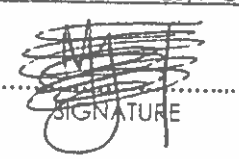


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 22996/14

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	10/07/19 DATE
	 SIGNATURE

In the matter between:

PATRICIA ANN VENTER

Plaintiff

and

THE MINISTER OF POLICE

Defendant

J U D G M E N T

TEFFO, J:

- [1] The plaintiff, Ms Patricia Ann Venter, sued the defendant, the Minister of Police, for payment of the sum of R200 000,00 in respect of damages for unlawful arrest and detention.

- [2] The defendant is being sued in his capacity as the head of the South African Police Service ("the SAPS").
- [3] The plaintiff's cause of action arises out her arrest and detention at Muldersdrift police station on 11 December 2012 by female Const Molefe with a J50 warrant on a charge of theft of a motor vehicle. She was detained for 2 (two) hours. It is alleged that she was unlawfully arrested and detained and that the J50 warrant was illegally obtained by Detective Const Nkuna. The said policemen were acting within the course and scope of their employment as members of the SAPS.
- [4] The defendant admitted the arrest and the detention of the plaintiff with the warrant but denied that she was unlawfully arrested and detained and that the warrant was illegally obtained. He pleaded that the arrest was lawful and properly executed in terms of the provisions of section 44 read with section 43 of the Criminal Procedure Act, 51 of 1977 (the CPA). The defendant further pleaded that the arresting officer was a peace officer as defined in section 1 of the CPA. She had exercised her discretion properly when she executed the warrant. She had a reasonable suspicion which had been formulated and based on the warrant of arrest that the plaintiff committed a crime of theft of a motor vehicle. The defendant denied that he was liable for any damages alleged consequent thereof.

The issues

- [5] This judgment concerns the issues of whether or not Ms Venter's arrest and detention were unlawful, whether or not the J50 warrant was illegally obtained and not the quantum of damages to which she is entitled, if they are. By agreement between the parties, I ordered the separation of these issues at the commencement of the trial.

The evidence

- [6] The plaintiff testified on her own in support of her case and the defendant called 3 (three) witnesses, namely, Mr Eric van Staden, female CST Molefe and Detective CST Nkuna, in defence of the case against him.
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- [7] The plaintiff, Ms Venter, testified that she was arrested on 11 December 2012 by CST Molefe. She had worked for the complainant, Mr Jan Dirk du Bryn, for some years at his pub and restaurant. She had been residing at the back of the restaurant at the time. She had been responsible for the collection of the stock for the restaurant. The stock comprised liquor and meat. She had been using the complainant's bigger motor vehicle, a Hyundai Tucson with registration letters and numbers, VBL 494 GP, to collect the stock and the complainant had been using her motor vehicle until it broke down. She continued driving the complainant's motor vehicle and the complainant took her motor vehicle for repairs. The situation at work became unbearable and she decided to leave. At that time, she was still in possession of the complainant's motor vehicle. She asked the

complainant to come to the restaurant. He did not peach up. She then left the premises in the beginning of October 2012 with the complainant's motor vehicle and went to reside with her son.

[8] The complainant called her several times and asked her to come back to work and she refused. In November 2012, her sister passed on and she saw the complainant at her sister's funeral in Evander. The complainant did not mention anything about her motor vehicle. Some days later, the complainant phoned her and demanded his motor vehicle. She informed him to come to Evander police station at 16:00 to fetch it. He did not come.

[9] A week later she received a call from Muldersdrift police station where she was informed that the complainant wanted his motor vehicle. She assumed at the time that her motor vehicle was repaired. She kept contact with CST Molefe, requesting her to agree on the time she would bring the motor vehicle. That did not happen. Eventually an arrangement was made for her to meet with CST Molefe on 11 December 2012 at Muldersdrift police station with the view to exchange the motor vehicles.

[10] She drove to Muldersdrift police station early in the morning and met with CST Molefe. They had a discussion and CST Molefe wrote down what she had been telling her. CST Molefe then said she should accompany her to Krugersdorp police station where she was going to see someone after which she would get her motor vehicle.

- [11] CST Molefe took the complainant's motor vehicle keys from her and she drove with her in a police van to Krugersdorp police station.
- [12] At Krugersdorp police station CST Molefe ordered certain police officers to lock her up. She was taken to a room where she was locked up with some men.
- [13] There were many men in the room where she had been locked up. They grabbed and touched her and demanded money and cigarettes from her. Eventually she was released. She left and went to Muldersdrift police station where she got her motor vehicle. The repairs on her motor vehicle were still not done.
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- [14] She was not shown the warrant of her arrest and she was not told of the charge she was facing. Her constitutional rights were not explained to her. CST Molefe handed a lot of documents to her which she signed. All what she had wanted at the time, was to go home.
- [15] She never appeared in court. According to a letter appearing on page 30 of the bundle of documents, that had been addressed to the Liaison Officer of the Krugersdorp Court, dated 11 December 2012, from the Senior Public Prosecutor, Krugersdorp, S E van der Merwe, her case was not enrolled because she had been arrested unlawfully and the office of the Public Prosecutors declined to prosecute.
- [16] She disputed the contents of the complainant's statement which he made to the police and reiterated that after the complainant had damaged her vehicle, by mutual consent he let her use his motor

vehicle. She had agreed with the complainant that she would get her motor vehicle after it had been repaired. After she had left her employment and had relocated to her son's residence and before her sister's funeral, the complainant phoned her several times. In all the conversations, the complainant never spoke about her motor vehicle. At her sister's funeral, the complainant did not speak to her about the motor vehicle. He just grabbed her by her arm and left. She never spoke to him. She had been using the complainant's motor vehicle since June 2012.

[17] She had never interacted with CST Nkuna. It was never her intention to keep the motor vehicle to herself permanently. She had learnt for the first time on 11 December 2012 that a case of theft of a motor vehicle was being investigated against her.

[18] Under cross-examination she testified that she did not steal the motor vehicle and the police did not have to lock her up. She disputed that the complainant did not know that she had relocated to her son's residence. She confirmed her names and details on the warrant and admitted that she took the complainant's motor vehicle on 7 October 2012. The complainant had spoken to her on a weekly basis on a cellphone that she had used when she had been working for him. Shortly after she had relocated to her son's residence, she stopped using the phone. She had never spoken to CST Nkuna about the case. She had only spoken to CST Molefe. She denied being contacted by CST Nkuna about the case. After it had been put to her that the period

from 7 October 2012 to 21 November 2012 was quite a lengthy period in a situation where someone had borrowed a motor vehicle to someone and the owner thereof did not know its whereabouts, she replied that her motor vehicle which the complainant had damaged, had been taken for repairs from June 2012. She had to use the complainant's motor vehicle.

[19] She testified that she was unlawfully arrested in that she had spoken to CST Molefe many times to arrange for the exchange of the motor vehicles. She denied that CST Molefe only spoke to her on 8 December 2012. She could not recall the date she had first spoken to CST Molefe but maintained that it was before 11 December 2012. She testified that she could have spoken to CST Molefe in November 2012. She did not know at the time when she spoke to CST Molefe that there had been pending criminal charges against her. She was phoned and requested to come to Muldersdrift police station. She was under the impression that she and the complainant were going to swap their motor vehicles. She denied that she could have spoken to CST Molefe between 7 October 2012 and 21 November 2012. She maintained that she could have spoken to her about four times. She could not go to the police as CST Molefe said she should make an appointment.

[20] It was only on 8 December 2012 that she and CST Molefe managed to agree on an appointment for 11 December 2012. That concluded the plaintiff's case.

[21] Mr Eric van Staden testified that he is a Regional Court Control Prosecutor at Krugersdorp Magistrate's Court. He had been stationed at the same place in December 2012. The docket relating to the matter against the plaintiff was brought to him. After he had read its contents, he issued a *nolle prosequi*. On the version of the plaintiff, he realised that the State would not have been in a position to prove its case beyond a reasonable doubt. There were contradictions between the complainant's version and that of the plaintiff. He had been informed that the complainant and the plaintiff agreed to exchange their motor vehicles. The initial statement of the complainant (A1) did not reflect the true state of affairs regarding what had transpired between the parties.

[22] The docket was not taken to court. The matter was not enrolled. A docket was just issued so that the plaintiff could be released from the cells.

[23] When he read the A1, the complainant's statement and the A4, his son's statement, he picked up that the plaintiff had absconded from work and had left the premises with her employer's motor vehicle. At her sister's funeral, the complainant had confronted her about his motor vehicle and she did not give an indication of its whereabouts. According to him the police applied for a J50 warrant after taking into account the period of time that had lapsed from the day the plaintiff had the complainant's motor vehicle to the day of her sister's funeral when she had been confronted about the vehicle.

[24] He could not tell which documents had served before the magistrate when the warrant was applied for. The A1 and the A4 together with an application for a J50 warrant by a police officer served before another public prosecutor. The public prosecutor had made a determination that he would sign for an application to be made before a magistrate. What he knows is that in Krugersdorp after the public prosecutor had signed the J50, police officers would have taken the application with all the documents to the magistrate.

[25] Reference was made to the statement that was made by the officer who applied for the warrant, CST Nkuna. The statement reads:

"Paragraph 2

I am the Investigating Officer of CAS191/11/12 use of a motor vehicle without the owner's consent case. After receiving a written sworn affidavit from the complainant, Mr Jan Du Bryn, it appeared that Mrs Patricia Ann Venter ... intentionally and unlawfully took the complainant's vehicle without the owner's consent and intended to keep it to herself permanently. It is evident that this amounts to theft. Therefore, I hereby apply for the warrant for Mrs Patricia Ann Venter's arrest. Her last known address is Warriors Arms Pub, Van Wyk ..."

[26] In his explanation of why the police officer who had applied for a warrant had mentioned the offence of theft as against the offence of use of a motor vehicle without the owner's consent as referred to in the docket, he stated that police officers are not lawyers. They do not have authority to put charges on the docket. That is in the domain of the prosecution.

[27] On page 30 of Bundle E, there is a letter from the Senior Public Prosecutor Krugersdorp, S E van der Merwe dated 11 December 2012. Paragraph 1 thereof states that the abovementioned case was not enrolled because (a) the accused had been arrested unlawfully; (b) this office had declined to prosecute in this matter. The accused may thus be released immediately.

[28] He testified that paragraph 1(a) of the letter was not applicable in this matter.

[29] According to him the J50 warrant had been applied for because the offence was serious in that the value of the motor vehicle was R160 000,00 and the address of the plaintiff was unknown. He disagreed that there was no evidence in the docket that stated that the plaintiff had taken the vehicle to herself to use it permanently and referred to the A1. It was put to him that the complainant mentioned in his statement that he had borrowed the vehicle to the plaintiff. He replied that the evidence was that at some stage, the plaintiff disappeared with the motor vehicle from the place where she had resided at the time.

[30] It was put to him that if the motor vehicle of the complainant had been stolen, when he laid a complaint, he would have stated that it was stolen. His reply was that he did not have any idea of what the complainant had said when he laid charges against the plaintiff. When the docket was brought to him on 11 December 2012, he realised that the complainant did not tell the truth about what had happened.

[31] It was further put to him that CST Nkuna had made false allegations about the plaintiff when he applied for the J50 warrant. He replied that he cannot answer on the allegations made because the initial application for the warrant, was not dealt with by him. He only dealt with the matter on 11 December 2012.

[32] W/O Barati Violet Molefe testified that she is a police officer and she is stationed at the Krugersdorp SAPS Forensic Service. She has 20 years and 6 (six) months experience as a police officer. She holds the rank of Warrant Officer. During 2012 she was a Constable and was stationed at Muldersdrift police station.

[33] She had been the investigating officer in the case against the plaintiff.

She had taken over the investigations from DC Nkuna on 23 November 2012. She contacted the plaintiff on 8 December 2012 and requested her to come to the police station. At approximately 07:15 on 11 December 2012, the plaintiff came to her office. The complainant also came. The plaintiff introduced herself to her and she did the same and told her that she was the investigating officer in the case of the use of the motor vehicle without the owner's consent. She further told her that she was going to execute the warrant of arrest against her. She took her to the charge office for a formal admission to be done. At the charge office, she told her that she was arresting her with a warrant.

[34] She read her rights according to the constitution and also showed her the original warrant of arrest. She read all the information that had been on the warrant of arrest. She then asked her if she understood

and she said yes. She confirmed her full names and did the paper work at the charge office.

[35] She had only contacted the plaintiff on 8 December 2012. She took her warning statement on 11 December 2012 and also wrote a statement confirming the execution of the J50 warrant of arrest. The notice of rights in respect of the plaintiff was done at 07:10 on 11 December 2012 at the charge office of Muldersdrift police station. She read the notice of rights to the plaintiff in English and she indicated that she understood. They both appended their signatures on the document.

[36] She arrested the plaintiff at 07:15 and detained her at 09:00. Immediately thereafter, she took her to Krugersdorp SAPS.

[37] After she had received the docket, she read it and checked if there were investigations to be done prior to her executing the warrant. She realised that she needed to take the A4, the statement from the complainant's son, who was the owner of the motor vehicle. She explained why there was a difference in the offence mentioned in the warrant and that on the docket. The first offence was recorded at the charge office before the docket came to the detectives. After the docket had been sent to the detective they go through it. After going through it, they, as detectives, are allowed to change the charge and also add more charges.

[38] The plaintiff did not go to court. She had been taken to the control office where the prosecutors read the docket before it goes to court. She presented the case against the plaintiff to Mr Van Staden and he

declined to prosecute. The complainant and the plaintiff agreed to give each other the motor vehicles.

[39] Under cross-examination, she testified that she telephoned the plaintiff on 8 December 2012 and she and her agreed to meet each other on 11 December 2012. She did not have any trouble to get hold of her. She had her details to be able to trace her. She disputed that she had asked the plaintiff to bring the complainant's motor vehicle in order to exchange it with her motor vehicle which was in the possession of the complainant. She did not know at the time that the complainant was in possession of the plaintiff's motor vehicle. She heard about that from the plaintiff.

[40] She did not obtain the warrant. She had only executed it. When she received the docket, the warrant was already in the docket. She denied that the plaintiff had been booked in the cells at Krugersdorp Court.

[41] She denied that she had telephoned the plaintiff more than once. She denied that there was no information in the docket that the plaintiff had stolen the motor vehicle and maintained that according to A1, she did. It was put to her that in the A1 statement, the complainant did not say that the plaintiff had stolen his motor vehicle but that he had borrowed the motor vehicle to her. She replied that the whereabouts of the plaintiff and the motor vehicle had been unknown to the complainant and according to her, the plaintiff had the intention to keep the complainant's motor vehicle permanently to herself.

[42] Under re-examination she testified that she did not have the residential address of the plaintiff in the docket when she telephoned her.

[43] DC Elect Jewes Nkuna testified that he is employed at the fraud department of the First National Bank, FNB. During 2012 he had been employed at Muldersdrift SAPS and had held the rank of constable. He had been the investigating officer in the matter immediately after the case was opened.

[44] On 21 November 2012 he contacted the plaintiff on cellphone number 072 400 0521. The person who answered introduced herself to him as Ms Ann Venter. He also introduced himself to her as CST Nkuna and informed her that the complainant had laid charges against her which related to his motor vehicle. He asked her to come and give her side of the story. The plaintiff hung up the phone on him. He tried the number again and she did not answer. When he informed her that she was a suspect, she arrogantly put the phone down.

[45] The reason he had applied for a warrant is that he had read the complainant's affidavit (the A1) and had understood that his motor vehicle had been missing for some time. It was missing from 7 October 2012 to 20 November 2012. According to him the complainant has exhausted all the avenues to get his motor vehicle back. He resorted to the police for help. He was satisfied that the elements of theft have been established, hence the plaintiff was charged of theft. When he applied for a warrant, he was in possession of the A1 statement of the complainant. Before he applied for the warrant, his

impression of the suspect when she hung up the phone on him was that she was not co-operative to him as a police officer. He was satisfied that she could have been guilty of theft and that the way she had behaved towards him made him suspect that she could be knowing something.

[46] He was employed by the SAPS for 9 (nine) years and some months.

[47] Under cross-examination he disputed that he had spoken to the plaintiff's daughter when he called looking for her. He was adamant that the person who answered the phone was the plaintiff. He conceded that the number 072 400 0521 belonged to the plaintiff's daughter. He had tried the number 082 448 871 which belonged to the plaintiff but the phone was off. It was put to him that the complainant in his statement mentioned that he had borrowed the plaintiff the motor vehicle and his complaint was that the plaintiff had used his motor vehicle without permission. There was no evidence to say the plaintiff had intended to keep the motor vehicle permanently. He replied that after reading the complainant's statement, he was satisfied that the plaintiff was not going to return the complainant's motor vehicle hence he tried to call her so that she can come to the police station and give her version. According to him the plaintiff did not want to come. The complainant had exhausted all the avenues to get his motor vehicle back. He then resorted to the police. He had a reasonable belief that the plaintiff was not going to return the motor vehicle.

[48] When the suspect does not want to come forth, the police officer discusses the case with the Senior Public Prosecutor and he can apply for a warrant on his behalf. In the plaintiff's case, the complainant's motor vehicle had been missing and she did not want to co-operate. That was more than enough to apply for the warrant. The reason for the plaintiff's arrest was not to punish her but to secure her attendance in court as he had failed to secure her appearance before him.

[49] A case against the plaintiff was opened on 20 November 2012. Immediately thereafter he tried to call the plaintiff. He did his investigation to get the plaintiff's version. He did not rush to court. He also went to the complainant's house but he did not find him. The fact that the plaintiff did not want to speak to him was very crucial to him. That is the reason why he had reported it. When told that Const Molefe only made one call to the plaintiff and plaintiff went to the police station, he replied that he does not know the method that Const Molefe used to communicate with the plaintiff. At that time a warrant of her arrest had already been issued.

[50] He disagreed that the reason he had stated in the application for a J50 warrant that the plaintiff committed theft was because he had known that the J50 warrant would not be authorised for an offence of using another person's motor vehicle without permission.

The law

[51] An arrest pursuant to a warrant is *prima facie* lawful. The onus of proving the wrongfulness of the arrest by showing that the warrant was

irregular, rests on the plaintiff. ¹A warrant in the proper form and issued by a duly authorised official provides the arresting officer with a defence. ²

[52] Section 43 of the Criminal Procedure Act³, ("the Act) reads:

"43 Warrant of arrest may be issued by a magistrate or justice

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

a) which sets out the offence alleged to have been committed;

b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

c) which states that from information taken upon oath, there is a reasonable suspicion that the person in respect of whom the warrant is applied for, has committed the alleged offence.

¹ Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie Noord Transvaal 1972 (1) SA 376(A) p394; Minister van Polisie v Goldschagg 1981(1) SA 37(A).

² Divisional Commissioner of SA Police Witwatersrand Area v SA Associated Newspapers Ltd 1966 (2) SA 503 (A); Prinsloo v Newman 1975 (1) SA 481 (A).

³ Act 51 of 1977.

(2) A warrant of arrest issued under this section, shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of Section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed."

[53] Section 44 of the Act reads:

"Execution of warrants

A warrant of arrest issued under any provision of this Act, may be executed by a peace officer, and the peace officer executing such warrant, shall do so in accordance with the terms thereof."

Analysis

[54] It is trite that the onus rests on the defendant to justify an arrest. In this case, the plaintiff was arrested with a J50 warrant. She had alleged in her particular of claim that her arrest and detention had been unlawful and that the J50 warrant had been illegally obtained by Detective Constable (DC) Nkuna. Because she bore an onus to prove alleged illegality of the warrant, she testified first.

The warrant

[55] The plaintiff testified that the warrant was not shown to her by CST Molefe and she was not told of the charges against her. She further testified that her constitutional rights had not been explained to her. This evidence is at variance with what had been pleaded in the plaintiff's particulars of claim. It had also been denied by CST Molefe. There was no evidence presented that the plaintiff had demanded a copy of the warrant from CST Molefe and that she had refused to show or hand a copy to her.

[56] The plaintiff's counsel put it to Mr van Staden that DC Nkuna had made certain allegations against the plaintiff when he applied for the warrant. Mr van Staden testified that he cannot respond to the allegations because he was not involved in the matter at the time. The plaintiff had not presented any evidence to the effect that DC Nkuna had made allegations against her when he applied for the warrant and this was not pleaded.

[57] Counsel for the plaintiff submitted that the warrant had only been signed after the plaintiff's arrest. The arresting officer went with the plaintiff to the magistrate. He further submitted that CST Molefe had been aware of this and had acted under a warrant that was not proper. That according to him renders the arrest of the plaintiff unlawful. No evidence was presented that when the plaintiff was arrested, the warrant was not issued and/or proper and that CST Nkuna had been aware of that. In any event, the plaintiff's cause of action is that she was unlawfully arrested and detained with a J50 warrant that was

illegally obtained by DC Nkuna. In my view whether the warrant was signed or issued when the plaintiff was arrested, is irrelevant. What is relevant is whether there was a legal and probable cause for the arrest of the plaintiff. The plaintiff was cross examined about the warrant in order to ascertain whether the requirements envisaged in section 43 of the Act had been complied with. Her evidence confirmed that the requirements had been met.

The arrest and detention of the plaintiff – Whether lawful or not

[58] The defendant's evidence regarding the arrest of the plaintiff is straight to the point. It was that the plaintiff disappeared without trace with the vehicle of the complainant. DC Nkuna had applied for the warrant on the basis of the statement that had been made by the complainant (A1). He tried several times to phone the plaintiff and when he found her on her phone in order to inform her that a charge was laid against her, and to request her to come to the police station to tell her side of the story, she did not co-operate. She hung up the phone on him and this made him to suspect that she could be guilty of theft of the said motor vehicle.

[59] Although the plaintiff disputed that she had ever spoken to DC Nkuna on the phone, DC Nkuna had nothing to gain from making such allegations against the plaintiff. The plaintiff went to the police station with the complainant's vehicle. This confirmed the complainant's statement that she had disappeared with his vehicle for more than a month. Mr van Staden testified that the police had applied for the J50

warrant because the motor vehicle had been missing for some time, and the value thereof was high. This evidence corroborated the evidence of DC Nkuna.

[60] It was clear from the evidence that CST Molefe did not apply for the warrant. All what she did was to execute the warrant. She phoned the plaintiff and requested her to come to the police station. When she arrived at the police station, she told her that she was going to execute the warrant and she did exactly that. It is not probable that CST Molefe could have requested the plaintiff to come to the police station in order for her to exchange her vehicle with that of the plaintiff. If that was the case, why would she then arrest the plaintiff. Her evidence was that she did not know that the complainant and plaintiff had swapped cars until she was told by her. The warrant had been issued at the time and hers was to execute it.

[61] Mr. van Staden honestly testified that after hearing the plaintiff's version, he realised that the complainant had misled the police. He did not tell them the truth about what had happened between him and the complainant.

[62] Counsel for the plaintiff referred me to the case of *S v More*⁴ and submitted that the attendance of the plaintiff in court could have been secured by way of summons or written notice and that there were no reasonable grounds upon which the defendant could say that the said

⁴ 1993 (2) SACR 606 (W) at 608 C - J

methods were insufficient to secure the attendance of the plaintiff in court.

- [63] In *Minister of Safety and Security v Sekhoto*⁵, the Supreme Court of Appeal did to some extent curb the approach adopted by the High Courts in assessing whether the arrest is justified when a summons could have been used. However, the court stated that where the case is trivial, an arrest would clearly be rational. The SCA went on to say the following:

“What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases, it is generally desirable that a summons be used”.

- [64] The defendant’s evidence was that the whereabouts of the plaintiff and the motor vehicle of the complainant were unknown. The plaintiff had disappeared with the motor vehicle for more than a month and when she met with the complainant at her sister’s funeral, the motor vehicle was not there and she did not disclose its whereabouts to the complainant. The value of the vehicle was +/- R160 000,00. This was the reason why the J50 warrant was applied. Mr. van Staden explained the difference between the J175 and the J50 warrants. The police did not have the plaintiff’s address at the time when the J50 warrant was applied for. The argument that the attendance of the plaintiff in court

⁵ 2011 (1) SACR 315 par 54

could have been secured by means of a summons, is without merit. It can also not be said that the offence committed was trivial.

[65] The argument that the docket mentioned the charge against the plaintiff as use of the motor vehicle without the owner's consent while on the warrant, it was referred to as theft is neither here nor there. CST Molefe testified that they, as detectives, have the right to change or add changes upon the matter being investigated. Mr van Staden's evidence was that it is the competency of the public prosecutors to formulate charges and not the police who are not lawyers. DC Nkuna can also not be faulted for regarding the offence as theft when one looks at his evidence. He was clear in his evidence that according to the complainant, the motor vehicle and the plaintiff's whereabouts were unknown from 7 October 2012 to 20 November 2012. When he finally got hold of the plaintiff on the phone, she did not co-operate. According to him the plaintiff's conduct made him to suspect that she was hiding something and could be guilty of theft. Had the plaintiff co-operated and came to the police station to provide her side of the story before DC Nkuna applied for the J50 warrant, the matter would not have gone this far.

[66] There is merit in the submission that was made on behalf of the defendant that the plaintiff was aware as early as 24 November 2012 that there existed a warrant for her arrest. The allegations appear on her warning statement. She mentioned that the complainant phoned her on 24 November 2012 and told her that about the warrant. He

requested her to return his car. She told him to come fetch it the following day on 25 November 2012 at Evander but he did not come. Despite having been made aware of the warrant for her arrest, she did not approach the police to prove her innocence.

[67] DC Nkuna was criticised that he had only made one call to the plaintiff and decided to apply for the warrant. This, in my view, does not take the case of the plaintiff any further. DC Nkuna's evidence was logical and he stood his ground under cross examination. The fact that the docket was only opened on 20 November 2012 and he managed to get hold of the plaintiff on 21 November 2012, does not mean that he had only called her once. He was clear in his evidence that he had phoned her several times but only got hold of her on 21 November 2012.

[68] Further arguments that CST Molefe's evidence that she did not know that the plaintiff and the complainant swapped their motor vehicles until on 11 December 2012 should be rejected in the face of the plaintiff's evidence that CST Molefe phoned her several times to try and arrange that she and the complainant should exchange their vehicles but could not agree on a suitable date and time until 11 December 2012, is without any basis. The plaintiff had been aware as early as 24 November 2012 that a warrant for her arrest was in existent. She did not go to the police to prove her innocence. If indeed she did not speak to DC Nkuna on 21 November 2012 as she alleges, on her own version the complainant told him that there was a warrant for her arrest. She

should have cleared her name by going to the police to prove her innocence.

[69] All the witnesses of the defendant gave a good impression to the court. They testified satisfactorily. They were never shaken during cross-examination. Their evidence was consistent with the case that had been pleaded by the defendant unlike the plaintiff whose evidence was lacking and wanting in that it was not consistent with the allegations she had made in her particulars of claim.

[70] The matter between the complainant and the plaintiff was settled on 11 December 2012 in that the plaintiff received her motor vehicle back after she had returned the complainant's motor vehicle. Counsel for the plaintiff criticised Mr van Staden's evidence on the basis of what had been stated in the letter from the Senior State Prosecutor that "*the accused had been arrested unlawfully and this office had declined to prosecute*". He argued that Mr van Staden's evidence that the statement that the plaintiff had been arrested unlawfully was not applicable to this case, cannot be true. The statement from the Senior State Prosecutor was just an opinion. It is the court that has to determine the lawfulness or unlawfulness of the plaintiff's arrest. It therefore follows that there was a legal and probable cause for the arrest of the plaintiff with a J50 warrant. No evidence was presented to prove that the warrant that was used to arrest the plaintiff did not comply with the requirements of Section 43 of the Act. The arrest of the

plaintiff with a J50 warrant was therefore lawful. The plaintiff's action falls to be dismissed.

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

1. The plaintiff's action is dismissed with costs.



M J TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the plaintiff JJN Swart

Instructed by Erwee Attorneys

c/o Dyason Attorneys

For the defendant H O R Modisa

Instructed by The State Attorney

Heard on 10 January 2019

Handed down on 10 July 2019