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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NUMBER: 481/2016

DATE HEARD: 20/08/2018-23/08/2018

DATE DELIVERED: 18/09/2018

In the matter between:

S V

FIRST PLAINTIFF

E V

SECOND PLAINTIFF

D B

THIRD PLAINTIFF

M D

FOURTH PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

NAIDU AJ:-

INTRODUCTION:

[1] This is an action for damages wherein which the plaintiffs seek damages arising out of their alleged unlawful arrest and detention by employees of the defendant being members of the South African Police Service.

BACKGROUND

[2] It is common cause that on the late evening of the 14th November 2014 and into the early hours of 15th November 2014, and at or near Maduna and Rosedale Streets, Rosedale, Uitenhage, the plaintiffs were arrested by members of the South African Police Services and later detained in pursuance of such arrest.

[3] The third plaintiff was detained at the Kamesh Police Station from the early hours of the Saturday the 15th November 2014, until his release from detention at the Uitenhage magistrate's Courts on the Monday morning of the 17th November 2014.

[4] The first plaintiff was detained at the Uitenhage Police Station at Church Street, Uitenhage, and was released into the care of his mother, one *Mrs Meyer* a few hours later on the 15th November 2014.

[5] It is submitted on behalf of the plaintiffs that their arrest and detention was wrongful and unlawful.

[6] The defendant submits that the members of the South African Police Services, who effected the arrest, were acting in terms of section 40(1) of the Criminal Procedure Act 51 of 1977, in that the plaintiffs had been suspected in the commission of a crime, and that their subsequent arrest and detention was lawful.

THE PLAINTIFFS CASE

THE THIRD PLAINTIFF'S CASE- D B:

[7] The Third Plaintiff, *Mr D B* testified that at the time of the incident, he was 18 years old.

[8] He submitted that on or about the late evening of the 14th November 2014, and proceeding into the early hours of the following morning being the 15th November 2014, he and the fourth defendant were on their way to *Rina's Tavern*, in 24th Avenue, Rosedale, Uitenhage. On the way to the tavern, they met the first and second plaintiffs who requested them to wait with them as they were looking after a car. The first and second plaintiffs are known to him as they all reside in the same area.

[9] *Mr B* confirmed that the vehicle which was being cared for by the first and second plaintiffs was a "Red Fox". The first plaintiff had advised them that the owner of the vehicle had gone to obtain fuel for the vehicle and had requested him and his brother, the second plaintiff, to look after the vehicle whilst he obtained such fuel.

[10] He submits further that he and his fellow plaintiff's waited for about one and a half hours when they decided to remove the battery of the vehicle and other valuables they could find in the vehicle for safe keeping as the driver of the vehicle had not returned. The fourth plaintiff opened the bonnet of the car from the inside of the vehicle. The third plaintiff then removed the attachments of the battery and removed the battery, and handed over same for the second plaintiff to carry. *Mr B* confirmed that it was the group's intention to take the battery to the home of the first and second plaintiff for safe keeping.

[11] Whilst on their way to the second plaintiff's home, and when they were approximately ten meters away from the vehicle, they saw members of the South African Police Services approach them. *Mr B* then submitted that the group of their own accord and volition, approached the police persons in the vehicle. He confirmed that three police members were present, a black male officer, a coloured male officer, and a coloured female officer. They then approached the police officers and advised them as to the circumstances of them carrying the battery. It was the second plaintiff that attempted to inveigle the police officers as to the seemingly innocent circumstances of their possession of the battery, however his assiduous attempts were seemingly brushed aside by the police officers, who advised the group that it appeared that they were up to no good.

[12] *Mr B* submitted further, that being unswayed by the explanation of the second plaintiff, one of the police officers, the black male officer, then slapped the second plaintiff. They were then advised that they were all being arrested for the theft of the battery. They were placed in the back of a demarcated police van. They were not taken immediately to a police station, but the police officers drove around for about half an hour, before they were taken to the Kamesh Police Station.

[13] At the Kamesh Police Station, they were all taken into a room, where they were questioned by a police officer. They were requested to provide their names and addresses, which they did. The police officer then took him and the second and fourth plaintiffs to the cells, where they were detained.

[14] *Mr B* then testified that there were three to four other men in the cells, who summarily searched them upon their entrance into the cell, and were questioned whether they had any monies on them. The third plaintiff confirms that he was scared and felt bad. He testified further that the men in the cell looked rough and had tattoos depicting them to be affiliated to the “26” gang.

[15] Regarding the conditions inside the cell, the third plaintiff submitted that the mattresses were thin and the blankets were infested with fleas. He further confirms having received visits from his parents over the particular weekend.

[16] On the morning of the 17th November 2014, he was taken to the Uitenhage magistrate's court, where the charges against him and his fellow plaintiffs were withdrawn.

[17] Under cross examination by *Ms Ntsepe*, for the defendant, *Mr B* admitted, that his fellow plaintiffs never actually advised him as to the identity of the owner of the vehicle. He further admitted that he had agreed to assist the first and second plaintiffs in removing valuables from the vehicle, including the battery. It would appear that the battery was the only object of value.

[18] It was also put to *Mr B* that various versions of how he and his fellow plaintiffs came to be in possession of the battery, were given to the police officers present at the scene. *Mr B* denied this and confirmed that only a single version had been conveyed to the police officers.

[19] *Mr B* further confirmed that when the police officers had requested details as to the identity of the owner of the vehicle, the second plaintiff, *E V*, the brother of the first plaintiff gave the nickname of the owner to the police. *Mr B* conceded he was unable to provide the name and home details of the owner of the vehicle. He further replied in the affirmative to *Ms Ntsepe's* submission that the police officers at the scene could not take them to the address of the owner as none of the plaintiffs were able to provide such details.

[20] *Mr B* also conceded that it would appear suspicious that they were unable to provide details of the owner of the vehicle. He also confirmed that his rights were explained to him upon his arrest by the police.

[21] *Mr B* further admitted that at his court appearance, he and his fellow plaintiffs had entered into a mediation agreement with the State, that he was part of the negotiations. He further admitted that according to the mediation agreement there was no indication that the owner of the vehicle had consented to them removing the battery, or to look after same.

[22] It was further put to *Mr B* that at no stage did he convey his version of events on record, in terms of his warning statement. The witness conceded that this was indeed so.

THE FIRST PLAINTIFF'S CASE- S V:

[23] The first plaintiff confirmed that at the time of the incident he was 17 years old and that he was residing with his mother and two brothers, *E and D*, at [...] P. Street, Rosedale, Uitenhage.

[24] The first plaintiff submitted that on the evening of his arrest, he and his brother *E V*, being the second plaintiff herein, had decided to attend upon *Rina's Tavern*, in order to consume alcohol. They had proceeded to walk to the tavern, when they came across a vehicle that appeared to be stuck. The vehicle was described as being a "Red Fox". The driver of the vehicle was sitting in the vehicle and when he saw them, he got out and summarily requested them to look after the vehicle.

[25] The driver of the vehicle had requested them to look after the vehicle as he intended to purchase fuel for the vehicle.

[26] The first plaintiff confirmed that he and his brother had waited at the aforesaid vehicle for more than a half hour when the third and fourth plaintiffs arrived. He is acquainted with the third and fourth plaintiffs as they reside in the same area. He then beseeched them to wait with him and his brother. After waiting almost two hours, and the driver of the vehicle having not returned, they decided to remove the valuables from the vehicle for safe keeping. The intention was to store any valuables at his home.

[27] He further confirmed that the group had assented to this plan, with the fourth plaintiff *M D*. *M D* opened the bonnet of the vehicle and the third plaintiff, *D B*, removing the battery. The third plaintiff then handed the battery to *E V*, the second plaintiff herein to carry, and they began to walk away from the vehicle.

[28] It was then submitted that when the group was approximately 10 meters away from the vehicle, a police vehicle approached them. The police stopped and climbed out, and the group approached the police officers. The second plaintiff placed the battery on the ground and advised the police officers of the circumstances of their possession of the battery, that they were merely holding on to the battery for safe keeping. The police officers were disinclined to believe the submissions made and advised them that they were up to no good, and they were consequently going to arrest them.

[29] It is further submitted that the second plaintiff once again attempted to explain their possession of the battery to the police officers, however they refused to listen. It was further submitted that they were "rough" with the second plaintiff, and in fact slapped him.

[30] *Mr V* further submits that he and his fellow plaintiffs were all then loaded into the back of a police van, and after travelling around for approximately 20 minutes, they were all taken to the Kamesh Police Station.

[31] At the police station they were placed in a room where they were interviewed by certain police officials and their personal details were requested. A male and female police officer were present in the room. After they were interviewed, *Mr V* submitted that he was once again placed in the police van and he was then taken to the Uitenhage Police Station in Church Street, Uitenhage.

[32] At the police station, he was placed alone in a dusty cell. He remained in the cell until he was released into the care of his mother later the afternoon of the same day. He confirmed that both he and his mother were instructed to attend court on the Monday, the 17th November 2014 at 08h30.

[33] After his release, he and his mother attended upon the Kamesh Police Station, in order to visit his brother, *E V*, but were advised that visiting hours were over. They then attended upon the Police Station the following day to visit the second plaintiff. During this visit, *E* advised them that the name of the owner of the car was one "Bunny". His mother later recalled who "Bunny" was and where he resided.

[34] The first plaintiff and his mother later on the same day attended upon "Bunny" at his home in the area known as "Gerald Smith" in Uitenhage. It was here that the first plaintiff recognised "Bunny" as the person that had been driving the vehicle on the evening in question. "Bunny" was then requested to accompany them to the Kamesh Police Station; he declined to go with them. The first plaintiff and his mother then returned home.

[35] The first plaintiff then submits that on the morning of the court appearance, being the 17th November 2014, he and his mother collected "Bunny" from his home and took him with them to court, where "Bunny", withdrew the charges against him and his fellow plaintiffs.

[36] Upon cross examination by *Ms Ntsepe* for the defendant, *Mr V* agreed that the decision to remove the valuables from the motor vehicle, including the battery was agreed to by all the plaintiffs. *Mr V* further submitted that he and his brother were acquainted with the driver of the vehicle on the evening in question, as the driver was a friend of his sister's husband.

[37] It was then put to *Mr V* that the driver of the vehicle, would attend court and deny that he had given permission to anyone to look after his vehicle. *Mr V's* reply was that he had no comment. Under cross examination, *Mr V* also denied that the police officers had at any stage inquired as to how they had obtained the battery. It was put to him that

this contradicted the version of *Mr D B*, who confirmed that the police officers had made such inquiry. *Mr V* further confirmed that the second plaintiff had explained to the police officers that they were safekeeping the battery for a friend. *Mr V* also conceded that they were unable to provide the police officials with the name and address of the owner or driver of the vehicle that had requested them to take care of the vehicle.

[38] *Mr V* further conceded under cross examination, that he could not remember whether he had advised the police official that had taken down his warning statement, that he had stated in such statement, that he did not wish to make a statement and that he would “speak at court”. He further conceded that since he could not recall, he could not dispute that he had in fact made such statement. *Mr V* had no comment as to why he did not advise the police official taking down his statement, that the plaintiffs were innocent, and had been merely looking after the property of a friend.

[39] *Mr V* also had no comment when it was put to him that the reason the charges were withdrawn against the plaintiffs at court, were due to a mediated settlement agreement arranged by the state between the owner of the battery and themselves, and not as a result of their innocence, and that they had in fact signed said agreement.

[40] One *Mr Mkhululi Solomon* a messenger for the Plaintiffs legal representatives firm, testified regarding circumstances that allegedly prevailed during the course of these proceedings. I do not consider *Mr Solomon*’s evidence germane to the present matter.

Mr Le Roux on behalf of the Plaintiffs then closed their case.

THE DEFENDANT'S CASE:

THE EVIDENCE OF MR LEE WAYNE SIMON:

[41] *Mr Simon* confirmed that he was a resident of the suburb "Gerald Smith" in Uitenhage, and that he knew the two plaintiffs that testified, namely *D B* and *S V*, by sight, as they resided in the same encompassing area. *Mr Simon* denied the submission that *Mr V* had made, that he was a family friend.

[42] *Mr Simon* testified that on the 14th November 2014, he had attended upon a local tavern. He decided to leave and was on his way home when the vehicle he was driving ran out of fuel. He had then left the vehicle at the corner of Maduna and 24th Avenue, which is common cause is in Kamesh, Uitenhage and decided to walk home. *Mr Simon* conceded that he was unsure as to whether the windows of the vehicle were open or whether he had in fact locked the vehicle when he decided to walk home.

[43] *Mr Simon* further confirmed that he had not left anyone to attend to the vehicle, and specifically denied *Mr V*'s submission that he had requested *Mr V* to look after the vehicle. According to him there were no people in the vicinity of the area where the vehicle had come to a stop. He further confirmed that he and his brother attended to returning to the scene to collect the vehicle, on the following day being the 15th

November 2014. At the area where the car had been parked, he was asked by a certain old man as to whom the owner of the vehicle was. He replied that he was the driver of the vehicle.

[44] He was then advised by the old man that certain young boys had been arrested regarding the vehicle, and for removing the battery from the vehicle. He was advised to attend upon the Kamesh Police Station to make further enquiries. He attended upon the Kamesh Police Station, and confirmed that the battery of the vehicle he had been driving had indeed been taken. *Mr Simon* denied giving the *Plaintiffs* permission to look after the battery.

[45] *Mr Simon* further confirmed that on the morning of the 17th November 2014, he attended upon the Uitenhage magistrate's court for the matter, and had signed the mediation agreement as complainant. He reiterated that he was not interested in court proceedings and merely wanted the return of the vehicle's battery.

[46] Under cross examination by *Mr Le Roux* for the plaintiffs, *Mr Simon* confirmed he had not laid criminal charges against the plaintiffs nor was he interested in pursuing the matter in court. He merely wanted the return of the vehicle's battery. *Mr Simon* further conceded that he was under the influence of alcohol on the evening. When the vehicle had run out of petrol, he got out and decided to walk home as he just wanted to sleep. He knew he could fetch the vehicle the following day. The balance of *Mr Le Roux's*

cross examination of *Mr Simon* related to an incident preceding the trial of the matter and as mentioned above, which incident I do not consider germane to the issues to be determined upon by this Court.

THE EVIDENCE OF CONSTABLE NTSIKILELO ROMAN:

[47] *Constable Roman* confirmed that he was a member of the South African Police Services with seven years' experience. He further confirmed that on the 14th November 2014, he was stationed at the Kamesh Police Station in Uitenhage, and was on duty with his partner *Constable Hardy*, patrolling the Kamesh area. They were in 24th Avenue Kamesh, Uitenhage when they came upon a group of males walking, 1 of the males was carrying an object.

[48] *Constable Roman* testified further that he and his partner approached the group in a marked police vehicle and when the group had caught sight of them, the person carrying the object dropped same, and the group continued walking. As they approached the group, one of them ran away. They then decided to investigate. They stopped the group and advised them as to the reason for them being questioned. *Constable Roman* then questioned the person who had been carrying the object as to what it was. He was advised by the person, that it was a battery that he was keeping safe for a friend. They then went to the point where the battery had been dropped, and it was confirmed that the object had indeed been a battery. He confirms that it was a "Willard battery".

[49] *Constable Roman* testified further that he question the person as to the identity and the address details of the friend for whom it was alleged the battery was being kept safe for. The person could not provide such details. The group had argued amongst themselves and one of the four suspects then was overheard to have said, "*Eke het jou gese ons moes nie die ding gedoen het nie.*" The group then took him and his partner to a vehicle that had been parked in 24th avenue, Kamesh, Uitenhage. He identified the vehicle as a Red Volkswagen.

[50] *Constable Roman* confirmed further that he had contacted his radio control to try and assist in identifying the owner of the vehicle, however their computer systems were down, and he was unable to obtain such information. He requested the group again to provide the details of the friend that had allegedly given them permission to look after the vehicle; one of the group submitted that the owner was in the tavern. When he requested that they all go to the tavern, the group once again could not provide details. *Constable Roman* again requested the name, address and cellular phone number of the owner of the vehicle from the group, but yet again received no reply from them. He then advised them that as they could not provide the necessary details, he had no choice but to arrest them. He explained the reason for their arrest, as being for being in possession of suspected stolen property, and he further explained their constitutional rights to them.

[51] Upon receiving personal details of the suspects, he ascertained one of them, in this regard, *Mr S V*, was a minor. He placed *Mr V* in his vehicle being a VW Golf. He summoned another police vehicle to assist, and the remaining 3 suspects were placed in this vehicle. The suspects were taken to the Kamesh Police Station, where they were formally interviewed, and the docket was administered. The administering of the docket comprised the completion of various documentation, including completion of the suspects warning statements.

[52] *Constable Roman* further confirmed that as *Mr V* was a minor, he was taken to the Uitenhage Police Station, where they had provision for a cell for minor suspects. *Constable Roman* further confirmed that he duly completed the annexure SAP 583(d), attached as part of Exhibit 'B' which is a document entitled "*Written Report on Failure to Notify a Parent, Guardian or Appropriate Adult of Arrest of Child.*" He advised that this was completed as he had unsuccessfully attempted to contact *Mr V*'s parent at the given address of 41 Penguin Street, Rosedale, Uitenhage, this despite having attended upon the given address personally with no-one opening the door. He further confirmed that he was not provided with the telephonic contact details for *Mr V*'s parent.

[53] Under cross examination by *Mr Le Roux*, it was put to *Constable Roman* that upon apprehending the group of plaintiffs, he should have interviewed them one at a time. *Constable Roman* submitted that the group had begun arguing amongst themselves. He

also confirmed that if the plaintiffs had submitted that they had provided a single version explaining their possession of the battery, then same was a lie.

[54] It was further established under cross-examination by *Mr le Roux*, that *Constable Roman* and the police members present on the evening had firstly taken the plaintiffs to the respective addresses they provided, in order to confirm such addresses. Being unable to confirm the addresses, the plaintiffs were then taken to the Kamesh police station. *Constable Roman* then made a further attempt to verify the addresses of the plaintiffs, and on the second attempt, was largely successful.

[55] *Constable Roman* further confirmed that he was aware that so-called “*police bail*” could be granted but that was a decision the assigned investigating officer in the case would make, and not himself.

[56] Upon re-examination by *Ms Ntsepe*, *Constable Roman* confirmed that he had arrested the four plaintiffs for being in possession of presumably stolen goods. He confirmed that the factors that informed his decision to arrest the plaintiffs were:

- (1) The time the offence had been committed, being the early hours of the morning;
- (2) That a fifth member of the group had run away;

- (3) The person that had been carrying the battery had dropped same once they had caught sight of the police;
- (4) That the plaintiffs were unable to provide a reasonable explanation for their possession of the battery, and that upon being advised that they were looking after the battery for a friend, they were unable to provide the name or address of the friend;
- (5) Furthermore, that one of the plaintiffs in the group had remarked whilst being questioned, *“Ons moes nie die ding gedoen het nie.”*

THE EVIDENCE OF ZWANDILE MICHAEL MAGAJANA:

[57] The witness confirmed that he was a sergeant in the South African Police Services, attached to the detective unit, and had joined the force in the year 2002.

[58] He confirmed that case docket 417/11/2014, being the case docket of the plaintiffs, had been allocated to him. He confirmed that he received the docket on the Saturday morning being the 15th November 2014. He also confirmed that he read the docket and noted that the plaintiffs had been charged for being in possession of presumably stolen property and that one of the plaintiffs was a child (a minor).

[59] *Sergeant Magajana*, confirmed further that he then attended to confirming the residential addresses of the plaintiffs. He then set about formally charging the plaintiffs.

He was aware that he could not charge *Mr V*, who was a minor at the time, without a parent being present. He attended upon the residential address of *Mr V*, to approach his parents, but was unable to locate *Mr V*'s parents at the address provided. He then returned to the police station, and charged all four of the plaintiffs as he was unwilling to delay the matter any further, as the plaintiffs had to attend court.

[60] *Sergeant Magajana* further confirmed that he then attended upon having the plaintiffs sign their warning statements, and they all confirmed that they understood their rights, were unwilling to make any statement regarding their defence and instead had chosen to "*speak in court*." The plaintiffs in their evidence never denied this.

[61] In cross examination by *Mr Le Roux*, it was placed to *Sergeant Magajana* that the offence the plaintiffs had been charged with, was not a serious offence. *Sergeant Magajana* disputed this submission and advised that in matters where persons are charged with being in possession of presumably stolen property, and in the absence of a reasonable explanation for being in such possession of such property, that in his experience, having regard to the area wherein which the offence took place being a so-called coloured area, there were many cases where it was discovered that a greater crime such as murder or theft of a motor vehicle had preceded the possession of the presumably stolen goods.

THE PLAINTIFFS PLEADINGS:

[62] The Plaintiffs case in essence is that their arrests were unlawful and consequently their subsequent detention was also unlawful. If I find the arrests to have been lawful then I should give consideration in reviewing the decision not to grant bail and construe such decision to be unreasonable and unlawful in the circumstances.

THE DEFENDANTS PLEADINGS:

[63] The Defendant's case is anchored on two grounds:

- (a) That the arrest and detention of the plaintiffs were not unreasonable and unlawful as it was effected in terms of Section 40(1) of the Criminal Procedure Act 51 of 1977;
- (b) That the plaintiffs had been lawfully arrested in terms of Section 36 of the Criminal Law Amendment Act 61 of 1955.

LEGAL PRINCIPLES APPLICABLE:

[64] It is trite that the deprivation of a person's liberty, such as arrest and detention at the hands of the police, is *prima facie* unlawful. In *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993(3) SA 131(A) 153 D-E, the then Appellate Division (per Hoexter JA) held:

"The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are prima facie illegal."

[65] In *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA) (per Malan AJA) held:

“To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself or someone acting as his agent or employee, deprived him of his liberty.”

[66] Further, in *Minister of Law and Order and Others v Hurley and Another* 1986(3) SA 568 (A) the Court at 589D-E, (per Rabie CJ) stated as follows:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

[67] In the present matter before me, it was somewhat strange that the parties had agreed at the outset that the onus to begin fell on the plaintiffs. This however can in no way divest the defendant of its onus as set out in the plethora of cases of similar ilk.

[68] The Defendant’s defence to the allegations is two-fold. The Defendant firstly submits that in terms of Section 40(1)(a) of the Criminal Procedure Act 51 of 1977, the police officer who effected the arrest of the plaintiffs, were acting within the ambit of this particular section.

[69] Section 40(1) (a) of Act 51 of 1977 provides:

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

(a) Who commits or attempts to commit any offence in his presence;

(b)”

[70] The reasonable suspicion requirement in Section 40(1) was dealt with by Jones J in *Mabona and Another v Minister of Law and Order and Others 1988(2) SA 654 (SE) at 685E-G*, where the learned Judge stated in essence that the test as to whether an arresting officer held a reasonable suspicion is an objective one. He also stressed that in this enquiry, it had to be borne in mind that what is required is suspicion, not certainty, albeit that the suspicion must be based on solid grounds. This principle was also affirmed in *Raduvha v Minister of Safety and Security and Another [2016] ZACC para 40-44*.

[71] The Defendant further relies upon Section 36 of the Criminal Law Amendment Act 61 of 1955, which states:

“Failure to give a satisfactory account of possession of goods. Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act 57 of 1959, in regard to which there is a reasonable

suspicion they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.”

EVALUATION OF THE EVIDENCE:

[72] Having regard to the evidence as a whole, it is trite that there are two mutually destructive version of events.

[73] In having regard to the version of the plaintiffs, *Mr B* and *Mr V*, the following issues arise:

- (a) The plaintiffs inexplicably were unable to provide *Constable Roman* and his partner at the scene, with the name and address of the driver of the vehicle. This despite the fact that *Mr V* submitted that he and his brother were aware of the identity of the driver of the vehicle as one “Bunny”, and that he was a friend of their sister’s husband;
- (b) Having been unable to provide the police officers at the scene with the necessary identity and address details of the driver of the vehicle, how were the plaintiffs going to return the battery to the driver of the vehicle?
- (c) The plaintiffs submissions that they had decided to look after the vehicle of a person whom they did not know, and had in fact, on their own version of events

had looked after the vehicle for hours before deciding to remove the valuables from the vehicle for safe-keeping, is improbable;

(d) Furthermore counsel for the plaintiffs failed to put to *Constable Roman* that the plaintiff person carrying the battery on the evening in question, had never dropped the battery as alleged by *Constable Roman*. This to my mind is essential as it elucidates the *animus* of the plaintiffs. Had their actions been *bona fide*, there would have been no reason to drop the battery upon sighting the police officers;

(e) On cross-examination by *Ms Ntsepe*, as to *Constable Roman's* submission that one of the plaintiffs had exclaimed "*Ons moes nie die ding gedoen het nie,*" *Mr V* instead of disputing same curiously remarked that he had no comment;

(f) Furthermore, pursuant to their arrest and detention, at no stage do the plaintiffs provide *Sergeant Magajana* with the details of the driver of the vehicle, being *Mr Simon*. It was in fact never even put to *Mr Simon*, by counsel for the plaintiffs that *Mr Simon* was indeed the "Bunny" that *Mr V* had been referring to;

(g) The plaintiff further failed to provide *Mr Magajana* with their version of events regarding their purported innocent possession of the battery, and chose to state in their warning statements that they would "speak in court". No reasonable explanation is provided for this. On cross-examination of *Mr V* by *Ms Ntsepe* for

the defendant, *Mr V* conceded that as he could not dispute that he did in fact advise the police official that he would speak in court;

- (h) At their first appearance at court, it is not disputed that the plaintiffs had entered into a mediation agreement with the State and *Mr Simon*, being the driver of the vehicle, to the extent that the charges against them would be withdrawn upon the return of the vehicle's battery to *Mr Simon*. At no stage did any of the plaintiffs protest their innocence to the State, and willingly entered into the mediation agreement;
- (i) In terms of the mediation agreement, it is trite that the agreement stated that the owner of the battery did not give any persons permission for the battery to be removed. This was agreed to and signed by the plaintiffs. In cross examination, *Mr B*, confirmed that he agreed to the above assertion as being correct;
- (j) The mediation agreement is destructive to the version of events as postulated by the plaintiffs.

[74] Both plaintiffs called to testify, namely *Mr B* and *Mr V*, failed to impress me as credible witnesses. Their version of events is simply improbable in the light of the above issues. *Mr B* conceded under cross-examination that it would indeed look suspicious to the police that they were unable to provide the relevant details of the driver of the vehicle to them. Furthermore the time that they were approached by the police being 01h10, would also give rise to suspicion, to which he agreed to.

[75] *Mr V*'s evidence was interspersed with submissions that he simply had no comment to certain submissions being put to him by counsel for the defendant. A case in point being when *Ms Ntsepe* put to him that the police officer would testify that he overheard one of the plaintiffs remark at the scene of the offence, "*Ons moes nie die ding gedoen het nie,*" *Mr V* submitted he had "no comment."

[76] Having regard to the evidence on behalf of the defendant, firstly that of *Constable Roman*. His evidence related to the actual arrest of the plaintiffs. I found his evidence to be clear and concise regarding his suspicions of the plaintiffs on the evening in question. His evidence was never disputed to the extent that his suspicions regarding the plaintiffs were unreasonable and unjust. The only issue raised by *Mr Le Roux* for the plaintiffs was the fact that it only emerged under cross examination that the plaintiffs were first taken to their respective home addresses to confirm same, before being taken to the Kamesh Police Station. This *Constable Roman* explained that at times the chronology of events is out of order. His evidence was never contradicted in any form.

[77] *Sergeant Magajana*'s evidence related to the plaintiffs' detention in the police cells until their appearance at court on the Monday the 17th November 2014. It is common cause that *Mr V*, the first plaintiff was released on warning and into the care of his mother on the Saturday, the 15th November 2014. *Mr Le Roux* in his closing argument inveigled me to view *Sergeant Magajana*'s evidence as being poor and the basis for

such submission was that *Sergeant Magajana's* reasoning for not releasing the plaintiff's on police bail was irrational and based on generalizations of the area and the occupants of such area. I do not hold with this submission.

[78] It was not disputed that *Sergeant Magajana* was an experienced police officer with numerous years of experience. His explanation for not releasing persons arrested for being in possession of presumably stolen goods is reasonable. According to his understanding of Section 36 offences, once a person has been arrested in terms of the section, and has failed to provide a reasonable explanation for being in such possession, the act states that person "shall be guilty of an offence..", having regard to this, as well as the fact that in his experience Section 36 offences are more often than not coupled with more serious offences preceding the actual possession of the goods, he does not grant police bail or release accused persons on warning for such offences. He would not oppose bail but would rather the public prosecutor make such decision to release the accused persons on bail or not. I do not find this rational to be unreasonable.

[79] While certain aspersions may be cast on *Mr Simon's* evidence due to his state of inebriation at the time of the incident, when cognizance is had to the evidence as a whole, his submission, that he gave no-one permission to look after the vehicle or to remove the battery of the vehicle is corroborated by the uncontroverted evidence of the mediation agreement. *Mr Simon* readily made concessions due to his state of

inebriation and confirmed that he was not interested in pursuing criminal charges; he merely wanted the vehicle's battery back. *Mr Simon* had no reason to contrive his evidence and I accordingly accept same to the extent that he had not requested the plaintiffs to look after his vehicle, nor did he provide them with permission to remove the battery from the vehicle.

APPLICATION OF THE LAW TO THE FACTS:

THE ISSUE OF UNLAWFUL ARREST

[80] As stated in the case of *Mabona* above, the test to determine whether an arresting officer's suspicion of an accused person/s and subsequent arrest is reasonable, entails an objective enquiry involving the question whether a reasonable person in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the person to be arrested was guilty of the alleged offence.

[81] Having regard to the facts set out above and by the first and third plaintiffs own concessions that their conduct on the evening in question could be construed as being suspicious, there is only one reasonable conclusion that can be drawn, and that is that *Constable Roman's* suspicion of the plaintiffs on the evening in question was reasonable, and that he had properly applied his discretion to arrest the plaintiffs in the circumstances. I accordingly find that the plaintiffs arrest to have been lawful.

THE ISSUE OF UNLAWFUL DETENTION

[82] Having determined the arrest of the plaintiffs to have been lawful, the Court must now consider whether the first plaintiff's detention until his release into the care of his mother a few hours after his arrest to have been unreasonable, and whether the continued arrest of the remainder of the plaintiffs until their release from the Uitenhage magistrate's court on the Monday morning of the 17th November 2014, was unreasonable.

[83] In determining this issue the evidence of *Sergeant Magajana*, becomes integral to such determination. *Sergeant Magajana* confirmed that in matters where an accused person has been arrested in terms of Section 36 of Act 62 of 1955, due to the fact that the possibility exists that the possession of the presumably stolen property could be an extension of a greater crime, he does not grant so-called "*police bail*", or release such accused on warning, and would rather have the public prosecutor make such decision.

[84] Section 59(1) (a) of the Criminal Procedure Act 51 of 1977 provides:

"An accused who is in custody in respect of any offence, other than an offence referred to in Part II of Part III of Schedule 2 may (my emphasis), before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police

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

[85] From the above it is clear that the investigating officer in a matter has a discretion as to whether to release an accused before his first appearance at a lower court.

[86] In *Shidiack v Union Government* 1912 AD 642 at 651-652, Innes ACJ held:

“ Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own...There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior motives, if he had not applied his mind to the matter or exercised his discretion at all or if he had disregarded the express provisions of a statute- in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.”

[87] The above principles have been confirmed by our Courts.¹

[88] Applying the above principles to the facts, I cannot find that *Sergeant Magajana's* decision in not granting so-called "*police bail*" to be capricious or *mala fide* in any way, nor could counsel for the Plaintiffs evince any evidence of an ulterior motive on the part of *Sergeant Magajana* in not releasing the second, third and fourth plaintiffs before their court appearance on the Monday morning. Regarding the first plaintiff, *Mr V* who was a minor at the time, it is apposite that he was released a few hours after his arrest once *Sergeant Magajana* had managed to contact his parent.

[89] In the circumstances I cannot find the detention of the plaintiffs to have been unlawful.

[90] Regarding *Ms Ntsepe's* issue of *locus standi* in respect of the second and fourth plaintiffs that did not testify, I do not deem it necessary to make a determination on this issue in view of my findings.

[91] In the premises I make the following order:

- (i) The Plaintiffs claims are dismissed with costs.

¹ *Groenewald v Minister van Justisie* 1973(3) SA 877 (A); *Ulde v Minister of Home Affairs and Another* 2009(4) SA 522 (SCA) para 7

ACTING JUDGE OF THE HIGH COURT

For Plaintiff: Adv le Roux instructed by Lessing Heyns Keyter & Van der Bank Inc, Port Elizabeth

For Defendant: Adv Ntsepe instructed by the State Attorney, Port Elizabeth