IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A182/2022

Before:
The Hon Ms Justice Baartman
The Hon Mr Justice Henney
The Hon Mr Justice Sher

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE — **Appellant** (Second Defendant in the court a quo)

and

SANDILE KHUMALO — **Respondent** (Plaintiff in the court a quo)

SANDILE KHUMALO — **Appellant** (in the cross-appeal)

and

MINISTER OF POLICE — **Respondent** (in the cross-appeal)

Hearing: 28 July 2022
Judgment: 5 September 2022 (to be delivered electronically to the respective counsel and will be distributed on Saflii)

JUDGMENT

HENNEY, J

Introduction:

[1] The respondent instituted an action for damages in this court against the Director of Public Prosecutions, Western Cape ("the DPP") and the Minister of Police ("the Minister"), wherein he alleged that he was unlawfully arrested and detained. He also alleged that a malicious prosecution was instituted against him. He alleged that occurred pursuant to his arrest by members of the South African Police Service on 7 March 2014.

[2] By agreement between the parties there was a separation of issues in terms of rule 33(4) of the Uniform Rules of Court, and the trial was confined to the question of liability. The question of damages stood over for later determination. After the hearing was concluded in respect of this issue, the trial court handed down judgment on 29 July 2020; the respondent was successful in his claims, for malicious prosecution and unlawful detention for the period from 17 July 2014 to 3 February 2015, against the DPP. The claim for unlawful arrest against the Minister was dismissed.

[3] The DPP applied for leave to appeal the judgment and order of the court a quo, and the respondent also noted a cross-appeal against the order dismissing the claim for unlawful arrest against the Minister. On 28 January 2021 the court a quo refused the applications for leave to appeal in respect of both the appeal and cross-appeal. Thereafter, on 13 May 2021, the Supreme Court of Appeal granted both the DPP as well as the respondent leave to appeal to a full court of this division.

Mr Jaga SC, with Miss Y Isaacs, appears for the DPP as well as the Minister in this appeal. Mr Godla (attorney) appears for the respondent.

Grounds of appeal in the main appeal

[4] The DPP submits that the court a quo erred in finding that the respondent had proved his claim for malicious prosecution and unlawful detention, for the following reasons:

1) That the court a quo failed to take cognisance of the fact that the delictual action as pleaded by the respondent only related to the Kodak store charge and not the Vivido store charge. The DPP therefore submits that the subsequent arrest, detention and the prosecution in respect of the Vivido store charge was therefore deemed to be lawful. The court a quo erroneously referred to problems with the identification of the respondent in respect of the Vivido store charge;

2) That the court a quo erred when it confused the facts relating to the Vivido store charge investigation and prosecution, with the Kodak store charge investigation and prosecution;

3) That the court a quo erred in finding that the investigation was incomplete when the matter was referred to the regional court;

4) That the court a quo erred in its finding as to why the matter was provisionally withdrawn;

5) That the court a quo failed to consider whether the prosecution failed;

6) That the court a quo overlooked material evidence relating to communication between the regional court prosecutors and investigating officers when the matter was in the regional court;

7) That the court a quo erred in expecting the regional control prosecutor to conduct a dock identification of the respondent, before deciding to prosecute him in the regional court;

8) That the court a quo misconstrued the elements of animus injuriandi, by not addressing the subjective element thereof. That the court a quo's reasoning, instead, was unilaterally focused on the objective assessment based on the contents of the police docket.

[5] Regarding the grounds of appeal against the verdict on unlawful detention, based on the findings of the court a quo the DPP submits that:

1) The court a quo erred in failing to take into consideration that the respondent abandoned his bail application in the District Court and failed to bring another bail application to be released. The DPP submits that the respondent was charged with a Schedule 5 offence, and he was legally represented throughout the entire proceedings in the lower courts. Further that his detention was at the instance of the magistrate, and not the DPP. The causal link was broken when the respondent abandoned the bail application;

2) The court a quo failed to consider the respondent's pleaded case in this regard, and impermissibly had regard to issues falling outside of the pleadings when it decided the issue of the alleged unlawful detention, namely that the respondent's detention between 17 July 2014 and 3 February 2015 was at the instance of the prosecution. This issue was not even canvassed in the court a quo.

The Minister's submissions regarding the cross-appeal:

[6] Regarding the unlawful arrest, the Minister submits that, objectively viewed, prior to the arrest, the investigating officer had reasonable grounds to suspect that the respondent had committed an offence. Further, that the investigating officer personally conducted a comparison between the respondent, in person, and the person in the photographs taken from the CCTV footage of the housebreaking, and he had been satisfied that it was the same person.

[7] The Minister further submits that the respondent has not challenged the investigating officer's independent assessment of the available evidence prior to arresting him. The Minister further contends that the respondent relied on unsubstantiated facts.

Respondent's submissions on the main and the cross-appeal:

Main Appeal

[8] Regarding the submissions on the main appeal (malicious prosecution), the respondent submits that the court a quo embarked upon a comprehensive analysis of the facts presented before it to arrive at a fair and equitable decision. In this regard, the respondent submits that Mr. Riaan Le Roux ("Le Roux"), the regional court control prosecutor, had been in possession of the photographs upon which Warrant Officer

Nomdoe ("Nomdoe") had based his arrest, and inasmuch as the photographs were not clear, the only clear photograph depicted a person who, physically, differed glaringly from the respondent.

The cross- appeal

[9] The respondent submits that his arrest by Nomdoe did not comply with the provisions of section 40 (1) (*b*)[1] of the Criminal Procedure Act 51 of 1977 ("the CPA"), and the principles as set out in *Duncan v Minister of Law and Order*[2]. In this regard, the respondent specifically submits that Nomdoe did not independently arrest him, but rather acted on the say so of the witness, Vincent Windvogel ("Windvogel"), without first satisfying himself by assessing the information at his disposal.

[10] The Act requires that a peace officer must entertain a reasonable suspicion. Nomdoe's conduct fell short of what is expected of an arresting officer. When Windvogel arbitrarily identified the respondent as a person resembling one of the suspects caught on camera the night the crime was committed, Nomdoe felt that there was no need to satisfy himself about the veracity of Windvogel's allegation and proceeded, based on this allegation, to place the respondent under arrest. He conceded in court that the respondent does not resemble the person appearing on the photographs presented to him during evidence.

[11] The court a quo erred in concluding that there was only a duty on the prosecution to satisfy itself about the physical attributes of the respondent, and not on the police officers. Le Roux realised, or ought to have realised, that the person before the court was completely different from the one depicted on the photographs. The court a quo correctly summarised the facts and arrived at a fair and equitable decision. Most of the facts are either common cause or not disputed. I shall set out the chronology thereof hereunder and, at a later stage, refer to the disputed facts. The essence of this appeal lies against the court a quo's findings in law.

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

[2] 1986 (2) SA 805 (A) at p818G-H.

Background Facts and evidence

[12] The respondent attended the Kodak store in Plettenberg Bay on 7 March 2014. A few days prior, on 21 February 2014, at 01h50, there had been a housebreaking at the Kodak store, and theft of cameras and equipment valued at R182 000. This incident had been recorded on a CCTV camera belonging to the store. That same morning, a copy of the CCTV footage was handed over to the investigating officer by Mr. Ryan Best ("Best"), the owner of the store. A copy of the CCTV footage was also handed over to a staff member of the Kodak store, Windvogel.

[13] Two hours after the incident, the security manager recorded in an email that 'we have clear footage of all the suspects and Ryan will hand these (sic) over to the detectives this morning . . . attached find the photographs of the incident.' Hereafter enlarged copies of photographs of the suspects involved in the break-in were displayed inside the Kodak store, hidden from public view.

[14] When the respondent entered the Kodak store on 7 March 2014, he was recognised by Windvogel as one of the persons he had observed on the CCTV footage, and photographs that were taken from that CCTV footage, of the housebreaking at the store on 21 February 2014. The police were called and Nomdoe became involved in the matter.

[15] It is not in dispute that when Nomdoe arrived at the Kodak store, Windvogel pointed the respondent out to him. Windvogel also showed him photographs that he had on his cell phone, as well as the enlarged photographs that had been placed against the wall at the back of the store. When Windvogel testified before the court a quo, he confirmed most of the undisputed evidence regarding how he came to be in possession of cell phone photographs of the persons that had allegedly been involved in the housebreaking at the Kodak store. In this regard he testified that Best had the video footage of the incident stored on the hard drive of his computer, from where it was transferred to his (Windvogel's) cell phone after his cell phone was plugged into the computer.

[16] He himself viewed the video footage before it was transferred onto his phone. He furthermore stated that the photographs on the computer were the same photographs that were presented in evidence in court; however, the photographs on

the computer and on his phone were much clearer than the enlarged printed photographs which were presented in evidence.

[17] According to him, the quality of the photographs presented as evidence in the court a quo was not that good. The reason why this was so, is that once photographs are printed out from a computer they tend to become more pixellated[3], whereas when the images are viewed on the computer screen itself they are much more compressed, so that one can gets a much clearer view of them. He testified, with reference to the photographs presented to him in court, that once there is an enlargement the clarity of the enlarged image depicted is not of the same quality as that of the original. The photographs that he had showed Nomdoe, at the time of the respondent's arrest, had been of a much better quality and were much clearer. This evidence was also confirmed by Nomdoe when he testified.

[18] Nomdoe's evidence was that on the day of the respondent's arrest, after Windvogel had shown him the photographs, he had gone to the respondent and introduced himself to him, whereupon the respondent identified himself as Sandile Khumalo. Nomdoe had then shown the respondent the photograph which was shown to him by Windvogel, and asked the respondent whether the photograph depicted him.

[19] The respondent denied that it was him and said he had not been in Plettenberg Bay before that day. He also stated to Nomdoe that he had been hitch-hiking from Cape Town to Port Elizabeth (now renamed as Gqeberha), but Nomdoe said he hadn't seen any luggage in the respondent's possession. Nomdoe then proceeded to explain the charge of housebreaking to the respondent, and informed him that he had been identified by a witness as one of the persons involved therein. Nomdoe also informed the respondent that there were photographs of him on the witness' (Windvogel's) cell phone. These photographs were shown to the respondent and he was asked whether they depicted him, which the respondent denied, claiming that that day was the first time that he was in Plettenberg Bay. Nomdoe testified that he only saw the

[3] With reference to digital images, thefreedictionary.com defines it as:
'To reduce the resolution of (a digital image) by replacing groups of pixels whose values are different with groups of pixels whose values are the same, typically the minimum, maximum, or average value of the original pixels in that group. Images can be pixelated intentionally or as the accidental result of enlarging an image too far.'
In other words, distorting the image

photographs, not the CCTV video footage, and that he did not tell the respondent that there was video footage of him.

[20] Based on this evidence, Nomdoe had then proceeded to arrest the respondent. He confiscated the respondent's cell phone and took him to the police station. At the police station, after some investigation, it appeared that the cell phone which was found in the respondent's possession had been circulated and seemed to have been reported as stolen in Oudtshoorn. Nomdoe then conducted a background check on the respondent, to ascertain whether he had outstanding cases or previous convictions. This was verified by making use of the identity number the respondent had given him at the time of his (the respondent's) arrest.

[21] From this he ascertained that there were more than ten[4] outstanding cases against the respondent. He also found that there were four warrants circulating for the respondent's arrest, in connection with four different cases, which had been issued at various courts in the country. He tried to verify the respondent's address, and requested colleagues in Cape Town to visit the addresses that had been given to him by the respondent. The feedback given to him by his colleagues, was that the respondent was not known at any of the addresses that had been given to him. He also obtained a statement from Windvogel.

[22] The CCTV footage that had been handed over to the investigating officer when the docket was opened initially, was sent to a police unit in Cape Town known as the "war room", where specialised equipment would be used to print photographs of the suspects from the DVD containing the footage downloaded from the store. He further testified that when he was in the shop prior to arresting the respondent, he looked at the respondent and recognised him as the person that appeared on the photographs; he recognised him by his features, eg his build and his face.

[23] At some point, he became aware of another matter in which Captain Ntlabathi ("Ntlabathi") was the investigating officer, CAS 8/11/2013, a theft that had been committed at the Vivido jewellery store, also situated in Plettenberg Bay. That docket also contained photographs of the suspects. While examining the photographs in the

[4] The record of the proceedings in the magistrate's court, on 20 March 2014, indicates seven outstanding cases.

Vivido store case, he recognised the respondent, and told Ntlabathi that he had a person who appeared on those photographs in custody. He suggested to Ntlabathi that he question the person. Nomdoe was shown the photographs referred to during the trial in the court a quo, and testified that the photographs on Windvogel's cell phone that were shown to him, were much clearer and the enlargements of the photographs made by the Kodak store were also very clear. The Kodak store is a camera store and with their equipment they enlarged the faces of the suspects on the photographs on Windvogel's phone, and it was also much clearer on the enlargement of the photographs. He was at a later time informed by the prosecutor that the matter had been provisionally withdrawn.

[24] The respondent appeared in the magistrate's court at Plettenberg Bay on 10 March 2014, before Magistrate Goosen; the prosecution opposed bail stating that the provisions of section 60 (11) (*b*)[5] of the CPA would be applicable, and the circumstances as set out in Schedule 5[6], because the offence with which he had been charged was a Schedule 1[7] offence, and that he either had a previous conviction for a Schedule 1 offence, or he had been released on bail for a previous Schedule 1 offence, whereafter he had again been arrested for a Schedule 1 offence. At the same time the respondent's right to legal representation was explained by the magistrate. Strangely, at that stage, he indicated to the magistrate that he wished to conduct his own defence and that he wished to apply for bail.

[25] From the record it seems that on the same day the matter stood down and was later recalled. The respondent then appeared before Magistrate Maseti and was represented by a legal representative, Miss Scleel. The matter was thereafter

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[5] '(11) Notwithstanding any provision of this Act, where an accused is charged with an offence—
(a) . . .;
(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release; . . .'

[6] **Schedule 5**
'An offence referred to in Schedule 1—
(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or
(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.'

[7] **Schedule 1**
'Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
Theft, whether under the common law or a statutory provision.
Receiving stolen property knowing it to have been stolen.'

postponed to 20 March 2014 for a bail application. Once again, on this particular day, the respondent made two appearances before different magistrates. It seems that earlier on he made an appearance before Magistrate Maseti who would have dealt with the bail application and he was legally represented by a Miss Swiegelaar.

[26] His legal representative conveyed to the magistrate that the respondent was abandoning his bail application at that stage, the reason being that there were seven outstanding cases against him and he had previous convictions. The record reflects that the case was thereafter re-transferred back to Magistrate Goosen, after the respondent abandoned his bail application, whereupon the matter was postponed to 5 May 2014 for further investigation and, strangely, once again for legal aid.

[27] Ntlabathi, as referred to earlier, confirmed the discussion he had with Nomdoe, and confirmed that subsequent to this discussion he went to visit the respondent whilst he was in custody on the Kodak store case. After the respondent was informed about his alleged involvement in the theft at the Vivido store, which had been committed on 1 November 2013, he was warned about this charge against him.

[28] According to Ntlabathi the respondent elected to give a warning statement, wherein he admitted that he had been in the Vivido jewellery store on the date the alleged incident took place. He stated that he was with a friend who wanted to buy some jewellery for his mother.

[29] In his warning statement, the respondent denied that he stole anything from the jewellery store. There was some debate, during the trial in the court a quo, about the admissibility of this statement made by the respondent during the proceedings. I shall deal with this at a later stage, except to mention that the purpose of the presentation of the statement as evidence by counsel for the DPP and the Minister, was to rebut the respondent's version on the Kodak store charge, when he was confronted with the allegation that he had been involved in the housebreaking and he claimed never to have been in Plettenberg Bay before that day.

[30] Ntlabathi then proceeded, on 9 April 2014, to charge the respondent for the theft which had been committed at the Vivido store on 1 November 2013. He was requisitioned to appear on the additional charge on 11 April 2014. Both the Vivido store as well as the Kodak store charges were consolidated in one charge sheet. On

5 May 2014 the matter was postponed to 6 June 2014, in order to obtain a regional court date. The matter was thereafter postponed to 16 and 17 July 2014, whereafter it was transferred to the regional court.

[31] At the time of the respondent's first appearance in the district court, the docket was handed over, by Nomdoe, to the district court control prosecutor, Henriette Breedt ("Breedt"), who has been a prosecutor since 1999. During 2014 she was stationed at Plettenberg Bay magistrate's court. Plettenberg Bay magistrate's court is a periodic court, and she travelled between the Knysna and Plettenberg Bay courts. Amongst her duties were to screen all cases that were brought to court, and to decide whether to proceed with the prosecution thereof or whether to withdraw those cases.

[32] She furthermore had to decide which cases were to be heard in the regional court, and which had to be transferred to the Knysna Court. With regards to the matter involving the respondent, she received the docket from the investigating officer, Nomdoe, and after reading the docket and discussing it with him, came to the conclusion that there was a *prima facie* case and decided to enrol the matter. She could not recall whether the respondent, when he appeared in court, requested a copy of the video footage. She would not have been in a position to furnish him with a copy thereof, because it was not available to her when the docket was enrolled for the first appearance. At that time, according to her knowledge, the video footage was in Cape Town, in order for it to be transferred onto a disc.

[33] She further testified that if the respondent had requested a copy of the video footage in court, it would have been recorded on the court record, by the magistrate. Her decision to enrol the matter was based, firstly, on a statement by the owner of the Kodak store about what had happened, which also referred to the existence of video footage of the perpetrators, inside the shop. Secondly, there was a statement from the investigating officer, Nomdoe, who stated that he received a telephone call from an employee at the shop, Windvogel, who had a copy of the video footage on his cell phone. Windvogel, according to Nomdoe, had recognised one of the persons on the video footage. Thirdly, there was a statement from Nomdoe, who had gone to the shop where he recognized and identified the accused as the person whose image appeared on the video footage which had been taken in the shop.

[34] She stated that although the video footage had at that time not been given to her, because it had already been sent away to have it transferred onto a disc, she nonetheless came to the conclusion on the basis of the affidavits referred to that there was a prima facie case and decided to enrol the matter. She further testified it was not apparent at the time when she made her decision that there were other witnesses, who were employees in the Kodak store, who were present at the time when Windvogel identified the respondent. She said that a prosecutor in the ordinary course and scope of their duties, would generally accept what was stated on affidavit under oath by witnesses.

[35] According to her it would be practically impossible for prosecutors, before making a decision to prosecute, to confirm the contents of the witnesses' respective statements. After it was decided that the matters involving the respondent would be transferred to the regional court, both dockets were sent to the regional court control prosecutor, Le Roux, who has been stationed at the George magistrate's court since 1995.

[36] Le Roux testified and confirmed Breedt's evidence regarding the procedure that had to be followed when the matter was transferred to the regional court. As far as the case involving the respondent was concerned, he decided it was a matter that had to be enrolled in the regional court, because the value of the items allegedly stolen exceeded R60 000. He confirmed that it is usually accepted that if a matter has been transferred to the regional court, the necessary investigation has been completed.

[37] In certain cases however there may still be some investigation outstanding at the time of the transfer. It may also happen that, even if he/she is of the view that a matter has been fully investigated, the prosecutor who is assigned to the case may after consultation conclude that further statements from witnesses should be gathered. No prior consultations with witnesses are undertaken before the decision is made as to whether the matter should be enrolled on the regional court roll. The only consultation that may take place will be done by the regional court prosecutor assigned to the case just before the trial starts. He testified that as regional court control prosecutor, he is not involved in consultations with any witnesses except in exceptional circumstances. That is left to the prosecutor in the regional court who is assigned to the case.

[38] The prosecutor usually consults with witnesses in the course of the morning just before the case starts. After Le Roux receives a docket from the district court, he would enrol it on the regional court roll for a specific date, and he would retain the docket. The docket is not sent back to the district court or the investigating officer. Any further communication either with the district court or the investigating officer, will be by means of written instructions which would be given to the investigating officer.

[39] In the two dockets relating to the Kodak store and the Vivido store cases, there were photographs of the commission of the offences which depicted the suspects in both cases. He could not remember whether there had been a disc in the dockets as well at the time when he received them. The practice would be that the investigating officer would make still photographs from CCTV footage, because they did not have the facilities at the court to watch CCTV footage. During his evidence, Le Roux was referred to the photographs in the dockets in respect of both of the charges.

[40] In respect of the Kodak store charge, he confirmed that the statements of all the witnesses were contained in the docket. When the docket was laid before him, he had to determine whether there was a *prima facie* case against the person or persons allegedly involved in the crime. As far as the Kodak store case was concerned, there was video footage which he considered to be real evidence. There was also a sworn statement from the witness who saw the CCTV camera footage, as well as still photographs identifying the suspects.

[41] There was a statement from Nomdoe, the investigating officer, who stated that he had also compared the photograph of the respondent that was shown to him by Windvogel with the person that was present in the store. The real evidence of the CCTV footage, as well as the statements, was sufficient for him to conclude that there was a *prima facie* case. Regarding the Vivido store case, the investigating officer also presented him with photographs as well as video footage of the commission of the offence. Furthermore, as far as the Vivido store charge was concerned, the investigating officer had visited the respondent in the cells, and the respondent had confirmed that he was one of the persons depicted in the photographs. There was also a warning statement of the respondent which confirmed that the image taken from the video was indeed him as he had been present in the store that day.

[42] According to Le Roux the respondent, by doing so, placed himself on the scene. In respect of the Vivido case, he therefore also concluded that there was a *prima facie* case for the matter to be enrolled in the regional court. He said that after a matter was placed on the regional court roll, the prosecutor to whom the case had been assigned would keep him abreast of any developments. A matter would not be withdrawn without his permission or input.

[43] There were a few postponements in the regional court, as indicated on the charge sheet[8], and on 25 September 2014 the matter was postponed for trial to 3, 11 and 12 February 2015. At that stage, the prosecutor mentioned that there was fingerprint evidence as well as video material available which the prosecution would use during the trial. Immediately after the postponement on 25 September 2014, the prosecutor sent a notice[9] to the investigating officer stating which witnesses should be subpoenaed for trial.

[44] The prosecutor also requested that the video footage be made available in a format that could be viewed in court. Thereafter the matter was postponed to 26 and 27January 2015[10], when the then prosecutor, Ms. Barnard ("Barnard"), informed the court that she had contacted the investigating officer, who had indicated to her that he had made arrangements to have the video material available, and that she would attempt to have it available for the defence within the following week.

[45] Once again it was confirmed that the matter would be postponed to 3, 11 and 12 February 2015, and all the witnesses would be present. It needs to be mentioned that, during these proceedings in the regional court, the respondent was legally represented at all times. The next interaction Le Roux had with this case was when prosecutor Barnard, on 3 February 2015, informed him that the evidence of the single witness would be sufficient, it would strengthened the prosecution's case, if the other witnesses would corroborate the evidence of the single witness.

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[8] Record page 818 - 819(8).
[9] Record page 792(8).
[10] Record page 819(8).

[46] She informed him that there were other witnesses available that could strengthen the state case. They then discussed whether they should withdraw the matter temporarily and concluded, because the respondent could be easily traced and because he was known to investigating officer, that it should not be a problem to withdraw the matter at that point. They decided that they would re-enrol it at a later stage. The main reason for their decision to withdraw the matter, was that the respondent had been in custody for a long time, and a postponement would have caused a further delay.

[47] Le Roux said it was not apparent to him, at the time when he screened the docket, that there had been other employees in the Kodak store at the time when Windvogel had made the identification of the respondent to Nomdoe. It only came to his attention when Barnard informed him that, after consultation, further witnesses had come to light. If this fact had been known to him at the time when he screened the docket, he would have sent it back to the investigating officer for him to obtain the further statements of the other witnesses.

[48] In a further explanation in cross-examination as to why he decided to proceed with the prosecution against the respondent, in circumstances where there were no eyewitnesses, he explained that eyewitness testimony is not the only evidence allowed in court. In this regard, he explained that he had the sworn statement of a witness (Windvogel) who had recognised the respondent from a photograph which was distilled from the CCTV footage of the crime scene, which he had also earlier observed on the CCTV footage. This, he explained, constituted acceptable evidence in a court.

[49] The evidence of this witness would have been corroborated by the real evidence of the video footage. Le Roux also stated that by the time he received the docket for enrolment on the regional court roll, the photographs were already in the docket. However, when it was later pointed out to him that the photographs in the Kodak store case may not have been in the docket, he stated that even if it hadn't been there he would still have made the decision to prosecute. This was because Nomdoe had also viewed the photograph(s) on Windvogel's phone and he had been satisfied that the respondent had been correctly identified by him as one of the suspects.

[50] Le Roux further testified that he never compared the photographs in the two dockets to the respondent to see whether they were of the same person. He pointed out that he was not a witness in the matters. He reiterated that he based his decision on the affidavits which were before him in the two dockets. He further stated that as a prosecutor his duty was just to consider whether there was a prima facie case on the available evidence and not whether there was conclusive evidence. He said t the investigating officer would have brought the video evidence to court and he preferred that it be kept as evidence in the police's SAP13 facility, where all other real evidence which is intended to be used as an exhibit is always kept by the police for safekeeping. He also confirmed that the regional court did not have facilities available to download still pictures from video footage.

[51] The respondent stated in his evidence that on 7 March 2014 he travelled through the area of Plettenberg Bay on his way from Cape Town to Port Elizabeth (Gqeberha). He was traveling by vehicle with 2 friends of his, namely Mduduzi and Mthunzi. In Plettenberg Bay they stopped, because he wanted to develop some photographs he had on his cell phone at the Kodak store, and while he was waiting for the photographs to be developed, he was approached by a police officer who took his cell phone. After the police officer looked through the cell phone, he came back and placed him under arrest for theft. He was told he was arrested for an incident that allegedly took place on 21 February 2014, whereupon he told the police officer that he had never been in Plettenberg Bay before that day. It was the first time that he visited the area. The policeman would not listen to him.

[52] The policeman then told him that he was going to take him to the police station and that there was some video footage of the incident, which they would have to look through to see whether he appears on it. He was told that if he did not appear thereon, he would be released. His two friends who accompanied him came to the police station and informed him that they tried to call him on his cell phone. No video footage was shown to him at the police station. He also did not at any stage see any video footage showing him breaking into the Kodak store.

[53] He further stated in cross-examination that he did not know anything about the incident that happened at the Kodak store on 21 February 2014. He also could not dispute that there had been an incident at the Vivido store on 1 November 2013. He

further testified that he did that know any of the witnesses in both incidents. He confirmed that he always had a lawyer when he appeared in court. He also had a lawyer at the time his bail was considered. At the time of his arrest, he believed that there was video footage available of the persons involved in the offence. He further denied that Nomdoe ever showed him photographs while they were in the Kodak store and claimed that the witnesses had never made a positive identification of him in the Kodak store.

Evaluation:

[54] I shall firstly deal with the issue of the unlawful arrest of the respondent raised in the cross-appeal. Thereafter I shall deal with the issue of the unlawful detention and malicious prosecution of the respondent raised in the main appeal.

The unlawful arrest:

[55] Section 40 of the CPA and, more particularly in this case, subsection 1 (*b*), clearly sets out the circumstances under which a person can be arrested by a peace officer, without a warrant. The arrest of a person in terms of this subsection is only permissible when a peace officer entertains a reasonable suspicion that the person being arrested has committed an offence listed in schedule 1.

[56] In this particular case it is not in dispute that there was an allegation that the respondent had committed an offence as listed in schedule 1, which was an offence of housebreaking with the intent to steal and theft. The jurisdictional facts that have to be present before an arrest can be effected in terms of section 40 (1) (*b*) were set out in *Duncan* (supra) as follows:

a) the person executing the arrest must be a peace officer;

b) the person executing the arrest must entertain a suspicion;

c) the suspicion must be that the suspect committed an offence referred to in schedule 1; and

d) the suspicion must be based on reasonable grounds.

It is only when all of these jurisdictional facts are satisfied that the discretion whether or not to arrest arises.

[57] It seems that there is no dispute as to whether the jurisdictional factors listed in (a) to (c), above, were present when Nomdoe affected the arrest of the respondent. The complaint is that Nomdoe did not act independently when he arrested the respondent; he acted on the say so of the witness Windvogel without satisfying himself by assessing the information at his disposal. Furthermore, that there were no eyewitnesses and the allegations against the respondent at that stage were based on circumstantial evidence. Based on these submissions, the respondent submits that Nomdoe had not held a reasonable suspicion when he performed the arrest on him.

[58] The requirements of what is understood to be a reasonable suspicion are well-established. *Duncan* (supra)[11] cited the English decision of *Shaaban Bin Hussien and Others v Chong Fook Kam and Another*[12], where it was held that a 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.'

In *Powell NO and Others v Van Der Merwe NO and Others*[13], quoting further from *Shaaban Bin Hussien*, the court stated: 'When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.'

[59] The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion. Once the required suspicion exists, an arresting officer will be vested with a discretion to arrest, which he must exercise rationally. In addition, before determining whether the suspicion is reasonable, a court must be satisfied that the person affecting the arrest actually formed his or her own suspicion. Whether an arresting officer entertained a reasonable suspicion is to be determined from the facts and circumstances of the particular case. In this regard the evidence of Nomdoe, as supported by Windvogel, is of crucial importance.

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[11] At page 819I.
[12] [1969] UKPC 26 (7 October 1969); [1969] 3 All ER 1627 (PC) at 1630.
[13] 2005 (5) SA 62 (SCA) para 37.

[60] I do not agree with the respondent's submission that Nomdoe, on an objective approach, did not have reasonable grounds for his suspicion. Whilst he was told by Windvogel that the respondent was one of the persons involved in the housebreaking at the Kodak store, Nomdoe did not merely rely on what was told to him. He personally viewed the still photographs shown to him by Windvogel, that had been downloaded onto his cellphone from the video footage.

[61] He also closely observed the respondent while he was in the store, and satisfied himself that the person shown to him on the photographs, as having allegedly been involved in the housebreaking, was indeed the respondent. He looked at the respondent's features, and saw that it was him. He further testified that there were other photographs in the store, out of sight of the public, that had been enlarged. It was only after viewing these that he approached the respondent, with the photographs on the cellphone, which he showed to the respondent and asked whether it depicted him, to which the respondent replied no, it was not him, and said that he had never been in Plettenberg Bay before that day.

[62] At the time when he indicated that he was going to arrest the respondent for the housebreaking, the respondent had been identified by Windvogel. He was also aware of the fact that there was video footage which captured the commission of the crime and the persons involved, but he never saw the video footage and he did not tell the respondent that there was video footage.

[63] At that stage Nomdoe had considered the evidence and was aware of the video footage, from which those photographs had been downloaded, shortly after the incident on 21 February 2014. In my view, all these facts formed the foundation upon which Nomdoe formed a reasonable suspicion that the respondent had been involved in the commission of a schedule 1 offence, in order to justify his arrest in terms of section 40 (1) (*b*) of the CPA.

[64] The fact that there were no eyewitnesses, given the facts and circumstances of this case, in my view, was irrelevant for the determination as to whether Nomdoe entertained a reasonable suspicion. The evidence upon which Nomdoe based his reasonable suspicion was of a circumstantial nature in the form of real evidence i.e photographs taken from video footage of the commission of the offence, from which

the respondent was identified. A reasonable suspicion that a person has committed an offence is capable of being formed not only on the basis of the evidence of eyewitnesses, but also by circumstantial evidence, as in this case, in the form of real evidence. It is well-established in our law that a person's guilt can be established by means of real evidence in the form of video footage[14], which Nomdoe reasonably believed would be available for proof at a later stage, during the prosecution of the respondent.

[65] In my view, all these facts point ineluctably to the conclusion that at the time of the arrest of the respondent, Nomdoe had formed a reasonable suspicion that the respondent had been involved in the commission of the housebreaking on 21 February 2014 at the Kodak store. The court a quo was therefore correct to hold that the respondent did not show that his arrest was unlawful. The cross-appeal therefore falls to be dismissed.

Malicious prosecution and Unlawful detention

[66] From a reading of the court a quo's judgment, it is clear that the court found that there had been a malicious prosecution against the respondent, and that this was inextricably linked to his unlawfully detention. Put differently, the court a quo found that had it not been for the fact that the prosecution was malicious, the continued unlawful detention of the respondent would not have endured[15].

[67] The court a quo found that from 17 July 2014, when the matter was placed on the regional court roll by the prosecutors, and until it was withdrawn on 3 February 2015, the evidence upon which the decision was reached was lacking, and the matter was not trial ready. This, according to the court a quo, was because the evidence in respect of the identity of the respondent was at all times lacking, while the matter was on the regional court roll, and 'the decision to enrol the matter in the Regional court for trial from 17 July 2014 and the decision of the prosecutors in George to argue for the

[14] *S v Baleka and Others* (3) 1986 (4) SA 1005 (T); *Motata v Nair NO and Another* 2009 (1) SACR 263 (T); *S v Mdlongwa* 2010 (2) SACR 419 (SCA). *S v Mpumlo and Others* 1986 (3) SA 485 (E) at 490H-I

[15] Para 36 judgment, at page 1083 – 1084.

detention of the plaintiff (respondent) between 17 July 2014, and 3 March (sic) 2015 was arbitrary'.

[68] The court further held that the respondent proved *animus injuriandi* on the part of the DPP and the prosecutors in the regional court at George, because they clearly intended to prosecute the respondent fully aware of the fact that by doing so, he would in all probability be injured as regards his privacy and liberty. Further that the decision to enrol the matter on the regional court roll and to keep the respondent in custody, was not based upon evidence reasonably believed to be reliable and available to put the respondent on trial. Therefore, the continued detention of the respondent, whilst there was no reliable evidence of his identity as a perpetrator, and whilst there was no continued investigation done in regard thereto, infringed on his liberty.

[69] The court a quo found in effect that because the investigation was not complete, and the matter was therefore not trial ready, which resulted in the withdrawal of the case against the respondent, there was a malicious prosecution. The court found that the investigation was not complete because the fingerprint reports, as well as a 'report' from the "war room", were outstanding. This came about because the prosecutors, by keeping the docket, failed to give the police clear instructions. Therefore, the outstanding investigations were not properly and adequately reported to the police by the prosecutors.

[70] Furthermore, the court a quo held that the prosecutors did not take sufficient care to ensure that all necessary investigations were completed before the matter was set down for trial and did not adequately assess all the material which was before them in order to prepare for trial. The court a quo concluded that in the circumstances the prosecutors did not have reasonable grounds to believe that the prosecution of the respondent was justified. In its view the prosecutors that attended to the matter in the regional court, did not properly consider the law or make a decision with regard to the prosecution of the respondent.

[71] The trial court was of the view that, had Le Roux or any prosecutors in the regional court read the docket when it was submitted for their decision by the district court prosecutor, they would have known that the investigation was incomplete and that the matter was not yet ready for trial. The court a quo found that Le Roux's

evidence, that although he had read the docket, he was not aware that Windvogel had been in the Kodak store with two of his colleagues, was untrue. It found that Le Roux and his colleagues had not read Windvogel's statement, because if they had they would have been aware of the fact that two other colleagues had been in the shop with him at the time when the respondent entered the shop and they would have been aware that the LCRC report on the fingerprints was outstanding, as were the results of the video footage from the "war room".

[72] Based on all these facts, the court was of the view that it was irrational for Le Roux, or the prosecutors in the regional court, to conclude that the investigation was complete and that the matter was ready for trial. It was also apparent that the photograph the prosecution relied on, which was in the docket, was not clear. According to the court the photograph was, however, clear enough for the regional prosecutors to observe that the person who was depicted on it had broader shoulders and his earlobes, nose and hair did not match those of the respondent.

[73] The court a quo itself went through the extraordinary exercise, during the trial, of having a look at the image of the person on the photographs that were presented to it and comparing these to the respondent whereupon it opined that one would find it difficult to understand how a prosecutor could come to the conclusion that it was sufficient evidence of identity and that it portrayed the respondent.

[74] This conduct of the trial court in itself poses some difficulties, because firstly, it was not a court which was seized with criminal trial of the respondent, and secondly, the trial judge, based on his own observations, and based on the wrong evidence, contradicted the versions of the witnesses who testified before him during the trial. In this regard the court incorrectly sought to compare the grainy, pixelated images on the enlarged photocopies of photographs which were contained in the docket with the respondent who was before it, some years after the incident in question. What the court did not do, if such an exercise was at all permissible, was to compare the image of the person who may have been depicted on the photograph(s) which Windvogel had on his cellphone, on which the identification by him and Nomdoe had been made, with the respondent. This in itself was a material misdirection.

[75] The court a quo was of the view that the prosecutors purely relied on the strength of the existence of photographs without applying their independent minds thereto. The court a quo, in my view, with respect, clearly misdirected itself on the facts and on the law, in respect of both its findings that there was a malicious prosecution of the respondent and that his detention was unlawful.

[76] This court, as a court of appeal, is well aware of its limited power to interfere with the trial court's findings of fact. In the absence of a demonstrable material misdirection the trial court's findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows it to be clearly wrong[16]. It is not clear on what basis the court a quo found that the investigation was incomplete. Right from the onset, it was the case of the prosecutors in respect of the Kodak store charge, that they would be relying on video footage which was available, but not in their possession. This was the evidence of Breedt as well as Le Roux.

[77] According to Le Roux's evidence, it was common practice that the recording of the video footage was held by the police in the SAP13 store, as they would do with all real evidence, rather than being kept in the docket, where the statements of witnesses are filed. This would make sense because video evidence, before it was captured in digital form, was captured on rather large VHS tapes.

[78] It is also a common practice that photographic stills are produced from video footage, in order that copies thereof may be provided to the parties and present it as evidence in court. It is for that reason that the video footage was sent to the so–called "war room" in Cape Town. This was a common practice, according to Le Roux. There was thus a common understanding between the police and the prosecutors and, it seems, the defence attorneys appearing for the respondent, that this evidence would either be made available to the defence attorneys prior to the start of the trial, or it seems at the very least on the day the trial would commence. This evidence was not placed in dispute by the respondent.

[79] In a pre-trial hearing on 25 September 2014, the prosecutor informed the court that fingerprints were lifted and that video material was available. Also that they would need two days for trial and that 6 witnesses would be called. A trial date was set for

[16] *R v Dhlumayo and Another* 1948 (2) SA 677, at 705-706.

3,11 and12 February 2015. The matter was postponed to 26 January 2015, a provisional date, whereafter the matter was postponed to 27 January 2015. On 27 January 2015 the prosecutor Barnard informed the court that she had contacted the investigating officer and arranged that the video footage be made available, and that she would attempt to give it to the respondent's defence attorney during the course of the following week.

[80] The prosecutor also confirmed that all witnesses would be available on the first day of the trial, which was arranged for 3 February 2015. The video footage referred to was the video footage that Windvogel had observed, that had been given to the police by his employer, Best, on the morning of the incident, 21 February 2014. It is also common cause that the photographs of the incident were filed in the docket. It seems that on 25 September 2014[17], the regional court control prosecutor caused a letter to be sent to the branch/station commander of the Knysna detective unit, requesting that a list of mentioned witnesses be subpoenaed in respect of both the Kodak store as well as the Vivido store cases. One of the instructions given to the investigating officer was that the video evidence must be made available in a format that would make it possible for it to be viewed in court by the prosecution as well as the defence.

[81] The investigating officer was also instructed to report to the office of the regional court prosecutor at 8:30 a.m on the morning of the trial. Once again on 26 January 2015, prosecutor Barnard[18] sent a written request to Plettenberg Bay police station for the attention of Nomdoe, to 'please ensure that the witnesses are subpoenaed' and 'to make more than one copy available of the video footage as well as the photos taken'. The police, it seems, complied with the prosecutor's instructions sent to them on 25 September 2014, to subpoena all the witnesses, as listed in the letter which was sent to them. This is evident from the service returns which show that the witnesses were subpoenaed to testify in court on 3 February 2015[19].

[82] Given this response, it seems there was a clear line of communication between the police and the prosecutors as regards what needed to be done to prepare the

[17] Record page 792 (Vol 8); 871(9) Vol (8).
[18] Record page 791 Vol 8.
[19] Record Vol (9) page 872-882.

matter for trial. The court a quo therefore clearly erred in its finding that there was no communication between the regional court prosecutors and the police, and in its finding that the last time that the investigating officer heard from the district court prosecutor was in April 2014, and the next communication from the regional court prosecutor was only in March 2015. It is also not clear on what basis the court found that, because of fingerprint evidence that was outstanding, the investigation was not complete, because it was never the prosecution's case in respect of the Kodak store matter, which was the only pleaded case (it was not alleged that the respondent had been wrongfully arrested and prosecuted maliciously in relation to the Vivido store charge), that the respondent was linked to the crime by means of fingerprint evidence. The respondent was also not arrested or prosecuted on the basis that there was fingerprint evidence which implicated him in the break-in and theft.

[83] The DPP in its plea, in response to an allegation by the respondent that he was unlawfully arrested and wrongfully detained, stated in paragraph 3.3 that: 'The Plaintiff was identified and recognised by a third party in the store from photographs and/or video surveillance footage capturing the suspects, including the plaintiff.' The DPP, as I said earlier, made it known from the onset that the case against the respondent rested on the video footage of the surveillance cameras. The prosecutors always believed, and up to 3 February 2015 still believed, that they would prove the case against the respondent by means of the video footage. More than one request was made to the police to have it available. This belief was based on the affidavits of Windvogel, Nomdoe and Best. The prosecutors never misled the respondent or the magistrate in the regional court about the existence of this evidence. It was also never the respondent's case that he was misled by the prosecutors about the actual existence of this evidence. It was on this basis that Le Roux, quite correctly in my view, concluded that there was a *prima facie* case. Especially based on the evidence of Windvogel, who had a clear view of the video footage and who had clear photographs of the respondent that had been downloaded from the video footage. Windvogel's evidence was clear, when he was confronted with the photographs which were shown to him in court (or rather the photocopies of photographs|), that they were of a poor quality[20].

[20] Record page 636-638 (Vol 7).

[84] He stated that they were distorted, and explained why the photographs portraying the respondent, which had been presented in court, differed from those which he had in his possession. As previously indicated he explained that once photographs are printed out from a computer screen, such photographs are prone to pixellation, whereas on the screen it was much more compressed and would be much clearer. He further testified that the photographs he had on his cell phone, which he had shown to Nomdoe, were of a much better quality than those that were shown to him in court. This evidence remained unchallenged and the court a quo did not deal with it all and also did not reject it outright as incorrect. Nomdoe in his evidence also stated that the photographs on Windvogel's cell phone were much clearer, when he was confronted with the photographs from the docket that were shown to him in court during cross-examination[21].

[85] He also stated that the enlarged photographs that had been placed against the back walls of the Kodak store, were also much clearer. Nomdoe, as well as Windvogel, when confronted with the distorted photographs in the court a quo, while conceding that the features as depicted therein might appear to be different, were nonetheless adamant that they were those of the respondent. The court a quo, in my view, failed to take this crucial evidence into consideration when it concluded that the prosecutors wrongly relied on these photographs'. It was clear from the evidence of Windvogel, as supported by Nomdoe, and the sworn statement he made to the police which Le Roux and the other prosecutors relied on, that these were not the photographs that Windvogel referred to. It was also clearly not based on this evidence that the prosecutors concluded that there was a prima facie case. It was based on Windvogel's statement as contained in the police docket, which he later further expounded upon in his uncontested evidence.

[86] The court a quo preferred its own observations it made of the person appearing on the photographs, to that of the witnesses who had observed much clearer photographs of the person depicted on their photographs. It also rejected the version of Windvogel, notwithstanding that he had clearly seen the respondent on the video footage and also had seen much clearer still photographs of the respondent. If the court a quo had properly taken the undisputed versions of Windvogel and Nomdoe

[21] Record page 326 (Vol 4).

into consideration, it should have accepted their version as to the poor quality of the photographs which were presented to them in evidence, and should not have made any findings about the identity of the respondent based on the distorted photographs. This, in my view, was also a serious misdirection.

[87] Regarding its finding that the identity of the respondent was not properly considered by the prosecutors, and that they were not clear as to his identity, the court a quo impermissibly relied on the evidence of identity in the Vivido store case that was registered under docket number CAS 8/11/2013. This was not the pleaded case on which the respondent relied to base his claim. In an exchange between the court a quo and Le Roux, Le Roux was questioned by the court about an entry made by prosecutor Barnard in the Vivido store case, where she made the following entry in the investigating diary to the investigating officer: 'Please provide info as to how the identity of the accused was established as a perpetrator in this case'[22]. Le Roux was then taken to task for having considered and assessed the contents of the docket in that particular case and finding that there was a reasonable ground to prosecute, only for Barnard to have doubts about the identity of the respondent.

[88] This was part of the evidence the court a quo sought to rely on, in order to conclude that there was no proper evidence of identity regarding the respondent when the decision was made to prosecute him. This was a clear misdirection on the part of the court a quo, because it was not called upon to adjudicate the claim as set out in the particulars of claim in respect of the Vivido store charge. In any event, even if the identity of the respondent in the Vivido store charge would have been relevant to the Kodak store charge, there was evidence in the docket in the Vivido store case in the form of a warning statement by the respondent, in which he had stated that he had been present in the shop on 1 November 2013, on the day when the theft was committed. This evidence was presented, without any objection thereto, except that it may not have been admissible in the criminal trial, in order to disprove the respondent's version given to Nomdoe on 8 March 2014, that he had never before been in Plettenberg Bay. It was evidence in a criminal court which, in my view, may well have found it to be admissible after having applied the provisions of section 35 (5) of the Constitution. It would therefore have been an issue of the admissibility of

[22] Record page767 -768 (Vol 8).

such evidence before the criminal court. The court a quo clearly ignored this evidence and did not take it into account. (See fn14 page 20) (supra).

[89] The court a quo was clearly wrong to conclude that the prosecutors' case was purely based on the photographs and that the respondent was not properly identified, based on this entry made by Barnard, which was in any event irrelevant to the pleaded case. The court a quo was also not correct in its finding that the investigation was not complete, because of the fact that the video evidence was not available. The evidence clearly points to the fact that it was at all times available, only not in the possession of the prosecutors, but with the police, for the reasons given by Le Roux.

[90] Le Roux also stated that the further evidence that he had available, although it referred to the Vivido store charge, was that it would seem that the respondent *prima facie* falsely claimed to Nomdoe that he, apart from being in the Plettenberg Bay area on the day of his arrest, could never have been in the area when the offence was committed in respect of the Kodak store charge, on 21 February 2014, as he was confronted with the photographs in the Vivido store charge indicating that he had been in Plettenberg Bay prior to the day of his arrest. This evidence was also ignored by the court a quo when it concluded that the prosecution of the respondent was malicious. It is on these grounds that I find the court a quo misdirected itself on findings of fact upon which it concluded that there was a malicious prosecution as well as an unlawful detention of the respondent.

[91] In my view, as said earlier, the court a quo, with respect, also misdirected itself regarding the legal requirements for a malicious prosecution. In *Minister for Justice and Constitutional Development v Moleko*[23] the Supreme Court of Appeal reaffirmed the requirements for a claim for a malicious prosecution, where it said:

'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without the reasonable and probable cause;

[23] [2008] 3 All SA 47 (SCA), para 8.

(c) that the defendants acted with "malice" (or animo injuriandi); and

(d) that the prosecution has failed. . . .'

[92] There is no dispute that the first requirement was met. It is clear that after his arrest the respondent was arraigned before the magistrate's court, and thereafter the matter was transferred to the regional court, thereby setting the law in motion by instituting a prosecution against the respondent.

Reasonable or probable cause

[93] This requirement is usually met if the prosecution can be justified; if there is a *prima facie* case, consisting of allegations supported by statements and real and documentary evidence available to the prosecution, which is of such nature that if it is proved in a court of law by admissible evidence, it would result in a conviction.[24]

[94] In *S v Lubaxa*[25] the meaning of reasonable and probable cause was explained thus:

'Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C - E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold.'

[95] Was there real and probable cause for prosecution in this particular case, or, put differently, a minimum of evidence to justify a reasonable and probable belief on the part of the prosecutors that the respondent would be convicted? It is not disputed that when the docket was laid before Breedt and thereafter Le Roux, they were presented with statements under oath of Best and Windvogel that there had been a housebreaking at the Kodak store and certain persons who were involved in the

[24] Murray v Minister of Defence 2009 (3) SA 130 (SCA) para 46.
[25] 2001 (2) SACR 703 (SCA) para 19.

housebreaking were captured on video footage. Windvogel declared on affidavit that he had observed the video footage and on 8 March 2014, a person resembling one of the persons who had been involved in the break- in as depicted on the video footage, entered the Kodak store, as a result of which he summonsed Nomdoe telephonically and identified the respondent to him, as such a person.

[96] Nomdoe in turn also stated on affidavit that this person was pointed out to him after he had observed the photographic stills of the video footage on Windvogel's cell phone, as well as an enlarged photographs of the respondent that were displayed at the back of the store. Nomdoe himself identified the respondent as the person who appeared in the photographs on Windvogel's cellphone and those on the back wall of the store. At the time of the respondent's arrest, he presented Nomdoe with a version that he had never been in Plettenberg Bay before that day, which later proved to be false, given the version he had given in the Vivido store case. All of this, in my view, constituted strong *prima facie* evidence on which the prosecutors could rely in order conclude that there was reasonable and probable cause to proceed with the prosecution, especially where this evidence would be backed up by real evidence in the form of video footage.

[97] The mere fact that the video evidence was not in the police docket, as the witnesses stated under oath, is irrelevant, because it was not in dispute that it was always available to be presented as evidence during the trial. There was always an honest and genuine belief on the part of the prosecutors that this evidence would be made available to them before the trial would proceed. It was also never disputed that there was such evidence.

[98] There was no duty, in my view, on Le Roux or any of the other prosecutors in the regional court, to verify the correctness of the statements given by witnesses under oath, who had observed the video footage and the photographs which were taken from it. The veracity and reliability of the versions of witnesses in a criminal matter is determined by them giving oral evidence in an open court and being subjected to cross-examination[26]. Le Roux, as any other prosecutor would do, relied on the statements of these witnesses. It was reasonable for him to believe that these

[26] Section 161 of CPA.

witnesses would be telling the truth as to what they observed, because their evidence was based on statements made under oath, and there was an assurance that their identifications would be verified by the video footage. It is not expected of prosecutors, in the ordinary course of their duties, to confirm or corroborate the evidence of witnesses as set out in their sworn statements. If they were required to do so, they would run the risk of becoming witnesses themselves in the cases they would be prosecuting.

[99] In the ordinary course, prosecutors would request the police or investigating officers to find other evidence to verify or corroborate the evidence of a witness. It is also not expected of a prosecutor him or herself, where the identity of an accused will be proven by photographs or video footage, to verify the accuracy of those photographs or video footage by comparing it with an accused's features while he or she stands in the dock. The court a quo's criticism of the prosecutors, especially Le Roux and the other prosecutors at the regional court in George, and the language it used, was most unfortunate, unfair, unreasonable and unjustified[27].

In my view therefore, the respondent has failed to show the DPP acted without reasonable and probable cause.

Animus injuriandi

[100] The respondent was required to allege and prove that the DPP intended to injure either by means of direct intention or indirect intention. In *Moleko*, at para 63, the court held that *animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness. It is also further accepted, as pointed out in *Moleko*, that:

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[27] Judgment record page 1063 para 28, with reference to prosecutors Noyi or Goloda, the trial judge remarked:
'It seems to me that the two were legally qualified, duly delegated information transmitters or super-graced messengers wearing gold embroidered National Prosecuting Authority black gowns . . . Their primary duty had been reduced to be to parrot before magistrates what prosecutors in offices said'.
On page 1065 para 33 it said the following in respect of all the prosecutors in general:
'. . . without applying their deemed independent mind thereto'.
On page 1066 para 36:
'The time has arrived for the DPP to trust Prosecutors who appear before magistrates' courts. They must be returned from well-decorated glorified messengers to duly delegated legal professionals. . .'
On page 1067 para 37:
'. . .there was sheer dereliction of duty on the part of the prosecution. . .'

'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.' (Internal footnotes omitted.)

[101] The court a quo was satisfied that the respondent proved the element of *animus injuriandi*, by stating that the DPP, Le Roux and the prosecutors in the regional court at George clearly intended to prosecute the plaintiff, fully aware of the fact that by doing so, he would in all probability be injured as regards his privacy and liberty. On a conspectus of the evidence I am of the view that such a conclusion is not borne out by the evidence which was before the court a quo. On the contrary, as said earlier, the evidence clearly points to the opposite. Le Roux's decision was based on the honest belief, borne out by objective evidence as corroborated by Windvogel and Nomdoe, that there was reasonable and probable cause to prosecute the respondent.

[102] The respondent failed to show that the prosecution was instituted for any other reasons than those which Le Roux objectively found to be in the docket that was presented to him. It was based on clear evidence pointing to the involvement of the respondent in the commission of the housebreaking which was perpetrated on 21 February 2014 at the Kodak store, and nothing else. This belief was based on the evidence of the witness statements in the docket, as presented to him. As said earlier, the prosecutors as well as Le Roux always believed that the case against the respondent was based on the real evidence of the video footage that was always available, the mere fact that it was not in the docket is not a reason to conclude that his decision to proceed with the prosecution was malicious.

[103] The respondent failed to show that the evidence of the video footage did not exist and further failed to show that Le Roux and the prosecutors at George did not honestly believe that based on this evidence, and the evidence of the witnesses, the respondent was guilty of the offence, and thus that there was no reasonable ground to prosecute him. At the very least, the case, in the absence of the video footage on 3 February 2015, may not have been trial- ready, but the intention to enrol the matter on the regional court for that reason cannot be construed as being malicious. The mere fact that a case may not be trial- ready, does not mean that the prosecutors,

after having come to such a realisation, were malicious when they instituted the prosecution.

The prosecution has failed:

[104] It cannot be said that where a case has been provisionally withdrawn by prosecutors in the circumstances which applied in this case, the prosecution has failed. The reason for the withdrawal was to gather further evidence to strengthen the case against the respondent, after Barnard, during consultation, discovered that two further witnesses were available. The prosecutors embarked on this course of action and exercised their discretion in such a way so as not to prejudice the respondent by requesting a postponement, which would have resulted in him being kept in custody for a longer period. This is what happens in criminal courts on a daily basis. Although, in my view, they would have been perfectly justified in the interests of justice to request a postponement for this reason, especially in circumstances where the accused had abandoned his bail application and where he was sought on four warrants of arrest, by other courts. It was, however, a discretion that they exercised, in a rational manner.

[105] As I said earlier, at the very least at that stage, the case was not trial ready, but it does not mean that there were no grounds to prosecute the respondent. In fact, by doing what they did, the grounds to prosecute him would have been strengthened. The respondent has by no means proven that this withdrawal resulted in the criminal proceedings being terminated in his favour. The intention was clearly to reinstitute the proceedings against the respondent and the withdrawal was of a temporary nature. The respondent's prosecution was also not settled by an acquittal or a finding of not guilty or a withdrawal on the merits. On the contrary, it seems that the prosecution had a strong case and the temporary withdrawal of the proceedings was made in order to strengthen, or enhance, its case.

[106] The case against the respondent was not withdrawn because of an unmeritorious prosecution, or a lack of evidence, where the prosecutors believed that there was no prospect that the respondent would be found guilty should they proceed with the prosecution. That does not mean the prosecution against the respondent has

failed[28]. For all of these reasons, the court a quo, in my view, was wrong to conclude that the respondent has proven that there was a malicious prosecution.

Unlawful Detention:

[107] The court a quo's finding that the decision to enrol the matter in the regional court and keep the respondent in custody, was based on evidence which was not reasonably believed to be reliable, was based on a clear misdirection in the interpretation of the evidence, especially where it said the following: 'the decision of the prosecutors in George to argue for the detention of the plaintiff between 17 July 2014 and 3 March 2015 was arbitrary'. The first difficulty I have with this finding, is that it was not based on the case pleaded by the respondent. It was never alleged in the particulars of claim that because of the malicious prosecution that had been instituted from the period 17 July 2014 to 3 March 2015, the further detention thereafter of the respondent was unlawful

[108] The second difficulty I have with the decision of the trial court, was that it held that the arrest and detention of the respondent, from the period of 7 March 2014 to his initial appearance on 10 March 2014 in the district court, up to his first appearance in the regional court on 17 July 2014, was lawful. It later found on the same facts that during the period 17 July 2014 up until 3 March 2015 the respondent's further detention was unlawful.

[109] It seems that the facts or evidence that initially were considered sufficient to justify his lawful detention, suddenly morphed into insufficient facts or evidence, in order to conclude that the detention in the regional court was unlawful. The evidence on which the prosecutors in the district court believed that there were sufficient grounds to prosecute, was the very same evidence the regional court considered to be sufficient to warrant a prosecution in that court. It is not clear at what stage there would 'not have been any evidence reasonably believed to be reliable*'* in the docket which led to the respondent's arrest and detention up the transfer of the case and enrolment in the regional court.

[28] *Nogwebele v Minister of Police & another* 2016 (2) SACR 662 (WCC).

[110] The prosecutors at all times clearly believed that there were reasonable and probable grounds to prosecute the respondent. There is a general duty and obligation on a prosecutor and the police to present a magistrate with information that will assist a magistrate to reconsider the further, continued incarceration or detention of an accused person. Especially where the prosecutor is in possession of evidence that would, if placed before a magistrate, result in an accused person either being set free on bail or warning[29]. In this particular case, there was no such evidence and therefore no such duty on them at any stage, before 3 February 2015, to inform the regional magistrate that they did not believe that they had a case, or to request that the respondent be released either on bail or on warning, nor was there any duty on them to withdraw the charge against him.

[111] The third difficulty I have with the finding that the prosecutors were liable for the unlawful detention of the respondent during this period, is that on the objective facts, the respondent did not proceed with a bail application, because he had outstanding cases against him, outstanding warrants of arrest and a long list of previous convictions. No doubt the respondent realized that given these circumstances he had little chance of being granted bail.

[112] There is no allegation made by the respondent and no finding made by the court a quo that the prosecutors misled the magistrate during the proceedings in the regional and the district courts. See *Manyoni v Minister of Police and Another* (41499/2018) [2021] ZAGPJHC 87 (23 June 2021). On the available evidence, from his first appearance in the district court up to the time the matter was withdrawn against him in the regional court on 3 March 2015, all the facts militated against a decision to grant him bail. He failed to show why his release during that period would have been in the interests of justice, as he was required to do, given the onus was on him. He was at all times legally represented when he abandoned his bail application in the district court, and when his case was postponed on various occasions in the regional court.

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[29] *Mahlangu and Another v Minister of Police* 2020 (2) SACR 136 (SCA); *Woji v Minister of Police* 2015 (1) SACR 409 (SCA). This general duty imposed on public officials was confirmed by the Constitutional Court in the appeal of this matter in *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC) at paragraphs 37 – 40 in my view, even though it was said in the context of the duties of a police official, it is equally applicable to prosecutors.

At no stage during this period did he again attempt to make application to be released on bail.

[113] His version that he only abandoned his bail application because he was told there was another charge against him, is not convincing, because the facts clearly show that he had outstanding warrants of arrest and outstanding cases against him. Furthermore, he had a long list of previous convictions. His evidence about his arrest, and the reasons for his further detention, was highly unsatisfactory and unconvincing. Especially when he was confronted with the evidence of his outstanding warrants and outstanding cases. His further detention, therefore was based on his own inaction which resulted in an order by the respective regional magistrates that he be detained until the finalisation of his case. See in this regard, *De Klerk v Minister of Police*[30].

[114] All the facts and evidence would have justified an order for the refusal of bail for the respondent. The evidence therefore points to the fact that these were the reasons why the respondent was lawfully detained up to the point when the case was withdrawn. There was thus no evidence on which to conclude that the prosecutors in George were responsible for the 'unlawful' detention of the respondent between the period of 17 July 2014 to 3 March 2015.

[115] It is for all these reasons that I would uphold the appeal of the DPP against the findings that there was a malicious prosecution and unlawful detention of the respondent, and would dismiss the cross-appeal, which sought to hold the Minister of Police liable for the respondent's detention. In addition, as requested by counsel for the DPP I think it is necessary that the order which was made by the court a quo, whereby it directed that a copy of its judgment should be referred to the DPP, should also be set aside. Clearly, the aim of making such an order was that the DPP should thereby be enjoined to take some action against the prosecutors who featured in the proceedings, (some of whom never even testified and never took any decisions in regard to the continued prosecution and detention of the respondent), who were subjected to the unfortunate and unnecessary criticism as previously stated in this judgment[31]. In my view it is necessary to set aside such order so that their reputations

[30] 2020 (1) SACR 1 (CC)
[31] See paragraph 99 supra

can be restored, as it may otherwise serve as a blemish on their work records and adversely affect their careers.

[116] In the result therefore, I would make the following order:

1) The appeal against the finding and order of the court a quo whereby the appellant was held to be liable for the malicious prosecution and unlawful detention of the respondent in the period between 17 July 2014 and 3 March 2015, is upheld with costs, including the costs of two counsel.

2) The order of the court a quo is set aside and replaced with an order dismissing the respondent's claim for malicious prosecution and wrongful detention, with costs, including the costs of counsel.

3) The cross-appeal is dismissed, with costs, including the cost of two counsel.

4) The order of the court a quo whereby it directed that a copy of its judgment should be served on the Director of Public Prosecutions, Western Cape, is set aside.

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HENNEY, J

I agree, and it is so ordered:

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BAARTMAN, J

I agree:

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SHER, J