

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Case No. 2987/2018

In the matter between:-

KEENAN PETER NOEMDOE

Plaintiff

and

THE MINSTER OF POLICE
Defendant

Coram: Bands AJ
Dates heard: 19-21 & 24 January 2022
Delivered: 3 May 2022

JUDGMENT

BANDS AJ:

[1] The plaintiff was arrested on 1 April 2018, without a warrant by the arresting officer, Constable Mandla, at approximately 17h35, at the Wells Estate Splash Festival, on a charge of assault with intent to do grievous bodily harm; and/or assault with the infliction of a dangerous wound.¹ He was detained at the Motherwell Police Station until 19h00 on 2 April 2018, when

¹ I deal with these respective charges and the defendant's amended pleadings hereunder.

he was released on bail. It is not in dispute that the plaintiff was in custody for 26 hours and 25 minutes.

[2] The plaintiff claims damages against the defendant for his alleged unlawful arrest and detention. Whilst the defendant initially raised a special plea of non-compliance with section 3 of Act 40 of 2002, this was later withdrawn together with the filing of the defendant's amended plea, prior to the commencement of the matter on the first day of trial. Accordingly, the only issues which fall to be determined are the lawfulness of the plaintiff's arrest and his subsequent detention. In the event that I am of the view that the plaintiff's arrest and/or detention was unlawful, the quantum of the plaintiff's claim will be considered.

[3] On the pleadings, the plaintiff contends that his arrest and detention was wrongful and unlawful inasmuch as there existed no grounds to suspect that the plaintiff had committed an offence. Alternatively, in the event that the members of the South African Police Services (*"the SAPS members"*) entertained such suspicion, the plaintiff pleaded that they failed to exercise their discretion to arrest and detain the plaintiff rationally, as a consequence of which, it was exercised unlawfully. The basis for the attack on the SAPS members exercise of discretion is canvassed on the pleadings.

[4] The defendant pleaded that the arrest and detention was lawful and justifiable in that a complaint was received by *"the SAPS official(s) on duty"* and that the *"nature of the complaint was that the Plaintiff and his co-*

accused, had committed the offence of assault with the intent to do grievous bodily harm on the complainant and/or a schedule 1 offence of assault with the infliction of a dangerous wound.” The defendant further contends that the plaintiff was lawfully detained and charged as aforesaid. The plaintiff’s arrest, without a warrant, as pleaded by the defendant, was effected in terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977 (“*the CPA*”).

[5] Strikingly, until the amendment of the defendant’s plea on the first day of trial, which introduced the alternative alleged offence of “*assault with the infliction of a dangerous wound*”, the defendant placed sole reliance on the offence of assault with the intent to do grievous bodily harm, the latter not being an offence referred to in Schedule 1 of the Act, and accordingly not justifiable under section 40(1)(b) of the Act. I return to this aspect later.

[6] The only account of the circumstances surrounding the commission of the alleged offence/s were narrated by the plaintiff, who was stationed at the main entrance of the Wells Estate Splash Festival, as an independent security official, together with Morne Joel (“*Joel*”) and Glendon Mejanie (“*Mejanie*”), both of whom testified on behalf of the plaintiff at trial. The defendant elected not to call the complainant, Banele Mzimansi (“*Mzimansi*”) as a witness. Given the conclusion to which I arrive at herein below, I do not deem it necessary to draw an adverse inference against the defendant for such failure.

[7] The undisputed evidence on behalf of the plaintiff is that on the afternoon of 1 April 2018, Mzimansi approached the main entrance of the Estate in a White Mercedes Benz, accompanied by a male passenger. Upon his arrival, a female Metro Security official attended to an inspection of Mzimansi's vehicle, which inspection the latter resisted. Mzimansi was found with a glass in his hand, from which he was drinking what appeared to be an alcoholic beverage. The official from Metro Security attempted to explain to Mzimansi that he was not permitted to bring alcohol or glass into the estate. This angered Mzimansi and the situation became volatile. At this point, Joel approached Mzimansi, who in turn reached for a bottle of Hennessy Whisky and topped up his glass.

[8] Joel made numerous requests for Mzimansi to put down his glass and to desist from drinking, reinforcing what had previously been stated by the Metro Security official. Mzimansi became aggressive towards Joel both verbally and physically and proceeded to push Joel in the chest. Joel assessed the glass in Mzimansi's hand to be a possible weapon and placed his hand around that of Mzimansi, who proceeded to hit Joel in the head with his free hand. Joel thereafter retaliated. The glass broke in Mzimansi's hand and fell to the ground. Mzimansi returned to his vehicle and emerged with a sealed champagne bottle, which he held by the neck and approached Joel aggressively. He attempted to strike Joel on the head with the bottle. Joel raised his arms to block the blow and the impact broke the bottle, which in turn cut Joel under the chin. The wound began to bleed profusely.

[9] The plaintiff and Mejanie, who were nearby, assessed the situation as dangerous and attempted to approach Mzimansi. Mzimansi, who was still holding the broken bottle neck approached Mejanie aggressively. Mejanie punched Mzimansi on the nose, who thereafter dropped the bottle neck and returned Mejanie's punches. Mzimansi proceeded to punch the plaintiff, who retaliated by punching Mzimansi once on each side of his head, in an attempt to get away.

[10] The altercation continued between Joel and Mzimansi, with Joel throwing Mzimansi to the floor, and the parties ultimately landing up in a small ditch next to the road before the fight was naturally diffused. Mzimansi left Wells Estate. An ambulance arrived on the scene and Joel was treated. Joel thereafter approached the Metro Security and offered to provide them with a statement, which offer was declined.

[11] Joel, Mejanie and the plaintiff continued with their official duties until later in the afternoon when approximately three SAPS members, inclusive of Constable Mandla, arrived on the scene, together with Mzimansi. Upon their arrival, Mzimansi pointed to Joel; Mejanie; and the plaintiff. The plaintiff enquired from Constable Mandla if there was a problem, to which Constable Mandla responded that a complaint had been laid against them and that he was there to arrest them. The plaintiff testified that he attempted to explain to Constable Mandla what had transpired earlier on that afternoon, but his attempts fell on deaf ears. Constable Mandla read Joel; Mejanie; and the plaintiff their rights, whereafter they were transported in the back of the

police vehicle to Swartkops Police Station, where they were held for a short period of time before being transported to the Motherwell Police Station, where they were detained.

[12] It bears mention that Joel; Majanie; and the plaintiff struck me as honest witnesses, with their evidence being probable; reliable; and credible in all material respects. I am alive to the minor discrepancies in their evidence, such as to the type of glass that was being held by Mzimansi, but nothing turns on this.

[13] Constable Mandla testified that on the day in question, he was stationed at the Wells Estate Splash Festival, performing crime prevention duties. He returned to the Swartkops Police Station in order to fetch warm clothing. He was informed by Warrant Officer Mondile that a complaint of assault with intent to do grievous bodily harm had been received from a member of the public and that there were no other vehicles that were available to go out and assist the complainant.

[14] Constable Mandla approached Mzimansi and introduced himself. He testified that upon seeing Mzimansi he noticed that he had an open wound between his eyes; that he had sustained a severe injury to the nose, which was crooked; and that his face from his nose downward was full of blood. According to Constable Mandla, Mzimansi had also sustained an injury to his left hand. He thereafter requested to have sight of the docket. He had regard to the injury statement contained therein and found the content thereof to be consistent with what he had noted. Mzimansi informed

Constable Mandla that he had been assaulted by security guards at the Wells Estate Splash Festival. Constable Mandal requested Mzimansi to accompany him to the scene of the incident.

[15] Upon arrival at the Wells Estate Splash Festival, and at the behest of Constable Mandla, Mzimansi pointed out Joel; Majanie; and the plaintiff as the persons who had assaulted him. According to Constable Mandla, he approached the three men and introduced himself. He advised the men that a complaint had been received and that a charge of assault with the intent to do grievous bodily harm had been laid against them. Following a phone call received from an unidentified woman who was with Joel; Majanie; and the plaintiff, Captain Krieger arrived at the scene and addressed Constable Mandla away from the three men. According to Constable Mandla, Captain Krieger advised him that he was unaware of the reason for the said call and informed Constable Mandla to do his job. Constable Mandla thereafter reapproached the three men; advised them, once again, of the charge against them; and informed them that he was going to arrest them on the charge stated. He read the three men their rights and enquired whether there was anything that they did not understand, to which there was no response. He requested the three men to get into the police vehicle and advised them that he would be taking them to the Swartkops Police Station.

[16] Warrant Officer Mondile confirmed that he assisted Mzimansi when he attended upon the Swartkops Police Station; that he was the author of the injury statement; and that he had requested Constable Mandla to go out to the scene of the incident to assist the complainant.

[17] Sergeant Nikelo testified that he first became aware of the incident and subsequent arrest on 2 April 2018. Upon receipt of the docket, he proceeded to interview Mzimansi telephonically, whereafter he attended upon the Motherwell Police Station, together with Warrant Officer Appolis, to interview the plaintiff. During the course of the interview, Sergeant Nikelo and Warrant Officer Appolis obtained the necessary information relating to the plaintiff's personal circumstances, relevant to the issue of bail, and Warrant Officer Appolis completed the "*Prosecutors info on Swartkops CAS06/04/2018*" document. Following the said interview, Sergeant Nikelo formulated the view that the three persons, including the plaintiff "have a right" to be released on bail but that as they were charged with assault with intent to do grievous bodily harm, an order of court would be necessary.

[18] It is common cause that Constable Mandla, prior to the arrest of the plaintiff: (i) failed to obtain exculpatory statements from the plaintiff; Joel; Majanie; and/or from any one of the numerous persons who witnessed the incident; and (ii) that he had no information concerning the personal circumstances of the plaintiff. I return to these two aspects later herein below.

[19] Before proceeding to deal with the central issues herein, it is necessary to state that whilst I found Constable Mandla to be an evasive and argumentative witness, I am of the view, given the parties' pleaded cases; the evidence led; and the issues which fall to be determined, that it is not

necessary to make a definitive credibility finding in respect of him as a witness.

[20] In terms of section 40(1)(b) of the Act:

“A peace officer may without a warrant arrest a person-

(a) ...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

[21] The jurisdictional facts to justify an arrest in terms of section 40(1)(a) of the Act are as follows: (i) the arresting officer must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. It is trite that all four jurisdictional facts must be present to succeed with such defence.²

[22] The onus rests on the defendant to justify an arrest. It was stated by Rabie CJ at 589E-F in *Minister of Law and Order v Hurley*:³

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

² *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA).

³ *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F.

[23] In light of the evidence referred to above, it cannot be gainsaid that the arresting officer, Constable Mandla, was a peace officer; and that he entertained a suspicion that the plaintiff had committed an offence.

[24] I previously alluded to the defendant's pleaded case in respect of the alleged offence committed by the plaintiff and the amendment effected on the first day of trial, the effect of which was to introduce the alternative alleged offence of "*assault with the infliction of a dangerous wound*", which falls within schedule 1 of the Act.⁴

[25] Notwithstanding the amendment, at no stage did Constable Mandla contend in evidence that the plaintiff was being charged with the offence of assault with the infliction of a dangerous wound and that he was being arrested on such charge.

[26] In argument, Ms Desi on behalf of the defendant, argued that Constable Mandla testified that Mzimansi had sustained a "*dangerous wound*", presumably for the purposes of establishing that the plaintiff's arrest had been effected pursuant to the commission of a schedule 1 offence. I find no merit in such argument. The quoted evidence is taken out of context and cannot be assessed in isolation. To do so would be to ignore firstly, the body of Constable Mandla's evidence in which he continuously made reference only to the charge of assault with the intent to do grievous bodily harm; and secondly, his unequivocal evidence that he was arresting the plaintiff on such charge. This too is supported by the description of the

⁴ No doubt in an attempt to bring the defendant's pleaded defence within the ambit of section 40(1)(b).

alleged offence recorded by Constable Mandla on the document headed Notice of Rights in Terms of the Constitution, completed at 17h55 on 1 April 2018, following the plaintiff's arrest. The evidence relied upon by Ms Desi was tendered by Constable Mandla merely as a description of Mzimansi's wounds, as assessed by Constable Mandla and for no other purpose.

[27] It is clear that Constable Mandla relied solely on the version told to him by Mzimansi, which in itself was scant if regard is had to his evidence, and the injuries which he was presented with. He failed to investigate the further circumstances of the assault itself; and whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. Constable Mandla wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1.⁵

[28] As previously stated, Schedule 1 does not include assault with intent to do grievous bodily harm.

[29] In the absence of establishing that Constable Mandla suspected the plaintiff of having committed an offence referred to in Schedule 1, one of the necessary jurisdictional facts is missing. I am accordingly unable to find that the defendant has discharged the onus, on a balance of probabilities, that the plaintiff's arrest without a warrant is lawful in terms of section 40(1)(b).

⁵ *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA).

- [30] In the event that I am incorrect, I in any event find that the defendant has failed to prove the existence of the fourth jurisdictional fact, and more particularly, has failed to prove that the information at the disposal of Constable Mandla gave rise to a reasonable suspicion.
- [31] As previously stated, Constable Mandla failed to obtain exculpatory statements from the plaintiff; Joel; Majanie; and/or from any one of the numerous persons who witnessed the incident. The plaintiff, relying on a recent decision of the Supreme Court of Appeal, *Brits v Minister of Police and Another*⁶ argued that there is an obligation on an arresting officer to take into account all information which is reasonably available to him and that the version of the arrestee should also be considered.
- [32] The approach to be adopted in considering whether or not the suspicion is reasonable has often been restated and was succinctly set out by Jones J in the matter of *Mabona and Another v Minister of Safety and Security and Others*:⁷

"It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to

⁶ (756/2020) [2021] ZASCA 161 (23 November 2021).

⁷ 1988 (2) SA 654 (SECLD) at 658E-H.

engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

[33] Reliance in similar matters is also often placed on the decision of *Louw and Another v Minister of Safety and Security and Others*,⁸ wherein the court stated that the failure of the arresting officer to investigate an arrestee's explanation amounted to a dereliction of duty; and on the matter of *Liebenberg v Minister of Safety and Security*⁹ wherein the Court, relying on *Louw*, stated that:

"Police officers who purport to act in terms of section 40(1)(b) should investigate exculpating (sic) explanations offered by a suspect before they can form a reasonable suspicion for the purposes of a lawful arrest."

[34] Van Zyl DJP in *Wani v Minister of Police and one Other*¹⁰ had the opportunity to critically consider the statements expressed in *Louw* and *Liebenberg*, and commented at paragraphs [27] and [28] as follows:

"[27] ... What was said in Louw cannot be elevated to a hard and first (sic) rule, namely that a failure to first investigate an exculpatory statement proffered by a suspect would render an arrest in terms of section 40(1)(a) (sic) unlawful. That is not what the Court in Louw said or what was intended to be conveyed. The statement in Louw that the inaction of the police officer in question amounted to a

⁸ 2006 (2) SACR 178 (T) at 184.

⁹ (18352/07) [2009] ZAGPPHC 88 (18 June 2009).

See also *Sibuqashe v Minister of Police and Another* (527/2011 EC Bhisho) delivered on 22 October 2015.

¹⁰ (149/2015 EC Bhisho) delivered on 20 March 2018.

dereliction of duty was made in the context of the Court's findings that the arresting officer acted with malice. That is, that he had an ulterior motive for the arrest of the arrestee, that the arrest took place in circumstances that could never have raised a reasonable suspicion that the arrestee had committed an offence listed in Schedule 1 of the Act.

[28] What is required by Section 40(1)(a) (sic) is that the arresting officer must entertain a suspicion that a Schedule 1 offence has been committed. He must entertain the suspicion at the time of the arrest. The test for determining the existence of a reasonable suspicion is an objective one... The question is whether a reasonable person, confronted with the same information, would form a suspicion that a person has committed an offence as envisaged in Schedule 1. It is not whether the police officer believes that he has reason to suspect, but whether objectively, he in fact has reasonable grounds for his suspicion. Reasonable ground for the suspicion is to be determined against what was known, or reasonably capable of being known at the relevant time. What is required is that the police officer must take into account all the information available to him at the time and base the decision to arrest on such information."

[35] Van Zyl DJP went on further to state at paragraph [30] that:

"[30] The application of the aforementioned test is case specific. In other words, the test must be applied in the context of the facts and circumstances presented in each case. Accordingly, the quality of the information at the disposal of a police officer may in any particular case, as was clearly the position in Louw, be so tenuous and/or conflicting that objectively it cannot sustain a suspicion as envisaged in a (sic) section 40(1)(b) without the police officer first, acting reasonably as envisaged in Mokoena,¹¹ making further enquiries before effecting the arrest. What it certainly does not mean, is that a police officer has a duty to prove, or disprove the truth of what was conveyed to him before he can lawfully execute a warrantless arrest in terms of section 40(1)(b). The judgment in Louw is certainly no authority for such proposition, or for the proposition that the failure to first investigate an exculpatory explanation proffered by a suspect without more renders an arrest in terms of section 40(1)(b) unlawful."

¹¹ I accept that this ought to have been a reference to *Mabona*.

[36] I align myself with the aforesaid position. 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. As Harms J found in *Minister of Safety and Security v Sekhoto and Another*,¹² no fifth jurisdictional fact is required.

[37] I, accordingly, respectfully disagree, with the comments of the Court in the matter of *The Minister of Police and one Other v Erasmus*,¹³ insofar as the Court found that it is a legal requirement to investigate exculpatory explanations and that there is a duty on an arresting officer to verify exculpatory explanations prior to effecting an arrest.

[38] It is essential that a legal principle is understood within the context of the particular facts of the matter in which it is raised, and that such principle is supported by the relevant facts. Put differently, each case should be decided on the merits of its own facts.

[39] In *Brits v Minister of Police and Another*,¹⁴ the Court stated at paragraph [30] as follows:

“On a holistic consideration of all the evidence, the circumstances under which the goods suspected to be stolen ended up at the appellant’s shop were in part within the knowledge of Col Espach as he had witnessed their conveyance to the

¹² 2011 (1) SACR 315 (SCA).

¹³ (182/2019 EC Grahamstown, as it then was) delivered on 19 January 2021 at para [25].

¹⁴ (756/2020) [2021] ZASCA 161 (23 November 2021).

appellant's shop. Furthermore, the appellant proffered a reasonable explanation regarding the circumstances surrounding his SMS exchange with Mr Dube. Armed with all of that information, any further suspicion on the part of Col Espach could only have fallen within the category of a 'flighty or arbitrary, and not a reasonable suspicion'.^[11] To the extent that Col Espach continued to harbour a suspicion notwithstanding the plausible explanation given by the appellant, his suspicion did not pass the test laid down in Mabona and was therefore not reasonable."

[40] What distinguishes *Brits* from the present matter is that the arresting officer in *Brits*, had knowledge of the arrestee's exculpatory statement at the time of effecting the arrest, which statement the Court found to be a plausible explanation in the context of the matter. It was in those circumstances that the Court found that a police officer possessed of all the information known to the arresting officer at the relevant time, would not have reasonably suspected that the arrestee was complicit in the commission of the offence.

[41] Turning to the facts of the present matter, it cannot be said that time was of the essence to the extent that Constable Mandla ought not to have assessed the quality of the information provided to him by Mzimansi prior to effecting the arrest of the plaintiff, insofar as same was possible.

[42] On Constable Mandla's own version, and apart from noting Mzimansi's injuries, he was merely informed by Mzimansi that he had been assaulted by *inter alia*, the plaintiff. There exists no plausible explanation as to why Constable Mandla, when approaching the plaintiff at the scene of the incident on the afternoon of 1 April 2018, failed to enquire from him, his version of events, which version was reasonably capable of being

ascertained at the relevant time. There further exists no reason why Constable Mandla elected not to obtain statements, or at the very least question, one of the many independent persons who had witnessed the altercation in an endeavour to establish an objective account of the incident.

[43] Constable Mandla conceded during cross-examination that Mzimansi had not informed him of the events leading up to his assault, and that had he been aware of such facts, as set out by the plaintiff, he would have approached the matter differently. On the facts of the present matter, I find that Constable Mandla ought to have made further enquiries, as envisaged in *Wani*, prior to effecting the plaintiff's arrest.

[44] I accordingly find, in the context of the present matter, that Constable Mandla failed to take into account all the information available to him at the relevant time upon which to found a reasonable suspicion that the plaintiff had committed an offence referred to in Schedule 1 of the Act.

[45] Given the absence of the fourth jurisdictional fact, the above finding is once again dispositive of the issue of liability. It therefore follows that the plaintiff's arrest and subsequent detention was unlawful.

[46] In light of the findings which I have reached, I do not intend dealing at length with the question of how Constable Mandla exercised his discretion to arrest the plaintiff, nor do I intend recounting the trite legal principles relevant to such discretion, suffice to state that such discretion only arises once the jurisdictional facts for an arrest in terms of section 40(1) of the Act are

present, and accordingly, for the reasons already stated, does not arise in the present matter.¹⁵

[47] Notwithstanding the aforesaid, I am constrained to record that Constable Mandla's evidence was self-evidently contradictory in many respects insofar as the exercise of his discretion to arrest the plaintiff is concerned. Amongst others, Constable Mandla's version vacillated as follows: (i) that he arrested the plaintiff as a consequence of the seriousness of the injuries sustained by Mzimansi; (ii) that he was merely performing his duty as an officer to look at the complainant and the injuries sustained by him and to determine whether the injuries sustained were life threatening; (iii) that he is aware of his "duty" or "job" when to arrest; and (iv) for further investigation.

[48] I pause to mention that the defendant, in his amended plea, contends that the plaintiff was arrested with the intention of bringing him to justice and that the SAPS member(s) weighed their/his or her duty in terms of section 205 of the Constitution of the Republic of South Africa, 1996, against the plaintiff's right to liberty and in light of all the information exercised a discretion to arrest and detain the plaintiff. This did not emerge from the evidence of Constable Mandla.

[49] Apart from the fact that it is clear that Constable Mandla's understanding of his discretion to arrest, when same arises, is lacking in the extreme, the

¹⁵ Or in terms of section 43 of the Act.

Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA).

See also: *Domingo v Minister of Safety and Security* (CA429/2012) [2013] ZAECGHC 54 (5 June 2013).

ineluctable conclusion, on his own version, is that he had already decided to arrest the plaintiff prior to leaving the Swartkops Police Station and accordingly he had no intention of taking any steps to obtain objective facts regarding the incident, nor did he attempt to obtain information regarding the plaintiff's personal circumstances, which were easily ascertainable and which became known to the SAPS members shortly after his arrest on 2 April 2018, when interviewed by Sergeant Nikelo and Warrant Officer Appolis. In the circumstances of the present matter, I am of the view that consideration ought to have been given to such circumstances insofar as they were relevant to the exercise of Constable Mandla's discretion to arrest.

[50] I accordingly conclude that Constable Mandla's decision to arrest the plaintiff was objectively irrational.

[51] I now turn to the quantification of the plaintiff's damages.

[52] The plaintiff, in his particulars of claim, claimed an amount of R581,083.00, with R500,000.00 being in respect of general damages and R81,083.00 being for past loss of income, given the delay in his promotion from Shift Commander to Regional Manager at Odyssey Security Solutions (Pty) Limited, which delay was occasioned as a direct consequence of the then pending criminal charge against him. The plaintiff's employer testified in support of the plaintiff's case and gave an account of the circumstances surrounding the plaintiff's promotion; the reasons for the delay in such promotion; and the financial implications of such delay. He further testified

as to the implications that the pending criminal case had on the plaintiff's employment until such time that the charge was withdrawn, and more particularly, how the plaintiff's delegated firearms authority had been revoked and how he had effectively been demoted to a more administrative position, which the plaintiff found to be embarrassing and degrading. This evidence was uncontested by the defendant.

[53] At the hearing of the matter, and by agreement between the parties, the plaintiff handed into evidence, as exhibit "A", an amended actuarial report regarding the plaintiff's loss of earnings, which provided for past loss of income calculated in the amount of R80,948.00. The accuracy of such report and the facts upon which it was based were not challenged by the defendant in evidence. I see no reason to depart from the content thereof.

[54] In argument, the quantum of the general damages claimed was significantly reduced from R500,000.00 to R100,000.00 and accordingly, the plaintiff's total claim at the end of the trial was in the amount of R180,948.00

[55] As recorded herein above, the plaintiff was in custody for a period of 26 hours and 25 minutes. At the time of his arrest, the plaintiff, who is now 36 years old, was 32 years of age. He was arrested in clear view of his colleagues and community members.

[56] The plaintiff explained that by virtue of the position held by him in the security sector, he often works together with the South African Police

Service at various events and is well known for that reason in the Motherwell community. He was humiliated and embarrassed by his arrest and detention, both in his professional and personal life.

[57] The conditions in which the plaintiff was detained at the Motherwell Police Station were undeniably unsavoury. He stated that whilst he was initially detained along with Joel and Majanie only, by the end of the night there were approximately 13 to 14 persons sharing the same cell. The ablutions were unhygienic and not fit for use and the walls of the cell and shower were decorated with faeces. The plaintiff was offered nothing to eat or drink on 1 April 2018.

[58] The plaintiff's employer further testified that the plaintiff is an even-tempered individual with integrity.

[59] It is trite that whilst awards for damages made in previous cases may serve as a guide in the consideration of an appropriate amount of damages, such awards are not to be followed slavishly, and each case must be determined on its facts.¹⁶

[60] In *Brits*, the Court, after considering recent awards, in similar matters, of the Supreme Court of Appeal and the Constitutional Court, together with the facts relevant to the case, including the age of the appellant; the

¹⁶ *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA);

See also: *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA).

See also: *Brits v Minister of Police and Another* (756/2020) [2021] ZASCA 161 (23 November 2021).

circumstances of his arrest (inclusive of the fact that the plaintiff therein was arrested at his place of business in the presence of two of his employees); and the relatively short duration of the detention, the Court ordered general damages in the sum of R70,000.00. I pause to mention that the period of detention in *Brits* is comparable to the period of detention herein.

[61] Given the particular facts of the present matter, and more particularly, the circumstances set out in paragraphs [55] to [58] above, I consider an award in the amount of R90,000.00 to be suitable in the circumstances.

[62] Lastly, I now turn to the issue of costs. The quantum of the plaintiff's damages falls within the jurisdiction of the Magistrates' Court. I find no reason to justify the prosecution of the claim in this court. Whilst the parties appeared to be *ad idem* that any cost order granted herein ought to be on a High Court scale, any such agreement between the parties cannot, and does not, oust the Court's discretion in the award of costs.

[63] I agree with the plaintiff's counsel, Mr Mouton (who appeared together with Ms Barnard), that the plaintiff's employer, who is based in Gauteng, was a necessary witness. The plaintiff had since May 2020 requested that the defendant make certain admissions relating to his claim for past loss of income (in the event that the plaintiff was successful in proving that his arrest and/or detention were unlawful), which the defendant refused to do. Notwithstanding the aforesaid, and as previously stated, no aspect of this portion of the plaintiff's claim was placed in dispute by the defendant during

evidence. In these circumstances, it would be fair to order the defendant to pay the costs associated with such witness.

[64] In the result, I make the following order:

1. Judgment is granted in favour of the plaintiff for the payment of the sum of R170,948.00 as against the defendant in respect of his unlawful arrest and detention on 1 April 2018.
2. The defendant is ordered to pay interest on the sum of R170,948.00, at the legal rate, calculated from the date of judgment to date of payment thereof.
3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs of suit on the Magistrates' Court Scale, which costs are to include the travel costs incurred in respect of the plaintiff's witness, Mr Wellerman, who is declared a necessary witness.
4. The defendant is ordered to pay interest on the amount referred to in paragraph 3 herein, at the legal rate, calculated from fourteen days from the date of taxation or agreement to date of payment thereof.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:

Adv P Mouton, together with Adv N Barnard

For the Defendant:

Adv Desi