



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

**CASE NO: 6938/2019**

**(1) REPORTABLE: YES/NO**

**(2) OF INTEREST TO OTHER JUDGES: YES/NO**

**(3) REVISED**

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**DATE**

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**SIGNATURE**

In the matter between:

**MATHISO, VINCENT MZIWAKHE**

**PLAINTIFF**

And

**THE MINISTER OF POLICE**

**DEFENDANT**

**Coram:** Thupaatlase AJ

**Date of hearing:** 22 October 2021- In a 'virtual hearing' during a videoconference on Microsoft Teams digital platform.

**Date of Judgment:** 03 December 2021

This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto the caselines system.

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## **JUDGMENT**

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**THUPAATLASE AJ**

### **INTRODUCTION**

- [1] This is an action for damages arising from alleged unlawful arrest and unlawful detention by members of the South African Police Services(SAPS). It is alleged that the arrest took place on the afternoon of 21<sup>st</sup> April 2017 at the residential place of the Plaintiff at Linatex House No. 6 Doornfontein, Johannesburg. The cause of action arose within the jurisdiction of this court.
- [2] The defendant; Minister of Police is being sued in his representative capacity. It been alleged that when effecting such arrest and detention the members of SAPS were acting in the exercise and execution of their duties and in furtherance of the interest of the Minister. The claim is for amount of R 950 000.00.
- [3] The Defendant pleaded a bare denial of all the allegations.

### **FACTS**

- [4] The plaintiff Mr Mathiso was the only witness who testified. He testified in respect of both the merits as well as quantum. He stated that he was arrested on the afternoon of 21<sup>st</sup> April 2017 on his return from work; he found his stay-in girlfriend with a gentleman he didn't know. He proceeded with his usual routine of taking a shower when he is from work.

- [5] After that he enquired from his girlfriend who the gentleman was and she informed him that it was her brother. He expressed surprise as he had not seen the person prior that day.
- [6] The plaintiff realised no food was prepared. He went to request his daughter who was staying in the upper section for food. The daughter prepared food in her room and brought to it to him to eat. It was at that stage that the plaintiff's girlfriend took an exception and questioned why the plaintiff had made such an arrangement.
- [7] At that stage the girlfriend left the room and was away for approximately 1hr 30 minutes. Upon her return she was in the company of the same gentleman who was earlier in her company. The same gentleman arrested him.
- [8] He told the court that the gentleman informed him that he was being arrested for the abuse of his girlfriend and daughter. He was handcuffed and also manhandled and even pushed against the fence. The said gentleman never identified himself as a police officer. He was clad in civilian clothes the vehicle was an unmarked sedan. He denied to have committed any offence.
- [9] He was driven to Jeppe police station where he was processed. Thereafter the plaintiff was taken to a holding cell. He was kept until the following Monday on the 24<sup>th</sup> April 2017 when he was taken to court. Whilst at the police station he informed that charge against him was for 'Assault GBH (DV)'.
- [10] He described the condition in the holding cell as unhygienic and filthy. That the toilet was not flushing and that the cell was over-crowded with about 15 other mates. He slept on the floor and had only one blanket which was infested with lice. He was provided with a small towel and soap to take a shower with cold water. The breakfast which comprised of two slices of brown bread and black coffee. According to him it was the first time that he had being arrested. The routine was repeated for the remainder of the weekend.
- [11] During appearance in court and the plaintiff was offered the services of a legal representative through legal aid and thereafter was remanded for seven days' period. The reason that given was that the police needed to conduct further

investigation in particular to verify his physical address. This was despite the fact that he was arrested at his place of residence and in the presence of girlfriend.

[12] After his remand he was taken to Johannesburg Correction Centre (colloquially referred to as Sun City). He had an unpleasant experience at the facility. He was physically assaulted by the officials. He was also put in overcrowded cell and the food ration was little.

[13] He further felt uncomfortable in an unfamiliar environment and was among strange people, some of whom didn't want to take a bath. Because of such unhygienic condition he faced a risk of falling sick. There were also inmates who were hostile and unfriendly towards him and ill-treated him. He was forced to do their laundry by other inmates. The plaintiff's efforts to report the assault by of prison officials were ignored.

[14] He appeared in court for the second time and remanded in custody. He was returned to the correctional facility where the same unhygienic condition and ill-treatment persisted. It was during his third appearance in court that he was released on bail. It was on the 16<sup>th</sup> May 2017. On his subsequent court appearance, the charges were withdrawn for lack of sufficient evidence to prosecute.

[15] He lost his job and people started referring to him as an abuser. He felt bad as he was arrested and detained for something he didn't do. As a result, he is fearful of the police and shivers whenever he comes across the police.

[16] In respect of the amount of claim he said that he was not aware of the amount set out the particulars of claim and that according to him R 100 00.00 was sufficient so that he could take his children to school.

## **ANALYSIS OF THE EVIDENCE**

[17] It is common cause that the plaintiff was arrested and appeared in court. He was detained for a period from the 21<sup>st</sup> April 2017 to 16<sup>th</sup> May 2017 before bail was granted. There is no evidence to gainsay his testimony. The court had

the opportunity to observe the plaintiff. He didn't come across as a mendacious witness. He described what happened from the moment of his arrest and the whole period of his detention with plausible precision.

[18] Whilst it is difficult to understand how he could have been arrested for no reason; this court is unable to make any finding in the absence of any countervailing evidence from the defendant. The evidence of the plaintiff must therefore be accepted as the truth.

[19] The Plaintiff was arrested with a without warrant arrest. The defendant failed to place any evidence before court regarding the reason for the arrest. It appears that there was an allegation that the plaintiff committed an offence of assault. This can be gleaned from the discovered copy of the docket.

[20] In the heads of argument the Counsel for the defendant urged that the court should find that the plaintiff was an untrustworthy also not candid and reliable.

[21] It is true that the plaintiff denied to have been told about the reason for his arrest and further remands when he appeared in court. This was despite the fact that the 'notice of rights' indicates what was alleged to have been the reason for the arrest.

## **LAW**

[22] It is clear that the plaintiff was arrested without a warrant of arrest. In order for the arrest to be lawful it is necessary for the defendant to lead evidence which shows that such arrest was in terms of the Criminal Procedure Act (Act)<sup>1</sup>. The Act gives police officers extraordinary powers of arrest. These powers are set out in section 40 of the Act. There was no rebuttal of the factual allegations placed before the court by the plaintiff. It is trite that warrantless arrest is prima facie unlawful.

[23] The defendant is expected to plead a case in terms of the provisions of the Act in order to enable the court to make a determination whether the arrest was justified. In *casu* no attempt was made by the defendant to bring the

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<sup>1</sup> Act No. 51 of 1977 as amended

arrest within the ambit of the Act. The defendant denied the arrest despite that the plaintiff was kept at the police station and even appeared in court at the behest of members of the defendant.

[24] In the case of *De Klerk*<sup>2</sup> it was stated as follows:

*“A claim under the actio iniuriarum for unlawful arrest and detention has specific requirements:*

- (a). the plaintiff must establish that their liberty has been interfered with;*
- (b). the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;*
- (c). the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and*
- (d). the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought”.*

[25] Defendant in the heads of argument has argued that as was held in *Sekhoto*<sup>3</sup> that the arresting officer has a limited role in the process that takes place in court. He further submitted that:

*“presiding officers in courts of first appearance must ensure that the rights in terms of section 35(1) (e)-(f) of the Constitution are not undermined. In my view the police cannot be held liable for further detention, even if the arrest is found to be lawful. What is critical is that,*

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<sup>2</sup> *De Klerk v Minister of Police* (CCT95/18) [2019] ZACC 32; BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) per Theron J at para [14]

<sup>3</sup> *Minister of Safety and Security v Sekhoto* [2019] ZASCA 141; 2011 (5) 367 at para. 44 the court remarked as follows: ‘While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than bring the suspect before court (or the senior officer) so as to enable that role to be performed’.

*justice department would be responsible and liable for the further detention because of its failure to observe the constitutional rights of a detained person*<sup>4</sup>.

[25] The remarks in *Sekhoto* were found to be obiter.<sup>5</sup> It is clear that in the context of the matter before court, this decision doesn't appear to be advancing the argument of the defendant. The other distinguishing feature of *Sekhoto* was that in that case the arrest was found to be lawful.

[26] The case of *De Klerk* dealt with the issue being contended by the defendant and rejected that contention. The court held as follows:

*"The facts of this case raise a particular question. Does an 'unlawful' remand decision by a Magistrate – for instance, as here, where the applicant should clearly have been released on bail – render harm arising from the subsequent unlawful detention too remote from the unlawful arrest? The argument advanced by the respondent is that a remand order by a Magistrate acts as a fresh intervening act that breaks the legal chain of causation between the unlawful arrest and the detention after the remand order"*<sup>6</sup>.

[27] Essentially, the question before this court as in the case of *De Klerk* is whether only the Minister of Police (the defendant) is solely liable for the plaintiff's unlawful detention after his first appearance in court.

[28] The previously held position was that once a persons appeared in court, their claim against the Minister of Police came to an end and any claim arising from unlawful detention post court appearance had to be brought against the National Director of Public Prosecutions and or Minister of Justice. I say so mindful that there was no unanimity in that regard. In the case of *De Klerk* Theron J identifies two streams of cases dealing with this question. The cases

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<sup>4</sup> See para 44 of the Defendant's Heads of Argument.

<sup>5</sup> *De Klerk* at para [72] 'The reliance on *Sekhoto* is in my view misplaced. I agreed with the minority that *Sekhoto* "was not concerned with the question whether the [respondent] could be held liable for detention following the judicial remand, but with whether the arrest itself was unlawful. *Sekhoto* did not deal with the role of police officer in context of delictual liability for post-court appearance detention. It merely delineated the functions of police vis-à-vis the court in the judicial process, in particular the bringing a suspect to court to stand trial. Anyhow, the statements were obiter. The appeal in *Sekhoto* was upheld because the Court held that the arrest was lawful.'

<sup>6</sup> *De Klerk* para [34]

that are referred as “Case law suggesting the lawfulness of the subsequent detention is determinative of liability’ and Case law suggesting lawfulness of the subsequent detention is not determinative of liability”.

[29] In the first category is *Ndlovu*<sup>7</sup> case where the court held that post-appearance detention of the accused was unlawful. The Court held that the magistrates were obliged to apply their minds to the question of bail. In this matter the Minister of Police and Minister of Justice were held jointly and severally liable. The other matter considered by the court in this category was *Kader*<sup>8</sup> where it was commented that the Magistrates were obliged to apply their mind.

[30] The second category are cases where it was held that lawfulness of the subsequent detention is not determinative of liability. In this category the court made reference to the case *Thandani*<sup>9</sup>.

[31] After considering the case-law Theron J concluded that:

*“In sum, there are then two Supreme Court of Appeal decisions suggesting that the lawfulness of subsequent detention determines without more whether the arrestor is liable. There are three going the other way, with an express consideration of legal causation”*<sup>10</sup>.

[32] The court then resorted to the question of legal causation in order to resolve and answer the question of liability by the arrestor. The court concluded that:

*“The principle emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the*

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<sup>7</sup> *Minister of Safety and Security v Ndlovu* [2012] ZASCA 189; 2013 (1) SACR 339 (SCA)

<sup>8</sup> *Minister of Law and Order v Kader* [1990] ZASCA 111; 1991 (1) SA 41 (A) at 51A-C

<sup>9</sup> *Minister of Law and Order v Thandani* [1991] ZASCA 123; 1991 (4) SA 862 (A)

<sup>10</sup> *De Klerk* para59



*deprivation of liberty pursuant to a remand is lawful, regard can be had to the manner in which the remand order was made”<sup>11</sup>.*

[33] The present position of the law as expounded by *De Klerk* is that liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation; having regard to the applicable tests being factual and legal causation and policy considerations.

#### **APPLICATION OF THE LAW TO THE FACTS**

[34] As already indicated this court unlike in the *De Klerk* matter didn't have the benefit of the version of the defendant. The defendant pleaded a bare denial. The circumstances of the arrest are only from the side of the plaintiff. The plaintiff testified that the reason for his remand on his first appearance before court were two-fold. The first was for him to apply for legal aid assistance and the second reason was that the police needed time to verify his residential. This was obviously false. The plaintiff was arrested at his residential place in the presence of his girlfriend. It was therefore unnecessary to have verified a known address. It can only be concluded that the police lied and by their action caused further detention of the plaintiff.

[35] It follows that in conveying this false information to the court; a reasonable arresting officer in the circumstances may well have foreseen the possibility that the plaintiff will be remanded in custody. Therefore, but for such conduct the plaintiff will not have endured further detention. This is even egregious given the fact that the arrest itself was unlawful.

[36] By providing false information the arresting officer must have subjectively foreseen that the court will remand the plaintiff to enable such verification to take place and that further detention will ensue.

[37] As observed by Cameron J in a concurring judgment in *De Klerk*:

*“In these circumstances, in wrongfully arresting the applicant and sending him without more for processing to that particular court, with no effort to ensure that he was processed differently, and thus afforded*

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<sup>11</sup> *De Klerk* para 62

*opportunity to apply for bail, the police officer who unlawfully arrested the applicant is as much responsible for the wrong by his further detention as if, she were being sued for personal injury inflicted by a negligently driven motor car, she had culpably caused him to fall into its path*<sup>12</sup>.

## QUANTUM

- [38] The approach to the calculation of costs to be awarded was enunciated in *Tyule*<sup>13</sup> that in the assessment of damages for unlawful arrest and detention, it is important that 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.
- [39] Physical liberty is a recognised and entrenched common law and constitutional right<sup>14</sup>. It follows that a breach of this right of personality will give rise to an action for damages.
- [40] Where members of the police transgressed in that regard, the victim of abuse was entitled to be compensated in full measure for any humiliation and indignity which resulted. Third, where a right is said to be so important that it has been afforded constitutional protection, any damages to be awarded should reflect that importance.
- [41] In considering quantum, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a human being in a free society, which should be jealously guarded at all times and there is a duty on the courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual.
- [42] The court has a wide discretion to award an amount which it deems to be fair and reasonable under the circumstances. The underlying principle in

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<sup>12</sup> *De Klerk* para 112

<sup>13</sup> *Minister of Safety and Security vs Tyule* 2009 (2) SACR 282 SCA

<sup>14</sup> Section 12 of the Constitution. The right includes the right not to be arbitrarily deprived freedom or without just cause, and the right not to be detained without trial.

awarding such damages is that money can never be more than a crude consolation for the deprivation of liberty. It is to be also be noted that courts have not been extravagant in compensating loss<sup>15</sup>.

[43] The Plaintiff testified that he was made to endure unbearable conditions in the cells. He was given small food ration, had to wash with cold water and endure filthy and unhygienic cell. In addition, the cells both at the police station and the Johannesburg Correctional Facility were made to hold an excess number of inmates. The blankets were dirty and were infested with lice. This is the type of treatment that was visited on him despite that no charges could be proved against him. The experience was hurtful and most humiliating and no attempt was made by the defendant to provide any form of justification.

[44] The length of time that the Plaintiff was unlawfully detained was for a long period of time (26 days). The Plaintiff was a family man and he was employed at the time of his arrest. He lost his job because of prolonged period of absence from work. It is axiomatic and to state the obvious that in South Africa the prospects of getting a job gets harder by the day especially for those with little or no skills.

[45] It is also trite that when assessing damages for unlawful arrest and unlawful detention prior comparable awards serve only as a guide<sup>16</sup>. Each case must be determined on its merits bearing in mind the fundamental rights that the law confers on all the citizens of this country.

[46] In considering an amount to be awarded in this matter the court has to express the importance of the constitutional right to individual freedom.

### **Order**

- (i) It is hereby ordered that the defendant is found to be liable for unlawful arrest and unlawful detention for 26 days.

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<sup>15</sup> *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA), 2006 (6) SA 320 (SCA) 326

<sup>16</sup> *Mvu v Minister of Safety and Security* [2009] JOL 23450 (GSJ), 2009 (6) SA 82 (GSJ) 91: Each case must, however, be decided on its own merits, and the facts in each of the above cases are distinguishable from the facts in the present one'.

- (ii) It is ordered that defendant pay plaintiff the sum of (Three hundred and fifty thousand rand (R 350 000. 00)
- (iii) Plus, interest calculated from the date of judgment.
- (iv) The defendant to pay costs of suite as between party and party and costs to include employment of two counsels.

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**THUPAATLASE AJ**

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of the hearing: 22 October 2021

Judgment Delivered on: 03 December 2021

For the Plaintiff: Adv. Vobi with Adv. RV Mudau

Instructed by: Oni Attorneys

For the Defendant: Adv. Msimanga

Instructed by: State Attorney Johannesburg