

REPUBLIC OF SOUTH AFRICA



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

15/12/16

Case No. 16266/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<i>J. Chap</i> SIGNATURE	<i>15 December 2016</i> DATE
DATE	SIGNATURE

In the matter between:

TSHIMANGADZO MUNYAI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

GCABASHE AJ

Introduction

- [1] This is a claim for damages for the unlawful arrest, detention and assault of the Plaintiff by members of the South African Police Services ("SAPS") acting within the course and scope of their employment as police officers and members of the SAPS.
- [2] In their opening addresses, counsel for both the Plaintiff and the Defendant advised the court that by agreement and for purposes of these proceedings, liability would be separated from quantum, and that they would therefore only be addressing the merits of the Plaintiff's claims.
- [3] I agreed to this understanding that, having heard all the evidence on the merits, should the claim on quantum proceed to court, I would make myself available to deal with that aspect of the trial.
- [4] With respect to the question of the duty to begin, the Defendant has admitted to arresting the Plaintiff. In the circumstances the Defendant had the duty to begin and establish the lawfulness of the arrest and detention. The Plaintiff bears the onus of proving the allegations made in respect of the assault.

Issues for determination

[5] The main cause of action arises from the arrest, without a warrant, of the Plaintiff by members of the SAPS on 10 November 2011. The Plaintiff was detained by the SAPS from 10 November 2011 and released approximately 14 months later on or about 15 January 2013 after he was found not guilty and discharged by the regional court at Sibasa. These are common cause facts.

[6] The divergence of facts arises with regard to the underlying causa for the arrest and detention, and with respect to whether the Plaintiff was assaulted on arrest and during the period of detention. The Plaintiff contends that his arrest and consequent detention was unlawful. In addition, he alleges that he was severely assaulted by members of the SAPS on arrest and during his detention.

[7] It was apparent from the parties opening statements that the evidence to be presented consists, in the main, of material disputes of facts. The Defendant maintains that the arrest and detention were lawful in that the arrest was executed under section 40(1)(b) and section 42(1)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA") and the detention followed on as a consequence of the gravity of the charges. It denies the charge of assault.

[8] It is to these disputed matters that I now turn by:

[8.1] summarising the pleadings;

- [8.2] summarising the evidence of the witnesses called on behalf of each party,
- [8.3] giving a synopsis of the oral submissions of the parties' closing arguments;
- [8.4] noting the issues in dispute;
- [8.5] addressing the relevant legal prescripts;
- [8.6] analysing the evidence, giving due consideration to the credibility and reliability of the witnesses;
- [8.7] evaluating the probabilities of each version;
- [8.8] noting the findings on whether the onus that rests on each party has been discharged.

The Pleadings

- [9] Prior to traversing the evidence I find it appropriate to make the following observations regarding the manner in which the pleadings in this matter were dealt with. The Plaintiff issued his Summons and Particulars of Claim on 13 March 2013. The essential allegations concerned his arrest on 10 November 2011 at Tshiungani Village in Limpopo where he alleged he was arrested unlawfully without warrant by unknown police officers.

[10] Thereafter he was detained and incarcerated at Tshamutumbu Police Station for five days *"at the instance of the aforesaid policemen and various other policemen"* *"whose names and ranks were unknown to him"*. He alleged that these policemen were acting within the course and scope of their employment as members of the South African Police Service ("SAPS"). His first claim for the unlawful arrest and detention was R850 000.

[11] The second claim for damages was for the wrongful and unlawful he suffered at the hands of members of the SAPS whom he alleged hit him with fists, slapped him with open hands, kicked him and hit him with blackswine all over his body and under his feet. As a result, he sustained injuries all over his body and feet, had to undergo medical treatment and could not work for 1 year and six months. His claim under this head of damages was for R500 000.

[12] The defendant filed a bare denial in response to the material allegations regarding the unlawful arrest, detention and assault of the Plaintiff. On 13 January 2015 the Plaintiff requested further particulars in order to prepare for trial. These were quite detailed. A second request was sent to the Defendant in which the Plaintiff pointed out the discrepancies between the bare denial and the content of the case docket MAS 23/11/2011.

[13] The Defendant's essential response was that the matters raised were within the Plaintiff's personal knowledge; constituted an abuse of the court's rules; and in any event were not relevant for the Plaintiff to prepare for trial. On 7 March 2015 the Plaintiff sought further particulars, which included a question whether the arrest was denied and another concerning whether an identity parade had been held in respect of the Plaintiff, as well as questions surrounding the R7800 that the Plaintiff alleged he had on him when arrested.

[14] Other than admitting to the arrest of the Plaintiff without warrant by members of the SAPS, for lawful reason on the basis of a reasonable suspicion that he had committed a Schedule 1 offence being that of robbery, the material questions raised in the request for further particulars were ignored. On 18 May 2015 the Defendant filed an amended plea which took the matter no further.

[15] On 13 August 2015 the Plaintiff amended its particulars of claim by substantiating the version it relied on. He referred to cash he had in his pocket. He described his arrest and assault in great detail. The allegation that there were no objective grounds for arresting the Plaintiff were made in the amendment, as was an allegation that the arresting officers exercised their discretion to arrest and detain the Plaintiff irrationally, alternatively arbitrarily, further alternatively unreasonably or with ulterior motives, and *inter alia* in breach of their constitutional

rights under section 7 of the Constitution and in violation of a number of the Plaintiff's constitutional rights. The damages claim was increased to R1 370 000.

- [16] A further amendment was filed by the Plaintiff on 30 March 2016. The most material amendment was in relation to the quantum of damages claimed, which now escalated to R6 327 800.

Summary of the evidence

The Defendant's case

- [17] The Defendant called five witnesses, one of whom was a member of the community, a Mr. Lavhelesheni Shandukani (Mr. Shandukani), and four being members of the SAPS.

The evidence of Mr Shandukani

- [18] Mr. Shandukani, who was one of the primary witnesses for the defence, gave his evidence in Tshivenda and was assisted by a court interpreter. He resides at Mabvete village in Tshiugani. Though he described himself as a member of the community, it transpired during the presentation of his testimony that he is also a police reservist.

[19] He testified that on the morning of 10 November 2011 the owner of a spaza shop in Mabvete village where he lived, phoned him to say that he should urgently go to the spaza shop as a robbery had taken place there. He testified that he lives approximately 50m from the spaza shop.

[20] On arrival at the shop the shop keeper, an Indian lady, told him that while she had gone to the bathroom, two men came into the spaza shop. His younger sister, one Folofilo was at the shop at the time of the robbery as she had gone there to make some purchases. He testified that he was told that the two men had stolen cold drink and bread. His confirmed, however was that on his arrival at the spaza shop the two men were nowhere in sight.

[21] People along the road told him which direction the two suspects had run in. He and others pursued the two suspects who, he testified, ran into a forest and up a hill. One suspect produced a firearm. The group then stopped and waited for other members of the community to join them before resuming their pursuit of the two suspects. At some point visibility was poor, but after a while the group was able to pick up the tracks of the suspects. Later more members of the community joined in the chase, including a man who drove an Isuzu van. The pursuit of the suspect lasted approximately 3 to 4 hours.

[22] While they were chasing the suspects Mr. Shandukani noted the following. The two suspects split up and ran in different directions. The group continued to pursue the suspect who had a firearm. Mr Shandukani also noticed the suspect stop and pass water, take his shirt off and hang it on a tree, then further on, take his shoes off and walk bare foot.

[23] He further testified that at some point the suspect picked up some stones and started throwing them at the group that was pursuing him. At that point one of the members of the group shouted at the suspect and threatened to kill him if he threw stones at them. Given that it was a hot day and the suspect no longer had shoes on, and was having difficulty running over the rocks and the hot sand, the pursuing group was able to catch up with him. The police managed to join the group at about this point in time.

[24] Mr Shandukani observed the injuries that the suspect had sustained under his feet. The man with the Isuzu van was on hand to assist them take the suspect to the clinic. It was only after the suspect had been taken to the clinic that the SAPS dog unit and a SAPS helicopter arrived on the scene. The members of the community and the police then proceeded to search for the second suspect who was ultimately found hiding in a cave. When he eventually emerged from the cave,

the second suspect produced 2 cellular phones and some money that was inside the sling bag that he was carrying. Inside the bag there were some black cable ties as well. This suspect was taken down the hill and put into a police van.

[25] On being questioned Mr Shandukani identified the Plaintiff by name and as the suspect who they had pursued through the forest. Though he testified that the Plaintiff did not readily submit himself to the group that had pursued him, the witness denied that the Plaintiff was assaulted. He also confirmed that it was not the first time that he was seeing the Plaintiff as the latter had been in the area the previous evening in the company of a certain un-named lady, and had bought some scones and chips.

[26] He also testified that the items stolen from the spaza shop included money, airtime, and cellular phones belonging to the shop keeper. His further evidence was that the two suspects had threatened those in the spaza shop with a firearm.

[27] Under cross examination Mr Shandukani confirmed that he did not witness the criminal activity at the spaza shop, but had heard of the events that occurred from others, including his sister. He also confirmed that as they pursued the two suspects, they dropped the airtime vouchers, bread and cold drink. His answer to a question about

whether they searched the Plaintiff when they apprehended and whether the Plaintiff had a firearm on him was in the affirmative.

[28] When asked what type of firearm this was, he stated that he could not describe it because of the distance of about 150 meters between himself and the suspect. He further confirmed that the group of community members apprehended the Plaintiff and that it was only after they had apprehended him that he was handed over to the police. He denied being in court when the Plaintiff was acquitted of all charges.

[29] When the Plaintiff's version of the events that occurred on 10 November 2011 was put to the witness, he denied that there was any truth in the Plaintiff's version. He even denied events that related to the assault of the Plaintiff at the police station, including the statement that the Plaintiff was forced to sign a confession. It was only in relation to the first appearance of the Plaintiff in court after being detained for 5 days that the witness stated that he could not testify to what happened after the arrest of the Plaintiff.

[30] In answer to the court's questions he confirmed that the robbery happened at approximately 09h00 – 10h00, and that the Plaintiff was apprehended between 13h00 and 14h00. He testified that the Plaintiff ran with his shoes on for the first two hours, then bare foot for the last

hour. He also confirmed that he was there when the Plaintiff was taken to the clinic where they left him with the police.

The evidence of Constable Ramphabana

[31] The second witness for the defence was Constable Azwindwi Matthews Ramphabana ("Constable Ramphabana), a policeman of nine years standing.

[32] This witnesses evidence was that he received a call from the Tshamuthumbu Police Station advising him that a robbery had been committed at Mabvete village at Tshiungani and that back up was required.

[33] He and a colleague travelled to where the robbery was said to have taken place and found Warrant Officer Nembayi there. He then received a call that one of the suspects was wearing black clothes and had run in the direction of the forest. It took him 5 minutes to get to the point where the people chasing the suspect were pointed out to him.

[34] He parked the vehicle and followed the members of the community on foot. He testified that they chased the Plaintiff for 2 hours. He was

behind the front runners. The witness testified that the Plaintiff was ultimately apprehended at an open space.

[35] The witnesses' description of the Plaintiff was that he was wearing black clothes and fitted the description of the person who had been mentioned earlier. He further testified that as the group that had been pursuing the Plaintiff attempted to apprehend the Plaintiff he told them not to as he was close enough to do so himself.

[36] He noticed that the Plaintiff could not get up. On enquiring he was told that the suspect was injured under his feet. He then asked the community members to give him time with the Plaintiff. He introduced himself to the Plaintiff and informed him that he was arresting him for a robbery committed at Mabvete village at Tshiungani. The Plaintiff then told him that he was not alone when he committed the robbery. He also asked not to be handcuffed as he was prepared to submit to his arrest.

[37] His further evidence was that one of the community members opted to contact an acquaintance to bring a motor vehicle. After some time, an Isuzu motor vehicle pulled up and the Plaintiff was placed in it and taken to the clinic for medical attention. From the clinic the Plaintiff was taken to Tshamuthumbu Police Station.

[38] The injuries that this witness observed on the Plaintiff were the injuries under his feet and scratch marks on his arms which the witness assumed he sustained as he ran past some thorn trees.

[39] In identifying the Plaintiff as the person who had participated in the robbery at the spaza shop, this witness stated that the description of the clothes he was wearing fitted the description that was given to him telephonically. He further stated that the persons who had pursued the Plaintiff from the point where the robbery occurred identified him as the person they had been pursuing.

[40] The witness denied that the Plaintiff was assaulted by the community members who pursued him. The Plaintiff had his identity book on him and a photograph of the second suspect. On being asked if any money was found on the Plaintiff the answer was a firm no. He once again described the clothes worn by the Plaintiff as a black long sleeved shirt with buttons and worn out long black pants. When he first saw the Plaintiff he was approximately 100 metres from him and between 2 to 3 km from the spaza shop at Mabvete village. He arrested the Plaintiff approximately 2 hours after he first spotted him.

[41] The witness further testified that he did not see the Plaintiff stop to take his shoes off nor did he see him pass water. He also did not see the

Plaintiff throw anything away, and certainly not any drinks, toy or any other thing.

- [42] The witness denied the version that the Plaintiff's counsel put to him concerning the events that took place on the day the Plaintiff was arrested.

The evidence of Warrant Officer Dagada

- [43] The next witness for the Defence was the Acting Commander of Tshamuthumbu Police Station, Mashudu Michael Dagada. He testified that he received a telephone call between 09h00 and 11h00 from the owner of the spaza shop at Mabvete village who reported that a robbery had been committed. He despatched police officers to the scene of the crime. He also went to the scene of the crime and summoned back up in the form of the dog unit and a helicopter because the community members told him that the suspects had run into the forest and up the mountain.
- [44] He was later advised of the arrest of the Plaintiff, and told that the Plaintiff had been injured and taken to the clinic. On his arrival at the clinic he found the nurses bandaging the Plaintiff under his feet. He also noticed that the Plaintiff had scratch marks which he assumed he got from running through the bushes.

[45] He informed the Plaintiff that he was under arrest for a robbery at Mabvete village. He informed the Plaintiff of his rights and thereafter took him to Tshamuthumbu Police Station. He confirmed that the Plaintiff went back to hospital, but could not remember the date. Finally, he confirmed that the arrest was lawful and that the Plaintiff was not assaulted by the police.

[46] Under cross examination the witness could not explain why there were no records of the first visit to the clinic by the Plaintiff nor could he explain why no entry about that visit was made in the investigation officer's diary. He confirmed that he was aware that the investigating officer had taken the Plaintiff to the forest where a firearm was recovered, but stated that he did not see the firearm.

[47] The Plaintiff's version of his arrest by the roadside while he was waiting for transport home was put to the witness, who denied that this version was true.

[48] In replying to questions put by the court the witness explained that he did not go to the spaza shop after receiving the report about the robbery, nor did he meet the shop owner or shop keeper. He stated that he was aware that money was recovered from the second suspect,

but was not sure about the quantum, or whether anything else was taken from the spaza shop.

[49] The witness confirmed to the court that he collected the Plaintiff from the clinic and that the nurse asked that the Plaintiff be brought back for further treatment. He could not recall who he gave this latter instruction regarding a follow up visit to the clinic to.

[50] When asked by the Plaintiff's counsel why there was no reference in the investigation diary to his presence at the clinic his response was that such information was not what the investigating officer would want to know.

The evidence of Constable Netsamba

[51] The next witness for the defence was Dzihuluwani Ludwig Netsamba a police officer stationed at Tshamutumbu Police Station. He confirmed that he was on duty when a report about the robbery was received. He interviewed the shop keeper who told him that two men, one holding a small firearm, had demanded that she open the enclosure into the shop and taken money, two cellular telephones, two loaves of bread and some cold drink. Thereafter they ran away in the direction of the forest.

[52] He took a statement from the shop keeper, who could not give a description of which of the suspects held the firearm. It transpired that the shop keeper is the wife to the shop owner.

[53] The witness explained that he noticed the injuries of the Plaintiff when he arrived at the police station. The Plaintiff was handed over to him by Warrant Officer Dagada. The injuries he observed were that the skin under the Plaintiff's feet had been peeled off. When he asked the Plaintiff how he sustained these injuries the Plaintiff said he got them from walking in the nearby rocky area.

[54] The witness denied that the Plaintiff had been assaulted or humiliated by the police. He confirmed that a Schedule 1 offence had been committed, hence the lawfulness of the arrest.

[55] Under cross examination the witness confirmed that he did not depose to an affidavit on 10 November 2011, and that this was the first time he was explaining his involvement in this matter. The only statement he took on 10 November 2011 was that of the complainant shop keeper.

[56] On answering questions of clarity put by the court, the witness stated that he did not see how the Plaintiff's feet were injured as he had bandages on his feet.

The evidence of Warrant Officer Gumbu

[57] The witness that followed was Naledzali Russia Gumbu, the investigating officer. He heard about the robbery and while attempting to give assistance, and was advised that the Plaintiff had been arrested and taken to the clinic. He found the Plaintiff at the clinic where they were putting bandages on his feet. He left him at the clinic with Warrant Officer Dagada and went to assist in the apprehension of the second suspect.

[58] The witness testified that it was only on 11 November 2011 that he realised that a firearm had been used in the commission of the robbery. On 12 November 2011 he took the Plaintiff out for him to point out the weapon that was used in the commission of the robbery. They found the pistol that was used in the commission of the robbery in the forest inside a baobab tree and sent it for ballistic tests. On their return they went past the clinic for the Plaintiff's bandages to be changed, as this was a daily routine.

[59] The matter was referred to court. Bail was denied because the second suspect was a Zimbabwean national. He confirmed that he had asked the Plaintiff if anyone had assaulted him and was told no one had. At that point he explained the Plaintiff's rights to him and the purpose of the interview. He told him he could engage a private legal

representative or have one appointed by the State. The Plaintiff elected to give him a statement. It was free and voluntary.

[60] When the docket came back from court on 14 November 2011, there were questions in it posed by the Public Prosecutor, and an instruction that the Plaintiff must be taken to the hospital. Pertinent questions raised by the Public Prosecutor in his notes to the investigating officer were:

[62.1] that the accused's addresses should be verified;

[62.2] whether anything was recovered;

[62.3] whether the accused had been identified by the complainant after they had been apprehended; and

[62.4] what happened to the firearm that was alleged to have been used.

[63] The Public Prosecutor also made a note in the file that the Plaintiff was to attend the hospital on a daily basis, and made it a point to check every morning that this instruction had been executed. The witness also testified that he recalled that the Plaintiff was hospitalised at Musina hospital at some point. When asked why the Plaintiff was hospitalised, he replied that it was for further treatment for the burns he sustained on his feet on day of commission of the offence.

[64] The witness was also asked about the firearm that was taken for ballistic tests. The entry in the investigation diary indicated that the firearm was a toy gun. His testimony in this regard was that any item resembling a firearm is taken for ballistic tests before any conclusion is reached on what exactly it might be.

[65] Under cross examination, and with reference to the documentary evidence by way of the investigation diary, the witness conceded that the firearm was only recovered on 4 December 2011. When it was put to him that the Plaintiff never took him to the place where it was recovered he responded that he did book the Plaintiff out, even though there was no entry of this in the investigation diary.

[66] Despite intense questioning on the point, the witness was not able to point to an entry in the investigation diary where an entry was made that the Plaintiff showed him where the firearm was, where after it was recovered from that location. Counsel then put it to the witness that he would argue that no firearm was found and that someone simply bought a toy firearm which was introduced as the firearm used in the robbery.

[67] The discrepancy in the entries made on 10 November 2011 and 14 November 2011 was interrogated at length. The materiality of these discrepancies turned on the fact that the Plaintiff's version, as put to

this witness, was that he was unlawfully arrested, detained and assaulted on 10 November 2011 and only taken to court on 14 November 2011. The warning statement he made was coerced as a result of those assaults. That statement that was put up as a confession was as a result of such assaults. The witness categorically denied the veracity of this version.

The Plaintiff's case

[68] The Plaintiff was the next to testify. His version was that he was standing at the side of a cross road waiting for transport to take him home. He testified that he was wearing a short sleeved UZZI branded t-shirt that was grey in colour, and a denim trouser. He had a bag with him. In this bag he had an amount of R7800 which he had withdrawn over time and which he intended using at home for various tasks. As he stood by the roadside a Quantum mini-bus with approximately 7 police officers appeared and stop at the cross road.

[69] There was a male police officer wearing a Bafana Bafana branded soccer team jersey who asked him where he was from and where he was going to. A lady police officer wearing pink trousers and a black top started searching his bag. She found the money in his bag and asked where he had obtained this money as there were people who reported that an offence had been committed. The suspects had run in

the direction of the cross roads. The male policeman mentioned the letters TRT and said they worked in the field and know how to treat a criminal.

[70] The Plaintiff denied all knowledge of the robbery. The lady policeman then said that the money he had looked like fake money. The Plaintiff offered to bring her his bank statement as proof of the source of the money. In response the police grabbed him and sprayed a chemical over his eyes. He couldn't see. Then a policeman from the Quantum motor-vehicle said "*you are going to produce the firearm you shot with before you ran away*". He was dragged into the bush and assaulted.

[71] The Plaintiff testified that thereafter his whole body was swollen. He was assaulted, tortured and handcuffed. He lost consciousness and regained his senses at a clinic where his wounds were attended to. Warrant Officer Dakada took him to the police station. At the police station police officers Dakada, Robert Nemarara, Bongani Nemarare and Azwindwi Matthews Ramphabana took turns in assaulting him. His hands were cuffed behind his back, he testified. One way in which he was assaulted was that his feet were placed on a moving conveyer belt. The friction between his feet and the moving belt burnt and bruised his feet. At some point his head was put into a toilet bowl and the toilet was flushed. Eventually an officer by the name of Malusi pulled him into a cell in an effort to stop the assaults.

[72] The police told him they want the firearm that he used during the robbery. He denied any knowledge of the robbery or firearm. Warrant Officer Gumbu brought some documents for him to sign. He explained that these documents related to his rights, and to the toiletries etc. that he was entitled to.

[73] From the 10 to 13 November he was not taken to the clinic. For three months he could hardly walk. When he was taken to the Muthari Magistrate's court he could still not walk or sit on a bench. He further testified that he was afraid to tell the Magistrate that he had been tortured as the police had warned him against doing so. He also refrained from telling two legal aid attorneys the truth when they asked about his scratches as he had been threatened by the police should he divulge anything of their treatment of him.

[74] The Magistrate issued an order that he be taken to a hospital for treatment. He spent approximately 7 to 8 days in hospital. When he returned to court the matter was referred to the regional court in Sibasa. When he appeared at the Sibasa Magistrate's Court he asked Magistrate Coetzee to allow him to go and get his bank statement so as to reconcile that statement with the money he had on him on arrest. The Magistrate instead said he would send a police officer to take a statement if the Plaintiff wished to charge the Minister of Police.

[75] On the day he was acquitted, i.e. on 14 January 2013, the complainant was in court and testified that he was not the person who robbed the spaza store as both suspects were much shorter than he was. When asked by the presiding officer when he had seen the complainant, he told the court that this was the first time he had seen her. He was acquitted on the same day.

[76] He confirmed that from the time of his arrest to the time of his release, he had been detained for approximately 14 months.

[77] Under cross examination he was asked to estimate how far the cross roads where he stood was from Mabvete village where the police said a robbery had taken place. He estimated about 30 to 35 km. On confirming that the persons in the Quantum vehicle were policemen, he stated that the vehicle had police marking on it. Also the police in the vehicle had rifles. None was in uniform.

[78] He further testified that it was only after he was asked to sign the documents that he was told explained his constitutional rights that he was informed that he was under arrest. Warrant Officer Gumbu asked him to sign these papers.

[79] The Plaintiff denied that he had robbed the spaza shop at Mabvete village. He explained that he worked at Lephalale, formerly Naboomspruit, at Inferior Golf Course, and used the route with the cross roads all the time when on his way home to his village, Malale village. That route goes through Mabvete village. He denied knowing where the spaza shop in Mabvete village was though.

[80] The Plaintiff explained that the R7800 he had on him was drawn from his savings. He confirmed that the R7800 was in a wallet in his Nike branded bag. He also clarified that the police who assaulted him were not the ones who took him to the police station and detained him. He did not see them at the clinic either. What he did recall was that one of the policemen from the Quantum vehicle assaulted him. He was wearing a Bafana team jersey. He confirmed that he was further assaulted at the police station.

[81] The Defendant's version was put to the Plaintiff who denied robbing the spaza shop. He also denied all knowledge of the toy gun that was sent for ballistics testing. He confirmed that he was assaulted severely by the police.

[82] On being questioned by the Court the Plaintiff confirmed that he appeared in court on 5 December 2011, 15 January 2012, in February

and thereafter on a monthly basis until the matter was referred to the Regional Court.

- [83] He could not recall which clinic he was taken to, but confirmed that he was admitted at the Musina hospital.

Submissions of the parties

- [84] In closing arguments the Defendant relied on section 40(1)(b) read with Schedule 1 of the CPA in justification of the arrest and detention. Counsel put up the testimony of the Defence witnesses, read with the warning statement made by the Plaintiff, as evidence supporting all allegations regarding the commission of the offence. Counsel further argued that the injuries sustained by the Plaintiff were as a result of running over hot sand and stones over a protracted period of time.

- [85] Counsel for the Plaintiff submitted that the Defendant had failed to put the version of its main witnesses to the Plaintiff. In addition, counsel asked the court to draw an adverse inference from the fact that the person who made the first report about the robbery was not called to complete the chain of events relating to the cause of the arrest.

[86] Counsel made submissions on the contradictions and discrepancies in the Defence witnesses evidence. He pointed to the weak evidence relating to the toy gun. He asked this court to make an order that the Defendant pay the proven damages of the Plaintiff with costs.

[87] In its reply the Defendant submitted that the testimony of the Plaintiff was not credible, in that:

[87.1] he prevaricated about whether he had in fact signed the warning statement;

[87.2] his testimony regarding the assault in the bushes was unclear;

[87.3] he failed to report the other injuries he sustained in addition to the burn wounds, and

[87.4] his responses were generally evasive.

[88] Counsel also took issues with what he considered to be the change of evidence between what was pleaded and what was testified to in court. The discrepancy between the testimony concerning the arrest on 10 November 2011 as pleaded and that of being arrested three days after being released from the local clinic was placed in issue. The Defendant also took issue with the fact that the description of the police in the Quantum ranged from 4 to 7 police officers during testimony, and the location of the R7800 changed from being in his pocket (as recorded in the warning statement) to being in a wallet in the Nike bag, (as testified in court).

[89] With regard to the absence of crucial witnesses from the scene of the crime, the Defendant argued that in its view the witnesses called were material and persuasive witnesses. The testimony of Warrant Officer Gumbu was particularly relied upon as being supported of the material facts as established by the finding of the firearm, the warning statement, the Plaintiffs attendance at the clinic on 10 November 2011 and his hospitalisation from 15 November 2011.

[90] Finally, Counsel for the Defendant submitted that the place where the Plaintiff was arrested on his own version is consistent with the testimony that the suspects ran in the direction where the Plaintiff was arrested.

The issues in dispute

[91] This court has heard all the evidence. It is faced with two mutually destructive versions of the events that took place on 10 November 2011. It is clear from a review of the testimony of the witnesses that:

[91.1] the versions of the Plaintiff and Defendant are irreconcilable;

[91.2] the Plaintiff alleges that he was arrested, detained and assaulted without lawful by police officers acting in the course and scope of their employment with the Defendant, and that

there was no lawful justification for their actions, as evidenced by his acquittal on the criminal charges pursued.

[91.3] the Plaintiff also alleges that during his arrest his money in the amount of R7800 was taken by the police who arrested him.

[91.4] the Defendant's version is that its officers acted in accordance with the statutory powers accorded them in section 40 and 42 of the CPA read with Schedule 1 thereof in that a robbery was committed at Mabvete village, which incident was reported to them and to which they responded promptly by pursuing the suspects and ultimately arresting both suspects and retrieving the weapon that was suspected to have been used in the robbery.

[91.5] The assault of the Plaintiff is specifically denied by the Defendant whose version is that the injuries sustained by the Plaintiff were as a result of him taking off his shoes and running barefoot on the hot rocks and sand in the forest.

[91.6] there is a material dispute with regard to whether the Plaintiff assisted the police in the recovery of the firearm that was allegedly found in a baobab tree and then sent for ballistic testing.

[92] The respective versions of the Plaintiff and Defendant are completely irreconcilable. This court must therefore make a careful assessment of

the credibility of the various witnesses, their reliability, and the probabilities of their respective versions.

[93] The court in **SFW Group Ltd & Another v Martell Et Cie & Others** 2003 (1) SA 11 (SCA) had the following to say with respect to how to approach two irreconcilable versions and circumstances where a number of peripheral areas of dispute may have a bearing on the probabilities:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; (c) the probabilities. As (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to

*experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b), and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."*¹

[94] The approach that this court takes in the analysis of the evidence tendered by witnesses for the Defence and the Plaintiff is aligned to the approach suggested by the court in the **SFW Group Ltd & Another v Martell Et Cie & Others** matter.

[95] However, prior to delving into an in-depth analysis of that evidence, it is apposite to briefly sketch the provisions of the CPA that the Defendant relies on, which prescripts give contest to the conduct of the police officers who were involved in the arrest and detention and alleged assault of the Plaintiff.

¹ Id at para [5]

Arrest and detention as provided for in the Constitution and in the CPA

- [96] Section 205 (3) of the Constitution provides that the objects of the police are to *"prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law"*.
- [97] The arrest of a suspect without a warrant is intended to assist the police in bringing an offender to justice by investigating the offence that has been reported to them whilst simultaneously protecting the interests of the community, bearing in mind the infringement that an arrest visits on the rights of an individual. Arrest is therefore a means to an end and not an end in itself.
- [98] The basic principles that underlie the object of an arrest without warrant include the establishment of the jurisdictional fact that a reasonable suspicion had been formed by the arresting officer that the suspect had committed an offence, and in this instance, a Schedule 1 offence.
- [99] Provision is made in section 39, and 40 of the CPA for forcibly confining the body of a suspect should this be the most effective and appropriate manner of effecting an arrest. The courts have specifically

noted that the effective investigation and prevention of crime is as important as the right to liberty.

[100] A fair balance must therefore be struck in the manner in which the police use their discretion in making the judgment call to physically arrest a suspect by confining his body and detaining him as opposed to permitting him to retain his liberty on the understanding that he will co-operate with their investigations and present himself to them as and when required.

[101] As stated in **Minister of Safety & Security v Van Niekerk** 2008 (1) SACR 56 (CC), Standing Order (G) dealing with arrest and the treatment of an arrested person *"makes it clear that arrest is a drastic procedure which should not be used if there are other effective means of ensuring that an alleged offender could be brought to court"*.

[102] It is a requirement of a fair process that the police approach the arrest and subsequent detention of a suspect with an open mind and within the parameters required of section 12(1) of the Constitution which provides that:

"(1) Everyone has the right to freedom and security of the person which includes the right –

(a) Not to be deprived of freedom arbitrarily or without just cause;

(b) Not to be detained without trial;

- (c) *To be free from all forms of violence from either public or private sources;*
- (d) *Not to be tortured in any way; and*
- (e) *Not to be treated or punished in a cruel, inhuman or degrading way”.*

[103] In the interests of totality, section 12(2) of the Constitution provides for the right to bodily and psychological integrity, which is a right that is implicated in the Plaintiff's claim before this Court. It is apposite to mention that sections 7, 8, 9, 10 have equal bearing and application in the manner in which the police and this Court approaches issues of the liberty of a suspect and the protections afforded by the Constitution.

[104] Of particular significance to these proceedings is section 35 of the Constitution in its totality, as it firmly establishes a legal framework within which an arrest person, a detained person and an accused person arraigned for trial must be dealt with.

[105] Section 36 of the Constitution, in providing for the limitation of the rights in the Bill of Rights, prescribes that such rights can only be *“limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”*, and taking into account the

factors set out in section 36(1)(a) to (e) thereof. I do not find it necessary to enumerate these factors here.

[106] Related constitutional rights that have tangential relevance to these proceedings include the right to privacy, the right to freedom of movement and the right not to be deprived of property except in terms of a law of general application, which includes the prohibition against the arbitrary deprivation of property. As indicated, these more tangential rights are probably of greater relevance to part two of these proceedings should it become necessary to place the issue of quantum on this Court's roll.

[107] In concluding this aspect of my judgment, it is apposite to review the provisions of section 40(1)(b) read with Schedule 1 of the CPA and section 42(1) which the Defendant relies on. Section 40(1)(a) and (b) provide that:

"(a) a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence" or

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

[108] Section 42(1)(a) on the other hand permits the arrest by a private individual of a person without warrant if such person:

- (a) *"...commits or attempts to commit in his presence, or whom he reasonably suspects of having committed an offence referred to in Schedule 1."*

[109] Section 42(2) provides that any *"private person who may without warrant arrest any person under subsection (1)(a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein."*

An analysis of the testimony of the witnesses

[110] In summary, the first time that the Defendant's version was put on record was when the trial began. Despite this, it is the Defendant that complained that material parts of the Plaintiff's evidence had not been placed on record. The court does not agree with the assessment of the Defendant, as will become evident in the analysis of the evidence tendered by the various witnesses.

[111] The first witness for the Defence was Mr Shandukani. It turned out that he did not witness the robbery at the spaza shop. He was not in the vicinity of the spaza shop when the robbery took place. He was not called by the shop keeper but by her husband, to whom the robbery

was reported by the shop keeper, and who was ostensibly not on the premises at the time. Mr Shandukani lived about 50 meters away from the shop. He was told of the material events that occurred when he arrived at the shop. His recollection of the material events differs from the testimony of Constable Netsamba, who made no reference to the shop keeper being robbed when she went to the bathroom. He instead referred to the shop keeper being asked to open the enclosure into the spaza shop

[112] Mr Shandukani was a member of the Police Forum. The material part of his evidence related to the pursuit of the after the suspects who had been described to him on the basis of hearsay evidence. They chased the Plaintiff for 3 to 4 hours. He referred to the Plaintiff being in possession of a firearm which he could not describe as he was about 150 meters away from the suspect when he noticed the firearm.

[113] He referred to the Plaintiff:

[113.1] stopping to ask for some water at a village;

[113.2] taking his shirt, and later his shoes off, yet no shirt or shoes were collected as evidence of the items collected during or after the chase;

[113.3] as having thrown stones at the group that was pursuing him;

[113.4] as having resisted arrest.

[114] Mr Shandukani gave the court the impression that he was tailoring his evidence to suit the version that the Defendant was putting up. No other member of the community group that pursued the suspects was called to give evidence. His hearsay evidence on what happened during the robbery is not only hearsay, it is contradictory.

[115] There is some uncertainty in the role of the second Defence witness, Constable Ramphabana whose evidence concerning the arrest of the Plaintiff is different to that of Mr Shandukani. Mr Shandukani gave the impression that the community group apprehended the Plaintiff before Constable Ramphabana arrived. Finally, he denied being in court when the Plaintiff was acquitted, which denial was challenged.

[116] The evidence of Constable Ramphabana was unclear with respect to the description of the suspects that he was pursuing. He persisted in asserting that on arrest, the Plaintiff was wearing a black shirt, as described to him, yet Mr. Shandukani told the court that the Plaintiff took off his black shirt and shoes. Constable Ramphabana said and ostensibly did nothing about the Plaintiff's shoes, despite being a police man of 9 years standing. He said that he noticed that the Plaintiff's shirt was torn as a result of running through the bushes. He testified that they were in the forest for 2 hours, chasing after the Plaintiff.

[117] The incident regarding calling for assistance from the Isuzu owner does not tally with the evidence of Mr Shandukani. The impression given by Constable Ramphabana was that the owner of the Isuzu van was only summonsed after he arrested the Plaintiff. The testimony of Mr Shandukani was that the Isuzu van owner was summoned before the police arrived.

[118] The court has difficulties believing the version put up by these two witnesses for the Defendant. They did not appear to be credible witnesses, but rather witnesses who were repeating facts that they themselves were uncertain about. Where there were gaps, they simply filled the gaps.

[119] A 2 to 3 hour chase on foot, as testified by these two witnesses, sounds incredulous to this Court. The description of a firearm by Mr Shandukani from the distance of 150 meters is dubious. His testimony on what was stolen during the robbery is hearsay evidence. The taking off of the shoes and shirt are equally far-fetched, particularly as the result could only have been that the Plaintiff would be the worse for wear if he took the shoes off in hot sandy and rocky terrain. No records of the taking of the Plaintiff to the clinic immediately after his apprehension were put up, despite the testimony that the Plaintiff was taken to the clinic in the Isuzu van. The owner of the Isuzu van was not asked to confirm any of the events of the day.

[120] One of the most concerning aspects of Mr Shandukani's evidence was his categorical denial of the version put up by the Plaintiff, even on matters, such as the alleged assault by the police, that he would have had no knowledge of. Constable Ramphabana on the other hand kept on referring to one suspect as opposed to two, giving the impression that, on his version, he joined the community group at a very late stage, despite stating that it took him five minutes to catch sight the community group that was pursuing "*the suspect*". He confirmed that no money was found on the Plaintiff. Unlike Mr Shandukani, he made no reference to the Plaintiff being in possession of a firearm.

[121] These two witnesses were not candid with the court. As persons associated with the police, indirectly and directly, their bias towards the SAPS is apparent in their testimony. This court has no hesitation in rejecting the version put up by these two witnesses insofar as their evidence relates to the pursuit of the Plaintiff. It is a version that was not pleaded, and first emerged in court. I find their evidence to be unreliable in material parts, as enumerated above. The weaknesses in their testimony was objectively shown up when the Plaintiff was acquitted on 14 January 2013 because the complainant clearly could not identify him as one of the suspects.

[122] The probabilities of this version of events leading to the arrest and detention of the Plaintiff being true is non-existent.

[123] The remaining SAPS members who testified in court did their profession a disservice. On an evaluation of the evidence tendered in its totality, it is patent that these officers were aware that there were no objective facts that could have influenced the decision to arrest and detain the Plaintiff. The evidence of Warrant Officer Dagada, Acting Commander of Tshamutumbu Police Station, was particularly disappointing in its content. He collected the Plaintiff from the clinic on 10 November 2011, yet could not explain why no entry concerning that visit was made in the investigation diary or the OB book.

[124] To compound his version, he confirmed to the court that he did not go to the spaza shop after receiving the report of the robbery nor did he meet the owner or shop keeper. To the extent that he ought to have overseen the convening of an identity parade by the investigating officer, he failed to do so.

[125] The evidence of Constable Netsamba with regard to the injuries he observed on the Plaintiff when he arrived at the police station was that the Plaintiff's skin underfoot was peeling off. This is inconsistent with the evidence of Warrant Officer Dagada who collected the Plaintiff from the clinic, and who testified that the Plaintiff's feet were bandaged.

When asked about this by the Court, Constable Netsamba retracted his testimony and stated that he did not see how the Plaintiff's feet were as they were bandaged.

[126] The testimony of the investigating officer was equally unsatisfactory. The most concerning aspect of his testimony related to the finding of the toy gun which was then sent for ballistic testing. This presumably was supposed to be the firearm that Mr Shandukani saw at a distance of about 150 meters. There is no evidence to show that the toy gun that was recovered was pointed out by the Plaintiff.

[127] The manner in which the investigating officer handled the questions noted by the Public Prosecutor on 14 November 2011 also raises concerns about the reasons for the arrest and continued detention of the Plaintiff. The Plaintiff was in employment on arrest. He had a fixed abode. None of these factors appear to have been confirmed or verified by the investigating officer. The Plaintiff posed no particular danger to any member of the community.

[128] This court is satisfied that the conduct of the investigating officer and the other members of the SAPS, including Mr Shandukani, is consistent with the suggestion that the arrest and detention of the Plaintiff was not for the purposes set out in sections 39 and 40 of the CPA. These policemen did not conduct themselves as professional

policemen, driven by the constitutional objective set out in section 205 of the Constitution. What they did smacks of a cover up of the truth of what really happened on 10 November 2011. It is to this version that the Court now turns.

[129] The Plaintiff took the stand and testified about the events of 10 November 2011. Unlike the Defence witnesses, his testimony was clear, it rang true, it was presented in great detail, and it was broadly consistent with the essential version that had been put up in the pleadings, both prior to and after the amendment thereof. He was cross examined about the reference in the pleadings to keeping the money in his pocket as opposed to keeping it in a wallet in his Nike branded bag. This interrogation he handled with clear responses that his instructions to his attorney were that the money was in his bag.

[130] The Plaintiff's testimony was that he was arrested approximately 35 km from Mabvete village. The SAPS who apprehended him mentioned the robbery at the spaza shop. He denied all knowledge of it. When asked about the money he had on him he explained where he got it from and offered to go to the bank with the police to prove that it was his.

[131] The assault that he described was perpetrated on him is consistent with the injuries he sustained and with the order by the magistrate that he be hospitalised so that he could receive treatment. He spent 7 to 8

days in hospital, a fact that attests to the severity of his injuries. These are the first set of medical records that were introduced in evidence. His fear of the police is believable.

An evaluation of the probabilities of the two irreconcilable versions

[132] The only common cause factors that are supported by incontrovertible evidence relate to the medical treatment of the Plaintiff at Musina Hospital, his detention at Tshumuthumbu Police Station, his court appearances, his acquittal on 14 January 2013, and the testimony of the complainant who testified that he was not one of the suspects who robbed her spaza shop.

[133] In giving context to the analysis of the evidence carried out hereunder, I wish to preface my evaluation and findings by referring to the points made by the Court in **Ex parte Minister of Safety and Security: In Re S v Walters** 2002 (4) SA 613 (CC) at para 54 where it is stated:

"[54] In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

(a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.

(b) Arrest is not the only means of achieving this purpose, nor always the best.

(c) Arrest may never be used to punish a suspect.

(d) *Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.*

(e) *Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.*

(f) *In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances."*

[134] I accept that, as stated by the court in **Minister of Safety & Security v Van Niekerk** 2008 (1) SACR 56 (CC)

*"The constitutionality of an arrest is heavily dependent on the factual circumstances."*²

[135] The primary issue in dispute is whether the arrest and detention of the Plaintiff was lawful. On this court's assessment and evaluation of the evidence tendered, its finding is that there is no merit in the version put up by the Defendant. The version of the Plaintiff is accepted as being the most credible, reliable and probable. This court has observed him closely when giving his testimony, and found him to be an honest and forthright witness.

² Id at para [17]

[136] On the Plaintiff's version, which this court accepts, there was no cause for the police to arrest the Plaintiff on the spot or at all. Had they had well-grounded suspicions regarding his participation in the robbery, nothing prevented them from verifying his employment and residential details and then arresting him when more thorough investigations had been conducted into the robbery³.

[137] This approach would have been in alignment with not only Standing Order G as noted in **Minister of Safety & Security v Van Niekerk** 2008 (1) SACR 56 (CC), which "*makes it clear that arrest is a drastic procedure which should not be used if there are other effective means of ensuring that an alleged offender could be brought to court*".

[138] The approach of the SAPS was also inconsistent with **Ex parte Minister of Safety and Security: In Re S v Walters** (supra) in which the court mapped out clear guidelines that would assist in the arrest and detention of suspects. The four material points emphasised were that:

"[54]...

(a) *The purpose of arrest is to bring before court for trial persons suspected of having committed offences.*

(b) *Arrest is not the only means of achieving this purpose, nor always the best.*

³ **Ex parte Minister of Safety and Security: In Re S v Walters** 2002 (4) SA 613 (CC at para [28], [44]. And [49

(c) Arrest may never be used to punish a suspect.

(d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.

[139] There are various points at which the police were not truthful in their version about the events that occurred. When cross examined Warrant Officer Dakada gave highly unsatisfactory answers that shook his credibility and reliability as a witness. In this regard, I point to some of the entries in the investigation diary which were interrogated and found to be suspicious. The finding of the firearm was highly questionable.

[140] In addition, the probability of chasing a suspect through bush and forest for 3 to 4 hours is improbable. The version that the Plaintiff took off his shirt and shoes is not only improbable, but is also contradicted in the evidence of Constable Ramphabana.

[141] The failure by the SAPS to take the Plaintiff to the clinic regularly between the 11 November 2011 and 13 November 2011 supports the Plaintiff's version that in that period he was severely assaulted. This court accepts the Plaintiff's version of the assaults that he suffered during his detention, as well as the reason for not bringing these to the attention of the Magistrate or the Legal Aid practitioners who noticed his pain and discomfort in court.

Finding on the discharge of the onus

[142] This court is satisfied that the Defendant has failed to discharge the onus, on a balance of probabilities, of proving that the arrest and detention of the Plaintiff was lawful, and effected on the basis of section 40(1)(b) read with section 42(1)(a) or section 42(2) of the CPA.

[143] The most rudimentary investigations, such as verifying the residential and employment address of the Plaintiff, and conducting an investigation parade, was not done.

[144] The material similarity between the evidence set out in the pleadings and that of the Plaintiff struck the court. The tentative approach by the Defendant in giving a version in its pleadings created the impression that the version was still under consideration.

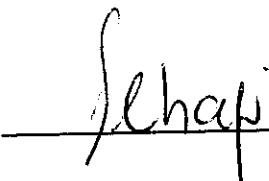
[145] The Plaintiff has succeeded in discharging the burden of proving that he was severely assaulted by members of the SAPS, who fall within the authority of the Defendant.

[146] For these reasons I find that the arrest and detention of the Plaintiff, as well as the assaults he suffered, were unlawful. The Plaintiff therefore succeeds on its claim on the merits. The question of the quantum of damages, if not settled between the parties, should be set down before this Court.

Order

[147] I make the following order:

1. the Plaintiff succeeds on the merits in respect of the claim of unlawful arrest, detention and assault; and
2. the Defendant is ordered to pay the costs of these proceedings.



**GCABASHE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Counsel for the Plaintiff: Adv. J P Nel

Instructed by: Erwee Attorneys, c/o Dyason Attorneys, Nieu Muckleneuk

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Instructed by: The State Attorney, Pretoria

Date of Hearing: 14 – 18 November 2016

Date of Judgment: 15 November 2016