



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

REPORTABLE

Case no: CA 117/2021

In the matter between:

THE MINISTER OF POLICE

Appellant

AND

LUVUYO FUNDILE DUNJANA

First Respondent

SAMKELISIWE MZAMO HOPA

Second Respondent

CHUMA FUYISIZWE KOSANA

Third Respondent

SINEKAYA MCOPELA

Fourth Respondent

LUYANDA NZO

Fifth Respondent

SINETHEMBA PAYI

Sixth Respondent

MELIKHAYA TANCA

Seventh Respondent

Coram: van Zyl DJP; Govindjee J and Ah Shene AJ.

Heard: 16 May 2022

Delivered: 25 October 2022

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] This is an appeal by the Minister of Police against a judgment of Tshiki J (the Court) in the Gqeberha High Court ordering the Minister to pay the sum of R500 000-00 as compensation to each of the seven respondents. The order was made pursuant to an action arising from what the Court found was the unlawful arrest, detention and assault of the respondents by police officers employed by the South African Police Services.

[2] The Minister requested, and was given leave by the trial court to appeal the whole of its judgment. At the hearing of the appeal, the issues were confined to the correctness or otherwise of the finding of the trial court that: The Minister had failed to prove that the arresting officer entertained a reasonable suspicion that the respondents had committed the crime of robbery; the second and fourth respondents were assaulted by members of the Police Services; and the quantum of the compensation awarded to the respondents in respect of both claims, was justified in the circumstances of the matter.

[3] What has become a not too uncommon occurrence took place on 15 June 2013 when a supermarket in Beetlestone Road in Gelvandale, a suburb of Gqeberha, was robbed of cash monies by eight persons armed with firearms. The robbers, who had covered their faces to mask their identities, fled the scene in a white Nissan pickup truck. A warrant officer Botha, who is a member of the police reactionary unit, was on patrol duty with two fellow police officers in the area at the time. In response to being notified of the robbery on the police radio, he proceeded to patrol the area in the vicinity of the supermarket. In Botha's experience, the perpetrators of a robbery would exchange motor vehicles after they had fled the scene of the robbery, leaving behind the get-away vehicle. He accordingly did not proceed to the scene of the robbery, a task which he left to the uniform branch of the police, but kept a lookout for an abandoned motor vehicle.

[4] According to Botha, a street block or two away from the supermarket he found a vehicle that raised his suspicion by the manner in which it was parked. He radioed the registration number of the vehicle to the police control centre. He was told that the vehicle had been reported as stolen, and that the vehicle matched the description of the vehicle that was used in the robbery at the supermarket. While at the scene, Botha said he was approached by a member of the public who wanted to remain anonymous. The individual told him that the persons who had fled the scene of the robbery in the pickup truck to the place

where Botha found it, alighted therefrom, and left in a silver Volkswagen motor vehicle. The person was able to only provide him with the alphabetical letters of the registration details of the vehicle.

[5] Making use of a social media application on his cellular phone, Botha said that he asked his informers to be on the lookout for a motor vehicle that matched the description given to him. In the early evening of the same day Botha was told by an informer that two motor vehicles, of which one was a silver Volkswagen Polo motor vehicle with matching registration letters, were parked at an address in Ngalo Street, New Brighton in Gqeberha. Botha thought it necessary to request assistance from what was referred to as a tactical response unit, whose members accompanied him to Ngalo Street in their own vehicle.

[6] On their arrival at the address they found five persons sitting in two vehicles parked inside the property. Both vehicles were Volkswagen Polos, the one silver and the other red in colour. The occupants got out of the vehicles and ran away. They were however all caught and searched. Nothing was found on them. Two persons were also found inside the house. Similarly, nothing incriminating was found on them. A search of the two vehicles and the house yielded alcohol and items of clothing that included a black leather jacket found in the red vehicle. The explanation offered by the respondents for their

presence at the house was that they were celebrating the birthday of one of them. Botha spoke to a Captain Dippenaar, first telephonically and later on Dippenaar's arrival at the house in Ngalo Street with regard to the clothing that he had found. Dippenaar, who viewed the close circuit television footage of the commission of the robbery, informed Botha that the clothing worn by the participants in the robbery looked like the clothing found by Botha at Ngalo Street. Botha thereupon arrested the respondents, having formed what he said was a reasonable suspicion that the respondents committed the robbery at the supermarket in Gelvandale.

[7] Dippenaar's evidence was that he attended the scene of the robbery and viewed the video footage recorded by cameras inside the supermarket. There were seven or eight robbers who were all armed with firearms and with their faces covered by balaclavas. Several policemen, including the witness Botha, came to the scene to inform him of information received by them about possible suspects. He later went to Ngalo Street at the request of a Colonel Humphreys. There he found seven persons who were tied up and were lying on the ground. He saw what he thought were Volkswagen Golf motor vehicles parked outside the property. The clothing worn by the persons lying outside seemed similar in appearance to the clothing worn by the robbers in the video footage. In one of the motor vehicles he was shown a black leather jacket that resembled a jacket worn by one of the robbers. Inside the house there was a branded hat, what

Dippenaar described as a “hoodie” or a “beanie” type of balaclava, including two laptop computers with pictures of firearms stored thereon.

[8] The next day the investigation of the robbery at the supermarket was assigned to a Warrant Officer Erasmus. Erasmus testified that he compiled a photo album consisting of photos taken of the respondents in the clothing which they were wearing when they were arrested by Botha the previous day. The photos were shown to witnesses to the robbery. According to Erasmus none of them were able to identify any of the respondents by their clothing. He thereupon released the respondents from custody. He continued investigating the matter. The respondents were not arrested again, nor were they ever charged with having committed the robbery at the supermarket.

[9] The arrest of the respondents was without a warrant. The expectation is that the law relating to a warrantless arrest under our constitutional dispensation must by now be certain, particularly following the judgment of the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto (Sekhoto)*¹, a judgment that may rightly be considered to be the *locus classicus* with regard to the principles which find application to a claim for unlawful arrest and detention. There has however, of late, been a marked increase in the number of cases serving before the different courts in this division that involve claims for compensation arising from the arrest of persons without a warrant, particularly

¹ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA).

in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act). While there may be other reasons for this, it is apparent from the case law relied upon during argument that diverse outcomes have created fertile ground for litigants to choose from a number of available legal arguments that may be used in an attempt to pursue a favourable outcome. This, what is an unravelling of the construction given to the legislative intent in the section in Sekhoto, engenders legal uncertainty, and “**The power of the lawyer**” wrote Jeremy Bentham, “**is in the uncertainty of the law**” (The Works of Jeremy Bentham, Now First Collected at page 429).

[10] As a point of departure, section 12(1) of the Bill of Rights of the Constitution provides for the right of every person not to be deprived arbitrarily or without just cause of his or her freedom. This conforms with the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights that guarantees the right not to be subjected to arbitrary arrest or detention except on such grounds in accordance with such procedures as are established by law. Officials with the power to arrest are constrained, like any other public functionary, by the principle of legality imposed by the Constitution, and may not exercise any power or perform any function beyond that conferred upon them by the law, or exercise such power arbitrarily or without just cause.²

² *Mahlangu and Another v Minister of Police* [2021] ZACC 10 paras [21] to [28].

[11] The arrest of a person without a warrant is authorised by law in section 40 of the Act. The section has passed constitutional muster.³ It sets the conditions for the arrest of a person without a warrant in what are a number of differing circumstances. In the factual context of the present matter, the arrest was effected in the circumstances contemplated in subsection (1) (b). In terms thereof, a peace officer may arrest any person without a warrant “**whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.**”

[12] On a reading of the section it raises two separate and distinct issues, each with its own onus of proof. The first issue deals with the power or authority of the peace officer to arrest a person without a warrant. The existence of the power to effect such an arrest is subject to proof of four jurisdictional facts, namely that: (a) the arrestor was a peace officer; (b) he entertained a suspicion; (c) the suspicion was that an offence referred in Schedule 1 of the Act had been committed; and (d) the suspicion was based on reasonable grounds.⁴

[13] The second issue deals with the exercise of the power to effect a warrantless arrest, and is not to be conflated with the jurisdictional facts for the

³ *Sekhoto* op cit fn 1 paras [24] and [25].

⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G – H and *Sekhoto* op cit fn 1 para [6].

coming into existence of the power to effect an arrest without a warrant.⁵ It only arises once it is found that the four jurisdictional facts are present for the existence of the power to arrest. It is accordingly premised on a finding that the arrestor was possessed of the power to effect a warrantless arrest. In *Sekhoto*, Harms DP referred with approval to the pronouncements of Hefer JA in *Minister of Law and Order v Dempsey*⁶ with regard to the drawing of a distinction between jurisdictional facts for the existence of a power, and the improper exercise of that power once found to exist. This, Hefer JA said, means that there are two separate and distinct issues, each having its own onus.⁷

[14] In the context of section 40(1)(b), the focus of the exercise of the power to arrest is on the discretionary nature of that power. The section provides that a peace officer “**may**” without a warrant arrest any person. They are accordingly not obliged to exercise their powers of arrest. “**It is permissive, and not peremptory or mandatory.**”⁸ Not unlike any other exercise of a discretionary public power, the traditional common law grounds of review and the objective rationality ground required by the Bill of Rights are used to test the legality of the exercise of the discretion to arrest.⁹ However, unlike in the case of the existence of the power to arrest, where the onus of proof is on the person who

⁵ *Sekhoto* op cit fn 1 para [48].

⁶ *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 37 B- 39 F.

⁷ *Ibid* at 38 G.

⁸ *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para [42].

⁹ *Sekhoto* op cit fn 1 paras [33] to [36].

contends to have been possessed that power, the onus is on the party who contends that the power was improperly exercised, to prove it. **“The general rule is also that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof.”**¹⁰

[15] The effect of the location of the onus is that the issue of the improper exercise of the arresting officer’s discretion will only arise when it has been pertinently pleaded. **“The onus can arise only after the issue itself has arisen.”**¹¹ As stated by Harms DP in his judgment in *Sekhoto*, the principle of litigation fairness demands not only that the ground(s) on which it is contended there had been an improper exercise of a discretion must be pleaded, but the specific facts on which those grounds are based must be stated, **“It cannot be expected of a defendant ... to deal effectively, in a plea or in evidence, with unsubstantiated averments of *mala fides* and the like, without the specific facts on which they are based being stated.”**¹² This is in keeping with the purpose of pleadings which is to **“ascertain definitively what is the question at issue between the parties; and this object can only be obtained when each party states his case with precision.”**¹³ It follows that the issue of an improper exercise of the arresting officer’s discretion cannot be

¹⁰ *Sekhoto* op cit fn 1 para [44].

¹¹ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para [21].

¹² *Sekhoto* op cit fn 1 para [50].

¹³ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107 C – E.

raised for the first time on appeal as the respondents attempted to do in argument in this matter.

[16] It was not in dispute in the present matter that the arresting officer was a peace officer as defined in the Act, and that he formed a suspicion that the respondents had committed the offence of robbery, which is an offence referred to in Schedule 1 of the Act. The first issue to be decided in the appeal was accordingly confined to the question of whether the suspicion formed by the arresting officer, that the respondents had committed the offence in question, was a reasonable suspicion. The test for whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective.¹⁴ The enquiry is whether a reasonable person in the position of the arresting officer, and possessed of the same information, would have considered that there were grounds for suspecting that the arrestee committed the Schedule 1 offence in question. It is not whether the police officer believes that he has a reason to form a suspicion, but whether objectively he had formed a suspicion that is reasonable.¹⁵ The requirement that the arresting officer must have a suspicion, as opposed to probable cause, implies an absence of certainty or adequate proof. **“The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on**

¹⁴ *Minister of Safety and Security and Another v Swart* 2012 (2) SACR (SCA) para [20] and *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (E) at 658 E.

¹⁵ *Mabona* op cit fn 14 at 658 E – F.

specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.¹⁶ The facts or information possessed by the arresting officer must not be equated with evidence that will be admissible in court. **“It must at the outset be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.”**¹⁷ It is an important distinction that must be kept in mind when the facts and information possessed by the arresting officer is evaluated against the standard of reasonableness.¹⁸

[17] A suspicion would be reasonable even in the absence of sufficient evidence to support a *prima facie* case against the arrestee.¹⁹ Accordingly, at the point of a reasonable suspicion, it appears that a crime may have been committed, as opposed to the situation where probable cause exists, that is, when the likelihood is raised that a crime had been committed. A suspicion, by definition, means the absence of certainty. As it was explained in *Minister of Law and Order v Kader*,²⁰ it **“is a state of conjecture or surmise where proof is lacking ... Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.”**²¹

¹⁶ *Biyela v Minister of Police* [2022] ZASCA 36 para [34].

¹⁷ Petse AP *Biyela* ibid para [33].

¹⁸ See para 28 of this judgment.

¹⁹ *Duncan* op cit fn 4 at 819 I to 820 B. See also *Manango and Others v Minister of Police* 2021 (2) SACR 225 (SCA) para (8).

²⁰ *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50 H.

²¹ See also *Duncan* op cit fn 4 at 819 I; *Powel NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) para [36] and *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130 para [11].

[18] With this distinction in mind, the test for a reasonable suspicion requires an objective assessment of the information the arresting officer says, and is found on the probabilities, to have been possessed by him at the time of the arrest. The test is however not applied in a vacuum. It is subject to the facts and the context. In its application, as in so many other areas of the law, context is everything. Accordingly, this assessment must be made, as correctly pointed out in *Minister of Safety and Security v Van Niekerk*,²² with due regard to the factual context of each case. **“It would not be desirable for this court to attempt a blanket all purpose test for constitutionally acceptable arrest ... the lawfulness of an arrest will be closely connected to the facts of the situation.”**²³ By reason of its very nature, the enquiry must be fact specific, that is, each case must be assessed in the context of its own facts and circumstances.²⁴ That factual context will be provided by matters such as the nature of the crime, the elements thereof, the source and the nature of the information on which the suspicion is said to be based, and its significance in supporting the suspicion entertained by the arresting officer. By way of an illustration, in *Mabona and Another v Minister of Law and Order (Mabona)*,²⁵ the reasonableness of the suspicion of the arresting officer was determined in the context of the fact that the source of the

²² 2008 (1) SACR 56 (CC). See also *Jacobs v Minister of Safety and Security* (unreported Case no CA 327/2012) GHTHCZA delivered on 23 September 2013 para [22].

²³ *Jacobs* op cit fn 22 para [20].

²⁴ *M R* op cit fn 8 para [42].

²⁵ *Mabona* op cit fn 14.

information, on which the officer based his suspicion, was an anonymous informer. That fact, it was found, would cause a reasonable police officer to be mindful of the cautionary considerations that would usually find application to the evidence of such a witness in his assessment of that information.²⁶ There is clearly no room for a general rule that must be applied dogmatically. What may be sufficient in one instance to raise a suspicion that is reasonable, may be found to be insufficient in another instance. It is, as a result, simply wrong to attempt to formulate what may be wrongly perceived as hard and fast rules for applying the test for the existence or otherwise of a suspicion that is reasonable.

[19] A recent example of a misconception regarding the application of the test for a reasonable suspicion, that has managed to take hold, is the proposition, framed as if it is a rule of general application, that it is **“trite that police officers purporting to act in terms of Section 40 (1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest.”**²⁷ It manifested itself in this matter in the submission that Botha could not objectively have formed a suspicion that it was the respondents who committed the robbery without him first having made an attempt to determine the veracity of their alibi. This is a most unhelpful proposition. I say this for the following reasons: Firstly, it negates the fact that

²⁶ At 658 I to D.

²⁷ *Matebese v Minister of Police* (unreported case no 224/2017) ZAPHC delivered on 18 June 2019 para [28]; *The Minister of Police and one Other v Erasmus* (unreported Case no 182/2019) GHCZA delivered on 19 January 2021 of para [25] and *Barnard v Minister of Police and Another* [2019] 3 All SA 481 (ECG) para [35].

the application of the test for a reasonable suspicion is fact specific. As stated by the Constitutional Court in *MR v Minister of Safety and Security*,²⁸ in the context of the exercise of the discretion as envisaged in section 40(1)(b), which is similarly an enquiry that is fact specific, “**it is neither prudent nor practical to try to lay down a general rule.**” To hold otherwise may have unintended consequences and place too onerous a duty on a police officers that may, as stated in *MR v Minister of Safety and Security*,²⁹ prove to obstruct them in the exercise of their powers pursuant to their constitutional duty to combat crime.

[20] As the test for a reasonable suspicion is fact specific, and must consequently be applied in the context of the facts and the circumstances of each case, the quality of the information at the disposal of a police officer may in a particular case be so tenuous or conflicting that it cannot objectively sustain a suspicion as envisaged in section 40(1)(b) without the police officer first having made further enquiries before he effected an arrest. However, the fact is that the resultant finding that the police officer could not reasonably have formed a suspicion as required, is because the information at his disposal was insufficient to sustain such a suspicion, and not because he had failed to investigate the information given to him by the arrestee. To hold otherwise would be to conflate the requirement that the suspicion must be a reasonable

²⁸ *MR* op cit fn 8 para [42].

²⁹ *Ibid.*

one, with the legal standard which is applied to determine fault in delictual claims, where it is the action or inaction of the defendant that is tested against that of the reasonable man. The statement that a **“peace officer who fails to substantiate his suspicion when he is able to do so or has the opportunity to do so, does not act reasonably,”**³⁰ has accordingly no place in the context of the enquiry envisaged in section 40(1)(b).

[21] The question is simply whether a reasonable person, confronted with the same information possessed by the arresting officer at the time of the arrest, which would include the exculpatory statement of the arrestee, could form a suspicion that the suspect had committed an offence as envisaged in Schedule 1. In *Mawu v Minister of Police*³¹ the court rejected the proposition in *Mbotya v Minister of Police*³² that the arresting officer’s failure to verify information on which he acted rendered the arrest unlawful. As correctly stated by Zondi J, there is nothing in the provisions in section 40(1)(b) which leads to a conclusion that it is a requirement for a reasonable suspicion to be formed that **“the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on the information, the quality of which has not been subjected to scrutiny will render an arrest unlawful”**,³³ and that the decision in *Mabona* certainly does not

³⁰ *Barnard v Minister of Police and Another* op cit fn 27 para [35] and *Nkosi v The Minister of Police and Another* (unreported Case no 51083/2015) GTHCZA delivered on 23 August 2017.

³¹ *Mawu v Minister of Police* 2015 (2) SACR 14 (WCC).

³² *Mbotya v Minister of Police* (1122/10) [2012] ZAECPEHC at para [25].

³³ At para [31].

provide authority for such a proposition. The reason, the court said, lies in the fact that a lawful arrest in terms of section 40(1)(b) is made upon a suspicion that must be reasonable, and not on facts which can be proved in court. To this may be added that the focus of the enquiry is the information at the disposal of the arresting officer, which information is to be measured against the standard of reasonableness, as opposed to the reasonableness of the conduct of the police officer concerned.

[22] Secondly, the decision which is being relied upon for the proposition, is not authority for it. Reliance is usually placed on the judgment in *Louw and Another v Minister of Safety and Security and Others (Louw)*,³⁴ a judgment which the Supreme Court of Appeal in *Sekhoto* had found to introduce an approach contrary to the meaning of section 40(1)(b). In the passage in *Louw*, relied on for the proposition, the court said the following about the actions of the arresting officer. **“The fact that De Beer and his colleagues acted with malice is further evidenced by his failure to acquaint himself with the content of Mr Badenhorst’s statement, which records no accusation of theft at all. His failure to investigate the plaintiff’s explanation, or to contact Mr Wessels, was a clear dereliction of duty. He was obliged to pay as much attention to the suspects’ statements prior to arrest as he was to consider the Badenhorsts’ story. In this case he did neither. Had he stopped to consider what the Badenhorsts told him, he would have known that there was no *prima facie* case of the commission of a crime contained in the First Schedule.**

³⁴ *Louw and Another v Minister of Safety and Security and Others* 2008 (2) SACR 178 (T) 184 b.

Had he listened to the plaintiff's version and had he been as concerned about the rights of the plaintiffs, the suspects, as he had been about those of the complainants, he would have realised that no crime had been committed, let alone one warranting an arrest." "The wrongfulness of the police action is further evident from the way in which the docket was completed after the arrest. From its cover, and from the second plaintiff's evidence, it is quite clear that Van Niekerk and De Beer were uncertain what the plaintiffs ought to be charged with once plaintiffs had been taken to the police station. Eventually, they decided that the theft of the fax machine should be regarded as the principal charge."³⁵

[23] This passage was relied upon in *Liebenberg v Minister of Safety and Security* (Liebenberg)³⁶ in support of the notion that **"Police officers who purport to act in terms of subsection 40(1)(b) shall investigate exculpating (sic) explanations offered by a suspect before they can form a reasonable suspicion for the purposes of a lawful arrest."**³⁷ On a reading of the judgments referred to in paragraph [13] above, it is evident that the *Louw* and *Liebenberg* judgments are the source of what has subsequently been said to be **"trite"**, namely that there is a duty on an arresting officer to verify exculpatory statements before he can form a reasonable suspicion as envisaged in the section.

[24] What was said in *Louw* cannot be elevated to a hard and fast rule that the failure to first investigate an exculpatory statement proffered by a suspect would

³⁵ *Louw* ibid at 184 b – c.

³⁶ *Liebenberg v Minister of Safety and Security* (18352/07) [2009] ZAGPPHC 88.

³⁷ At para [19.23].

render the arrest in terms of section 40(1)(b) unlawful. That is not what the court in *Louw* said, or what was intended to be conveyed. That this is so, is evident from a reading of the aforementioned passage in *Louw* on which reliance is placed as authority for the stated proposition. It is presumably based on the statement in the passage in *Louw* that the failure of the arresting officer to investigate the plaintiff's explanation, was a dereliction of duty. However, this statement was not made in the context of determining the reasonableness of a suspicion held by the arresting officer, but rather in the context of the court's finding that the arresting officer acted with malice, and that the arrest was made for an ulterior purpose, namely to punish him. That purpose, Harms DP in *Sekhoto*³⁸ pointed out, was unlawful, as the arrestor invoked the power for a purpose not contemplated by the legislature, which is to bring the suspect before a court to stand trial.³⁹

[25] Lastly, as correctly found by the court in *Noemdoe v The Minister of Police*,⁴⁰ the statement in Liebenberg cannot be correct, because **“To hold otherwise would be tantamount to creating an additional jurisdictional fact justifying an arrest in terms of Section 40(1)(b) of the Act.”** In *Sekhoto* Harms DP, dealing with the finding in *Louw* that the police are obliged to consider in each case whether there are no less invasive options to bring a suspect before the court

³⁸ *Sekhoto* op cit fn 1 paras [30] and [31].

³⁹ *Sekhoto* op cit fn 1 para [30].

⁴⁰ *Noemdoe v The Minister of Police* (unreported Case No 2987/2018) GCHCZA para [36].

other than arrest, definitively found that there is nothing **“in the provision which leads to the conclusion that there is, somewhere in the words a hidden fifth jurisdictional fact.”** The judgment in *Louw* is therefore not authority for the proposition that a police officer should investigate exculpatory explanations offered by a suspect before he can form a reasonable suspicion for the purpose of a lawful arrest, or for the proposition that flows therefrom, namely that a police officer has a duty to prove or disprove the truth of what has been conveyed to him by a suspect before he can execute a warrantless arrest in terms of section 40(1)(b) as was contended in argument, and correctly rejected in *Minister of Police v Soetwater and Others*.⁴¹

[26] Turning to the facts of the present matter, the first question is then whether Botha could reasonably have entertained the suspicion, which he said he did, when he arrested the respondents. This question is of course premised on an acceptance that Botha was as a fact possessed of the information which he said he had at the time. On a reading of the trial court’s reasons for its judgment, it is evident that it was also not convinced of the credibility, and as a consequence the reliability, of Botha’s evidence with regard to what the information was he said he possessed. To this extent, the court pertinently found in its assessment of the evidence that Botha’s testimony was contradicted in material respects by that of Dippenaar. Considering the fact that the trial court was in the advantageous position to assess the credibility of the witnesses

⁴¹ *Minister of Police v Soetwater and Others* (unreported Case no 217/2016) GHHCZA.

owing to its extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*, this finding must be approached with the necessary deference.⁴²

[27] Credibility involves an assessment of the trustworthiness of a witness' testimony based on the veracity of the witness and the accuracy of the evidence that the witness provides. This assessment of the evidence would involve an examination of the various factors including, but not limited to whether the witness's evidence harmonizes with that of other witnesses on the same aspects. On a reading of the appeal record the court's criticism of the evidence of Botha does not appear to be unjustified or made in error. Material contradictions in the evidence of Botha and Dippenaar that are relevant to an assessment of Botha's credibility and ultimately the reliability of his evidence with regard to the incriminating information he said he was possessed of, relates to whether: Botha went to the actual scene of the robbery at the supermarket where he, according to Dippenaar, spoke to him and he gave Dippenaar information regarding possible suspects; the model of the Volkswagen vehicles found at Ngalo Street was a Golf or a Polo; not only the items of clothing found in one of the vehicles and inside the house was similar to that which Dippenaar said was worn by the perpetrators of the robbery, but also the clothing worn by the suspects which Dippenaar said he found lying on the ground on his arrival at

⁴² *Rex v Dhlumayo* 1948 (2) SA 677 (A) at 705; *S v Hadebe* 1997 (2) SACR 641 (SCA).

Ngalo Street; a hat was found inside the house which had a branded logo that corresponded with a logo seen by Dippenaar in the video footage on a balaclava worn by a perpetrator, and lastly, two laptop computers were found inside the house with what Dippenaar clearly thought was incriminating evidence stored thereon. These discrepancies in the evidence of the two police officers are material in the context of the issues raised in the matter. They are all relevant to the information the arresting officer said he had at his disposal at the time, and whether it was sufficient to establish a suspicion that is reasonable as required by section 40(1)(b).

[28] The trial court proceeded to find that Botha, on an objective approach, did not have reasonable grounds for his suspicion that the respondents had committed the robbery earlier that day at the supermarket in Gelvandale. The question that must be answered is whether a reasonable person in the position of Botha could have considered that there were good and sufficient grounds for suspecting that the respondent participated in the robbery. As stated, an assessment of the information possessed by the arresting officer against the standard of reasonableness takes place *inter alia* in the context of the nature and the elements of the crime in question, the source and the nature of the information, and its importance in establishing the suspicion which is said to have arisen.⁴³ Where, as in the instant matter, the description of the vehicle

⁴³ *Mabona* op cit fn 14 at 658 I to 659 F.

was given to the arresting officer by an unidentified person who wanted to remain anonymous, and who was not prepared to make a sworn statement, a reasonable policeman would, as stated in *Mabona*, be aware of the possible danger in an uncritical acceptance of the word of a person which is nothing more than an informer.⁴⁴ A reasonable policeman would also have been aware that in the circumstance of this case, the focus of any information on which they have to base a suspicion, must of necessity relate to the identification of a suspect as having been one of the robbers. As in the case of an informer, evidence of identification is generally approached with caution,⁴⁵ and is one of the many considerations which may be relevant in evaluating *ex post facto* whether the information possessed by the arresting officer was objectively sufficient to sustain a suspicion that is reasonable. However, as cautioned earlier, the information is not to be equated with what would be evidence that is admissible at a trial.⁴⁶ Put differently, in applying the test for a reasonable suspicion, the evaluation of the information is aimed at determining the reasonableness of the grounds for the suspicion that the arrestee committed an offence, as opposed to whether it constitutes admissible evidence that could support a decision to charge him with an offence, or is sufficient to secure his conviction at the trial.

⁴⁴ *Mabona* op cit fn 14 at 658 I to 659 B.

⁴⁵ See Zeffertt and Paizes *The South African Law of Evidence* (3rd ed) at p 162 and further.

⁴⁶ See para [16] of this judgment.

[29] With regard to the nature of the information received by Botha from the anonymous bystander, the information was very scant and purely circumstantial in nature. It consisted simply of the colour and make of a motor vehicle with a partial registration number. It did not provide any information relating to the model of the vehicle or the number and the possible identities of the persons who got into the vehicle. The information which Botha received from Dippenaar was similarly nothing of a concrete nature. It goes no further than that some of the items of clothing found at Ngalo Street appeared to be similar to those items which Dippenaar said he had seen the perpetrators of the robbery wearing in the video footage. According to Dippenaar, the clothing worn by the suspects “**seemed to be similar.**” This description is rather meaningless. Except for the leather jacket, an item of clothing that could not specifically be linked to any of the respondents, the information Botha got from Dippenaar provided no detail of the nature of the clothing and its colour, and in what way the clothing was said to be similar to that worn by the robbers.

[30] Botha did not immediately arrest the respondents. He did so only after he had requested that the person who viewed the video footage of the robbery come to Ngalo Street. Botha himself, quite clearly did not think that he had sufficient information before the arrival of Dippenaar on which to form a reasonable suspicion that the respondents participated in the commission of the robbery. He waited for Dippenaar to arrive, and it was only after he had met

with and spoken to Dippenaar that he arrested the respondents. Botha's own reservations about his ability to form the required suspicion in the circumstances was, in my view, justified. The question is accordingly whether the information which Botha said he had subsequently received from Dippenaar, was sufficient to tip the scale to him forming a suspicion that was reasonable? The tenuous nature of the information he said was given to him by Dippenaar, is, in my view, insufficient to do that. The hat found inside the house, which was the one item of clothing Dippenaar testified **“resembled almost exactly”** the head gear worn by the first robber that entered the supermarket, was evidently not considered by Botha. He made no mention of it in his evidence. Botha, also made no mention of Dippenaar's evidence that the clothing worn by the suspects he found lying outside the house seemed to be similar to that seen by him in the video footage. The question remains of course who the suspects were that wore the clothing seen by Dippenaar, and in what way it resembled the clothing seen by him in the video footage. In the final analysis, the only additional information which Botha, on his evidence, based his suspicion on, was that some of the clothing found at the address in Ngalo Street looked similar to that observed by another police officer in the video footage. To conclude, having regard to the evidence as a whole, I am not convinced that the trial court can be said to have erred with regard to its finding that Botha was not a credible witness, and that he could not have entertained a reasonable suspicion in the circumstances.

[31] The next question is whether the trial court was correct in finding that on the evidence placed before it, the second and fourth respondents discharged the onus of proving that they were assaulted by police officers during their arrest. At the hearing of the matter, the appellant informally sought leave to amend his notice of appeal so as to specify this as a factual finding that is appealed against on the basis that it was made without evidence, and that it was clearly wrong. The respondents quite correctly did not oppose the amendment on this basis. The appellant sought leave to appeal the whole of the judgment, and the trial court, in granting leave, did not limit it in any way to any specific ground(s), and it will be unjust to preclude interference on appeal if it is found that the judgment and the order of the trial court is obviously wrong.⁴⁷

[32] The appellant's submission that the finding of the trial court that the second and fourth respondents were assaulted was wrong, is premised on their acknowledgement in evidence that they were not physically assaulted by any of the police officers, but were simply verbally abused by being sworn at. The second respondent testified that **"I was not manhandled. I was not assaulted but we did, we was (sic) verbally abused, yes."** The fourth respondent was asked in his evidence in chief whether anything was done to him after he was told to lie down on the ground, to which he replied **"No, nothing ... then nothing happened to**

⁴⁷ *Qunta v Minister of Police* [2013] ZAECGHC 53.

me specifically.” The trial court did not give reasons for its finding that the appellant is liable to compensate the two respondents for assault. Counsel for the respondents submitted, in argument, that the second respondent’s evidence that he was pushed, and that both respondents were made to lie down on the ground, constituted an assault. On a whole, the evidence is in my view insufficient to prove that the actions relied upon were, on the principle of *de minimis non curat lex*, unlawful or that the police officer(s) had the intention to interfere with the bodily integrity of the two respondents. The actions complained of are more consistent with that of a police officer whose aim was to secure the detention of a suspect following his apprehension and arrest.⁴⁸ There was also no evidence placed before the trial court that either of the two respondents was caused to suffer any pain or discomfort, whether physically, mentally or psychologically, or that they were humiliated by the aforesaid actions of the police officer(s).⁴⁹ Accordingly, the finding of the trial court in relation to the second and fourth respondent’s claim for compensation for assault founded on the *actio iniuriarum*, must be set aside.

⁴⁸ “In the case of *actio iniuriarum* the fault element involves two considerations. The first is that the defendant acted intentionally and the second is that the defendant knew that the act was wrongful.” *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139 D. (Translated by Loubser et al *The Law of Delict in South Africa* at p 377). In *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A) at 157 B this was confirmed as a correct statement of the law.

⁴⁹ *Bennett v Minister of Police and Another* 1980 (3) SA 24 (C) at 37 D – E.

[33] That leaves the question whether the compensation awarded by the trial court was justified on the facts of the matter. As stated, the court decided to make a single award, and ordered the appellant to pay each of the respondents the sum of R500 000-00. The appellant's submission is that the amount is excessive and not supported by the evidence.

[34] In awarding compensation for claims based on the *actio iniuriarum* the court necessarily exercises a wide discretion. It is trite that where the amount of compensation is a matter of discretion, a court of appeal will be slow to interfere with the award of the trial court, and cannot simply substitute its own award for that of the trial court. It will only interfere if the trial court has misdirected itself, or the award is so exorbitant or inadequate that it compels an inference that the trial court did not properly exercise its discretion.⁵⁰

[35] The purpose of the *actio iniuriarum* is to afford satisfaction to the individual whose personality rights have been infringed, and to act as a deterrent to future infringements from taking place. In this matter the personality rights infringed, namely that of personal liberty and bodily integrity, are constitutionally protected rights that require the making of an award that will reflect the seriousness of the infringement. This however does not suggest that large amounts would always be justified, as the primary purpose of making

⁵⁰ *Protea Assurabce v Lamb* 1971 (1) SA 530 (A) at 534 H to 535 H and *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at para [11].

an award for compensation is not to enrich the aggrieved party. This was confirmed in *Minister of Safety and Security v Tyula*⁵¹ as follows:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.”⁵²

[36] Considerations which are relevant when making an assessment of the amount of compensation to award for a deprivation of the liberty of a plaintiff would include, but is not limited to, the status; standing and the personal circumstances of the plaintiff; the circumstances under which the plaintiff was deprived of his liberty; the duration and nature of the deprivation of liberty; the

⁵¹ *Minister of Safety and Security v Tyula* 2009 (5) SA 85 (SCA).

⁵² *Ibid* para [26]. This passage was quoted with approval by the Constitutional Court in *Mahlangu and Another v Minister of Police* [2021] ZACC 10 para [51]. See also *Diljan v Minister of Police* [2022] ZASCA 103 para [16] and the word of caution expressed in paragraph [17] of that judgment.

presence or absence of malice or an improper motive on the part of the defendant; the conduct of the defendant; the extent of publicity given to the deprivation of liberty; and awards made in previous comparable cases.⁵³ Factors relevant to the quantification of compensation for an assault based on the *actio iniuriarum* would include the nature and seriousness of the assault; the motive of the attacker; the publicity given to the assault; the nature and seriousness of the plaintiff's injuries; and previous awards made in comparable cases.⁵⁴

[37] Whilst regard may be had to comparable cases and the awards made therein, Nugent JA warned in *Minister of Safety and Security v Seymour*⁵⁵ that they are nothing more than a useful guide to what courts have considered to be appropriate on the facts before them, **“but they have no higher value than that.”**⁵⁶ Previous awards are therefore not to be followed slavishly, and should not be **“allowed to dominate the enquiry so as to become a fetter upon the Court’s general discretion in such matters.”**⁵⁷ Ultimately, each case must be determined on its own facts.⁵⁸

⁵³ *Mahlangu and Another v Minister of Police* op cit fn 52 para [52]; *Diljan v Minister of Police* op cit fn 52 para [18] and Visser & Potgieter *Law of Damages* (3rd ed) at p 545 to 548 and the authorities referred to.

⁵⁴ Visser and Potgieter op cit fn 48 at p 551.

⁵⁵ *Minister of Safety and Security v Seymour* op cit fn 50 at para [17].

⁵⁶ *Ibid* para [17].

⁵⁷ *Protea Insurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535 H – 536 B referred to with approval in *Minister of Safety and Security v Seymour* op cit fn 50 para [17].

⁵⁸ *Minister of Safety and Security v Seymour* op cit fn 50 para [17]. See also *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) para [26]; *Brits v Minister of Police and Another* [2021]

[38] The respondents were detained for a period of 35 hours. With the exception of the second and fourth respondents, they were assaulted while lying down in the road outside the house in Ngalo Street over an extended period of time in full view of local residents and other bystanders. They were assaulted by being kicked, trampled underfoot and threatened with firearms by policeman whose faces were masked to hide their identities. The assaults were accompanied by verbal abuse and were perpetrated for an unlawful purpose, namely in an attempt to force the respondents to provide the police with information regarding the whereabouts of the firearms used and the money stolen in the robbery at the supermarket.

[39] The trial court correctly gave due consideration to the personal circumstances of the respondents; the nature and the circumstances of the assaults; the humiliation and embarrassment suffered by them as a consequence of the arrests and assaults having taken place in the presence of community members; the seriousness of the infringement of their personal rights; the reprehensible nature of the conduct of the police officers; and the conditions under which the respondents were detained in the police cells.

ZASCA 161; and *Minister of Safety and Security v Tyula* op cit fn 51 para [26].

[40] The respondents were detained for a relatively short period of time. Two more recent cases which are comparable with regard to the period of detention are *Brits v Minister of Police and Another (Brits)*⁵⁹ and *Minister of Police and Another v Erasmus (Erasmus)*⁶⁰ where the plaintiffs were released from detention the day following their arrest. In *Brits* the plaintiff was detained for 25 hours and he was awarded R70 000-00 on appeal. In *Erasmus*, where the plaintiff was detained for 20 hours, and an award of R25 000-00 was made on appeal. In *Diljan v Minister of Police (Diljan)*⁶¹ the plaintiff was detained for 3 days and the court on appeal considered an award of R120 000-00 to be fair and reasonable. A recent matter wherein a large award was made was in *Mahlangu and Another v Minister of Police*⁶² where the Constitutional Court awarded R500 000-00 for an unlawful arrest and a detention that lasted 8 months and 10 days. In *De Klerk v Minister of Police*⁶³ the Constitutional Court considered an award of R300 000-00 for approximately 7 days detention to be appropriate.

[41] An important distinguishing factor in the present matter is the fact that the respondent's unlawful arrest and detention was accompanied by assaults, the purpose of which was to extract information from them. This conduct, its duration and its public nature, is deserving of censure that must be reflected in

⁵⁹ *Brits v Minister of Police and Another op cit* fn 58.

⁶⁰ *Minister of Police and Another v Erasmus* [2022] ZASCA 57.

⁶¹ *Diljan v Minister of Police op cit* fn 52.

⁶² *Mahlangu and Another v Minister of Police op cit* fn 52.

⁶³ *De Klerk v Minister of Police* 2021 (4) SA 585 (CC).

an award for compensation. However, it does not justify an award of the extent made by the trial court, and there is clearly a striking disparity in the amount of the compensation that should rightly have been awarded, and that actually awarded by the trial court. The appeal against the *quantum* of the compensation awarded must accordingly also succeed. In respect of those respondents who were also assaulted, I am of the view that it would be appropriate in the circumstances to award a single round sum as compensation.

[42] Lastly, turning to the issue of the costs of the appeal, it must in my view follow the result. The appellant was substantially successful and the amount claimed by the respondents in the trial court was unjustifiably inflated and excessive. In *Diljan* the court urged legal practitioners to **“exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be ‘thumb-sucked’ without due regard to the facts and circumstances of a particular case. Practitioners ought to know the reasonable measure of previous awards, which serve as barometer in quantifying their clients’ claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above.** There accordingly exists no reason to depart from the usual rule relating to costs, and to deprive the appellant from any of his costs.

[43] For these reasons, the appeal is upheld with costs, and the order of the trial court is set aside, and it is replaced to the following extent:

- (1) The second and fourth plaintiffs' claims in respect of assault are dismissed.**
- (2) Judgment is granted in favour of the second and fourth plaintiffs for the payment of R70 000-00 as against the defendant in respect of their unlawful arrest and detention on 15 June 2015.**
- (3) Judgment is granted in favour of the first, third, fifth, sixth and seventh plaintiffs for the payment of R150 000-00 as against the defendant in respect of their claims for unlawful arrest, detention and assault on 15 June 2015.**
- (4) The defendant is ordered to:**
 - (a) Pay interest on the aforesaid amounts at the legal rate, calculated from the date of judgment to date of payment, and**
 - (b) Pay the plaintiffs' costs of suit together with interest thereon at the legal rate calculated from 14 days from the date of taxation to date of payment."**

D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree:

L AH SHENE
ACTING JUDGE OF THE HIGH COURT

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