IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

CASE NO. CA 28/2021

In the matter between:

ROBERT ANDREW GROVES Appellant

and

THE MINISTER OF POLICE First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

JUDGMENT

RUGUNANAN, J

[1] Arising from conduct occasioned by their officials, acting as they did in the course and scope of their employment, the respondents were suited as

vicarious defendants in a civil action instituted by the appellant as plaintiff in the court *a quo* in which action he claimed damages against the respondents jointly and severally for:

(i) *"Claim one: malicious, alternatively wrongful and unlawful arrest and detention"*; and

(ii) *"Claim two: wrongful, false and malicious prosecution"*.

[2] The action proceeded to trial in the regional court, Gqeberha, and in a judgment delivered on 11 December 2020 the magistrate dismissed the plaintiff's claims with a costs order on a scale as between attorney and client. The appeal to this court is against the whole of the judgment and order and is postulated on a diatribe of some 50 grounds of appeal. Quite simply, an intelligible formulation is that the magistrate erred in her evaluation of the evidence on the onus issue.

[3] A common attribute among claims for malicious arrest, and wrongful arrest is that they are based on the *actio iniuriarum*. They are however distinct as was succinctly enunciated in *Newman v Prinsloo and Another*[1] as follows:

> *"Stated shortly, the distinction is that in wrongful arrest, or false imprisonment, as it is sometimes called, the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose actions he is vicariously liable, whereas in malicious arrest the interposition of a judicial act, between the act of the defendant and the apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law. The importance of the distinction is that, in the case of wrongful arrest, neither malice nor absence of justification need be alleged or proved by the plaintiff, whereas in the case of malicious arrest it is an essential ingredient of the*

[1] 1973 (1) SA 125 (W) at 127h-128A

plaintiff's cause of action, which must be alleged and proved by him, that the defendant procured or instigated the arrest by invoking the machinery of the law maliciously."

[4] In a claim based on malicious arrest, it is essential for the plaintiff to allege and prove that the defendant acted maliciously and without reasonable and probable cause. The same applies to an action based on malicious prosecution (see *Thompson and Another v Minister of Police and Another*[2]) though, in addition, it is required of a claimant to allege and prove: that the defendant set the law in motion, and that the prosecution failed.[3] Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful (see *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at paragraph [14]).

BACKGROUND AND EVIDENCE

[5] This is a case of mistaken identity to which there is a temporal dimension. As is required for both claims, the appellant has pleaded the necessary averments of malice and the absence of reasonable and probable cause, but the inquiry into the determination of proof of these elements is necessarily directed at the state of affairs at the time of events leading to his arrest, detention and prosecution. On the alternative to claim one, where the first respondent has pleaded that the appellant was arrested on the strength of a warrant of arrest but the arresting officer having testified that he was unaware that he had a discretion to arrest, the inquiry is directed at whether lawfulness has been established. The requirement of

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[2] 1971 (1) SA 371 (ECD) at 373F-H
[3] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) at 419f

lawfulness also applies in respect of justifying the appellant's detention following his arrest and subsequent appearances in court.

[6] The scope of these issues renders it unnecessary to regurgitate all the evidence in the appeal record.[4] Counsel who conducted the trial (being those who appeared before us), aside from an air of condescension, had an appetite for repetition. The record demonstrates notable instances for long-windedness and imprecision in formulating objections, and in other instances for speculating on issues affecting cross-examination which, in sum, indubitably inflated the record. Their manifest antagonism for each other did little to ensure the decorum of the proceedings. It is incumbent upon adversaries in litigation to demonstrate collegial courtesy towards each other and to maintain deference for the presiding officer. The record speaks for itself.

[7] A convenient starting point begins with the real evidence of video footage recorded covertly by Constable Jacobus Zaayman in the performance of an undercover operation on 7 September 2016 at certain residential premises in Sapphire Street[5] which the appellant described as a *"house-shop and a shebeen"*[6] ("the premises"). On that day Zaayman purchased a white substance identified as mandrax. The operation was authorised under section 252A of the Criminal Procedure Act 51 of 1977. It is mentioned that on 8 September 2016, Zaayman presented himself at the premises for the second time and purchased *"tik"* in addition to mandrax. It is not seriously disputed that, on the version of the first respondent, the footage recorded by Zaayman on the second occasion served as evidence for an additional investigation docket being opened and a further charge

[4] *S v Zondi* 2003 (2) SACR 227 (W) at 242h
[5] Examination in chief Zaayman, Transcript volume 4, 2:3-6
[6] Cross-examination Appellant, Transcript volume 2, 18:12-13

for dealing in drugs being preferred against the appellant for which a second warrant of arrest was obtained. This footage was not presented as evidence during trial and for present purposes, this judgment (as in the trial) will focus on events flowing from 7 September 2016. On that day Zaayman, purchased three mandrax tablets[7] (colloquially known as *"vollas"*[8]) through a window of the premises while the appellant, clad in a red T-shirt,[9] stood in the yard at the driver's side of a BMW motor vehicle. It is not disputed that the footage, as recorded, does not present a clear identification of the appellant.[10]

[8] On the pleadings the appellant's case commences with his arrest in the early hours of 26 September 2016 which he alleges was effected without a warrant. When the police gained entry to the premises, among them Detective Constable William Dietrich and Captain Kriel, he was informed that there was a warrant for his arrest but could not recall the name of the officer who addressed him. He enquired as to the whereabouts of the warrant but was rebuffed and told to dress warmly and get his medication.[11] He observed that the police did have papers with them.[12] He was not given a reason for his arrest[13] and was placed into the back of Captain Kriel's vehicle and escorted to the Mount Road police station after a female suspect was arrested along the way. At the police station he was handed a document and was told to sign it. When he read the document it disclosed the reason for his arrest, more specifically the charge of dealing in drugs. He was taken to court and while detained in the court cells, at which time he was consulting with his legal

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[7] Examination in chief Zaayman, Transcript volume 4, 3:1
[8] Cross-examination Appellant, Transcript volume 2, 1:21-25
[9] Examination in chief Zaayman, Transcript volume 4, 6:17-25, 16:13-15, and 17:6-8
[10] Exhibit A in Trial Bundle
[11] Examination in chief Appellant, Transcript volume 1, 20:1-6
[12] Cross-examination Appellant, Transcript volume 3, 28:16-20
[13] Examination in chief Appellant, Transcript volume 1, 23:12-13

representative, the prosecutor Ms Liesel Landman, walked by. His legal representative approached her and requested his release on bail - adding that he (the legal representative) could vouch that the appellant did not have any other cases against him. According to the appellant, Ms Landman merely indicated that she needed to verify this information.

[9] The appellant confirmed his first appearance before a magistrate on 28 September 2016 on which date the matter was postponed to 3 October 2016 for a formal bail application. He appeared in court on 3 October 2016 and while standing in the dock, Ms Landman approached him urging him to plead to the charge due to the revelation in the video footage of his transaction with a policeman. He declined to do so, and the case was then postponed to 6 October 2016 due to the unavailability of his profiles. For her part Ms Landman denied approaching the appellant; he was legally represented and it was unnecessary for her to communicate directly with him. On 6 October 2016 he was granted bail in the amount of R2 000 and was released the same day. The charge against him was withdrawn on 30 May 2018.

[10] On viewing the footage which had been procured by his legal representative the appellant stated that he was able to recall the events of 7 September 2016. He confirmed that he was standing at the driver's side of the BMW vehicle while wearing a red T-shirt but sought to distance himself from any indication that he had knowledge that drugs were sold from the premises, or that Zaayman had purchased them through the window.[14] Despite his protestations to the contrary (correctly rejected by the trial court), he eventually made concessions consistent with the

[14] Cross-examination Appellant, Transcript volume 1, 45:23-46:11, and 55:6-56:4

admissions extrapolated from the video footage of 7 September 2016 in particular, that he was not easily identifiable in the footage.[15]

[11] Backtracking to events prior to the appellant's arrest begins with Zaayman's deployment from his station in George and his arrival in Gqeberha on 6 September 2016. On that date he met up with his handler and was presented with the photograph of the target person from whom the purchase would be made. The target identified in the photograph, and from whom the drugs would be acquired[16] was Robert Groves, the appellant. Zaayman estimated that it had taken him less than two minutes to study the photograph to enable him to precognise the target.[17] Although it was disclosed to him during the briefing session that the target had a brother, no photograph to this effect was put before him.[18] Zaayman narrated that he was given cash and was escorted at night and shown the premises where the transaction would be made. On the day in question, while equipped with a camera the size of a button attached to his shirt[19], he observed a person wearing a green cap standing inside the premises at a window overlaid by mesh wire[20]. The window was barred from the outside. Albeit that the evidence indicates that other persons were present at the scene, they were not identified and their respective roles are inconsequential to the events that subsequently unfolded.[21]

[12] Zaayman observed the BMW and the person in a red T-shirt standing outside the vehicle. While approaching the window Zaayman asked the person wearing the green cap for three *vollas*, at which point the person

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[15] Cross-examination Appellant, Transcript volume 2, 77:24-78:4
[16] Cross-examination Zaayman, Transcript volume 4, 24:5-14
[17] Cross-examination Zaayman, Transcript volume 4, 26:6 and 27:4-5
[18] Cross-examination Zaayman, Transcript volume 4, 24:17-21
[19] Cross-examination Zaayman, Transcript volume 4, 31:7-12
[20] Cross-examination Zaayman, Transcript volume 4, 41:1-9
[21] Cross-examination Zaayman, Transcript volume 4, 28:23-29:1-5

in the red T-shirt, who was approximately 2,5 metres away[22], enquired *inter alia* if he was a policeman. Zaayman responded in the negative - at which point the person told him to *"go stand there"*[23], suggesting by implication, the window. Due to the presence of a dog between them, Zaayman did not pay much attention to the person in the red T-shirt; he was fixated on the dog and simultaneously the window where the drugs were to be purchased.[24]

[13] On returning to the safehouse, Zaayman, believing that he made the purchase from the target, met with the investigating officer Detective Constable William Dietrich to whom he reported this. They watched the video footage on the screen of a small device linked to the video camera. Zaayman attributed the identity of the appellant, and hence the name Robert Groves, to the person at the window without the slightest inclination that the person in the red T-shirt who stood beside the BMW, was the appellant. Until that point in time Zaayman did not know that the person at the window from whom the mandrax was purchased was the appellant's brother. Some three years later[25] during a consultation session after the appellant instituted action for damages, only then did the appellant's name and identity become known to him. This had also become apparent to him during the conduct of the trial consequent to admissions drawn from the video footage, and the appellant's evidence that there was a facial resemblance between himself and one of his brothers.

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[22] Examination in chief Zaayman, Transcript volume 4, 9:5
[23] Examination in chief Zaayman, Transcript volume 4, 9:14-22; 12:8-15
[24] Examination in chief Zaayman, Transcript volume 4, generally 7-20:7-12; also Cross-examination Zaayman, Transcript volume 4, 26:15-17
[25] Cross-examination Zaayman, Transcript volume 4, 37:3-4

[14] Following the report to Dietrich, Zaayman deposed to a statement under oath which had been taken down by Dietrich. Zaayman returned to his station in George and had no further involvement in the arrest, detention nor in the prosecution of the plaintiff.[26]

[15] Dietrich is a member of the organised crime unit which specialises in the investigation of gang related activities. He investigated the matter in which Zaayman implicated the appellant, as also the numerous other matters for which arrests were made during the course of operation "*Fiyela*" (dealt with below). He was not involved in the briefing and induction of Zaayman – this was done by the handler.[27] He confirmed that Zaayman was tasked to purchase drugs at the specified premises and from the specific target person. When Zaayman had later met up with him and handed over the drugs, he was able to identify them as mandrax due to their distinctive odour. After having viewed the footage with Zaayman, he obtained a statement from him.[28]

[16] Dietrich stated that the footage was viewed in real time on a small device[29] - and merely for establishing that a transaction occurred[30] at the specified premises[31]. The footage disclosed that money was handed over and drugs were received.[32] This was also confirmed by Zaayman.[33] From that perspective Dietrich was satisfied that a transaction had been concluded.[34] But insofar as Zaayman's statement identified the name of the appellant as Robert Groves, the target, this information was proffered by

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[26] Re-examination Zaayman, Transcript volume 4, 80:17-21
[27] Examination in chief Dietrich, Transcript volume 3, 44:12-22
[28] Examination in chief Dietrich, Transcript volume 3, 36:10-21
[29] Examination in chief Dietrich, Transcript volume 3, 56
[30] Examination in chief Dietrich, Transcript volume 3, 55:7-9
[31] Examination in chief Dietrich, Transcript volume 3, 55:12-13
[32] Examination in chief Dietrich, Transcript volume 3, 55:7-9 and Cross-examination, Transcript 3, 132:15-16
[33] Cross-examination, Dietrich Transcript 3, 132:20-24
[34] Examination in chief Dietrich, Transcript volume 3, 42:3-6, and 55:7-9

Zaayman.[35] Dietrich conceded that when he first viewed the footage he could not identify the appellant. He explained that the recording was *"quite shaky"*[36] but since Zaayman was familiar with his brief[37] he accepted Zaayman's identification under oath[38] and so formed the view that the appellant was a suspect[39]. Although Dietrich had previous knowledge of the identity of the appellant, that in July 2016 the appellant was arrested for being in possession of a stash of 49 mandrax tablets found in the glove compartment of his wife's motor vehicle, and that there was a previous episode of a drug transaction at the premises, also recorded in video footage which showed the appellant being present but not involved in the transaction[40], the evidence indicates that Dietrich examined the footage - not with a view to conducting an identity assessment - but rather to establish that a transaction had been concluded in which money was exchanged for drugs.

[17] In the events that followed, and on the basis of the statement by Zaayman, Dietrich, believing the appellant to be a suspect, obtained a warrant for his arrest - the purpose of which was to bring him before court.[41] The warrant was authorised and issued on 23 September 2016.[42]

[18] In the course of an operation codenamed *"Fiyela"* conducted in the early hours of 26 September 2016, the appellant was arrested at 01h50 at the aforementioned premises. Approximately 24 other suspects variously located in the district[43] were arrested during the operation. The appellant

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[35] Examination in chief Dietrich, Transcript volume 3, 42:7-11; 44:23-25
[36] Examination in chief Dietrich, Transcript volume 3, 61:10
[37] Examination in chief Dietrich, Transcript volume 3, 55:25
[38] Examination in chief Dietrich, Transcript volume 3, 42:16-21; and 55:24-56:2
[39] Examination in chief Dietrich, Transcript volume 3, 45:10-24
[40] Magistrate's judgment volume 7 at 17
[41] Examination in chief Dietrich, Transcript volume 3, 45:22-46:1
[42] Cross-examination Dietrich, Transcript volume 3, 106:5-10
[43] Examination in chief Dietrich, Transcript volume 3, 46:10-19

was arrested by Warrant Officer Peter Swanepoel who commanded one of several police task teams that were dispatched during the operation. In a briefing session prior to the commencement of the operation the details of the implicated cases were communicated to the task officers of various police units that were involved in the operation.

[19] The objective of the operation was to arrest (i.e. *"take down"*) the identified suspects.[44] Each of the units involved in the operation had a team leader or commander who was to effect the arrest. Dietrich handed to Swanepoel a package containing *inter alia* the warrant of arrest.[45] Digressing briefly, it is noted from the magistrate's assessment of the evidence that she reasoned that the appellant's arrest was not an isolated event. This is evaluated with regard to the purpose and exigency of the operation which, from what emerges below, assumes relevance to Swanepoel's evidence on whether he exercised a discretion in arresting the appellant.

[20] Following his arrest the appellant was detained at the Mount Road Police Station. The evidence indicates that Dietrich was not present at the premises at which the appellant was arrested and was deployed in a separate unit during the conduct of the operation. He was not in favour of the appellant's release on bail. This is signified by his entry in the docket *"no bail until profiles and 69s verified"*.[46] He explained that the appellant was kept in detention since the investigation team needed to verify whether he had prior cases that related to the matter for which he was arrested.[47] He acknowledged that the presiding magistrate before whom

[44] Examination in chief Swanepoel, Transcript volume 5, 3:7-15
[45] In fact there were two warrants of arrest; the second one related to the events of 8 September 2016
[46] Magistrate's judgment volume 7, 7
[47] Examination in chief Dietrich, Transcript volume 3, 47:4-24

the appellant would appear was vested with the discretion to decide whether or not a valid reason existed to refuse bail.[48] On the information available to Dietrich, pertinent to which was the material incorporated in the section 252A application, the appellant was classified as a gang member.[49] In addition, Dietrich had personal knowledge that the appellant had been involved in previous cases.[50] He intended to verify this information by resort to the appellant's profiles and SAP69s. For these reasons he was not swayed by the appellant's favourable responses indicated on his bail information form. In short, it is readily apparent that Dietrich could not accept them uncritically without checking them. Upon the investigation docket being referred to the prosecutor Ms Liezel Landman, for the appellant's first appearance in court on 28 September 2016, she took note of the recommendation by Dietrich.[51] The detail contained in her evidence is traversed elsewhere in this judgment where the questions of malice and the absence of reasonable and probable cause are addressed.

[21] At a subsequent stage Dietrich was contacted by the regional court prosecutor Mr Mark Drieman. Dietrich was informed that the video footage, on being viewed by the appellant's legal representatives, disclosed that the appellant was not the target person who sold the drugs to Zaayman.[52] Following this disclosure, Dietrich met with Drieman. He could not recall the date of the meeting. The footage was viewed on a larger device. The replay was in still motion and occurred frame by frame.[53] Relying on his previous knowledge of the appellant's identity

[48] Examination in chief Dietrich, Transcript volume 3, 49:9-18
[49] Examination in chief Dietrich, Transcript volume 3, 48:3-19 and 174
[50] Examination in chief Dietrich, Transcript volume 3, 63:4-12
[51] Examination in chief Dietrich, Transcript volume 3, 48
[52] Examination in chief Dietrich, Transcript volume 3, 50:7-13
[53] Examination in chief Dietrich, Transcript volume 3, 56

and appearance, Dietrich identified the appellant as the person who wore the red T-shirt.[54] He concluded that the mandrax was not purchased from the appellant but deduced nonetheless that the appellant facilitated the transaction when he said to Zaayman, *"gaan staan daar"* - the implication being to stand near the window of the premises.[55] He thus formed the view that in facilitating the transaction the appellant committed the offence of dealing in drugs.[56] This was further informed by Dietrich's knowledge acquired from a previous undercover investigation involving the appellant's brother, that drugs were indeed sold from the premises and that the premises were owned by the appellant's father.[57]

[22] Swanepoel confirmed that he arrested the appellant on a warrant of arrest that indicated a charge of dealing in drugs. Entry was gained to the premises through forceful means after efforts at knocking on the door and calling out for the occupants did not elicit a response.[58] Prior to the arrest he identified himself to the appellant and explained the reason for his presence.[59] He informed the appellant that he was in possession of a warrant of arrest and a search warrant.[60] He exhibited these documents to the appellant.[61] He explained the appellant's constitutional rights to him and arrested him on the aforementioned charge.[62] On the face of the warrant he certified, in manuscript, the appellant's arrest on the relevant date (26 September 2016) and at the relevant time (01h50). He did this in the presence of the appellant.[63] En route to the police station, a further

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[54] Examination in chief Dietrich, Transcript volume 3, 56-57
[55] Examination in chief Dietrich, Transcript volume 3, 57-58
[56] Examination in chief Dietrich, Transcript volume 3, 58:14-23
[57] Examination in chief Dietrich, Transcript volume 3, 65-67
[58] See s48 of the Criminal Procedure Act 51 of 1977, as amended
[59] Examination in chief Swanepoel, Transcript volume 5, 7:17-19
[60] Examination in chief Swanepoel, Transcript volume 5, 7:21-22
[61] Examination in chief Swanepoel, Transcript volume 5, 9:10-15
[62] Examination in chief Swanepoel, Transcript volume 5, 7:24-8:17
[63] Examination in chief Swanepoel, Transcript volume 5, 8:18-22

arrest was made, and in the course of the operation numerous other suspects were arrested by the various task teams. On arrival at the station he once again informed the appellant of his rights and issued him with a "Notice of Rights in terms of the Constitution" which they both signed. Thereafter the appellant was detained. Swanepoel maintained that he arrested the appellant on the authority of the warrant and the purpose of the arrest was to ensure that the appellant be brought before court.[64] He stated that he was not aware that he had a discretion to effect the arrest.[65]

[23] Ms Liesel Landman, was the prosecutor who dealt with the police investigation docket when the appellant first appeared in court on 28 September 2016. She read the docket and determined that there was a *prima facie* case against him. Her determination was based on the affidavit by Zaayman. In addition, the contents of the docket revealed that photographic material of the identity of the appellant was shown to Zaayman. For these reasons she accepted that his identification of the appellant as the person from whom mandrax was purchased, was credible.[66] She did not have prior knowledge of the appellant's identity[67] and did not view the video footage. This would have been done in the presence of and in consultation with Zaayman in preparation for the criminal trial.[68] She viewed the footage in the course of consultations in preparation for giving evidence in the trial court. Given that the footage did not present a clear identification of any of the persons therein, she maintained that even if she viewed it at the time of the appellant's first appearance, her decision to place the matter on the court roll would not have been affected since she had concluded, for reasons already stated,

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[64] Examination in chief Swanepoel, Transcript volume 5, 17:10-14
[65] Cross-examination Swanepoel, Transcript volume 5, 48:23-25
[66] Examination in chief Landman, Transcript volume 6, 4:4-22, and 6:15-21
[67] Cross-examination Landman, Transcript volume 6, 20:11-21
[68] Cross-examination Landman, Transcript volume 6, 25:18-22

that there was a *prima facie* case.[69] Even though the issue of the appellant's identity in the footage was resolved, she contended (as did Dietrich) that the appellant facilitated the transaction and committed the offence of dealing in drugs[70] for which he could still be charged.

[24] On 28 September 2016 the appellant's case was remanded to 3 October 2016 for obtaining his profiles and SAP 69s and for a formal bail application. At his first appearance, the appellant was legally represented by an attorney and it was agreed with the latter, who raised no objection, that the matter be remanded. This was not disputed by the appellant[71] nor did he dispute that the reason for the postponement was disclosed to the presiding magistrate who raised no issue therewith.[72] Although the legal representative did inform Ms Landman that the appellant had no previous convictions, she was reluctant to uncritically accept his word since she needed to independently ascertain the appellant's status from the required documentation in order to make a proper decision regarding the question of bail.[73] In her experience it often occurs that accused persons do not disclose their previous convictions, even though they are under a legal duty to do so but would at a later stage lay claim to the excuse that they had forgotten.[74]

[25] On 3 October 2016, the unavailability of the required documentation occasioned a further postponement until 6 October 2016, on which date Ms Landman received the appellant's profiles. Absent any indication of previous convictions or pending cases, she issued instructions that the

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[69] Examination in chief Landman, Transcript volume 6, 6:12-7:1
[70] Examination in chief Landman, Transcript volume 6, 10:25-11:10
[71] Cross-examination Appellant, Transcript volume 2, 67:14-16
[72] Cross-examination Appellant, Transcript volume 2, 68:19-69:19
[73] Examination in chief Landman, Transcript volume 6, 13:11-25
[74] Re-examination Landman, Transcript volume 6, 105:1-8

appellant be released on bail fixed in the sum of R2 000.[75] Her instructions were attended by another prosecutor and the appellant was released on bail. On both occasions, 28 September 2016 and 3 October 2016 Ms Landman maintained that the magistrate had no difficulty granting the remands for the reasons stated.[76]

ARREST AND DETENTION (UNTIL FIRST COURT APPEARANCE)

[26] It is clearly established that the power to arrest may be exercised only for the purpose of bringing a suspect to justice and that the arrest is only one step in that process.[77] Once an arrest has been effected the suspect must be brought to court as soon as reasonably possible and at least within 48 hours (depending on court hours). It is trite that the *onus* rests on a defendant to justify the arrest and detention. A failure to establish that the arrest was lawful will result in the detention being unlawful. In argument the appellant advanced the following grounds in support of the contention that his arrest and detention were unlawful: (i) the arresting officer failed to exercise a discretion before arresting him; (ii) a warrant of arrest was not produced despite demand, nor was it shown to him, and (iii) he was not brought to court as soon as reasonably possible.

Failure to exercise a discretion:

[27] At one level, Swanepoel's evidence clearly indicates that he was not aware that he was vested with a discretion to effect the arrest. At another level he stated that he would have arrested the appellant even if he knew

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[75] Cross-examination Landman, Transcript volume 6, 75:10-76:8
[76] Examination in chief Landman, Transcript volume 6, 16:1-11
[77] *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at paragraph [42], and *Minister of Police v Bosman & Others* (1163/2018) [2021] ZASCA 172 (9 December 2021) at paragraph [13]

he had a discretion because the appellant faced charges relating to dealing in drugs.[78] The evidence indicates that he evaluated this against the consideration that the appellant was not charged with possession of drugs. The arrest was intended to ensure the appellant's appearance in court, and as previously mentioned he attended a briefing session and was undoubtedly aware of the purpose and exigency of the operation.

[28] In these circumstances it is the substance of the evidence that assumes relevance in the inquiry as to the lawfulness of the arrest rather than the mere concept of the word 'discretion'. Swanepoel was cognisant that he was engaged in an operation; his decision to arrest hinged on the seriousness of the offence and the intention to bring the appellant before court. He was not ambivalent about this. His evidence signifies that he applied his mind before arresting the appellant and his decision to do so was rational. The approach adopted herein finds support in *Zweni v Minister of Police and Another*[79] in which Malusi AJ (as he then was) stated the following:

> *"Harry may not have been aware of discretion as a concept. He struck me as not being a knowledgeable or sophisticated police officer. An example is that in his 11 years' experience he had never applied for a warrant of arrest. In my view the court needs to look beyond mere concepts but at the substance. He clearly applied his mind before arresting the plaintiff. His decision hinged on the identification of the plaintiff."*

[29] In so far as the appellant sought reliance on *Domingo v Minister of Safety and Security*[80], and *Qunta v Minister of Police*[81], for contending that the

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[78] Re-examination Swanepoel, Transcript volume 5, 58-59
[79] (2629/2013) [2016] ZAECPEHC 65 (4 October 2016) at paragraph [31]
[80] (CA 429/2012 [2013] ZAECGHC 54 (5 June 2013)
[81] (CA 114/2012) [2013] ZAECGHC 53 (5June 2013)

failure to exercise a discretion by itself rendered the arrest and detention unlawful, it is apposite to quote further from *Zweni* (*supra*):[82]

> *"I am obliged to distinguish the present matter from* [these cases]. *Both ... cases ... are distinguishable from the present case on the facts. In both* [cases] *it was clear no thought was given to the arrest by the arresting officer. The facts in this matter are quite different as outlined above. As such I may depart from the precedent in these two cases."*

[30] While these sentiments are echoed in this judgment it is appropriate to briefly distinguish the cases relied on by the appellant. *Domingo* concerned an arrest authorised by a warrant. The arresting officer was unaware of a standing order that cloaked him with a discretion if he believed on reasonable grounds that on conviction the person to be arrested would be met with a fine not exceeding a gazetted amount. The standing order was not considered by the arresting officer, hence the observation by Malusi AJ in *Zweni* that *"no thought was given to the arrest"*. In *Qunta* it was found that it was improbable that the plaintiff, on being confronted by an allegation of theft of household items, would have voluntarily submitted himself to arrest without protesting that the items were his property and without pointing them out to the arresting officer. Here again, *"no thought was given to the arrest"*.

[31] In the present scenario, despite his ignorance, Swanepoel did apply his mind to the arrest.

Failure to produce warrant on demand:

[32] Moving onto the appellant's pleaded case that he demanded a copy of the warrant, section 39(2) of the Criminal Procedure Act places an obligation

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[82] At paragraph [33]

on a person effecting an arrest by virtue of a warrant, to hand the arrested person a copy of the warrant upon demand. A refusal to comply renders the arrest unlawful.[83] In terms of the section, Swanepoel was under no obligation to hand over a copy of the warrant unless the appellant demanded it. The evidence indicates that the warrant of arrest and the search warrant was exhibited by Swanepoel to the appellant, and that the endorsement by Swanepoel on the arrest warrant was done in the presence of the appellant. No evidence indicating that the appellant demanded a copy of the warrant was led. Plainly, the case pleaded for him is not supported by the evidence. The only conclusion to be drawn from the evidence is that the warrant of arrest was shown to the appellant and that he was thereupon arrested in accordance therewith.

Failure to be brought before a court as soon as reasonably possible:

[33] The particulars of claim read as follows:

> "17 Plaintiff's initial detention and incarceration in police custody from the 26th of September 2016 to the 28th of September 2016, was malicious, alternatively wrongful, unlawful and without reasonable and probable cause, in that *inter alia*:
>
> ... He was not brought before a court of law as soon as reasonably possible as he could and should have been brought before court on the same day of his arrest and detention, alternatively, on the next day."

[34] A preliminary observation is that the pleading is couched in bald terms that do not in any way suggest when "on the same day" or "the next day" it would have been reasonable for the appellant to have been brought before court, nor are material facts pleaded in support of malice. It is

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[83] *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ) at paras [293-294]

contended for the appellant in heads of argument that the first respondent failed to lead evidence as to why the appellant was not brought to court on the same day of his arrest, in particular, considering the fact that he was arrested in the early hours of 26 September 2016 and the fact that the investigation was complete at the time of his arrest and detention; alternatively he should have been brought to court on 27 September 2016.

[35] Dietrich testified that it was not possible to have ensured that the appellant along with all the other suspects could have been brought before court within the time-frame contended for by the appellant, given the number of arrests that were made, the number of cases that had to be processed, and he being the only investigating officer. Absent the specific facts on which the appellant predicates his allegation, it would be untenable to have expected Dietrich, without more, to have effectively dealt with the issue, as pleaded. It bears mentioning that despite the appellant being notified of his constitutional rights, indications that he demanded to be taken to court either on the day of his arrest or the day thereafter are significantly non-existent. This must be evaluated against his evidence indicating that his wife contacted his attorney either at the time of his arrest or soon thereafter. Legal representation was thus accessible to facilitate the right to apply for bail. Any criticism or inference that Dietrich's conduct might have been, malicious or deliberately obstructive[84] would be speculative. On the evidence, the only plausible conclusion is that the appellant was brought to court as soon as reasonably possible. Whereas the first respondent has discharged the onus of

[84] compare *Minister of Police v Ndaba and Others* (A553/2014) [2016] ZAGPPHC 277 (6 May 2016); *Mashilo and Another v Prinsloo* 2013 (2) SACR 648 (SCA)

justifying the appellant's detention that followed upon his arrest, the appellant has not done so for proving that his detention was malicious.

DETENTION AFTER FIRST APPEARANCE, AND MALICIOUS PROSECUTION

[36] Once the suspect is brought before court[85] the authority of the police to detain, which is inherent in the power to arrest, is exhausted and it is the role of the court to determine whether the suspect ought to be detained pending trial.[86] In that process the police have a limited role to play,[87] save for a duty to bring to the attention of the prosecutor any factors known to them relevant to the exercise by the court of its discretion to admit the suspect to bail.[88]

[37] In relation to the appellant's detention after first appearance, and his claim for malicious prosecution, the particulars of claim are replete with allegations that the respondents' officials acted maliciously and without reasonable and probable cause. The evidence on record brings into focus the conduct of Dietrich and Ms Landman.

[38] Whereas malice requires proof of an intention to injure (see *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 SCA at paragraph [18]), lack of reasonable and probable cause requires proof that the proceedings (or conduct of the defendant/s) were initiated without an honest belief based on reasonable grounds of justification.

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[85] In terms of section 50 of the Criminal Procedure Act 51 of 1977, as amended
[86] *Sekhoto supra* at 384A; also *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) at paragraph [28]
[87] *Sekhoto supra* at 384A
[88] *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at paragraph [40]

[39] When it is alleged that a defendant had no reasonable cause for a prosecution (or for an arrest[89]), it means that a defendant did not have such information as would lead a reasonable person to conclude that the plaintiff had probably been guilty of the offence charged; and if despite having such information the defendant is shown not to have believed in the plaintiff's guilt, a subjective element becomes operative which disproves the existence of reasonable and probable cause (see *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (AD) at 136 A-B). Put otherwise, a defendant will not be liable if he/she genuinely believed on reasonable grounds in the plaintiff's guilt (*Relyant Trading supra* at paragraph [14]).

[40] Dietrich had first opportunity to view the video footage obtained by Zaayman when the latter reported to him once the transaction on 7 September 2016 had been concluded. Dietrich conceded that could not identify the appellant and because the footage was unstable, he relied on Zaayman's identification given under oath.[90] Hence he engendered a belief that the appellant was a suspect[91]. Although Dietrich had previous knowledge of the identity of the appellant he examined the footage to establish that a transaction had been concluded in which drugs were traded for money. Significantly, Dietrich did not, at the relevant time, have knowledge that Zaayman had mistakenly identified the appellant as the person from whom drugs were purchased, nor did Dietrich have a suspicion to the contrary. His ignorance of Zaayman's mistake persisted throughout the course of events which included the appellant's first and second appearances in court until his (i.e. Dietrich's) ultimate meeting with Drieman. All the way through there is no indication in the evidence

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[89] *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at paragraph [14]
[90] Examination in chief Dietrich, Transcript volume 3, 42:16-21; and 55:24-56:2
[91] Examination in chief Dietrich, Transcript volume 3, 45:10-24

to suggest that Dietrich's state of mind was influenced by improper purpose or that he knowingly or recklessly relied and acted on mistaken information. As a matter of fact, he acted on the basis that there was direct evidence of a transaction involving the sale of drugs. In these circumstances the appellant's allegation of malice is not supported by the evidence or the probabilities; nor can it be seriously contended that there was an absence of reasonable and probable cause in the sense that Dietrich did not engender an honest belief based on reasonable grounds, that the appellant was guilty.

[41] On receipt of the docket prior to the appellant's first appearance, Ms Landman formed the view that there was a *prima facie* case against the appellant. She acted objectively and independently. She used her own discretion in making that determination. Her reasons therefor are incorporated in the summary of her testimony dealt with in the preceding paragraphs of this judgment and are essentially informed by similar considerations that influenced Dietrich. Crucial for establishing the requisites of malice and the absence of reasonable and probable cause is evidence indicating that she had knowledge of the identity of the appellant at the time of receipt of the investigation docket, and/or that she was aware of Zaayman's mistake on the identity issue, and that this persisted throughout her involvement in the matter. Such evidence is significantly lacking and is not supported by the probabilities.

[42] In the appellant's apparent contention that his remand on 28 September 2016 and again on 3 October 2016 was precipitated by malice, it is of course a fact that on both occasions he was remanded in detention. The detention orders, however, were issued at the instance of the presiding magistrate who is not an employee of either of the respondents. What

bears emphasis is that the remand on 28 September 2016 was by agreement and, in our view, did not constitute a wrongful and improper use of court process to deprive the appellant of his liberty. The further remand on 3 October 2016 was certainly not anything arbitrary – there was a legitimate reason and it read persuasively with the magistrate.

[43] As with Dietrich, there is no scope for contending that Ms Landman knowingly or recklessly relied and acted on mistaken information nor can it be seriously contended that there was an absence of reasonable and probable cause in the sense that she did not engender an honest and reasonable belief in the guilt of the appellant.

[44] Where the appellant has failed to prove malice and the lack of reasonable and probable cause it is considered unnecessary to deal with the remaining requirements for purposes of his claim for malicious prosecution.

CONCLUSION

[45] The magistrate's judgment reflects that she holistically considered the evidence without disregarding issues affecting the onus. In her assessment of the evidence she was cognisant that the parties' presented mutually destructive versions and sought guidance from *dicta* in cases *inter alia* such as *National Employers' General Insurance Co Ltd v Jagers*[92] for weighing up the parties' respective versions and in determining which version is acceptable and which version falls to be rejected. In summary, we are unable to fault the magistrate's factual findings as to her

[92] 1984 (4) SA 437 (E) at 440D-G. See too *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-F; *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) para 30.

conclusion of the preferred version and the credibility of the witnesses who supported it.

[46] A final aspect of the magistrate's judgment pertains to costs. Quoting directly from her judgment, she states: *"The glaring conclusion that the court arrives at is that the plaintiff's case was orchestrated to substantiate a successful civil claim"*. The reasons informing that finding are fully ventilated in her judgment. We are not persuaded that she erred in her conclusion and find no reason to interfere therewith.

[47] In the result the appeal is dismissed with costs.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

M. MAKAULA

JUDGE OF THE HIGH COURT