimberley to present additional facts in another bail application scheduled for 22 March 2011. In the interim the plaintiff set about obtaining evidence establishing that Strydom had fixed addresses, and statements aimed at discounting the possibility of witness interference. He returned to Kimberley on 21 March 2011 and testified on behalf of Strydom on 22 March 2011. The magistrate granted Strydom bail of R1000 subject to conditions related to his residence, contact with witnesses and reporting to the police. The bail application of Viljoen was postponed to 28 March 2011.

12. According to the plaintiff, Captain van Rooyen appeared upset about the outcome of the bail application. This, he maintains, prompted her to embark upon a fraudulent process of fabricating evidence against him with a view to arresting and maliciously prosecuting him. Captain van Rooyen denied that she did any such thing. I will revert to this issue more fully later.

13. On 8 March 2011, Rudi Strydom introduced the plaintiff to Dennis van Kerrebroeck, who was also held in Kimberley on charges of fraud in relation to a diamond valued at US$ 3,5 million. According to Colonel Luis, the investigating officer in this matter, the investigation pertained to the theft and fraud of the diamond which was mined in Hopetown. The diamond was discovered in 2008, and in 2009 van Kerrebroeck (a Canadian citizen) fraudulently created documents and forged signatures in relation to the transaction. Colonel Luis is attached to the Directorate

for Priority Crimes (the so-called Hawks) and a member of the Anti-Corruption Task Team in the Northern Cape, in Kimberley. Van Kerrebroeck was arrested in February 2011 and was held in the same facility as Strydom and Viljoen. He ultimately entered into a plea bargain, was convicted, fined and deported to Canada in July 2013. Earlier in the proceedings, van Kerrebroeck asked Luis whether it was possible to pay somebody to make the case go away. He further sought to provide information on corrupt politicians in exchange for a deal. Van Kerrebroeck was also investigated in relation to allegations of fraud pertaining to a gold mining company in Gauteng. There was some confusion about which court had jurisdiction in relation to the various offences resulting in van Kerrebroeck needing to appear in Randburg and in Kimberley.

14. As mentioned, the plaintiff met van Kerrebroeck on 8 March 2011 and took instructions to do certain work for him. The evidence in relation to the nature of the instructions and the work undertaken is somewhat vague. The plaintiff intimated that it related to van Kerrebroeck's business and personal affairs which required attention while he was incarcerated.

15. On 21 March 2011, the day before Strydom's second bail application, the plaintiff met with Strydom, van Kerrebroeck and Viljoen at the Kimberley Correctional Centre. What transpired at this meeting is at the heart of this case, and forms the subject matter of a statement made by Viljoen to van Rooyen, on 23 March 2011, Exhibit C, in which Viljoen incriminated the plaintiff. I will discuss its content later.

16. The plaintiff was remunerated by van Kerrebroeck for the work he performed. Van Kerrebroeck's brother, Ian, transferred an initial payment of approximately R20 000 directly into the plaintiff's bank account during March 2011. The plaintiff testified that he received additional payments at a later stage.

17. After Strydom was granted bail on 22 March 2011, Viljoen asked to speak to the plaintiff, who consulted with him in the cells at court. The plaintiff on account of his association with Viljoen, and the fact that he had assisted him in the past, was aware that there were issued warrants for Viljoen's arrest and that he was on parole. He agreed to help Viljoen with his postponed bail application, but was not confident that it would be granted and was not sure about what, if anything, he could do. After consulting with Viljoen, the plaintiff left Kimberley together with Strydom and drove back to Pretoria.

18. On the way back to Pretoria, the plaintiff received a telephone call from Warrant Officer Meiring of Villeria police station who wanted to make an appointment to inspect his weapons safe as part of the process of re-licensing his weapons. They agreed that she would visit his premises for that purpose on Friday 25 March 2011. The Plaintiff at that stage was the owner of nine weapons.

19. According to Captain van Rooyen, she received a telephone call from Viljoen from the Kimberley Correction Centre on her cell phone at approximately 15h00 on 22 March 2011. Both the plaintiff and Viljoen maintained that this was not possible because at that time Viljoen was consulting with the plaintiff at the police cells. Viljoen's version is that it was impossible to phone because there are no phones at the holding cells and he was there from early in the morning until he arrived back at prison at 18h00. The relevance of this discrepancy, according to the plaintiff, is that it adds to his version that van Rooyen fabricated evidence against him.

20. Viljoen and the plaintiff's version is contradicted by Exhibit S and Exhibit Z, the cell register and the computer printouts of the correctional centre, which indicate that Viljoen was taken from the court back to the prison on 22 March 2011 at 14h15 and was back at prison at 14h35. These documents are completed in the normal course of events. Both Mr Jackson, an official at the prison, and the plaintiff testified that prisoners may make phone calls in the afternoon. For reasons aligned with Viljoen's

general credibility, which I discuss later, I accept that Viljoen did indeed phone van Rooyen from the prison in the afternoon of 22 March 2011.

21. Captain van Rooyen testified that she returned to her office after Strydom's bail hearing. She then received a call from Viljoen on her cell phone who asked her to come and see him at the prison as he had information for her. She checked her phone, saw that it was 15h00 and decided to leave it to the next day. She met with Viljoen the following morning who told her that he had overheard Strydom and van Kerrebroeck discussing an arrangement whereby the plaintiff could arrange for van Kerrebroeck's docket in the diamond case to disappear. She immediately left the prison and went to speak to Colonel Perumal at the Director of Priority Crimes in Kimberley. Perumal told her to speak to the investigating officer, Colonel Luis, who in turn instructed her to take a written statement from Viljoen. She returned to the prison, interviewed Viljoen again and took detailed notes of his testimony. She then returned to her office and typed up the statement, admitted into evidence as Exhibit C. She returned to the prison, gave the statement to Viljoen, who read through it, deposed to the truth of its content, initialled each page and signed it at the end. Captain van Rooyen then commissioned the statement.

22. Exhibit C has assumed central importance. It consists of 11 paragraphs which read as follows:

1.

"Ek is 'n volwasse RSA Burger, met ID nr […], woonagtig te […], Doringpoort, Pretoria, tans 'n verhoorafwagtende te Kimberley Korrekktiewe Dienste.

2.

Ek verlang om die volgende verklaring af te lê. Ek verwag geen voordele in ruil vir die verklaring nie. Ek is nie gedreig of gedwing om die volgende verklaring af te lê nie, en doen dit vrywillig.

3.

Op Woensdag 3 Maart 2011 is ek vanaf Kimberley Hofselle na Kimberley Korrektiewe Dienste oorgeplaas. Toe ek by Korrektiewe Dienste aankom, is ek in die Ontvangs aanhoudingssel geplaas saam met Rudi Strydom en Dennis van Karreabroeck. Rudi en Dennis het gepraat, en Dennis het vir Rudi meegedeel dat hy in aanhouding is oor ‘n diamant transaksie. Rudi het vir Dennis gesê dat hy ‘n gewese kolonel van Moord en Roof ken, en dat die gewese kolonel, ene André Austin kan reël dat dossier kan wegraak, en dat André Austin ook kan reël dat Dennis borg sal kry, en dat André ook kan help met die ondersoek in die diamanttransaksie. Rudi het vir Dennis gesê dat André Austin al hierdie dinge kan “uit sort”.

4.

Rudi Strydom het toe daagliks vir André Austin telefonies geskakel. Ek was telkemale by as Rudi vir André telefonies geskakel het. Rudi het oor die telefoon vir André gesê dat Dennis iemand soek om sy dossier te laat weg raak, of as hul nie die dossier kan laat wegraak nie, reël dat Dennis borgtog sal kry. Rudi het toe in my teenwoordigheid vir Dennis gesê dat André Austin sê as die fondse (geld) reg is, hy (André) sal sorg dat die dossier weg sal raak, en indien dit te ingewikkels is, hy sal reel dat Dennis op borgtog vrygelaat sal word, en dan later sal reel dat die dossier weg sal raak. Rudi het toe vir Dennis gesê om R20 000-00 in André Austin se Trust rekening in te betaal. André Austin se besigheid se naam is S.W.A.T. Services. Rudi het toe verder vir Dennis gesê as iemand navraag doen oor die R20 000-00 wat in Austin se trust rekening in betaal is, Dennis moet sê dat die R20 000-00 in betaal is vir ondersoekwerk wat André Austin vir hom moet doen. Ek weet ook dat Dennis telefonies kontak met André Austin gehad het. André Autin se selfoonnommer is […].

5.

Rudi het toe by twee geleenthede vir Dennis gevra of die geld al in betaal is. Die laaste keer het Dennis vir Rudi gesê dat sy broer (Dennis se broer) van Kanada die geld in André se trust rekening inbetaal het. Dennis het ook by my en Rudi gekom en gesê dat André Austin op Maandag 21 Maart 2011 Kimberley toe kom ons te besoek.

6.

Op Maandag 21 Maart 2011 het André Austin ons besoek te Kimberley Gevangenis. André het toe vir my, Rudi en Dennis Kentucky gebring. Austin het toe met Dennis begin praat, en Rudi het vir my gesê da tons vir André en Dennis moet los dat hul alleen moet praat.

7.

Later het ek en Rudi weer terug gegaan na André en Dennis. André het toe ‘n wit koevert uit sy aktetas uitgehaal en dit vir Dennis gegee. Dennis het die koevert se seël gebreek, en ‘n pak dokumente uit die koevert uit gehaal. Ek het gesien op die dokumente is ‘n rooi seël wat omtrent so groot soos ‘n R5 muntstuk is. Ek het gesien dat op die dokument 4 handtekeninge van persone is. Daar was ‘n oop spasie vir nog ‘n handtekening. Dennis het toe in my

teenwoordigheid sy handtekening op die oop spasie geteken. Ek het vir Dennis gevra wat se dokumente hy geteken het. Dennis het vir my gesê dat al die besigheid wat gedoen word, en reeds gedoen was in Suid-Afrika nou wettig is, en dat dit nou baie moeilik gaan wees om iets teen hom te bewys. Blykbaar is dit ‘n Internationale Tekenreg dokument.

8.

Voordat André gery het by Kimberley Korrektiewe Dienste het Dennis aan hom sy sleutel oorhandig van sy woonstel te Sandton. Dennis het vir André gesê om al die elektriese toestelle en sy klere uit die woonstel te verwyder. Dennis het vir André verder gesê om die tweede kamer se kas mooi skoon te maak. Dennis het vir André gesê om die meubels en televisie te los in die woonstel, omdat dit nie sy (Dennis) se eiendom is nie, en daar moet bly.

9.

Ek, Rudi en Dennis was ook in een sel geplaas. Tydens een van ons gesprekke het Dennis ons vertel dat hy “deals” maak met persone van die Kongo. Hy ontmoet die persone vanaf Kongo in ‘n hotelkamer. Die persone vanaf Kongo kom verkoop dan ongeslypte diamante aan Dennis. Dennis reël dan dat terwyl hy en die persone van Kongo in die hotel kamer is, persone wat hul as polisiebeamptes voordoen, die persone vanaf die Kongo arresteer. Hul lê dan beslag om die ongeslypte diamante. Hulle laai dan die persone vanaf Kongo langs die pad af, en oorhandig dan aan Dennis die ongeslypte diamant. Dennis en Rudi het toe gepraat en gesê as Rudi en Dennis op borgtog uit is, moet hul in samewerking met André Austin aangaan om diamant transaksies met Kongo persone te maak.

10.

Ek wens ook verder te veklaar dat André Austin by sy woning te […], Waverley, Pretoria, ‘n onwettige R4-geweer in sy kluis het. André Austin het ook ‘n kantoor agter sy woning. In sy kantoor het hy ‘n leêrs van Roy Lochner en Rudi Strydom, met al die sake waarin hy hul al gehelp het, wanneer hul beskuldigdes in sake was.

11.

Op Woensdag 23 Maart 2011 het ek vir Dennis tydens ontbyt gesien. Hy het baie kwaad gelyk. Ek het vir hom gevra wat fout is, toe sê Dennis dat hy telefonies met André gepraat het, en dat André vir Dennis meegedeel het dat hy nie op Donderdag 24 Maart 2011 teenwoordig kan wees as Dennis in die hof gaan verskyn nie. Dennis het toe vir my gesê dat hy ongelukkig is, omdat hy reeds die R20 000-00 in André se rekening in betaal het om hom te help met die diamantsaak. Ek weet ook dat Dennis telefonies in verbinding met Rudi Strydom is. Rudi Strydom se selfoonnommer is […].”

23. Captain van Rooyen was at pains to emphasise the statement in paragraph 2 that Viljoen did not expect to receive any benefit for making the statement, had made it without threat and freely. This, to my mind, seems doubtful. It is common cause that Viljoen was released on R1000 bail on 28 March 2011 without presenting any evidence. Captain van Rooyen was aware that Viljoen was on parole. She claimed the state advocate withdrew opposition to bail on the basis that his previous convictions were more than 10 years old. I find her explanation unconvincing and incline rather to the view that Viljoen was indeed rewarded with bail for his co-operation and the information provided. While this raises some question in relation to Captain van Rooyen's credibility and the reliability of her evidence, that alone is not definitive about the provenance of the information contained in the statement.

24. Viljoen testified that after his arrest Captain van Rooyen told him that she would oppose his bail on the grounds that he was on parole and there existed warrants for his arrest from various jurisdictions. He claimed that he abandoned his bail application at that stage. But that does not accord with what he told the magistrate on 8 and 22 March, who postponed the application to allow him to obtain legal representation. He initially denied that he spoke telephonically to Captain van Rooyen on 22 March 2011, then claimed he was not sure, said he spoke to her on 27 March 2011 and then eventually elected to say he phoned her one morning that week to ask if he was going to get bail. It should be noted that Exhibit C concludes with the typed name of Viljoen, below his handwritten signature, and is dated 23 March 2011 at 17h00. It is safe to conclude that the common cause fact of his signing the statement occurred on that day at that time.

25. Viljoen's version is to the effect that Captain van Rooyen visited him in prison on 23 March 2011 at her own instance and that she confided in him that she was angry about the fact that Strydom had been able to get bail because of the plaintiff's intervention. He claimed that he told her she was aware of the plaintiff and that an R4 assault weapon had gone missing while under his control during his service with the SAPS. She told him she was keen to lock the plaintiff up and asked him if he would be prepared to make a false statement incriminating the plaintiff in exchange

for receiving bail. If he refused to make a statement she would also re-arrest his wife (one of his co-accused), have her bail revoked and their children placed in care. Under this kind of duress, Viljoen claims he agreed to sign a false statement seriously incriminating the plaintiff.

26. Viljoen testified that Captain van Rooyen jotted down some notes in a pad, left and later returned with a typed statement, Exhibit C, which he then signed without reading it, or it being read back to him, or its contents being confirmed by him. After he signed it, so he alleged, Captain van Rooyen told him she would use it to lock up the plaintiff. She supposedly said that Colonel Luis would be pleased and she could now be expected to be favourably considered for promotion.

27. Captain van Rooyen denied Viljoen's allegations. While, as I have said, I doubt that Viljoen was not offered any inducement to provide information, there are a number of factors standing in the way of accepting Viljoen's version. Firstly, Viljoen has an impressive, long-standing history of fraud and deception. His record alone makes him a less credible witness. Secondly, a man who admits to have been willing to falsely incriminate his friend, the plaintiff, by making a false statement of elaborate detail to a senior police official is innately untrustworthy and unreliable. He knew when making the statement that he would bring severely harmful consequences to the plaintiff, yet, on his own version, he was prepared to do that in order to secure his release on bail. He was wholly unperturbed by the dishonourable nature of his account. But, perhaps most importantly, the notion that Captain van Rooyen concocted the story told in the statement is inherently improbable. The statement contains specifics of conversations and events that are truthful and did in fact take place. Some of the information presented could only have been known by the plaintiff, Viljoen, Strydom and van Kerrebroeck. Nobody else was present at the meeting which both Viljoen and the plaintiff confirmed had actually taken place on 21 March 2011. What transpired during the meeting was only known to the four of them, and hence the information in the statement could only have emanated from Viljoen and no one else. It is thus implausible that Captain Viljoen could have concocted the

version with the purpose of falsely incriminating the plaintiff. It gives the lie to Viljoen's testimony that nothing in the statement derived from him.

28. The following information in Exhibit C is undeniably truthful and would not have been known by Captain van Rooyen. First, that Rudi Strydom had told van Kerrebroeck to transfer R20 000 into the plaintiff's trust account. Second, that van Kerrebroeck's brother did indeed transfer the funds. Third, the meeting of 21 March 2011 did in fact take place and that the plaintiff brought Kentucky Fried Chicken for the three detainees. Fourth, the plaintiff confirmed he had a separate consultation with van Kerrebroeck. Fifth, the plaintiff did bring documents for van Kerrebroeck, which the latter signed. Sixth, van Kerrebroeck did give the plaintiff the keys to his apartment and instructed him to take certain action in relation to it. Seventh, the plaintiff was not available to assist van Kerrebroeck on 24 March 2011 at court. And finally, as will be canvassed more fully later, although the plaintiff did not possess an unlawful R4 weapon in his safe, weapons of questionable legality were found in his safe on 24 March 2011. Furthermore, the plaintiff admitted that he had assisted both Roy Lochner and Rudi Strydom in various civil and criminal matters. Therefore a very significant portion of Exhibit C is in fact true and contains information that could not have been known to van Rooyen on 23 March 2011. In this regard, it should be kept in mind that Captain van Rooyen had no prior dealings with or information about van Kerrebroeck. She had heard about the diamond transaction in the media but was in no way connected with the investigation. It was for that reason that she immediately visited Colonel Perumal and contacted Colonel Luis after she first spoke to Viljoen and before taking his statement. Captain van Rooyen does not work for the Hawks. And prior to this case she had only a passing acquaintance with Colonel Luis.

29. In the result, I reject the allegation by Viljoen that Captain van Rooyen fraudulently fabricated Exhibit C. The information in Exhibit C emanated from Viljoen and he probably offered it willingly in the hope that it would assist in his obtaining bail on 28 March 2011.

30. After Viljoen deposed to Exhibit C, Captain van Rooyen faxed it to Colonel Luis who wanted to use it to oppose van Kerrebroeck's application for bail at Randburg on 24 March 2011. After reading the statement, Colonel Luis contacted Warrant Officer Botes stationed at the Directorate of Priority Crimes in Pretoria. He told him that he was in possession of information incriminating the plaintiff and was interested in searching the plaintiff's premises for the illegal R4 weapon. They decided that the best way to go about it would be to get officers of the provincial task team of the Firearms Unit in Pretoria to do a normal safety inspection and to obtain access to the plaintiff's gun safe in that fashion. Botes agreed to liaise with the relevant officers.

31. Warrant Officer Botes then contacted Warrant Officer Viviers (the fifth defendant) of the task team, who went the following day to the plaintiff's premises to conduct a safe inspection accompanied by Warrant Officer Breedt (the fourth defendant). The plaintiff was a bit taken aback by their arrival at his premises early in the morning of 24 March 2011 as he had arranged an inspection for the following day with Warrant Officer Meiring from Villeria police station. Nonetheless, he co-operated, consented to the safe inspection and opened his safe. Warrant Officer Viviers prior to leaving his office had downloaded information from the system which revealed that the plaintiff owned nine weapons. Three of the weapons were not there. One of them had been sold and two of them had been transported by Wouter Viljoen to Kimberley and were in the possession of his uncle, Mr Kotze, the weapon smith. Two other weapons were discovered which did not appear on the list. Photographs of these two weapons taken during the course of the trial are contained in Exhibit AP. The one is a 9mm BXP semi-automatic hand carbine, which in appearance resembles a Uzzi sub-machine gun. It was recovered from the safe together with 9mm ammunition. The second is a 12 gauge calibre CW Andrews double barrel shotgun, which is probably more than 100 years old.

32. It is common cause that the plaintiff does not have a license for a shotgun. He claimed variously that the gun had been de-activated, was an antique and has only

been used by him as an ornament. He had put it in his gun safe because he feared it might be stolen from an outside lapa where it used to adorn the wall. The firearm was proven by the defendant's ballistic expert, Mr Cornelius Janse van Rensburg, to be a firearm capable of discharging ammunition. Major Matheus of the SAPS firearms control unit confirmed that this firearm was never deactivated by a weapon smith and that the plaintiff had never been issued with a deactivation certificate in terms of the relevant legislation.

33. The plaintiff has produced a licence for the BXP – Exhibit J. There is some dispute about when he first produced the license to which I will refer later. The license is issued to Oos Vrystaat Invorderaars BK, a close corporation. The cross-examination of the plaintiff on this issue, together with Exhibit M, a certificate issued by the Commissioner of Companies and Intellectual Property Commission on 27 February 2015, confirmed that this close corporation still exists but changed its name on 2 February 2001 to Special Weapon and Debt Collecting Services CC. The plaintiff is not a member or director of this close corporation and never has been. The only member of it is Mr Richard Barry Nel who was appointed on 28 March 2001. Despite this cogent and compelling evidence, the plaintiff sought to obfuscate by trying to create the impression that the company was one of the SWAT group which had been "centralized" and "consolidated" when he took over part of the business and that such process somehow justified his being in possession of the weapon without a licence.

34. I am accordingly satisfied that both these firearms fall within the definition of a firearm in section 1 of the Firearms Control Act 60 of 2000, and the shotgun in particular did not fall within the category of exclusion from the definition provided to deactivated firearms in section 5(1)(j) of the Act. In terms of section 11 of the Act, the Registrar must issue a separate licence in respect of each firearm licensed under the Act. It is common cause that the plaintiff was not the holder of a license in respect of the shotgun. It is also more than probable that the plaintiff was not in compliance with the provisions of Chapter 6 of the Act in respect of the BXP semi-automatic.

With the discovery of these weapons it was established, at least *prima facie*, that the plaintiff had committed an offence as contemplated in section 120 of the Act.

35. During much of his testimony the plaintiff sought to lay a basis that the visit by Viviers and Breedt to his premises was part of the scheme of malicious prosecution concocted by Captain van Rooyen and Colonel Luis on the basis of fabricated evidence. He testified that the officers told him they were acting on instructions from Kimberley. He made much of the fact that the search was conducted on the false pretence of being a safe inspection. Whatever the case, I do not think the issue one way or the other takes the matter further. No doubt the search would not have been conducted had Colonel Luis not received Exhibit C and contacted Warrant Officer Botes. Viviers testified that at that stage he knew nothing about the Kimberley case and Botes had not explained the situation to him beyond telling him that there was information that there were unlicensed firearms in the plaintiff's safe. Whatever their motivation or the information at their disposal, the two officers conducted a safe inspection and unearthed two weapons which *prima facie* were in the illegal possession of the plaintiff. They arrested him on that basis and took him to Villeria police station. Section 40(1)(h) of the Criminal Procedure Act provides that a peace officer may without warrant arrest any person who is reasonably suspected of committing or having committed an offence under any law governing, *inter alia*, the possession or disposal of arms or ammunition.

36. I accordingly agree with counsel for the defendant that the fact that Viviers and Breedt conducted a safe inspection rather than obtain a search warrant is insufficient to infer any malice or illegality on their part. Section 115(4) of the Firearms Control Act provides that designated officers may at any reasonable time enter business premises or dwellings for the purposes of any inquiry or investigation with the consent of the owner and without a warrant. The plaintiff consented to the inspection. The motive for conducting the search and affecting the arrest is irrelevant. As our

superior courts have held, for just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal.[1]

37. The plaintiff maintained that he showed Exhibit J to Viviers and Breedt and explained to them the process of centralisation of the SWAT group whereby he came to possess the BXP. They denied seeing Exhibit J. A license in the name of a close corporation would not have allayed the suspicion and the fact that he had committed an offence. Likewise his justifications regarding the shotgun were equally unmeritorious. The arrest of the plaintiff was effected on the basis of a reasonable suspicion that subsequently proved to be well-founded.

38. The plaintiff was taken to Villeria police station where he was held and processed. His legal representative arrived in the afternoon and somewhat unusually persuaded the investigating officer to accompany him with the docket to see the control prosecutor, Ms Wilsenach, in Pretoria. Ms Wilsenach entered the following file note (Exhibit C) on the docket:

> "Matter not placed on the roll: - the attorney Mr Joubert will submit proper representations to me personally tomorrow – that needs to be investigated before a final decision is made to prosecute or not. He has made verbal representations but will submit written representations tomorrow (25/3/11)."

39. The plaintiff and his legal representation seemed to believe that this file note entitled him to immediate release. Ms Wilsenach testified that the mere fact that a matter is not placed on the roll does not amount to an instruction to release a suspect. She also confirmed that she has no authority until a suspect is charged and brought to court to give the police instructions to release a suspect. The plaintiff was

[1] *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) at 17G-H; and *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) para 30-31.

formally charged at about 17h30, was brought to court early the following morning and was released without appearing in court.

40. The decision to detain the plaintiff overnight was taken by Colonel Alberts, the commander at Villeria police station. He did so after discussing the matter with Colonel Luis who faxed him a copy of Exhibit C. Colonel Alberts was by then aware that Ms Wilsenach had not placed the matter on the roll that day, since Constable Sebulela, who had accompanied Mr Joubert, had told him so. Alberts had been informed of the arrest by the plaintiff's daughter, who is a police officer at Villeria. He was later informed by Captain Dubell, a colleague of the plaintiff's daughter, about the Kimberley connection. He then contacted Colonel Luis who informed him that the plaintiff should not be released and faxed him Exhibit C. He later received a call from Adv Lupendo, one of the control prosecutors, who asked that the docket be placed before him the next day. Colonel Alberts also recognised that there was a *prima facie* case against the plaintiff in respect of the possession of the weapons. Joubert had shown him Exhibit J, the licence for the BXP in the name of Oos Vrystaat Invorderaars BK, but Colonel Alberts understood that such did not regularise the possession of the gun. With that he decided that the plaintiff should not be released and should be brought before court the next day. Colonel Alberts' decision has not been explicitly challenged and does not form the part of any cause of action pleaded by the plaintiff. Colonel Alberts is not a defendant in the action. Claim 1 is restricted to the arrest by the fourth and fifth defendants and the continued detention after the decision by Ms Wilsenach not to place the matter on the roll. Suffice it to say, Colonel Alberts was not obliged to release the plaintiff on the basis of Ms Wilsenach's note and on the basis of the information he had at hand he had a reasonable suspicion that an arms and ammunition offence may have been committed.

41. In the premises, I am persuaded that the defendants have discharged the onus of proving the lawfulness of the plaintiff's arrest on 24 March 2011 and that Claim 1 falls to be dismissed.

42. Claim 2, 3 and 4 relate to events that followed the plaintiff's release from custody on 25 March 2011.

43. The search of the plaintiff's premises had established that two of the plaintiff's weapons were not in his safe. His explanation for their absence was that they had been taken to Kimberley by Wouter Viljoen for repair work by Kotze, the weapons smith. Captain van Rooyen testified that she was instructed by Colonel Luis on 24 March 2011 to visit Kotze to investigate the matter further. She accordingly did so and established that the two weapons were indeed in the possession of Kotze or an associate of him.

44. On 28 March 2011, after receiving bail, and at the instance of Colonel Luis, Wouter Viljoen made another statement to the police – Exhibit P.

45. Exhibit P reads:

> 1.
>
> "Ek is 'n volwasse RSA Burger, met id nr […], woonagtig te […], Hercules, Pretoria, met selfoonommer […], tans werkloos.
>
> 2.
>
> Op 2011-03-23 om 17:00 het ek 'n verklaring af gelê. Ek wens hiermee 'n aanvullende verklaring af te lê. Ek verwag geen voordele in ruil vir die verklaring nie. Ek is nie gedreig of gedwing om die volgende verklaring af te lê nie.
>
> 3.
>
> Op 3 Maart 2011 terwyl ek, Rudi Strydom en Dennis van Karrebroeck in die Aanhoudingssel van Ontvangs aangehou is te Korrektiewe Dienste, Kimberley, het Rudi geld aan 'n bewaarder gegee, wat Kaizer genoem word. Rudi het vir Kaizer gesê dat in ruil vir die geld ek, Rudi en Dennis in die Aanhoudingssel te Ontvangs aangehou moet word. Ek, Rudi en Dennis

is toe in die Aanhoudingssel van Ontvangs aangehou tot op 6 Maart 2011. Ek weet nie hoeveel geld Rudi vir die Bewaarder gegee het nie. Rudi het toe vir Kaizer gesê dat hy ‘n trok vir Kaizer kan kry, en dat Kaizer dan net die paaiemente kan oorvat.

4.

Op 21 Maart 2011 terwyl ek, Rudi, Dennis en André Austin by die Regsbesoek Lokaal, te Korrektiewe Dienste, Kimberley was, het Dennis van Karrebroeck vir André Austin gesê dat die swartmense in Thembisa ‘n probleem is, en dat hul uitgesorteer moet word. Dit het blykbaar iets te doen gehad met diamanttransaksies. Dennis het ook vir André gesê dat hy (Dennis) ‘n aandeelhouer van ‘n Maatskappy is, die maatskappy se naam is iets met ‘n “Gold”, en dat Dennis vir André ‘n deel van die aandele sal gee, as André vir hom (Dennis), uit die trunk kan kry. André Austin het toe ook gesê dat hy gaan reël dat die saak van Kimberley, oorgeplaas word na Handelstak, Johannesburg. André sal met ‘n Kaptein Barries Barnard praat om te reël dat Rudi ‘n 204 Getuie word in die saak, en dank an hul dalk reël dat die dossier weg raak.

5.

Gedurende April 2009 het André Austin vir my ‘n toestemmingsbrief gegee om die volgende vuurwapens te kan vervoer na Kimberley:

1 X Haelgeweer

1 X 303 Geweer

1 X 243 Geweer

Ek het die 243 Geweer vir Gert Kotze gegee, wat hout kolf vervang het. Gert Kotze het die 303 en Haelgeweer na ‘n wapensmid geneem om metaalwerk te doen. André Austin is bewus van die feit date k tans op Parool is.

6.

Op 6 geleenthede, datums onbekend, was ek teenwoordig terwyl André Austin ‘n R4-aanvalsgeweer oorhandig het aan Roy Lochner en Rudi Strydom. Die R4-aanvalsgeweer was in André Austin se kluis te Lawsonsstraat 1330. Rudi en Roy het die R4-geweer gebruik om te jag. Ek het dan tydens sulke jag episodes, het ek self die R4 geweer hanteer.”

46. Thus, Viljoen incriminated the plaintiff further. In addition to the allegations of conspiracy to commit corruption and defeating the ends of justice in Exhibit C, there are further suggestions that the plaintiff had it within his power to have the case against van Kerrebroeck transferred to Johannesburg and to arrange for the docket

to disappear. Viljoen confirmed that he had transported the weapons to Kimberley and went on to make additional allegations about the unlawful use and possession of the R4 rifle. The plaintiff denies the truth of all the allegations.

47. Relying on the statements and the evidence at her disposal, and on the instructions of Colonel Luis, Captain van Rooyen sought and obtained a warrant for the arrest of the plaintiff and Rudi Strydom. At about 01h15 on the morning of 31 March 2011 the plaintiff was arrested at his home in Pretoria by a tactical team and transported by them to Kimberley. The plaintiff complained during his testimony about the rough handling he received in the course of his arrest and transportation. He has pleaded no distinct cause of action related to this alleged mistreatment. Though, if accepted as true, would be of some relevance to the question of damages.

48. The plaintiff appeared in the Kimberley magistrate's court on 1 April 2011. Captain van Rooyen indicated that any application for bail would be opposed. He appeared again on 4 April 2011, 13 April 2011 and 20 April 2011 when he eventually was granted bail. The reasons for the postponement were in the first instance the unavailability of the plaintiff's counsel (despite the prosecution being ready to proceed) and later the unavailability of Colonel Luis. The plaintiff was incarcerated for 21 days in conditions that were less than salubrious. After a number of appearances the charges against the plaintiff were withdrawn in November 2011.

49. Claim 2 of the plaintiff's particulars of claim disclose a composite cause of action for malicious prosecution, unlawful arrest and detention. The allegations are that the second and third defendants wrongfully instituted a criminal prosecution against the plaintiff by unduly, actively fabricated evidence, and opened a police docket and obtained a warrant of arrest based on that false evidence. It is then alleged that the arrest and detention of the plaintiff on this basis were consequently unlawful. Claim 3 is a claim for the impairment of reputation and dignity. It is in effect a duplication in

that claim 2 and 3 are one cause of action. The claim for malicious prosecution encompasses a claim that the plaintiff's *dignitas* and *fama* were impaired.

50. The onus is on the plaintiff to prove claim 2 and 3. In order to succeed the plaintiff has to prove that:

a) the defendants instigated or instituted a prosecution;

b) the defendants acted without reasonable or probable cause;

c) the defendants were actuated by malice or *animo injuriandi*; and

d) the prosecution has failed.[2]

51. The plaintiff contended that the hearsay allegations in Exhibit C and Exhibit P (the only evidence upon which the warrant of arrest was issued) could not constitute reasonable or probable cause for the arrest and detention. Captain van Rooyen's reliance on such a limited evidentiary basis, it was contended, supported an inference that she was motivated by malice to prosecute the plaintiff in retaliation for the role he had played in obtaining bail for Rudi Strydom.

52. As I have already held, I do not accept that Captain van Rooyen fabricated Exhibit C. Viljoen volunteered the information in that statement most probably in the hope of obtaining bail. The evidence is insufficient to conclude that he was encouraged to supply false information. Viljoen testified similarly in relation to Exhibit P which he deposed to after he had received bail. He denied ever telling Captain Viljoen anything of the information in paragraphs 3 and 4 of Exhibit P. Despite it being true that he had transported the weapons to Kimberley, he denied that he told

[2] *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 16.

Captain van Rooyen and claimed that she must have obtained the information from his fiancée. He denied further that he ever told Captain van Rooyen anything about the R4 rifle.

53. I reject Viljoen's version for similar reasons to those for rejecting his version about Exhibit C. Viljoen is a wily man with considerable experience as a criminal and a prisoner. It is inconceivable that he would have signed a wholly concocted statement. He would have understood fully the implications of doing that. The corroborated truth of some of the information in the statements and the probability that Viljoen was motivated to co-operate to obtain the benefit of bail and other possible advantages in his pending prosecutions rule out the inference that the content of the statements were falsely concocted by van Rooyen.

54. However, there is no getting away from the fact that Luis and van Rooyen may have been a bit over-zealous. Luis gave hearsay evidence in the bail application that the plaintiff had been investigated in regard to a R4 rifle that went missing while under the control of the plaintiff during his time at SAPS. There is no evidence to support this. The police do not use R4 rifles, they use R5 rifles. Moreover, when he gave that evidence, he knew that although illegal weapons had been found in the possession of the plaintiff, an R5 was not among them. He also gave incorrect evidence about the theft of a motor vehicle involving the plaintiff. Counsel has also alluded to other unsatisfactory aspects of the testimony of Luis in the bail application suggesting that he may have misstated certain facts from which may be inferred malice and the lack of probable cause. Whatever their merits they are inconclusive and ultimately inconsequential.

55. To my mind Luis and van Rooyen had reasonable and probable cause to suspect that the plaintiff may have been conspiring to defeat the ends of justice because Viljoen's evidence had been objectively corroborated. Although a R4 rifle had not been found, illegal weapons had been discovered in his safe. It was also confirmed that Viljoen, by virtue of his having transported the plaintiff's weapons to

Kimberley, had knowledge of the plaintiff's weapons and his weapon's safe. Viljoen had hunted with the plaintiff. He was also aware of the plaintiff's association with Roy Lochner, a convicted criminal, and Rudi Strydom. This knowledge and insight positioned Viljoen to know about possible wrongdoing by the plaintiff. If we accept that Viljoen had furnished much of the information in Exhibit C and Exhibit P, which I do, and accepting that Viljoen had knowledge of the plaintiff's weapons, there was unquestionably a duty upon Luis and van Rooyen to investigate further. The fact that the plaintiff had been released in Pretoria did not preclude them from taking further steps, especially in light of the allegations of corruption and defeating the ends of justice. Even more the case in view of Luis being aware that van Kerrebroeck was minded to pay a bribe to make the case against him go away.

56. It must also be kept in mind that Luis had no prior knowledge of the plaintiff, and was not involved in Rudi Strydom's bail application or the fraud charges against Viljoen and Strydom. Although it is true that Luis may have misstated certain hearsay facts in the bail application of the plaintiff, he impressed me as an honest and conscientious police officer who reacted to serious allegations of corruption and defeating the ends of justice, which had been partially corroborated. After briefly meeting Viljoen, once bail had been granted, he instructed van Rooyen to obtain a warrant. His lack of personal knowledge of the plaintiff militates against any inference of malice prior to the issue of the warrants by the magistrate.

57. If there was any malice on the part of any person, it was with Viljoen. It was he who in effect instigated the prosecution. The plaintiff conceded that but for the two statements of Viljoen no prosecution could have been initiated. In *Lederman v Moharal Investments (Pty) Ltd* [3] Jansen JA remarked:

> "When an informer makes a statement to the police which is wilfully false on a material particular, but for which false information no prosecution would have been undertaken, such an informer "instigates" a prosecution."

[3] 1969 (1) SA 190 (AD) at 197B-C

58. In the premises, it cannot be held that the second and third defendants instigated the prosecution with malice. The information contained in Exhibit C and Exhibit P corroborated by the proof that Viljoen had knowledge and insight into the affairs of the plaintiff and what transpired during the plaintiff's visit to the prison on 21 March 2011, were sufficient to give rise to a reasonable suspicion that the plaintiff may have committed an offence sufficient to justify the application for a warrant of arrest.

59. The lengthy and complex nature of the trial justified the employment of two counsel.

60. In the premises the plaintiff's action is dismissed with costs, such costs to include the costs of two counsel.

JR MURPHY

JUDGE OF THE HIGH COURT

Dates Heard:	11/08/2015,24/08/2015-28/08/2015 and 3/11/2015
Counsel for Applicant:	Adv JJ Greeff
Instructed by:	Jaap Venter Inc.
Counsel for Respondent:	Adv GC Muller SC, Adv MS Mangolele
Instructed by:	State Attorney, Pretoria