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

CASE NO. CA 29/2024
NOT REPORTABLE

In the matter between:

ALLISTAIR SOLOMON	**First Appellant**
FRANKLIN AFRICA	**Second Appellant**
GEORGE PLAATJIES	**Third Appellant**
GERALDINE PRINCE (N.O.)	**Fourth Appellant**
AMBRAAL NORKIE	**Fifth Appellant**
GERWIN RADEMEYER	**Sixth Appellant**

and

MINISTER OF POLICE	**Respondent**

APPEAL JUDGMENT

HARTLE J

[1] This appeal before us concerns the arrest of the appellants late on the night of 15 November 2017 at a home in Gelvandale, Gqeberha, and their detention thereafter for a period of twelve days.

[2] In a prelude to the arrest, the South African Police Service had broadcast over the radio a report concerning a blue Golf motor vehicle that had been highjacked in the Kabega Park patrol area earlier that evening. It came to the attention of the arresting officer, Constable Naidoo, and his colleague, Sergeant Oosthuizen, both of the "*K9*" unit, who heard it shortly after they reported for duty that night. A full description of the motor vehicle was circulated as well as its registration details and some background information regarding the incident, especially that the hijacking had just recently happened and that the complainant had been dropped off at the Malabar cemetery. Later, at around 22h00, they received a tip off of a motor vehicle matching the description of the hijacked vehicle being stripped at a given address in Gelvandale, which turned out to be the home of the 6th appellant from where he runs a mechanical workshop.

[3] A visit to the latter's home shortly after receiving the information turned up the stolen motor vehicle (verified by VIN number) that was, true to the information shared, in the process of being stripped by the appellants and one other party, Mr. Agherdien, in the workshop. On the version of the police, the seven persons encountered in the workshop gave no account to the officers for their constructive possession of the positively identified stolen motor vehicle, or concerning the presence of a "*firearm*" (together with four rounds of ammunition) found in the engine compartment of a Fiat Palio motor vehicle that was standing adjacent to the stolen motor vehicle in the workshop, or for the fact that the numberplates of the Fiat Palio motor vehicle (also as per immediate verification obtained from the SAPS Central Database) were affixed to the stolen motor vehicle and those of the latter destroyed and ostensibly hidden from plain sight underneath the Golf.

[4] Additionally, the police officers retrieved door panels patently stripped from the stolen Golf as well as a flat screen television inside a Bantam "*bakkie*" parked outside the 6th appellant's premises. The officers established that the Bantam Bakkie had been driven there by one Mr. Agherdien and belonged to the latter's father. The keys to the Golf were also found in the Bantam.

[5] The appellants were arrested together with Mr. Agherdien on charges of being in possession of suspected stolen property and possibly an unlicensed firearm. As an aside, it was confirmed after the fact by ballistic testing that the "*firearm*" found in the engine compartment of the Palio was a gas pistol which, according to section 5 of the Firearms Control Act, No. 60 of 2000, is not a "*firearm*" as defined in the Act.[1] I will return to this aspect later.

[6] The appellants together with Mr. Agherdien were detained subsequent to their arrest at the Gelvandale Police Station until 20 November 2017 when they made their first appearance in the Magistrate's Court. Except for Mr. Agherdien, they were released on bail of R500 each a week later on 27 November 2017. The charges against the appellants were withdrawn on 6 June 2018.[2]

[7] The appellants sought to vindicate their experience of the arrest and detention by instituting an action for damages against the respondent in the Gqeberha Regional Court.

[8] At the hearing of the action the respondent led the testimony of the two officers, Naidoo and Oosthuizen, who had responded to the complaint and carried out the arrest of the appellants and Mr. Agherdien at the 6th appellant's workshop. Their evidence was intended to satisfy the onus resting on the Police to justify the arrest on the pleaded basis, namely that they were lawfully arrested in terms of section 40 (1)(e) of the Criminal Procedure Act, No. 51 of 1977 ("*CPA*") on a charge of possession of suspected stolen property and, in terms of section 40 (1) (h) of the CPA, also reasonably suspected of having committed an offence "*under a law*

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[1] The definition of a "*firearm"* is referenced in section 1 of the Act.
[2] The fact of the prosecution not having been pursued is not of relevance. The appellants' claim was confined to one based on unlawful arrest and detention.

governing the possession of arms or ammunition".[3] Further pleaded is that the Police, by so arresting them, intended to bring them to justice, and that their decision to have done so "*fell within the bounds of rationality*".

[9] The respondent also called one Constable Diniso from the organized crime unit in Gqeberha who on the ensuing Friday, 17 November 2017, was assigned the investigation of the matter including the charge of robbery relating to the hijacking. Her testimony was intended to satisfy the further onus on the Police to justify that the detention of the appellants, an expected incident of their arrest, was entirely lawful in the circumstances.

[10] Co-incidentally the case which the respondent was expected to answer to concerning the basis for the claimed unlawful detention was, for the first part, that after the appellants' arrest without a warrant, they were "*detained arbitrarily without just cause*" at the Gelvandale Police Station on the supposed charges. In this respect it was alleged that the police officers there failed to apply their minds in respect of their detention and the circumstances relating thereto; there were no reasonable and objective grounds justifying their detention; they were not informed of their rights to institute bail proceedings; and they were only taken to court on 20 November 2017 whereas they could and should have been formally charged and taken to court on Thursday, 16 November 2017, alternatively on Friday, 17 November 2017, by the latest. It was pleaded in the last respect that the appellants were not brought before a court of law "*as soon as reasonably possible*".

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[3] The relevant statutory authority relied upon for the arrest is reproduced below:

"**40. Arrest by peace officer without warrant**

(1) A peace officer may without warrant arrest any person—

(a) …;
(b) …;
(c) …;
(d) …;
(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
(f) …;
(g) …;
(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition; …"

[11] For the second part, the pleaded challenge is that the investigating officer failed in (his) duty towards them to properly investigate the alleged crime and to bring to the attention of the prosecutor and the magistrate right from the first court appearance information that was relevant to the exercise by the magistrate of his discretion, manifested by the fact that the arresting officer/investigating officer failed at that juncture to convey "*extremely crucial information*" to the prosecutor that Mr. Agherdien admitted that the illegal firearm and vehicle belonged to him. Pleaded in this regard is that this failure on the part of the officers to disclose and to discharge their public duties conduced to the magistrate ordering the appellants' continued detention until 27 November 2017 when they were granted bail on an unopposed basis and the fact thereanent that they were remanded in custody to St Albans prison in this interlude.

[12] The premise for the judicial review of the Police's conduct in purportedly unreasonably precluding the possibility of the appellants' earlier release on bail is the peremptory provision in section 50 (1) of the CPA that arrestees in their position are to be brought before a lower court "*as soon as reasonably possible*", but not later than 48 hours after the arrest. The purpose for this imperative must be read together with section 35 (1)(d) and (e) of the Constitution which provides that "(e)*veryone who is arrested for allegedly committing an offence has the right …to be brought before a court as soon as reasonably possible, but not later than …48 hours after the arrest…and…to be released from detention if the interests of justice permit, subject to reasonable conditions*".

[13] Ms. Du Toit, who appeared for the appellants, clarified that it was not suggested by this allegation in their particulars of claim that the Police had exceeded the outer limit of the 48 hours. (Although the appellants were arrested on a week night the period would have expired outside ordinary court hours that night. Thus, they were obliged to be brought to court not later than "*the end of the first court day*", meaning the ensuing Monday, which they were.)[4] Rather she asserted that they had been "*negligent*" (she discounted the notion of any malice) in not bringing the

[4] See section 50 (1)(d)(i) and (2), read together with sub-section (6) (b) of the CPA.

appellants before court earlier because there was no reason advanced in the evidence to preclude their having been processed and taken to court on the morning after their arrest already.

[14] The respondent in his plea had relied on the provisions of sections 39 and 50 of the CPA as a justification for the appellants' detention. Section 39 (3) of the CPA asserts in broad terms that the effect of an arrest is that a person is in lawful custody until he/she is lawfully released from custody.[5] Whilst section 39 (3) of the CPA provides for the "*continuity of the lawfulness of the detention of a suspect*", its provision must of necessity be read in the context of those provisions of the CPA which provide for the release of a suspect from detention.[6]

[15] Section 50 of the CPA, which is the statutory justification the respondent relied upon in his plea, provides in extensive detail for the procedure after the arrest of a person, whether with or without a warrant. It straddles the period of his/her sojourn through the portals of the criminal justice system from the first moment of arrest from whence he/she is categorized as a person "*who has been arrested for allegedly committing an offence*", with the focus being on the minimum permissible infringements of such a person's right to liberty as contemplated by the section, and the regular incidents of the process that are inclined to justify the continued detention expected to flow as a necessary consequence of an arrest.

[16] So, for example, a person in the position of the appellants would have to be brought as soon as possible to a police station, and consonant with the fact of their detention at the police station under such circumstances, as soon as reasonably possible be informed of their right to institute bail proceedings. If they are not charged, or police or prosecutorial bail is not granted to them,[7] then the next objective is to ensure that they are brought before the lower court as soon as reasonably possible but not later than 48 hours after their arrest. The section provides, as a final option as it were, for a judicial determination of the arrested

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[5] This subsection provides regarding the manner and effect of arrest that "*The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."*

[6] *Syce & Another v Minister of Police* [2024] 2 All SA 662 (SCA) at para [42)

[7] Sections 59 and 59A of the CPA apply respectively.

person's right to be released on bail if, by reason of the category of offence with which they are charged, they cannot be granted police or prosecutorial bail before their first appearance in court, or they are not otherwise permitted by the provisions of the CPA or any other law to be released from detention on warning or on a written notice to appear in court.

[17] Certain safeguards kick in at the first court appearance in the lower court for such a person who has been arrested for allegedly committing an offence. Here they must be informed by the court of the reason for their further detention or be charged and are then entitled to be released on bail subject to the provisions of section 60 of the CPA. The latter provision in turn provides for the release of the arrestee on bail if the interests of justice so permit.[8] If they are not so charged or informed of the reason for their further detention, they must be released.

[18] The bail application of a person who is charged with an offence in terms of Schedule 6 must be considered, in the sense of being judicially determined, by a lower court, if not by a regional court as suits the occasion where the proviso applies.[9]

[19] The lower court before which a person who was arrested for allegedly committing an offence appears is authorized to postpone any bail proceedings or application to any date or court, for a period not exceeding seven days at a time, on terms which it may deem proper and which are not inconsistent with any provisions of the CPA if it is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on that application; or the prosecutor informs it that the matter has been or is going to be referred to an Attorney-General for the issuing of a written confirmation referred to in section 60 (11 A);[10] it appears to the court that it is necessary to provide the State with a reasonable opportunity to procure material

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[8] Section 60 (1) (a) of the CPA provides that an accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, *if the court is satisfied that the interests of justice so permit.* The test is different where a Schedule 6 or 5 offence is concerned. See section 60 (11) of the CPA.

[9] See section 50 (6)(c) of the CPA.

[10] This is the unique procedure that applies where the category of offence entails a Schedule 5 or 6 offence.

evidence that may be lost if bail is granted or perform the functions referred to in section 37;[11] or it appears to the court that it is necessary in the interests of justice to do so.

[20] The respondent pleaded that after they were brought to the lower court on 20 November 2017, the Magistrate had issued a detention order in terms of section 50 (1) of the CPA pursuant to which they were remanded in custody to the St Alban's Correctional Facility in Gqeberha and that their detention on each occasion on which they appeared in court subsequently thereto also occurred pursuant to orders issued by and at the instance of the presiding magistrate(s). This plea is consistent with the respondent's contention that their detention until their release and because of the orders of court occurred in terms of "*a due process of law*".

[21] Although the respondent's plea on the face of it does not speak pertinently to the complaint that the Police failed to bring the appellants before the lower court "*as soon as reasonably possible*" (it is to be noted though that the particulars of claim do not aver what was instead reasonably possible for the Police to have done under the relevant circumstances), it broadly asserts, again with regard to section 39 (3) and 50 of the CPA that the Police acted within the constraints of what the law permits or provides, for their part in the process of bringing a person who has allegedly committed an offence to court, in respect of the appellants' continuing detention.

[22] In her testimony at the trial, in brief, Constable Diniso explained that she had taken charge of the investigation on 17 November 2017 around midday although she conceded that the appellants had been arrested on the Wednesday night at 23h00 already. She was assisted by a colleague to take warning statements from them and Mr. Agherdien, the suspects numbering seven in total.

[23] She could not say what happened on the 16th although she was inclined to agree, with reference to documentary evidence held up to her in the docket, that touch DNA had been obtained on that day.

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[11] Section 37 of the CPA provides for the taking of fingerprints, palm-prints, footprints, the drawing of blood samples, attendance at an identity parade and the taking of photographs.

[24] The founding statements of Constable Naidoo and Sergeant Oosthuizen regarding what they had encountered on the night of the 15th and conflicting warning statements by the suspects satisfied her that it had been necessary for the Police to oppose bail as a first inclination in order to investigate further. Even though some of the suspects during questioning at the police station mentioned that the Golf was brought to the workshop by Mr. Agherdien and that the firearm was his, the statements did not tally. Mr. Agherdien himself, for example, claimed that one Kiddo had brought the vehicle directly to the workshop where he was to check it before acquiring it from the latter by way of purchase. The 5th appellant by contrast said that Kiddo and Mr. Agherdien had together brought the Golf to the workshop. One of the other appellants implicated two other unidentified persons who had come to the workshop in the company of Mr. Agherdien earlier that evening.

[25] Constable Diniso testified that she had been present at court on the 20th when the appellants were brought to court for the first time. She discussed the case with the prosecutors and responsibly conveyed the import of the matter to both of them concerned. She reconciled herself to their decision to oppose bail. The suspects were all legally represented and did not argue against the necessity to postpone the matter for a period of one week for a formal bail application.[12]

[26] She denied the averment pleaded in the particulars of claim that the Police withheld crucial information from the prosecutors to the effect that Mr. Agherdien had supposedly admitted that the firearm and Golf belonged to him. To the contrary, she pointed out that he had not owned up in his warning statement to the fact that he was the owner of the firearm.[13]

[27] As for the further investigation she considered necessary, she wanted Mr Agherdien to point out Kiddo who in her estimation would have had the stolen Golf in his hands earlier the same day. Mr Agherdien had informed her that he could not

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[12] It appears from the record of proceedings on this date that the 1st, 3rd and 5th appellants at least were noted to have previous convictions for theft and/or pending cases which put them in a Schedule 5 category. Despite the pleaded allegation that the appellants were remanded in custody on the 20th without being afforded a reasonable opportunity to address the court on their possible release from custody, it is evident that they were legally represented at the first appearance.

[13] In his bail affidavit made on 1 December 2017 he still maintained his innocence that he knew nothing about any firearm.

provide an address (neither did any of the appellants know where he lived) but that he could show her where Kiddo could be found. On the 17th he undertook to do so. He was however swearing and aggressive. Arrangements were made with him to do so on the following morning, the 18th, but his attitude changed overnight and he no longer wished to cooperate in this respect thereafter.

[28] Asked to state exactly the reasons for her to have opposed bail she relied on the confirmed fact that the Golf was robbed from the complainant and that a firearm was used when the vehicle was taken from her. Further the Golf had been found in the workshop not long after it had been hijacked where all of the suspects had been caught in the act as it were busy stripping parts off it. She further needed to get fingerprints off both the firearm and the Golf and also obtain a ballistics report. Later she added that it was also necessary to secure SAP 69's and, finally, that she had been requested by the prosecutor to do a photo identity parade with the complainant to ascertain if the suspects may have been involved in the hijacking itself. As it turned out, none of them could be identified by her and this was why, by the 27th, she was inclined to agree to their release on bail and confirmed as much in an affidavit made by her that was handed up in court. In the same affidavit she however stood opposed to Mr. Agherdien being granted bail.

[29] Even though she agreed that the tenor of the appellants' warning statements obtained on the 17th pointed to Mr. Agherdien as being the one who had brought the Golf to the workshop and that he was the owner of the pistol, she clarified that she still considered it necessary to continue with her investigations *vis-à-vis* all the suspects to check which of them might have had knowledge regarding the hijacking of the Golf itself given the conflicting information the suspects had provided. She was not prepared to risk simply believing them. She was further not inclined to give the 3rd appellant a pass on his version that his presence at the arrest scene that night was innocent because of the statements of the arresting officer and crew member that also implicated him in the stripping of the Golf.

[30] The essential highlight of the testimony of the officers at the arrest scene (which aligned with their founding statements on which Constable Diniso pitched her investigation and stood opposed to the appellants' possible release on bail until she

could be certain that they were not involved beyond the obvious stripping of parts from the stolen Golf) is that not one of the appellants or Mr. Agherdien had offered an explanation at the time for the presence of a stolen motor vehicle at the workshop or why there were involved in the stripping of its component parts. Moreover, no one cared to explain why, what he mistook to be a firearm, was found in the engine compartment of the Palio.

[31] Constable Naidoo agreed that he had not pertinently asked Mr. Agherdien to account for his possession of the car keys and door panels at the scene of the arrest. He readily conceded though that it had looked like all fingers were pointing to the latter as being the chief suspect by the time they left the 6th appellant's home once all the suspects were placed under arrest.[14]

[32] Only the 3rd, 5th and 6th appellants testified at the trial. Contrary to the evidence of the police officers that all the arrestees were actively involved in the stripping of the Golf by the time they arrived at the workshop, the 3rd appellant insisted that his presence at the scene of the arrest was entirely innocent and merely co-incidental. He claimed to have gone to the 6th respondent's home to sell a USB device to him. The 5th and 6th appellants in their testimony sought to downplay any criminal involvement in the stripping of the Golf or knowledge of the fact that the motor vehicle was the property of someone other than Mr. Agherdien.

[33] After hearing the evidence, the Magistrate determined that the appellants' arrest, and detention for both periods, was not unlawful and dismissed their claims. No costs order was made against them, premised on the *Biowatch* principle.[15] Dissatisfied with the outcome on the merits, however, the appellants appealed to this court.

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[14] This is neither here nor there because the other six suspects would still have had to account for their association with the stolen Golf by their involvement in stripping off its parts.

[15] *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC). The "*Biowatch principle*" established by the Constitutional Court posits a general rule that in constitutional litigation an unsuccessful litigant asserting a constitutional right in proceedings against the State ought not to be mulct with costs unless the application is frivolous or vexatious or is in any other way manifestly inappropriate.

[34] The appeal challenges, firstly, the manner in which the Magistrate assessed the evidence and, secondly, her determination thereanent (on the accepted factual premise) that the arrest of the appellants was justified and that both periods of detention as well were lawful.

[35] In the notice of appeal the appellants submitted, regarding the first ground, that *"(t)he magistrate erred and misdirected herself in not properly evaluating the evidence as a whole, did not consider the versions that were given to the police at the time of arrest and incorrectly finds that the appellants did not say anything at the time of the arrest"*.

[36] In an ill-conceived attempt to isolate out the evidence of the 3rd appellant, whereas the Magistrate was correct to deal with the evidence wholistically, it was further submitted that the court *a quo* was wrong to dismiss the latter's claim for unlawful arrest and detention despite finding that he was only at the 6th appellant's house to sell a USB device. This strained interpretation of the Magistrate's judgement however overlooks her primary finding of fact that all of the appellants were making themselves complicit in the stripping of parts from the stolen Golf at the time the Police arrived.

[37] Regarding the second and third challenges on appeal, the appellants take issue with Magistrate's findings on the law, firstly in concluding that their arrest was justified and that there was a reasonable suspicion to arrest *all* of them[16] and, secondly, in determining that their detention in respect of each period under scrutiny was lawful.

[38] In getting to the factual premise which was found proven and against which the legality of the arrest and detention were tested, the Magistrate referenced the application of the customary approach to be adopted where a court is confronted

[16] Implicit in this aspect of the challenge on appeal is the suggestion that the police should only have arrested Mr. Agherdien, but this presupposes an acceptance of the appellants' version, which the trial court rejected.

with irreconcilable versions[17] and, for reasons which are indicated below, in our view correctly applied these principles in reaching the conclusion that the officers' testimony regarding the events of the night in question was acceptable and more probable than that of the appellants.

[39] In applying the standard technique utilized by courts in resolving factual disputes, she reasoned that Constable Naidoo had testified in a clear and satisfactory manner and was perfectly corroborated by his colleague concerning the fact especially that no reasonable explanation had been tendered by the appellants for their ostensible possession of the reported stolen Golf (or the find of the gas pistol for that matter) neither had they sought to offer an innocent explanation for their presence at the scene or for their apparent association in the stripping of the confirmed stolen motor vehicle, the substitution of the Golf's registration number plates, or the destruction and concealment of the original plates.

[40] Additionally, and with keen insight in our view, the Magistrate made strong credibility findings against the appellants and properly addressed the probabilities, both of which factors are key in resolving irreconcilable versions in a civil trial.

[41] It is a trite principle that it is only in exceptional circumstances that a court of appeal will interfere with the trial court's evaluation of the evidence.[18] Whilst the Constitutional Court in *Makate v Vodacom (Pty) Ltd ("Makate")*[19] reiterated the important moderating proviso that the deference afforded to a trial court's credibility findings must not be overstated, it must be established by the party seeking on appeal to upset or overturn the credibility findings of a trial court that the record demonstrates that the trial court came to a "*wrong conclusion*", in which event the court of appeal will be duty-bound to overrule the factual findings of the trial court "*so as to do justice to the case*".[20]

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[17] *Stellenbosch Farmer's Winery Group Ltd & Another v Martell & Cie SA & Others* 2003 (1) SA 11 SCA at para [5]*, NEG Insurance Association General v Gany* 1911 AD 187 at 199, *Santam Bpk v Biddulphs* 2004 (5) SA 586 (SCA) at 589 (G*)*.
[18] *C v C & Others* (Case No. 205/2019) [2021] ZASCA 12 (3 February 2021).
[19] 2016 (4) SA 121 (CC).
[20] *Makate supra,* at [40].

[42] In this instance I daresay that the appellants failed dismissably in pointing out any such wrong conclusions. The crux of the dispute concerned what was or wasn't said at the scene of arrest to speak to the immediate concern of the officers, which was for the appellants to answer to the question why late at night they were stripping parts off a motor vehicle that, so it was accepted by all concerned, was then and there confirmed to be one that had been stolen in a hijacking in close proximity to the workshop shortly before the police officers' arrival on the scene.

[43] Ironically not one of the appellants denied that a stripping of parts had in fact occurred at some stage that evening[21] even though the officers were criticised for failing to have remembered four years after the fact when they testified what tools exactly were being used by each suspect as if that was more critical than their damning testimony that something criminally untoward with respect to the stolen Golf was playing out before their very eyes when they arrived on the scene.

[44] The 6th appellant explained with specific reference to the central issue that when the police had approached them "*they did not ask a lot of questions*" yet did ask whose vehicle it was. He related that he had told them: "*Here is the man with the vehicle. He brought the vehicle here*". This assertion is however not even consistent with the appellants' particulars of claim in which the direct allegation was made that the arresting officer had failed to consider the *admissions* made by Mr. Agherdien supposedly at the time of arrest that the Golf and firearm belonged to the latter. It is certainly against the probabilities that Mr. Agherdien came clean right then and there. To the contrary even in his warning statement and later in his affidavit filed in support of his bail application, he resisted accepting blame and was rather pointing the finger back at the 6th respondent than accepting responsibility for his association with the stolen motor vehicle.[22]

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[21] There was a denial by those who testified that all six appellants were found stripping the Golf of its parts at the time of the arrival of Constable Naidoo and his crew partner. Ironically on such a version there would have been no reason to offer any explanation.

[22] Mr. Agherdien in his bail statement said that he had received a call from "*one of the accused persons*" who had asked him if he was interested in buying a motor vehicle. He claims to have been at the home of this person to inspect the motor vehicle and query the papers when the police arrived. The point of highlighting this is that it militates against him having made the admission the appellants say he did right from the get-go. It was also made clear in that affidavit that he knew nothing about any firearm. The appellants' entire case rested on the premise that it was then and there made clear

[45] The 5th appellant also sought to persuade the trial court that he too pointed out Mr. Agherdien to the police at the scene of arrest as the person that brought the car but that they did not want to listen and instead assaulted him. This was certainly not borne out in any of the other evidence (oral or documentary) and indeed it is improbable that he would not have sought to assuage this supposed dramatic violation of his physical integrity and security in the action instituted against the respondent or have mentioned it amongst the supposed breaches of their constitutional rights in their particulars of claim, if it had in truth occurred.

[46] The appellants who did testify were in our view justified in being criticized for contradicting themselves and each other with reference to what they stated in their warning statements and oral testimony. They were evasive and patently adapted their evidence as the proverbial shoe began to pinch. The probabilities too speak comfortably to the trial court's rejection of their testimony where it was in conflict with what the police officers related concerning the damning find on their arrival at the scene of arrest and how the appellants had reacted under the circumstances.

[47] We are satisfied that the Magistrate properly weighed the evidence in its totality and find no basis to doubt the factual findings made by her.

[48] Concerning the Magistrate's approach in determining that the arrest was lawful Ms. Du Toit referred this court to the judgement of *Setlhapelo v Minister of Police and Another ("Setlhapelo*") [23] with reference to the jurisdictional facts necessary to satisfy the respondent's reliance on the provisions of section 40 (1) (e) of the CPA. The five jurisdictional facts postulated in *Setlhapelo* for reliance on this ground to arrest without a warrant, are as follows:

> "*The jurisdictional facts for an arrest in terms of s 40(1)(e) of the CPA are the following: 1) the arrestor must be a peace officer, 2) the suspect must be found in possession of the property, 3) the arrestor must entertain a suspicion*

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to the police who was behind all of the mischief, if any, yet they were all strung along simply because they happened to be at the 6th appellant's home at the time.

[23] [2015] ZAGPPHC 363 (20 May 2015).

that the property has been stolen or illegally obtained, 4) the arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property and 5) the arrestor's suspicion must rest on reasonable grounds."[24]

[49] She contended that proof of the fourth requirement in particular would depend especially on the acceptability of the explanation given by the suspects for their possession of such property. That is so, but the thrust of her argument depends for its force on a consideration based on her client's version that they had supposedly informed Constable Naidoo right then and there that the Golf and pistol "*belonged*" to Mr. Agherdien (and that they were not found stripping the Golf), a factual premise that the trial court in our view correctly rejected.

[50] The accepted factual premise does not advance the appellants' case at all with reference to the court's peculiar approach adopted in *Setlhapelo* in interrogating the proof of the fourth and fifth jurisdictional facts, as follows:

"*If regard is had to s 36 of the General Law Amendment Act 62 of 1955, I am of the view that a suspicion originally based on insufficient grounds that the property has been stolen or illegally obtained or that a suspect has committed an offence in regard to property which is suspected of having been stolen or dishonestly acquired can become a reasonable suspicion as a result of something which the suspect says or does at the time when he is found in possession of the goods, such as giving an unacceptable explanation for his possession of such property.*

The plaintiff was found in possession of the property. The number and nature of the items found in the boot and the fact that the price tags had been removed were perhaps insufficient grounds to suspect that the property had been stolen, but when the plaintiff was asked for an explanation and he gave one explanation, changed his version and then gave another which could not be verified, the suspicion that the property

[24] At para [21].

had been stolen and that the plaintiff had committed an offence in regard thereto, in my view, became objectively reasonable.
In the result I find that the defendant has proved all the jurisdictional facts for a lawful arrest."[25]

[51] Compared to the facts found proven *in casu*, once it was confirmed that the Golf found in the workshop (which the appellants even on their own version could not shy away from had been stripped of its component parts) was the same vehicle stolen in the reported hijacking (hence stolen and probably then also "*dishonestly obtained*"), the question begged itself : Why were the appellants involving themselves in relation to a confirmed stolen motor vehicle in this manner? At that moment they were constructively in possession of the Golf and it was certainly not normal workshop business to be involved, late at night, in stripping parts off it. The other contenders were the find of a "*firearm*", whether real or not, and the fact that number plates had been switched and the Golf's plates hidden under the Palio. Now was the time to say and do something to absolve themselves entirely from any criminal involvement in respect of the Golf.

[52] If any answer would have mattered it was one that suggested that Mr. Agherdien who had brought the motor vehicle to the workshop late at night to be stripped of its parts, had a legal entitlement not only to have been in possession of it, but also to have been stripping it and using the workshop's services towards such end, neither of which suppositions formed the basis for the accepted factual premise.

[53] Indeed, on the basis of the facts found proven by the court *a quo* that the appellants and Mr. Agherdien were at the time of the arrival of the Police at the workshop then actively engaged in stripping parts and could not deflect why, Constable Naidoo's suspicion already had legs as being objectively reasonable. But even on the appellants' version that they informed the police officers that Mr. Agherdien had brought the vehicle there which had been stripped of its number plates, front grille and original tyres sometime earlier that evening with its parts standing ready in the bakkie to be moved off the premises, it would still have been

[25] At [22], [23] and [24].

reasonable in our view for the trial court to have concluded that Constable Naidoo reasonably formed the impression that all of the suspects under that roof had made themselves complicit with an offence with respect to the positively confirmed stolen Golf for which they had to account.

[54] On the accepted factual premise which we endorse, the appellants kept mum, which rendered Constable Naidoo's suspicion that the appellants had committed an offence with regard to the stolen Golf objectively reasonable.

[55] It was strongly contended by Ms. Du Toit that the respondent, despite the onus resting on him, had also failed to justify the arrest in terms of section 40 (1) (h) of the CPA, this based on the fact that the supposed firearm turned out to be a gas pistol or "*BB airgun*" as it is colloquially known. Constable Naidoo had however made it clear in his testimony that he and his colleague had not handled the pistol found at the workshop for fear of compromising the real evidence. Furthermore, upon its surprise find under the hood of the Fiat Palio, he honestly believed it to have been a firearm.

[56] To my mind the fact that it turned out not to be a firearm capable of sustaining the second charge brought against the appellants is neither here nor there. The surprise find of the gas pistol must have reasonably triggered in Constable Naidoo's mind a remembrance that the recent robbery reported was an armed one. In this context, it was certainly reasonable to consider that the presence of a hidden pistol in the Palio, right next to the Golf, supported his suspicion that an offence had been committed in relation to the Golf involving its use and that it was a firearm proper.

[57] Ms. Du Toit sought to rely on this court's finding in *Korkie v Minister of Police*[26] that it had been unreasonable for the arresting officer in that matter to have believed that he had found a firearm proper in circumstances where he had had a decent opportunity to look at an airgun retrieved and see that it could only but have been an airgun rather than a 9mm pistol. The facts in that matter are however entirely distinguishable from the circumstances here concerned. Constable Naidoo did not

[26] [2022] ZAECGHC 2 (1 February 2022).

have an opportunity to study the pistol and discount it as a mere airgun. His instinct though that it was a firearm and might have been used in the hijacking was objectively reasonable as the trial court correctly found.

[58] With regard to the appellants' detention after their arrest, the Magistrate in our view correctly determined that there was nothing arbitrary about their detention in respect of either period. As to how the Police handled the investigation she was satisfied that their conduct was not malicious; that it had been necessary for Constable Diniso to check out Mr. Agherdien's alibi of Kiddo before taking the docket to court, and that correct statutory procedures were adopted. More critically, she recognized that, although the matter was handed over to the prosecutor who then made a decision to oppose bail, the Police did not misrepresent facts that resulted in the appellants being detained unlawfully. Neither did she consider that the Minister was liable for the detention at the instance of the court. She further noted that the facts of the matter before her were distinguishable from those before the Supreme Court of Appeal in *Woji v Minister of Police ("Woji")*[27] where a police officer had given untruthful information at court in bail proceedings that had caused bail to be refused.

[59] Whilst notional legal causation was readily conceded by Constable Diniso at trial, this is as Ms. Glanville who appeared for the respondent correctly pointed out, not one of those kinds of situations recognized in *Woji* and three other recently decided classical examples of the court fixing liability on the Police for wrongful post-hearing detention. These have been helpfully summarized in *Minister of Police v Erasmus* [28] which sets out the basic principles of our law applicable to the determination of the liability of the Minister of Police and the National Director of Public Prosecutions for the deprivation of liberty in the aftermath of an arrest as follows:

> "It is necessary, at the outset, to set out the basic principles of our law that are applicable to the determination of the liability of the Minister and the NDPP for the deprivation of the liberty of Mr Erasmus for this period. These are the following. Both wrongful and malicious deprivation of liberty are *iniuria*

[27] 2015 (1) SACR 409 (SCA).
[28] [2022] ZASCA 257 (22 April 2022).

actionable under the *actio iniuriarum*. Wrongful deprivation of liberty (detention) takes place where the defendant himself, or his agent or employee, detains the plaintiff. Malicious detention takes place under or in terms of a valid judicial process, where the defendant makes improper use of the legal machinery of the state. The requirements to succeed in an action for malicious detention are therefore like those for malicious prosecution namely: that the defendant instigated the detention; that the instigation was without reasonable and probable cause; and that the defendant acted with *animus iniuriandi*. See Neethling et al *Law of Delict* 5 ed (2006) at 304-306. It follows that the NDPP could only be liable for the second period of detention if these stringent requirements were proved in respect of the relevant prosecutors.

When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, and (b) was the factual and legal cause of the post-hearing detention. In *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA), the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty. Similarly, in *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime. In *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR (CC) paras 58 and 76, the decisive consideration in both the judgments that held in favour of the appellant was that the investigating officer knew that the appellant would appear in a ‘reception court’ where the matter would be remanded without the consideration of bail. Finally, in *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC), the investigating officer deliberately supressed the fact that a confession which constituted the only

evidence against the appellants, had been extracted by torture and thus caused their continued detention."[29]

[60] Further and in any event, if one has regard to the provisions of section 50 of the CPA in their entirety, which provides a framework against which to test the legality of the subsequent detention of a person arrested for allegedly committing an offence and which indicate the objectively reasonable incursions that are expected to ensue in the aftermath of an arrest, it appears to us that the appellants were accorded the proper respect of the law and that the invasion of their liberty was permissible based on that fact that the charges which they were suspected of were serious and did not permit, without the necessary rigours insisted upon by Constable Diniso, for the appellants to have been released on bail before the State could be satisfied that it was in the interests of justice to do so. The fact that early bail was objectively contra-indicated can be distilled from the very plausible reasons provided by her why she stood opposed to bail.

[61] It is also to be noted that the 1st, 3rd and 5th appellants, evidently because they had previous convictions, were charged with Schedule 5 offences, and that the court on the 27th, even if only perfunctorily given that bail was conceded by the State on that date, applied the letter of the law in properly considering the issue of bail to them. In this regard it appears that the 1st, 3rd and 5th appellants' affidavits were submitted into evidence in the bail proceedings no doubt in substantiation of the legal requirement applicable in the case of a Schedule 5 offence that such an accused be detained in custody unless he/she adduces evidence which satisfies the court that the interests of justice permit his/her release. With no evidence presented by the State to gainsay that proposition, the court could judicially determine the matter of their entitlement to be released on bail at that juncture. As for the other appellants, on the facts found proven, it was not unreasonable that they too had to be put through the wringer as it were and endure the one week postponement pending the investigations which Constable Diniso testified had been vitally necessary in the circumstances.

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[29] At [11] and [12].

[62] Even if Constable Diniso had to speculate for the National Director of Public Prosecutions (who was not a party to the action) that a reasonable basis to oppose bail existed continuously until the appellants' release on bail ultimately on the 27th, namely that it was not in the interests of justice to release them on bail before then, she could confidently say with reference to what was in the docket that the facts at her disposal remained adverse to the appellants or did not permit of their release on bail from the first moment of their arrest at least until the identity parade and other investigative matters had taken their course. These measures were by no means arbitrary but proportional to what was at stake.

[63] As for the appellants' initial detention, it was pleaded very generally that the arresting officer as well as other police officers failed to apply their minds in respect of the detention and that there were no reasonable and objective grounds justifying the deprivation of their liberty, but such a conclusion could hardly have been sustained by the trial court on the basis of the accepted factual premise. Consistent with the principle stated in *Minister of Safety and Security v Sekhoto and Another*[30] and applied in *Minister of Police v Fry*[31] the mere nature of the offences justified the arrest for purposes of bringing the appellants to justice.

[64] Concerning the allegation that they did not appear in court as soon as reasonably possible and that they could have been charged and taken to court on the 16th of November 2017, alternatively on the 17th of November 2017, the details of this claimed infringement were bereft of any real pleaded or evidential basis.[32] Indeed no reason was indicated why the appellant's believed that their first appearance in court should have necessarily been expedited.

[65] In *Mashilo v Prinsloo*[33] to which Ms Du Toit referred**,** the court observed that: "…*The outer limit of 48 hours envisaged in the subsection does not, without more,*

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[30] *Minister of Safety and Security v Sekhoto and Another* (131/10) [2010] ZASCA 141; 2011 (1) SACR 315 (SCA) ; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) (19 November 2010) at [44].
[31] *Minister of Police v Fry* (CA250/2019) [2020] ZAECGHC 150 (6 December 2020) at [146].
[32] Although the onus rests upon the respondent to establish that the detention in question was lawful it only arises in the adjudication of a matter if the unlawfulness of the detention is pleaded or is canvassed in the evidence. It must thus be pleaded in a manner which triggers the application of the onus. See *Syce*, *Supra*, at [40].
[33] [2012] ZASCA 146 (28 September 2012).

entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hours expires before or during the weekend. Expedition relative to circumstances is what is dictated by the subsection and the detention. Deliberately obstructive behaviour, as was evidenced by Mashilo, is not tolerated."

[66] Apart from the expectation that the pleadings should have invited some basis to support Ms. Du Toit's submission from the bar that the Police were negligent in not expediting the appellant's first appearance in the lower court, which would have properly triggered the onus,[34] the accepted evidence assessed wholistically in our view did not support any expedition relevant to circumstances or of obstructive behaviour on the part of the Police having a factual and legal cause in the appellants' detention in this interlude.[35] Ms. Du Toit submitted in argument that there was absolutely no evidence placed before the trial court as to the reason why the appellants were only brought to court on the 20th and that the trial court had in effect been requested to speculate given that Constable Diniso could only surmise what had gone before she took charge of the docket.

[67] Apart from what appeared in her docket to support the fact that touch DNA was obtained on the 16th, it is so that no other evidence was led by the respondent to give a blow by blow account of what ensued after the appellants were detained at the Gelvandale Police Station until Constable Diniso could pick up the narrative again from the moment she became involved with the investigation. But therein lies the rub. The onus on the Police to establish that detention is lawful does not arise in a vacuum. That having been said though, even in the absence of an allegation in the pleadings inviting the respondent to answer to a pertinent claim of culpable misconduct of a police officer, we are satisfied that the trial court correctly found no misconduct of the *Woji* kind or any other failing on the part of the Police wholistically assessed in not having brought the appellants to court before Monday, the 20th. The evidence given by Constable Diniso after the fact supports a conclusion that the circumstances did not dictate any expedition. The investigative milestones and the

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[34] See footnote 32.
[35] *Erasmus, Supra*, at [12].

safeguards mentioned by her appear to have been properly justified and the appellants' detention at this juncture would not have been inappropriate in the whole scheme of things.

[68] There is accordingly no merit in our view in the challenge on appeal relating to the court *a quo's* application of the law in respect of either incident of the appellants' claim. The appeal accordingly falls to be dismissed.

[69] There is no reason why the costs should not follow the result. The court *a quo* was generous in our view in not having ordered the appellants to bear the ordinary consequences, costs-wise, of a failed action for damages in a scenario where the Magistrate had made significant adverse credibility findings against the appellants who testified. The 6th appellant co-incidentally did not hesitate when he testified to confirm under cross examination that he had indeed been informed of his constitutional rights (incorporating the right to apply for bail) yet this was one of the significant premises of their case pleaded in the particulars of claim, no doubt to set the tone that the Police had abused their powers in the circumstances of the matter and acted highhandedly.

[70] In our view this is not one of those cases.

[71] In the result the following order issues:

1. The appeal is dismissed with costs, such costs to be determined on Scale B in respect of counsel's fees.

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B HARTLE

JUDGE OF THE HIGH COURT

I AGREE,

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N GQAMANA

JUDGE OF THE HIGH COURT

DATE OF APPEAL : 28 February 2025

DATE OF JUDGMENT : 16 May 2025

Appearances:

For the Appellants: Ms. M Du Toit instructed by Carol Geswint Attorneys c/o Dullabh & Co, Makhanda (Mr. Dullabh).

For the Respondents: Ms. H Glanvill, instructed by Nolte Smith Inc., Makhanda (ref. T Kingwill).