

SOUTH AFRICA / JUDGMENT

Naidoo v Minister of Police (1462/14)

[2016] ZANWHC 83 (1 December 2016)

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COURT

North West High Court, Mafikeng

BEFORE

Gutta

CASE / FILE NUMBER

1462/14

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 1462/14

In the matter between:-

AMAL DAVID NAIDOO

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

- [1] The plaintiff instituted two claims against the defendant. Claim 1, is for damages arising from his unlawful arrest and detention in the amount of R400 000.00 and claim 2 is for special damages for loss of profit in the amount of R22 800.00.

B. PLEADINGS

- [2] Under claim 1, plaintiff alleged that on the 13 December 2013 at Delareyville he was arrested without a warrant and detained at Atamelang police station until the 17 December 2013 when he was released on bail.
- [3] It was alleged that the arrest and detention was unlawful in that the defendant:
- 3.1 had no reasonable grounds to believe that the plaintiff committed a Schedule 1 offence;
- 3.2 had no reasonable grounds to arrest the plaintiff;
- 3.3 did not realise that they had a discretion to arrest with or without a warrant of arrest.
- 3.4 neglected, refused and or failed to exercise the discretion alternatively to properly exercise his discretion;
- 3.5 neglected, refused and or failed to question the plaintiff and any other person to establish if there were grounds to arrest the plaintiff;
- 3.6 in an arbitrary manner and without proper grounds arrested the plaintiff;
- 3.7 infringed on the plaintiff's right to freedom in an arbitrary manner or without reasonable cause in terms of article 12(1)(a) of the Constitution;
- 3.8 failed to explain to plaintiff his rights in terms of the Constitution.
- [4] Under claim 2, plaintiff alleged inter alia that at the time of his arrest he was in possession of 300 photos of Nelson Mandela which he purchased for R24.00 each and intended to sell during the funeral of Nelson Mandela for R100.00 a photo. It is alleged that as a result of his unlawful arrest and detention he was unable to sell the photographs and suffered damages in the amount of R22 800.00.
- [5] Although the defendants initially raised a special plea of non-compliance in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, the plaintiff complied and the special plea was abandoned.
- [6] The defendants amended plea reads:
- “2.1 The Defendant admits and pleads that on 13th December 2013 at around 18H00 on the national road known as N4, between Delareyville and Vryburg, Warrant Officer Kalela arrested the Plaintiff without a warrant of arrest in terms of Section 40 of the Criminal Procedure Act, Act No. 51 of 1977 read with the Fire Arm Control Act, Act No. 60 of 200 in that:*
- 2.1.1. he reasonably suspected that the Plaintiff had committed a schedule 1 offence as he was found in possession of an unlicensed firearm and ammunition and

2.1.2. the Plaintiff failed to provide Warrant Officer Kalela with firearm license card and/or produce any reasonable explanation and/or proof confirming that he was the lawful owner of the firearm he was found in possession of.

2.2 The Defendant admits and pleads that the Plaintiff was detained at Madibogo police station and released on 17th December 2013 after paying bail in the amount of R1 000-00 (one thousand rands only).”

[7]

Facts

not in dispute

7.1 Plaintiff and defendant’s locus standi;

7.2 Plaintiff was arrested without a warrant on the 13 December 2013 at approximately 18h00 on the N4 between Delareyville and Vryburg by warrant officer Kalela and detained at the South African Police until the 17 December 2013 at 10h00;

7.3 Plaintiff was released on bail of R1000.00;

7.4 Plaintiff was arrested on a charge of being in possession of an unlicensed firearm and ammunition;

7.5 The arresting officer acted within his scope of employment;

7.6 Plaintiff was granted condonation for the late delivery of the notice in terms of section 3 of Act 40 of 2002.

7.7 Defendant carries the burden of proof and the duty to begin.

[8] Facts in dispute

8.1 whether the arrest and detention was lawful;

8.2 the claim for special damages in claim 2;

8.3 the quantum in respect of both the first and second claim.

C. EVIDENCE

[9] The first witness for the defendant was detective Kalela(Kalela), a police officer since 1987 and stationed at Delareyville SAPS. On Friday 13 December 2013, at 16h00 he and other officers were attending a road block on the N14 between Delareyville and Vryburg. His duty entailed making enquiries on the laptop after receiving the vehicles’ registration numbers to ascertain if the vehicle was stolen or not and who the owner of the vehicle was.

- [10] Warrant Officer Coetzee(Coetzee) stopped a vehicle with registration number [...]. There were two people in the motor vehicle and Coetzee told the driver that he is going to issue a warrant for his arrest as he does not have a driver's licence. The driver and the passenger alighted the vehicle, whereafter he observed a firearm on the passenger's (Naidoo) hip. Kalela took the serial number of the firearm and checked ownership on his laptop. Naidoo did not furnish him with his identity document or his firearm licence. The computer system showed the serial number and the owner of the firearm was one Schalkwyk and not Naidoo. Naidoo was arrested as he was unable to provide proof of ownership of the firearm or his identity document or any documents relating to the firearm. He said had Naidoo given him his firearm licence he would not have arrested him and if he only had his driver's licence in his possession he would still not have released him because Naidoo was arrested for possession of a firearm without a licence and if the name in the driver's licence was the same as the name that appeared in the system for the firearm, he would have only seized the firearm and requested Naidoo to produce the licence.
- [11] Naidoo was also requested to provide proof of ownership of the vehicle as the computer system indicated that one Keyster LS with ID number [...] was the owner. Naidoo explained that he recently purchased the vehicle and has not done the change of ownership and was unable to provide any documentation.
- [12] Kalela was referred to an affidavit deposed to by Naidoo on the 27/1/15 wherein Naidoo stated inter alia that on the 13 December 2013 he drove the vehicle that he purchased from Johannesburg to Kuruman where he was stopped at the road block. Kalela denied that Naidoo was driving the vehicle. In the affidavit, Naidoo states further that he explained to Kalela that he should contact the SAPS in Kuruman who can confirm that he is the owner of the firearm. Kalela denied this and said he only discovered the case in Kuruman later when the statement was made. Naidoo in his affidavit said that he had the documents referred to in exhibit B in his possession at the time of the arrest. Kalela denied this and said Naidoo was only in possession of his cellphone and he told Naidoo to call his family to bring the documents. Kalela said, he informed Naidoo of his rights when he arrested him at the police station and read him the Notice of Rights which he signed. Thereafter he returned to the road block and Naidoo was taken to the Madibogo police station because the police cells at Delareyville were under renovation.
- [13] When questioned about the investigation he conducted to confirm the report he received from the system, he said he discovered a case reported in Kuruman and called warrant officer Cloete(Cloete). Thereafter he returned to the road block. He left the docket at the police station for further investigation as there was an investigating officer on standby. Kalela denied having any knowledge about the Nelson Mandela photographs. He said he didn't see any photographs and Naidoo didn't say anything about the photographs at the time of his arrest.

- [14] Under cross examination, he said he told Naidoo that the firearm is registered in the name of Amal David Schalkwyk and Naidoo explained that he is the licenced owner of the firearm and he didn't believe Naidoo. He wanted Naidoo to produce the firearm licence. There was nothing to prove that the plaintiff is Naidoo or Schalkwyk. In the circumstances he could not release Naidoo. He said Naidoo gave him the name Amal David Naidoo and did not explain that he changed his surname because he is of the Hindu religion and his mother was Schalkwyk and his father was Naidoo. He believed Naidoo when he said he purchased the vehicle because the vehicle was not reported stolen.
- [15] In further cross examination he was referred to the affidavit by Cloete wherein he stated that he checked the firearm on the system and found that it belongs to Schalkwyk with ID Number [...] and it was put to him that Naidoo's ID number. and that of Schalkwyk are the same identity number and they are one and the same person. Kalela replied that he would have believed it if Naidoo produced the documents but he did not. He said a case has previously been opened that the firearm was stolen. The case was recovered by the investigating officer at a later stage and not on the day that Naidoo was arrested. On the day of Naidoo's arrest, he did not have the profile for the Kuruman case and could not verify it.
- [16] He was referred to the Prisoner's Property receipt which showed that Naidoo's drivers licence, registration certificate, motor vehicle licence and cellphone was handed in. He said he was not present when the document was compiled at Madibogo police station and denied that Naidoo had his driver's licence or any of the other documents in his possession. He also denied that Naidoo told him to contact Brigadier Ndumi at Kuruman.
- [17] It was put to him that in terms of section 107(3) of the Firearms Control Act, you can confiscate the firearm without a warrant and hold it until the licence/permit authority is produced and that he was not authorised to arrest Naidoo who carried the firearm without a permit. He confirmed that if Naidoo identified himself with a driver's licence and identity number to prove that he is the licence holder he would have let him go. He reiterated that Naidoo did not produce any documentation to prove that he is Naidoo, neither his identity book nor his driver's licence. He said in terms of the Criminal Procedure Act he had to arrest Naidoo and denied not knowing that he had a discretion whether to arrest or not. He said he didn't search Naidoo at the scene but he was searched at the Delareyville police station and nothing was found on him. He denied telling Naidoo that 'this is not Bangladesh'.
- [18] At the time of Naidoo's arrest, he did not know his identity number. The court asked Kalela when he stopped Naidoo whether he asked him for his identity number. He replied that he asked Naidoo for his name, his identity book and driver's licence and Naidoo was not in possession of the documents.
- [19] The next witness was Theunes Frans Coetzee (Coetzee) a member of the SAP for 18 years stationed at Delareyville. He said on 13 December 2013 at 18h00 he was on special duty, at a road block, 3km from Vryburg and Delareyville. His duties were to stop vehicles travelling from Delareyville to Vryburg. He stopped a vehicle and requested the driver who was a

young man, 30 years old to produce his driver's licence. Naidoo was seated next to the driver on the passenger seat. The driver said he does not have driver's a licence. Kalela checked the number plate on the laptop. Naidoo explained that he purchased the vehicle from someone in Johannesburg and had not changed ownership. He then told them to alight the vehicle so he could search the vehicle. In the boot were several photographs of Mandela. He then wrote out the summons and handed the fine to the driver of the vehicle. When he asked the driver what his relationship with Naidoo was, he replied that he was a hitchhiker and Naidoo picked him up in Vryburg and they drove together to Johannesburg and returned together. The driver told him they went to Johannesburg to buy photographs. He heard Kalela say that Naidoo was carrying a firearm and not able to produce his firearm licence. Later Kalela told him that he was arresting Naidoo. Kalela told him that Naidoo was not in possession of a firearm licence and the firearm was registered under the name Schalkwyk. Kalela arrested Naidoo who was taken to Delareyville police station and later that evening transferred to Madibogo.

[20] Coetzee spoke to Naidoo later when he was seated at the back of the Police van and Naidoo was angry and said he had changed his name from Schalkwyk to Naidoo. He didn't discuss the matter further with him. Naidoo did not produce a driver's licence in his presence. When he searched the motor vehicle he did not see any motor vehicle registration papers or any other documents. He did not hear Kalela referring to Naidoo as someone from Bangladesh. He believed Naidoo when he said he purchased the vehicle and was still going to do the change of ownership because the vehicle was not reported stolen on the system. He was surprised to see the SAPD22, Prisoner's Property receipt and said Naidoo did not produce any documents when he approached him at the back of the vehicle.

[21] William Jakobus Cloete(Cloete), a warrant officer for 16 years and member of SAPS for 33 years, said he was at home when Kalela

contacted him and informed him that, they found a firearm on a person at a roadblock and he requested him to verify who the owner of the firearm was because the person did not have a firearm licence on him. He went to his office and checked the Enhanced Firearm System on his computer and found that the firearm belongs to one Schalkwyk. He said he was the only person who had access to the Enhancement Firearm System. Kalela could only access the old system and he would not be able to find information for renewal of the licence or the fitness certificate. He prepared a statement dated 18 December with his findings. In his statement he said inter alia the following:

- a) on the system it showed that the firearm belongs to Ms AD Schalkwyk with ID No. [...];
- b) that since 2006, Schalkwyk did not renew his firearm licence;
- c) since 2006, he has not applied for a certificate from SARS fitness to possess firearm;

- [22] He said it was only after 19 December when Naidoo provided him with an identity card for Amal David Schalkwyk and the identity book for Amal David Naidoo. Under cross examination he admitted that the full name Amal David Schalkwyk appeared as the registered owner and it is only when Naidoo later produced his identity document and the identity card that he realized that they are one and the same person. He said he did not go to the Crime Administration System, only to the Enhanced Firearm System. He said if a person says he changed his name and does not produce his identity document or driver's licence, then he would ask him to produce his identity number.
- [23] Under re-examination, he said he initially did not think that the Amal David Naidoo and Amal David Schalkwyk could be the same person. When he conducted his investigation he was not aware that Naidoo had changed his name from Schalkwyk to Naidoo. He was referred to the two reports from the crime administration. In the first report he said Naidoo was the complainant and in the second report it was noted that the owner of the firearm is Schalkwyk. He said when he recorded his statement, Kalela only gave him Naidoo's initials, 'AD' and not his full name and when he checked the Enhancement system he found that the firearm was registered in the name Amal David Schalkwyk.
- [24] Kagiso Edward Serati(Serati) is a warrant officer for the SAPS stationed at Madibogo police station. On the 13 December 2013, he was on duty at the police station. During the evening the police from Delareyville police station wanted to detain Naidoo for being in possession of an unlicensed firearm. He searched Naidoo and found him in possession of a Samsung cellphone. He recorded his detention in the cell register, the SAPS 10 under serial number 886. What was recorded is the following "00:30 Suspect Detained: Constable Mokgele and Constable Setaname detained Amal David Naidoo SAP14 71/12/2013 CAS 75/12/2013". He said Constable Morime wrote the inscription and he and officer Mokgele signed.
- [25] Naidoo requested a phone to call his child as his cellphone battery was flat. Naidoo used the office landline and after the call he said his child was on her way and was not far from the police station and his child will bring the firearm licence. His daughter arrived and she was in the company of a man. They met with Naidoo and gave him the papers for his vehicle and his driver's licence. He then entered the documents in the SAPS 22 which is the property register and he signed at the bottom of the form where it states, signature of member receiving property and constable Morwe signed as a witness. He said the property entered was:
1. driver's licence;
 2. registration certificate;
 3. motor vehicle licence;
 4. Samsung cellphone.

- [26] Further in the cell register under serial number 888 at 1:30 am, he said Morwe wrote the “ppr handed in David Naidoo handed ppr as per serial no: L5988395”. This was written after he had handed Naidoo’s property over. He did not know anything about the Mandela photographs.
- [27] Under cross examination he said he received Naidoo at 1:30 and his daughter arrived approximately 30 minutes later. He later said Naidoo was detained at 12:30 and the property was entered at 1:30. It put to him that Naidoo’s daughter lives in Kuruman and the distance from Madibogo to Kuruman is approximately 240km. He reiterated that Naidoo called his child who brought the articles which were recorded in the SAP 22. He said Naidoo was arrested in Delareyville and the call from the police station was not the first call he made. At Madibogo police station he was merely confirming how far his child was. He said his duty was only to detain Naidoo and he did not ask him for his firearm licence. At the time Naidoo’s child arrived, Naidoo was still in the charge office and had not been taken to the cells. If he was in the cell, his child would not have managed to see him for the night. Had the documents been in Naidoo’s possession earlier it would have been registered earlier and he would have been detained in the cells.
- [28] Letlhogonolo Meshak Morwe(Morwe) is a member of the SAPS stationed at the Madibogo police station. He was in the charge office on the 13 December 2013. His commander was Serati. The police arrived from Delareyville with Naidoo and Serati told him to record the suspect in the occurrence book. He recorded it at 00:30 under serial number 886. Serati searched Naidoo and found a cellphone. Naidoo called his child and gave his child directions to the police station. After a while Naidoo’s family arrived. The lady handed over Naidoo’s driver’s licence and motor vehicle papers. No documents relating to the firearm were produced. Naidoo only had his cellphone with him and all the other items in the SAPS 22 were brought by Naidoo’s daughter. Thereafter Serati instructed him to make an entry on the OB that is why he recorded “PPR handed in” at 1:30. Serati completed the Prisoner’s Property receipt, SAPS 22 and he signed as witness. The OB No. is 884 and not 888, he explained that there was a mistake in recording the number but that the serial number on the SAPS 22 correlates with the serial number mentioned in the OB book under 888. The mistake in the serial numbers started at 843. When questioned why he booked the items into the SAPS 22 as they were not in Naidoo’s possession when they arrested him, he replied that if Naidoo was released in the absence of his children, he could get the items back by using the SAP 22.
- [29] Joseph Tebogo Galetlhobogwe(Galetlhobogwe) is a detective constable with SAPS. He was the investigating officer. He was allocated the file on the 14 December 2013. In the file was the Notice of Right which was signed by Naidoo on the 13 December 2013. He went to Madibogo police station on the 15 December 2013 (Sunday) to get Naidoo’s statement. He informed Naidoo of his rights and that he did not have to give a statement. He also informed Naidoo that he was arrested for being in possession of a firearm without a licence. Naidoo’s statement was read into the record. In his statement he said inter alia that he is the lawful owner of the firearm and he has possessed the firearm for 30 years, he purchased the

firearm at Vereeniging. His firearm was stolen and he reported it at Kuruman police station and the police recovered the firearm and arrested his grandson who removed the firearm from his safe at 1 Wallmoo Stree Kuruman. After taking Naidoo statement, he asked him if there was any other information he wanted to add and the reply was in the negative.

- [30] Galetlhobogwe then drove to Delareyville to go and see the arresting police to confirm the address that Naidoo had given him as it differed to the address Naidoo gave to the arresting officer. Naidoo told him that he resides at [...] B. Street, Kuruman. At Delareyville police station he called the Kuruman police station. The investigating officer was on leave but another officer confirmed that the case exists but was closed. He met with the arresting officer who told him that when he checked the system, it gave him a different name for the owner of the firearm. He then went into the system to request information and to verify. The name of the owner of the firearm on the system was AD Schalkwyk and the address for the owner was [...] K. Street, Rus Ter Vaal. After calling the Kuruman police station, he had to get the docket from Kuruman and had to verify at Home Affairs that Naidoo changed his surname from Schalkwyk to Naidoo and that they were one and the same person. He went the next day. Naidoo did not provide him with his Identity book. He could not release Naidoo because there were two surnames with one identity number and the addresses for both surnames differed. He went to Home Affairs on the day that Naidoo went to court. At Home Affairs he gave them Naidoo's identity number and requested them to check on the system. Home Affairs could not give him a print out and the official at Home Affairs signed an affidavit on the 5 December 2014.
- [31] He was referred to the documents obtained from the administration system on the 17 December 2013. Naidoo was the complainant in a charge of house breaking and theft. His safe with a firearm in it and cash in the amount of R24 000.00 was stolen from his home at 1 Willmore Street, Kuruman. He denied that he should have known from this information that the firearm belongs to Naidoo because on the same system the firearm is registered under the name Schalkwyk and although the identity numbers corresponds, the addresses are different. He said even if he had Naidoo's driver's licence he could not have released him because the system says Amal David Schalkwyk is the owner of the firearm and he had to verify who this person is. The plaintiff was released on bail on the 17 December 2013
- [32] He said the firearm was still stored in the SAP 13 in Delareyville and they were awaiting the owner to produce corresponding documents whereafter it will be released to him. He knew nothing about the Mandela photographs. The prosecutor had informed him that the state and the defence agreed on informal mediation in that the court called Naidoo and showed him the mistake and informed him that once he receives the relevant documentation he will receive his firearm that is why the firearm was kept. The charges were withdrawn when the prosecutor received the information from Home Affairs.
- [33] Under cross examination it was put to him that from the computer generated information, the administration system, he should have realised that Naidoo and Schalkwyk is one and the same person as the identity numbers were the same and the police in Kuruman handed

the firearm back to Naidoo even though the system showed it belonged to Schalkwyk. He replied that these were two cases under different case numbers, namely 48/06/12 and 49/05/12 and under case number 48/06/12 the identity number matched, AD Naidoo while and under case number 49/05/12 there was no name and he needed to verify the information.

- [34] It was put to him that in terms of S107 of the Firearm Control Act, Naidoo had 7 days to produce his firearm licence. He replied that Naidoo did not produce any documents that identified him and his address was different to Schalkwyk. If he released Naidoo, he would also not know where to find him. As the information he received was that the firearm belonged to Schalkwyk and not Naidoo he could not release Naidoo as there

was information that the firearm was reported stolen in Kuruman and it was registered under the name Schalkwyk not Naidoo. Naidoo failed to change his name under which the firearm was registered into his current name.

- [35] When asked why he went to Home Affairs as the identity number and first names were the same and only the surname differed, he replied that they are dealing with such cases where people use other people's identity numbers to get certain information and to promote crimes and he has worked with such cases. He said Naidoo told him that he changed his surname for personal reasons and he recorded this in his statement. He became suspicious because Naidoo said he possessed the firearm for 30 years yet he did not know the serial number for the firearm.

- [36] Under re-examination he also said he went to Home Affairs because he had three different addresses corresponding with Naidoo and one address for Schalkwyk. Hence the main reason for going to Home Affairs was to verify if the person at the three addresses is the same person with the identity number. It is for this reason he did not release Naidoo and further detained him. He also said when a person changes his address he informs the police so that they can update the system so the particulars change to the new address. In reply to the court questions he said Naidoo did not mention that he changed his surname from Schalkwyk to Naidoo when he initially took his warning statement.

- [37] The plaintiff, Amal David Naidoo(Naidoo) aged 62, testified that on the 13 December 2013 between 5:30 and 6:45 he was arrested at Delareyville. He said he purchased Mandela photographs in Vereeniging as it was his intention to sell them at Qunu where Mandela was going to be buried on the 15 December 2013. He paid between R22.00 and R24.00 per photograph and was going to sell the photographs at R100.00 per photo. He said 1km outside Delareyville he was stopped by the police. His motor vehicle was driven by a man he had given a lift to. As he was alighting, a policeman Kalela saw his 38 special firearm, which was inside a holster on his hip.

- [38] Kalela requested the licence for the firearm. He did not find it in his wallet and gave him his driver's licence. He told Kalela that the vehicle was new and he had purchased it today. He handed the document to Kalela. Kalela saw that the vehicle was under the surname Keyster

and called Keyster who explained to him that he sold the vehicle to Naidoo that afternoon. Kalela accepted the explanation that the vehicle was not stolen. Kalela again requested his licence for the firearm and he told Kalela that he may have left it in the shop at Kuruman and called his son who later called back to say that he could not find the licence and only found his identity document. Kalela then said he is going to detain him and handcuffed his hands and feet and put him inside the van. He asked Kalela if he could pass water and Kalela refused and said he had to wait until they went to the police station. He could not hold it and messed himself.

[39] He explained to Kalela that he was Amal David Schalkwyk and that he changed his surname to Amal David Naidoo and Kalela said there is nothing he can do but to detain him. He also told Kalela to call Brigadier Nguni about his case in Kuruman where he reported his firearm which was stolen and later recovered. Kalela told him he is not interested in the Brigadier. He said his driver's licence, motor vehicle's papers and his cellphone were taken by the police and kept by the police in Delareyville. From Delareyville they took him to Madibogo police station where they removed the handcuffs and put him inside the cell. On Saturday afternoon around 4pm his son arrived with his identity document and some documents from SAPS in Kuruman and delivered the documents at Delareyville. He denied that his daughter brought his driver's licence and motor vehicle papers on the Friday night. He said prior to 2004 he had his mother's surname, Schalkwyk and in 2004 he changed it to his father's surname which is Naidoo.

[40] The firearm was still registered under the surname Schalkwyk. He told Kalela, Coetzee and Morwe that his surname changed from Schalkwyk to Naidoo. He was released on bail by the court on Thursday, 17 December between 10:00 – 11:00. Wednesday the 16th was a public holiday. He said he was disappointed that he was imprisoned for a firearm he owned for so many years. He said it was

hurtful because he could not attend Nelson Mandela's funeral as he was his hero. After his release, he tried to sell the photographs and was only able to sell some at R20.00 each.

[41] He remained in the cells at Madibogo from Friday until Tuesday, for 4 days. In the cells he was with 7 other inmates. The condition in the cell was very bad, especially the food. Although he ate the bread, the other men over-powered him for his food. He had to scream for water and the toilet was a 'pigsty'. He said there were four mischievous/naughty 'boys' in the cell who smoked dagga. Galetlhobogwe refused to take him to a single cell. He attended court on 3 occasions. He said he was released because there was no case against him. He denied that there was any agreement for mediation. He said in Kuruman he first stayed at [...] B. street, Randville and then at [...] W. Street in town. He is presently still residing at [...] B. Street. His son and daughter could not attend court as they were both involved in an accident in Carltonville.

- [42] Under cross examination he admitted that he gave his new motor vehicle to a stranger to drive and didn't know that he was not carrying his driver's licence. He admitted that the version put to Kalela that he was driving the vehicle was wrong. He said Kalela stopped the motor vehicle and not Coetzee. He said his firearm licence was lost since 13 December and he last saw it 2 or 3 days before his arrest.
- [43] He said he produced his driver's licence because he did not have the firearm licence and when Kalela checked on the system he told him he is not Amal David Schalkwyk. He explained to Kalela they are the same person and he must look at the identity number. He was referred to Kalela's statement wherein he stated inter alia that he asked Naidoo for his surname and he said he is Naidoo and when he checked on the system with the number AA044768 it showed that the firearm belongs to Schalkwyk Amal David of [...] K. Street, Reistter Vaal. He said he explained to Kalela but because he didn't have any proof to convince him about the names nor the firearm licence he was arrested for possession of an unlicensed firearm.
- [44] When he arrived at Madibogo he was taken straight to the cells. He denied that Serati and Morwe searched him and found a cellphone or that he requested to use the landline to call his son and daughter who were not far from the police station and when his daughter arrived she handed over the driver's licence, motor vehicle licence and registration papers. He replied that it was a "blatant lie". He said his son arrived at Madibogo Police station on Saturday at 4pm and handed a police officer his identity document. He denied that his daughter who was coming from Kuruman would have the documents because the vehicle was purchased in Vereeniging. He admitted to signing the SAP 22 in the charge office. It was put to him that his version was that he was taken straight to the cells. He said this happened two and a half years ago. He admitted that he made a statement on Sunday to Galetlhobogwe and said that what was contained in the statement is all that he told him. When questioned about the condition in the cells and whether he had informed the investigating officer, he said he could not remember who he spoke to and later he said he spoke to the Investigating officer.
- [45] He was not sure how the claim in the amount of R22 800.00 was computed and whether he purchased the photographs for R22.00 or R24.00. Later he said he purchased 100 for R22.00 and 200 for R24.00. When asked why he didn't discover receipts he said the print on the receipts faded with time. He sold 120 and had 180 left. He explained that he was going to charge R100.00 per photograph which covers the costs for travelling and accommodation and for 2 people who were going to assist him to sell the photographs. When asked why he is claiming R400 000.00 general damages he said he had a business KLM Tyres and Mags and because he was detained for 4 days.

[46] When the court asked Naidoo about the date and time that his son and daughter arrived at the police station, he replied that it was not his son but his daughter and her friend who came on Friday and he could not recall the time they arrived. He said his son came on Saturday with his identity document.

PLAINTIFF'S

SUBMISSIONS

[47] Counsel for plaintiff submitted the following:

47.1 Naidoo was arrested and detained by Kalela on the basis that he reasonably suspected that he had committed a schedule 1 offence as he was found in possession of an unlicensed firearm and ammunition. The offence of being in possession of an unlicensed firearm and ammunition is not a schedule 1 offence. Possession of an unlicensed firearm and ammunition is an offence in terms of section 3 of the Firearms Control Act, Act 60 of 2000. A person convicted of being in possession of an unlicensed firearm may be sentenced to a fine or to imprisonment not exceeding 15 years.

47.2 It was submitted that as the offence of being in possession of an unlicensed firearm is not a schedule 1 offence, the arresting officer was not entitled to arrest Naidoo without a warrant for his arrest, that on that basis alone claim 1 should succeed. Plaintiff relied on the unreported case in this division of Borenotswa George Mekwe v Minister of Police, case number 1171/2014. Plaintiff submitted in the alternative that if it is found that Kalela could lawfully arrest Naidoo for the offence of being in possession of an unlicensed firearm, then Kalela could only lawfully arrest Naidoo if:

- a) he had reasonable cause to suspect Naidoo of being in possession of an unlicensed firearm and ammunition; and
- b) if he exercised his discretion whether to arrest or not to arrest.

[48] Kalela didn't apply his mind to the explanation given to him by Naidoo that he is the lawful owner of the firearm. The arresting statement is silent about Naidoo's explanation and what steps were taken to try to confirm the information given by Naidoo. There was a duty on Kalela to investigate whether Naidoo was the owner of the firearm. Naidoo was the lawful owner and licence holder of the firearm. Even if the evidence of Kalela is accepted that Naidoo had no identification documentation with him, which is still denied, Kalela could and should have clarified Naidoo's identity by asking him a few questions to confirm the information reflected on the system. The fact that Amal David Naidoo and Amal David Schalkwyk had the same first names had to alert Kalela to the fact that the explanation given by Naidoo could reasonably be true. Kalela did not apply his mind to the explanation given to him by Naidoo and insisted on receiving the license for the firearm failing which he was of the opinion that he could arrest Naidoo.

THE LAW

[49] In terms of section 40(1)(b) of the Act, a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody. The jurisdictional facts for a section 40(1)(b) defence are that:

- i) The arrestor must be a peace officer.
- ii) The arrestor must entertain a suspicion.
- iii) The suspicion must be that the suspect committed an offence referred to in schedule 1.
- iv) The suspicion must rest on reasonable grounds.

See: Duncan v Minister of land and order 1986

(2) SA 855 (A) 159 C

[50] Once the jurisdictional facts for an arrest are present, a discretion arises and the officer is not obliged to effect an arrest. The discretion must be exercised in good faith, rationally and not arbitrarily. This requires that it must be exercised with the

objective of bringing the suspect before court.

[51] Schedule 1 includes serious offences and offences for which a sentence may be imposed of imprisonment exceeding six months without the option of a fine. It is important that peace officers bear in mind that, due to the punishment which can be imposed, only crimes created by statute are included in schedule 1 See: Ariff v Minister van Polisie 1977(2) SA 900 (A) 91 3 B.

[52] In terms of section 3 of the Firearms Control Act, Act 60 of 2000.

“General prohibition in respect of firearms and loading in firearms.

(1) No person may possess a firearm unless he/she holds for that firearm:

a) A licence, permit or authorization issued in terms of this act”.

In terms of section 121 of the Firearm Control Act, states as follows:

*“121 penalties: any person convicted of a contravention of or a failure to comply with any section mentioned in column 1 of schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in column 2 of that schedule opposite the number of that section”.
Section 3 is listed in schedule 4 and carries a term of imprisonment not exceeding 15 years.*

[53] Although possession of an unlicensed firearm and ammunition, is a statutory offence in terms of section 3 of the Firearms Control Act 60 of 2000, it is not a schedule 1 offence as a person can be sentenced to a fine or imprisonment.

[54] Having established that the crime of ‘possession of an unlicensed firearm and ammunition is not a schedule 1 offence, the next question for consideration is whether Kalela entertained a suspicion that Naidoo committed a schedule 1 offence and finally

whether the suspicion was reasonable. Did Kalela apply his mind to the question whether it is a schedule 1 offence.

[55] Plaintiff’s reliance on the decision of *Borenotswa George Mekwe v the Minister of Police*, supra to submit that because the offence for which Naidoo was arrested was not a Schedule 1 offence, Naidoo should for that reason

alone succeed with his claim is in my view flawed. I say this because the test is not whether the offence was a schedule 1 offence but whether the peace officer reasonably suspected that the suspect committed an offence referred to in schedule 1 of the Act. In other words, did Kalela reasonably suspect Naidoo of committing a schedule 1 offence.

[56] Due to the requirement of reasonable suspicion, absolute certainty that the offence warranting the punishment specified in the schedule, is not necessary. It is not required of the policeman, before effecting an arrest under this, to first give consideration to the question of whether a court might sentence the suspect to more than six months imprisonment without the option of a fine.

R v Mlangeni 1957

(2) PH H62(0)

57] Section 40(1)(b) of the Act does not require a peace officer who carries out an arrest without a warrant to be certain that all the elements of the crime prescribed by schedule 1 have been established. All that the section requires is that the peace officer should entertain a reasonable suspicion that a schedule 1 offence had been committed.

See: Minister of Safety and Security and another vs Koekemoer case no. CA 278/2011 Eastern Cape High Court, Grahamstown [2012] ZA32 at ECEHC 32 at paragraph [26].

[58] South Africa has a very high level of gun related violence and several unlicensed firearms are used in the commission of crimes. The greatest contributor to the pool of illegal arms are firearms lost by and stolen from licenced owners.

See: Hide and seek: Taking account of small arms in Southern Africa p195 Gould, Chandre and others.

Although the crime of possession of an unlicensed firearm is not listed as an offence under schedule 1, the penalty under section 121 of the Firearms Control Act provides that a suspect can be sentenced to a fine or to imprisonment for a period up to 15 years without the option of a fine. Hence it is understandable when considering the penalty coupled with gun related violence why Kalela suspected the offence to be a Schedule 1 offence.

[59] The test in considering whether Kalela's suspicion was reasonable requires an objective standard of a reasonable person. The suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the person arrested committed a schedule 1 offence. See: *S v Reabow* 2007(2)SACR 292(E) at 297 c – e.

[60] An arrest without a warrant is a drastic means of initiating a prosecution or securing the accused attendance in court. Police

officers who purport to act in terms of section 40 (1)(b) should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of a lawful arrest.

Louw and another vs Minister Safety and Security and others 2006

(2) SACR 178 (7) 183j – 184d.

D. EVALUATION OF EVIDENCE

[61] It is necessary to evaluate the evidence in deciding whether the defendant discharged the onus to prove that the suspicion was reasonable and whether Kalela exercised a discretion when arresting Naidoo. The court is confronted with two conflicting versions of the events that transpired leading to Naidoo's arrest and detention.

[62] In the case of *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie* 2003

(1) SA 11 (SCA) at 141 paragraph [5], the Court held:

"[5] . . . The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

(v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the direction and its evaluation of the credibility findings compel it in one more

convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[63] Kalela presented himself as a good witness who remained steadfast with his evidence that he arrested Naidoo because he was unable to provide proof of ownership of the firearm which was registered under the name Schalkwyk or to provide his identity document or any documentation. Kalela gave Naidoo an opportunity to call his family to produce the documents and his daughter and son failed to produce his identity book and his firearm licence. Kalela evidence was corroborated by Coetzee, Cloete and Morwe. This is dealt with more fully hereinbelow. I am of the view that Kalela was a credible witness.

[64] Coetzee was a credible witness who corroborated Kalela's evidence in several material respects namely:

- (1) Kalela observed Naidoo carrying firearm and Naidoo was unable to produce the firearm licence.
- (2) Kalela told him the firearm was registered under the name Schalkwyk.
- (3) Naidoo did not produce any documentation at the scene.
- (4) Naidoo was not the driver of the motor vehicle.
- (5) He echoed Kalela view that without a driver's licence or identity book, you cannot believe a person when he says he changed his surname.

[65] Cloete was another credible witness whose evidence stands uncontradicted and who also corroborated Kalela in the following

respects:

- (1) He was contacted by Kalela who informed him that they found a firearm on a person at the road block and requested him to assist to verify who the firearm belonged to as the person did not have a firearm licence on him.
- (2) He reported that the firearm belongs to Schalkwyk.
- (3) When conducting his investigation he was not aware that Naidoo had changed his name from Schalkwyk to Naidoo.

[66] Serati and Morwe were both in the charge office when Naidoo was brought in. They both were able to answer questions in chief and cross examination without contradicting themselves. They were impressive and credible witnesses and they corroborated each other in the following material respects:

- (1) Police from Delareyville police station brought Naidoo to Madibogo police station and wanted to detain him for being in possession of an unlicensed firearm.
- (2) Serati searched him and found him in possession of a Samsung cellphone.

- (3) There were no documents in his possession. Serati recorded Naidoo's detention in the SAPS 10 cell register under serial number 886 at 00:30
 - (4) Naidoo requested a phone to call his child to bring his firearm licence. He used the office landline and said his child was not far from the police station.
 - (5) His daughter arrived and gave Naidoo the papers for his vehicle and his driver's licence.
 - (6) Serati then entered the documents in the SAP22 property register and Morwe signed as witness. Morwe wrote in the cell register at 1:30am after Naidoo handed over the documents.
 - (7) Naidoo's daughter did not produce his identity document or firearm licence.
- [67] Attempts were made by counsel for the plaintiff to show that the serial numbers had been altered. Nothing turns on this as it appears from the explanation that there was an earlier error in recording the number and that is why the numbers were incorrectly recorded. What was relevant is that the serial number on the SAP22 correlates with the serial number in the Occurrence Book.
- [68] Galetlhobogwe, the investigating officer was also a good witness and did not contradict himself in cross examination. He answered all the questions put to him confidentially without any hesitation. I am of the view that he was credible witness.
- [69] Naidoo displayed a poor demeanour and was not a reliable or honest witness. He contradicted his evidence as set out more fully hereinbelow.

69.1 In examination in chief and cross examination he denied that his daughter brought his driver's licence and motor vehicle papers on the night that he was arrested. He was adamant that his daughter lives in Kuruman which is a distance of 240 km from Madibogo and would not have come to the Madibogo police station. However in reply to the court's question about the date and time that his son and daughter arrived at the police station, he admitted that his daughter arrived at the Madibogo police station on Friday night and his son on Saturday.

69.2 He said Kalela and Galetlhobogwe put him into the vehicle with his hands and feet handcuffed. When it was put to him that Galetlhobogwe only became involved later, he admitted there were two other officers who assisted Kalela and he could not recall who the officers were.

69.3 He testified that he was not informed of his constitutional rights but later admitted that he was furnished with the Notice of Constitutional rights which he signed. In his affidavit in an application for condonation he also stated that he was not given the Notice of Rights. Later he said he was given the first page which was printed and told to sign and he did not know what it was.

69.4 He testified that he was taken straight to the cells at the Madibogo police station and later conceded that he was first in the charge office.

69.5 Naidoo's counsel put Naidoo's version to both Kalela and Coetzee that he was the driver of the motor vehicle. However Naidoo later testified that the motor vehicle was driven by a hitch hiker who he had given a lift to. Naidoo had also on the 27 January 2015, deposed to an affidavit wherein he said he was the driver of the motor vehicle.

69.6 Naidoo testified that he told Kalela that he may have left his firearm licence on the counter at the shop in Kuruman and later he said he was not sure. He also testified that his firearm licence was lost since 13 December and he last saw it 2 or 3 days before the arrest.

69.7 Naidoo initially testified that he was not sure whether the Nelson Mandela photographs were R22.00 or R24.00. However he later testified that he purchased 100 for R22.00 and 200 for R24.00

[70] Naidoo failed to put the following version to Kalela in cross-examination:

- 1) that he told him his name was Amal David Schalkwyk and that he changed his surname to Amal David Naidoo and Kalela said there is nothing he can do but to detain him;
- 2) that he told Kalela to call Brigadier Nguni in Kuruman to find out about his case where his firearm was stolen and later recovered, Kalela told him that he is not interested in the Brigadier.
- 3) that he refused to allow him to pass water and said he had to wait until he reached the police station;

[71] Kalela's evidence in cross-examination was that he told Naidoo that the firearm was registered in the name Schalkwyk and Naidoo's reply was that he is the registered owner of the firearm. Kalela asked Naidoo for documentation that he is Schalkwyk or Naidoo. What is clear and is common cause is that no documentation was submitted to prove that Naidoo was Schalkwyk.

[72] Counsel for the Naidoo submitted that it is irrelevant what documentation Naidoo had in his possession when he was arrested and whether his family arrived at the police station on the day of his arrest or the next day. I disagree, this issue is relevant not only to Naidoo's credibility, but also when this court weights the probabilities.

[73] I reject Naidoo version that he had his drivers licence and motor vehicles papers in his possession when he was arrested and accept Kalela evidence that Naidoo only had his cellular phone. This was corroborated by Coetzee, Serati and Morwe, that Naidoo was not in possession of any form of identification which is also consistent with the time when the SAP 22 was completed. The version of the defendant in respect of events leading to the arrest and detention of Naidoo is the most probable version as Naidoo's credibility is questionable. The probabilities favour the defendants version that Naidoo's daughter arrived later with his drivers licence and the vehicles documents.

[74] It is common cause that Naidoo did not give Kalela his identity book as he did not have it in his possession. There is also no evidence that Naidoo gave him his identity number. Had Naidoo explained to Kalela that he was Schalkwyk and had changed his surname for

personal reasons and given him his identity number to compare with the identity number on the system, the probabilities are that Kalela would have mentioned this fact in his arrest statement and would not have arrested Naidoo. Neither Kalela arrest statement nor Naidoo's statement to Galetlhobogwe mentions that Naidoo changed his surname from Schalkwyk to Naidoo, Naidoo in cross examination admitted that, what was contained in the statement was all that he told Galetlhobogwe.

[75] Plaintiff submitted that it is unlikely that Naidoo would not have referred to the Kuruman case and ask Kalela to phone the Kuruman SAPS to confirm that he is the owner of the firearm. However Kalela version is that he only discovered the case in Kuruman later when he returned to the police station. This is consistent with his arrest statement.

[76] Plaintiff submitted that as Kalela checked the system and saw that a case concerning the firearm was reported at Kuruman and he phoned Cloete to verify who the owner of the firearm was, that it should have been clear to Kalela and Cloete from the system that:

[i] Amal David Naidoo and Amal David Schalkwyk was the same person as the initials and identity number of the owner of the firearm and Naidoo are identical and that;

[ii] Amal David Naidoo was the person who reported the firearm stolen at the Kuruman SAPS;

[iii] That Naidoo's identity number was known to at least Cloete. Hence the only inference that can be made is that the identity number that he had from Naidoo was obtained from Kalela.

[77] The said inference is incorrect as Cloete in his statement did not mention either Naidoo's name or his identity number and in his evidence he stated that it was only after the 19 December when Naidoo produced his identity card, that he realized that they were one and the same person and when he conducted his examination he did not know that Schalkwyk and Naidoo were one and the same person and Kalela did not give him Naidoo's first name.

[78] As stated supra, Kalela was a credible witness and when considering the evidence and the probabilities discussed more fully hereinbelow, then I am of the view that Kalela's suspicion that Naidoo committed a schedule 1 offence which he believe to be possession of a unlicensed firearm was reasonable. I say this for the following reasons:

- 1) Naidoo was stopped at a roadblock carrying a firearm which he said belongs to him. He identified himself as Amal David Naidoo.
- 2) Kalela took the serial number of the firearm to verify ownership.
- 3) The computer system indicated that the owner of the firearm was one Schalkwyk.
- 4) Naidoo was requested to produce the firearm licence.
- 5) Naidoo had no form of identification and was unable to produce any documentation of proof of ownership or that he was the lawful

possessor of the firearm. Coetzee corroborated Kalelas evidence.

- 6) On Naidoo's version he told Kalela that he may have left the firearm licence at the counter in a shop at Kuruman.
- 7) Naidoo was afforded an opportunity to call his family to bring his firearm licence or his identity document or any other documents.
- 8) Notwithstanding, the fact that his daughter arrived on the same day that he was arrested, neither his identity document nor his firearm licence nor any identification to show that he was Schalkwyk was produced.
- 9) Kalela took further steps to investigate the matter when he arrived at the police station by checking on the system where he discovered that there was a case reported in Kuruman that the firearm was stolen and he called Cloete to verify who the owner was. This was corroborated by Cloete.

10) Kalela after receiving the report that a case had been opened in Kuruman where the firearm was reported stolen, he called Cloete to check the Enhanced Firearm System. Kalela evidence is corroborated by Cloete and is consistent with his arresting statement.

11) The probabilities are that Naidoo did not have any documents to prove that he was Naidoo or Schalkwyk and in view of the fact that the firearm was registered in the name of Schalkwyk, Kalela suspicion to arrest Naidoo was in my view reasonable. Naidoo version is improbable in view of the several contradictions highlighted above.

[79] Plaintiff further submitted that it is clear that at 01:30 on 13 December 2013 (the morning of 14 December 2013) Naidoo's

driver's license was booked in the SAPS22 and at that time there was therefore no longer a dispute or question about Naidoo's

identity and there was therefore no further reason to detain Naidoo and his detention therefore became unlawful from 01:30 at 14 December

2013. There is no merit in this contention as the issue was whether Naidoo was the registered owner of the firearm. Neither the driver's licence nor the motor vehicle licence proved that Naidoo was Schalkwyk, the registered licence holder of the firearm.

[80] Counsel for Naidoo submitted that Naidoo's statement was taken by the investigating officer, Galetlhobogwe on 15 December 2013 at 08:06 and that even if it is to be found that the initial arrest and detention of Naidoo was lawful, which is denied, Naidoo should have been released after making his statement to Galetlhobogwe and that Kalela after making his statement and receiving the statement, should have exercised his discretion and released Naidoo and his detention from 15 December 2013 at 08:06 became unlawful until 17 December 2013 when he was released.

[81] Defendant's counsel submitted that Naidoo's further detention was justified as the investigating officer, Galetlhobogwe

had to verify Naidoo's identity and his place of residence. Galetlhobogwe was allocated the file on Saturday the 14 December 2013 and he went to Madibogo police station on Sunday the 15 December 2013, where he took Naidoo's statement. What can be gleaned from the statement is that Naidoo told Galetlhobogwe inter alia that he was the lawful owner of the firearm for 30 years and that he had reported his firearm stolen in Kuruman and the police recovered his firearm. No mention is made that Naidoo changed his surname from Schalkwyk to Naidoo. He said Naidoo did not give him his identity

book and did not mention that he changed his surname. Under cross examination, when it was put to him that Naidoo said he is Schalkwyk

and that he changed his name to Naidoo and that his first name was Amal David, he replied that Naidoo only spoke about his surname and not his first name. When asked whether he believed Naidoo that he change his surname, he replied that he could not believe him without the driver licence or identity document.

[82] I am of the view that Naidoo's detention from the 13 December until the 17 December 2013 was lawful. The explanation given by Galetlhobogwe why he detained Naidoo until the 16 December is reasonable. I say this for the following reason:

- 1) Galetlhobogwe after taking Naidoo's statement on Saturday, 14 December 2013, immediately followed up on the information that Naidoo gave him and went to Delareyville police station to see the arresting officer. He also called Kuruman police station in respect of the stolen firearm and checked the system to obtain the history of the firearm.
- 2) From his investigations he found one identity number with two names namely Naidoo and Schalkwyk and with different addresses for Naidoo and Schalkwyk. He said because they are dealing with such cases where people use other peoples' names and identity numbers to promote crime because the addresses were different he had to verify it at Home Affairs. He said when a person changes his address, he has a duty to inform the police so they can update the system. It is common cause that Naidoo did not inform the police. Hence it was reasonable in the circumstances because of the prevalence of fraud matters and because of the different addresses for him to go to the Home Affairs to verify the information and to obtain the docket from Kuruman.
- 3) He went to the Home Affairs on the same day that Naidoo was taken to court. This was on Tuesday the 17 December 2013. The 16 December

2013, was a public holiday. At Home Affairs he gave the official the identity number and requested them to verify whose name appears under the said identity number. He said on the day he went back they could not give him a print out. He requested them to write down their finding which the official at Home Affairs did on the 5 February 2014 where he confirmed that Schalkwyk changed his name to Naidoo.

[83] As stated supra, I found Galetlhobogwe to be an honest and credible witness and therefore accept his version of the steps he took to verify Naidoo's

identity which I am of the view was reasonable. Accordingly Naidoo's continued detention was lawful.

[84] The next question for consideration is whether Kalela exercised his discretion to arrest or not to arrest. Plaintiff submitted that as Kalela testified that he had to arrest Naidoo, he did not appreciate the fact that he had a discretion to arrest or not to arrest and did not exercise such discretion.

[85] The court in *Minister of Safety and Security vs Sekhoto* 2011(1) SACR 315 (SCA) stated that:

"peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached".

[86] In *Gellman vs Minister of Safety and Security* 2008

(1) SACR 464 (W) at [97.5] –[97.7] the court gave useful guidelines to police officers making warrantless arrests, namely"

"After the policeman has determined that there are reasonable grounds for suspecting the commission of a Schedule 1 offence, he must exercise his discretion to determine whether there are circumstances which militate in favour of effecting a warrantless arrest. Usually the risk of the suspect absconding or committing further crimes if the policeman delays in obtaining a warrant, would militate in favour of a warrantless arrest. A policeman should always consider whether the accused's attendance can be procured through a summons as this is the preferable method of summoning a suspect's attendance at trial. If the policeman concludes that there is a risk of flight if a summons is served on the suspect, the policeman should consider whether the ends of justice may be defeated if he approaches a Magistrate or Justice of the Peace to obtain a warrant. In determining whether or not to effect an arrest, the arresting officer should carefully consider his/her standing orders. Where a police officer exercises a discretion in violation of standing orders, that may in itself be an indication that the discretion was not properly exercised and that the warrantless arrest was unlawful".

[87] Kalela acknowledged that in terms of section 107 of the Firearm Control Act, he had a discretion to seize the firearm from Naidoo until Naidoo provided the police with a licence or permit or proof of identity. Kalela further acknowledged that he had a discretion whether to arrest Naidoo or not. Kalela said he would not have arrested Naidoo if Naidoo produced his licence and the name in the system and the licence were the same. He said in those circumstances, he would only have seized the firearm and released Naidoo. Kalela further said that even if Naidoo had mentioned that he changed his name he would still require documentary proof. This sentiment was also expressed by Galetlhobogwe supra, who

testified about cases where people fraudulently use other peoples names and different addresses which had to be verified. Kalela in my view properly exercised a discretion whether to arrest Naidoo or not and Galetlhobogwe exercised a discretion in Naidoo's further detention.

[88] When considering the totality of the evidence and weighing the probabilities then I am of the view that an ordinary reasonable man in the position of Kalela would have formed the suspicion that Kalela did and that Kalela had reasonable cause to suspect Naidoo of being in possession of an unlicensed firearm and ammunition and Galetlhobogwe showed reasonable cause to detain Naidoo further.

Kalela and Galetlhobogwe exercised their discretion whether to arrest and detain or not to arrest and detain Naidoo.

[89] In the circumstances, Naidoo's arrest and detention was lawful. In view of my finding supra, Naidoo second claim for damages cannot succeed.

E. ORDER

[90] In the result:

90.1 Plaintiff's claim 1 and 2 are dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 19 SEPTEMBER 2016

DATE OF JUDGMENT

: 01 DECEMBER 2016

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