REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2019/05047

In the matter between:

DAVID DAVID	**FIRST PLAINTIFF**
SIMON NASHONGA	**SECOND PLAINTIFF**
MATEUS MATEUS	**THIRD PLAINTIFF**

and

MINISTER OF SAFETY AND SECURITY	**FIRST DEFENDENT**
THE PROSECUTOR GENERAL	**SECOND DEFENDANT**

Neutral citation: *David v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2019/05047) [2022] NAHCMD 556 (30 August 2022)

Coram: HANS-KAUMBI AJ

Heard: **27-30 June and 1, 4, 5 and 7July 2022**
Delivered: **14 October 2022**

Flynote: Delict – Unlawful Arrest – Defence raised in terms of Section 40 (1) of the Criminal Procedure Act – Two mutually destructive versions – Uncontradicted evidence not necessarily true -Onus to prove animus injuriandi on a preponderance of probabilities on the plaintiff – Plaintiff failed to prove – Claims dismissed.

Summary: The police received a call about a house breaking and that a TV was stolen at about 03h00 on the19 November 2018. They drove to the scene of the crime and in a street near the house where the house breaking was reported, they saw a red motor vehicle with two men standing outside the vehicle and turned into that street. When they approached the vehicle, the two men jumped into the vehicle and sped-off. The police chased the motor vehicle and tried to stop the vehicle with their lights but only managed to do so when they were parallel to the vehicle.

The three plaintiffs were asked to exit the vehicle and the vehicle was searched. Upon opening the boot of the vehicle, the police discovered a small flat screen television and the plaintiffs could not give a satisfactory answer in respect of its ownership. They took the plaintiffs to the house where the breaking was reported to confirm whether the television found in the boot was the one that was reported stolen and discovered that it was not the stolen television.

The police patrolled the area and followed the footprints they found at the scene of the crime to the street where they saw the red car parked earlier before they fled the scene. They found the television that was reported stolen behind a wall where the two men were standing earlier. They further found that the shoe print of the second plaintiff matched the shoe prints found at the scene of the crime. The plaintiffs were subsequently arrested and charged.

The charges against the plaintiffs in the magistrate court were later withdrawn by the second defendant as a *prima facie* case could not be established. The plaintiffs are now before this court claiming damages for unlawful arrest and detention and malicious prosecution.

Defendants deny the claim in that the arrest was effected in terms of s 40 (1) of the Criminal Procedure Act 51 of 1977 in that a reasonable suspicion on reasonable grounds existed that the plaintiffs might have committed the crime at the time of the arrest.

Held that on the basis of the evidence by the arresting officer, a reasonable suspicion was formed on the grounds that, when he saw the plaintiff's vehicle speed off when they saw the police vehicle, when he found a TV in their possession and the ownership of which they could not explain, the presence of house breaking implements, and the fact that the shoe prints of the second plaintiff matched the shoe prints found at the scene of the crime.

Held that the arresting officer based on the evidence available, used his discretion to arrest the plaintiffs as he deemed it necessary at the time.

Held that the subsequent detention was lawful as the plaintiffs were brought to a court within a period of 48 hours and were subsequently detained in terms of an order by a Magistrate in terms of section 50 of the Criminal Procedure Act.

Held further it is necessary not to deal with the claim in respect of malicious prosecution as it flows naturally from the lawful arrest and detention and that the prosecution in this regard could not have been malicious.

Held further that the plaintiffs' claims are dismissed with costs.

ORDER

The plaintiffs' claims are dismissed with costs.

JUDGMENT

HANS-KAUMBI AJ:

Introduction

[1] The plaintiffs brought an action in which they claimed from the first defendant damages in the amount of N$1 500 000 each for their alleged unlawful arrest and detention and N$500 000 each against the second defendant for malicious prosecution.

[2] The plaintiffs' claim against the first defendant is based on the allegations that the first defendant:

(a) deprived them of their freedom;

(b) caused them severe emotional stress and psychological trauma;

(c) embarrassed them by arresting them in public view and by keeping them in holding cells; and

(d) humiliated and caused them discomfort by detaining them in a police cell.

[3] The plaintiffs' claim against the second defendant is based on the allegations that the second defendant maliciously prosecuted them, thereby depriving them of their freedom, causing them severe emotional stress, humiliation and discomfort.

[4] The defendants deny that the plaintiffs' arrests and detention were unlawful and that their prosecution was malicious. The defendants pleaded that the plaintiffs' arrests were based on reasonable and probable cause and suspicion as contemplated in the Criminal Procedure Act 51 of 1977. They further denied that the plaintiffs suffered damages.

Pleadings

Plaintiffs' case

[5] The plaintiffs allege that they were arrested on the 19th of November 2018 at Swakopmund at or about 04h00, without any reasonable grounds on a charge of housebreaking with intent to steal and theft.

[6] The plaintiffs were refused bail at their first appearance at (in) court and were detained until 22 January 2020, a period of 64 days.

[7] The plaintiffs allege that the unlawfulness of their arrest occurred because:

a) there was no prima facie case against them;

b) the arresting officer did not consider their rights in terms of Article 5 and 7 of the Namibian Constitution;

c) they were arbitrarily and without good cause deprived of their freedom and;

d) that the arresting officer had no grounds to interfere with their constitutional right, in that

(i) they did not pose a risk to the community;

(ii) they would not have evaded their trial, (if any);

(iii) there were no grounds present to believe that they would harm themselves or any other person (members) of the public;

(v) there was no urgency for their arrest;

(vi) the fact that they had a known and fixed address was not taken into consideration.

[8] The plaintiffs further allege that the arresting officer did not exercise his discretion or did not do so properly in that:

a) there was no obligation on him to arrest and detain the plaintiffs;

b) he did not consider alternative methods to bring the plaintiffs before the court to secure their release from detention; and

c) he did not exercise his discretion properly or bona fide.

[9] They also allege that the arresting officer did not arrest them to further investigate the matter, to prevent them from committing further offences, to protect

them against themselves or other members of the public and as such this rendered the arrest and subsequent detention unlawful.

[10] It is further alleged by the plaintiffs that the public prosecutor, acting within course and scope of his employment with the second defendant, wrongfully and maliciously set the law in motion by prosecuting the plaintiffs in circumstances where there was no *prima facie* case against the them. The plaintiffs allege there was no reasonable or probable cause to believe in the truth of the information contained in the docket, the public prosecutor therefore failed to apply his mind to the information and acted with *animo inuiriandi*.

[11] The plaintiffs allege that the prosecution failed and the matter was withdrawn on 27 March 2020, the reason being that there was no *prima facie* case against the plaintiffs.

Common cause facts

[12] It is common cause between the parties that the arrest occurred on 19 November 2019 at about 04h00.

[13] It is further common cause between the parties that the plaintiffs were detained until 22 January 2020 when any/all objections against the plaintiffs being granted bail was withdrawn.

[14] It is also common cause between the parties that the case against the plaintiffs was withdrawn on 27 March 2020, reason being that there was no *prima facie* case against the plaintiffs.

Defendants' case

[15] The defendants defended the plaintiffs' action and they admitted the arrest of the plaintiffs, but denied the unlawfulness of the arrest. The defendants aver that the arrest and/or detention was lawful based on a reasonable suspicion as there was

reasonable and probable cause. The defendants further averred that it is not a requirement in terms of the law for a *prima facie* case to exist to conduct an arrest or detention for the offence for which the plaintiffs were arrested and detained.

[16] The defendants further averred that the arrest and/or detention was not malicious but was conducted in accordance with the law.

[17] In amplification of their denials, the defendants pleaded that they did not persist with the prosecution and the matter was withdrawn, owing to the lack of outstanding evidence as further investigations were pending.

[18] The defendants also denied that the plaintiffs suffered any damage in the amount stated in the particulars of claim or in any amount at all.

[19] The defendants further pleaded that the second defendant acted in accordance with its powers under the Criminal Procedure Act 51 of 1977 and consequently denied any indebtedness to the plaintiffs.

The pre-trial conference report

[20] The pre-trial report of the parties raised many issues of fact and law to be decided by this court. I have taken it upon myself to identify the most important issues as some of the issues would fall away once these ones are dealt with.

"Issues of fact to be determined

a) Whether or not the police officers who arrested the plaintiffs had a reasonable suspicion that the plaintiffs committed the offence of housebreaking with the intent to steal and theft.
b) Whether or not it was necessary to arrest the plaintiffs.
c) Whether or not the plaintiffs suffered damages in the amounts claimed in their particulars of claim pertaining to the unlawful arrest and detention
d) Whether or not the prosecution of the plaintiffs was malicious.

e) Whether or not the plaintiffs suffered damages as claimed in their particulars of claim pertaining to the malicious prosecution.

Issues of Law to be determined

a) Whether or not the arrest and detention of the plaintiffs were lawful.
b) Whether or not the plaintiffs are in law entitled to the damages as claimed in their particulars pertaining to the unlawful arrest and detention.
c) Whether or not the prosecution of the plaintiffs from 21 November 2018 to 27 March 2019 was malicious.
d) Whether or not the plaintiffs are in law entitled to the damages as claimed in its particulars pertaining to the malicious prosecution."

Testimony of the first plaintiff

[21] The plaintiffs repeated their position as pleaded in their particulars of claim and suffice it to say that it was clear that the witness statements were not drafted in the plaintiffs' own words as it made provision for legal jargon that the plaintiffs did not understand and when cross-examined on the meaning thereof, could not testify thereon.

[22] The first plaintiff testified that, on 19 November 2018, at about 04h00 at or near Swakopmund, he together with the second and third plaintiffs were arrested without any reasonable grounds by police officers, whom he did not know at the time. They were arrested on a charge of housebreaking with the intent to steal and theft.

[23] He testified that, on the day at about 21h00–22h00 he was driving from Walvisbay to Henties bay to see his girlfriend. He drove with his cousin, Paul's car, a red Suzuki. He averred that he had his broken small flat screen television in the boot of the car and he took it to Henties bay. He testified that he came with the television from Walvisbay with the intent of taking it home but forgot and drove with it to Henties bay.

[24] He further testified that, he drove back from Henties bay at 01h00 and gave a lift to a lady from the service station in Henties Bay and dropped her off at DRC in Swakopmund. On his way back to Walvisbay, at about 03h00, he was stopped, near the open market by two unknown males, i.e., the second and third plaintiffs, who they asked for a lift to Walvisbay.

[25] He gave them a lift and as he was driving past the Single Quarters near Etuna bar in Mondesa Swakopmund, he saw a car flashing lights from behind. He testified that he did not stop his vehicle and continued to drive until the vehicle came closer and he noticed that it was a police car. He stopped his vehicle and was approached by three unknown police men.

[26] He testified further that, the police officers asked him to get out of the vehicle and they asked for his driver's license and he gave it to them. They then searched his vehicle and he was asked to open the boot of the vehicle and they found his small flat screen television. The police asked him where he got the television and he informed them that it was his but they did not want to listen. The police informed him that they were looking for a stolen television and they ordered them, the plaintiffs, to get into the police van and they cooperated.

[27] He testified that the police first drove somewhere else and then to the police station and the police drove his vehicle to the police station. When they arrived at the police station there was a bigger TV with the small TV, found in first plaintiff's boot. Photos were then taken of them whilst standing next to the two TVs. He testified that they were detained at the Mondesa Police Station.

[28] During cross-examination, the first plaintiff testified that he was unemployed at the time of his arrest. He further testified that he took his cousin's car without his permission as he just asked to charge his phone in the car and then decided to drive to Henties Bay. The first plaintiff further testified that he does not know how the amount of N$1 500 000 in respect of the damages claim was arrived at. He later stated that he claimed that amount on the advice of his legal practitioner. The first plaintiff was further cross-examined on the meaning of contumelia, a word used in his witness statement and he testified that he does not know what it is.

[29] Instead of pertinently putting the versions of the defendants to the plaintiffs, counsel for the defense, ineffectively attempted to do so by referring the witness to pages 158-168 of the indexed bundle, where the witness statements of the police officers could be found and asked him whether the first plaintiff is aware of these statements and what he has to say about it. There was an objection by the counsel for the plaintiffs on the basis that counsel for the defense should be more specific in terms of his questions. Counsel for the defense then abandoned this line of questioning and the version of the defendants was not put to the first plaintiff.

Testimony of the second plaintiff

[30] The second plaintiff testified that, on the date in question at around 03h00 he was walking with the third plaintiff from DRC in Swakopmund and whilst walking, a red car came from behind and they hiked and the car stopped. He corroborated the evidence of the first plaintiff and only differed where he stated that the police for unknown reasons took his shoes and he did not know what they did with his shoes.

[31] During cross-examination, the second plaintiff testified that he was a general worker and only worked when there was work. He similarly did not know what the legal terminology used in his witness statement meant nor how the amount in respect of damages was arrived at and later stated that he claimed the amounts on the advice of his legal practitioner.

Testimony of the third plaintiff

[32] The evidence of the third plaintiff corroborates the evidence of the second plaintiff save for the shoes of the second plaintiff that were taken and the fact that the police officers asked the first plaintiff to search the car and that the first plaintiff agreed thereto.

Testimony of Cst. Kalyamashini for the defence

[33] Cst. Kalyamashini testified that whilst in the charge office on the date in question his colleague, Cst. Ndumba, received a telephonic report of a break-in during which a television was stolen. He was accompanied by Cst. Dumeni and Cst. Guibeb, who rushed to the scene. Cst. Dumeni was the driver of the police vehicle.

[34] He testified that, as they were about to enter Erica Tsuses Street, he saw two men standing next to a red car with doors open which was parked at a certain house in that street opposite the church. When they saw the police car approaching them, the two guys jumped into the car and drove off. Cst. Dumeni chased them into Mandume Ndemufayo street and he tried to stop the car by flicking his lights but they kept on driving. He then drove parallel to the car and parked in front of them when they stopped.

[35] He testified further that, he and his colleagues then introduced themselves as police officers to the driver of the red vehicle. Hereafter, Cst. Dumeni asked the driver why he did not want to stop when he saw that it was a police car trying to stop him and the first plaintiff remained silent. All three suspects then got out of the car after being requested to do so and the car was searched. He then asked the driver to open the boot and when he did so, a small Sansui 32-inch television was found inside the boot. When he asked who it belongs to no one answered him.

[36] He testified that they drove with the plaintiffs to Lukas Nehoya Street, where the house breaking occurred, to confirm if it was not the television that was reported stolen. The owner of the house confirmed that it was not her television as hers was a big Sony 46 inch. Whilst there, they followed the footprints to the street where they found the two men outside the red car before they drove off, and whilst looking around in that area they found the big television, the Sony 46 inch, hidden behind the wall.

[37] He concluded his testimony by stating that shoeprints were detected at the area where the stolen television was recovered, which did not only match the shoe prints of one of the plaintiffs but also the prints found at the house breaking scene. According to the witness, these shoe prints matched the shoe prints of the second

plaintiff. Hereafter they took the plaintiffs and the two televisions and drove to the police station.

[38] During cross examination, Cst. Kalyamashini confirmed that the police car was clearly marked and that the blue lights were on, the street lights were on as well and the red car was the only car in the street. He further testified that, the street was quiet and everyone was asleep as it was the early hours of the morning. He further confirmed that they received a report of a stolen television and when they pulled over the plaintiffs, they found a television on them and in their minds as police officers, it was reasonable to arrest.

[39] To the question as to why they arrested the plaintiffs, he testified that, they were in the vicinity where a television was stolen and he was not given any answer when he found the television on them and he suspected that they stole the television. He confirmed that the plaintiffs were arrested on reasonable grounds by Cst. Dumeni.

Testimony of Cst. Guibeb for the defence

[40] Cst. Guibeb corroborated the evidence of Cst. Kalyamashini in so far as that when they entered Erica Tsuses Street, they found two men standing outside a red car and the car's doors were open and when they saw the police car, they jumped into the car and they drove off. Cst. Dumeni gave chase and tried to stop them with the lights but to no avail and it is only when he drove parallel to their vehicle did, they stop. He further confirmed that none of the plaintiffs responded when asked whose television it was in the boot of the red car. When they were asked why they did not stop when they saw that a police car is stopping them, they also remained mute.

[41] During cross examination, Cst. Guibeb testified that the vehicle of the plaintiffs was stopped using only the flashing of the headlights and that the headlights according to him included the blue light. When confronted with Sergeant Dumeni's version that the siren was also on, he testified that he does not remember that the siren of the vehicle was on. As to the version of Cst. Kalyamashini that the siren in

the police car was not functional, Cst. Guibeb testified that the best person to explain that is the driver because the driver is the one who booked out the vehicle.

[42] He further testified that the vehicle was searched but not the person of the plaintiffs before they were loaded in the police van. When confronted with the versions that the screw driver and tyre lever was only mentioned once they got to the police station, and that Cst. Dumeni states that the tyre lever and screw drivers were found inside the vehicle, he stated that the tyre lever was only found on the person of the second plaintiff once they got to the police station, and that Cst. Dumeni should explain.

[43] During cross examination, Cst. Guibeb was asked how the shoe prints were matched, he stated that the second plaintiff was sitting inside the police van with his shoes facing up and he demonstrated this in court. They were checked from underneath and matched with prints outside. When asked if he was a shoe print expert, he stated that he is not.

[44] Cst. Guibeb was asked if he must arrest a person when he suspects they have committed an offence, and he answered yes, and further stated that he must arrest on reasonable grounds. When the version of the plaintiffs was put to him, he maintained that there was a reasonable suspicion for the arrest.

Testimony of Sergeant Dumeni (arresting officer)

[45] Sergeant Dumeni testified that he was the driver of the police vehicle on the date of the arrest and that he followed the red car of the plaintiffs after he spotted the vehicle in Erica Tsuses Street. He testified that he did so as the street was very quiet and when he was about to reach the car it drove off. He switched on the blue lights and the siren in order to stop them but they sped off. He later managed to stop them and introduced himself and asked them why they did not stop. He ordered them to get out in order to search the car. They found a 32 -inch television in the boot of the car and the plaintiffs could not give an answer as to whom it belonged to.

[46] He testified further that he recognized the second plaintiff when he got out of the car as a suspect in the following criminal matters relating to house breaking, CR 71,73,74 and 75/2018 and that he was evading arrest. The plaintiffs were requested to get into the police vehicle and taken to the complainant's house. At the complainant's house Sergeant Dumeni's colleagues, after following foot prints from the complainant's house, found the complainant's television.

[47] He further testified that, he then drove with the plaintiffs to the station and opened a case under Case no: CR 59/11/2018, and he explained their rights to them and locked them up. He testified further that, his colleagues found house breaking implements including a tyre lever and screw drivers in the car, whilst he was observing the search of the vehicle.

[48] During cross examination, he testified that he arrested the plaintiffs for being in possession of suspected stolen goods and that he did so because he found the plaintiffs vehicle in a quiet street and when he approached the vehicle the second and third plaintiffs jumped into the red car and they sped off and then he found a television in their boot and they could not explain who it belonged to. He further testified that it is not possible for the plaintiffs not to have known each other as he asked whether the first plaintiff was not afraid to give two men a lift at that time of the night?

[49] He continued to testify under cross examination, that there was an urgency to arrest the plaintiffs as he found them in the middle of the night with a television and it was a lawful arrest as they were in possession of suspected stolen property. He further testified that he used his discretion based on the evidence in front of him and he formed a reasonable suspicion that they were in possession of suspected stolen property and because of the housebreaking implements; and he deemed it appropriate to arrest the plaintiffs. He insisted that he switched on the blue lights and the siren, when he chased after the plaintiffs. The witness confirmed that the siren was in a working condition.

[50] On the question whether it was one set of foot print that was found and followed, he testified that, there was one set of foot print which was visible and which they compared with the second plaintiff's shoes and it matched.

Testimony of Ndamonaonghenda Elias (subpoena witness)

[51] Ms. Elias testified that she and her grandchild, Natasha Nandi Shitaleni went to bed around 21h00 that night and they locked all the doors and windows as well as their room door. Natasha woke her up at approximately 2h30 in the morning and told her that there was a person who was trying to open their room door. Since they were alone at home, she called the neighbor Rehabiam and informed him about the person(s) in their house and he came immediately. She testified that she heard his voice outside their room and asked him how he entered the house and he informed her that the kitchen door was wide open.

[52] They opened the room door and when they checked through the house, they found that the flat screen television that was in the sitting room was gone and that the kitchen door was forced open with an unknown object. She then told Natasha to call the police.

[53] She testified that when the police came, they first checked the house where the television was placed and they left. They later returned with a police van and a red car driven by one of the police officers and called her to come and look at the two flat screen televisions in the red car and she recognized her television and she saw three male persons in the police van that were unknown to her.

Testimony of Natasha Shitaleni (subpoena witness)

[54] Natasha corroborated the version of Ndamonaonghenda in so far as her evidence in chief is concerned. She further testified that she could see footprints in the yard that roamed around the house but could not see where the foot prints ended as the street is covered with interlocks. She called the police and when they came, she indicated where the television was placed. The police then went to patrol the

area and came back with a big screen television and she recognized it as theirs as the stand was still affixed to the television.

[55] During cross examination, Natasha confirmed seeing the shoe prints from the main door when entering into the yard and she confirmed that she could follow the prints up until where the interlocks started in the street. She testified that there are street lights and that further down the street there are no interlocks. The witness further testified that there were no people visible in the street when they were walking around the house to investigate. She stated that the police responded quickly as they do not live far from the Mondesa Police Station. She confirmed that she was not shown who was in the police van but she saw guys in the van and when the van was opened, she backed off as she was scared.

Testimony of Paulus Nghikalulwa (subpoena witness)

[56] Mr. Nghikalulwa testified that, he is the owner of the red Suzuki with registration number N8773 WB, which was driven by the first plaintiff on the night in question. The witness confirmed that he is related to the first plaintiff. On the day of the incident the first plaintiff went to his car to charge his phone. He unlocked his car for the first plaintiff and he went back into the bar and when he came back his car was gone. He called the first plaintiff who responded that he was quickly going to pick up his girlfriend at Housemate, which is another bar.

[57] He further testified that he found out the following day that the first plaintiff was arrested with his car and that television sets were found in his car. He stated that he did not give the car to the first plaintiff as he just allowed him to charge his phone and that there was only a chrome tap in the boot of his car and nothing else.

[58] During cross, the witness confirmed that he and the first plaintiff used to use the vehicle (Red Suzuki) together. He further stated that he was concerned about the first plaintiff's safety as he was gone for too long. He testified that he was not concerned about the fact that the vehicle might be stolen. He further testified that he merely made the statement to the police for the return of his vehicle.

The Law and its application to the facts

[59] In the Supreme Court case of Government *of Republic of Namibia v Ndjembo (*SA 39 of 2017) [2020] NASC 56 (30 November 2020) Shivute CJ stated that:

'[13] At the heart of the court's assessment of whether there were reasonable grounds to arrest a suspect lies a potential tension between two competing public interests. On the one hand, there is a need to guard against arbitrary arrest or detention that would make greater inroads into constitutional rights of arrested persons.[1] This consideration requires that the purpose of the arrest must be in fact to bring the arrested persons before a court of law to ensure that they are prosecuted and not to harass or punish them for an offence they have not been convicted of.[2] On the other, there is a greater need to ensure that crimes are effectively investigated and that those who commit them are brought to justice. It is in the interest of the rule of law that reported crimes are effectively investigated. Doubtless, effective investigation of crime serves the interests of victims of crime and of the public in general. What is required therefore is a balance to be struck between these two competing public interests.

[14] The Legislature sought to draw the required balance by providing firstly, in s 40(1)(*b*) of the Act, that a peace officer may arrest without a warrant any person 'whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody'. Secondly, by providing in s 50(1) of the Act that a person arrested, whether with or without a warrant must be brought to a police station or if arrested on a warrant, to any other place mentioned in the warrant and if not released by reason that no charge is to be brought against him, be detained for a period of 48 hours unless he or she is brought before a magistrate and the further detention is ordered by the court for trial or for the purpose of adjudicating upon the cause for the arrest.

[15] It would appear that the 'jurisdictional facts' that must exist for peace officers to exercise the power conferred upon them by s 40(1)(*b*) are that the arrestor must be a peace officer; he or she must entertain a suspicion; suspicion that the arrestee has committed an offence referred to in schedule 1 to the Act, and that the suspicion must rest on reasonable grounds."

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[1] Article 11(1) of the Namibian Constitution provides: 'No person shall be subject to arbitrary arrest or detention.'

[2] Cf. *MacDonald v Kumalo* 1927 EDL 293 at 301; *Tsose v Minister of Justice & others* 1951 (3) SA 10 (A) at 17C-D (*Tsose*).

[60] In the present case, the arresting officer was a peace officer, the issue to be decided is whether he had a reasonable suspicion to arrest and whether that suspicion rested on reasonable grounds.

[61] In *Ndjembo*[3], Chief Justice Shivute stated further that:

'[17] Whether a peace officer may arrest without a warrant a person whom he or she 'reasonably suspects' of having committed a schedule 1 offence appears to me to depend on what constitutes reasonable suspicion. This court in *Nghimwena v Government of the Republic of Namibia*[4] – adopting the views of the authors Lansdown and Campbell – noted that 'suspect' and 'suspicion' are vague and difficult words to define. One of the enduring definitions of the word 'suspicion' was given by Lord Devlin in *Shaaban Bin Hussien & others v Chong Fook Kam & another*:[5] Speaking for the Privy Council, the learned law lord has this to say on suspicion:

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.'(my emphasis)

[18] Lord Devlin drew a distinction between reasonable suspicion and *prima facie* proof in the following terms:

> "*Prima facie* consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. . . . Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case."[6]

[62] Counsel for the plaintiff argued that even if it were found that there was a reasonable suspicion to arrest, there was no need, as the arresting officer had a discretion to do so and he failed to exercise that discretion.

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[3] Supra
[4] (SA27-2011)[2016] NASC (22 August 2016).
[5] [1969] 3 All ER 1627 (PC) at 1630C-D.
[6] Id. At 1631B-C.

[63] In the *Ndjembo* Case[7], the Chief Justice confirmed the discretion the police has to arrest by stating that:

"[22] After a careful analysis of the jurisprudence and legislative history of s 40(1) (*b*) and its legislative predecessor, the Appellate Division in *Duncan* found that if the jurisdictional facts that must exist before a peace officer may invoke the provisions of s 40(1) (*b*) are in place, the peace officer may then resort to the power of arrest.[8] He or she has discretion as to whether or not to exercise that power.[9] Although the grounds upon which the exercise of such discretion may be questioned are circumscribed, such discretion has to be exercised properly.[10] The court found that neither from what was said in previous cases nor from the legislative history of s 40 of the Act, can it be said that the legislature had not contemplated further investigations to be undertaken subsequent to the arrest of a suspect.[11] On the contrary, the legislature must have contemplated that further investigations could lead either to the suspect's release from detention or his or her prosecution on a criminal charge.[12] (my emphasis)

[23] That there is scope for further investigations prior to the suspect's appearance in court is also apparent from the provisions of s 50(1) of the Act, which as previously noted, permits the detention of a suspect for a period of 48 hours before he or she is taken to court. Having analysed the legislation this way, the court in *Duncan* concluded that an arrest without a warrant was not unlawful just because the peace officer intended to make further investigations before deciding whether to release the suspect or to proceed with his prosecution as contemplated by s 50(1) of the Act.[13]

[25] If the intention of the arresting officer is to bring a suspect before court, then there can be no question of the arrest being unlawful. It would of course be unlawful to arrest the suspect with the professed intention to bring him or her to justice, while the real intention is to frighten or harass him or her as an inducement 'to act in a way desired by the arrestor, without his appearing in court'.[14]"

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[7] Supra.
[8] At 818H.
[9] At 818I.
[10] Id.
[11] At 819H.
[12] Id.
[13] At 820C.
[14] *Tsose* at 17E-D.

[64] Based on the above authority, it is clear that the police need not have a *prima facie* case in order to arrest but rather a reasonable suspicion based on reasonable grounds. In the present case, the defendants' witnesses, the police officers, testified that they stopped a suspicious vehicle after they saw two gentlemen jumping into a red car in a quiet street and the car sped off. They pursued the car and tried to stop it with their headlights and police blue lights and siren, but to no avail. The vehicle only stopped once they were parallel to it. When questioned about the television none of the plaintiffs responded and they decided to remain silent.

[65] They were loaded in the police van and taken to the house where the complaint about a stolen television emanated from and the television was pointed out to the complainant in the criminal matter. The complainant stated that the television brought to her was not hers and upon further investigation in the surrounding area, the complainant's television was found at the spot where the two gentlemen initially jumped into the motor vehicle. The television was found on the side of the wall where the two men jumped into the car and sped off. The plaintiffs were subsequently arrested after their rights were read and explained to them and they were detained and prosecution started as a result. They were later released and the case subsequently withdrawn as no *prima facie* case could be established.

[66] The police officers testified that there was a reasonable suspicion formed when the plaintiffs sped off at night, failed to stop when chased by the police van, failed to give a satisfactory answer about the television in their possession, housebreaking implements were found in possession of the plaintiffs and the shoe prints matching the shoes of the second plaintiff were found on the scene of the crime.

[67] The arresting officer testified that he exercised his discretion to arrest because he did not deem it fit to use any other method to ensure the presence of the plaintiffs at court. He testified that at the time, they did not know where the plaintiffs lived and they did not provide satisfactory answers in respect of the television found in their possession.

[68] At no stage during cross-examination of the defendants' witnesses, did the plaintiffs deal with the housebreaking implements that were claimed to have been found in their possession. In fact, the only issue raised during cross- examination in this respect was where the housebreaking implements were found, in the car or on the person of the second plaintiff, as it was averred by the police officers. Counsel for the plaintiffs during cross examination also did not deal with the testimony that the second plaintiff was wanted as a suspect in a number of unresolved criminal cases, namely, CR no's: CR 71,73,74 and 75/2018.

[69] It is not clear from the evidence of the first plaintiff when the small television was placed in the boot of the red car, especially when Paulus, the owner of the ~~red~~ said car, stated that when the first plaintiff took his vehicle without his permission, there was only a chrome tap in the boot. Nowhere in his evidence does the first plaintiff give any indication at what stage during the night in question he went to collect the television, which he alleges was his. He, however, in evidence in chief, amplified his witness statement to state that he came with the television from Walvisbay with the intent on taking it home but forgot to drop the television at home and drove with it to Henties Bay. This does leave me perplexed.

[70] Further, I find that the witness, Paulus, clearly lied to the police in an attempt to evade being implicated in this case since his vehicle was used in the commission of a crime. Hence, his testimony in cross examination differs materially from that in his evidence in chief. He earlier wanted to distance himself from the incident and now wants to save his relative by stating that the vehicle was used by them both. I did not find Paulus to be a credible witness.

[71] During cross examination of the arresting officer, the plaintiffs' counsel advanced a notion that the arrest of the plaintiffs was unlawful because it was done without a warrant of arrest. Counsel then referred to s 40 of the Criminal Procedure~~s~~ Act 51 of 1977. The police officer, in cross examination, in fact highlighted that in terms of s 40 of the CPA it is clearly stated that a peace officer may arrest, without a warrant when:

(1) A peace officer may without warrant arrest any person- … (d) who has in possession any implement of housebreaking and who is unable to account for such possession to the satisfaction of the peace officer; (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing; (f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;…

[72] Counsel for the defense submitted that:

"It is the defendants' case that this notion cannot be sustained because the plaintiffs never pleaded 'arrest without a warrant' in their particulars of claim and no replication was filed. In their joint pre-trial report dated 26 January 2022 and filed on record on 27 January 2022 the parties agreed to abide by what is stated in their pleadings. Therefore, the plaintiffs cannot now change their position of unlawfulness of the arrest to say that it is because it was done without a warrant of arrest. The joint pre-trial report was made an order of Court by Pre-Trial Court Order dated 8 February 2022. Hence the pre-trial report has become binding on the parties."

[73] It is true that this was never pleaded and as such is not available to the plaintiffs and that it was also not raised in the joint pretrial report,[15] however, this should have been objected to at the stage it was brought up and not merely in closing submissions.

[74] The plaintiffs are claiming that they were driving at night when the police stopped them out of the blue and arrested them. They did nothing wrong and explained that the television in their possession belongs to the first plaintiff. They were further (were) unlawfully arrested and detained on charges that they knew nothing about.

[75] In the case of *Cloete v Minister of Safety and Security* [2021] NAHCMD 523, Judge Schimming-Chase stated that:

[15] S T v P T (2) (5066 of 2014) [2019] NAHCMD 58 (15 March 2019).

"[86] It is now trite that once the court is faced with two mutually destructive versions, the court is judicially guided as to the approach to evaluating the conflicting evidence. This guidance has been reiterated over a long time of judicial pronouncements on the relevant principles, which are as follows: The plaintiff can only succeed if she satisfies the court on a preponderance of probabilities that her version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court must weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept her version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes her and is satisfied that her evidence is true and that the defendant's version is false.

[87] The proper approach is for the court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after applying its mind that the court would be justified in reaching the conclusion as to which opinion to accept and which to reject. Where the onus rests on the plaintiff and there are two mutually destructive versions as aforesaid, the plaintiff can only succeed if the plaintiff satisfies the court on a preponderance of probabilities that the plaintiff's version is true and the defendant's version is false.[16]"

[76] It is clear that the versions of the parties in this case differ materially and I have to apply my mind properly to the merits and demerits of these versions and whether the plaintiffs have, on a balance of probabilities, convinced me that their version is plausible and should thus be accepted.

[77] It is true that the defendants' version was not put to the plaintiffs in cross-examination and based on that the plaintiffs' counsel wants this court to accept their version as true and correct and totally disregard the evidence of the defence.

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[16] *National Employers Insurance Company v Jagers* 1984 (4) SA 437 (E) at 440D-G; *Afrikaner v Frederick* (I 2043/2004) Maritz J (18 November 2004) at 10.

[78] In *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (18 April 2017) Judge Masuku stated that:

"[25] I will start the enquiry by dealing with cross-examination as it appears central to Ms. Campbell's argument. The duty of a cross-examiner, is in my considered view key in this regard. In *Small v Smith* (*supra*), Claasen J. stated the following at 438E-F:

> "It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute is left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.' (Emphasis added). See also *Ndabeni v Nandu.*[17]

[26] In the *SARFU* case (*supra*), the court stipulated the applicable principle as follows:[18]

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity whilst in still in the witness-box, of giving an explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling that witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. The rule was enunciated in *Browne v Dunn* (1893) 6 R 67 (HL). The rule in *Browne v Dunn* is not merely of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisprudence.' (Emphasis added).

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[17] *Ndabeni v Nandu* (I 343/2013) [2015] NAHCMD 110 (11 May 2015) para 23 to 25.
[18] para 61 –64.

[27] The universality of the importance of aptly putting one's case in cross-examination to the other side's witnesses can be exemplified by two further judgments, after which I will summarise the importance of cross-examination and how the principles enunciated in the case referred to in this judgment apply in the instant case. In the Botswana case of *S v Fly*[19] I had occasion to refer to two cases on this subject. The first was *The Prosecutor v Jean Paul Akayesu,*[20]where the Chamber (court), stated the applicable law as follows about the need to put one's case to the opposing witnesses:

'If, and this is the second point, the Defence must lay the foundations for that challenge and put the challenge to the witness during cross-examination. This is both a matter of practicality and principle. The practical matter is this: if the Defence does not put to a witness the allegation that he is lying because he wishes to take the accused's property, then this may elicit a convincing admission or rebuttal. The witness may break down and reveal, by his words or demeanour, that he has indeed been lying for that purpose; alternatively he may offer a convincing rebuttal for example, pointing out that the accused has no property which the witness could appropriate. Either way, the matter might be resolved. To never put the crucial question to the witness is to deprive the Chamber of such a possible resolution. As a matter of principle, it is only fair to a witness, whom the Defence accuse of lying, to give him or her an opportunity to hear that allegation and to respond to it. This is the rule in common law, but is also simply a matter of justice and fairness to victims and witnesses, principles recognised in all legal systems throughout the world.' (Emphasis added).

[28] In the High Court of Swaziland, Hannah C.J. (later a Judge of this Court), stated the following in the celebrated case of *R v Dominic Mngomezulu And Others*[21] regarding the importance of putting one's case to the opposing party's witnesses:

'It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of a prosecution's testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of the cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening

[19] (CTHFT-000057-07) [2008] BWHC 464 (21 October 2009).
[20] Case No. 1 CTRT-96-4-T at 35 (A judgment of the United Nations Tribunal into the Genocide in Rwanda).
[21] Cri. Case No. 94/90 at. 17.

period of time. It is also important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story.'

[29] I must preface my remarks by saying that the fact that some of the cases referred to above are criminal cases is of no moment as the principle holds true even in civil cases. What is made plain in this regard from the foregoing authorities, is that it is imperative that the party called upon to cross-examine the opposing party's witness must put its case fully to the witness or witnesses as the case may be. This is because once the said witnesses have been excused, the likelihood of the court recalling or allowing them to be recalled is very minimal. In this regard, a party has to ensure that its case is fully canvassed in all its material aspects, leaving nothing to chance because once the witness has been excused, the witness will not ordinarily be called to deal with issues which come as an afterthought to the cross-examiner. As a result, the court is entitled to reach its verdict on the evidence led and to draw inferences, if any, from that evidence and no more."

[79] I do agree with the authorities herein in respect of the principles of cross-examination and how important it is to put your version to the witness in cross-examination. However, I do not necessarily agree that just because the defendants' version was not put to the plaintiffs it warrants the position that the plaintiffs' version is correct without having regard to the case as a whole.

[80] In McDonald v Young [2011] JOL27126 (SCA); 2012(3) SA 1 (SCA) the position was put beyond reasonable doubt:

"[6] It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In Kentz (Pty) Ltd v Power Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most succinct statement of the law in this regard is to be found in in Siffman v Kriel, where Innes CJ said:
"It does not follow, because evidence is uncontradicted, that therefore is true…The story told by the person on whom the onus rests may be so improbable as to not discharge it"[22]'

[81] I found the demeanor of plaintiffs to be evasive as they clearly did not deal with any of the allegations made by the defendants despite being notified of what the

[22] BR Southwood*, Essential judicial reasoning*, Lexis Nexis South Africa at 6

defendants' case was. I also find that, despite the lengthy cross examination of the police officers by the defense counsel, the police officers were materially steadfast in their version and could not be broken down. I also found the police officers to be credible witnesses based on their testimonies and the demeanor they portrayed whilst testifying.

[82] In conclusion on this point, I am of the view that I cannot, based on the fact that the defendants' version was not put to the plaintiffs, agree that it binds me to accept that their version is true as I am judiciously bound to have regard to the summation of the pleadings and evidence, be it oral or documentary, in deciding which version to accept as the truth.

[83] Having due regard to the authorities mentioned herein, the arresting officer is the only person who has to form a suspicion and such a suspicion needs to be reasonable and on reasonable grounds. I, on the basis of the evidence by the arresting officer, am convinced that a reasonable suspicion was formed when he saw the plaintiff's vehicle speed off when they saw the police vehicle, when he found a television in their possession, the ownership of which they could not explain, the presence of house breaking implements and the fact that the shoe prints of the second plaintiff was found at the scene of the crime.

[84] There are two mutually destructive versions before this court and the onus rest on the plaintiffs to prove their case on a balance of probabilities. I am of the view that the plaintiffs failed to discharge that onus.

[85] The defendants' version is highly probable as I am convinced that a reasonable suspicion existed on reasonable grounds in terms of Section 40 (1) of the Criminal Procedure Act and as such I come to the conclusion that the arrest of the plaintiffs was lawful. I further find that the detention of the plaintiffs was lawful in that the plaintiffs were brought before a court of law within a period of 48 hours and their further detention was ordered by a Magistrate in terms of s 50 of the Criminal Procedure Act 51 of 1977.

[86] In the premises, I do not deem it is necessary to deal with the claim in respect of malicious prosecution as it flows naturally from the lawful arrest and detention and that the prosecution in this regard could not have been malicious.

[87] For these reasons, I make the following order:

The plaintiffs' claims are dismissed with costs.

AN HANS-KAUMBI

Acting Judge

APPEARANCES

PLAINTIFF:	Mr Gobetz (assisted by Mr Ellis) of Ellis Attorneys, Swakopmund
DEFENDANT:	Mr Kashindi of Government Attorney, Windhoek