

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16783/2011

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	.....
DATE	SIGNATURE

In the matter between:

**ELIAS MANGA**

Plaintiff

And

**MINISTER OF POLICE**

Defendant

SUMMARY

Arrest – legality of – arrest without warrant by peace officer – Criminal Procedure Act 51 of 1977, sec 40(1)(b) – jurisdictional facts present – peace officer arresting plaintiff at police station for robbery which is offence specified in Schedule 1 of Criminal Procedure Act – peace officer first seeking confirmation and verification of allegations – reasonable suspicion – arrest lawful – subsequent detention of plaintiff at police station also lawful since

plaintiff not entitled to be released by police in terms of sec 59(1)(a) of Criminal Procedure Act – remand by magistrate at first court appearance – claims of unlawful and wrongful arrest and detention and claim based on malicious prosecution dismissed.

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## J U D G M E N T

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### **MOSHIDI, J:**

[1] The plaintiff has instituted action against the defendant in which he claims damages arising out of his alleged unlawful arrest, detention and malicious prosecution. The incident under discussion occurred at the Johannesburg railway station, commonly referred to as Park station (“*Park station*”), on 3 August 2009.

### **THE BACKGROUND FACTS**

[2] The facts that gave rise to this action can be summarised as follows: In the summons the plaintiff was described as a businessman of Louis Botha Avenue, Yeoville, Johannesburg. During July 2009 an armed robbery (“*robbery*”) was committed at Klerksdorp and the docket case number was opened under CAS1482/2009. The investigating officer assigned to the robbery case was Officer Karren (“*Karren*”). During the robbery case in Klerksdorp several complainants, including Mr Gift Kangansaru (“*Gift Kangansaru*”) were held hostage and robbed of a substantial amount in cash

including cellphones by several robbers. The plaintiff was a suspect in the robbery case. At that stage the plaintiff's address was given as Braksam Towers, Unit 57, Bok and Wanderers Streets, Joubert Park, Johannesburg.

[3] There was also a robbery case on 31 July 2009 during which a Nigerian national, Mr Adeniyi Olatunji Aladeselu ("*Aladeselu*") of Leopold Heights Building, Claim Street, Hillbrow and other victims, were robbed of at least R100 000,00 in a botched diamond dealing transaction. A robbery case was opened at the Hillbrow police station under CAS132/08/2009 ("*the Hillbrow case*"). The investigating officer assigned to the case was Warrant-Officer Jethro Paul ("*W/O Paul*"). Gift Kangansaru testified in the present action as part of the defendant's witnesses. However, Aladeselu was not called to testify even though his statements formed part of the bundles before the Court. It was common cause that the plaintiff was later arrested on 3 August 2009, which gave rise to the instant action.

#### THE PLAINTIFF'S EVIDENCE

[4] The plaintiff testified as the only witness in his claims. He said that on 3 August 2009 he had accompanied his children on their way to the Eastern Cape from Park station. He placed the children in a bus. Thereafter he went to the parking grounds of Park station. He came across a gentleman who turned out to be Gift Kangansaru, and who needed some help from the plaintiff. The plaintiff obliged and listened to Gift Kangansaru.

[5] The long and the short of the events, was that Gift Kangansaru skilfully lured the plaintiff into the police station at Park station. Once inside, Gift Kangansaru spoke to Warrant Officer M Mahasha (“*W/O Mahasha*”), who was on duty. This was about 15h00. Gift Kangansaru accused the plaintiff of being one of the robbers who had robbed him at Klerksdorp and later told Mahasha so. The plaintiff denied the allegations but remained largely uncooperative. Mahasha later placed the plaintiff under arrest for the robbery case. The plaintiff denied that whilst at Park station, further complainants came forward to link him to the robberies. One of such complainants was a gentleman called TJ, a friend of Gift Kangansaru. He said that Gift Kangansaru phoned this friend, who in turn phoned the Hillbrow police station. The police from Hillbrow then came to Park station police station and arrested the plaintiff. The friend phoned by Gift Kangansaru turned out to be Aladeselu.

[6] Contrary to other credible witness, the plaintiff testified that he was only later that day (3 August 2009) formally arrested and handcuffed at the Hillbrow police station. He was charged with armed robbery which was not specified. His constitutional rights were not read to him. He was placed in the cells where he joined other ten inmates. It was a small cell with one toilet and he slept on the floor. He was not visited by his family during his detention. He was 67 years of age and married with children.

## THE PLAINTIFF'S FIRST COURT APPEARANCE

[7] On 5 August 2009, the plaintiff made his first appearance in the Johannesburg Magistrate's Court. He was remanded in custody at the Johannesburg Prison. He made several subsequent court appearances. On his own version, he was denied bail due mainly to his previous convictions. The previous convictions included the use/possession/dealing in dependence-producing substance (dagga), and the illegal possession of gold, committed in May 1991 and July 1995, respectively. The charges against the plaintiff were subsequently, i.e. 2 February 2010, withdrawn by the public prosecutor for reasons explained later below by the defendant's witnesses. The plaintiff denied any complicity in the robberies.

## PLAINTIFF'S CROSS-EXAMINATION

[8] The plaintiff was closely cross-examined, I must hasten to observe that his evidence, both in chief and during cross-examination, was highly improbable and unimpressive. His evidence that when he was approached by Gift Kangansaru in the parking lot at Park station, the latter was a complete stranger to him, was false. He, however, said that he knew Gift Kangansaru by sight only before 3 August 2009, as he, the plaintiff, was a street vendor, selling food in the area of the station. He could not explain why he followed a complete stranger, Gift Kangansaru, into the police station, and why he volunteered to help such stranger with some unspecified request for help. He however admitted that he knew Aladeselu before 3 August 2009. He used to

visit Aladeselu's shop, a Cell C vendor. The plaintiff changed versions in cross-examination on occasion. He could not explain why two complainants could identify him as one of the robbers on the same day i.e. 3 August 2009. The plaintiff's denial of the Klerksdorp robbery was also blatantly false as shown later. The plaintiff initially denied that his constitutional rights were read to him upon his arrest and detention. However, when confronted with the SAP14, the notice of rights in terms of the Constitution, at p 100 of Bundle A, which he signed on 3 August 2009 at about 18h00, he alleged that he was merely told to sign the document. It was common practice that a copy of the document was normally provided to a suspect to retain the cells and to read at leisure.

[9] The plaintiff was truly not a consistent witness. For example, his evidence as to why he gave the police a false address on arrest could not be understood entirely. The same applied to the evidence as to why he could not supply his identity book to the police. He denied, rather unconvincingly, that the charges against him were subsequently withdrawn simply because his friends intimidated State witnesses, as testified by the investigating officer, W/O Paul and as contained in the statement made by Aladeselu. The plaintiff also tended to answer questions in cross-examination by asking questions. For example, when put to him that Gift Kangansaru pointed him out on arrest as one of the robbers, the plaintiff asked why Gift Kangansaru refused then to testify against him in the criminal trial. When it was put to the plaintiff that the arresting officer, W/O Mahasha, arrested him on grounds of reasonable suspicion, the plaintiff retorted that he did not know Klerksdorp at all. When

further put to the plaintiff that the police believed that they had sufficient evidence to prosecute him successfully, the plaintiff said that he had no comment. Further, in this regard, when put to the plaintiff that the charges against him were not false or drummed up, the plaintiff kept quiet, and the question had to be repeated before he said that he had no comment to make. To sum up, the plaintiff was truly not a credible witness on crucial aspects of this matter.

### THE DEFENDANT'S EVIDENCE

[10] At the conclusion of the plaintiff's evidence, three witnesses were called on behalf of the defendant. They were W/O Mahasha (the arresting officer); Gift Kangansaru; and W/O Paul. The evidence of W/O Mahasha, as arresting officer, was undoubtedly the most crucial in the context of this case. However, I must commence with the evidence of Gift Kangansaru, as the link.

### THE EVIDENCE OF GIFT KANGANSARU

[11] Gift Kangansaru testified that he was at Park station, Johannesburg, on the day of the arrest of the plaintiff, i.e. 3 August 2009. He observed the plaintiff whom he knew well. He testified in great detail about the plaintiff's involvement in the Klerksdorp robbery. This included prior meetings with the plaintiff in connection with a diamond deal. The plaintiff lured the complainants, including Gift Kangansaru, to the false diamond deal in Klerksdorp. However, the plaintiff and his accomplices had other motives. In

the end, and during the alleged deal, Gift Kangansaru and other complainants were robbed of at gunpoint their money in Klerksdorp, amounting to approximately R150 000,00. Gift Kangansaru himself was robbed of about R50 000,00 in cash by the plaintiff and his accomplices.

[12] He testified that when he observed the plaintiff at Park station on 3 August 2009, he at first became emotional and angry. However, on seeing the security guards in the vicinity of the parking lot, he gathered courage, and approached the plaintiff. He asked the plaintiff about his money (R50 000,00). Thereafter, he lured the plaintiff into the nearby police station. He made a report to W/O Mahasha in the presence of the plaintiff about the plaintiff's involvement in the robbery. At that stage, Gift Kangansaru said he had saved on his cellphone the case number of the robbery which he had opened at Klerksdorp. The case number was also referred to as a '*pointing out note*'. Gift Kangansaru also had the cellphone numbers of the initial investigating officer by the name of Karren. All of these he provided to W/O Mahasha.

[13] At the time of his evidence, Gift Kangansaru was a director at the Vine College where he had undergone training in identifying and dealing in genuine diamonds. He was introduced to the plaintiff prior to the robbery. He had meetings with the plaintiff. The plaintiff promised to obtain for Gift Kangansaru and his friends and colleagues, genuine diamonds. He knew the plaintiff well based on about three meetings with him. However, it was during the third meeting on 31 July 2009 that they were lured to this false deal during which the robbery occurred. During the robbery, the plaintiff was in the company of

four other accomplices. In the process of the false diamond deal, the robbers on seeing the money brought along for the deal, changed suddenly. The robbers produced firearms and police appointment cards. The victims raised their hands and pleaded for mercy. They were told that they were under arrest for dealing illegally in diamonds. The plaintiff, although not producing a firearm, shouted that the complainants were under arrest. The plaintiff also took part in searching their victims. The robbers took bank cards, and during the hostage, some of the robbers departed from the scene with the plaintiff to withdraw money from the bank accounts.

[14] Gift Kangansaru testified that during the hostage at the house in Klerksdorp, he managed surreptitiously to contact his brother, told him where they were held and to contact the police. The latter arrived at the scene swiftly, during the temporary absence of the plaintiff and arrested some of the robbers.

[15] Whilst at the police station on 3 August 2009, the complainant in the Hillbrow robbery case arrived and also identified the plaintiff as the robber who robbed him. He stopped attending the Klerksdorp robbery case after receiving death threats.

#### THE CROSS-EXAMINATION OF GIFT KANGANSARU

[16] Gift Kangansaru was cross-examined. There emerged nothing eventful. He was a consistent and comfortable witness. He corroborated

W/O Mahasha in all material respects. After tricking the plaintiff, he had to drag him into the police station at Park station since the plaintiff became reluctant to enter. After the arrest of the plaintiff he was in contact with the investigating officer in the Klerksdorp robbery case i.e. Karren, and became aware that the plaintiff was joined as a co-accused there. He also told the investigating officer that he had received death threats if he testified. He was certain that the plaintiff was one of the robbers who took his money. He was unsure if W/O Mahasha observed the witness holding the plaintiff when they entered the police station. Gift Kangansaru was adamant that when still at the Park station police station, and after he phoned one of the complainants called TJ, the latter promptly arrived at the police station and identified the plaintiff as one of the robbers as well. He denied that the plaintiff entered the police station voluntarily.

[17] Gift Kangansaru testified that once he had given W/O Mahasha all the details of the robbery case, W/O Mahasha telephoned the investigating officer in Klerksdorp, and after a discussion, W/O Mahasha confirmed that the plaintiff was wanted in Klerksdorp. Gift Kangansaru also personally phoned the investigating officer, Karren, and told her that the plaintiff was at the police station. W/O Mahasha then arrested the plaintiff and read his rights to him. The investigating officer, Karren, undertook to travel to Johannesburg and to collect the plaintiff. He made a statement to W/O Paul at the Hillbrow police station who was investigating the robbery perpetrated by the plaintiff on the victim called Aladeselu. The latter robbery took place on 31 July 2009 and Kangansaru knew another victim called TJ as a friend.

THE EVIDENCE OF W/O M MAHASHA

[18] W/O Mahasha testified. He corroborated the version of Gift Kangansaru in all material respects. The criticism levelled against W/O Mahasha both in cross-examination and in argument, was truly not justified in the circumstances. Crucial in his evidence, was his conduct, state of mind and decision to arrest the plaintiff on 3 August 2009, and caused him to be detained at the Hillbrow police station. At the time of the arrest, he was on duty at Park station police station from 06h00 to 18h00. He had some 21 years' service in the SAPS. The witness, Gift Kangansaru, came into the police station with the plaintiff. Gift Kangansaru alleged that the plaintiff had robbed him in Klerksdorp in July 2009. Gift Kangansaru, in proof of his allegations, produced the pointing out note from the Klerksdorp investigating officer, Karren, which contained a case number, police station, nature of the crime, and contact details of Karren. W/O Mahasha questioned Gift Kangansaru closely in order to ascertain the veracity of the allegations. He telephoned Karren and spoke to her to verify the allegations. This was about 16h30. Karren confirmed the robbery incident and the involvement of the plaintiff thereat. Arrangements were made with Karren to come to Johannesburg and collect the plaintiff. Subsequent to such confirmation and verification, he believed Gift Kangansaru, and decided to arrest the plaintiff. He read to the plaintiff his rights in terms of the Constitution, and made arrangements for the plaintiff to be detained at the Hillbrow police station.

[19] He testified that the arrest of the plaintiff in the circumstances, was perfectly lawful since the plaintiff was suspected of having committed the robbery, which is a Schedule 1 offence. He testified that his suspicion to arrest was based on reasonable grounds as the investigation of armed robbery was confirmed against the plaintiff.

[20] In cross-examination, W/O Mahasha testified that Gift Kangansaru was calm when he related the information to him. It was not unusual for a complainant to arrest a suspect. He did not know what happened between the plaintiff and Gift Kangansaru outside the police station. He was adamant that he read to the plaintiff his constitutional rights, which was a procedural matter. He could not explain what eventually happened to the pointing out note received from Gift Kangansaru. He had attached the note to his statement made in the Klerksdorp docket. He testified that in his telephone discussion with Karren, she mentioned that Gift Kangansaru assured her that he would be able to identify the robbers on sight. Gift Kangansaru sounded positive about the identity of the plaintiff as one of the robbers since they met before for days discussing the aborted diamond deal, which turned out to be false. He denied that the plaintiff was handcuffed on arrest and that he was not the arresting officer. The SAPS 14 notice of rights was in fact signed by his colleague, B M Nkosi, as reflected at Bundle A p 100. However, in his statement, which is at Bundle A 105, Mahasha confirmed that he read to the plaintiff his constitutional rights on more than one occasion. In regard to the allegations, the plaintiff was largely uncooperative when questioned.

[21] In my view, W/O Mahasha was an impressive and credible witness. He withstood close and incisive cross-examination. He had never before dealt with the plaintiff and had no known reason to falsely implicate the plaintiff. He was corroborated by Gift Kangansaru.

#### THE EVIDENCE OF W/O S J PAUL

[22] The final witness for the defendant was W/O S J Paul ("*Paul*") who was a detective stationed at the Hillbrow police station. At the time of his evidence, he had some 15 years' service in the SAPS. He was the investigating officer in the Hillbrow robbery case which was opened by Aladeselu. The plaintiff was the suspect. The plaintiff was detained at the Hillbrow police station from 3 August 2009. After his first court appearance at the Johannesburg Magistrate's Court, the plaintiff was transferred to the Johannesburg prison. The trial was postponed for further investigation and in order to verify the plaintiff's address. Thereafter bail was applied for but was declined mainly since the plaintiff had previous convictions and could not produce his identity document. At a later stage when the matter was to be heard in the Regional Court, the charges were withdrawn because the complainants were intimidated. In this regard, he referred to the statement of Aladeselu at Bundle A 109 in which the threats were mentioned.

### THE CROSS-EXAMINATION OF W/O PAUL

[23] In cross-examination, Paul testified that the charges against the plaintiff relating to the Hillbrow robbery case were withdrawn on 2 February 2010. He personally visited the address given by the plaintiff at Braksam Towers, Unit 57, Bok and Wanderers Streets, for verification. However, the plaintiff was unknown at this address. In regard to the Klerksdorp robbery, Paul testified that he made contact with the investigating officer, Karren, who confirmed that the plaintiff was also wanted there for robbery, which trial never proceeded for reasons unknown to him. There was plainly nothing controversial in the evidence of Paul. He made no attempt at all to implicate the plaintiff. There was no reason to doubt his evidence.

### THE ISSUES FOR DETERMINATION

[24] The pertinent issues for determination in this trial are whether the arrest of the plaintiff on 3 August 2009, and his subsequent detention by the police were wrongful or unlawful. The other issue was whether the plaintiff's claim for damages for malicious prosecution based on the fact that the prosecution of the plaintiff never occurred. In this regard, the plaintiff claimed general damages in the sum of R1 250 000,00.

THE LEGAL PRINCIPLES APPLICABLE

[25] It was common cause that W/O Mahasha arrested the plaintiff without a warrant. It was equally common cause that W/O Mahasha was a peace officer as defined in sec 1 of the Criminal Procedure Act 51 of 1977 (*“the Criminal Code”*). Sec 40(1)(a) and (b) of the Criminal Code provides that:

- “(1) A peace officer may without warrant arrest any person –*
- (a) who commits or attempts to commit any offence in his presence;*
  - (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody; ...”*

The offence of robbery under discussion in the present matter is contained in Schedule 1 of the Criminal Code.

[26] The *onus* of alleging and proving that the arrest without a warrant was lawful was on the defendant. In addition, sec 12(1) of the Constitution provides that:

- “(1) Everyone has the right to freedom and security of the person, which includes the right –*
- (a) not to be deprived of freedom arbitrarily or without just cause;*
  - (b) not to be detained without trial;*
  - (c) to be free from all forms of violence from either public or private sources;*
  - (d) not to be tortured in any way; and*

- (e) *not to be treated or punished in a cruel, inhuman or degrading way.*"

In *Minister of Safety and Security v Linda* 2014 (2) SACR 464 GP, at para [20]

the Court said:

*"Section 40(1)(b) of the Act provides that a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in sch 1. The jurisdictional facts for a s 40(1)(b) defence are: the arrestor must be a peace officer; the arrestor must entertain a suspicion; the suspicion must be that the suspect (arrestee) committed an offence referred to in sch 1; and the suspicion must rest on reasonable grounds."*

See also *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) at para [6].

[27] In the instant matter, and in my view, the defendant in its amended plea, properly pleaded the jurisdictional facts to the detailed facts, and followed by the evidence described above in full. In this regard para 5 of the amended plea (in response to paras 7, 8, 9, 10 and 11 of the particulars of claim) accorded with the credible evidence led on behalf of the defendant. For the sake of completeness, para 5 of the amended plea is hereby reproduced:

*"5. The contents of these paragraphs are denied as if specifically traversed and the plaintiff is put to the proof thereof.*

*5.1 On 3 August 2009, whilst on duty, the arresting officer, Mogale Mahasha, was approached by a certain Mr Gift Kangansaru. He pointed out the plaintiff, being a suspect in the case of armed robbery which was committed in Klerksdorp, and that he had been a victim of such armed*

*robbery committed by the plaintiff. Mr Kangansaru then gave Mahasha a case number for such armed robbery.*

- 5.2 *Mahasha then phoned the Klerksdorp investigating officer, who was handling the matter as per the case number provided to him by the complainant, Mr Kangansaru.*
- 5.3 *The Klerksdorp investigating officer confirmed that indeed the plaintiff was a wanted man, being a suspect in the case of armed robbery which was committed in the Klerksdorp area.*
- 5.4 *Based on such information and the fact that the complainant had a point out note which Mahasha had verified, he then arrested the plaintiff for a case of armed robbery, as he was authorised to do.*
- 5.5 *Immediately after his arrest, more complainants came up to complain that they had also been robbed by the plaintiff on different occasions. Subsequently, more armed robbery dockets were opened against the plaintiff.*
- 5.6 *The plaintiff was arrested on 3 August 2009 and appeared in court early on 5 August 2009, which means he appeared in court within 48 hours of his arrest.*
- 5.7 *Save as aforesaid, the defendant denies that the plaintiff was unlawfully arrested and that the police officers acted with malice.*
- 5.8 *Over and above what has already been pleaded, the plaintiff's arrest without a warrant was justified in law in that:*
  - 5.8.1 *the arrestor was a peace officer;*
  - 5.8.2 *the arrestor entertained a suspicion;*
  - 5.8.3 *the suspicion was that the suspect, the plaintiff, committed an offence as referred to in Schedule 1 and the suspicion rested on reasonable grounds.*
- 5.9 *Furthermore, the plaintiff was arrested with an intention to bring him to justice.*
- 5.10 *After plaintiff's first appearance in court, he was transferred to the Johannesburg Prison and from then onwards, the Minister of Police had no authority over him as his further detention was at the instance of the court.*

5.11 *The charges against the plaintiff were eventually withdrawn after the complainants had refused to testify following allegations of intimidation.*"

[28] It is also trite that the suspicion held by the arresting officer must be assessed, not generally, but objectively. The arresting officer also has a discretion whether or not to effect the arrest in the circumstances, and even consider other less drastic measures to ensure that the suspect appeared in court. In *Minister of Safety and Security v Linda*, *supra*, at para [21] the Court said:

*"The question whether the suspicion of the person effecting the arrest is reasonable must be approached objectively. A suspicion inherently involves an absence of certainty or adequate proof. A police officer is not expected to satisfy himself to the same extent as a court. A suspicion can be reasonable despite there being insufficient evidence for a prima facie case. In Shabaan Bin Hussain and Others v Chong Fook Kam and Another the Privy Council said:*

*'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'*"

In *Minister of Safety and Security v Sekhoto*, *supra*, at para [28] the Court said:

*"Once the jurisdictional facts of an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in Groenewald v Minister of Justice."*

## APPLYING THE LEGAL PRINCIPLES TO THE FACTS

[29] In applying the legal principles to the facts of the present matter, it was more than plain that in arresting the plaintiff, W/O Mahasha had more than a reasonable suspicion, objectively speaking. He received sufficient information from Gift Kangansaru about the involvement of the plaintiff in the robbery crime. Other complainants also later came forward implicating the plaintiff. W/O Mahasha applied his mind properly to the allegations. He spoke to the plaintiff who opted to be uncooperative. W/O Mahasha did not immediately and over-hastily arrest the plaintiff. He wanted to satisfy himself that the suspicion was based on reasonable grounds. He had the verbal report of Gift Kangansaru, the case number or pointing out note relating to the robbery case in Klerksdorp. He then telephoned the Klerksdorp investigating officer, Karren, in order to verify the allegations and also to satisfy himself that the Klerksdorp investigating officer was indeed investigating a case that involved the plaintiff. It was only after such confirmation that W/O Mahasha then decided to arrest the plaintiff. This was credible and reasonable conduct as opposed to the plaintiff's unimpressive version. I was more than convinced that the requirements of sec 40(1) of the Criminal Code had been satisfied. It followed therefore, that the arrest of the plaintiff on 3 August 2009, even though it was without a warrant, was justified and lawful in the circumstances. The plaintiff's claim based on unlawful and wrongful arrest must fail.

PLAINTIFF'S ALLEGATIONS OF UNLAWFUL DETENTION

[30] I turn to the alleged unlawful detention of the plaintiff. There is in law a clear distinction between the act of arrest and the act of detention in custody, as was made clear in, *inter alia*, *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E). The arrest of the plaintiff was lawful on a serious charge of armed robbery. He was detained at the Hillbrow police station from 3 August 2009 until he made his first appearance in court on 5 August 2009. Whilst it seemed logical to argue that where the arrest was unlawful, the subsequent detention would also be unlawful, in proper circumstances it can also be argued to the contrary. That is that, where the arrest was lawful, as in this case, the detention, pending first appearance in court, can also be said to be lawful. This will, of course, depend on the particular circumstances of each case. (*Cf Mthinkulu and Another v Minister of Law and Order* 1993 (3) SA 432.)

[31] In the instant matter, the claim of the plaintiff of unlawful detention in respect of his detention at the Hillbrow police station can in my view, be dismissed on one clear ground only. That is that, in the light of the serious nature of the offences that he was arrested for, which attracted the minimum sentencing regime in the event of conviction, there was conceivably no way in which the police could have, or should have, invoked their discretion to release him pending his first appearance in court. Sec 59(1)(a) of the Criminal Code provides that:

*'An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police officer.'*

See in this regard, *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) at 91. The charges which the plaintiff faced are specifically mentioned in Part II Schedule 2, i.e. robbery. The plaintiff could also not be released under the provisions of sec 50(3) of the Criminal Code which provides that, *'subject to the provisions of subsection (6), nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court'*.

[32] Once the plaintiff appeared in court on 5 August 2009, the matter of his further detention was not longer in the hands of the police, but under the judicial oversight of the trial court. In *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 315 (A), the appellant was initially asked to go to the police station for questioning. After questioning, the appellant was, however, ordered to stay in the police station and there to wait for the policeman who was at that time busy with further investigation into the case. At first court appearance, the appellant was remanded in custody. The appellant was technically under arrest. The Court found that a detainee's continued detention pursuant to an order of court in terms of sec 51 of the Criminal Code, was lawful despite the fact that it had followed upon the appellant's unlawful arrest. The facts in the latter case were clearly distinguishable from the facts in the present matter

since the arrest of the plaintiff here was plainly lawful. However, each case must be considered on its own circumstances. The end result, was however, that the plaintiff was in detention until the charges against him were ultimately withdrawn, was not unlawful, as discussed below.

### ALLEGATIONS OF MALICIOUS PROSECUTION

[33] Finally, I deal with the plaintiff's claim based on malicious prosecution. This claim too, must fail. The *onus* was on the plaintiff to allege and prove this claim, in all of its facets. One of the elements the plaintiff had to allege and prove was that the defendant instituted the criminal proceedings in question without reasonable and probable cause, including malice. See in this regard, *inter alia*, *Prinsloo v Newman* 1975 (1) SA 481 (A).

[34] The credible evidence of W/O Paul was that he investigated the matter, i.e. the Hillbrow robbery case thoroughly and believed that the plaintiff had a formidable case to answer. He provided all the relevant facts to the public prosecutor. The prosecutor in exercising his/her discretion, based on the facts produced, decided to prosecute the plaintiff. In this regard the evidence was significantly not challenged seriously in cross-examination. It was equally significant that it was never suggested to W/O Paul that he misled or misrepresented the facts to the prosecutor. It was also not the plaintiff's case that there was no evidence at all on which he could be prosecuted successfully. Furthermore, there was no evidence on record that the magistrate was misled or that incorrect facts were placed before the

magistrate with the result that the plaintiff had to be remanded in custody and refused bail. On his own version, the plaintiff was denied bail because of his previous convictions mentioned earlier in the judgment. This was not disputed. In addition, W/O Paul testified that the plaintiff was denied bail because he supplied to the police a false address. The plaintiff also was unable to provide any form of positive identification. This evidence too, was never contested by the plaintiff during cross-examination. In the circumstances, the conclusion that the further detention of the plaintiff after being ordered by the magistrate was lawful, became irresistible. In the same manner, the persistence of the police officers with the prosecution of the plaintiff, was justifiable, and could never have been in violation of his rights in terms of sec 12(1) of the Constitution.

[35] It is so that in terms of sec 35(2)(d) of the Constitution, the plaintiff, as an accused person, had the right '*to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released*'. The magistrate, on the basis of the information before court, decided otherwise, apparently because the interests of justice did not permit his release. There was no evidence that the plaintiff applied for bail later on new facts or appealed the decision of the magistrate in refusing bail. The fact remained that the charges against the plaintiff both in the Hillbrow and the Klerksdorp robbery cases, were withdrawn because the complainants were intimidated and threatened with death.

## CONCLUSION

[36] I therefore concluded that the plaintiff had failed miserably, to make out a case for any of the heads of damages he claimed in this action. The action must be dismissed.

## COSTS

[37] I deal with the issue of costs briefly. It is a matter of discretion, and ought normally to follow the result. The plaintiff was an elderly man of about 67 years of age. He earned his livelihood from hawking in the streets of Hillbrow or Yeoville. He looked pathetic in the witness stand. He was plainly opportunistic in his claims. He became emotional when he testified about his release from detention. This was clearly in an endeavour to mislead the court. He was a skilful trickster involved in illegal diamonds and gold. There was no hope that he would be able to meet an adverse costs order, although he was represented by eminent counsel and private attorneys in this trial. It would be unjust and inequitable to order him to pay the costs. He suffered purely because of his opportunism. He faced the might of the state and its resources in defending his claims.

## ORDER

[38] In the result the following order is made:

1. The plaintiff's action is dismissed.
2. Each party shall pay their own costs.

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**D S S MOSHIDI**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

COUNSEL FOR THE PLAINTIFF	C GORGIADES
INSTRUCTED BY	BARRY KIRKMAN ATTORNEYS
COUNSEL FOR THE DEFENDANT	B SHABALALA
INSTRUCTED BY	STATE ATTORNEY
DATE OF HEARING	17 NOVEMBER 2014
DATE OF JUDGMENT	27 MARCH 2015