REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 11180 / 2014
& 11181/2014

In the matter between:

SANDILE MDLALOSE First Plaintiff
NKOSINATHI DUH NTULI Second Plaintiff

and

THE MINISTER OF POLICE First Defendant
DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

Delivered on: 19 May 2016

JUDGMENT

BOQWANA, J

Introduction

[1] The plaintiffs brought an action for damages against the defendants on the basis that they were wrongfully and unlawfully arrested, unlawfully detained by the police and maliciously prosecuted.

[2] The two matters were brought under separate case numbers, and consolidated by agreement between the parties as the issues pertaining to the action arose at the same time involving the two plaintiffs. For the sake of convenience, Sandile Mdlalose ('Mdlalose') is cited as the first plaintiff whilst Nkosinathi Ntuli ('Ntuli') is cited as the second plaintiff. The parties agreed to separate the issue of merits from the quantum and the matter accordingly proceeded on merits only.

[3] It is common cause that the plaintiffs were arrested on Tuesday 20 November 2012 by members of the South African Police Service acting within the course and scope of their employment with the first defendant. They were subsequently detained and charged with house robbery which allegedly occurred on 19 November 2012 at approximately 22h00 in Montclair, Mitchells Plain. They appeared in court on 23 November 2012 and members of the second defendant, also acting within the course and scope of their employment with the second defendant, decided to prosecute. The plaintiffs remained in custody until 19 March 2013 when they were released after charges were withdrawn.

[4] The defendants deny allegations of wrongfulness and unlawfulness and allege that the arrest and detention were carried out in terms of s 40 (1) (b) of the Criminal Procedure Act, 51 of 1977 ('the Criminal Procedure Act') and s 50 (1) of the Criminal Procedure Act, respectively. They further deny any malice in the prosecution of the plaintiffs, alleging that the charges against the plaintiffs were withdrawn provisionally pending further investigation.

[5] The evidence led was quite extensive and went on for a number of days. Closing argument was heard much later owing to the parties arranging for the transcription of the record of proceedings.

[6] Both plaintiffs testified. The first plaintiff also called Nicky Ngcobo ('Ngcobo'), who allegedly resided at the same premises as he did during the period of the alleged house robbery in Montclair. The defendants called four witnesses: Jerome Alliston Malan ('Malan'), Ivan Angus Ryneveldt ('Ryneveldt'), Deon Clive Phillip De Villiers ('De Villiers'), all three were members of the first

defendant, and Natasha Lynn Simons ('Simons') who was a member of the second defendant.

Evidence

Plaintiff's case

[7] Mdlalose testified that during November 2012 he was staying in Delft but could not recall the full address of where he resided and specifically the house number. He, however, recalled that the address was in Blackgum Street. He lived at the same address as Ngcobo who had his own room in the same house.

[8] Mdlalose had been in custody for an unrelated matter and was released on 19 November 2012 at approximately 16h00, having been detained since October 2012. After he was released by the Magistrates Court in Cape Town on 19 November 2012, he went back to his place in Delft using a taxi. He did not have money for the taxi and only managed to get money at approximately 18h15. He only arrived home at approximately 19h00. On his arrival, he encountered Ngcobo and informed him about his whereabouts because Ngcobo did not know about his incarceration. He and Ngcobo then had something to eat, watched TV and went to bed. He never left home until the next morning, Tuesday 20 November 2012, when he woke up and went to the barber shop, Luzuko, in Phillipi to cut his hair. He was due to appear in court in Strand later that day but did not have money in order to take a taxi. At about 10h00 that morning he met his friend Ntuli whom he had not seen for a long time and asked him for the money that he needed in order to go to court in Strand. He definitely was not with Ntuli on 19 November 2012.

[9] After telling Ntuli about his money problem, Ntuli advised him that he did not have money and they then went to Mandalay to visit other friends where Ntuli was going to ask for money. Upon their arrival in Mandalay, they found people drinking and having meat and they joined them. There were all together eight men, including himself and Ntuli, at the house in Mandalay and about six or seven women. Mdlalose did not drink because he was still going to appear in court that day. As they were busy enjoying the braai and drinks, police came and pointed at

them with firearms. The police searched them but found nothing. The police then put the eight men into the back of the police van and left the women behind.

[10] The eight men that were arrested were taken to the Mitchell's Plain police station and the time was between 13h00 to 14h00. They were already arrested at 15h00 in the afternoon as depicted in the SAP 14 register. They were not told why they were arrested. On their arrival at the police station they were taken into the cells.

[11] The following day on Wednesday 21 November 2012, they heard the cell guard saying that '*these are the robbers*'. On Thursday 22 November 2012, the investigating officer arrived and asked all eight of them to stand in one line. He took pictures of all of them individually with a phone. The investigating officer then left with the phone and told them that those that were not pointed on the photographs by the complainants would be released but those pointed out would remain in custody.

[12] The investigating officer came back after 9 o'clock in the evening. When he arrived he pointed at Mdlalose and Ntuli and told them to stand aside. He then informed them that the complainant pointed them as those that had robbed him. He released the six men that were arrested with them whilst he and Ntuli remained in custody. They were then charged and locked in a cell by the investigating officer. The investigating officer told them that they were going to appear in court in Mitchell's Plain on Friday.

[13] On Friday 23 November 2012, they appeared in Mitchell's Plain court and the case was postponed. He did not bring a bail application because on the day he was supposed to appear for bail he was informed that there was an outstanding warrant for his arrest for the case that he was supposed to attend in Strand on 20 November 2012. He could not attend the case in Strand because he was arrested by the police on that day in Mandalay. The case in Strand was finalised and he was found not guilty and his co-accused was convicted. Due to him being refused bail, he stayed in custody for about 4 months (i.e. from when he was arrested on 20

November 2012 to 19 March 2013 when the case was withdrawn). He did not know why the case was withdrawn.

[14] He informed the investigating officer that he never met Ntuli on 19 November 2012 and he was not at the scene of the crime in Montclair on 19 November 2012 but instead he was at home. Ngcobo who was with him could testify to that.

[15] In cross-examination, he conceded that he was not in custody at the time of the alleged robbery but stated that he was at his house in Delft. He denied that he was part of the robbery. He maintained that he had told the police that he was not involved in the robbery and he had an *alibi* even though his warning statement stated that '*I was explained my rights to remain silent and elected to exercise my right to remain silent. I will appoint legal representation'*.

[16] He further testified that he did not get the money from Ntuli or the other people in Mandalay as the police came whilst they were still eating and whilst he was still waiting. He did not know the address of the house in Mandalay. He did not know anything about items or cell phones confiscated by police in Mandalay and that issue never arose in court (presumably during the bail proceedings). A phone was used to take photos and not a photo album. He did not see why he could not get bail and remained in custody for 4 months. They were charged based on hearsay. The investigating officers were supposed to investigate the matter before they were charged and not waste time by bringing them before court without any evidence. There was, accordingly, no justice in having him remain in custody. He told the investigating officer about his *alibi* but the investigating officer refused to go to the place where he said that he was and to the person he said he was with and that is the reason why he decided that he would not make a statement and he would only speak in court.

[17] Ngcobo testified that during the time of the incident he was staying with Mdlalose at number 29458 Blackgum Street in Delft. In November 2012, Mdlalose arrived [at home] between 6:00 and 7:00 in the evening. He did not know where he

was. Mdlalose explained the cause of his absence for the period he was not at home. They then slept up until the next morning. Ngcobo then left for work. He usually went to bed at 22h00. The house they lived in had two bedrooms and he and Mdlalose slept in separate rooms. The police never came to ask him about Mdlalose's whereabouts on 19 November 2012.

[18] In cross-examination, Ngcobo testified that he kept the keys for the house therefore Mdlalose would not be able to get out of the house in the evening. It would also not have been possible for Mdlalose to exit the house through the windows as the windows had burglar bars. He noticed that Mdlalose did not have a key when he found him outside on the night he arrived. Ngcobo was responsible for rent and food because he brought Mdlalose to Cape Town. He considered number 24948 which was alleged in the particulars of claim as the address where he and Mdlalose lived.

[19] Ntuli testified that on 20 November 2012 at approximately 10 o'clock in the morning he met Mdlalose whom he had not seen for a month. They were happy to see each other. He got Mdlalose to get into his vehicle and they went to Mandalay. On their way there Mdlalose told him about the money that he needed and about the case that he had been arrested for. They enjoyed themselves in Mandalay for two hours after which the police arrived. The police put all the eight men that were in the house in a police van and left the three women behind. Whilst they were in detention, on that same day, they overheard the cell guard that was walking up and down saying that they were robbers. It was not clear to them what robbery the cell guard was talking about. They remained in custody for Tuesday, Wednesday and on Thursday noon during the day a certain man arrived and took pictures of the eight of them whilst they were standing one by one using a phone. This man told them that he will release those who were not involved in the crime. The pictures were taken at close proximity. When the man finished taking pictures he left. All eight of them were African males. This man came back at 9 o'clock [in the evening] and took him and Mdlalose aside. He told them that the two of them

were pointed by the people that were robbed. He charged them and released the others. He told them that he was charging them for the robbery that happened in Montclair but he did not tell them exactly where this robbery took place in Montclair. This man (who turned out to be the investigating officer) asked him if he wanted to make a statement but he never forced him. He told the investigating officer that he had proof that he did not know anything about the incident. The investigating officer wrote something down but he did not know what it is that he wrote. It was a long time ago but he could see that the signature that appeared on the warning statement was his. When they appeared in Court on 23 November 2012, the matter was postponed for 7 days. Mdlalose was told that he had a warrant issued against him and that Ntuli was the only one who could apply for bail. He told the court (at the bail proceedings) that he was not at the scene of the crime and that he had an *alibi* when this incident happened.

[20] He testified that he knew nothing about the items that were confiscated at a house in Mandalay. He had never seen them and he did not want to lie. He did not reside at those premises and he was not charged in relation to those items but for robbery. The person that could give the *alibi* was his girlfriend but he did not tell the police about the girlfriend being the *alibi* witness. He was released in March having been arrested in November.

[21] In cross-examination he testified that the investigating officer did not ask him what type of *alibi* he was talking about and that it was the duty of the investigating officer to find out himself (so that he could investigate). He confirmed that the signature on the warning statement that recorded that he exercised his right to remain silent and that he would speak in court, was his. He saw that the investigating officer was not interested in what he was telling him regarding the *alibi*. The investigating officer told him about his legal rights. He told the investigating officer that he did not want to make a statement. The *alibi* was not mentioned during the bail application possibly because at that stage the lawyer was simply asking for bail. When one looked at the photographs one could

not tell whether a person was shorter or taller as the photographs were taken from the waist up. He was informed by the Magistrate that he could not be given bail because the case (he was charged with) was serious. When he went back to court in March, the Magistrate told him that the case was withdrawn but he never explained anything again about the seriousness of the case. He doubted that the case was provisionally withdrawn and that it would be reinstated if the complainant resurfaced. According to him, complainants could easily be contacted as one did not require a passport to travel from Gauteng.

Defendant's case

[22] Ryneveldt testified that he is detective sergeant stationed at Lentegeur police station and has been a police officer for 11 years. On 19 November 2012, he was on stand-by duty for serious and violent crimes in Mitchell's Plain. When he received a phone call at approximately 22h30 in the evening informing him of a house robbery that took place in Montclair. He arrived at the scene at 23h00 and was addressed by Sergeant Leibrand who was the first member on the scene and Constable Booysen. He then saw the complainant, Sifiso Tshabalala ('Tshabalala') and about six other people who were in the house. These people were visibly traumatised, they could hardly speak and they were shocked by what happened. There was liquor in the house but he did not know if they were intoxicated. He could see that they were shaking. He was told that three males appeared with firearms and pointed at all the occupants of the house and robbed them of cell phones, bank cards, ID Books and a motor vehicle.

[23] He managed the scene and called all the role-players. After that he started to task his informer and told him that he was looking for information regarding what happened in the house robbery that night. He also told him that there were three males that were involved that robbed the complainant and tenants pointing firearms at them. At that time the photographer and the fingerprint expert arrived. He then briefed the street committee and the neighbourhood watch about what happened so he could get information about the alleged suspects.

[24] The docket was completed by the first SAPS member on the scene but he (Ryneveldt) took charge of the docket and a case under Mitchell's Plain CAS 20137/11/2012 was registered. On 20 November, the next day after 14h00, the docket was referred to the detectives for further investigation. After 14h00 he received information from the informer that he had relevant information that the suspects that were involved in the house robbery were possibly at a house in Mandalay. He could not disclose the identity of the informer as it would jeopardise the investigation.

[25] He then consulted his senior that day and they got the technical response team ('TRT') from Mitchell's Plain to go ahead and safeguard the scene. This was because firearms had been used in the robbery and they were not sure what the situation was in the current house. He and De Villiers proceeded to the house after TRT had taken control of the scene. At the house they found eight black males in the lounge. He started to write down the information about what he saw in front of him. De Villiers addressed the people in the house. He noticed that the informer was among the people in the house. He could not speak to him because he did not want to expose his identity. He was told by De Villiers that they found cell phones, bank cards and identity documents for which the people in the house could not explain ownership. Because there were three suspects mentioned in respect of the robbery that happened the night before, they arrested all eight males that were found in the house. The eight males were all arrested because he could not speak to the informer at the time. They took them to the Mitchell's Plain police station for questioning and to ascertain identification by the witnesses. He was not part of the photo parade. The investigation was given to Malan. He made entries in the investigation diary regarding the role he played.

[26] In cross examination he testified that he could not smell liquor on Tshabalala. Tshabalala was also shocked but was able to speak to him than anybody else. He called the photographer at the scene of the house robbery because a serious offence was committed. He does not know what happened to

those photographs because he is not an investigating officer in the matter. The informer told him that he must act fast because the people he was with in the house spoke about bank cards that were taken the night before. He could not recall if he asked who those cards belonged to. What he was told by the informer could not have been a coincidence. He took the description of the suspects from Tshabalala. He effected the arrest at 15h00. The informer was among the eight men that were detained. The informer did not bring him any further information at a later stage. When asked why he arrested people without establishing who the items found belonged to, he stated that De Villiers told him that he found the items and that they should proceed to arrest. De Villiers was his superior and had to give him instructions. He was not at the bail application hearing. He was challenged as to why he only made an entry in the investigation diary that all witnesses were intoxicated but only mentioned in court that they were traumatised. He stated that he forgot to make an entry. He made no entry that there was an informer but told Malan, the investigating officer who took the matter over. The informer was not in the house robbery scene in Montclair and did not see the suspects, he was just told about the kind of property that was stolen. When the informer returned with information the next day it was protocol to follow up on that information. Once the case was passed on to Malan, he (Ryneveldt) was not involved.

[27] De Villiers testified that he is a warrant officer in the SAPS stationed at Lentegeur Police Station with 30 years' experience. During 2012 he was stationed at Mitchell's Plain. On 20 November 2012, he was in his office and after 14h00 Constable Ryneveldt came to his office and informed him that he had received information from his informer about suspects that were allegedly involved in a house robbery that took place the previous evening. Ryneveldt informed him that they needed to act as a matter of urgency because his informer was with the alleged suspects at the premises and he did not know how long they were going to be at those premises. He contacted the TRT unit to secure and make the area safe as the alleged suspects could be armed. The TRT commander indicated to him and Ryneveldt that the premises were safe and that they may enter. De Villiers and

Ryneveldt noticed a member of TRTguarding two female persons outside. When they entered the house they found that there were eight male persons lying down on the floor with a TRT person guarding them. According to the procedures, the TRT will neither collect nor search anything from the premises. Their primary duty was to secure the premises. Ryneveldt was the investigating officer in charge of the premises. De Villiers noticed phones on the table and on the floor next to the table. He asked the men that were lying on the floor who the owner of the house was. No one indicated that they were the owner but there was one person who indicated that he resided in those premises. He asked that person about the phones and everything that was lying on the ground and on the table. The said person could not tell where the phones and other articles came from. He then told this person to bring all the items to him so he could place them in a sealed bag until he could tell him whom the phones belonged to. This person brought the items to him accompanied by a TRT member. He kept all the items because Ryneveldt was busy talking to people on the ground. As he was asking the resident of the house about the items, none of the people on the ground stood up and claimed ownership of the phones because he could recall that the people on the ground still had their personal items on them. He did not confiscate those from them. Altogether the items found were 9 cell phones, identity documents, bank cards and three registration papers of three different vehicles. There was also a set of video tapes which was on the couch. When Ryneveldt finished interviewing people on the floor De Villiers instructed that they search the premises. They searched premises with the permission of the person who resided there. They found nothing incriminating from the search. Ryneveldt informed him that they had enough evidence to arrest the people and take them to the police station for questioning as they could possibly have been involved in the house robbery of the night before. The eight males were then arrested and the two females left behind because according to Ryneveldt they had nothing to do with the house robbery in Montclair. He kept the confiscated items until they were collected by the investigating officer. He wrote a statement and gave it to Malan with the items.

[28] In cross examination, De Villiers testified that Ryneveldt took the decision to arrest because that was his prime function. He conceded that Ryneveldt was wrong when he said that he (De Villiers) gave an instruction to Ryneveldt to arrest. According to him, Ryneveldt was present when the items were discovered. He disputed Ryneveldt's evidence that he did not know how the items were found. According to him, Ryneveldt was moving around talking to those that were lying on the ground. He would also have arrested the people if he was the one to make that call because there were reasonable grounds to do so. If he had to establish a link between the items and the suspects, he would take the items to the complainants to identify them and arrange for an ID parade. Steps would then be taken to release the suspects within 48 hours if there was no positive linkage. He would not know if the alleged suspects were instructed to put their cell phones on the table by members of the TRT but he knew that TRT are instructed not to search anyone but to simply secure the area. They did not take personal property of the suspects. He did not ask the TRT members how the scene was when they found it, i.e. whether there were phones on the table or how those items landed on the table. He however conceded that the TRT members had to check if the alleged suspects had firearms or sharp items in their possession. If they were instructed by TRT to put their personal items down, he would have expected their wallets to be there also but there were no wallets. The person arresting someone should prepare a statement so that the investigating officer could see how the person was arrested. He would never approve that people are arrested without a statement. He did not know if the men lying on the floor had cell phones despite those on the table. He conceded that there would be no reason to arrest people that were outside the house. He was confronted with a contradiction between his testimony and his written statement where he mentioned that there were six men in the house and two other people outside. He retorted that the statement could be incorrect. He stated that the two persons that were outside were females that he ordered to be brought inside. The second discrepancy in the statement was that there were two females inside the house. He attributed that to a mistake. He did not read his statement after

he had typed it because he was confident that it was correct. He agreed that before a person can be arrested, he must ask that person about where the object was obtained; if the person is unable to give a response then he can be arrested. He agreed that he only spoke to the person who resided in the house but was expecting those that were lying on the floor, including the plaintiffs, to react and say something about the stolen products but they failed to give a satisfactory answer. He conceded that he did not talk to the plaintiffs but stated that he spoke to the group. He was upset when Malan collected the exhibits after two days because they were lying in his cupboard. He did not think about the people that were arrested. The suspects were arrested for possession of suspected stolen property but he did not think they were charged for that. He did not keep the exhibits for any cynical reason. He was available but the investigating officer did not come to collect it.

[29] Malan testified that he is a warrant officer at the South African Police Services. During 2012 he was stationed at Mitchell's Plain police station. On 20 November 2012 at about 14h00 he was informed by Captain Petersen, his commander, that he should investigate a case under Mitchell's Plain CAS 2037/11/2012. The case concerned a house robbery that took place in Mandalay (sic) at 4 Camelia Street on 19 November 2012, the evening where the victims were robbed with firearms and had items taken from them. He established from a statement made by one of the victims, Tshabalala, that there were seven victims involved. This statement ('Tshabalala's A1 statement') was taken by a police officer when the case was reported. From it he also established that cell-phones, wallets, cash, bank cards inside the wallets and a motor vehicle which was parked outside the house, were taken by the robbers. In the Tshabalala's A1 statement it is recorded that the victims were attacked by three black males and some of the victims sustained injuries.

[30] Malan went to visit the victims in order to interview them. They were not at the house where the incident occurred but at their workplace known as IPSOS in

Constantia where they were busy with a certain project. He visited IPSOS on that same afternoon of 20 November 2012. By that time he had been informed that there were already eight suspects in custody but he had to deal with the victims first. He was not involved in the arrest of the victims and was not at the scene of arrest. At IPSOS he was told by the manager, Trudy, that the victims had been under counselling treatment because of their state. They were so emotional that it was impossible for him to speak to them. He arranged to go back the next day, i.e. on 21 November 2012.

[31] After he could not interview the victims due to their alleged emotional state, Malan went to the Mitchell's Plain's police cells still on 20 November 2012 and questioned the eight suspects. None of them could give him information about the incident. He then informed them that he had to do a photo parade because the witnesses were not able to attend the identification parade as they were busy with a counselling programme. It was not possible to get them to the police station and he therefore asked to take the suspects' photographs for a photo parade he planned to have on 22 November 2012 with the victims. He took eight photographs, one of each of the eight suspects, and loaded them on a photo file on the laptop and prepared them for the victims. He compiled an album which was a mixture of photographs of Coloured and African males because the description of the suspects was two African males and one coloured male. The photographs were arranged in a form of a slide show, which would show photos one by one. He took the laptop to IPSOS. When he got there, he first took statements from two witnesses who could communicate, Kedumetse Sima and Nokuthula Mavuso in an office that was available at IPSOS. He had three victims to work with, including Tshabalala whose statement he already had. He managed to obtain a list of all items that were taken from the victims during the robbery.

[32] He then proceeded with the photo parade in the same office where he showed the photos individually to the three witnesses that were available. He interviewed one witness at a time whilst other witnesses waited and sat outside in

another office. The facilitation was done at his request to the team leader of the premises. All three witnesses pointed Ntuli and Mdlalose's photos as the men that went into their house and robbed them. This was done in the absence of the others and it took a while for them to look at the photos and to point out the suspects.

[33] After the pointing out, he called Tshabalala again and took a photo pointing out statement from him. He could not take pointing out statements from the two other witnesses because they were taken back to the counselling programme.

[34] He then went to the police cells to sort out the eight people that were in detention. He informed them that six were going to be released and the two that were pointed out on the photographs would be charged for house robbery. He released the six men and started interviewing the plaintiffs. He started with Ntuli. He explained his rights and took a warning statement. Ntuli indicated that he was not going to give a statement and will exercise his right to remain silent. It was the first time hearing that Ntuli had an *alibi*. Ntuli denied that he was involved in the house robbery. He then interviewed Mdlalose and followed the same process as he did with Ntuli. Mdlalose also indicated that he will remain silent and will speak in court. He denied that Mdlalose gave him an *alibi*. According to him, the two plaintiffs were upset at the time of the interview; they started speaking in Xhosa to each other. When he asked them what their decision was they told him that they would speak in court. When asked to clarify this issue by Mr Godla who represented the first plaintiff, Malan changed his earlier testimony by stating that the two were talking to him in Xhosa and he told them that he did not understand any African language. The interview was done in English and they answered in English. The two plaintiffs signed the statements. He then took fingerprints and officially charged them. At 15h30 of 22 November 2012, he went to the prosecutor, the prosecutor advised that the two accused be enrolled in the morning of 23 November 2012 because the courts were already closed and the magistrate had already left. He then assumed that they could not get another case on the court roll. The two plaintiffs then appeared in court on 23 November 2012. He

recommended that the case be postponed for seven days for bail information which includes obtaining the profile of the accused as to whether there were any outstanding or pending warrants of arrests, cases and convictions. His recommendation to the prosecutor was to oppose bail. He was absent from work because he was hospitalised after the first appearance. The bail application was on 11 December 2012. He went off sick again and made an entry on 20 December 2012 after the bail application had occurred. He was not able to attend the bail application. Charges against the plaintiffs were withdrawn on 19 March 2013. He returned to work on 11 March 2013. When he had to follow up on the outstanding queries, he had to trace witnesses to finalise the investigation. He made an entry on that date that '*all witnesses relocated to Soweto, Johannesburg for the same company; outstanding investigations not finalised*'. The matter was postponed to certain dates for the investigation to be completed. He was not at work for long periods of time and somehow the investigation was not finalised. Fingerprints from the crime scene still needed to be taken, statements from the rest of the witnesses, tracing of stolen property and photos of the crime scene were all still outstanding. Witnesses were not available to finalise the investigation. He could not get information from the company in Constantia and had to go back to court and ask for another postponement which was not granted. The case was withdrawn provisionally until the investigation was finalised. The case was transferred to Lentegeur Police Station and he was not involved in the case from that moment forward.

[35] He further testified that he did not ask the plaintiffs if they wanted an interpreter as they were willing to speak English. The interpreter was not available. He conceded that he did not record that. The plaintiffs started speaking in Xhosa when he was explaining their constitutional rights to them. He informed the prosecutor that the plaintiffs were arrested around 15h00 on 20 November 2012. He mentioned that he could have been wrong by stating that he received the docket at 14h00 when the suspects were already in the cells. He, as an investigating officer, could conduct a photo parade because it was informal. Formal parades are

done by a person who is not investigating the case. The plaintiffs were arrested for questioning in connection with house robbery and he was not there when they were arrested. He denied that they were arrested for being in possession of stolen property. He conceded that the two suspects were linked to the robbery after the photo parade. He denied that the plaintiffs told him they had an *alibi*.

[36] He was not present during the bail application to rectify the mistakes made by the prosecutor because by then he had the A1 statement, two witness statements and the photo parade statement, the prosecutor was therefore wrong to say only the A1 statement was in the docket during the bail proceedings. No one else proceeded on the docket in his absence. He has no authority to reallocate matters to other investigation officers. Captain Petersen was supposed to do that. He repeated in re-examination that he conducted an 'informal' photo parade because of the victim's condition and that he had only 48 hours and in the time he had it was the only option. It was the first time he had done a photo parade after arresting suspects. He could not have done the parade on the machine at the office.

[37] Natasha Lynn Simons ('Simons') testified that she is a Regional Court control prosecutor at Mitchell's Plain. She has been a public prosecutor for 14 years. On 23 November 2012 she was on duty. This matter was referred to her because she dealt with serious matters. When she received the docket it contained mostly witness statements, description of identification statements, Malan's statement detailing a brief overview of what he had done, photographs of two suspects, warning statements and bail information. All this information was available at the first appearance of the suspects. Having been presented with those facts, her decision was that the contents contained in the docket amounted to a *prima facie* case and she enrolled it for 23 November 2012. Her reasoning for this was that there were three complainant statements that referred to an incident that occurred on 19 November 2012, a photo album was shown to them, and they clearly identified the two plaintiffs and so that amounted to a *prima facie* case of house robbery or robbery with aggravating circumstances. She entered queries in

the docket to the investigating officer. First, it was for him to specify how the witnesses were taken through the photo album. Second, according to her what was done was not a photo ID but witnesses were just taken through a photo album. She also wanted to know if fingerprints were taken at the scene where the robbery took place. She also stated that outstanding statements had to be obtained from all the witnesses as only three were taken, whereas those who were in the house were allegedly six. Stolen property needed to be traced and she also wanted to know if photographs of the scene were taken. She wanted to know the connection between the alleged stolen items which were found at a certain place and the incident that occurred on 19 November 2012 and whether the stolen items had been recovered. She also wanted a report of the request made that the exhibits were sent for forensic analysis as mentioned in De Villiers' statement. She enquired whether neighbours saw or heard anything and for the three or four outstanding witnesses to be taken on an ID parade with the two suspects.

[38] She testified that the fact that there was no match between the items found in Mandalay and those allegedly taken during the robbery did not affect her conclusion that there was a *prima facie* case because three witnesses went through a photo album and identified the two suspects. Identifying the stolen items at the later stage would have just been additional evidence. As regards bail, it is a norm in Mitchell's Plain to oppose bail as soon as they are dealing with a schedule 6 offence. In this instance, the accused must show that there are exceptional circumstances that warranted his release. She was of the opinion that bail should be opposed because of the nature of the offence. She did not appear in court personally to prosecute the matter in court. She was taken through the contents of the court file and hand written notes made by the magistrate. She stated that she was familiar with the magistrate's handwriting having worked with him for a long time. It appears on the document on file that on 23 November 2012 prosecution was conducted by the district court prosecutor, Ms T Sambo. Both accused were represented by Adv Vallie. The matter was postponed for bail information until 28 November 2012. The accused were remanded into custody. On 28 November

2012, the accused appeared *via* an audio visual link from Pollsmoor prison. There was no need for them to come to court as the matter was going to be postponed. The prosecutor on that day was Mr Gontsana and Mr Davies represented both accused. The defence had no objection to postponement for a bail application. The matter was postponed to 11 December 2012. On that date, the accused appeared in court. The court refused bail for accused 1, i.e. Ntuli. The case was postponed in respect of accused 2, Mdlalose, for further investigation. The matter was then postponed to 22 January 2013 and both accused remained in custody. On 22 January 2013, the plaintiffs again appeared in court. Mr Davies withdrew as attorney for Ntuli but continued to appear on behalf of Mdlalose. Mr Mqela took over as Ntuli's attorney. Mr Davies informed the court that Mdlalose was abandoning his bail application. The prosecutor requested a postponement as the witness statements; photographs from the scene and the fingerprint expert report were all outstanding. The matter was postponed for further investigation to 19 March 2013 with the accused being remanded into custody. On 19 March 2013, both accused were represented by Mr Dunga. The case was withdrawn on that day.

[39] Simons made the decision to withdraw the case although there was still a *prima facie* case of robbery. She did this because the investigating officer, Malan made an entry on 11 March 2013 that all the witnesses had relocated to Soweto, Johannesburg. They all worked for the same company and the investigation was still not finalised. She formed a view that, although there was a *prima facie* case, it would not be in the interests of justice to keep the plaintiffs in custody since November 2012, if the witnesses were still being traced. The matter was characterised as provisionally withdrawn because it could be reinstituted if witnesses were found and consultations done with them. She was not informed about the plaintiffs' contention that they were kept in custody for more than 48 hours before their first appearance. The document containing information about the arrest, which is the document she had, stated that they were arrested at 16h00 on 20 November 2012. According to her understanding if the 48 hours expire outside normal court hours or on a day that is not a normal court day, the accused must be

brought on the first available court day. Therefore, because 48 hours expired at 16h00 on 22 November 2012, the accused had to be brought in court on 23 November 2012. It has happened before that if the defence disagreed with the assessment of the time; the matter would be brought before the magistrate who would decide to keep the matter on the roll or strike it from the roll. It did not look like the defence brought any complaint before the magistrate that the plaintiffs were kept in custody beyond the 48 hour requirement.

[40] In cross examination, Simons confirmed that the decision of whether to oppose bail is that of the state. She only became aware of the docket on 23 November 2012. She bears no knowledge of Malan having gone to the prosecutor after 15h00 on 22 November 2012 and was told to come back the following day. On the facts put to her, if the suspects were arrested on 20 November at 14h00 and Malan had come to her around 15h00 on 22 November 2012, she would have said they must be released because the time had expired.

[41] She did not have regard to the 'description of suspect' document in coming to her decision that there was a *prima facie* case because she had witnesses that went through a photo album and pointed out people. The question was put to her that the two description documents referred to slender people as being robbers whereas one of the robbers was said to be short and fat in the witness statements, her response was that it must be taken into account that the documents lacked the description of a third suspect because there were three alleged robbers on the day in question. Witnesses would normally go through a photo album if they did not know the name of the suspect. They would point the person out who would be arrested by the police. According to her, there is nothing wrong with people being shown a photo album, that is why she asked the investigation officer to give her a more detailed statement as to whether the witnesses were sitting separately, how many photos they went through and all photos they went through needed to be placed in the docket and not only those of the two accused. She was satisfied with the manner in which the plaintiffs were identified. Her decision was only based on

the fact that they were pointed out. One can take a *prima facie* case to trial and not win it. The reason she wanted further clarity from the investigating officer was to prepare for trial because those are the points the defence would attack, and not to ascertain whether or not the description might be incorrect or inaccurate. She would have clarified with witnesses when consulting with them the meaning of the statement: *'Detective Malan showed me photos of both African males and coloured males on the laptop. I paged through the photo album and identified the same two African males on the photo album'*. According to her, the sentence should be read to mean the witness was shown photos of both African and coloured males. Not just of the two plaintiffs and further the witness is an African lady with English most likely not being her first language, therefore, when she read the second part of the statement, it should be interpreted to mean she identified the two African males that robbed her, the same two, that is how she understood it. The witness did not identify the coloured person hence the statement is silent about identification of a coloured person.

[42] Simons was adamant that conviction could be secured just on the basis of the photo album pointing out. She did not get any response about her queries from Malan. She discovered that the docket did not go back to the police, and so they did not see the queries that she made in the investigation diary. It is indicated in the docket that it stayed in court so Malan could not respond to her queries. She only discovered that the docket did not go to back to Malan on 10 December. There is an entry made by Malan on 7 December 2012 which is an indication that at some stage he did get the docket. She was not concerned at that stage that Malan had not complied with her request because the case was at the bail proceedings stage and not at the trial stage and the state also had a *prima facie* case. Simons' unanswered queries at that stage would not have any bearing on the court proceedings. She saw the docket again on 19 March 2013, when she noted Malan's entry about relocation of witnesses. She knew her questions would not be answered by then and felt it was in the interests of justice to provisionally withdraw the case. If she did not care about other people, as it was put to her, she would have just asked for

a postponement and allow the police to investigate while the accused were in custody. Further, the plaintiffs applied for bail which was denied by the court based on the facts before it. They were legally represented.

[43] If the prosecutors were made aware that 48 hours had expired they would not have accepted the docket. Also, if she knew about the alleged *alibi*, such as, if it was indicated in the warning statement or investigation diary, she would have had that followed up so that she could have a view of both sides of the spectrum before a decision to proceed was made. She conceded, when a question was put to her, that it did not appear that the investigating officers gave her all the information based on the questions put to her about their evidence in court.

[44] She testified that the plaintiffs were legally represented at all relevant times. Their legal representatives could have made representations to the prosecution team regarding their allegations that they could not have committed the offences and of their alleged *alibis*. That information would have been put to the state witnesses and be considered by the state. That is the normal procedure of resolving matters even in Mitchell's Plain. The plaintiffs in this matter did not do that.

Issues to be determined

[45] The issue to be determined is whether the arrest of the plaintiffs and further detention were lawful and whether their prosecution was malicious. Key to the determination is whether the police officers acted within the bounds of ss 40 (1) (b) and 50 (1) of the Criminal Procedure Act, and whether the plaintiffs meet the threshold set for malicious prosecution to be proved.

[46] Mr Sidaki argued that the claims for deprivation of liberty, discomfort, loss of dignity, shock and *contumelia* were abandoned by the plaintiffs. He further submitted that the first plaintiff had abandoned his case for malicious prosecution. I disagree with Mr Sidaki on this point. The plaintiffs' claims are three-pronged: unlawful arrest, unlawful detention and malicious prosecution. Those were pleaded and evidence was led in respect of all three by the plaintiffs. The tabulated

damages of deprivation of liberty, discomfort, loss of dignity, shock and *contumelia* form part of the three broad claims.

[47] The defendants have also raised an issue of non-joinder of the Magistrate in his official capacity or the Minister of Justice and Correctional Services on the basis that the plaintiffs were refused bail by the Magistrate and were remanded in custody on the strength of the Magistrate's orders.

Evaluation

The lawfulness of the arrest

[48] Police officers often have to act swiftly whenever crime is committed. At times they are called upon to arrest suspects without being in possession of a warrant of arrest. There are, however, parameters that have been created by the legislature within which arresting officers are required to act. Section 40 (1) (b) of the Criminal Procedure Act, which is the subject of this case is one such provision. The requirements laid down in s 40 (1) (b) of the Criminal Procedure Act have been discussed in numerous cases. The relevant section provides as follows:

> ***'40 Arrest by peace officer without warrant***
>
> *(1) A peace officer may without a warrant arrest any person-*
>
> *...*
>
> *(b) whom he reasonably suspects of having committed an offence referred in Schedule 1, other than the offence of escaping from lawful custody.'*

[49] It is indeed the duty of the peace officers to ensure that those suspected of committing crimes against society are brought to justice. It sometimes becomes exigent to strike while the iron is hot in certain situations. Prompt action becomes necessary when an opportunity to catch suspects who have committed serious crimes may be lost and the police might later be blamed for not taking action when information relating to the suspects was given by members of the community. A balance is, however, required in that a police officer should keep an open mind and be alive to the possibility that the information he or she may have may not be

sufficient to meet the requirements set by law as to when an arrest without a warrant can be effected. This open mindedness is important because of the jealously guarded liberty of a person by our law and the Constitution. As Van Dijkhorst J put it in *Duncan v Minister of law and Order* 1984 (3) SA 460 (T) at 466D-F:

> 'The power of arrest without a warrant is valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the Legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or guilt.'

[50] Section 12 of the Constitution[1] guarantees everyone the right to freedom and security including the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial.[2] In *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC); 2007 (10) BCLR 1102 it was held at paras 17 and 20 that:

[51] '…the constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances… it would not be desirable for this court to attempt in an abstract way divorced from the facts of this case, to articulate a blanket, all-purpose test for constitutionally acceptable arrests.' It is trite that arrest without a warrant would be justified if the following jurisdictional facts are present:

a) The arresting officer is a police officer;
b) He or she entertains a suspicion;
c) The person so arrested must be suspected to have been committing a Schedule 1 offence;
d) The suspicion must be based on reasonable grounds.[3]

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[1] Act 108 of 1996 ('the Constitution')
[2] Section 12(1)(a) and (b) of the Constitution
[3] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 F-H; *Minister of Safety and Security & Another v Swart* 2012 (2) SACR 226 (SCA) at para 17

[52] Once the jurisdictional requirements set out above are present, the peace officer may invoke the power conferred on him or her by s 40 (1) (b) and arrest the suspect. The peace officer thus has a discretion whether to arrest a suspect once the defined jurisdictional prerequisites are present. Put differently, the officer is not obliged to arrest. That view was emphasized in *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at para [28]. In *Duncan* (1986)[4] supra at 818 I, the court held that the grounds upon which an exercise of such a discretion can be questioned are narrowly circumscribed. It further stated that '*an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the Legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee*…'[5] It further held that the purpose of the arrest must be to bring the person so arrested before court.[6]

[53] It is now also established that the onus to prove the lawfulness of the arrest lies with the arrestor, in this case the first defendant.[7] This is so because '[*a*]*n arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law*.'[8] (Underlined for emphasis)

[54] The test on whether the peace officer reasonably suspects a person to have committed an offence is an objective one. The test as succinctly put by Zondi J (as he then was) in *Mawu & Another v Minister of Police* 2015 (2) SACR 14 (WCC) at para 22, '…*is not whether a police officer believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion*.' Ultimately, the question is whether any reasonable person, confronted

[4] The Appellate Division decision in footnote 2 above
[5] *Duncan v Minister of Law and Order* (1986) supra at 818 I – 819A
[6] *Duncan v Minister of Law and Order* (1986) supra at 820 D
[7] See *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) at paras 24 - 25
[8] *Minister of Law & Order & Others v Hurley & another* 1986 (3) SA 586 (A) at 589 E- F

with the same set of facts as the arresting officer in this case, would form a suspicion that a person has committed a Schedule 1 offence.[9]

[55] It is not in dispute in this case that the arresting officer was a police officer acting within the course and scope of his employment with the first defendant. The question that arises is whether the arresting officer formed a suspicion that a Schedule 1 offence was committed, which suspicion rested on reasonable grounds, before effecting the arrest. The plaintiffs contend that he did not.

[56] In advancing their argument on this point, the plaintiffs' attorneys, Mr Godla and Ms Mziba, who represented plaintiffs 1 and 2 respectively, referred me to the unreported decision of *Mbotya v Minister of Police* (1122/10) [2012] ZAECPEHC 43 (10 July 2012) at para 25 which quoted a well-known passage of the decision of *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) with approval. The Court in *Mabona* held the following at 658 F – H:

> '…It seems to me in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However the suspicion must be based upon solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion.' (Underlined for emphasis)

[57] Zondi J, in the *Mawu* decision where the passage in the *Mbotya* matter was also raised, rightly rejected any suggestion that the relevant passage was authority for the proposition that, for a reasonable suspicion to be formed, the quality of the

[9] *Minister of Safety and Security & Another v Swart supra* at para 20

information upon which the arresting officer acts must be analysed and assessed, and acting upon information which has not been so scrutinised will render an arrest unlawful.[10] He found no such requirement in s 40 (1) (b) and I am in agreement with him.

[58] All that is required by s 40 (1) (b) is a suspicion which must be based on reasonable grounds. Quoting from what was said by Lord Devlin in *Shaaban Bin Hussein and Others v Chong Fook Kam and Another* 1969 3 All ER 1627 (PC) at 1630, Van Heerden JA in *Duncan* (1986) supra at 819I, said: '*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'*

[59] Thus, grounds for suspicion are not limited to those facts that can be proved in court. It was conceivable that a reasonable suspicion can be formed 'where a person has been seen at the scene of a crime and upon being questioned gives a false *alibi* or refuses to answer questions.'[11] Arrest on reasonable suspicion can be made even if the intention of the arrestor is first to conduct an investigation before charging a suspect or to question suspects or to test the *alibi* or place the suspect in identification parade.[12]

[60] Looking at the facts of this case, Ryneveldt's testimony was that he had no time to obtain a warrant and had to act quickly based on the informer's advices. I have already alluded to the fact that there are indeed cases where arrest should be immediate, where police officers are duty bound to effect the arrest without having to consider other extraneous factors, where it is necessary to strike it while the iron is hot as was stated by Jones J in *Mabona supra* at 660D. Whilst that is so, the arresting officer '*should keep an open mind and take notice of every relevant circumstance pointing either to the innocence or to guilt.*'[13]

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[10] *Mawu & Another v Minister of Police supra* at para 31
[11] *Mawu & Another v Minister of Police supra* at para 32
[12] See *Duncan v Minister of Law and Order (1984) supra* at 468 E- G
[13] *Duncan v Minister of Law and Order (1984) supra* at 466D - F

[61] As Bertelsmann J put it in *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T*)* at 185b: *'an arrest should only be the last resort as a means of producing an accused person or a suspect in court.'*

[62] The plaintiffs submit, firstly, that the informer who allegedly gave information to Ryneveldt about the house robbery did not give him any additional information that could be objectively assessed and lead to an arrest. When Ryneveldt was told about the possible suspects by the informer, he did not ask questions so as to assess the information properly. He simply arrested the plaintiffs on the say- so of the informer.

[63] Secondly, when he arrived at the house in Mandalay he proceeded to arrest the plaintiffs (along with six other male persons) without anything linking them to the house robbery in Montclair. If it was not an opportune time for Ryneveldt to critically assess the information given to him by his informer, he still needed to verify same at the police station by taking the exhibits found in Mandalay with immediate effect to the victims to see if the victims would be able to identify any of the items as theirs.

[64] Thirdly, what created further urgency to critically assess whether it was reasonable to arrest, according to the plaintiffs, was the fact that the plaintiffs (and five others) were not residing at the Mandalay address. Added to the insufficient evidence which crucially needed to be assessed, the victims of the house robbery were said to be intoxicated at the time of the robbery which had a potential of compromising their ability to observe the identity of the assailants.

[65] According to Mr Sidaki who appeared for the defendants, the arrest was lawful because:

(a) The evidence of Ryneveldt showed that police acted on the information (provided by the informer) during the course of investigating housebreaking and robbery which occurred in Montclair on 19 November 2012;

(b) The plaintiffs were found among a group of men identified by the informer as having been involved in the robbery;

(c) The police found items resembling those that were stolen during the Montclair robbery;

(d) The men, including the plaintiffs, could not provide an explanation for those items found in their midst;

(e) These constituted grounds sufficient and reasonable for the police to suspect that the plaintiffs and the other men in their company may be guilty of the crimes of house breaking and robbery or even competent verdicts thereto;

(f) These met the requirements for the arrest to be effected at that stage, as the police conducted further investigation before formally charging the suspects;

(g) The photo identification parade that the police held after the arrest where plaintiffs were identified strengthened their case against the plaintiffs and was also the cause for the release of those that were not identified.

[66] According to Ryneveldt, what justified the arrest was the information he received from his informer on 20 November 2012 that the possible suspects of the house robbery that occurred on 19 November 2012 were with him at a certain house in Mandalay. The informer did not know how long the suspects would be there and the police had to react quickly. He trusted this informer and the information he gave as being reliable as he had used him before and managed to secure successful convictions. The informer did not tell him much other than to say that he must act fast '*because these guys mentioned bank cards that was* (sic) *taken the night before*'[14] '*…He mentioned that the suspects that was* (sic) *possibly involved of the incident last night, last night before at Montclair are also with him. He just don't* (sic) *know who were all involved*.'[15]

[14] Page 414 line 21 of the record of proceedings
[15] Page 414 line 26 to 415 line 3 of the record of proceedings

[67] An informer's identity is not disclosed in order to protect him or her and in order not to jeopardise an investigation process, which I accept. An informer, ordinarily, does not depose to an affidavit like a normal witness would and in those circumstances, I venture to say that the credibility of the information an informer provides cannot, without more, be viewed in the same manner as the information which is obtained from a witness who gave a statement to the police under oath about a suspect which may result in that suspect's arrest. This is not to say that police officers cannot act on tip-offs. Every case should be dealt with in its own context.

[68] In this case, Ryneveldt conceded that he could not arrest the eight men solely based on the informer's information that there were possible suspects at a house in Mandalay who were talking about bank cards taken the night before. There had to be more than that and that 'more' became the items which were suspected to be stolen. At that stage it was not clear who of the eight men were involved in the house robbery in Montclair, the previous night as only three were implicated in that robbery. It is understandable that Ryneveldt could not pull the informer aside to give him more information when the police arrived in Mandalay, as that could have exposed his identity. The actions of the police officers after having noticed the items on the table and floor in Mandalay have to be analysed.

[69] While it can be argued that the existence of the items might have given rise to a suspicion, the question that arises is whether steps should have been taken to have the suspicion confirmed one way or the other, and if so, what steps? The most obvious step was to establish from all the men if they knew anything about the items found and why those were there. That step was necessitated, firstly, by the fact that seven of the men were visitors at that house; secondly, the information provided by the informer did not link any particular individuals at that particular stage. For instance, the informer did not say, A and B are the possible suspects or men wearing ABC clothes among the eight are the suspects. So, at that stage no information linked any particular men from the eight to the Montclair robbery;

thirdly, De Villiers and Ryneveldt were not first on the scene (in Mandalay). A number of gaps therefore, exist in this case. Members of the TRT unit who went to secure the premises for safety reasons were not called to testify about how they found the scene when they arrived. More particularly, whether the items noticed by De Villiers on the table or the floor were there when TRT arrived and whether the eight men that got arrested were all inside or outside the house. Both De Villiers and Ryneveldt could not shed any light on this issue. They further did not obtain any information from the members of the TRT about the state of the scene on arrival. They only arrived on the premises after the eight men had been ordered to lie on the floor inside the house. It was not enough, in my view, for De Villiers to state that procedures did not allow TRT members to do anything other than to secure the place. A possibility existed, as it was put to De Villiers, that the TRT members searched or ordered the men to put their belongings on the table or floor in an attempt to ensure that the men did not have firearms or dangerous objects on their person.

[70] Nonetheless, De Villiers ascertained from the resident of the house about the items and that person could not tell him where the items came from. The person told him that he knew nothing. He then ordered the person to bring the items to him so he could put them in a sealed bag. Based on the fact that the person could not account for those items, De Villiers informed Ryneveldt who arrested all the men in the house. There is a bit of blame-shifting as to who took the decision to arrest. Ryneveldt's evidence further contradicted De Villiers' assertion that he (Ryneveldt) was talking to the people lying on the floor. Ryneveldt stated that he was talking on the phone and De Villiers was the one talking to the people that were lying on the floor.

[71] What is unsettling, in my view, about Ryneveldt and De Villiers' approach is that seven of the men did not live in that house, therefore it was crucial for them to critically assess the situation before arresting all the men. It was not sufficient in my view to only ask the resident about the items, if the intention was to arrest all

the men. The fact that the question to the resident of the house was asked in a loud manner and in full view of others that were lying on the floor does not, in my view, absolve the officers of their duty in those circumstances. If the eight men were to be arrested for suspected stolen property, logically they should have been given an opportunity to account for those items before being arrested. If they failed to account after having been asked, then the officers would be entitled to effect arrest. It cannot be assumed that the resident of the house answered for all of them and that if any of them knew about the items they should have raised their hands and spoken. The question was not posed to them as a group, as De Villiers alleged at one stage. One person was asked and he was asked on the basis that he resided at that house.

[72] Dealing with arrest for suspected stolen property, the court, in the judgment of *Swalivha v Minister of Safety and Security* (32477/2009) [2011] ZAGPPHC 32 (17 March 2011) at para 118, held that: *'[t]he suspect must have personal and direct control over the goods. He must also be in possession at the moment that the goods are found by the police – see the discussion by Snyman Criminal Law fourth edition on p514-515*.' It was further held in *Setlhapelo v Minister of Police and Another* (45031/2012)[2015]ZAGPPHC 363 (20 May 2015) which dealt with the requirements of 40 (1) (e) at para 22, that if regard is to be had to s 36 of the General Law Amendment Act 62 of 1955[16] '*…a suspicion originally based on insufficient grounds that the property has been stolen or illegally obtained or that a suspect has committed an offence in regard to property which is suspected of having been stolen or dishonestly acquired <u>can become a reasonable suspicion as a result of something which the suspect says or does at the time when he is found in possession of the goods, such as giving an unacceptable explanation for his possession of such property</u>*.' (Underlined for emphasis)

[16] Section 36 of the General Law Amendment Act 62 of 1995 provides that: *'Failure to give a satisfactory account of possession of goods – Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'*

[73] Seven of the men in the Mandalay house were visitors. It is furthermore not clear whether they were all found inside the house by members of the TRT, and if so, doing what? It could not be said that the items were found in their possession if those were found lying on the table whilst the men were lying on the ground. Secondly, to the extent that it was suspected that the men were in possession of the suspected stolen property found in the house, they should have been asked directly about the items. What would prompt an obligation from them to respond when they were not individually or at least directly asked to account about property found in someone else's house. What compounds the problem is that both De Villiers and Ryneveldt did not see how all the eight men got to be inside the house. De Villiers conceded that he did not ask members of the TRT to explain or make a statement on how they found the scene. A possibility that some of the men were outside when TRT came and ordered them to go inside the house cannot be ruled out. De Villiers' written statement that six men were inside the house and two people were outside also raises confusion. De Villiers did not provide a satisfactory answer as to the discrepancy between his testimony and the written statement but conceded that if the plaintiffs were outside there would be no reason to arrest them. Whether they were inside or outside the house it was imperative, in my view, that they be given a fair opportunity to account for the suspected stolen items.

[74] I am not convinced by the argument that De Villiers and Rynveldt found items that resembled those that were stolen in the house robbery. No such evidence was given. De Villiers was not the investigating officer in the house robbery but Ryneveldt was. It was not Ryneveldt's evidence that the items found resembled those reportedly stolen at the scene of house robbery because that comparison was never made. Ryneveldt stated that he did not ascertain whether any of the items were those taken from Montclair because he was not in charge of the exhibits. He also conceded that he did not know if the men lying on the floor still had their cell phones in their possession when he arrived at the house. He just observed cell phones and other items lying on the floor and the table.

[75] The blame shifting between De Villiers and Ryneveldt as to who found the items did not assist. De Villiers disputed Ryneveldt's evidence that he was in charge and that he instructed the arrest. Nevertheless, what is clear is that one of them or both formed a view that because of the items that were unaccounted for, the men must be arrested as some of them could be suspects in the Montclair robbery.

[76] It is common cause that no link was ever made between the items found and those stolen in the house robbery and the men were never charged for being in possession of property suspected to be stolen. That also became apparent during the bail proceedings.

[77] It is so, that the plaintiffs were identified in a photo album after they had been arrested. That, in my view, is *ex post facto*. It does not justify the initial act of unlawful arrest as the arrest that occurred in terms of s 40 (1) (b). There must first be a reasonable suspicion to arrest. I accept that '[*a*] *reasonable suspicion may be confirmed by an identification parade at which the arrested suspect is positively identified and a prima facie case may be thus born, or the hopes of the police may be dashed by a negative result and the suspect released*' as Van Dijkhorst J observed in *Duncan v Minister of Law and Order (1984) supra* at 466B. Thus, identification of the suspects during an ID or photo parade or photo pointing out does not establish reasonable suspicion but may confirm a reasonable suspicion that already exists.

[78] Whilst '*some measure of detention necessarily follows an arrest, for there can be no arrest without at least a momentary detention*'[17], further detention of the plaintiffs after they were identified and charged and the act of arrest itself are in my view two separate actions with their own specific requirements that need to be fulfilled. In *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E) it was held at 675d-f:

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[17] *Minister of Justice v Ndala* 1956 (2) SA 777 (T) at 779 C-D

> *' It is clear that the mere act of arrest itself involves deprivation of liberty, but our law recognises a clear distinction between the act of arrest, which may occur anywhere, and the act of detention in custody, which involves incarceration after the arrest, and pending the taking of further procedural steps. The power granted to 'detain' may in particular circumstances include the power to arrest. See R v Moquena E 1932 OPD 52. However, in my view, the power to arrest does not include the power to detain save insofar as such detention may be concomitant to the arrest itself. Arrest is the act by which a free person is apprehended, if necessary by use of force. Once the arrest has been effected, the authority of the person effecting the arrest insofar as any further detention is concerned, ceases. S v Van Vuuren 1983 (4) SA F 662 (T) at 668E. Any subsequent detention, which involves restraint in confinement for a specified or unspecified period of time, must be in terms of an authority to detain, and is not automatically conferred, without such authority, on the person authorised to arrest.*' (Underlined for emphasis)

[79] The plaintiffs are in my view entitled to question the lawfulness of their initial arrest. The fact that their further detention may be held to be lawful (which I will come to in a moment) is a different question. In the first instance, an arrest still has to be justifiable according to the demands of the constitution and the law.[18] I am therefore persuaded to find that the first defendant has not been able to show that the arrest of the plaintiffs was lawful. In para 16 of the *Pillay* decision supra the court observed that the provisions of s 35 (2) (d) of the Constitution, which I deal with below make it clear that the accused's right to challenge the unlawfulness of his or her arrest and detention does not lapse upon his first appearance in court. I align myself with this view.

The 48 hour requirement

[80] Section 35 (1) (d) of the Constitution provides that a person has a right to be brought before a court as soon as reasonably possible but not later than 48 hours

[18] See *Pillay v Minister of Police & Others* (5644/2011) [2011] ZAKZPHC 42 (30 September 2011) at paras 13 -16. In particular para 16 where the court stated that: '*It is clear from this provision [s 35 (2) (d) of the Constitution] that the accused's right to challenge the* ***unlawfulness of his arrest*** *and* ***detention*** *does not lapse upon his first appearance in court*.'

after arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day. Section 50 (1) (d) of the Criminal Procedure Act has the same effect. Ordinary court hours mean hours from 09.00 to 16.00 on a court day.[19]

[81] The case of the defendant on the aspect of detention after arrest suffers from evidentiary shortcomings. Malan initially testified that he received the docket at about 14h00 on 20 November 2012, from his superior who informed him that suspects were already in custody. During cross examination, he kept changing his testimony regarding the time he received the docket, stating at one point that he received the docket at around 14h00. At another stage he denied having mentioned the time to the point of not committing to any specific time, stating that it could have been after 18h00, because if they were detained at 15h50 then he would have received the docket much later than 14h00. Malan contradicted himself on this issue. Ryneveldt testified in cross examination that he effected the arrest at 15h00.

[82] The SAP 14 register indicates that on 20 November 2012 the plaintiffs were arrested by or at 15h00 and detained at 15h50. The plaintiffs themselves testified that that they were arrested before 14h00 and were in custody by 15h00, which materially coincides with that of the first defendant's witnesses that the arrest was well before 16h00 on 20 November 2012. In light of this evidence, and lack of coherence from the first defendant as to when the plaintiffs were arrested, I have no option but to find that they were kept in custody beyond the 48 hours required before their first appearance in court. The onus was on the first defendant to prove the time of the arrest and that the plaintiffs appeared in court within 48 hours and it failed to do so. The document appearing in the docket that was given to the prosecutor stating 16h00 as the time of the arrest is accordingly of no value and is misleading. In any event, the time in that document, which only the prosecutor presented contradicts the evidence of Malan, Ryneveldt's, the plaintiffs'

[19] Section 50 (2) of the Criminal Procedure Act

and the SAP 14 register. The detention of the plaintiffs after the expiry of 48 hours, without having appeared in court, was therefore unlawful.

Further detention

[83] It is so that after their first appearance the plaintiffs were remanded in custody at the behest of the court. The court however makes orders based on information presented before it. The Supreme Court of Appeal in *W v Minister of Police* [2015] 1 All SA 68 (SCA); 2015 (1) SACR 409 (SCA) at para 25 referring to the Constitutional Court decision of *Zealand v Minister of Justice and Constitutional Development and another supra* held that the right contained in s 12 (1) (a) of the Constitution '*required not only that every encroaching on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates issued orders remanding the appellant in detention was not sufficient to establish that the detention was not arbitrary or without just cause. The Constitutional Court then concluded at para 45 that the majority [of the SCA in Zealand] wrongly held that the magistrate's remand orders justified the appellant's deprivation of freedom. The breach of s 12 (1) (a) of the Constitution was sufficient in the circumstances of the case to render the appellant's detention unlawful for the purposes of delictual claim for damages, based upon the action for unlawful detention (para 53).*' The court held further that the legality of the manner in which the magistrate's discretion was exercised cannot be precluded simply by the existence of the magistrate's order. Swain JA observed that the constitution imposed a duty on the state and its organs not to perform any act that infringes the entrenched rights. Further, that a policeman in the employ of the state has a public law duty not to violate a person's right to freedom, either by not opposing his or her bail application or by placing all relevant and readily available facts before the magistrate.[20]

[20] *W v Minister of Police supra* at para 28

[84] It appears that during the bail application Mdlalose, through his lawyer, did not apply for bail because of an outstanding warrant. At a later stage, Mr Davies told the court that Mdlalose was abandoning his bail application. I agree with Mr Sidaki that Mdlalose cannot blame the state for his failure to apply for bail. Mr Sidaki further submitted that Ntuli failed to show that exceptional circumstances existed warranting his release on bail.[21] He had an opportunity to provide the court with the details of the *alibi* he claimed he had. It was held in *W v Minister of Police supra* at para 3 that '*Proof by an accused that he or she will probably be acquitted can serve as 'exceptional circumstances'. The strength of the State case is accordingly relevant to the existence of 'exceptional circumstances''*.

[85] I am also not convinced by the plaintiffs' evidence that they told Malan that they had *alibis*. Even if they did tell him, they could have given him more detail of what their *alibis* were without the necessity to be probed and they failed to do so. Ntuli's legal representative told the magistrate that there were no *numerus clausus* for exceptional circumstances. He only focused on personal circumstances and on the photo pointing out which he argued was questionable, which were found not to be exceptional. The magistrate was not told about the *alibi* or given details about it. Mdlalose's bail application was postponed for more information. He chose not to pursue it *via* his legal representative. He was in court when these submissions were made by his lawyer. Furthermore, no representations were ever made to the state about the alleged *alibis* so it could weigh both sides of the case.

[86] Having said that, something needs to be said about the manner in which the investigation of this matter was handled. Malan stated that he had never done a photo parade after suspects were arrested. This instance was the first for him.

[87] My view on the appropriateness of the use of photo identification is that this issue has been shown to depend on the circumstances of each case. The crucial

[21] Being a Schedule 6 offence in terms of s 60 (11) (a) of the Criminal Procedure Act, the accused bore the onus of establishing on the balance of probabilities that exceptional circumstances existed, which in the interests of justice permitted his or her release.

consideration for assessing the cogency of such process is fairness.[22] Circumstances that necessitate employment of photo identification of suspects after their arrest, instead of identification parade should in my view be shown to exist.[23] I do take note of Simons' testimony that what Malan did was not a photo parade but a pointing out from a photo album. Malan referred to this photo pointing out as an informal parade which he alleged he could do as an investigating officer. He conceded in cross examination that an investigating officer cannot conduct an ID parade, which he terms as formal, of a case he or she is investigating. Mr Sidaki is correct that this court is not called upon to determine whether or not the plaintiffs were properly identified, care, however, ought to be taken in how photo parades are done.

[88] Without deciding on this point, there is something unnerving about the allegation that the basic rules pertaining to conducting identification of suspects generally followed, which are intended to insulate the witnesses from improper influence and to protect suspects from being prejudiced, do not apply or are not to be observed in what is termed an informal photo pointing out after the arrest of suspects. Whilst taking the point that stringency is not required, I doubt that the safeguards, even at the minimum level, that are normally applied in identification processes, whether formal or informal, which ensure that witnesses are free from any influence are as relaxed as it is suggested by the defendants, when it comes to photo identification or photo pointing out, done after arrest of suspects. Such a view could potentially taint the reliability of such identification processes, in my view.

[89] The second issue that concerns me is that when Malan was off sick for long periods and hospitalised no one attended to the investigation of the matter. The last time any investigations were done was when Malan went to show the

[22] *The South African Law of Evidence*, DT Zeffert, AP Paizes, A St Q Skeen, Lexis Nexis Butterworths, 2003 at pages 148 and 149;

[23] In *Van Willing & Another v S* (109/2014) [2015] ZASCA 52 (27 March 2015) at para 14 the court found the reasons for resorting to photographic identity parade (where a witness refused to participate in the identity parade where she had to face the persons she saw the night of the incident) were valid due to due to the accepted gang activities in the area and there was an additional safeguard in place which ruled out coincidence.

photos to the victims on 22 November 2012 and statements from three of the victims were taken. It is not clear what happened to the fingerprints and photographs of the scene if at all they were taken. Ryneveldt testified that he called these experts to the scene in Montclair when he was the investigating officer. It appears from Malan's evidence that those were still outstanding. Regarding failure to follow up with the investigation, Malan stated that he was not responsible for allocating the matter to another investigating officer in his absence. That was the responsibility of his superiors. Although, the queries made by Simons would have no bearing on whether or not a *prima facie* case existed, the fact that nothing was done since 22 November 2012 on account of Malan being off sick, could have a bearing on the their continued stay in custody. Malan came back to work on 11 March 2013 and only then was it established that witnesses had relocated to Johannesburg. A decision to release the plaintiffs could have been made sooner had Simons been made aware of these developments earlier on.

[90] All that being said, there are no sufficient grounds to hold that further detention of the plaintiffs after their appearance in court was unlawful. It may have been undesirable, but I cannot find it unlawful. The plaintiffs were charged and there were grounds to investigate. Things did not go their way during the bail application which could partly be attributed to their legal representatives.

Was the prosecution of the plaintiffs malicious?

[91] The onus on this aspect lies with the plaintiffs. They must allege and prove that the defendants: a) set the law in motion or instituted proceedings; b) acted without reasonable and probable cause; c) acted with malice (*animo injuriandi*); and the prosecution failed.[24]

[92] The bar for the plaintiffs is quite high. When Simons received the docket it contained witness statements, description of suspects, Malan's statement photographs of the plaintiffs, warning statements and bail information. All this

[24] *W v Minister of Police supra* at para 33. See also *Minister of Justice and Constitutional Development and Others v Moleko* [2008] 3 All SA 47 (SCA) at para 8

information was available at the first appearance of the suspects. Having been presented with those facts, she took a view that the contents contained in the docket amounted to a *prima facie* case and enrolled it for 23 November 2012. She reasoned that there were three complainant statements that talked to an incident that occurred on 19 November 2012, a photo album was shown to them, and they identified the plaintiffs and that in her view, constituted a *prima facie* case of house robbery or robbery with aggravating circumstances against the plaintiffs.

[93] In *Moleko* the court held at para 64:

> *'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence will not suffice.*

[94] Having considered Simons' evidence, I find no malice regarding her decision to prosecute the plaintiffs. Simons acted astutely in accordance with what she was presented with in the docket, which showed a *prima facie* case against the plaintiffs existed. There is no evidence that she or the police officers acted in pursuit of their own interests, knowing that their actions to pursue the prosecution of plaintiffs were wrongful and pursued it anyway, without reasonable or probable cause. I found no recklessness either. Shortcomings in the investigation of the plaintiffs also do not suffice. Not only could they not be imputed on the second defendant, negligence or even gross negligence is not sufficient to constitute malicious prosecution as stated in *Moleko supra*. It could further not be held that the prosecution failed.

[95] The plaintiffs, accordingly, fell well too short of the requirements outlined above. They could not prove any of the required elements except to show that the prosecution was withdrawn, which in itself is not sufficient to overcome the hurdle. The claim of malicious prosecution must accordingly fail.

[96] In conclusion, I have found that the arrest and failure to bring the plaintiffs before court before the expiry of 48 hours were unlawful. The further detention after their appearance in court and their prosecution were lawful.

[97] In view of my findings above, it makes sense that costs be determined at the quantum stage.

[98] In the result the following order is made:

1. The first defendant is liable for the damages which plaintiffs shall have proved as having been suffered as a result of their unlawful arrest and their subsequent detention prior to their first appearance in court;
2. Claims in respect of malicious prosecution are dismissed.
3. Costs are to stand over for later determination.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the plaintiffs: Mr L Godla and Ms G L Mziba of Godla & Partners Inc., Cape Town

For the defendants: Adv. T S Sidaki

Instructed by: State Attorney, Cape Town.