

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
24/05/2017	
DATE	SIGNATURE

CASE NO: 33740/14

In the matter between:

MATHE: THANDEKA

Plaintiff

and

THE MINISTER OF POLICE

Defendant

Summary – Unlawful arrest and detention – duties of police towards women and the identification of women as a vulnerable sector in our society discussed – Prejudices based on gender incompatible with Constitutional values

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] This is an action for damages consequent upon an unlawful arrest and detention. The Defendant has admitted that the arrest and detention was unlawful and this court is called upon to determine:

- 1.1. The quantum of general damages to be awarded to the Plaintiff; and
- 1.2. The scale of the costs to be awarded to the Plaintiff.

[2] The following facts are common cause:

- 2.1. Plaintiff was unlawfully arrested by police officials on 18 February 2014 on a charge of prostitution;
- 2.2. Plaintiff was unlawfully detained in police custody in detention cells at Sandton Police station from 18 February 2014 to 19 February 2014;
- 2.3. At the time of the arrest and detention, all relevant police officials acted within the course and scope of their employment with the South African Police Services ('SAPS');
- 2.4. The plaintiff complied with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act no 40 of 2002.

[3] Only the plaintiff testified.

EVIDENCE OF MS MATHE

[4] Ms Mathe was born on 9 June 1982. At the time of her arrest she was 31 years of age and had resided at her maternal home at 1562B, White City, Jabavu, Soweto, most of her life. She was employed as an assistant manager at Movie Fanatics in Alberton.

[5] At the time of her arrest she was married. She has two children who, during February of 2014, were 4 and 13 years old respectively, living with her at her mother's home. Her husband was not residing with them nor was he contributing towards their maintenance. Ms Mathe was the sole financial provider for herself, her two children, her mother and her younger brother.

[6] She did not work on Monday the 17th of February 2014 as it was her day off. That evening, she and two of her friends decided to go out to Mandela Square in Sandton City. They had supper at a restaurant, took some photo's and then, at about 11h00 decided to go to a nightclub called Cocoon, which is approximately 500 meters from Mandela Square. Upon arrival a security guard told them that the night club was closed on Monday evenings. They established from him that they could catch taxis at either the BP garage or the Shell garage, both garages being very close to the nightclub. They walked to the BP garage, which was about 500 meters from Cocoon nightclub. The taxis there were too expensive and they then walked another approximately 500 meters to the Shell garage.

[7] Having established from the petrol attendants that taxis were expected, they sat down on some chairs, which were about 10 meters from the road, waiting for a taxi to arrive. After about 10 minutes of waiting, a white vehicle pulled up next to them. The driver was a white man and the passenger a black man who alighted and approached them. He started questioning them, enquiring from them what they were doing there. They explained that they were waiting for taxis. He asked them whether they thought he was a fool. He told them they were being arrested and ordered them to get into the vehicle. After he had ordered them into the car, he identified himself as a policeman. They were not informed about the charge against them. They asked but were told that they would find out at the police station.

[8] Upon arrival at the Sandton Police station, they were taken to the holding cells. After some time the police arrived and started writing notes. They were told that they were being charged with the offence of prostitution.

[9] Ms Mathe testified that there were 5 people in the cell. She explained that the cell was filthy. The cell itself had one toilet in the centre, which was blocked and not functional. There was no other toilet and they were accordingly compelled to use this facility. One was visible to all when using the toilet. There was no toilet paper. The cell had one tap without water. Dirty blankets were on the floor. One could not use them they were so filthy. Due to the human excrement in the non-functional toilet, the smell inside the cell was unbearable.

[10] Ms Mathe was not permitted to make a telephone call and this caused her much distress as her mother is sickly. She explained that her anxiety was heightened as those dependant on her would not know what had happened to her. At this point Ms Mathe became very tearful. It was clear that she was extremely distressed and the court adjourned.

[11] At the commencement of the matter the following day, she explained that reliving the events of the arrest was traumatising and that is why she had broken down during her testimony the previous day.

[12] She testified that at 7h00 on the morning of the 19th of February 2014, she had been handed a document entitled 'Notice of Rights' which document was received as evidence. It reflected that she had been arrested for prostitution. She was taken to the Randburg Court where she was released at 15h00. She had thus been detained for approximately 37 hours.

[13] Upon her release, she went to work as she had the key to the shop. Her employer was very angry with her for having failed to open the shop and summarily dismissed her.

[14] She explained that this case was extremely important to her. She said that her dignity had been impaired. When she arrived home some young men said to her that they had heard that she had been out selling her body. They wanted to know what her fee was. She explained that a stigma has attached to her since this event. Asked by the court, she explained that she was an isiZulu speaking Zulu woman. In her culture, women who practice prostitution, are shunned.

[15] Ms Mathe was modest and reserved. When she started crying, I could visibly see the pain of the experience that she had been put through. She clearly felt deeply humiliated for having been considered a prostitute. I express no view whether she ought to have felt like this. In our law, prostitution is still regarded as a crime. Whether women involved in this profession should be shunned is not the subject of this trial. The point here is that Ms Mathe denied having engaged in this conduct and felt enormously offended and stigmatised by virtue of having been incorrectly accused of having done so. If there had been any substance to the charge the defendant would not have admitted that the arrest was unlawful.

QUANTUM

[16] The Appellant suffered an arbitrary deprivation of personal liberty and was humiliated and traumatized by virtue of her unlawful arrest and detention.

[17] In her particulars of claim, she claimed R500 000 in damages, those damages being based on an infringement of her constitutional rights to equal protection and benefit of the law, human dignity, freedom and security of a person, freedom of movement and conditions of detention that are not consistent with human dignity. The damages are also based on an infringement of her personal rights to

physical integrity, dignity, privacy, reputation and sense of self-worth. The particulars of claim allege that as a result of her arrest and detention, she suffered shock, psychological trauma, emotional shock and *contumelia*.

The general approach in the assessment of damages for unlawful arrest and detention

[18] The Supreme Court of Appeal held as follows in *Minister of Safety and Security v Tyulu*:¹

'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. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26–29).'

¹ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) paragraph 26 at 93D-F.

Factors that can play a role in the assessment of damages

[19] The authors of Visser & Potgieter *Law of Damages* have extracted from South African case law the following factors which can play a role in the assessment of damages:²

'In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bono. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function.

[20] Section 35(2)(e) of the Constitution³ provides as follows:

'(2) Everyone who is detained, including every sentenced prisoner, has the right –

.... (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'

² Visser & Potgieter *Law of Damages* Third Edition, pages 545–548. This list of factors has been referred to with approval in *Ntshingana v Minister of Safety and Security* (unreported judgment dated 14 October 2003 under Eastern Cape Division case number 2001/1639) and *Phasha v Minister of Police* (unreported judgment by Epstein AJ dated 23 November 2012 under South Gauteng High Court case number 2011/25524).

³ Constitution of the Republic of South Africa, 1996.

[21] In *Minister of Safety and Security vs Seymore*⁴, Nugent J A stated at paragraph 17:

'The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.'

[22] In *Mandleni v Minister of Police*⁵, Hellens AJ observed as follows in para [13]:

'In *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 Mokgoka J very wisely in my view described the purpose of an award of general damages in the context of a matter such as the present as a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress. The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore struck at the very fundament of such ethos. Those with authority to curtail that right had to do so with the greatest of circumspection, and sparingly. Where members of the Police transgressed in that regard, the victim of the abuse was entitled to be compensated in full measure for any humiliation and dignity which resulted. To this may be added that where an arrest was malicious, the Plaintiff was entitled to a higher amount of damages than would be awarded, absent malice.'

I am persuaded by this reasoning and share the sentiments expressed.

⁴ 2006(6) SA 320 (SCA)

⁵ an unreported judgement of this division dated 24 April 2017 by Hellens AJ under case number 37539/14

Case law considered

[23] Conscious of the limited value that previous cases provide, I will refer to certain decided cases and work my way to an appropriate assessment of damages in this case.

[24] In *Seymour* (supra) a 63 year old man had been unlawfully arrested and imprisoned by the State for a period of 5 days. The Court held that an appropriate award was the sum of R 90 000. This was in 2006, an inflationary adjustment would yield approximately R 180 000 today. He had had free access to his family and a doctor throughout his detention. He had suffered no degradation beyond that which is inherent in being arrested and detained and after 24 hours he had spent the remainder of this detention in a hospital bed.

[25] In *Van Rensburg v City of Johannesburg*⁶, the Plaintiff was a 74 year old male retiree. The Plaintiff was detained in a holding cell at the Johannesburg Central Prison. The Plaintiff spent about 6 hours in custody. The Plaintiff was awarded general damages of R75 000. Adjusted for inflation this is approximately R120 000 in today's money.

[26] In *Pasha v Minister of Police*⁷ Epstein AJ awarded general damages of R80 000 (in today's money approximately R110 000). The Plaintiff had spent about 9 hours in custody. He was 40 years old at the time of his arrest. He had a wife and children. He worked as a Debt Collector at the office of the State Attorney in Johannesburg. The Plaintiff knew the Police Officials who arrested him as they were colleagues of his wife. After having been handcuffed, the Plaintiff was led through a shopping mall which caused him to feel humiliated, embarrassed and his dignity was

⁶ 2009 (2) SA 101 WLD

⁷ . Unreported judgment by Epstein AJ, dated 23 November 2012, under South Gauteng High Court case number 25524/2008.

impaired. People who knew the Plaintiff were surprised to see what was happening. He was detained in the holding cell with about 7 other detainees. The toilet in the cell was filthy and there was no toilet paper. The blankets provided were dirty. The Plaintiff felt that the community no longer had confidence in him and regarded him as a robber. Sometimes colleagues made negative comments towards him.

[27] In *Mothoa v Minister of Police*⁸, a matter decided during 2013, the plaintiff was forced to endure a detention lasting twenty two hours in the holding cells of the Johannesburg Central police station under appalling conditions. The plaintiff was awarded R 150 000 (approximately R 190 000 today) as damages for his unlawful arrest and detention.

[28] In *Black v Minister of Police*⁹ (decided during 2013), the plaintiff was sleeping inside his parked vehicle outside a building of flats when he was arrested. He had pneumonia and was under medical treatment. He was arrested for drunkenness. He was refused access to a bathroom and defecated in his pants. He was kept in over crowded holding cells both at the police station and at court. It was mid winter. This ordeal lasted 40 hours. Damages in the amount of R 140 000 (approximately R 180 000 today) were awarded for his unlawful arrest and detention.

[29] In *Keitumetsi Letlalo v Minister of Police*¹⁰, the plaintiff, a hairdresser, photographed with his cell phone, police officers assaulting two persons. The police demanded the phone, when he refused he was arrested and detained for 24 hours. There was no legal basis for his arrest. He was kept in appalling circumstances. He was awarded R 110 000 (approximately R 130 000 today).

⁸ An unreported judgment by Hutton AJ, dated 8 March 2013, under South Gauteng High Court case number 2011/5056

⁹ An unreported judgement by Windell J, dated August 2013 under case number 2011/38093

¹⁰ An unreported judgment by Francis J, dated 28 March 2014, under Gauteng Local Division, Johannesburg case number 28575/12

[30] In *Mandleni* (supra), the plaintiff, a 28 year old man who was unlawfully detained for 12 hours in appalling conditions, was awarded R 110 000 during April of 2017.

Application to facts of this case

[31] In the present case, three women were waiting for transport when an unmarked police vehicle arrived. After a very short exchange, the women were arrested. There is nothing before me to suggest that the police had any lawful reason whatsoever for arresting them. From the facts before me they were arrested because they were out in the early hours of the morning (02h00), they were women and they were seated on chairs at a filling station. These facts appear to have triggered the suspicion (or conclusion), that they were prostitutes. There exists very little doubt in my mind that had three men been seated at the very same location and time, they would not have attracted the police officers' attention let alone have moved them to make an arrest.

[32] The police abused the power entrusted upon them. They did not even take the basic step of identifying themselves to their victims prior to starting their interrogations of these women. They then bundled them into the car and told them that they would find out what they were being arrested for when they arrived at the Sandton Police Station. They did not explain to the plaintiff her constitutional rights until 07h00 on 19 February 2014. The police conducted themselves in a high-handed (not just neglectful) manner.

[33] Section 205 of the Constitution provides as follows:

'(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

[34] At that time of the morning, the plaintiff and her friends were particularly vulnerable. It is not this courts' duty to pronounce upon the wisdom of being out that late without transport. However, women, like all other members of our society, should be entitled to the protection from our police services. When the police turn on those they are supposed to protect the Constitutional order is threatened. It is noteworthy that section 205 of the Constitution goes further than merely obliging the police to investigate crimes. The section imposes a positive duty on the police to prevent and combat crime. To have prevented and combatted crime in this situation may have entailed these policemen advising these women of the fact that the men approaching them were policemen. It would not have been beyond reason for the policemen to have prevented and combatted crime by waiting nearby to make sure that the women caught the taxi that they were waiting for. That would have protected them from criminal attention in the vulnerable time that they were not in a vehicle. Instead these policemen put them in their vehicle and took them away to a place of filth and fear for two days without even the benefit of being allowed to advise their loved ones or employer of their fate. In the plaintiff's case this resulted in her losing her job. If one wanted to drive a person to a life of crime, one could hardly think of a more effective way of doing that than causing them to lose their legal employment.

[35] Women are entitled to equal treatment and, as I have already observed, men in the same situation would be unlikely to attract the negative attention that these

policemen bestowed on these women. One cannot but deduce that the motives of the police in question were influenced by the fact that the people they arrested were women. Our society does not have a day of protest against violence against men. Our society does not have a public holiday called Men's Day. Women, it is widely recognised, are often undervalued for the role that they play in society as care-givers of children and the elderly. It is equally widely recognised that they are frequently subject to sexual violence. That those who, in general terms, play such a valuable role should be treated so badly is a bitter irony that all South Africans, particularly members of the police service should be working towards eliminating. The members of the police engaged in this arrest and detention did the opposite of what section 205 of the Constitution requires them to do and they added unnecessarily to the infinite quotient of womens' humiliation and distress in the history of our society. This cannot be treated lightly by a Court enjoined to apply the Constitution.

[36] The plaintiff was subjected to prejudices which are exclusively based on gender. The grinding down of women's rights, erodes the rights of the community as a whole. One pictures the youths who spoke cruelly to the plaintiff being encouraged by the fact that it was the police who instigated her fall from grace. Role modelling of this kind, our young men can do without. Rather, they should be seeing our police being considerate and respectful of the women in our communities, in the finest traditions of all South African cultures. Terms of familial bonds, like "sister" and "mother" are commonly used by South Africans of many languages to address women. The women leaders of the struggle towards the liberation of our country, who are celebrated in our Woman's Day public holiday, are not lightly referred to as the mothers of the nation. Our police, though facing many stresses and challenges of

their own, should strive to maintain the ethos of kindness and respect that underpin these fine traditions, common courtesies and kindnesses, particularly towards women, as part of their daily interactions.

[37] In *R A and Others v The Minister of Police*¹¹ at para 34 the following was held:

'This case also bears a public interest element as, *inter alia*, it relates to unlawful conduct by the SAPS and the protection of the rights of citizens. An attack on the rights of the individual is an attack on the community and the grinding down of individuals' rights erodes the rights of the community as a whole. Therefore in this type of case the impact is not limited to the individuals but extends to the community of which they form part. This underscores the importance of the matter.'

[38] The plaintiff was locked up with other inmates in an unhygienic, dirty, stinking holding cell with only one open toilet that did not work, but in which inmates relieved themselves in full view of others.

[39] Not only was the plaintiff detained under the inhumane conditions described hereinbefore, but she also lost her employment, a job she had held down from 2009. The plaintiff was stigmatised as a result of the nature of the offence, which she was alleged to have committed.

[40] The plaintiff has sought R175 000 for the unlawful arrest and subsequent 37 hours of unlawful detention. The defendant has contended that R60 000 would adequately compensate the plaintiff. Having regard to the facts as a whole, the past awards and the relevant case law, in my view a fair and reasonable amount for the damages to be awarded to the plaintiff is the amount of R 120 000.

¹¹ *R A and Others v The Minister of Police*. Unreported full bench appeal judgment, dated 21 April 2016, under Gauteng Division case number A315/2015. Saflil reference: [2016] ZAGPPHC 264. The following summary of the facts of this matter is contained in paragraph 1 of the judgment by Tolmay J: "The appellants instituted action against the Minister of Police for damages suffered, including general damages, as a result of an incident that occurred on 16 June 2009. On that day, at approximately 2:00am, members of the SAPS broke into and entered the house where the appellants lived. The appellants believed that they were the victims of crime and that their lives were at peril."

COSTS

The basic principle in costs awards

[41] A unanimous bench of the Constitutional Court¹² held as follows in *Affordable Medicines Trust and Others v Minister of Health and Others*:¹³

'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations.'¹⁴

[42] The Appellate Division¹⁵ stated this general principle as follows in *Norwich Union Fire Insurance Society Ltd v Tutt*:¹⁶

'[T]he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides.

The amount of the damages awarded is not the only consideration in determining the scale of the costs

[43] *R A (supra)* was an appeal from a single Judge to a full bench.¹⁷ It was held¹⁸ that the Judge *a quo* erred in awarding costs on the magistrate's court scale merely because of the quantum of damages¹⁹ awarded by her. The full bench was

¹² Ngcobo J writing for Langa DCJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.

¹³ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC). Referred to as *Affordable Medicines*.

¹⁴ *Affordable Medicines* in paragraph 138 at 296H–297A.

¹⁵ Holmes AJA, with Beyers JA, Ramsbottom JA and Malan AJA concurring.

¹⁶ *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (AD).

¹⁷ Tolmay J, Tuchten J and Makgoka J.

¹⁸ *R A* in paragraphs 33 and 37.

¹⁹ *R A* in paragraph 1. The Judge *a quo* granted each of the plaintiffs general damages of R25 000.

unanimous²⁰ that the Judge *a quo* ought to have awarded costs to the plaintiffs on the High Court scale. A number of considerations were taken into account in setting aside the costs award of the court *a quo* and awarding costs on the High Court scale. Such considerations included the importance of the rights involved,²¹ public interest,²² the complexity of the matter,²³ the duration of the trial,²⁴ and the conduct of the defendant during the course of the litigation.²⁵

[44] The following was held in *Seleka v The Road Accident Fund*.²⁶

'The only aspect that remains is the question of the scale of costs that plaintiff is entitled to in view thereof that, so it was argued by defendant, the amount falls within the jurisdiction of the magistrates' court and plaintiff should therefore have pursued her action in that forum.

In this regard I am of the view that the amount of the claim is not the only factor that should be considered by this court when considering an appropriate cost order.²⁷

[45] Jones J held as follows in *Vermaak v The Road Accident Fund*.²⁸

'While the amount of a judgment is always important, it is, however, not the only consideration. Various other circumstances – for example, the complexity of the factual issues, the difficulty of the legal issues, the seriousness of an imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small.²⁹

²⁰ R A in paragraph 43.4 of the majority judgment and in paragraph 24 of the minority judgment.

²¹ R A in paragraph 33.

²² R A in paragraphs 34 and 35.

²³ R A in paragraph 37.

²⁴ R A in paragraph 37.

²⁵ R A in paragraphs 36 and 38.

²⁶ *Seleka v Road Accident Fund* 2016 (4) SA 445 (GP).

²⁷ *Seleka* in paragraphs 31 and 32 at 455E–G.

²⁸ *Vermaak v The Road Accident Fund*. Unreported judgment by Jones J, dated 3 March 2006, under South Eastern Cape Local Division case number 2509/03. *Saflii* reference: [2006] ZAECHC 10.

²⁹ paragraph 5.

The case presented potentially considerable difficulties in fact and in law - the Defendant only conceded the merits on the day of trial

[46] It became common cause at the pre-trial conference that the Plaintiff was arrested and detained on a charge of prostitution. However, the Defendant still had the onus to prove that the arrest and detention were lawful. Rabie CJ, writing for a full bench of the Appellate Division,³⁰ held as follows in *Minister of Law and Order and Others v Hurley and Another*:³¹

'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.³²

[47] The Defendant only conceded the merits of the Plaintiff's claim on the day of the trial, thereby admitting that the Plaintiff's arrest and detention were unlawful. Prior to conceding the merits of the Plaintiff's claim, the Defendant would have had to prove that the Plaintiff was arrested in terms of section 40(1)(a) of the Criminal Procedure Act 51 of 1977 ("**the Act**"), which provides as follows:

'(1) A peace officer may without warrant arrest any person –
(a) who commits or attempts to commit any offence in his presence.'

³⁰ Jansen JA, Trengrove JA, Botha JA, and Van Heerden JA concurring.

³¹ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (AD) 589E–F.

³² This onus was reaffirmed by the Constitutional Court in *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) paragraph 25 at 468D–469C and also in several subsequent judgments by the Supreme Court of Appeal, including *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) paragraph 19 at 232b where it was held that "[i]t is well established that the onus rests on the arresting officer to prove the lawfulness of the arrest"; and in *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) paragraph 14 at 222i it was held that "[the] Police bear the onus to justify an arrest and detention". Also see *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) paragraph 5 at 99B.

[48] In *National Commissioner of Police and Another v Coetzee*³³ the Supreme Court of Appeal held as follows regarding the jurisdictional facts for a section 40(1)(a) defence:

'The jurisdictional facts necessary for an arrest under s 40(1)(a) are: (i) the arrestor must be a peace officer; (ii) an offence must have been committed or there must have been an attempt to commit an offence; and (iii) in his or her presence.'

[49] This means that, up to the morning of the trial, the Defendant would have had to prove *inter alia* that the Plaintiff committed or attempted to commit an offence in the presence of a peace officer. In the context of the charge of prostitution, the Defendant would have had to prove that the Plaintiff was guilty of one or both of the offences created in section 19 of the Sexual Offences Act 23 of 1957 which provides as follows:

(1) Any person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence.

(2) Any person 18 years or older who wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access, shall be guilty of an offence.'

[50] To prove that the Plaintiff committed or attempted the offence created in section 19(1) of the Sexual Offences Act, the Defendant would have had to prove –

50.1. the meanings of the words "entices", "solicits", "importunes" and the phrase "immoral purposes";

³³ *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA) paragraph 14 at 365h.

50.2. that the Shell garage where the Plaintiff and her friends were arrested, was a public place within the meaning of the section; and

50.3. that the Plaintiff enticed, solicited or importuned or attempted to do so.

[51] To prove that the Plaintiff committed or attempted the offence created in section 19(2) of the Sexual Offences Act, the Defendant would have had to prove –

51.1. the meaning of the phrases “indecent dress” and “indecent manner”; and

51.2. that the Plaintiff exhibited or attempted to exhibit herself.

[52] These were potentially complex issues of law and fact.

The detention

[53] Police officials have the power to detain an arrestee at a police station after an arrest.

[54] The power to arrest is distinct from the power to detain an arrestee at a police station after the arrest. The two powers are exercised independently of each other.

[55] In *Mvu v Minister of Safety and Security and Another*,³⁴ Willis J, as he then was, held as follows:

‘The claim is based not only on an alleged unlawful arrest, but also upon alleged unlawful detention. That there is an important distinction between the two is, in

³⁴ *Mvu v Minister of Safety and Security and Another* 2009 (6) SA 82 (GSJ) paragraph 9 at 89F.

my respectful opinion, not properly understood by many – and it is not only police officers who have erred in this regard.'

[56] Both the power to arrest and the power to detain an arrestee at a police station after an arrest are statutory authorities expressly granted.

[57] Even where an arrest is lawful,³⁵ police officials must apply their minds to the arrestee's detention and the circumstances relating thereto, and the failure by a police official properly to do so is unlawful.³⁶

[58] Willis J held as follows in *Mvu*:³⁷

'It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all.'³⁸

[59] The police officials who detained the Plaintiff at the police station after her arrest had a public law duty not to violate the Plaintiff's right to freedom.

[60] The Supreme Court of Appeal held as follows in *Woji v Minister of Police*:³⁹

'The Constitution imposes a duty on the state and all its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2002 (1) SACR 79 CC ... par 44.

On the facts of this case, Insp Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Wojji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrates. A breach of this public law duty gives rise to a private

³⁵ *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (CPD) 110D.

³⁶ *Hofmeyr* at 131G.

³⁷ *Mvu* *supra* paragraph 10 at 90A.

³⁸ Also see *Rowan* *supra* paragraph 57 at 455g–h.

³⁹ *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) paragraph 28 at 418b–f.

law breach of Mr Woji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Insp Kuhn's omission to perform his public law duty was wrongful in private law terms.'

[61] Determining whether the official(s) who detained the Plaintiff at the Sandton police station failed in their public law duty not to violate the Plaintiff's right to freedom, raises potentially complex issues of fact.

Considerations relating to the great importance of this action to the Plaintiff

[62] Claassen J held as follows in *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino*:⁴⁰

'Deprivation of one's liberty is always a serious matter. This contention is reflected in the fact that our Constitution has entrenched the freedom and security of the person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

'(1) Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial.'

[63] It is important to note that, as in *R A*, this matter also deals with the violation of important constitutional rights, including the Plaintiff's rights to human dignity,⁴¹

⁴⁰ *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino* 2000 (4) SA 68 (WLD) 86D.

⁴¹ Section 10 of the Constitution.

freedom and security of the person,⁴² freedom of movement⁴³ and to conditions of detention that are consistent with human dignity.⁴⁴

[64] The underlying principle in awarding costs in these types of matters relates to the nature of the cause of action. The Courts attach importance to the questions of unlawful arrest and detention, because they involve the violation of important constitutional rights and issues of public interest. In *Mvu v Minister of Safety and Security and Another*,⁴⁵ Willis J, considered a number of cases⁴⁶ where Courts had granted costs on the High Court scale although the general damages awarded were within the jurisdiction of the magistrates' court.⁴⁷ The learned Judge concluded that⁴⁸

'[t]he underlying principle would appear to be the importance which the courts attach to questions of unlawful arrest and detention.'⁴⁹

[65] In *Van Rensburg v City of Johannesburg*,⁵⁰ the Court awarded R75 000 general damages.⁵¹ Considering the issue of costs, the Court held as follows:⁵²

'Although the quantum falls within the jurisdiction of the magistrates' court, the plaintiff was, in my view, justified in seeking redress in the High Court. Added to that is my distaste for the behaviour of the defendant's Metro Police and their indifference to the lot of a respectable citizen. I intend therefore to award costs on the High Court scale. Further, counsel asked that I award costs on the scale as between attorney and client. There is merit in that request. Public officials must be made aware that the courts will not tolerate high-handed (not just

⁴² Section 12(1)(a), (c) and (e) of the Constitution.

⁴³ Section 21(1) of the Constitution.

⁴⁴ Section 35(2)(e) of the Constitution.

⁴⁵ *Mvu v Minister of Safety and Security and Another* 2009 (6) SA 82 (GSJ).

⁴⁶ The Court referred to *Seria v Minister of Safety and Security and others* 2005 (5) SA 130 (CPD); *Louw v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T); *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (WLD); and *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (WLD).

⁴⁷ *Mvu supra* in paragraph 17 at 93D-E.

⁴⁸ *Mvu supra* in paragraph 17 at 93E.

⁴⁹ In the *Mvu* case, counsel for the parties were *ad idem* that, mindful of precedent, and the facts and circumstances of that particular case, R30 000 general damages would be an appropriate award. Despite this low quantum of general damages, the Court, having regard to the above underlying principle, granted costs of suit on the High Court scale as between party and party.

⁵⁰ *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (WLD).

⁵¹ *Van Rensburg supra* at 110I-J.

⁵² *Van Rensburg supra* at 110I-111B.

neglectful) behaviour which results in the people that they serve suffering injury at their hand.'

[66] Section 10 of the Constitution provides as follows:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[67] Section 35(2)(e) of the Constitution⁵³ provides as follows:

'(2) Everyone who is detained, including every sentenced prisoner, has the right –.....

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'

[68] This matter is of great importance to the Plaintiff because her dignity was impaired by the unlawful conduct of police officials.

The case bears a public interest element

[69] In *R A*,⁵⁴ the majority⁵⁵ explained why matters relating to unlawful conduct of police officials⁵⁶ that affect the rights of individuals bear a public interest element and how such public interest has an effect on the scale of costs awards:

'The Courts have granted costs on a High Court scale despite relative low amounts of quantum in similar matters... In *Seria v Minister of Safety and Security and others*⁵⁷ the Court dealt with the issue of public interest and

⁵³ Constitution of the Republic of South Africa, 1996.

⁵⁴ *R A and Others v The Minister of Police* *supra*.

⁵⁵ Tolmay J and Tuchten J.

⁵⁶ In *R A*, a summary of the unlawful conduct of the relevant members of the SAPS is contained in paragraph 1 of the judgment by Tolmay J: "The appellants instituted action against the Minister of Police for damages suffered, including general damages, as a result of an incident that occurred on 16 June 2009. On that day, at approximately 2:00am, members of the South African Police Service (SAPS) broke into and entered the house where the appellants lived. The appellants believed that they were the victims of crime and that their lives were at peril."

⁵⁷ *Seria v Minister of Safety and Security and others* 2005 (5) SA 130 (CPD) at 151.

awarded High Court costs despite that the damages awarded was only R50 000,00.⁵⁸

[70] This case is of public interest because, recognising the injustices of our past,⁵⁹ our society is founded on human dignity and the advancement of human rights.⁶⁰ The state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁶¹ Consequently, society has an interest in the High Court hearing matters that relate to state officials violating the rights enjoyed by individuals rather than respecting and protecting such rights. In *S v Makwanyane and Another*,⁶² the Constitutional Court,⁶³ *per* Chaskalson P and Langa J respectively, held as follows:

'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does...'⁶⁴

...

Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law..., but it demonstrates in the best way possible, by example, society's own regard for human life and dignity...⁶⁵

⁵⁸ *R A* in paragraphs 34 and 35.

⁵⁹ Preamble to the Constitution.

⁶⁰ Section 1(a) of the Constitution.

⁶¹ Section 7(2) of the Constitution.

⁶² *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paragraph 144 at 451D and paragraph 222 at 480D–E. [*Makwanyane*].

⁶³ Chaskalson P, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mahomed J, Mokgoro J, O'Regan J and Sachs J.

⁶⁴ *Makwanyane* in paragraph 144 at 451C–D, *per* Chaskalson P.

⁶⁵ *Makwanyane* in paragraph 222 at 480D–E, *per* Langa J.

[71] In *S v Williams and Others*,⁶⁶ the Constitutional Court held as follows:

'The rights entrenched in chap 3 are available to 'every person'; that includes children and adults, women and men, prisoners and detainees. The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading...

... The Constitution has allocated the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that '... even the vilest criminal remains a human being possessed of common human dignity'.'

[72] The Constitutional Court held as follows in *S v Dodo*:⁶⁷

'In the phrase 'cruel, inhuman or degrading' the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these three characteristics. This imports notions of human dignity as was correctly recognised, although in another context, by the High Court in this case. The human dignity of all persons is independently recognised as both an attribute and a right in s 10 of the Constitution, which proclaims that '(e)veryone has inherent dignity and the right to have their dignity respected and protected'. It is also one of the founding values of the Constitution and is woven, in a variety of other ways, into the fabric of our Bill of Rights. While it is not easy to distinguish between the three concepts 'cruel', 'inhuman' and 'degrading', the impairment of human dignity, in some form and to some degree, must be involved in all three. One should not lose sight of the fact that the right relates, in part at least, to freedom.'

[73] The conduct of the police officials involved in this matter was unconstitutional and unlawful.

⁶⁶ *S v Williams and Others* 1995 (3) SA 632 (CC) paragraphs 76 and 77 at 654F–655B.

⁶⁷ *S v Dodo* 2001 (3) SA 382 (CC) paragraph 35 at 403C–F.

[74] Section 199 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") provides as follows:

'(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

...

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'

[75] The preamble to the SAPS Act provides *inter alia* as follows:

'WHEREAS there is a need to provide a police service throughout the national territory to –

(a) ensure the safety and security of all persons and property in the national territory;

(b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;'

[76] Section 13 of the SAPS Act provides as follows:

'(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.

...

(3)(a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.'

A plaintiff is required to make an estimate when issuing summons

[77] In *Phasha v The Minister of Police*⁶⁸, the plaintiff was awarded R80 000 general damages⁶⁹. The Court then remarked as follows regarding costs:⁷⁰

'Insofar as costs are concerned, a Plaintiff is required to make an estimate when issuing summons. Although the amount awarded falls within the jurisdiction of the Magistrate's Court, the Plaintiff was in my view entitled to bring this action in the High Court.'

Unintentional results of costs orders should be avoided

[78] It was held in *Botha v African Bitumen Emulsion (Pty) Ltd*⁷¹ that –

'...it may perhaps be desirable to impress upon judicial officers the necessity of adjusting critically their orders as to costs if these orders are not sometimes to produce results which are unintentional and unjust.'

Agreement between the parties that the case should not be transferred to another court

[79] The parties agreed at the pre-trial conference that the case should not be transferred to another court. It was on the basis of that agreement that the trial proceeded in this court instead of being transferred to the magistrates' court. Consequently, the Defendant should not be allowed to resile from the agreement by arguing for costs on the magistrates' court scale.

⁶⁸ *Phasha v The Minister of Police*. Unreported judgment by Epstein AJ, dated 23 November 2012, under South Gauteng High Court case number 25524/2008.

⁶⁹ *Phasha* case in paragraph 38 on page 14.

⁷⁰ *Phasha* case in paragraph 39 on page 14.

⁷¹ *Botha v African Bitumen Emulsion (Pty) Ltd* 1960 (2) SA 6 (TPD) 10A.

[80] The Supreme Court of Appeal held as follows in *Filta-Matix (Pty) Ltd v Freudenberg and Others*:⁷²

'To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37...'

[81] In this matter the parties expressly agreed at the pre-trial conference that the matter should not be referred to another court.

Conclusion in respect of costs

[82] I am persuaded that High Court costs should be granted. This judgment is not intended to be authority for the proposition that no matter what quantum is achieved in an action, if wrongful arrest and detention is at issue, one is always allowed to sue out of the High Court. This decision is based on the facts of this case.

ORDER

[83] In the result I grant the following order:

Judgment is granted against the Defendant for:

1. Payment of the sum of R 120 000;
2. Interest thereon at the rate of 9% per annum from 14 days after date of service of the summons until date of payment;
3. Costs of suit.

⁷² *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B–C.

A handwritten signature in black ink, appearing to read 'I Opperman', is written over a horizontal line.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 3 May 2017

Judgment delivered: 24 May 2017

Appearances:

For Plaintiff: Adv Du Bruyn

Instructed by: Bessinger Attorneys

For Defendant: Adv Liphoto

Instructed by: The State Attorney