IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO.~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~
(3) REVISED.
2014/11/20 .... 20/11/14
DATE **SIGNATURE**

CASE NO: 54019/2010

IN THE MATTER BETWEEN

REINHARD GUNTER MAX JAHN	1ST PLAINTIFF
RYNO VERMAAK	2ND PLAINTIFF

and

JOHANNES NICOLAAS VOSLOO	1ST DEFENDANT
MINISTER OF POLICE	2ND DEFENDANT
CONSTABLE NEDUVHULEDZA	3RD DEFENDANT

JUDGMENT

LEGODI, J

HEARD ON: 05-10 NOVEMBER 2014
JUDGMENT HANDED DOWN ON: 20/11/2014

[1] This is an action against the Minister of Police and Constable Neduvhuledza, the second and third defendants respectively. The first defendant is one Mr Johannes Nicolaas Vosloo. The first defendant laid a charge of theft at Elsburg Police Station against the first and second plaintiffs Messrs. Reinhard Gunter Max Jahn and Ryno Vermaak.

[2] When Mr Vosloo so laid the charge of theft against the plaintiffs, he had just been suspended from Eickhoff (PTY) Ltd (Eickhoff). He was employed there as a Financial Manager. He laid the charge at the police station on the 8 February 2010 being the date on which he was suspended.

[3] The first plaintiff was a Managing Director at the said Eickhoff (PTY) Ltd. The second plaintiff was a Production Manager and the second in charge of Eickhoff. They were both arrested on the 10 February 2010 and detained at the said police station. They were arrested and detained by the third defendant or at his instigation. They were released on the 12 February 2010 without having been charged and without having appeared in court, the prosecutor having declined to place the matter on the roll.

[4] On the 20 September 2010, the plaintiffs instituted the present proceedings. They claim in total, an amount of R666 365.95 to the first plaintiff and R591 365.95 to the second plaintiff. The amounts are respectively calculated as follows:

'***To the first plaintiff:***

Legal costs	=	*R 16 365.95*
General damages for unlawful arrest	=	*R250 000*
General damages for deprivation of freedom, suffering, discomfort, anguish, loss of reputation, honour and dignity	=	*R300 000*
Contumelia	=	*R100 000*

To the second plaintiff

Legal costs	=	*R 16 313-95*
General damages for unlawful arrest	=	*R250 000*
General damages for deprivation of freedom, suffering, discomfort, anguish,		

loss of reputation, honour and dignity	=	*R300 000*
Contumelia	=	*R 75 000'*

[5] The cause of action is framed in the particulars of claim as follows:

'4

On or about 10 February 2010 at the South African Police Services Elsburg, the First defendant wrongfully, intentionally, animo iniuriandi and maliciously set the law in motion by instigating a willfully false criminal charge of theft against the Plaintiffs with the South African Police Services pertaining to the dispatch on 30 November 2009 of a gearbox, well knowing that they had committed no such theft, and identified himself with the prosecutions and/or produced statements, without any reasonable or probable cause for so doing nor any honest or reasonable belief in the truth of such allegation, alternatively actuated by spite as a result of the fact that the First Plaintiff had on 9 February 2010 advised the First Defendant that he was suspended at his then place of employment, namely EICKHOFF (PTY) LTD.

5.

On 10 February 2010 the Third Defendant, acting as aforesaid, without any investigation or proper enquiry, prematurely and unnecessarily, given the personal particulars of the Plaintiffs and the nature and circumstances of the matter, unlawfully and maliciously alternatively unreasonably and/or at the instance of the First Defendant, arrested both the Plaintiff's without a warrant of arrest and more particularly:

5.1 arrested the First Plaintiff in public at his aforesaid place of employment at about 09h00 and thereafter escorted him in custody to the South African Police Elsburg;

5.2 arrested the Second Plaintiff at the South African Police Elsburg at approximately 12h00.

6.

In addition to and/or pursuant to and as a result of the aforegoing:

6.1 *the Third Defendant merely advised First Plaintiff that the reason for the arrest was theft, refusing and/or failing to provide any particulars of the alleged theft;*

6.2 *at the time of his arrest, the Third Defendant refused and/or failed to inform the First Plaintiff of his rights, adequately, completely or at all;*

6.3 *the First Plaintiff was escorted in custody to the South African Police Elsburg;*

6.4 *Second Plaintiff was unexpectedly but promptly arrested at the South African Police Elsburg when he arrived there at the request of the Third Defendant;*

6.5 *both plaintiffs were detained in the cells at the South African Police Elsburg from 10 February 2010 until 12 February 2010 by or at the instance of the First, Second and/or Third Defendant;*

6.6 *the Third Defendant refused and/or failed to allow or enable the Plaintiffs, or either of them, to be released on bail, apply for bail and/or bring a bail application prior to 12 February 2010, despite being informed on 10 February 2010 and on numerous occasions on both 10 and 11 February 2010 that the Plaintiffs were legally represented and that they wanted bail or to bring a bail application;*

6.7 *both Plaintiffs were escorted in custody from South African Police Elsburg to the Germinston Magistrate court and detained until their case was finalized.*

7.

7.1 *The criminal proceedings instigated by First Defendant terminated in favour of the plaintiffs when the public prosecutor at the Germinston*

Magistrate's Court on 12 February 2010 declined to prosecute them; and

7.2 the Plaintiffs were released from custody on 12 February 2010 at about 11h30.'

[6] I must immediately mention that the particulars of claim as indicated above are badly drafted. However, it is clear from paragraph 4 of the particulars of claim quoted above, that only the first defendant is sued for malicious prosecution. The police played no role in setting the law in motion against the plaintiffs. It was the defendant and only the defendant who did so. There is therefore no factual basis to seek any damages against the second and the defendants for malicious prosecution.

MALICIOUS PROCEEDINGS

[7] The cause of action for a claim for damages caused by malicious criminal or civil proceedings is the *action iniuriarum*. The plaintiff bears the onus in respect of all the elements of the delict including that of *animus iniuriandi*[1]. To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

'(a) the defendants set the law in motion, that is, they instigated or instituted the proceedings;

(b) the defendants acted without reasonable and probable cause;

(c) the defendants acted with malice or animo iniuriandi; and

(d) the prosecution has failed.[2]'

[8] The plaintiff must allege and prove that the defendant instigated the proceedings, or that he or she set the law in motion. That is, the defendant actually instigated or instituted them. The mere placing information or facts before the police, as a result of which proceedings are instituted, is insufficient[3]. On the other hand, an informer who

---

[1] Amler's Precedents of Pleadings at 273, see also
Van der Merwe v Strydom 1967 (3) ALL SA 281 (A) and
Rudolf v Minister of Safety and Security 2007 3 ALL SA 2010T.

[2] Amler's Precedents of Pleadings, see also *Lederman v Mohard Investments (PTY) Ltd* 1969 (1) ALL SA 297 (A), 1969 (1) SA 190 (A) 196-197.

[3] *Minister of Justice and Constitutional Development v Moleko* 2008 3 ALL SA 47 (SCA).

makes a statement to the police which is willfully false in a material respect instigated a prosecution and may be personally liable[4].

[9] The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable and probable cause. Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves both subjective and objective elements[5]

[10] Malice means *animus iniuriandi*. That is, intention to injure. Such intention might be inferred from facts of each case. The plaintiff must allege and prove that the proceedings were terminated in his or her favour[6].

[11] It is common cause that the first defendant, Mr Vosloo set the law in motion against the plaintiffs. Secondly, setting of law in motion terminated on the 12 February 2010 when the prosecution declined to place on the roll the case against the plaintiffs. He laid a charge of theft of a tractor gearbox against them. Background to the laying of the charge is necessary. On the 8 October 2009, Eickhoff purchased one gearbox RC30 for R2052.00 from Mnani Implements CC in Delmas. Mnani Implements CC issued an invoice to Eickhoff. On the 30 November 2009, the said gearbox was gearbox was removed from the premises Eickhoff by the first plaintiff who was the Managing Director of Eickhoff at the time.

[12] On the 1 December 2009 the first defendant in his capacity as Financial Manager of Eickhoff confronted the Managing Director about the removal of the gearbox the previous day. Mr Vosloo wanted to know from the first plaintiff as to why he removed the gearbox without permission or proper documentation. The first defendant was not satisfied with the explanation that the second plaintiff provided the first plaintiff with a waybill. A waybill is a document that is used for the recording of removal of things or stock from Eickhoff's premises.

[13] On the 8 December 2009, the removal of the gearbox aforesaid was discussed during the meeting of the management. The first defendant was not happy with the

---

[4] *Prinsloo v Newman* 1925 (2) ALL SA 89 (A), 1975 (1) SA 481 (A) 492.
[5] See *Prinslo supra* and Amler's Precedent of Pleadings at 274.
[6] Amler's Precedents of Pleadings at 274.

explanation. His own investigation allegedly revealed the involvement of the second plaintiff in the removal of the gearbox. On the 8 February 2010, the first defendant was suspended. On the same day, he laid a charge of theft at Elisburg police. Two statements were made. On the 10 February 2010, based on the statements, the police arrested and detained the plaintiffs. On the 12 February 2010 the prosecutor declined to place the matter on the roll and the two plaintiffs were released.

[14] Based on the statement deposed to on the 10 October 2009, is suggested that the first defendant had no reasonable and probable cause to belief that either of the plaintiffs stole the gearbox in question. This contention was denied by the first defendant for the following reasons:

14.1 The gearbox was loaded into the first plaintiff's car without documentation. The offence of theft was completed by the time the first plaintiff approached the exit gate and was refused exit. At that stage, he had no authorization to take the gearbox out of the Eickhoff's premises. The first defendant in his written heads of argument put it simply: '*Theft of the gearbox was committed the very moment when it was loaded into the vehicle without the transportation documents and sales invoice on the evening of the 30 November 2009'.*

14.2 The waybill issued after the first plaintiff was refused exit by the security, did not change the fact that attempts were made to leave the premises with a gearbox and without necessary documentation.

14.3 Inasmuch as the first plaintiff wanted to suggest that the gearbox belonged to his brother, the waybill in question was not issued to the customer as it should have been the case, but rather to the first plaintiff.

14.4 On the 18 November 2009 the first defendant in his capacity as the Financial Manager of Eickhoff introduced a computer system through which to control the movements of the assets of the Eickhoff. The system was intended to move away from the manual system like the waybill. The system introduced by him was not followed when the gearbox in question was removed.

[15] Having regard to all of the above, I understood the first defendant to contend that he had an honest belief founded on reasonable grounds that the institution of proceedings was justified. The concept is both subjective and objective. In other words, did he honestly believe that the offence of theft was committed? Did he have reasonable and probable cause that such an offence has been committed by the plaintiffs?

[16] On the date in question, the first plaintiff approached the second plaintiff. He arranged with the second plaintiff to have the gearbox loaded in his vehicle. The second plaintiff asked other employees of Eickhoff to load the gearbox into the first plaintiff's vehicle. It is a known policy that no one removes anything from the premises of Eickhoff without necessary documentation. The security at the gate has specific instructions to search every vehicle and not allow any person to take out anything belonging to Eickhoff without necessary authorization or documentation. The gear box purchased by Eickhoff in Delmas belonged to Eickhoff, so the first defendant believed; and in my view, correctly so.

[17] However, neither of the plaintiffs ensured that there were necessary documentations before the gearbox was loaded and before the first plaintiff sought to exit the premises. The suggestion was that both of them forgot about the documentation. A worrying factor is that the gearbox's destination was according to the first plaintiff, to his brother. Coincidentally this happened to be in respect of a gearbox for which no papers were available when the first plaintiff was stopped at the gate and searched by the security.

[18] The other worrying factor in the whole episode is that on the 9 December 2009, after the meeting of the 8 December 2009, a tax invoice in respect of gearbox RC30 was issued. Whilst the plaintiffs sought to suggest that it was issued by the first defendant, there was no evidence to this effect. The first defendant denied that he had generated the invoice. It is a computerized tax invoice. It is issued to 'C.O.D CASH SALE'. The email address reflected on the invoice is said to be that of the first defendant. It was therefore suggested that it was generated by him. This was denied by the first defendant. Preparation and generation of such an invoice needed technical skills and he possessed no such skills. He is not a technician. He is an accountant having

acquired the following degrees: B.Com (Hons) and M.Com. The invoice in question could only have been prepared by a technician, so the first defendant contended.

[19] The plaintiffs sought to give an explanation regarding the content of the invoice. It is a combined invoice that included the gearbox RC30 purchased by Eickhoff from Delmas and repairs work for the other gearbox that was allegedly brought by the first plaintiff's brother before the 30 November 2009. The latter gearbox was too expensive to repair, so was the plaintiffs' version. That was when the other gearbox was 'cheaply' bought in Delmas. The sales invoice that was issued on the 9 December 2009 allegedly for two gearboxes was for the amount of R3862-32 inclusive of VAT.

[20] The first defendant questioned the invoice. According to him it did not include the gearbox allegedly brought in for repairs by the first plaintiff's brother. It is an invoice in respect of the gearbox purchased from Delmas. It is addressed to no specific customer. As indicated earlier in this judgment, it is addressed to: 'C.O.D CASH SALE'. This would mean cash on delivery. However, no cash was made on the 30 November 2009 when the gearbox was removed and delivered to the first plaintiff's brother.

[21] After the 9 December 2009 the first defendant obtained statements from other employees which according to him pointed to the impropriety in the removal of the gearbox on the 30 November 2009 from the premises of Eickhoff. All of these led him to lay a charge of theft when he was suspended on the 8 February 2010. This was after he had completed his investigation, amongst others, having interviewed and obtained statements from other employees of Eickhoff.

[22] The time of the laying of the charge raises eyebrows. But that is not the issue. The issue is whether when he so laid the charges, he reasonably and probably believed that there were grounds to suspect that an offence of theft has been committed by the plaintiffs. In other words, the plaintiffs must first allege and prove that when the first defendant so laid charges of theft against them, he had no reasonable and probable cause, meaning, he did not have an honest belief founded on reasonable grounds that the plaintiffs stole the gearbox.

[23] When the gearbox was loaded in the boot of the first plaintiff's vehicle, without necessary paperwork, and the first plaintiff was about to exit the premises when stopped

by the security, that must have established a reasonable and probable cause in the mind of the first defendant to honestly believe that an offence of theft was committed. It is almost like, removing an article from Supermarket's shelve, put it in the bag, pass the tills, and when confronted by the security at the exit, allege that, 'I forgot to pay'. According to the first defendant, if it was not for the alertness of the security at the gate, in all probability, no one would have known about the removal of the gearbox, except those involved in the removal. Issuing of the sales invoice on 9 December 2009, in my view, did not make the situation better to alleviate the belief, neither did the confrontation on the 1 December 2009. This emerged from questioning of the first plaintiff by the first defendant.

[24] For the plaintiffs to succeed in this case, they must show that the first defendant falsely, maliciously and or with intend to injure, laid a charge of theft against them. The plaintiffs have failed to discharge the onus resting on them. The first defendant is found not to have maliciously set the law in motion against the plaintiffs. Finding in favor of the first defendant on the malicious prosecution brings to an end the plaintiffs' case on the malicious prosecution claim against the other defendants. In now turn to deal with the other cause of action.

ARREST

[25] The plaintiffs were arrested on the 10 February 2010 without a warrant. Section 40(1)(b) of the Criminal Procedure Act provides that a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule I, other than the offence of escaping from lawful custody. The offence of theft is a Schedule I offence. Therefore the jurisdictional fact of having arrested the plaintiffs without a warrant has been met.

[26] The lawfulness or otherwise of the arrest and detention was challenged on the basis that the police did not have a reasonable suspicion that the plaintiffs committed an offence of theft of a gearbox. The test is objective[7]. Accordingly, the circumstances giving rise to the suspicion must be such as would accordingly move a reasonable man to form the suspicion that the suspect has committed a Schedule I offence. In order to

[7] *MVU v Minister of Safety and Security & Another* 2009 (2) SACR 29 (GSJ) at 9, *Minister of Safety and Security v Swart* 2012 (2) SACR 226 (SCA) at 20.

ascertain whether a suspicion that a Schedule I offence has been committed is reasonable, there must obviously be an investigation into the essentials relevant to each particular offence[8].

[27] In *Duncan v Minister of Law and Order*[9] the court found that the word "suspicion" implied an absence of certainty or adequate proof. Thus a suspicion might be reasonable even if there is insufficient evidence for a prima facie case against the suspect. And indeed because of the element of uncertainty inherent in the concept of 'suspicion,' 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 question[10]. The underlining is my emphasis.

[28] In general, the person effecting arrest is also the person who must harbor 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 the arrest and who must have reasonable suspicion[11]. In the same vein, it may be argued that a police officer who orders one of his subordinates to effect an arrest, is actually the person who takes the suspect into custody, although the subordinate is the person who physically complies with the requirements of the arrest. Then, it is also the officer who must harbor the reasonable suspicion[12]

[29] In *Ralekwa v Minister of Safety and Security*[13] the court conducted its examination into the lawfulness of an arrest against the backdrop of the Constitution. It held that section 40 provides no protection to a police officer who did not from his own suspicion, but relied on the opinion as something else[14].

[30] A peace officer who relies on section 40(1)(b) has to prove the jurisdictional fact in the section. Once the facts are present, the discretion whether or not to arrest arises. When arrest is effected, it must be on the basis that the arresting officer wishes to bring

---

[8] *Ramakulukusha v Commander Venda National Force* 1989 (2) SA 813 (V) 836G- 837B.
[9] 1984 (3) SA 460 T
[10] See *Duncan* supra at 465-6
[11] Minister of Justice v Ndala 1956 (2) SA 777 (T) at 780.
[12] *Bhika v Minister of Justice and Another* 1965 (4) SA 399 (W) 400G.
[13] 2004(1) SACR 131 T
[14] See *Bhika* supra paras 11 and 12 on 135 D-I and para 14 on 136 G

the suspect to justice. If the arresting officer has the intention to bring the arrested person to justice, the validity of the arrest will not be affected because he or she had other motives as well, for example, to conduct further investigation to either confirm or dispel the suspicion required in section 40(1)(b)[15].

[31] Once the jurisdictional fact of the existence of the reasonable suspicion is proved by the defendant, the arrest is brought within the ambit of the enabling legislation; and thus justified. If it is alleged that his suspicion was improperly formed, it is for the party who makes the allegation to prove it. There is no reason to deviate from the general rule that a party who attacks the exercise of discretion where jurisdictional facts are present, bears the onus of proof[16].

[32] The third defendant received the docket on the morning of the 10 February 2010. There was a statement by the complainant, that is, the first defendant. The handwriting was not legible. He was not able to make head and tail. Facts were not properly articulated. He then decided to contact the first defendant. Statement was re-taken. He was with Warrant Officer Mohale. Thereafter, the two of them went to Eickhoff's premises. The first plaintiff was arrested. Later that day, the second plaintiff brought himself to the police station. He was also arrested. The plaintiffs were interviewed. They both declined to make statements. That was on the 10 February 2010.

[33] The arrest was based on the two statements made by the first defendant, although the first statement did not form part of the bundle of documents. The first statement had since disappeared after the third defendant had left it in the office. For the determination of the issue under consideration, the statement marked in these proceedings as exhibit S, and made by the first defendant, is very important. In the statement, the first defendant states that he is employed by Eickhoff as a financial manager. On 1 December 2009 he was informed by the head of the security that a gearbox was removed from the premises the previous night and without any permission, without a waybill or necessary dispatch documents. The first plaintiff was the person who removed the gearbox from the company premises. The gearbox was loaded in the first plaintiff's vehicle. It was contrary to company's rules to use own vehicle to remove or dispatch any stock or asset of the company from its premises. It was also not the first

---

[15] Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 SCA at paras 29 to 31.
[16] See *Sekhoto* supra at paras 45 to 49

plaintiff's job to remove from the premises and deliver any stock or asset to customers. On the 1 December 2009, the first defendant decided to confront the first plaintiff. The first plaintiff responded by saying that the waybill was issued by the second plaintiff after the security refused to allow the first plaintiff to leave the premises with the gearbox. Further the plaintiff indicated that they were assembling the said gearbox for his brother.

[34] When the first plaintiff was questioned why he bridged the company's procedure by taking out the gearbox for his brother without the sales invoice delivery note, the first plaintiff could not give a reasonable answer. The first defendant told the firs plaintiff to bring back the gearbox to the financial department for invoicing. That did not happen. The gearbox was removed to an unknown destination as indicated on the waybill which was issued by the second plaintiff after the security had refused the first plaintiff to leave with the gearbox. On the 8 December 2009 the incident was raised again at the management meeting. He again questioned the first plaintiff why he removed the gearbox contrary to the company's policy. To this, the first plaintiff denied. On his investigation, he discovered that the second plaintiff was also involved in the removal of the gearbox.

[35] The first defendant further in the statement to the police stated:

> *"The gearbox that was stolen is valued approximately about R30 000. The suspects are known to me as Jahn and Mr Vermaak. The company policy did not give anyone permission to remove any company property without proper documentation or invoices. I request police investigation in this matter as I have attached the necessary documentation that can be used as evidence.*
>
> *On the company we have three drivers who are doing deliveries so what Mr Jahn did is theft, he is not allowed to use his vehicle to deliver items with it, and it is the duty of three drivers to deliver, not Mr Jahn. Mr Jahn and Vermaak are the two who steal (sic) the gearbox at the Company as they helped each other to load into Jahn's car.*
>
> *I confirmed that I have photos of John's vehicle loading the gearbox when he was stopped by the security, when security ask (sic), for invoices there was nothing on him no documentation or invoices with him he parked his*

motor vehicle and went back to the company and organize a slip which is slip 10252. No address were (sic) the gearbox to be delivered to. This slip was just done so that the gearbox can be out of the company, they did not follow the Company procedure ..."

[36] The slip 10252 is the waybill mentioned earlier in this judgment. Counsel for the plaintiffs took swipe at the statement. The contention being that it was contradictory and secondly that it is also based on hearsay evidence. The police could not have formed reasonable suspicion that a schedule 1 offence of theft has been committed based on the statement, so it was contained. The hearsay evidence refers to the statement that the head of security informed the first defendant that the first plaintiff removed the gearbox 'without any permission, without a waybill or necessary dispatch document'. That might be so, but such a statement must be considered in the context of the whole document. Firstly, 'without waybill' is clarified in the statement. It was only obtained after the first plaintiff was refused exit. Secondly, it is not in dispute that the gearbox was loaded in the first plaintiff's vehicle without necessary documentation. Lastly, and most importantly, the bulk of the statement is about the first defendant's personal knowledge and what he did after he had received the information about the events of the 30 November 2009. The bulk of the statement is not based on hearsay.

[37] The contention that the police should have obtained the statement of the security person who was involved with the first plaintiff before taking the drastic decision to arrest the plaintiffs, in view, has no merits. I do not see how the statement of the security person could have assisted. In his statement; and of relevance is stated:

"What Mr Reinhard did he turn (sic) back into the Company at the workshop and came with another man who wrote the waybill, waybill no. 10252. As the security measure I gave Mr Reinhard the top copy of the waybill and he wanted to take both waybill slip which was sign by other white man. I told him to leave the control with me but he refused he take (sic) both the original and the copy.

I only left with the invoice 10252. As he did that I did notice that there is something he is hiding why he is taking both slip and the copy. Is then I reported this matter to my supervisor about the situation and my

supervisor take (sic) up the matter and reported it to Mr Vosloo is then Mr Vosloo confirm (sic) which mean they steal (sic) that gearbox why they refuse (sic) me to take the copy of the control".

[38] The statement is not favourable to the plaintiffs. In my view, is doubtful that it would have changed the third defendant's decision to arrest the plaintiffs, had it have been obtained before the arrest. Secondly, the statement repeats material facts already stated in the statement of the first defendant.

[39] The test again, is whether the third defendant had reasonable grounds to arrest. In other words, whether reasonable grounds existed that the plaintiffs committed the offence of theft. Put differently, the circumstances of the case are such that they give rise to the suspicion that would accordingly have moved a reasonable man to form a suspicion that the plaintiffs have committed an offence of theft. I am satisfied that such grounds based on the first defendant statement were established. The arrest was therefore not unlawful.

[40] Inasmuch as it was suggested that whoever arrested the second plaintiff had no reasonable grounds to do so as required in section 40(1)(b) of the Criminal Procedure Act, is important to mention that Warrant Officer Mohale is the police official who ordered for the detention of the second plaintiff. At all material times he was with the investigating officer, the third defendant. Warrant officer Mohale was aware of the contents of the statement by the first defendant. He was present when the first plaintiff was arrested. They were later contacted and told that the second plaintiff was at the police station. They proceeded to the police station. As the third defendant was busy parking the vehicle, warrant officer Mohale proceeded to the charge office to attend to the second plaintiff. He ordered for his detention based on the information which was at his disposal, in particular, the statement by the first defendant. He was therefore in the same position as the third defendant was regarding reasonable grounds to believe that a Schedule 1 offence has been committed by both plaintiffs. I now turn to deal with the other issue.

DETENTION

[41] The first plaintiff was detained at 09h50 on the 10 February 2010. That is, immediately after his arrest. The second plaintiff was detained at 11h57 upon his arrival at the police station. Both of them were told of theft of a gearbox being a charge against them. They were later on that day interviewed. During the interview they elected to exercise their rights to remain silent. Similarly, in their warning statements they elected to remain silent. They were seen by an attorney on the same day. Still they elected to make no statement. All of these are relevant to their continued detention.

[42] Perhaps before dealing with the detention as a whole, it is important to mention that if their arrest is lawful, I cannot see why their detention can be unlawful in the circumstances of the case. The contention as understood it, was that the detention was unlawful, because the arrest was unlawful. I have already made a finding that the jurisdictional factors for lawful arrest were met.

[43] The plaintiffs might have wanted to suggest that the police did not properly exercise their discretion in detaining the plaintiffs. The test and proof was discussed earlier in paragraphs 30 and 31 of this judgment. As understood, the contention was that the third defendant made it impossible to have the plaintiffs released earlier than 12 February 2010. The suggestion was based on the evidence of Advocate Van Vuuren. He was briefed very late on the afternoon of the 10 February 2010. He tried to launch an urgent bail application in the High Court. Having spoken to the Judge on the urgent roll, the bail application was not pursued. Advocate Van Vuuren was not sure if he had spoken to the investigating officer on the 10 February 2010. But certainly, he spoke to him on the morning of the 11 February 2010. The third defendant was still having one statement to obtain from a witness. He suggested that they can discuss the issue of bail as soon as the statement is obtained apparently from the security person who dealt with the first plaintiff on the 30 November 2009.

[44] Later in the course of the day on the 11 February 2010, Advocate Van Vuuren tried to get hold of the third defendant but without success. He then visited the prosecutor. He too could not get hold of the first defendant. The phone rang but there was no response. This was seen as refusal on the part of the third defendant to bring the plaintiffs to court for bail application. The conduct was seen as having constituted unlawful detention of the plaintiffs'.

[45] The third defendant had an explanation. That morning he was scheduled to give evidence in the bail application concerning another case. He put his phone on silent. He forgot to put it on loud when he went out of court. But he was really not sure whether he had actually put his phone off or on silent. He realized later that day that he had missed calls. He however, did speak to Adv. Van Vuuren very late that day. His evidence was further that late in the afternoon of the 11 February 2010, he obtained the statement from the security personnel one Mr Nyathi. He also completed a bail information form which is meant for the prosecutor. In the form he indicated that he did not have an objection to the release of the plaintiffs on a bail of R1000 each. It is also recorded in the form that the investigation was completed.

[46] The gist of the contention was that the investigating officer, that is, the third defendant acted *mala fide* in making it impossible for the plaintiffs to apply for their release earlier than the 12 February 2010. They could have been brought earlier to court and could have been released on bail. The prosecutor could have fixed bail, so the contention went. I cannot agree with the contention. The plaintiffs in the first place elected not to play open cards with the police. The moment they were told of the charge against them, they had a choice. They could have confided in the police and told them everything they knew about the gearbox or they could have decided to exercise their rights to remain silent. They could even have told the police that the first defendant was on suspension. Instead they elected not to tell the police anything. True, they were entitled to exercise their rights to remain silent as they did. But, for the purpose of early release from detention, they owed it to themselves to disclose all what they knew about the gearbox. For example, when the first plaintiff was asked in court if he knew anything about the gearbox when it was brought to his attention by the police, he responded by saying he knew everything about the gearbox. But yet, he said nothing to the police until released on the 12 February 2010.

[47] The only time the first plaintiff gave his side of the story was in an affidavit deposed to by him on the 5 February 2011, long after he was released. He made the statement because the first defendant persistently wanted to know why the matter was 'declined' from the roll by the prosecutor. Subsequent to the affidavit aforesaid and apparently on the insistence of the first defendant why the matter could not be prosecuted, ultimately on the 23 February 2011, the prosecutor issued a *nolle prosecqui*

certificate. Further, on the 19 May 2011, the prosecutor remarked in the Police Investigation Diary as follows:

> *"Further representations by the complainant have been considered. The decision still remains. The matter is refused from the roll. Furthermore, the company has indicated through its CEO that it supports the suspects in this matter and that they do not want to pursue this matter'.*

[48] Just as a brief background for whatever is worth, although the plaintiffs were taken to court on the 12 February 2010, they never appeared in court. Instead, the prosecutor recorded in the Police Investigation Diary as follows:

> *"(1) Obtain written representations from both suspects and their witnesses and submit the docket for decision. The matter is declined from the roll at this point".*

[49] It appears from this statement that the plaintiffs' legal representatives must have made oral representations to the prosecutor. Whether the decision to decline to prosecute or to place the matter on the roll, was correctly made, is not for this court to decide. However, refusal to prosecute in the circumstances of the case, cannot be used as the basis to construe the institution of the theft charge against the plaintiffs, their arrest and subsequent detention as not having been based on reasonable suspicion. I have already made a finding that such a suspicion existed.

[50] Inasmuch as it was also suggested that the prosecutor could have fixed bail had the police co-operated, it is necessary to deal with the contention. The first defendant in his statement estimated the value of the 'stolen gearbox' at R30 000. Prosecutor authorized thereto may in terms of section 59A of the Criminal Procedure Act and in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorize the release of an accused on bail. Theft in respect of which the value is R30 000 does not fall under Schedule 7. The police were never told by the plaintiffs that the value of the gearbox in question was in the region of R 3000-00 as suggested during evidence. The first plaintiff saw on the cover of the docket that the value was given as R30 000. Yet, he decided not to tell the police more about the gearbox and to specifically contest the estimated value of R30 000. The police

could not have acted on their own to determine the value of the gearbox to bring it within the discretion of the prosecutor to grant bail as envisaged in section 59A.

[51] Remember, once the jurisdictional facts under section 40 (1) (b) are met, discretion arises whether to arrest and detain. Again, the object of arrest is to bring an arrested person before court, to be charged, tried and either convicted or acquitted. The decision to arrest must be based on the intention to bring the arrested person to justice. The general rule is that a party who attacks an exercise of discretion where jurisdictional facts are met, bears the onus of proof. The plaintiffs have failed to prove that the detention of the plaintiffs was improper exercise of discretion.

[52] Consequently the plaintiffs' action is hereby dismissed with costs.

MF LEGODI

JUDGE OF THE HIGH COURT, GAUTENG DIVISION

For the 1st & 2nd Applicants:	**Adv P W SPRINGVELDT**
Instructed by:	**SPRINGVELDT ATTORENYS** **c/o B CEYLON ATTORNEYS** Montana Forum Building Suite 4, Ground Floor PRETORIA, REF: YS/CV 495 TEL: 012 684 0607
For the First Respondent:	**Mr Vosloo JN** (In person)
For the 2nd & 3rd Respondents:	**Adv. B Minaar**
Instructed by:	**THE STATE ATTORNEY** Ground Floor, Salu Building Corner Andries & Schoeman Street PRETORIA REF: B MINAAR/5855/2010/Z59