REPORTABLE
HANDED DOWN: 18 JUNE 2009

/bh/sg

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: **18352/07**

IN THE MATTER BETWEEN:

W J LIEBENBERG	**APPLICANT**
AND	
MINISTER OF SAFETY AND SECURITY	**FIRST RESPONDENT**
INSPECTOR FUCHS	**SECOND RESPONDENT**

JUDGMENT

LEGODI, J

INTRODUCTION

1. In this matter, the plaintiff, Mr W S Liebenberg is claiming damages against the two defendants, the Minister of Safety and Security and Inspector Fuchs.

2. The first defendant is sued as an employer of the second defendant who is alleged to have acted at all material times hereto within the course and scope of his employment with the first defendant.

3. The claim against the defendants arises from two incidents of arrest of the plaintiff without a warrant on 14 January 2006. The plaintiff alleges that the arrests were unlawful. In his replica, the plaintiff firstly avers that the police in arresting him without warrant, did not have reasonable suspicion that he committed a schedule 1 offence.

4. The plaintiff in a further alternative averment, particularly with specific reference to Inspector Jacobs, states that there was a duty on Inspector Jacobs to consider the following facts before arresting the plaintiff:

    4.1 The plaintiff is a South African citizen

    4.2 The plaintiff's identity number is 6112175040088.

    4.3 The plaintiff has no firearms in his possession or have a firearm licence.

4.4 The plaintiff is residing at the house stated in paragraph 1 of the particulars of claim, since 2005 and is the registered owner of the property since 2006.

4.5 The plaintiff is permanently employed with Lohrnmon Platinum, Mooinooi since 1999 as a rock engineer.

4.6 The plaintiff is married since 1985 with his present wife residing at the aforementioned address.

4.7 The plaintiff has two children who at the time of the arrest were fourteen and seventeen years old respectively.

4.8 The plaintiff has no criminal record.

4.9 The plaintiff does not represent a danger to society.

4.10 The plaintiff was and is willing to stand any trial.

4.11 The plaintiff will not harm himself and or is not in danger of being harmed by others.

4.12 The plaintiff is able and keen to disprove the allegations made against him which was already indicated to the inspector Jacobs during the first arrest.

4.13 The plaintiff is *inter alia* a member of SANIRE (South African Institution of Rock Engineers), Committee member of the Mooinooi Golf Club and a member of the Old Apostolic Congregation.

5. The plaintiff then in his replica avers that having regard to the aforementioned facts, a reasonable officer in the position of inspector Jacobs would not have arrested the plaintiff, but would have considered less invasive action to ensure that the plaintiff will stand his trial. He then concluded that the arrest of the plaintiff by inspector Jacobs is unconstitutional and unlawful.

6. Just before the start of the hearing of evidence, parties handed in a pre-trial minutes dated 14 May 2009. In it, the following admissions were made in the form of questions and answers:

6.1 The plaintiff's residential address;

6.2 That the plaintiff was arrested during the evening of 13/14 May 2006 at the plaintiff's residence.

6.3 That the arrest was made without a warrant;

6.4 That the plaintiff was detained on 14 January 2006 from 02h00 till 12h00.

6.5 That the plaintiff was released due to the fact that the State Prosecutor refused to prosecute the matter.

6.6 That the plaintiff was thereafter arrested on 14 January 2006 at his residence.

6.7 That the aforesaid arrest took place without a warrant of arrest.

6.8 That the plaintiff was detained at the Brits SAP from 14:50 to 18:30.

6.9 That the plaintiff was released for the second time without being charged.

7. Just before evidence was adduced, I was further informed that the defendants have conceded that the second arrest was unlawful. I was further informed that based on the defendants' admission and defence of justification in terms of section 40 of the Criminal Procedure Act, the defendants have a duty to begin.

FACTS RAISED BY PLEADINGS AND ADMISSIONS

8. From what have been stated in the previous paragraphs, and subsequent evidence which was adduced by the parties, the following issues in my view, have been raised:

Whether Inspector Jacobs in arresting and subsequently detaining the plaintiff in the early morning of 14 January 2006 had reasonable suspicion

that an offence of attempted murder had been committed by the plaintiff? And if so,

Whether Inspector Jacobs had any discretion not to arrest and detain the plaintiff? And if so;

Whether Inspector Jacobs had properly exercised such discretion?

EVIDENCE ON BEHALF OF THE DEFENDANTS

9. Only one witness testified on behalf of the defendants. This was inspector Jacobs who arrested the plaintiff. His evidence was in a nutshell to the following effect:

9.1 He has been a police officer for a period of 18 years, seventeen of which he has been a detective investigating cases.

9.2 During the weekend of the 13th/14th January 2006 he was doing standby duties. He had to attend to all newly reported cases during the night and in particular serious cases.

9.3 After 24 hours in the morning of 14 January 2006, he was informed by the charge office at Brits Police station that there was an attempted murder case which has been reported.

9.4 He proceeded to the office and a docket containing statements by three witnesses was also handed over to him. Based on the information contained in the docket, he then made enquiries regarding ownership of a motor vehicle of the alleged suspects.

9.5 The car in question was described as a white Corsa bakkie with registration numbers F95835NW from which shots were fired and one of the shots hit one of the witnesses. Having obtained the particulars of the registered owner of the bakkie in question, he then together with other members of the police, including Inspector Fuchs, proceeded to the house of the plaintiff.

9.6 At the home of the plaintiff, the bakkie as described and with the same registration numbers as contained in the docket was found. The plaintiff was then confronted with the allegations and in particular the plaintiff was asked:

9.6.1 If he was the owner of the bakkie in question and he confirmed that he was the owner.

9.6.2 If he was driving the bakkie during the early hours of 14 January 2006 and he said the last time he drove the bakkie was during the day of 13 January 2006.

9.6.3 He was asked if he was the only driver of the vehicle and he confirmed that he was the only driver.

9.6.4 He was asked if he was during the night of the 13th to the early hours of the 14th January 2006 at or near Cooken Bull Pub in the district of Brits and he said he was not in Brits district.

10. Having had these responses from the plaintiff, inspector Jacobs then walked to the bakkie in question, which was parked under a carport. He put his hand on the bonnet and the engine was very hot. He then put it to the plaintiff that if the last time he had driven his car was during the day of the 13th January 2006, the engine would not have been so hot.

11. The plaintiff then made the following admissions to Inspector Jacobs:

    11.1 That he did drive the bakkie in question during the late hours of 13 January 2006 up to the early hours of 14 January 2006.

    11.2 When told that there were witnesses who saw him at or near Cock Bull Pub/Bar Restaurant, he confirmed that he was at the said bar at the late hours of 13 January 2006 to the early hours of 14 January 2006.

    11.3 He also confirmed that he was accompanied by a certain Izet and that he was willing to go and show the police where Izet was residing in Rustenburg. Inspector Jacobs then arrested the plaintiff. The plaintiff's house was searched for a firearm, and nothing was found.

12. The police then travelled to Rustenburg together with the plaintiff. In Rustenburg Izet, was arrested. A search was conducted, but nothing was

found. The police then drove back to the police station. Both the plaintiff and his friend were detained in the cells.

13. Inspector Jacobs then went home to rest. As he was on standby for the weekend, roundabout 10:00 he returned to the police station. He was then informed that the control prosecutor had directed that the plaintiff and his friend be released as there was no case against them. Inspector Jacobs then ordered Inspector Fuchs to release the plaintiff. This concluded the evidence on behalf of the defendants.

EVIDENCE ON BY THE PLAINTIFF

14. The plaintiff was the only witness that testified. He did not deny the bulk of the evidence adduced by Inspector Jacobs insofar as it related to the plaintiff.

15. The plaintiff was arrested at his home round about 13:05. From there, he was taken to Rustenburg where his friend was also arrested. On their return from Rustenburg, he was taken to Brits police station. He was then placed in a dark cell where there were other inmates.

16. Immediately after he was locked into the cell, which was closed with a big steel door, he was robbed of his belongings like cigarettes. He got so frightened and he was worried that he might be raped. He stood the whole time against the door to avoid being raped.

17. In the early hours round about 18:00, they were taken out to an open space, next to the cell. Later that morning they were taken back into the cell. At round about 12:00 he was released apparently on the intervention of his lawyer.

18. When he arrived at his home, the first thing he wanted to do was to bath because he felt so dirty. He was very hungry as he never ate since he was arrested. As he was preparing to eat, the police arrived again. That was round about 14:00. They arrested him, took him back to the police station, locked him in again. He was then released round about 18:30 on 14 January 2006. This in short, concluded the evidence by the plaintiff.

APPLICABLE PRINCIPLES AND LEGISLATION

19. In the light of the issues raised herein, and submissions which were made by counsel on behalf of the plaintiff, I find it necessary to deal with all or most of the methods of securing an attendance in court by an accused person. I also find it necessary to deal with guidelines and principles regarding relationship between the prosecution and investigators of crime.

SECTION 54

19.1 In terms of this section, while the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance, of the accused by drawing up the relevant charge and handing it over to the clerk of the court to issue

summons containing the charge and the information handed to him by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on such charge, and deliver such summons to a person empowered to serve a summons in criminal proceedings.

SECTION 56

19.2 Section 56 deals with written notice as a method of securing attendance of the accused in the magistrate's court. Sub-Section 1 thereof provides that if an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by notice in the Gazette, such peace office may whether or not the accused is in custody, hand to the accused a written notice calling on the accused to appear at a place and on a date and a time specified in the written notice to answer to a charge of having committed the offence in question.

SECTION 57

19.3 This section deals with payment of admission of guilt on summons issued in terms of section 54 and written notice in terms of section 56, in which event it becomes not necessary for such an accused to appear in court.

SECTION 57A

19.4 This section deals with admission of guilt and payment of fine after appearing in court. Subsection 1 thereof provides that if an accused who is alleged to have committed an offence has appeared in court and is, in custody awaiting trial on that charge and not on another more serious charge, or is released on bail under section 59 or 60 or is released on warning under section 72, the prosecutor may before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate in convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, hand to the accused a written notice or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again. (My own emphasis)

SECTION 59

19.5 This section deals with bail before first appearance of an accused in the lower court. Subsection (1)(a) 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 first appearance in a lower court, be released on bail in respect of such offence by any police officer of or above the rank of a non-commissioned officer, in consultation with the police officer charged

with the investigation, if the accused deposits at the police station the sum of the money determined by such police official.

SECTION 59A

19.6 This section deals with the National Director of Public Prosecutions authorising the release of an accused person on bail before appearance in court. It provides that an attorney-general or a prosecutor authorised thereto in writing by attorney-general concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail. The effect of bail granted in terms of this section is that the person who is in custody shall be released from custody.

SECTION 60

19.7 Section 60 deals with an application for bail by an accused person in court. Subsection (1)(a) provides that an accused who is in custody in respect of an offence shall, subject to the provisions of subsection 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. Subsection (6) of section 50 provides as follows:

(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who-

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60-

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released on bail and if the accused is not so charged or inform of the reason for his or her further detention, he or she shall be released; or

(ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.

(b) An arrested person contemplated in paragraph (a)(i) is not entitled to be brought before court outside ordinary court hours.

SECTION 50

19.8 This section deals with procedure after arrest. Subsection (1)(a) thereof provides that any person who is arrested with or without a warrant for allegedly committing an offence, or for any other

reasons, shall as soon as possible be brought to a police station or in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant.

19.9 Paragraph (b) of subsection (1) provides that a person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings. Paragraph (c) provides that subject to paragraph (d), if such an arrested person is not released by reason that –

(i) no charge is to be brought against him or her, or

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

ROLE OF PROSECUTION AND THE POLICE

19.10 Department of police as it is now called, is an independent government department under the ultimate control of the relevant minister of cabinet. The structure and functions of the department are governed by the South African Police Service Act 68 of 1995 and section 205 to 208 of the Constitution. (See Commentary on the Criminal Procedure Act page 1-4, *S v Henna & Another* 2006 (2) SACR 33 (SE) 40F.)

19.11 One of the functions of the police is to investigate any crime or alleged crime and to prevent crime. In terms of section 205(3) of the Constitution and also as read with the preamble to Act 68 of 1995, police officers also have the duty to ensure the safety and security of all people in the country. (See *Minister of Safety and Security v Mahofe* 2007 (2) SACR 92 SCA at paragraph 11 and K v Minister of Safety and Security 2005 (6) SA 419 (CC) at (18) and (19).)

19.12 As far as prosecutions are concerned, the police do in practice, exercise a discretion of their own and often refrain from bringing trivial matters and allegations, which are not adequately supported by evidence, to the attention of the public prosecutor. All investigations completed by the police for purpose of a prosecution must be submitted to the prosecuting authorities as the prosecutors do not have the final say on whether a prosecution should be instituted. (My own emphasis). This separation between officials who investigate crime and those who decide to prosecute and actually do prosecute crime is an important one. It provides objectivity and provides criminal justice system with a process in terms of which the results of a police investigation can to some extent be evaluated independently before grave steps of instituting a prosecution is taken. (See Commentary on the Criminal Procedure Act at 1-44.)

INFORMAL CO-OPERATION BETWEEN PROSECUTION AND POLICE

19.13 In practice, there ought to be some sort of co-operation between the police and prosecutors in the investigation of a case and its preparation for trial. In terms of paragraph 8 of the Prosecution Policy, issued by the NDPP in terms of section 12(1)(a) of act 32 of 1998, the relationship between prosecutors and police officials should be one of efficient and close-cooperation, with mutual respect for the distinct functions and operational independence of each profession. (My own emphasis.)

19.14 The initial investigation is conducted by the police. They do so upon their own, including or as a result of a complaint received from the public. Or they may do so in consequence of instructions received from the prosecuting authority. (See section 24(43)(c)(i) of National Prosecuting Authority Act 32 of 1998. The police prepare a docket for submission to the public Prosecutor who takes a decision matter to prosecute or not. See again Commentary on Criminal Procedure Act at 1-44.) (My own emphasis)

19.15 The prosecutor, in the exercise of his discretion to prosecute, examine the witnesses' statements and documentary evidence contained in the docket together with such real evidence as might be available. At this stage, the prosecutor may also direct and control the investigation by giving specific instructions to the investigating officer, that is, the police official charged with the investigation of the crime. The prosecutor may, for example order for further statements from potential state witnesses or, he may direct for certain

information to be submitted or collected. But he himself does not in principle participate in the investigation of cases. (See again page 1-42 of Commentary on the Criminal Procedure Act.) (Own emphasis)

THE PROSECUTION AS *DOMINUS LITIS* AND WITHDRAWING OF CHARGES IN TERMS OF SECTION 6 OF THE CRIMINAL PROCEDURE ACT

19.16 Of relevance, section 6(a) of the Criminal Procedure Act, provides that an attorney general (National Director of Public Prosecutions), or any person conducting a prosecution at the instance of the state, or any body or person conducting a prosecution under section 8, may before an accused pleads to a charge, withdraw that charge, in which event, the accused shall not be entitled to a verdict of acquittal in respect of that charge. (Own emphasis)

19.17 Prosecution as *dominus litis* means that the prosecution can do what is legally possible to get or not to get criminal proceedings in motion for example, determining the charges and the duty and venue of trial. *(S v Khamela and Five Similar cases* 2008 SACR 165 (C) at 22 and 35). A measure of control by the courts over decisions then by the prosecution as *dominus litis* remains essential.

THE DISCRETION TO PROSECUTE

19.18 A prosecutor has a duty to prosecute if there is a *prima facie* case, unless there is compelling reason for a refusal to prosecute. In this context, *prima facie case* is said to mean, the allegations as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict, that is, if there are reasonable prospect of a successful prosecution. The prosecution, does not have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution. (See *Beckenstrate v Rollcher and Theunnissen* 1955 (1) SA 129 (A) at 137, *S v Luhota* 2001 (2) SACR 703 (SCA) 707i and *Gellman v Minister of Security and Safety* 2008 (1) SACR 446 (W) at (33).)

SECTION 40

19.20 This section deals with an arrest without a warrant. Section 40(1)(b) provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.

19.21 The question as to whether the suspicion of the person effecting the arrest is reasonable, must be applied objectively. The circumstances giving rise to the suspicion must be as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence.

19.22 The word suspicion is said to imply an absence of certainty or adequate proof. A suspicion might be reasonable, even if there is insufficient evidence for a *prima facie* case against an arrestee. For example, it is conceivable that a reasonable suspicion can be formed where a person is seen at the scene of a crime and gives a false alibi under interrogation or refuse to answer any questions. (See *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T).)

19.23 Police officers who purport to act in terms of section 40(1)(b) should investigate exculpating explanations offered by a suspect before they can form a reasonable suspicion for the purposes of a lawful arrest. (See *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) 183j-184d).

19.24 In general, the person affecting the arrest is also the person who must harbour the reasonable suspicion. But where a police official carries out the physical part of an arrest on the command of another police official under whom he serves, and who makes the requisite notification to him, it is actually the superior who carries out and the arrest and who must have reasonable suspicion. (See *Minister of Justice v Ndala* 1956 2 SA 777 (T) 780).

19.25 In *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (T) the Court correctly conducted its examination into the lawfulness of an arrest against the backdrop of the constitution. The court held

that section 40 does not provide a protection to a police officer who did not form his own suspicion, but relied on the opinion of another person.

19.25.1 It is said, an arrest without a warrant is a drastic means of initiating a prosecution or securing the accused's attendance in court. In the pre-constitutional era it was accepted that there was no rule of law that required that milder methods of bringing a person to court either by summons, written notice, indictment, arrest on warrant, should be resorted to where these methods would be as effective as a warrantless arrest. (See *Tsotse v Minister of Justice* 1951 3 SA 10 (A) 17H).

19.26 However, it is said that time has come to state as a matter of law that, even if a crime which is listed in schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting officer believes on reasonable grounds that such a crime has been committed, this in itself does not justify an arrest forthwith. In each case falling within the ambit of section 40, the police are said to be obliged to consider whether less invasive to bring the suspect to court are available. It is said that it is constitutionally unacceptable to resort to warrantless arrest if there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained, or a notice to appear in court is obtained.

19.27 It is said the power contained in section 40 may be exercised only if there are reasonable grounds to suspect that the suspect will abscond if any application for a warrant is first made. (My own emphasis). (See *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) 186b, 187d, 187e and 187f.)

19.28 In contrast to *Louw's* case *supra*, it is said that the legislature having granted a peace officer the right to make an arrest in the circumstances set out in section 40 has created a situation where due compliance with such section by a peace officer is lawful and affords such a peace officer protection against an action for unlawful arrest. The court is said to have no right to impose further conditions on such persons. To do so, is said, would open a Pandora's box where the courts would be called upon in cases of this type to have to enquire into what is reasonable in a variety of circumstances and further where peace officers would be called upon to more value judgments everytime they effect arrest in terms of section 40. These judgments which they would have to make would later have to be considered and tested by judicial officers attempting to place themselves in the shoes of the arresting officer. (See *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W) 144b-d).

19.29 It requires no more than an honest exercise of their duties. If the police *bona fide* fear that a suspect will evade justice, then an arrest is obviously the correct option. But, by the same token, it is said this

test makes an arrest *ultra vires* when exercised against a suspect under circumstances where the suspect is perfectly willing to come to court on warning, on notice or summons. (See *Louw supra* at 187g.)

19.30 Unnecessary restrains on police officials, who have to take snap decisions, can be detrimental to the administration of justice. However, it is said that it is equally true that fundamental rights must be protected and accommodated. Where the two considerations are evenly balanced, a modern constitutional state requires that the scales must fall on the side of individual liberty. (See *Minister of Safety and Security v Glisson* 2007 (1) SACR 131 (E) 134g).

19.31 The following guidelines are said to be particularly helpful to the police officers about to make an arrest without a warrant:

19.31.1 that after the policeman has determined that there are reasonable grounds for suspecting the commission of a schedule 1 offence, he must exercise his discretion to determine whether there are circumstances which militate in favour of effecting a warrantless arrest. Usually, the risk of the suspect absconding or committing further crimes if the policeman delays in obtaining a warrant, would initiate in favour of a warrantless arrest.

19.31.2 a policeman should always consider whether the accused's attendance can be procured through a summons, as this is the preferable method of summonsing a suspect's attendance at trial. If the policeman concludes that there is a risk of Flight if a summons is served on the suspect, the policeman should consider whether the ends of justice may be defeated if he approaches a magistrate or justice of the peace to obtain a warrant.

19.31.3 that in determining whether or not to effect an arrest, the arresting officer should carefully consider his or her standing orders, that may in itself be an indication that the discretion was not properly exercised and that the warrantless arrest was unlawful.

19.32 That the factors under paragraphs 19.30.1 to 19.30.3 above should be seen as guidelines only bearing in mind that what is reasonable will be assessed against the background of the particular circumstances of each case. (See *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W) 90-94).

19.33 Section 36 of the Constitution deals with limitations in the Bill of Rights. It provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in a open and democratic

society based on human dignity, equality and freedom, taking into account all relevant factors such as the native of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and the less restrictive means to achieve the purpose.

FURTHER ISSUES RAISED

20. After judgment was reserved in this matter, I requested the parties to file further heads of argument as follows:

"*(1) Whether Inspector Jacobs having arrested the plaintiff in the early hours of Saturday 14 January 2006 had any discretion to release the plaintiff? If so,*

(2) In terms of which law or provision of the Criminal Procedure Act, was Inspector Jacobs entitled to exercise such a discretion? Parties are requested to deal with relevant provisions in the Criminal Procedure Act dealing with securing attendance of an accused person in court and in particular sections 50, 54, 57, 59, 59A and 60 of Act 51 of 1977.

(3) Was the public prosecutor entitled to order the release of the plaintiff or withdrawing the charges at such an early stage of the police investigation and without having consulted with the

arresting officer and or before the plaintiff was actually charged? If the answer is in the affirmative,

(4) *Did the prosecutor's conduct not amount to an interference with the police investigation? And If not,*

(5) *In terms of which authority or a provision of the law did the prosecutor act in withdrawing the charges at such an early stage and without consulting with the arresting officer?*

(6) *If the public prosecutor could be found to have been wrong on the prima facie evidence against the plaintiff, and that he or she interfered with the police investigation and that he or she had no authority to withdraw the charges and order the release of the plaintiff, on what basis can it be said that the second arrest and subsequent detention was unlawful?*

(7) *If it could be found that the public prosecutor acted improperly and unlawfully and that the second arrest was not unlawful would this court be bound by the concession made by the defendants to the effect that the second arrest was unlawful?*"

DISCUSSIONS, SUBMISSIONS AND FINDINGS

21. I now turn to deal with the issues raised in paragraphs 8 and 20 of this judgment. I find it necessary to deal first with the information that led the police to the home and arrest of the plaintiff.

WHETHER INSPECTOR JACOBS HAD REASONABLY SUSPECTED THE PLAITNIFF AS HAVING COMMITTED AN OFFENCE REFERRED TO IN SCHEDULE 1?

22. An offence of attempted murder is an offence falling under schedule 1. In his written heads of argument which was submitted to the court on conclusion of evidence, counsel for the plaintiff challenges Inspector Jacobs reasonableness of his suspicion and lawfulness of the arrest as follows:

> "*2.4 It is submitted that the defendants did not proof that Inspector Jacobs had a reasonable suspicion that the plaintiff had committed an offence of attempted murder*."

22.1 In paragraphs 19.21 to 19.24 of this judgment I dealt with how reasonable suspicion ought to be interpreted. The plaintiff was arrested without a warrant based on the following set of facts:

22.1.1 On the evening of 13 January 2006 three witnesses made written statements to the police.

22.1.2 In their statements, they confirmed a shooting incident where one of them was shot and their vehicle damaged by bullets.

22.1.3 A description of a white Corsa bakkie and registration numbers thereof were given to the police.

22.1.4 The vehicle's particulars were circulated and it was discovered that it belonged to the plaintiff at a given address.

22.1.5 The police in the early hours of 14 January 2006 proceeded to the home of the plaintiff.

22.1.6 At the home of the plaintiff the white Corsa bakkie as described by the witnesses and with the same registration numbers as supplied by the witnesses to the police was found at the home of the plaintiff.

22.1.7 The plaintiff confirmed that it was his bakkie and that no other person was using or driving the said bakkie. He was the only person using the bakkie.

22.1.8 He denied any allegation that, the night in question he was anywhere near the place where the alleged offences were alleged to have been committed.

22.1.9 That the last time he drove the vehicle was during the day of 13 January 2006.

22.1.10 Having told the police as stated in 22.1.9 above, Inspector Jacobs walked towards the bakkie, put his hand on the engine and felt the engine. The engine was very hot.

22.1.11 Inspector Jacobs confronted the plaintiff and told him that if he had driven his bakkie during the day on 13 January 2006, the engine would not have been so hot in the early hours of 14 January 2006.

22.1.12 The plaintiff then admitted that he did drive the bakkie in the late hours of 13 January 2006 and early hours of 14 January 2006.

22.1.13 The plaintiff further admitted that he was at or near the spot where the shooting incident was said to have taken place. He, however, denied that he was involved in the shooting.

22.2 Based on all these factors mentioned in 22.1, 22.1.1 to 22.1.13, Inspector Jacobs formed the suspicion that the plaintiff was involved in the commission of the offence and he then arrested him. I deal later with the issue of arrest.

22.3 I understood counsel for the plaintiff to have suggested that for two reasons, Inspector Jacobs should not have relied on the statements of the witnesses:

22.3.1 Firstly, that none of the witnesses had indicated in their statements that they saw shots been fired from the plaintiff's bakkie.

22.3.2 Secondly, that none of the witnesses did indicate in their statements that they saw a firearm or the plaintiff shooting.

22.4 In the statement A1, which was handed in as exhibit B and in particular paragraph 2 and 3 thereof, it is stated as follows:

> " *2.*
>
> *After a few minutes I saw the motor vehicle passing. I didn't suspected that car. After it had passed, I heard the big sound like a firearm I then realised that the car had shot me on my right leg because I was feeling pains on right leg. I then saw many gun shots on the right back door of the motor vehicle.*
>
> *3.*
>
> *We then followed that motor vehicle and managed to took the registration number. The number was white bakkie Registration no FJS835NW with two white male. We followed*

the car until it parked at Cookenbull Pub and I was transported to Britz Hospital because I was bleeding on my right leg due to gun shots. I went to the police to investigate the matter because I didn't gave them permission to shoot me."

22.4.1 This is a statement by the witness who was shot. What appears in paragraphs 2 and 3 of the statement was said to have meant nothing connecting the plaintiff to the commission of the crime. I understood counsel for the plaintiff further to suggest that the fact that registration numbers of the plaintiff's bakkie were given to the police, did not mean that he was involved.

24.4.2 Very easy to make this kind of a suggestion. However, this must be seen in the context of what Inspector Jacobs objectively understood to have been the case. Firstly, he took into account the fact that the person who took down the statement did not use his or her first language. I do not think that anyone can question this. The person who took the statement is indicated as Lomake Modibedi, a black police official.

24.4.3 Secondly, it was not the understanding of Inspector Jacobs that "the car shot me" literally meant the car shooting. Any other reasonable person, placed in the position of Inspector Jacobs would have understood to

mean the occupants of the bakkie as having shot at the witness. This understanding should further be seen in the light of statements A2 and A3 quoted in full in the preceding paragraphs 31.1.5 and 32 of this judgment respectively.

24.4.4 I do not think that what is stated in these statements could mean anything than to referring to the occupants of the bakkie as the people who fired shots. Otherwise, what would have been the point for taking down the registration number of the plaintiff's bakkie, if occupants were not meant to have been the people responsible for the shooting.

24.4.5 To suggest that all of these did not create a reasonable suspicion that the plaintiff was involved in the shooting, would in my view defeat one's sense of logic and common sense. Such reasonable suspicion in the present case should also be seen in the light of the conflicting statements that were made to Inspector Jacobs as indicated in paragraphs 22.1.8 and 22.1.9 above. The plaintiff, despite the fact that he took the witness stand, elected not to offer any explanation as to why he had initially lied to Inspector Jacobs. His exculpatory explanation should therefore be seen in the light of these conflicting versions.

24.4.6 Remember, reasonable suspicion requires no more than moving a reasonable man to form the suspicion that the arrestee has committed a first schedule offence. I am therefore satisfied that Inspector Jacobs correctly formed the view that the plaintiff was reasonably suspected of having been involved in the commission of the offence. The next issue is:

WHETHER INSPECTOR JACOBS HAD ANY DISCRETION NOT TO ARREST AFTER HAVING FOUND THAT REASONABLE SUSPICION OF COMMISSION OF A SCHEDULE 1 OFFENCE EXISTED?

25. Section 40(1)(b) entitles a police officer to arrest without a warrant any person reasonably suspected of having committed a schedule 1 offence. The issue is whether such a police officer has any other election to make, other than either to arrest without a warrant or to apply for a warrant seen in the light of the provisions of section 40.

25.1 The suggestions in *Louw's* case and *Gellman's* case *supra*, were that release on warning, notice or summons would be within a peace officer's discretion under section 40(1)(b). This was also the contention by counsel on behalf of the plaintiff in the instant case. I have very serious difficulties with this. Earlier in this judgment under paragraph 19.28 I referred to what was said in *Charles'* case *supra*.

25.2 I tend to agree with the sentiments expressed in *Charles'* case *supra*. But, I think one must take the sentiment a step further. Clear from the provisions of section 50, 54, 56, 57, 59, 59A and 60 of the Criminal Procedure Act, that the legislature was mindful in minimising the impact of an arrest and detention. Whilst it is said that an arrest without a warrant in terms of section 40, is a drastic means of initiating a prosecution or securing the accused's attendance in court, it is not only an arrest without a warrant, but any other arrest for that matter.

25.3 Arrest with or without a warrant infringes one's right to freedom of movement contrary to the provisions of section 21(a) of the Constitution. However, the legality of such an infringement is justified in terms of sections 40 and 39 of the Criminal Procedure Act. This justification in my view, should be read together with section 36 of the Constitution.

25.4 The legislature appears to make a distinction between minor offences, serious offences and more serious offences. For example, summons could be issued in terms of section 54. I do not think that the issue of summons under section 54 is meant for serious offences where there is sufficient evidence either to formulate a suspicion in terms of section 40 or where there is a *prima facie* case. Before I attempt to justify the thinking in this regard, in practice or generally, police officials when they are uncertain about whether or not an offence has been disclosed or committed, they submit a

docket to the prosecutor for a decision. If the prosecutor was to find that there was a *prima facie* case, he will then issue or cause summons to be issued in terms of section 54. It seldom happens that in a clear cut case, would a prosecutor be requested for a decision. Similarly it does not happen in practice that a person who is alleged to have committed a more serious offence, for example, murder or attempted murder and who is found or located at the spot or immediately thereafter, that instead of arresting such a person either because he is well known person or because he is a prominent figure or because his place of residence is known, he is not immediately arrested and brought to court. Instead, he or she is told to wait for the summons to be served on him after issue in terms of section 54: It could not have been the intention of the legislature. If this was to happen it would bring the administration of justice into a disrepute. Imagine a suspect in a murder case or attempted murder case who is not arrested at the scene or immediately thereafter. He is told to go home and wait for the summons: and only to appear in court on summons after fourteen days. This would be seen as mockery of justice by the ordinary members of our society and it would never have been intended by the legislature.

25.5 In terms of section 38 of the Criminal Procedure Act, methods of securing the attendance of an accused in court for the purpose of historical, shall be arrest, summons, written notice and indictment in accordance with relevant provisions of Act 51 of 1977.

25.6 Inasmuch as the police are authorised in terms of paragraph 3 (3)(a) of Police Standing Order (G) 341 to secure the attendance in court of a person by means of summons in terms of section 54, such a discretion should be seen in the context of what is intended by the legislature, for example, sections 59 and 59A of the Criminal Procedure Act. Similarly, it must be seen in the context of section 56 and 57.

25.6.1 Section 56 deals with a written warning by a police officer before appearance in court. The provisions of section 56(1) were referred to earlier in paragraph 19.2 of this judgment. Clear, from the provisions of this section that the legislature intended such a release on warning to apply to minor offences. For example, if a magistrate's court on convicting such a person would not impose a fine exceeding R2 500.00 which is the current amount determined by the Minister in the Gazette.

25.6.2 Section 57 deals with an admission of guilt and payment of fine without appearance in court. The provisions of section 57(1)(a) are stated in paragraph 19.3 of this judgment. The fine determined by the Minister is not exceeding R5 000.00. For example, traffic summons. Clear, that section 57 is not meant for serious offences.

25.6.2.1 I find it necessary to deal with the provisions of section 57(1) in context, seen in the light of the fact that it imposes a limitation on the admission of guilt fine that can be imposed by the prosecutor, and secondly seen in the light of the fact that it makes reference to summons issued in terms of section 54. It provides as follows –

> "**57. Admission of Guilt and payment of fine without appearance in court**
>
> *(1) Where –*
>
> *(a) Summons is issued against an accused under section 54 (in this section referred to as summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believe that a magistrate's court, on*

convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court; or

(b) a written notice under section 56 (in this

section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer."

25.6.2.2 Remember, section 56 deals with warning to appear in court for the first time as sanctioned by a police official. There is no question that such a warning is meant for minor offences. The issue of summons by the police or at the instance of the police, in terms of section 54, in my view, should therefore be seen in the context of the police restrictions in terms of section 56. But, not only in terms of such a restriction, but also the restriction to the prosecutor in terms of sections 57 and 59A. The police too, are also restricted in terms of section 59. The question is, why would such restrictions not be applicable to section 54 if it was intended

by the legislative to apply even to serious and or more serious offence? "*Any offence*" in section 54 should therefore be seen in context.

25.6.3 Section 59 deals with what is commonly referred to as a police bail. It is bail which is granted by the police to an arrested person before his or her first appearance in court. I have referred to the provisions of section 59(1) in paragraph 19.5 of this judgment. The fixing of bail and release of an arrested person is prohibited in terms of section 59 for offences falling under parts II and III of schedule 2. Attempted murder is a part II schedule 2 offence under Act 51 of 1977. Secondly, attempted murder carries a minimum sentence of five years under part IV schedule 2 of Act 105 of 1998, the so-called Minimum Sentence Act. It is therefore a serious offence.

25.6.4 The prohibition under section 59 raises another issue. That is, whether it could ever have been the intention of the legislature to allow issuing of summons under section 54 of the Criminal Procedure Act for attempted murder, but prohibits a police bail in terms of section 59(1) for such an offence? The fixing of bail and release of an arrested person can happen within a snap of time and with less invasion of one's right to freedom of

movement. It is on this basis that I further find that summons under section 54 or release on warning under section 56, could not have been intended to apply to serious offences in circumstances where section 40 relating to schedule 1 offences apply or where there is a *prima facie* case. This cannot be said to be a limitation not falling within the provisions of section 36 of the Constitution.

25.6.5 Similarly, with regard to section 59A the prosecutor is restricted to certain offences in fixing bail before an appearance in court. The prosecutor is entitled and after consultation with the police official in charge of the case, to fix bail, but only in respect of offences falling under schedule 7. These offences are, public violence, culpable homicide, bestiality, assault, involving the infliction of grievous bodily harm, arson, housebreaking, malicious damage to property, robbery other than robbery with aggravating circumstances if the amount involved in the offence does not exceed R20 000.00 theft and any offence referred to in section 264 (1)(a)(b) and (c), if the amount involved in the offence does not exceed R20 000.00, any offence relating to extortion, fraud, forgery or uttering if the amount of value involved in the offence does not exceed R20 000.00 and any conspiracy, incitement or attempt to commit any offence

referred to in schedule 7. I deal later in this judgment with the effect of failure to consult with the police at an early stage of the investigation insofar as it relates to the release of the suspect or withdrawal of the charges by a public prosecutor.

25.6.6 Invasion of a person's right to liberty or freedom to movement should be balanced against all necessary steps taken by the legislature under sections 50, 54, 56, 57, 57A, 59, 59A and 60. For as long as there is compliance hereof, it cannot be said any of the provisions of these sections including section 40 and 38 are unconstitutional. Having said this, I do not think that Inspector Jacobs having been found to have had reasonable suspicion that an offence falling under schedule I and schedule II part II of Act 51 of 1977, to wit attempted murder was committed, had any discretion to exercise under section 40, particularly having regard to the provisions of section 59(1), 57, 56 and 54 as discussed above. Even if I was to be wrong in this regard, another issue arises:

<u>WHETHER INSPECTOR JACOBS HAD PROPERLY EXERCISED A DISCRETION IN ARRESTING THE PLAINTIFF?</u>

26. BERTELSMANN J in *Louw's* case and also the Judge in *Gellman's* case *supra*, respectively appear to have been particularly worried about the

arrests by police officials without warrants. In my view, once a reasonable suspicion is established under section 40(1)(b), a defence of justification is proved. If a police officer has a discretion, having established reasonable suspicion, the *onus* then shifts to the one who alleges that the discretion was not properly exercised.

26.1 Counsel for the plaintiff sought to argue that factors mentioned in paragraph 4.1 to 4.13 of this judgment and not denied by the defendants, serve to establish on the balance of probabilities that the exercise of discretion in arresting the plaintiff instead of warning, summonsing or releasing him on bail, was unlawful and unconstitutional.

26.2 In paragraph 3 of the plaintiff's initial written heads of argument, the submission is made as follows:

> "*3.1 In the alternative to the aforesaid, and in the event that this Honourable Court finds that Inspector Jacobs had a reasonable suspicion as stated above, it is submitted that the arrest is unconstitutional and therefore unlawful on the following grounds:*
>
> *3.1.1 Inspector Jacobs had an obligation to consider the facts as set out in the plaintiff's reply.*

3.1.2 That a reasonable official in the position of Inspector Jacobs would, having regards to the facts produced by the plaintiff, would not have arrested the plaintiff and would have applied … … invasive measures to ensure that the plaintiff would stand his trial."

26.3 This contention appears to have been premised on the following: Firstly, that Inspector Jacobs had at his disposal other options to take than to arrest and detain the plaintiff. Other measures or options as I see it, could either have been to act in terms of section 54, 56 or 59. I have dealt with this aspect earlier in the judgment and I do not think that such options fell within the powers or discretion of Inspector Jacobs seen in the light of the seriousness of the offence. Secondly, the suggestion is that the discretion (if it does exist), was not properly exercised. The factors mentioned in paragraph 4.1 to 4.13 of this judgment and the contention made by counsel for the plaintiff in this regard, in my view, fails to take the following factors into consideration.

26.3.1 That the report was made to Inspector Jacobs and the docket was also handed over to him later that the evening.

26.3.2 That of importance for police was first to locate the bakkie and the occupants who were alleged to have committed the offence.

26.3.3 That it may have been difficult to find people to authorise and issue a warrant so late in the evening without putting the investigation at risk.

26.3.4 That when Inspector Jacobs arrived at the plaintiff's home and confronted the plaintiff he first gave a wrong version to the police. The issue is, how do you start to trust a person who had just lied to you that if not arrested, he will attend court? Remember, attempted murder is a serious offence, which justifies a minimum direct minimum imprisonment of five years. All factors which he mentioned as having favoured his release should therefore be seen in the light of this.

26.3.5 That a search was conducted and no exhibit was found or located. It was therefore of paramount importance to the police to still take all efforts to look for the firearm that was used in the commission of the offence.

26.3.6 It was late in the evening and therefore not possible or easy without undue delay to obtain the plaintiff's profile. That is, whether he had previous convictions or pending

cases. This of course is very important. A person alleged to have committed serious violent crime or crimes must first be checked in determining whether or not to release him. You would not want to release a person who might pose a threat to the society because of his or her proness to commit such crimes.

26.3.7 The plaintiff mentioned to the police a possible accomplice. The plaintiff had to direct the police where this person lived in Rustenburg. The suggestion was that this could have been done without having had to arrest the plaintiff. I find this suggestion to be unreal and unreasonable. Remember, the police were also looking for a firearm which they did not find at the home of the plaintiff. The suggestion is that the plaintiff should have been allowed to be on the loose and thus create the opportunity for the plaintiff and his accomplice to talk and conceal exhibit.

26.3.8 The accomplice's house in Rustenburg was searched and still no firearm was found. This in my view, would have necessitated the police to launch a serious search for the firearm during the day. The release of the plaintiff could not have been done without hampering the police investigation or putting such investigation at a risk.

27. In the light of all of the above, I am not satisfied that Inspector Jacobs exercised his discretion (if it existed) improperly in arresting and detaining the plaintiff. The plaintiff was arrested at about 01:05 on the morning of 14 January 2006. His first arrest and subsequent detention should be found to have been lawful and constitutional. I now turn to deal with the second arrest. In doing so, I find it necessary to deal with the conduct of the public prosecutor.

CONDUCT OF THE PUBLIC PROSECUTOR IN THE WITHDRAWAL OF THE CASE AGAINST THE PLAINTIFF

28. In the police investigation diary, marked as exhibit F during evidence, the public prosecutor made entries in Afrikaans as follow:

> "*SA bespreek met OB en lees dossier. A1 en A2 sê daar is een skoot geskiet, 'n persoon gewond. Geen vuurwapen gesien of waar die skoot van dan kom nie. dit is nie 'n geval van Road-rage nie. Die OB deel my dat huise gevisenteer is, geen wapen kan gevind word nie. Verdagtes het geen vuurwapens op stelsel nie. Dit is my submissie dat dit nie voldoende getuienis is om arrestasie te regverdig nie. Bring dossier op 17/01/06 na streekhofaanklaer (Thibedi) vir verdere opdragte of beslissing. Verdagtes vrygelaat voorlopig teruggetrek tot ondersoek voltooi is*."

29. The time when the entry was completed is indicated as 10h55. This entry was made at Britz police station. Based on this instruction by the public prosecutor, the arresting officer, Inspector Jacobs, was informed. Inspector Jacobs then told Fuchs to release the plaintiff as initiated by the public prosecutor.

30. Inspector Jacobs says the prosecutor took this decision without contacting him as the arresting officer. If he had been contacted, the circumstances under which the plaintiff was arrested would have been disclosed to him. Inspector Fuchs had since died and he could therefore not testify. The second arrest of the plaintiff was apparently executed by the late Fuchs on the instructions of his commander.

31. The public prosecutor in taking the decision as he or she did on 14 January 2006, relied on two statements marked in the docket as A1 and A2. I find it necessary to quote in full what is stated in these statements.

> " *STATEMENT A1*
>
> *1.*
>
> *On Friday 13/01/06 at about 21h20 I was travelling with my friend Patrick Simangahso Ngwenya and Gittrude Sibanda. We parked our motor vehicle at Bravo towing tavern to bought liquor. After I have bought that liquor I went back to the motor vehicle and sitted at the back sit together with my friend.*

2.

After a few minutes I saw the motor vehicle passing. I didn't suspected that car. After it had passed I heard the big sound, like firearm. I then realised that the car had shot me on my right leg. I then saw many gun shots on the right back door of the motor vehicle.

3.

We then followed that motor vehicle and managed to took the registration number: The number was white Corsa Bakkie Registration no FJS835NW with two white male. We followed the car until it parked at Cookenbull Pub and I was transported to Britz Hospital because I was bleeding on my right leg due to gun shots. I went to the police to investigate the matter because I did not gave them permission to shoot me."

31.1 In my view, it did not need a scientist to understand what is conveyed in the statement. Clear, from the statement that the witness meant this:

31.1.1 that she was in the car when she heard gunshots.

31.1.2 that these shots were fired immediately after the plaintiff's car had passed.

31.1.3 that the shots were coming from the plaintiff's vehicle. "*Realised that the car has shot me on my right leg*", could not have meant anything to a reasonable person other than to say shots were fired from the vehicle.

31.1.4 that there were two white male persons in the plaintiff's bakkie. Indeed as at the time, the prosecutor withdrew the charges, it was common cause that in the car that evening, it was only the plaintiff and his accomplice and that both of them were arrested when a decision to withdraw was taken.

31.1.5 that "*I did not give them permission to shoot me*" was referring to the two white male persons who were in the bakkie as described, that is, the plaintiff and his accomplice.

" *STATEMENT A2*

1.

On the 13 January 2006 at about 21h20 I parked motor vehicle at Bravo 24hrs towing tavern/café.

2.

I was with Mike my colleague, Sophy Ngobeni and Gittrude Sibanda. We decided to park there in order to buy food. My motor vehicle is Golf 2 silver grey in colour registration DWX060GP.

3.

Sophy and her friend Gittrude went inside the shop to buy some food and came back and get inside the vehicle at the back. I was outside the motor vehicle still talking to my friend Mike.

4.

While we were talking a white Corsa bakkie registration number FJS835NW with two people inside came along driving slowly. After it passes us I heard a sound like a sound of firearm. Then I was scared the bakkie was driving towards the direction of Britz.

5.

Then Sophy said to me that she was shot in the right leg near the ankle she was bleeding, then I immediately get into my motor vehicle with Mike and both Sophy and Gittrude and follow that bakkie.

6.

At the T-junction that motor vehicle turned left towards Cook & Bull pub and stopped just after Cook and Bull then I took the registration of that bakkie.

7.

Then I noticed that my motor vehicle was also shot at as it has some holes on the right back door. I don't know why those two white males were shooting at us I don't even know them.

8.

I wont be able to identify them because it was in the dark so I could not see the.

9.

I didn't give anyone permission to shoot at us and my motor vehicle. I request police investigation into this matter."

32. Clear from this statement that the witness is talking about the occupants of the plaintiff's bakkie as the people who had fired shots and also damaged his motor vehicle. During the evidence of Inspector Jacobs, he was referred to the photos of the vehicle which had several bullet holes caused by the shots fired at the witnesses' vehicle. Why would the public prosecutor find that the car which was followed and registration number taken was not sufficient to implicate the occupants thereof, defeats one sense of logic. Remember the plaintiff's vehicle passed the witness' vehicle slowly. Immediately thereafter there were shots. Clear, the chasing after the vehicle by the witness suggested that shots were fired from the vehicle. In paragraph 7 of the statement A2, the witness stated as follows:

"*I don't know why those two white males were shooting at us I don't even know them*." To suggest that there was no *prima facie* case in the light of this, in my view, is shocking. For reasons best known to the public prosecutor, he or she decided to rely only on statements A1 and A2. He apparently decided to have no regard to statement marked A3.

STATEMENT A3

34. This witness was with the two witnesses who had attested to statements A1 and A2 respectively. In her statement she stated as follows:

> "
> 1.
> *On the 13 January 2006 at about 21h20 Sandfontein Bravo 24hrs café/tavern to buy some food.*
>
> *2.*
> *I was with my friends Sophy, Mike and the driver Patrick Ngwenya. Sophy Ngwenya and myself went inside the shop to buy food. Then we came back while Mike and Patrick were talking to each other next to the motor vehicle.*
>
> *3.*
> *We got inside the motor vehicle at the back then I saw a white motor vehicle passing us driving slowly then I heard a banging sound like a sound of a gun.*
>
> *4.*

Then my friend Sophy said she was shot in the leg near the ankle she was bleeding. Patrick and Mike got immediately in the motor vehicle. That white Corsa bakkie stopped at a pub next to Cook and Bull then Patrick took the registration of the motor vehicle, and he said his motor vehicle was shot, because he showed us the holes on the right back door.

6.

I don't know those guys and I don't know why they were shooting at us. I require police investigation into the matter."

34.1 To say, "*A1 and A2 sê daar is een skoot geskiet*" smacks the prosecutor's attention and understanding of the information as contained in A1 and A2. Paragraph 7 of A2 quoted earlier in this judgment does not convey one shot as been fired. Similarly, in paragraph 2 of the statement A1 makes it clear that several shots were fired. There were about four people at the vehicle of the witness in A2. Several shots were fired at them. One hit the witness in A1. Clear that, there was attempted murder aimed at about four people. Therefore, four charges of attempted murder would have been justified. The car was also damaged.

34.2 "*Geen vuurwapen gesien of waar die skoot vandaan kom nie*." I fail to understand the prosecutor's thinking in this regard. The suggestion is that there was no case because a firearm was not seen by the witnesses. The question is, did they have to see a

firearm in order to convey that the shots were fired from the plaintiff's car? Of course not. "*Of waar die skoot vandaan kom nie*." This suggests that in A1 and A2, the witnesses stated that they did not know from where the shots were fired. Clear that the prosecutor was speculating in this regard, because none of the three witnesses stated that they did not see from where the shots were fired. All the three witnesses pointed at the occupants of the plaintiff's car as the people who had fired shots. In any event, if the prosecutor was in doubt in this regard, the least he could have done was to call for further statements from the witnesses instead of risking to withdraw such serious charges and to order for the release of the plaintiff and his accomplice. In all the three statements, that is, A1, A2 and A3, cell phone numbers are indicated. The prosecutor if he wanted to deal with the matter diligently, he could have contacted the witnesses without undue delay. He did not, instead, in my view, decided to take a short cut by withdrawing the charges. I deal later with the issue whether or not the prosecutor in question did have the power or authority to withdraw the charges at an infant stage of the police investigation.

34.3 "*Dit is nie 'n geval van Road Rage nie*." The issue whether or not the statements by the three witnesses established a *prima facie* case, has nothing to do with whether this was the case of a road rage or not. I fail to understand what of relevance this had in making the prosecutor to withdraw the charges. It is as if he withdrew the

charges because it was not an incident of a road rage and that therefore it was not serious.

34.4 In my view, "*OB deel my dat huise gevisenteer is, geen wapen kon gevind word nie*", made a strong case for further investigation and a case against the plaintiff's release and withdrawal of the charges. Remember, at 08h50 on 14 January 2006, the plaintiff was formally interviewed by the police. The plaintiff declined to make any statement to the police. Only about two hours after the interview, the prosecutor decided to withdraw the charges due to the supposed lack of sufficient evidence against the plaintiff, and his accomplice. Remember, the entry in the police's investigation document was completed or signed for at 10h55 by the public prosecutor.

34.5 "*Verdagtes het geen vuurwapen op stelsel nie*." This suggests that because the plaintiff and his accomplice did not have licence for firearms they therefore could not have shot at the witnesses as alleged. The fact that they did not lawfully own any firearm, could not have served as the basis to find that there was no *prima facie* case against them or to release them. Very often, those who commit crimes with firearms, use illegal firearms. For this reason, the prosecutor should have allowed the investigation to take its course unhindered.

34.6 "*Dit is my submissie dat dit nie voldoende getuienis is om arrestasie te regverdig nie*", sounds like the prosecutor was arguing for the

plaintiff. The arrest is one thing, and instituting prosecution is another thing. True, you may institute prosecution proceeding without arrest. But, it looks like "nie *voldoende getuienis is om arrestasie te regverdig nie*" was what really concerned the prosecutor than "*nie voldoende getuienis om vervolging uit te voer nie*". Of course the prosecutor could not have said this. There was, in my view, sufficient evidence to institute prosecution, but not only to prosecute, but also to arrest as indicated earlier in this judgment. One is tempted to conclude that the prosecutor in withdrawing the charges seems to have been motivated by two things. Firstly, he could not release the plaintiff on bail because an attempted murder charge is not a schedule 7 offence in respect of which he would have been entitled to fix bail as provided for in section 59A of the Criminal Procedure Act. Secondly, it was over the weekend and outside court hours and therefore no bail proceedings could have been instituted as such proceedings are prohibited in terms of section 50(6)(1)(b) of the Criminal Procedure Act.

34.7 "*Bring dossier op 17/1/2006 na Streekhofaanklaer (Thibedi) vir verdere opdragte of beslissing*", in my view, makes what I have mentioned above even more clearer. What instructions are there to be given by the Regional Court Public Prosecutor, because a decision has already been taken? Charges had already been withdrawn. He or she who had withdrawn the charges should have given further instructions and not to withdraw the charges and then

defer further decision to another public prosecutor. I find this to be strange indeed and defeats one's logic.

34.8 "*Verdagtes vrygelaat voorlopig teruggetrek tot ondersoek voltooi is*", particularly "*tot ondersoek voltooi is*", is a clear indication that the prosecutor was fully aware that investigation was still incomplete. Quite very often, in bail application for example, detention if an accused applying for bail is sanctioned pending completion of investigation, especially where there is a fear of destruction or … of evidence or exhibits or where statements are still expected to be taken from witnesses. Incompletion investigation, should have, contrary to what the public prosecutor did, served as the basis to go against the release of the plaintiff. Having said this, there is another issue which in my view is raised by the conduct of the prosecutor.

WHETHER THE PROSECUTOR HAD AUTHORITY TO WITHDRAW THE CHARGES AGAINST THE PLAINTIFF?

35. In paragraph 19.16 of this judgment, I referred to the provisions of section 6 of Act 51 of 1977. "*May before an accused pleads to a charge, withdraw that charge*" in section 6 can never have been intended to mean releasing a suspect and withdrawing the charges at an early stage of the police investigation. The issue here, as I see it, is whether a prosecutor can withdraw the charges against an accused, even before he or she is charged by the police or whether such withdrawal can be sanctioned at an infant stage of the police investigation? There was no evidence that the plaintiff was formally charged when the public prosecutor sought to have

withdrawn the charges against him. If the plaintiff was not charged, because the police were still investigating the case, there was nothing to withdraw.

35.1 Here, one must not confuse a person arresting and detaining a person for further investigation, with the charging of a person. In practice, a person is charged to enable the police to take that person to court. If the arrested person is not charged and is not taken to court within 48 hours he or she should be released. This was not the case in the instant case. If there was nothing to withdraw, the public prosecutor was not entitled to order the release of the plaintiff. The *onus* was therefore on the plaintiff, to prove that when he was released, he was formally charged. In my view, he has failed in discharging the *onus* in this regard. The interview that he had with Fuchs, without evidence, cannot be reckoned as a proof thereof.

35.2 Even if I was to be wrong in this regard, the public prosecutor should be seen to have wrongly cut through the police's domain of investigating a crime. A public prosecutor in my view, is not a *dominus litis* before the police had submitted a docket to him for prosecution and therefore he could not claim to have been a *dominis litis* by getting into the police station, barely some few hours after the arrest and after the police had just interviewed the suspect. At that stage, the police were still completely and exclusively in charge of the case, bearing in mind that it was a weekend, and therefore the prosecutor could not have instituted bail proceedings. Secondly, the

prosecutor could not have fixed bail, his powers thereto having been limited to offences in schedule 7. (See also paragraphs 19.10 to 19.15 of this judgment.) Very clear from these paragraphs that both in terms of the constitution and also for practical purpose, but even more importantly for efficiency and effectiveness in combating crimes, there has to be a distinct function between the prosecution and the police. At the same time co-operation should prevail. Crimes are investigated by the police. The prosecutors should institute the prosecution. That is, their core function is to prosecute crimes. It is the police who must effect arrest in terms of section 40 and not the public prosecutor. Once the police through the arresting officer have formed the view that there is a reasonable suspicion that a schedule 1 offence has been committed, they must effect arrest. The prosecutor ought to form the view whether to prosecute and not whether there is or was "*voldoende getuienis om die arrestasie te regverdig*".

35.3 The prosecutor who had withdrawn the charges against the plaintiff and ordered his release must have frustrated the police. Few hours after the plaintiff was released that morning, in the afternoon, he was arrested again. One can ask a question why? I find that the public prosecutor did not have the authority at all to withdraw the charges against the plaintiff and his release on 14 January 2006 was therefore wrongful. Even if I was to be wrong in this regard, the public prosecutor had in any event acted improperly, firstly in withdrawing the charges in the face of a *prima facie* case against the

plaintiff, and secondly, in meddling with the police investigation at its very early stage. On this alone, the plaintiff's first release should be found to have been wrongful. This then brings me to consider another issue.

WHETHER THE SECOND ARREST OF PLAINTIFF WAS LAWFUL?

36. The person who executed the plaintiff for the second time is late. Therefore, he could not testify. It was Inspector Fuchs. He acted on a command by his superior. His superior did not testify. Whilst the first release of the plaintiff has been found to have been wrongful or unlawful, the difficulty the defendants are having with regard to the second arrest is twofold. Firstly, the commander who gave instructions to the late Inspector Fuchs to arrest the plaintiff for the second time, did not testify. Whilst one might be tempted to suggest that the second arrest was out of the frustration and the police's failure to understand why the public prosecutor withdrew the charges, it would remain a speculation. The fact that the first release was unlawful would not validate the second arrest in the absence of evidence regarding the second arrest and in particular justifying why the warrant for the arrest of the plaintiff was not sought. Secondly, the defendant conceded that the second arrest was unlawful. It looks like, because of this concession, the defendants elected to lead no evidence regarding the circumstances under which the second arrest of the plaintiff was ordered. In my view, had evidence been led around this aspect, the defendants would have had a lesser burden seen in the light of the wrongful conduct of the public prosecutor in releasing the plaintiff.

Therefore, not much could be said about the second arrest. The defendants elected not to join issues with the plaintiff.

QUANTUM REGARDING THE SECOND ARREST

37. Although counsel for the plaintiff could not tell the court as to how much should actually be awarded to the plaintiff, I was furnished with a number of authorities dealing with this aspect. Not very easy task in determining general damages. In this case, the bulk of plaintiff's evidence revolved around his experience in the cell when he was locked in the morning of 14 January. He spoke about the robbery of his possessions whilst in the cell. His fear of being possibly raped. He spoke of the cell environment, the toilet and his general fear of the people in the cell which was dark.

38. He testified about how he was traumatised by the experience. For example, his first arrest in the middle of the night after his dog had barked. The arrest having taken place in the presence of his wife and his child. Since this arrest, he can no longer sleep properly and in fact since his arrest during the night, he cannot afford to sleep in the bedroom with his wife. This is so because everytime his dog barks in the evening, he wakes up and drives in the street. He sleeps in the sitting room and does not sleep with his wife, because he fears that the police might come from him at anytime in the evening.

39. Whilst I find this very strange, the trauma, however, appears to prompted or caused by the first arrest and subsequent detention thereof. Not very

much was said about the second arrest as being the cause of all this behaviour. Secondly, his detention after the second arrest was for very limited hours. Having been arrested at 14h50, he was released at 18h30.

40. The first arrest was not unlawful. It was executed without a warrant based on reasonable suspicion as contained in statements A1, A2 and A3 and also based on the plaintiff's statement which was proved to be wrong regarding his alleged alibi and the use of his bakkie. Having regard to all these factors, I do not think that anything in the region of R20 000.00 would be inappropriate.

REFERRAL OF THE MATTER TO THE DIRECTOR OF PUBLIC PROSECUTIONS

41. During the discussions both counsels were quizzed as to the basis on which the second arrest was said to have been unlawful. Other than to say it was executed without a warrant, I could not be told, what formed the basis for the arrest. When counsel for the defendants was questioned as to why no one was called to testify on behalf of the defendants, he indicated that he was acting on instructions regarding the second arrest, apparently despite his expressed view on the issue. He, however, holds the view that justice was not done to the victims of the crime. I share his view.

42. I am sure that the witnesses who had reported the matter to the police on the evening of 13 January 2006 and having been told that the occupants of the bakkie were arrested and released (if they were so told), must be wondering, wherever they are, as to what else they could have done to ensure prosecution of the plaintiff and his accomplice. This can only have served to bring the administration of justice into a disrepute.

43. It is very clear from the statements, that firstly, there is a language problem. The statements are not taken in good English. It appears from the particulars of the police official who took down the statements, that he or she is possibly an African. He is also a constable and in all probabilities not well experienced in the taking of statements. Secondly, the information contained in the statements, whilst establishing a *prima facie* case against the plaintiff, there might have been a need to retake a more detailed statements from the witnesses. This, the public prosecutor who withdrew the charges had failed to do, or to give such instructions.

44. It must have been clear to the public prosecutor that it is not uncommon that quite very often statements of witnesses taken by the police are not detailed and that to make a decision to withdraw charges and to order for the release of the suspects in the circumstances it was done, could have a devastating effect to the police investigation and subsequent possible prosecution.

45. Having said all of this, I find it necessary to refer this matter to the Director of Public Prosecutions, firstly to review or reconsider the decision of the

public prosecutor in withdrawing the charges against the plaintiff and his friend, secondly, to investigate whether the public prosecutor breached any of his powers and or obligations in dealing with this matter.

COSTS

46. Both parties have substantially succeeded in this matter. The bulk of the evidence both on merits and quantum revolved around the first arrest. The defendants have been found not to have acted unlawfully in arresting and detaining the plaintiff until his release was sanctioned by the public prosecutor. On the other hand, the defendants failed to justify the second arrest and detention thereof. Having regard to all of this, an appropriate order should be for each party to pay his or her own costs.

ORDER

47. I conclude by making the following order:

47.1 Judgment is hereby granted in the amount of R20 000.00 against the defendants in respect of the second arrest.

47.2 The claim against the defendants relating to the first arrest is hereby dismissed.

47.3 Each party to pay his or her costs.

47.4 The registrar of this court is directed to send a copy of this judgment to the office of the Director of Public Prosecutions, Pretoria with a directive to –

47.4.1 reconsider or review the decisions of the public prosecutor to withdraw the charges against the plaintiff and his friend on 14 January 2006;

47.4.2 investigate and/or consider whether the public prosecutor in withdrawing the charges against the plaintiff and his friend did not breach the prosecution policies, authorities and his obligations.

M F LEGODI
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on:	19 May 2009
For the Applicant:	Messrs Gerhard Wagenaar Attorneys, Pretoria
For the Respondents:	The State Attorney, Pretoria
Date of Judgment:	18 June 2009