

SOUTH AFRICA / JUDGMENT

Makhoba v Minister of Police (9613/2012) [2017] ZAGPPHC 18 (24 January 2017)

[2017] ZAGPPHC 18

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo

CASE / FILE NUMBER

9613/2012

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 9613/2012

24/1/2017

Reportable:

No
Of
interest to other judges: No
Revised.
In

the matter between:

MPHIKELELI
WINDVOEL
MAKHOBHA Plaintiff
and
MINISTER
OF
POLICE Defendant

JUDGMENT

TEFFO. J:

INTRODUCTION

- [1] The plaintiff sued the defendant for damages arising from his unlawful arrest and detention by members of the defendant.
- [2] It is alleged that the members of the defendant were acting within the course and scope of their employment with the defendant when they arrested the plaintiff, they arrested him without a warrant and they did not have reasonable grounds to suspect that the plaintiff was involved in the commission of the robbery.
- [3] It was further alleged that the investigating officer in the matter unreasonably opposed the plaintiff's release on bail with improper evidence and he was as a result thereof detained for an unreasonably long period of time.
- [4] The allegations thereof are denied and the defendant specifically pleaded that the plaintiff was arrested by his members who are peace officers, who reasonably suspected that he had committed a schedule 1 offence and that his arrest and detention were lawful in terms of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act").

BACKGROUND

FACTS

- [5] On 20 July 2009 at midnight, the plaintiff was arrested by members of the South African Police Service at Reitz for a charge of robbery with aggravating circumstances allegedly committed at Food Zone on 12 July 2009. He was subsequently detained at Reitz police station until on 30 March 2011 after he was found not guilty and discharged. He was brought to court within 48 hours of his arrest for his first appearance.
- [6] As the arrest and detention of the plaintiff were not in dispute, the onus rested on the defendant to prove the lawfulness thereof. Four witnesses, namely, Sgt Tumelo Victor Mzizi, Warrant Officer (IN/0) Lerata Daniel Mosia, Captain (Capt) Mosiuoa John Mokgethi, and Lieutenant (Lt) Jerome Malefane Tshabalala testified in support of the defendant's case while the plaintiff testified on his own and also called a witness, Mr Themba Gift Mgwenya to prove his case.

THE EVIDENCE

- [7] Mr Tumelo Victor Mzizi testified as follows: He is employed by the South African Police Service and holds the rank of Sergeant. In 2009 he held the rank of Constable and was stationed at Reitz police station and was attached to the Detective Unit. On 12 July 2009 an

armed robbery was committed at Food Zone in Reitz. On that particular day he was on standby and he became involved in the matter. He attended the crime scene and interviewed three African women who were employees at Food Zone at the time and W/O Tshabalala interviewed the others. They informed him that they were in the shop when the robbery took place. Four people were involved in the robbery. Three of the robbers, were inside the shop while one was outside. Among the three robbers who were inside the shop, they recognised the plaintiff as he was well known to them. The plaintiff was involved in another matter where a white man was shot and killed in a hotel at Reitz and the story was published. He was told that the plaintiff entered the shop accompanied by two others. The robbers approached Mr Calitz, the owner of the shop, and demanded money from him. When he refused to give them money, they fired a shot which went past Mr Calitz and did not hit anyone in the shop. He did not take statements from any of the three African women he interviewed as they told him that they would not testify against the plaintiff because they were afraid of

him. Subsequent to receipt of the aforesaid information from the employees of Food Zone and while he was still at the scene, he also received a phone call from an informer whose identity he would not disclose for security purposes. The informer asked him whether there was any shop that was robbed in town. He responded by telling him that Food Zone was robbed. He then told him that the plaintiff was at the time with three other people at Iziko tavern. He overheard him and the people in his company talking and saying they had just robbed a shop some money.

- [8] According to the information he gave, the informer only knew the plaintiff among the group and the others were not known to him. He also told him that the group was planning to leave Reitz town. He asked the informer to find out how were they travelling. The informer told him that he overheard them saying two of them were driving with the plaintiff in his Mercedes-Benz motor vehicle while the other one was driving a Mazda. The description of the Mazda motor vehicle a cream and white Mazda 323 with a GP registration number, fitted that of the vehicle mentioned by the employees at Food Zone. The informer further told him that the two vehicles were parked at the parking lot of the tavern. He requested him to block the parking lot of the Mazda to enable him to rush to where it was. The informer blocked it from the front and returned to the tavern.
- [9] He went with Constable (Const) Mthimkulu to Iziko tavern. They parked their motor vehicle some distance away from the tavern and went straight to where the Mazda was parked. The Mazda he found fitted the same description he was given by the employees of Food Zone. They returned to the SAPS motor vehicle where he spoke to the informer again and told him to remove his motor vehicle. He also requested him to alert them when the people in the company of the plaintiff were leaving the tavern. At that time he also requested his colleagues to close all escape routes in the area while he sat in the motor vehicle waiting for the group to leave the tavern. At some stage the informer phoned him and told him that the people in the company of the plaintiff were leaving the tavern. He then saw the plaintiff and two others getting into the Mercedes-Benz and one of them in the Mazda as he was told. The

tavern is at the township. The Mercedes-Benz driven by the plaintiff took the direction to town and the Mazda took another direction further into the township. As he and Const Mthimkulu were watching the two motor vehicles, he communicated with his colleagues through the radio telling them what was happening. He requested them to focus on the plaintiff while him and Cst Mthimkulu concentrated on the one who was driving the Mazda.

[10] They observed the person who was driving the Mazda. At that time their motor vehicle was stationary. The Mazda drove off without

lights. It was in the night. He did not recall the time but said it could have been around 22:00. They followed the Mazda, tried to stop it by flickering lights. The driver of the Mazda continued driving. They eventually managed to stop him. They introduced themselves to him and showed him their employee identification cards. He introduced himself to them as Mr Sibaya or Sibiya. They informed him that the motor vehicle he was driving fitted the description of a motor vehicle that was involved in the robbery at Food Zone. He did not say anything to them. They also asked him why did he keep on driving when they were stopping him. All he said was that he was scared when he realised that a police motor vehicle was stopping him. He was arrested but charges against him were later withdrawn. After the arrest of the driver of the Mazda, he never played any role in the matter. He did not investigate the case. The investigating officer was W/O Tshabalala.

[11] He made the statement that appeared on pages 16 and 17 of the bundle of documents. The statement is a summary of the evidence he gave in court and he used it in the criminal investigation.

[12] The statement appears reads:

"Reitz Cas 50/07/09

I Victor Mzizi states under oath in English.

1

I am a Constable in the South African Police Service with Persal No. 7037775-1, stationed at Reitz Detective Service with telephone number (058) 863 8022.

2

On Sunday 2009-07-12 I was on standby for investigations of new dockets. At about 12:15 I received a phone call from my informer who explained that he noticed a suspicious Mazda 323 with registration number DSZ 988 GP (cream white in colour) parked near Iziko tavern. I went to Iziko tavern and identified that vehicle, the Mazda 323 and it was the same vehicle the informer explained about and it was involved in an armed robbery that occurred the same night at Stokkiesdraai (Food Zone) supermarket.

3

I then traced the occupants at the vehicle with Constable Mthimkulu. After a while then came an African male person and drove that car. We then chased that vehicle (Mazda

323) with Constable Mthimkulu and stopped it and we interviewed the driver who identified himself as Maphele Lindane Sibiya and arrested him in Reitz Gas 50107/2009 (armed robbery) and explained him his rights in terms of the constitution (section 35 of Act 108 of 1996) and he understand it and attached his signature into it."

[13] Under cross-examination he testified that the three African women he interviewed at Food Zone, told him that the plaintiff was the one among the robbers who took the money at Food Zone, and that they were not the only people who were in the shop when the robbery took place. He was referred to the statements of Ms Shila Rosa Shawn, Ms Ntswaki Motloun, Ms Anna and Ms Aletta Mokoena on pages 47, 52, 55 and 59 of the bundle of documents and asked whether he interviewed any one of them. He testified that he did not and that he did not take any statements from any of the three African women he interviewed at Food Zone as they were not willing to make statements. He conceded that he gave W/O Tshabalala the information that the three African women gave to him at the scene that they knew the plaintiff, they saw him during the robbery and that he was actively involved in the commission of the robbery. He also conceded that the Investigating Officer interviewed all the witnesses and took their statements but said those that he himself interviewed were reluctant to give statements. They told him that they cannot give statements because they did not want to testify in court.

[14] When asked whether he did not find it necessary to interview the witnesses whose statements he was referred to supra, he testified that W/O Tshabalala had already interviewed them and taken down their statements. Although he conceded that none of the employees at Food Zone at the time who made statements before W/O Tshabalala could identify the plaintiff, he reiterated that those he himself interviewed, who were not willing to make statements, identified him. He did not look at the video footage at Food Zone. When he got information from the informer, they were still gathering information by interviewing people who were present when the robbery took place.

[15] He conceded that in the statement that he made to the police for purposes of a criminal investigation the plaintiff's name was not mentioned and that he was the only known suspect but explained that the statement was made to explain Mr Sibiya's arrest.

[16] He was referred to W/O Tshabalala's statements on page 97 of the bundle, para 5 which reads:

"Volgens slagoffer die verdagtes het met 'n geel Mazda voertuig gery, met GP registrasienommers. Slagoffer het my die CCTV gewys en verdagtes was onbekend aan my. Verdagtes is gesoek in Petsana, dorp and omgewing sonder sukses."

and asked how was it possible for W/O Tshabalala to say that if he told him that the plaintiff was identified by some of the witnesses. He testified that he was informed by the employees of Food Zone that the plaintiff was involved.

[17] He was also referred to para 10 of the statement which reads:

"Op 2009/07/20 om ongeveer 13:20 ek het vir Windvoel Makhoba gearresteer horn volgens Art 35 van Wet 108196 gewaarsku. Die rede hoekom die verdagte gearresteer is dat hy het die verdagtes vervoer van die tavern af na Steynstraat toe."

and it was put to him that W/O Tshabalala did not mention anything that he said in his evidence in court about the plaintiff. His response was that he did not know.

[18] When he was told that even the statement he made lacked critical information about the plaintiff, he conceded but further said the plaintiff was subsequently identified at an identification parade. He further testified that he was not involved at the identification

parade held in respect of the plaintiff. He did not know who identified the plaintiff at the identification parade but just heard

that he was identified.

[19] He was asked what role did the people he interviewed say the plaintiff played during the robbery. He testified that as the

incident happened long time ago, he could not tell but what he knew was that they told him that he was present. After the arrest of Mr Sibiya, he searched his motor vehicle and did not find anything.

[20] W/O Lerata Daniel Mosia also testified. His evidence was briefly as follows: He has been employed in the South African Police Service for 21 years and holds the rank of W/O. In July 2009 he was stationed at Reitz police station. He was among the group of police officers who received information about an armed robbery that was committed at Food Zone. They left the police station in different motor vehicles to look for the motor vehicle that was involved. He corroborated the evidence of Sergeant Mzizi that they all went to different escape routes. The motor vehicle he was driving was at the route between Reitz and Petsana township. They were told that the motor vehicle that was involved in the robbery at Food Zone was parked at Iziko tavern and that the suspects were inside the tavern with the plaintiff. He then stopped his motor vehicle at Petsana crossing, waiting for information from police officers who were at the tavern (referring to Sgt Mzizi who was with Cst Mthimkulu at the time). They communicated through a radio. Shortly thereafter he got information that the people were leaving the tavern. Two of the suspects boarded the plaintiff's Mercedes-Benz which was driven towards town. He observed a white Mercedes proceeding towards town after it went over the railway lines between Petsana township and town. He waited for it until it reached the crossing where he was standing. At that time his

motor vehicle was stationary with its lights off. It was approximately 23:30. He was at that time facing the road towards the south. His motor vehicle was parked right at the stop street and street lights were on.

- [21] The white Mercedes approached the stop street. He could see the plaintiff driving it together with two passengers at the back. He was about 5 metres away from the Mercedes when it stopped at the stop street. He knew the plaintiff prior to the incident as they grew up together. He let the Mercedes pass and then followed it. He could not stop it at the time and arrest the suspects because he was alone at the time and did not have manpower. He followed the vehicle as it proceeded into different streets, viz, Voortrekker, Zyder and Steyn and at the same time he was giving his colleagues information about what was happening and also requesting their assistance in stopping the vehicle. Eventually Capt Mokgethi arrived in a motor vehicle. When the Mercedes reached Steyn Street, it stopped abruptly, its rear doors opened, two occupants alighted and it drove off. Capt Mokgethi passed the Mercedes on his way to him. He observed the two passengers who alighted from the Mercedes-Benz going outside the road and suddenly coming back. They put something on the side of the road.
- [22] Upon Capt Mokgethi's arrival, he went with him to the two suspects, they introduced themselves and told them that they were investigating a robbery case. They requested to search them. He searched Mr Themba Ngwenya and Capt Mokgethi searched the other one whose name he did not recall. He found about R2 620,00 cash from the one he searched and a cellphone. He then told him that he was arresting him as a suspect for the robbery at Food Zone and placed him in the vehicle he was driving. After Capt Mokgethi had finished searching the other suspect, he was also placed in the vehicle he was driving. He walked to the side of the road with Capt Mokgethi where they saw the suspects going after they alighted from the Mercedes driven by the plaintiff. They found some loose money thrown on the ground and two firearms. They cordoned the scene to prevent it from being tampered with. Capt Mokgethi went to the police station and returned with hand gloves in a plastic bag which he wore and wherein he put the exhibits.
- [23] After they had arrested the two suspects, they went around looking for the plaintiff in town and at the township. At some stage they found the plaintiff's Mercedes parked at his house. He was with Capt Mokgethi, Const Mthimkulu, Sergeant Mzizi and W/O Tshabalala at the plaintiff's homestead. He did not search the Mercedes-Benz motor vehicle because it was on the other side of the yard. Capt Mokgethi and W/O Tshabalala went into the house where they found a female person who told them that the plaintiff was not there.
- [24] He was not involved in the arrest of the plaintiff.
- [25] Under cross-examination he corroborated the evidence of Sgt Mzizi that he regarded the plaintiff as a suspect after he got a report from him on radio based on the information he received from Food Zone that he was involved in the robbery together with three others; they were at the tavern and that a Mazda vehicle was involved. Capt Mokgethi joined him

after the two suspects had alighted from the Mercedes motor vehicle the plaintiff was driving and it had already driven off. He had just passed the Mercedes-Benz motor vehicle at the time as they were driving in opposite directions. When the plaintiff offloaded the two suspects from his motor vehicle, he tried to stop the motor vehicle. It did not stop. He explained that he and Capt Mokgethi were driving two different motor vehicles.

- [26] He was referred to two statements he made which appeared on pages 28 and 224 of the bundle. He conceded that there were discrepancies in the statements. On page 28 he stated that he looked for the plaintiff's motor vehicle but did not find it. On page 224 he mentioned that the plaintiff's motor vehicle was found at his house and the engine was still warm. He explained that after the arrest of the two suspects who alighted from the plaintiff's motor vehicle, they looked for the motor vehicle, they did not find it. They found it later at his homestead. He disputed that he was with Capt Mokgethi when he or they tried to stop the motor vehicle. He further explained that in the other statement he omitted to write certain things.
- [27] He disputed that Mr Ngwenya, one of the suspects, was not offloaded from the plaintiff's motor vehicle. He also disputed that Mr Ngwenya had problems with his motor vehicle, had a breakdown and was offloaded from a truck which only gave him a lift. He disputed that Mr Ngwenya was at the time from Qwaqwa where he sold leather jackets and had cash in the amount of R1 800,00 in his possession which was from the proceeds of his sales. He conceded that he approached him with Capt Mokgethi, asked him questions and took him to the police station with the person who was in his company. He disputed that the two suspects were later on asked about the money and the firearms, that Mr Ngwenya did not know the plaintiff prior to meeting him at the police station and that the plaintiff did not know the other three suspects at all. Furthermore he disputed that the plaintiff did not offload the suspects on that particular day. He denied that him and/or Capt Mokgethi did not stop or try to stop the plaintiff's motor vehicle and that he did not run away from the scene. He disagreed that the plaintiff knew nothing about the allegations against him until he was told by his brother and his wife that the police were looking for him.
- [28] Capt Mosiuoa John Mokgethi also testified. His evidence was as follows: He had 27 years' service in the South African Police Service at the time of testifying and was stationed at Villiers police station. He was also stationed at Reitz police station in July 2009. He was also involved in the investigation of an armed robbery which took place at Food Zone on 12 July 2009. He was also among the group of police officers who were tasked to go and look for a Mazda motor vehicle that was implicated in the robbery that took place at Food Zone in Reitz. He corroborated the evidence of W/O Mosia that they overheard Sgt Mzizi talking over the radio saying the suspects were at Iziko tavern at Petsana township, that they were about to leave and they decided to close the escape routes. Furthermore W/O Mosia requested a backup after he said on radio that he was observing the plaintiff's motor vehicle leaving the township.

- [29] He further corroborated the evidence of W/O Mosia that he went to assist him. He came down Steyn Street where he observed the motor vehicle driven by W/O Mosia following another motor vehicle which stopped and two people alighted from it and it drove off. He tried to stop it but it did not stop. He flickered his motor vehicle lights, the motor vehicle drove past his motor vehicle and proceeded without stopping. He did not follow it as he was on his way to assist W/O Mosia who was alone and there were two suspects who were on the tarred road. He approached one of the suspects while W/O Mosia approached the other one. He searched one Mr Ndleleni and found money in his possession which was over R10 000,00.
- [30] He also corroborated the evidence of W/O Mosia that he observed the two suspects going to the side of the road after they had alighted from the plaintiff's motor vehicle, putting something down and then returning to the road, that he went with W/O Mosia to the spot they saw the suspects going to and found some coins and firearms. They asked them to whom the goods belonged and they said they did not know. They told them that the plaintiff dropped them off. They immediately cordoned the spot where they saw the two firearms and coins and he rushed to the police station to fetch the exhibit boxes where he put the exhibits and the two suspects were taken to the police station. They also called other police officers from the Local Criminal Record Centre (LCRC) but they did not come on that day.
- [31] After taking the suspects to the police station, they continued with their investigation. They went out again to look for the plaintiff. They went to his house at Petsana township where they found his Mercedes-Benz motor vehicle parked outside. They did not find him. They entered the house where they found an unknown female person who told them that the plaintiff was not there. They told her that they were looking for the plaintiff and asked her to tell him to come to the police station when he comes back home. He was referred to the statement he made to the police that appeared on page 29 of the bundle. Paragraph 3 of the statement reads:

"Die twee mans het gelyk asof hulle iets op die grond neer sit en hulle is toe benader en gevinsenteer. In een se besit (Nhlanhla Ndleleni) was daar klomp geld gekry te bedrag van R13 377-35 en die geld was ingeboek in SAP 131325, en in ander een se besit ene (Themba Ngwenya) wat deur Insp Mosia gevinsenteer was is die bedrag van R2 620-00 gekry en die geld is in SAP 13132612009 ingeboek. Ek toe na die plek waar hulle afgelaai was agter Built It geloop waar ek ook geld opgetel te waarde van R69-00 en twee vuurwapens. Die geld was in SAP 13132712009 en die twee vuurwapens SAP 13132912009 ingeboek vir verdere ondersoek en die gevonde eiendom is in die teenwoordigheid van die twee verdagtes gevind. Die betrokke voertuig was gesoek maar nie gekry nie en die mans het beweer dat hulle op pad was na die bank om die geld te gaan uittrek en hulle saam met Mnr Makhoba was."

and asked which motor vehicle was he referring to that they did not find and what he meant. He explained that after they dropped the two suspects at the police station, they looked for the plaintiff's motor vehicle in town and did not find it. They thereafter proceeded to Petsana township where they found it parked at his house.

- [32] He also attended the crime scene at Food Zone before they arrested the suspects. Lt Tshabalala and Sgt Mzizi were among the police officers he found at Food Zone. He did not speak to any of them at Food Zone. He knew the plaintiff prior to the incident. He did not observe any attempt by W/O Mesia to pull the plaintiff's motor vehicle off the road. Sgt Mzizi only spoke to him when they were patrolling over the radio. He also never spoke to Mr Calitz.
- [33] He was not with W/O Mesia when he wrote his statement. His statement was criticised as it was said to be similar to that of W/O Mesia appearing on page 224. He explained that he wrote his first. He was also referred to Inspector Majoro's statement wherein he stated that on 12 July 2009 at about 23:00 he attended the crime scene at Food Zone supermarket where he found two firearms, magazine, ammunition and cartridges. He disputed the contents thereof and reiterated that Inspector Majoro only found three cartridges at Food Zone and that at that time the firearms were already booked in at the charge office.
- [34] He was referred to information that was used at the bail application of the plaintiff that appeared on pages 134-135 of bundle 2-5 of the case docket. Para 4.4 reads:
- " Windvoel Mphikeleni Makhoba: He transported Accused 1 and 2 from the tavern to Steyn Street where the police arrested them and he (Mr Makhoba) flee the scene. Police followed him until his residential place where he parked his vehicle and ran away. He has been positively identified in the identification parade. Witnesses and the people who were there at the shop are vety traumatised after the incident, psychologists have been consulted to help witnesses and counsellors also consulted. Some of the people who are traumatised are vety young. If he be released on bail, he will intimidate witnesses as he knows all witnesses. Exhibits outstanding. Cash, wristwatch and cellphone: R68 333-65 and value recovered R16 666-35."
- He disputed the information above and reiterated that the plaintiff was not followed in his presence. He reiterated that at his house, they did not find him. He testified that he did not know who wrote the above information.
- [35] He disputed that Mr Ngwenya was dropped by a truck where they arrested him and not by the plaintiff, that he was from Qwaqwa where he sold leather belts and that the money they found in his possession was from the proceeds of those sales. When he left Food Zone, he had already shown Inspector Majoro the three cartridges. He did not know what Inspector Majoro did after he left. He also disputed that he handed the cartridges to him as stated in his statement as he could be tempering with the evidence before the experts arrived.
- [36] Lt Jerome Malefane Tshabalala also testified. He is a police officer with 30 years' service in the SAPS, who was stationed at Reitz police station in July 2009. He was the Investigating Officer in a case of armed robbery that took place on 12 July 2009 at Food Zone in Reitz. On that particular day he was on standby. He received a call from a colleague about the robbery incident. He then drove to Food Zone. Upon his arrival he found people in and outside the supermarket. He enquired from those he found outside as to what happened. Customers

who were at the supermarket before he arrived told him that four people who were driving in a cream Mazda 323 had just robbed the supermarket. Subsequent thereto he walked into the supermarket and spoke to the employees, one Ntsoaki and also met Mr Calitz, the owner. He also spoke to others who did not want to be identified as they feared for their safety. He asked the people he spoke to if they were able to see the suspects. They informed him that among the three people who entered the supermarket, they could identify the plaintiff. He did not take statements from them as they told him that because they were afraid of their safety, they did not want to get involved. They even told him about a case that happened in town where a white man was murdered where the plaintiff was implicated. He also interviewed other people amongst whom were some white customers. The people he interviewed whose statements he was able to take, were not able to identify the plaintiff. Other police officers, e.g.,

Sgt Mzizi, Capt Mokgethi, etc were also at the scene and each of them concentrated on their different roles.

- [37] The white customers who volunteered to identify the suspects said although the names of the suspects were unknown to them, they would be able to identify them. After he had received that information Sgt Mzizi approached him and told him that he had just got information that the plaintiff and two suspects were at Petsana township at Iziko tavern. Sgt Mzizi immediately rushed to the place while he remained at Food Zone. He contacted him and other police officers on radio informing them that the suspects were about to leave the tavern and requesting them to close the escape routes. He went to the escape route at the farming area, remained there until he got information from W/O Mosia that the plaintiff's motor vehicle had just passed where he was. He got a report which corroborated the evidence of W/O Mosia and Capt Mokgethi that they observed two suspects alighting from the plaintiff's motor vehicle, it driving off immediately thereafter, how they arrested the suspects. He corroborated the evidence of the other witnesses of the defendant that he proceeded with Sgt Mzizi and others to the plaintiff's house to look for him and they did not find him. They left a message that he should come to the police station.
- [38] He arrested the plaintiff on 20 July 2009 at the municipality offices in Reitz.
- [39] He testified at the bail application of the plaintiff and opposed it. He presented evidence that Mr Calitz and Ms Fourie pointed out the plaintiff at the identification parade, the information he obtained from Sgt Mzizi, the employees of Food Zone and the statements of W/O Mosia and Capt Mokgethi. He confirmed the contents of the statement he made for the arrest of the plaintiff and indicated that the statement was just a summary.
- [40] He disputed that he approached the plaintiff after his arrest and told him that he would release him on bail if he turned state witness against the other suspects. He also disputed that he did not do his job properly by not obtaining the statement of the police officer who took photos at the identification parade of the plaintiff as the photos got lost. He further disputed that the plaintiff was not properly identified at the identification parade. He was

adamant that when he opposed the bail application, the photos that were taken at the identification parade were in the docket. He conceded that several exhibits were missing in the docket at the time he was testifying. He disputed that he did not give the prosecutor correct information when he opposed the plaintiff's bail application.

- [41] He testified that although the driver of the Mazda was arrested at some stage, he did not have information about him. He only had information about the plaintiff and the two suspects who alighted from the plaintiff's motor vehicle. He was clear in his evidence that he only testified about what Sgt Mzizi told him in relation to the plaintiff and the two suspects who were in his motor vehicle.
- [42] In relation to the statements made by W/O Mosia and Capt Mokgethi, he testified that they wrote them down and he only commissioned them. He conceded that he was aware that the statements of W/O Mosia and Capt Mokgethi differed with that of Inspector Majoro but proceeded to arrest the plaintiff and detained him. He did not find that their discrepancies could be peculiar to the arrest of the plaintiff. He denied that he only arrested the plaintiff because he thought he gave the two suspects a lift. He reiterated that he had more information he mentioned in his evidence to arrest the plaintiff. While he conceded that there was no fingerprint and ballistic evidence to link the plaintiff with the robbery incident at Food Zone, he disputed that he did not have sufficient information at his disposal to give to the court to oppose the bail application. He reiterated that he provided the prosecutor with the information he had at his disposal at the time, which he used to oppose the bail application by the plaintiff.
- [43] He disputed that the plaintiff was not at Reitz on the day of the commission of the robbery at Food Zone and that he left Reitz to Klerksdorp at 15:00 to do subcontracting work for sidewalks and maintained that the information he obtained was that he was seen around Food Zone. He disputed that the plaintiff was on his way to the police station on 20 July 2009 when he arrested him.
- [44] Under re-examination he testified that when he arrested the plaintiff he did not have Inspector Majoro's statement. He further testified that he did not know what happened to the photos that were taken at the scene and at the identification parade, he placed them in the docket.
- [45] Mr Mphikeleli Windvoel Makhoba (the plaintiff) also testified. His evidence was briefly as follows: On 12 July 2009 he was at his homestead in Petsana from the morning until at 15:00 when he left to Klerksdorp in his Mercedes-Benz motor vehicle to pursue payments on the sidewalks he did as a subcontractor in building and construction work. The work was done between Klerksdorp and Stilfontein. It was not completed when he was arrested. It was given to another person.

- [46] He did not know anything about the robbery incident that took place at Food Zone in Reitz. He only got information from his brother that Lt Tshabalala wanted to interview him about the incident that took place at Reitz. Later in the afternoon his wife phoned him asking him why were the police looking for him. He only returned to Petsana on 18 July 2009 after he left on 12 July
2009. He went to the police station to find out why did Lt Tshabalala want to interview him. While he was on his way to the police station at a distance of between 15 to 20 metres, a motor vehicle emerged and stopped next to him. Lt Tshabalala alighted from the vehicle and requested to speak to him. He also asked him where was he going. He told him that he was on his way to him. Him and Lt Tshabalala walked together to the police station, and proceeded to his office. Lt Tshabalala informed him that it appeared there were people in the tavern who hired him to transport them around, firearms and money were found where he offloaded them with his motor vehicle, the people were implicated in the armed robbery that was committed at Food Zone in Reitz. He told him that the allegations were not true, he did not know the people he was talking about and his motor vehicle was not available to transport people around on that day. He never understood him when he told him that they should work together until he explained to him that he should agree with him that he dropped the people where the firearms were found. He refused and told him that he would not make a statement about people or something that he did not see with his eyes. Lt Tshabalala further told him that he was not implicated in the matter and that he should either agree to make a statement as he proposed or else he was putting him under arrest.
- [47] He argued with him until Lt Tshabalala became angry. He called his colleagues to lock him up. When they came to fetch him, he told him that he was going to spend a night in the cells and their discussion was going to continue the following day. The following day they did not proceed with their discussion but he charged him. After his arrest he was locked up in a holding cell alone and later on, two unknown arrestees joined him. The cell size was that of a single garage (about 6 x 4 cm²). The toilets in the cells were not functioning, they were dirty. He slept that night in the cells with dirty blankets and the condition thereof was not good. He was not properly fed and the following day he was given black tea with dry bread. He was in the cells at Reitz police station from Monday and taken to court on Wednesday. He was denied bail and from court he was detained at Bethlehem prison. He only met his co-accused the following week on Tuesday at Bethlehem prison when they were at the police vehicles preparing to be transported to court.
- [48] He saw his co-accused when they went for meals, they were at different prison cells and he did not know when he saw them that they were his co-accused. He disputed that he was positively pointed out at the identification parade and that photos were taken at the identification parade.

- [49] Lt Tshabalala testified at his bail application about a video footage where the four of them appeared, that him and one Ndleleni (his co-accused) were positively identified at the identification parade, that firearms and some cash were found from Ndleleni and Ngwenya (another co-accused) and that there were still firearms and cash not recovered which could jeopardise the investigation if they were to be released on bail. He also stated that there were or could be witnesses known to him or which he knew which he could interfere with. He specifically mentioned that he used his motor vehicle to transport the suspects. He could not recall if he ever said he flee the scene as the incident happened long time ago. Lt Tshabalala vehemently opposed his bail application.
- [50] The conditions at Bethlehem prison were the worst compared to those at Reitz prison cells. Each and every new person who arrived at Bethlehem prison cells was robbed of his belongings. He had no choice of getting along. There were a lot of gangsters. Prison inmates and local prisoners continued their rivalry in the cells. With the type of gangsterism he had no choice but to affiliate to one group otherwise he would not be safe or own anything. His wife was pregnant at the time of his arrest. She gave birth while he was still in custody. His wife struggled to register the child in his name. Because of his financial constraints, she could not reach him. His brother tried to give his family financial assistance in his absence. As a result of him being physically unavailable at the site to continue with the subcontracting work, it was stopped, given to someone else and his company was deregistered. He had a close corporation. As a member of the close corporation, he had to bear monthly operational costs. The municipality could also no longer work with him as his company and close corporation did no longer exist and he did not have the necessary documents that he used to have.
- [51] His arrest and detention affected him. He was hurt, felt bad about it and his social life was seriously affected. People looked bad at him and where he was staying at the time, people distanced themselves from him. He did not have any problems to go to Food Zone for meals before and after his arrest until one day while he was there with friends and after placing an order, Mr Calitz approached him and told him that people were not happy to see him at the shop, he should make a plan to leave and tell his friends who came from Johannesburg to come again. As he was surprised to hear all this, Mr Calitz suddenly stood up, lifted up the top of his tracksuit, showed him a firearm which was on his stomach and said that time he bought a firearm. He felt very bad because eventually armed response security officers arrived and they were refunded their money without being served and ordered to leave the premises.
- [52] Under cross-examination he disputed that he was pointed out at an identification parade.
- [53] When asked whether he signed any contract that related to the subcontracting work he testified he was busy with at the time of his arrest, he stated that he was given a letter of appointment but all the documents got lost after his arrest. He could not tell when did he tell his legal representatives about the subcontracting work he was busy with in Krugersdorp on the day of the robbery at Food Zone as he testified. He could also not explain why the

evidence that he lost a contract because of his arrest was not pleaded, and not put to the defendant's witnesses but only came up for the first time when he testified. He also disputed that the police came to his house to look for him on 12 July 2009 as they testified. While he disputed the evidence of Sgt Mzizi that he saw him with the suspects at Iziko tavern, he could not tell why the evidence was not challenged when Sgt Mzizi testified and it was never put to him that he was at Klerksdorp on that day. He could also not tell why it was never put to Lt Tshabalala that he transported the suspects in his motor vehicle on the day of the robbery at Food Zone. He conceded that his evidence about the condition of the cells at Reitz and Bethlehem police stations was not put to the police officers who testified on behalf of the defendant. He further conceded that he could not have told his legal team that Lt Tshabalala arrested him after he refused to make a statement that he transported the suspects with his motor vehicle on the day of the robbery because the incident happened long time ago.

- [54] Mr Themba Gift Ngwenya testified that on 12 July 2009 he was at Phuthaditshaba in Qwaqwa where he was selling leather jackets and bags. He left Bethlehem to Johannesburg at 20:00. He hitchhiked from trucks. He left Qwaqwa in the company of Mr Nhlanhla Ndleleni. On their way when they reached Kesel, the motor vehicle in which they were travelling's engine overheated. After counsel for the plaintiff told him that he was confusing him when he spoke about a motor vehicle whose engine overheated while his initial evidence was that they were hitchhiking from trucks, he changed and said he now remembered that they were travelling in Mr Ndleleni's motor vehicle, they took it to a BP Garage at Kesel and requested the petrol attendants there to assist them to hitchhike. They told them to hang on there as there were trucks that came from time to time. At some stage a truck approached. They spoke to the driver. He drove with them until at Reitz where he alighted and told them that he had to fix something. They also alighted and waited for him there.
- [55] As they were still standing there, a police van, travelling slowly, pulled up with two policemen inside. It stopped next to them and they were asked why were they standing there. They told them that they were on their way to Johannesburg and were waiting for the driver of the truck. The policemen requested to search them. In his pocket he had cash in the amount of R1 800,00, a cellphone and his identity book. They told them that they were suspecting them. One of them grabbed him with his trouser belt while the other one also did the same to Mr Ndleleni. They took them to the police van and drove with them to the police station.
- [56] At the police station they wanted to know where they came from. They told them that they were from Qwaqwa and on their way to Johannesburg. Other policemen also came who also asked them what was happening. They were told that they were arrested as they were suspected of having committed a robbery at Reitz. They were never shown firearms or money that was involved. He did not know the plaintiff in this matter. He met him for the first time at Bethlehem prison.

- [57] Under cross-examination he disputed that an amount of R2 600,00 was found in his possession. When he was confronted with a letter from his attorneys dated 5 April 2011 which appeared on page 178 of the bundle and which stated that the amount of R2 600,00 found in his possession at the time was still at the police station, he said the incident happened long time ago and that he had forgotten some of the things. He also testified that Mr Ndleleni was also selling the same items he was selling in Qwaqwa. He could not tell why that evidence was not put to the defendant's witnesses when they testified. He disputed that W/O Mosia and Capt Mokgethi were driving in two different motor vehicles when they saw them. He was adamant that he told the plaintiff's legal team that the policemen who apprehended them were driving one police motor vehicle. When asked what did he say to the two policemen when they told them that they suspected that they were involved in the commission of the robbery at Reitz, he said he did not remember the response he gave. When he was reminded about what he testified in his evidence-in-chief, he said he believed he said that to the police and that the incident happened long time ago, he did not remember some of the evidence.
- [58] At some stage he testified that he told the police that they should wait for the driver of the truck to confirm that he gave them a lift as he testified but they said they were on duty and did not have time to wait for truck drivers. After he was told that it was put to Capt Mokgethi and W/O Mesia that they were only shown firearms at the police station as against his evidence that firearms were not shown to them, he changed and said they were shown to them at the police station.
- [59] The issues for determination are whether or not the arrest and detention of the plaintiff were lawful and whether the opposition of his release on bail by Lt Tshabalala was unreasonable and based on improper evidence.
- [60] The defendant pleaded that the arrest and detention of the plaintiff were lawful in terms of the provisions of section 40(1)(b) of the Act.
- [61] Section 40(1)(b) of the Act provides that a peace officer may without a warrant arrest any person who he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.
- [62] As was held in *Duncan v Minister of Law and Order* (1986] 2 All SA 241 (A) at 248 the jurisdictional facts for a section 40(1)(b) defence are the following:
- 62.1. The arrestor must be a peace officer;
 - 62.2. The arrestor must entertain a suspicion;
 - 62.3. The suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and
 - 62.4. The suspicion must rest on reasonable grounds.

[63] It is trite that the onus rests on the defendant to justify the arrest. As Rabie CJ explained in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 at 589E-F:

"An arrest constitutes interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another should bear the onus of providing that his action was justified in law."

[64] In *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (6) BCLR 601 (CC) at para [25], the Constitutional Court in affirming this principle said:

"It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. "

[65] Van Heerden JA in *Duncan v Minister of Law and Order* *supra* at 249 said the following:

"If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; i.e. he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (of *Holgate-Mohammed v Duke* E [1984] 1 All ER 1054 HL at 1057). No doubt the discretion must be properly exercised."

[66] In *R v Van Heerden* 1958 (3) SA 150 (T) the court held that the suspicion must be reasonable and the test for such reasonableness is objective.

[67] The approach to be adopted in considering whether the suspicion was reasonable is the one followed by Jones J in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-H:

"It seems that 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; i.e. something which otherwise would be an invasion of private rights and personal 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 only 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 sufficient 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 on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion."

[68] The evidence of Lt Tshabalala, the Investigating Officer in the armed robbery case that was committed at Food Zone in Reitz on 12 July 2009 and which led to the arrest of the plaintiff, was that he arrested the plaintiff on 20 July 2009 on the basis of the information that he received from Sgt Mzizi, the statements of W/O Mosia and Capt Mokhethi and the employees

of Food Zone that he interviewed on the night of the incident. The crux of Sgt Mzizi's evidence was that after receiving information that an armed robbery was committed at Food Zone, he attended the crime scene where he interviewed three African women who told him that four suspects were involved in the robbery. Among them one was outside and the three who entered the shop and demanded money from Mr Calitz included the plaintiff. He was clear in his evidence that all these three African women he interviewed who implicated the plaintiff in the robbery, knew him as he was involved in another robbery in town where a white man was murdered. They were not willing to make statements to him as they told him that they did not want to get involved to protect their safety. While he was still busy at the scene he received a call from an informer whose identity he did not disclose for security reasons, who asked if there was any shop that was robbed in town. After he confirmed to him that an armed robbery took place at Food Zone, the informer told him that he overheard the plaintiff talking to other people in his company about a robbery that they had committed in town

and also planning to leave Reitz town. The informer spoke about three people who were in the company of the plaintiff.

[69] Sgt Mzizi immediately left Food Zone to Petsana township where he found a Mazda motor vehicle which fitted the description of the motor vehicle that was implicated at Food Zone as a getaway motor vehicle after the robbery. He was also able to see the plaintiff and two people in his company boarding his Mercedes-Benz motor vehicle while the other suspect drove alone in the Mazda motor vehicle. He communicated with his colleagues over the radio telling them what was happening and requested them to close all the escape routes in the area so that the suspects could be arrested and this led to the arrest of the driver of the Mazda motor vehicle and the two occupants of the plaintiff's motor vehicle who were found in possession of some money which was suspected to have been the proceeds of the robbery and two firearms which were found at a spot next to the road where they were offloaded by the plaintiff.

[70] Lt Tshabalala testified that he was also at Food Zone on 12 July 2009 where he also interviewed the African women who also gave him the information they gave to Sgt Mzizi about the plaintiff's involvement in the robbery. He corroborated Sgt Mzizi's evidence that the African women who implicated the plaintiff in the robbery did not want to get involved. They refused to make statements because they were afraid of the plaintiff. Lt Tshabalala also testified that he was among the police officers who looked for the plaintiff in town after the arrest of the three suspects who were in his company. They did not find him but they eventually went to look for him at his house in Petsana where they found his motor vehicle outside in the yard. They also did not find him after they were told he was not there.

- [71] W/O Mesia and Capt Mokgethi 's evidence basically related to how they arrested the two suspects who alighted from the plaintiff's motor vehicle and what they found in their possession after they searched them. This also included the two firearms that were allegedly found at the spot where they went after alighting from the plaintiff's motor vehicle.
- [72] The evidence of Sgt Mzizi was straight to the point. I found it to have been logical, clear and credible. All the other police officers who testified after him corroborated his evidence in relation to his communication with them on the night of the robbery incident and how they managed to apprehend the suspects who were in the company of the plaintiff.
- [73] I also did not find any discrepancies in their evidence except to say that their statements were criticised for not being as detailed as their viva voce evidence in court. I find that criticism immaterial in that sight should not be lost that the statements they made were only made in respect of the criminal proceedings that were instituted against the plaintiff and the suspects who were in his company. The defendant's witnesses were all clear in their evidence that those statements were only a summary of what happened on the day in question. Statements made by witnesses to the police are not subject to cross-examination like evidence that is presented in court. In any event the statements were not criticised for being contradictory but for lack of details which came out when evidence was presented in court.
- [74] Sgt Mzizi's statement was criticised for not mentioning the name of the plaintiff. He explained that he made the statement in relation to the arrest of the driver of the Mazda. It was clear from his evidence that he was not involved in the arrest of the plaintiff and that after arresting the driver of the Mazda he never got involved in the investigation of the case any further.
- [75] Lt Tshabalala's evidence was also criticised in that in his statement he mentioned that he arrested the plaintiff for transporting the suspects. In response to this he stated that he had more information about the plaintiff when he arrested him. A concern was also raised about the statement made by Inspector Majoro which was said to contradict that of Captain Mokgethi and W/O Mosia with regard to where the two firearms, magazines and cartridges were found. He was clear in his evidence that he was aware of the discrepancies but did not find them to be peculiar to the arrest of the plaintiff.
- [76] When Sgt Mzizi, Capt Mokgethi and W/O Mosia testified, their evidence in relation to seeing the plaintiff on the night of the incident in the company of the three suspects who were later arrested, was not challenged. It was also not put to them that the plaintiff was not in Reitz and/or Petsana township on the night of the incident. This version was only put to Lt Tshabalala when he testified and he disputed it and reiterated that he got information from the employees of Food Zone that the plaintiff was involved in the robbery and that he was seen by W/O Mosia and Capt Mokgethi offloading the two suspects from his Mercedes-Benz motor vehicle and immediately drove off.

- [77] There was no explanation as to why the above version was not put to Sgt Mzizi, W/O Mosia and Capt Mokgethi especially taking into account that Capt Mokgethi testified that he knew the plaintiff prior to the incident, he saw him driving his Mercedes-Benz motor vehicle being followed by W/O Mosia, he tried to stop it but the plaintiff proceeded driving. That evidence therefore remained unchallenged. The evidence of the plaintiff was wanting as against that of the defendant's witnesses. He came up with new evidence which was not put to the defendant's witnesses. The evidence that Lt Tshabalala told him that he was not implicated in the robbery and influenced him to turn state witness against the other suspects and that as a result of his failure to do so, he had to spend the night in the cells, was not put to Lt Tshabalala when he testified. Further to this it was never put to Lt Tshabalala that the plaintiff was disputing that he was pointed out at the identification parade. All that was put to Lt Tshabalala was that he was not properly identified at the identification parade. His evidence did not correspond with his pleadings. In his pleadings he did not make any allegations relating to the conditions of the cells in Reitz and Bethlehem prisons. The evidence was also not put to the defendant's witnesses. It was not fully canvassed in the evidence presented in court. It therefore stands to be rejected (Minister of Safety and Security v Slabbert [2010] 2 All SA 474 (SCA) paras [11] and [12]).
- [78] In the same version no allegations were made in the particulars of claim that the discretion to arrest the plaintiff was not properly exercised to enable the defendant to plead thereto and explain why it was necessary to arrest him. Further to his evidence, it only came up for the first time when he testified that he lost a contract which he was busy with in Klerksdorp at the time of his arrest. No allegations were made in his particulars of claim which related to his loss of income as a result of his arrest.
- [79] While it was alleged in the plaintiff's particulars of claim that Lt Tshabalala unreasonably opposed his application for bail with improper evidence, no facts were pleaded as to what improper evidence the investigating officer relied upon when opposing bail.
- [80] The evidence of Mr Themba Gift Ngwenya did not assist the plaintiff in any way. He seemed to be confused about how the events unfolded on the night of his arrest. His evidence was riddled with contradictions and he was not honest when he responded to questions. It could not have been a coincidence that money in excess of R2 600,00 and R10 000,00 was found in his possession and Mr Ndleleni and that both of them travelled from Qwaqwa where they both sold leather bags and belts. The version that a police motor vehicle stopped where him and Mr Ndleleni were standing in Reitz, that they were asked what were they doing there and the explanation that they were on their way to Johannesburg and were waiting for the owner of the truck, and that they were never shown firearms and money that was involved, was new evidence which was not put to Capt Mokgethi and W/O Mesia. He unreasonably disputed the evidence which was not challenged when it was presented by the defendant's witnesses, viz, the fact that an amount of R2 620,00 was found in his possession and that W/O Mesia and Capt Mokgethi were driving in one police motor vehicle when they approached them. His evidence also changed as he went along. I found his evidence to have been

contradictory, confusing, incredible and illogical and rejected it as false and unreliable.

- [81] It is common cause between the parties that Lt Tshabalala is a peace officer. From his evidence I find that he entertained a suspicion that the plaintiff committed a schedule 1 offence. He got information that the plaintiff was seen among the robbers in the shop and that he was later seen with the suspects one of whom was seen driving in a getaway motor vehicle. He also got information that all the three suspects who were with him were arrested after he offloaded two of them on the road who were found in possession of excessive amount of cash. It cannot be said that he did not analyse and assess the quality of the information at his disposal critically, accepted it lightly and did not check it where it was supposed to be checked. From his evidence it is clear that after examining the information at his disposal, he allowed himself to entertain a suspicion which would justify an arrest (*Mabona and Another v Minister of Law and Order supra*). Sgt Mzizi had a lengthy cross-examination about the fact that he could not disclose the name of the informer who gave him information that led to the arrest of the plaintiff and the suspects who were in his company and that he also did not disclose the names of the employees of Food Zone who implicated the plaintiff in the robbery and/or take their statements despite his explanation that

they did not want to be involved as they feared for their lives. Lt Tshabalala was also told that despite the fact that there was no fingerprint and/or ballistic evidence to link the plaintiff with the robbery, he continued to arrest the plaintiff. I find all these unnecessary in that what was required of him was to entertain a suspicion and not to have information of sufficient high quality and cogency to secure a conviction of the suspect (*Mabona v Minister of Law and Order supra*, *Minister of Law and Order v Kader 1991*

- (1) SA 41 (A)). The section requires suspicion and not certainty. It can also not be said that the suspicion was not reasonable or based on solid grounds.

- [82] Lt Tshabalala also had a lengthy cross-examination about the fact that he unreasonably opposed the bail application of the plaintiff while he did not have evidence against him. His evidence was criticised that he gave information that the plaintiff was identified at the identification parade while he was not, photos taken at the identification parade were missing in the docket and the police officer who conducted the identification parade was not called to testify. Further to this Capt Mokgethi was referred to the information that was used at the bail application of the plaintiff to the effect that he transported the two suspects (Mr Ngwenya and Mr Ndleleni) to Steyn Street where they were arrested and he flee the scene. Police followed him to his residential place where he parked his motor vehicle and ran away. He was positively identified at the identification parade. Witnesses and people who were at Food Zone at the time of the robbery were very traumatised after the incident and that if he was to be released on bail, he would interfere with the state witnesses.

[83] Lt Tshabalala was clear in his evidence that at the bail application of the plaintiff, the evidence that he was positively identified by Mr Calitz, the owner of Food Zone and Ms Fourie was not challenged. At the time he presented that evidence all photos taken at the identification parade were in the docket. He did not know what happened with them because when he testified in this case they were missing. The fact that he did not take the statement of the police officer who conducted the identification parade and that the police officer was not called to testify is immaterial in that he did not know when he testified that the photos were missing. He was adamant that the photos were in the docket when he gave evidence at the bail hearing of the plaintiff. Strange enough what was put to Captain Mokgethi regarding the information that was used at the bail application of the plaintiff was not put to Lt Tshabalala who gave evidence at the bail hearing.

[84] I cannot find from Lt Tshabalala's evidence that he gave improper evidence at the hearing of the plaintiff and unreasonably opposed his bail application.

[85] In my view the four jurisdictional facts laid down in section 40(1)(b) of the Act and outlined in the Duncan matter (supra) has been successfully established by the defendant. I find that the arrest and detention of the plaintiff was justified under the circumstances.

[86] In the result I make the following order:

86.1. The plaintiff's action is dismissed with costs.

M J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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Date of Judgment

24 January 2017

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