IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.:2020/23988

In the matter between:

HLOMUKA, THEMBA Plaintiff

and

THE NATIONAL COMMISSIONER

SOUTH AFRICAN POLICE SERVICE 1ST Defendant

MINISTER OF POLICE 2nd Defendant

J U D G M E N T

FLATELA, AJ.

Introduction

[1] On 26 June 2019 the plaintiff was arrested without a warrant and detained by the police on a charge of housebreaking with intent to steal and theft which allegedly took place at the plaintiff's home on 22 March 2019. All household items were recovered on 22 March 2019. The plaintiff was held in custody in

Jabulani police station cells and was brought before the court the following day. The plaintiff appeared before a Magistrate on 27 June 2019 for a bail application. He was legally unrepresented. The Magistrate considered the bail the application and set the bail amount at R2000 (Two Thousand Rands). The plaintiff was not able to the bail amount. The plaintiff was remanded in custody and transferred to Sun City Correctional Service whilst awaiting trial. The State withdrew the charges against him on 07 August 2019 after the matter was referred to informal Alternative dispute resolution. Plaintiff's mother withdrew the charges against him.

[2] The plaintiff instituted a delictual claim against the defendant for general damages in the amount of R2 000 000.00 (Two million rands only) arising from his unlawful arrest and detention without a warrant for the entire period of his detention including further detention after his first court appearance. The plaintiff contends that an amount of R30 000.00 per day is reasonable.

[3] Both liability and quantum are disputed by the defendant. In its amended plea the defendant contends that the arrest was lawful. The defendant relies on the ambits of section 40 (1) (b) of the CPA[1] , which as a general rule permits the arrest by the police officers without a warrant.

Issue for determination

[4] At issue before this court is whether the arrest and detention were wrongful and unlawful as alleged by the Plaintiff. Further, whether the Minister of Police is liable for further detention of about 6 weeks after the plaintiff's first appearance before the court in circumstances where bail was granted and the plaintiff could not afford to pay bail set by the Magistrate.

[1] Criminal Procedure Act 51 of 1977

Onus

[5] The arrest is common cause. It is trite that the onus rests on a defendant to prove that the action of its members was justified in law.[2]

[6] The complainant in the charge against the plaintiff died before the commencement of the trial. At the commencement of the trial, the counsel for the plaintiff applied that the statement made by the complainant which had since deceased is hearsay and should be declared inadmissible. After consideration of the issue, I resolved to admit the statement for what it purports to be but it will not have probative value in the determination of the matter.

Factual background

[7] The facts are common cause.

7.1 On 26 June 2019 at about 23H00 the plaintiff was arrested without warrant by a member of the South African Police Services Erwen Monyela (Monyela) after he was pointed out by the complainant, his deceased uncle Chief Albert Hlomuka.

7.2 The plaintiff was a suspect in a housebreaking that took place on an unknown date at the Plaintiff's residence wherein certain household items were stolen.

7.3 The household items were discovered by the plaintiff's late uncle in the property on 22 March 2019. It is alleged that the plaintiff's friend Mpumelelo Dlamini (Dlamini) brought them to the house and left them at the back of the main house on Friday 22 March 2019.

7.4 The plaintiff was not at home at the time.

7.5 The plaintiff lived in the property with his late uncle Chief Albert Hlomuka, his junior brother Mpumelelo Hlomuka and his mother Sibongile Hlomuka. The property consists of the main house with two bedrooms, kitchen and lounge

[2] Minister of Law and Order v Hurley 1986 (3) SA 568 (A)

(the main house), The outside garage which was converted to a room and there are outside rooms that are used by the tenants and an outside toilet.

7.6 The plaintiff and his mother use the bedrooms in the main house, the uncle and junior brother uses garage and an outside backroom respectively.

7.7 On 22 March 2019 the plaintiff's uncle discovered the stolen household items after seeing Dlamini, plaintiff's friend entering the property with a big plastic bag and left it behind the outside toilet.

7.8 After inspecting it, he took it to his room and called the plaintiff's mother who was at work at the time to inform him about the issue. In the evening, plaintiff's mother returned home after work, she confirmed the items as hers. She also discovered that her room door was tempered with.

7.9 The matter was reported to the police by the complainant as the plaintiff's mother does not stay permanently at her home. He suspected the plaintiff and his friend Mpumelelo.

7.10 The household items were left with the complainant as evidence.

[8] The statement by the complainant was read to the record. In his statement the complainant stated that on 22 March 2019 whilst at his room, looking through the window, he saw the plaintiff's friend, one Mpumelelo Dlamini (Dlamini) of house no 501 Zwane Street, Emndeni, entering their home from the main gate carrying a big plastic bag with an item inside. Dlamini knocked on the main door of the main house, there was no response, he went to the back of the house and came back of the house without the plastic and left the property. After Dlamini left the property, the complainant went out of his room to check the plastic bag. He found the plastic at the back of the outside toilet and he noticed that the plastic had household items that belonged to the main house. He immediately called his sister, Sibongile Hlomuka, the plaintiff's mother informing her that Dlamini had left a huge plastic back with household items. After identifying the items in the plastic, Sibongile confirmed that the items belonged to her. He took the plastic to his room. The complainant stated that he did not have keys for the main house, only the plaintiff and his mother had the keys as

they were the ones staying in the house. Sibongile returned from work in the evening on the same day. She confirmed that the items were hers. Sibongile unlocked the main door of the main house, they both entered the house. The main door was not tampered with. Sibongile noticed that her bedroom door was forcefully opened and two cast iron pots valued at R3000 and black carvela shoes valued at R1 925 .00 were stolen from her room. Although Sibongile has her room in the main house, she does not stay full time at her home. Sibongile did not open the case because she does not stay at home. It is this statement that the defendant relied on to arrest the plaintiff for housebreaking with intention to steal. After the arrest of the plaintiff on 26 June 2019, Sibongile Hlomuka, plaintiff's mother also made a statement.

The Defendant's case

[9] The defendant called evidence of three witnesses. The first witness was Sibongile Hlomuka, the plaintiff's mother. The second witness was Sergeant Monyela, who was the arresting officer and, the third witness was Constable Solly Baloyi, who was the investigating officer.

[10] Sibongile Hlomuka testified that on Friday 22 March 2019 she was called by her late brother Chief Albert Hlomuka who advised her that he found a green JM plastic bag with cookery, cutlery and some other household items behind the outside toilet. She stated that the items were hers and they were kept in her bedroom which was always locked as she was not staying full time in her home but with her fiancée. On the evening of the same day, she went to her home and found her late brother in the garage where he was staying. He showed her the plastic bag containing the household items. She confirmed that the items were hers. The deceased had taken the plastic bag from behind the outside toilet and kept it in his room. She left the plastic with her brother. She testified that she does not remember if the main door of the main house was locked on the day in question because sometimes it is unlocked and one could get entrance without using the key, however, she noticed her bedroom door was tampered with. Asked what else was missing she mentioned that her junior son also named Mpumelelo's carvela shoe to the value of R2000 was also

missing. On how the carvela shoe got lost, she stated that Mpumelelo stays in the outside room where he keeps all his belongings. Mpumelelo told her that the plaintiff had requested permission from him to use his room in order to spend time with his girlfriend and her girlfriend's friend who came to visit. The Plaintiff had left his girlfriend and her friend temporarily and he came back to accompany the girls to their homes. Mpumelelo noticed that his carvela was missing. She confronted the Plaintiff about the missing shoes and the Plaintiff told her not to worry as he was going to investigate the matter with his girlfriend. He came with feedback that the girls who were in Mpumelelo's room sold the shoes to one Sakhile.

[11] Her late brother told her that he suspected that the plaintiff was involved in committing the crime. She told him to report the matter to the police. He indeed went to the police station to report the matter. As the items did not belong to the complainant, the police required the owner to come forward and report as well. She went to the police station and confirmed what his brother told him and what he saw. She was not required to make the statement so she did not make the statement on that day. It was only after the plaintiff was arrested that Baloyi took the statement from her.

[12] The witness testified that whilst the plaintiff was in jail, she noticed that the plastic bag which contained the items that were kept by complainant was no longer full but half empty. When confronted about this, the complainant accused their cousin's girlfriend of stealing the items which the cousin brother denied. She realised that everyone in the family will end up being arrested due to the accusations. She also testified that her late brother told her that it was the tenant who saw Mpumelelo Dlamini with a plastic. She decided to withdraw the case against the plaintiff. She contacted the Defendant (Constable Baloyi) to advise him of her intention to withdraw the case against the plaintiff. Constable Baloyi told her to withdraw the matter in court. She attended court on 07 August 2019 where the matter against the Plaintiff was withdrawn. She testified that the plaintiff was not working at the time of arrest but sometimes he was working with attorneys.

[13] Under cross examination the witness testified that a person inside the garage could not see a person knocking on the main door of the main house. She also stated that all of them had keys to the main house except his junior son Mpumelelo. The main house is not always locked. Asked if the carvela shoes were stolen on the same day as other items which included pots. The witness stated these were two distinct incidents. When asked why the complainant reported the incidents as if they occurred on the same day, the witness then stated that her brother incorrectly reported the matter to see the plaintiff arrested as they were not in good terms. When asked if she knew that the police went to her home to investigate the matter, she responded in the negative. She also testified that she never visited the plaintiff in prison because she was always at work. She stated that the plaintiff was unemployed at the time of arrest but he was employed by attorneys on a part time basis.

[14] The evidence of this witness was totally inconsistent and contradictory to her statement that she furnished Baloyi on 26 June 2019. In her statement she stated that only the plaintiff had the key to the main house, the main door was not tempered with only her bedroom door was tempered with. Regarding the missing carvela shoe she stated that the plaintiff told her that he never stole the shoe and that the shoe was with Sakhile, she went to look to Sakhile's place and Sakhile advised that two girls came selling the shoe but he never bought them. In her statement she stated that she suspected the plaintiff because there was no forced entry in the front door. In court the story changed now it was not only Themba but her late brother had the key too, the main door is sometimes left unlocked, it was her late brother who suspected the plaintiff because he did not like him, the recovered items were missing whilst in her late brother's possession and that is the reason, she withdrew the complaint against the plaintiff. She was unreliable and definitely not credible witness however the counsel for the defence left her evidence in court untouched.

[15] The second witness Monyela. He testified that he has been in the employment of the SAPS for about 13 years. On 25 June 2019 he was attending to the complaints at the charge office of the Naledi Police Station. At about 23H00, He

received a call from the complainant that a suspect who was evading the arrest was at home sleeping. He attended to complaint and went to the plaintiff's home. The complainant informed him that the plaintiff is in the yard and he went to point him out in the outside room where plaintiff was sleeping. Monyela informed the plaintiff that he was arresting him for housebreaking with intent to steal and theft. The plaintiff told him that his uncle does not want him in his home. He took him to Naledi Police Station to verify the case number. The Plaintiff was later detained in Jabulani Police Station by the investigating officer, Baloyi.

[16] Under cross examination, Monyela stated upon receiving a call to arrest a suspect who was evading arrest he first checked in the system to see whether the case has been opened against the suspect, whether there was a case number and to check if the suspect has been arrested before. At that time, he was not in physical possession of the original docket. He confirmed that he did not see the items that were said to be stolen. He arrested the plaintiff based on the complainant's call and in terms of the pointing out. It was put to him that the complainant statement did not implicate the Plaintiff but it makes reference to him and therefore he could not have formed reasonable suspicion for his arrest. He stated that he had seen that the Plaintiff was indicated as a suspect. He then arrested the Plaintiff based on what he had been told had transpired. The witness also suggested that the Plaintiff had been reported to be evading justice.

[17] On re-examination Monyela was asked about the purpose of arrest. He answers that it was to bring the person in court and he arrested the plaintiff because he didn't believe that the suspect would have gone to court.

[18] The third witness Solly Baloyi testified that he was a police officer in the employ of the Defendant for about 11 years and 9 of those years he worked as a detective. He received training in detective courses, fraud, domestic violence and circulation of human beings and goods. On 22 March 2019 he received a complaint from Chief Albert Hlomuka regarding the stolen household items and Chief Albert suspected the Plaintiff and Mpumelelo Dlamini. A docket was opened and the case was assigned to him as an investigating officer on 26 March 2019. He read the statement of the late Chief Albert and he was convinced that the plaintiff is the suspect.

[19] On whether it does occur that the complainant combines two different incidents that occurred in different days in one statement, Constable Baloyi stated that it does happen that the complainant can report two different incidents in the police and those incidents could be recorded in one statement. Baloyi stated that after the matter was reported he went to the complainant's address to investigate. He described the property as a four-room main house, with two outside rooms. The main house had burglar proof and its main door was not tampered with. The property has high walls and in his view an outsider cannot get access to the house. He was told by the complainant that bedroom door of Sibongile Hlomuka was tampered with. The complainant had no keys to the main house. According to Chief Albert, Mpumelelo Dlamini who lived in the same street at 501 entered the property with a plastic looking for the plaintiff because he carried the items they stole from the plaintiff's mother in the house.

[20] Asked about what formed the reasonable suspicion that the plaintiff is the one who stole the items, Baloyi stated he was informed by the complainant that only the plaintiff and his mother who were staying in the main house and had keys. Also the plaintiff did not inform his mother about the breaking in her bedroom. He was also of the opinion that if Dlamini stole the items he wouldn't come with them to the house.

[21] Baloyi testified that he went to the house several times to arrest the plaintiff and had not been able to locate him because the Plaintiff was evading the police. He went to look for Mpumelelo Dhlamini too but he also was evading police. He stated that Mpumelelo had another case of theft. He stole his mother's money from the money market in Shoprite. He opened the case for him. Mpumelelo's mother informed him that Mpumelelo is no longer staying at his home, he is with the plaintiff. He then advised the complainant and Mpumelelo's mother to inform him whenever the suspects were seen. He relied on them as he went to the plaintiff's place of residence several times without finding him. As a result of Plaintiff evading justice, he left a pointing out notice with Chief Albert who was also given the phone number of the police to call at any time whenever the plaintiff is at home. In May the docket was temporarily closed because the suspect could not be traced.

[22] The plaintiff's 's name was circulated to be arrested by someone else anywhere in the country. The plaintiff was detained at 12 am. He interviewed the plaintiff at 12:30 am. He booked the cell at Jabulani Police Station to secure his court attendance. The plaintiff was informed of his rights, amongst them that he was entitled to legal representation. The plaintiff told him that he sold the shoes to Sakhile for R200. He didn't have the money to buy back the shoes from Sakhile. He took him to where he sold the shoes. They traced Sakhile and Mpumelelo. Baloyi was convinced that the plaintiff was involved in the break-in in the main house. He could not have taken him to where he sold the shoes if he was not involved. The plaintiff was brought to court within 48 hours. The plaintiff was granted bail of R2000 on the date of trial. The matter was withdrawn through the Alternative Dispute Resolution. The plaintiff's mother withdrew the complaint against the plaintiff.

[23] Under cross examination it was also put to him that he had not done the requisite investigation in this matter. Baloyi denies this allegation. He stated that he attended to the property and the gates were always locked and the complainant did not have the keys for the main house so he could not enter the main house to observe the crime scene. On the procedure of opening the

docket, Baloyi stated that the complainant opens the case, attends the crime scene and takes statements. He did not attend to the crime scene, his colleagues attended it and it was not his responsibility to take fingerprints. He never contacted the plaintiff's mother. It was put to him that there was no statement apart from that of the complainant at the time of arrest. The Plaintiff was arrested three months after the alleged offence. There was no evidence of the said theft as he had not even taken the plastic bag from the complainant's possession. that he could not have relied on the plaintiff's mothers' statement as it was taken after the arrest, he never interviewed the Plaintiff's mothers before the arrest. He only contacted the complainant. That he failed to obtain this number, he only obtained further statements only after the arrest. He confirmed all these facts.

[24] On the absence of the plaintiff's mother from the Magistrate court as one of the state witnesses, the plaintiff's counsel put to him that he was supposed have issued a subpoena Sibongile. Baloyi agreed that it is his responsibility to issue subpoena to any witness but the matter didn't proceed to trial.

[25] On ADR issue, Baloyi stated that Sibongile went to court on her own , he did not call her. Before arrest he had no contact with her. He was then asked, what happens when police are looking for a suspect and they cannot locate him. He stated that a name of the suspect is circulated and a pointing out notice is issued. A warrant for the arrest of the suspect is issued but, in this case, there was no ID number.

[26] On reasonable suspicion, it was put to him that there was no basis for the arrest of the plaintiff as there was insufficient evidence that the plaintiff had broken into the house when he was arrested. Baloyi stated that Chief Albert told him that he did not have the key to the main house. He did not have access to the house. He showed him the items he found after Mpumelelo had left the plastic.

[27] He was put to task about the dates upon which the carvela was stolen. In response he stated that if the date is not clear in the statement that does not mean that the crime was not committed. Baloyi was asked if he was familiar with the standing orders regarding arrest. The standing orders were read to the witness. He was asked why they did not use the warrant of arrest. Baloyi explained that he did not have the plaintiff's identity document. The plaintiff was invading the police so he issued a pointing out note instead of the warrant of arrest.

[28] On 26 June 2019 when the plaintiff appeared in court, Baloyi was not in court. He left the docket with the prosecutor. Regarding the ADR note that appear in the docket, he explained that the docket came back with the note.

[29] The plaintiff's version was put to him that the Plaintiff will state that he never left his place of residence since birth. The plaintiff was to testify that he did take Baloyi to the person who bought the shoes from the two girls whom he had taken to his home. He was not around when the shoes were stolen. He was not at home when the household items were found. His late uncle had a key to the main house. Baloyi refuted the plaintiff's version and stated that the plaintiff told him that he is the one who sold the shoes to Sakhile. When the prison conditions were put to the witness, he confirmed that prison is not a place to enjoy and that the Plaintiff must have endured those conditions.

[30] The state closed its case. There was not re-examination. The evidence Monyela and Baloyi was not impressive. Monyela stated that he was not in possession of the docket at the time of arrest. He relied on the complainant's pointing out the plaintiff. The evidence of Baloyi reveal that at the time of arrest and detention of the plaintiff, the investigation was not complete. He had not obtained the statement from Sibongile Hlomla despite the fact that three months passed before the arrest. Baloyi had not entered the main house before the arrest.

The Plaintiff's case

[31] The plaintiff testified that he was born on in Soweto in 1987 and he has been residing in the same address since birth. This is the same address where the alleged offence took place.

[32] He testified that he does not know why the police arrested him. He was not told of the reasons for his arrest. Prior to his arrest he did not know about the housebreaking and stolen household in his place. He denied that he evaded the police. The police did not search for him. He slept at home every day. He could have received the message from the tenants that the police are looking for him. His uncle lived in the garage and his junior brother lived in the outside room. He lived in the main house. The main house has four rooms, the front door is facing the front gate and the back door is facing the back room.

[33] Regarding the keys to the main house, he stated that all of them himself, his mother and his uncle had the keys to the main house. The main house has kitchen, dining room and 2 bedrooms, his and his mother's. The toilet is outside the main house. He uses the bedroom that was used by his grandparents. The second bedroom is used by his mother, Sibongile, whenever she comes home. His late uncle lived in the garage. The door of the garage is facing the rooms and kitchen, and the window is facing the gate and backroom. The garage has a roller door, which means that one cannot see the kitchen door unless it is opened.

[34] The plaintiff testified he obtained Matric and is unemployed. At the time of arrest, he was not working. He previously worked for Mazibuko Attorneys who employed him as messenger on occasion. On other occasions, he cuts grass and was paid between R80-R200 per day. He worked two days a week. His mother buys groceries for him.

[35] Regarding the incident of the missing carvela shoe of his junior brother Mpumelelo, he stated that on the day the carvela shoe got stolen, he was visited by his girlfriend and her friend. He asked his junior brother Mpumelelo to use his outside room in order to spend time with his girlfriend and friend. He stated that his mother is fine with him spending time with his girlfriend in the main house, but his late uncle had a problem because he did not like the fact that he was staying at his maternal home. He did not like him bringing the visitors to his home whether the visitors were girl or boys.

[36] On the day he brought his girlfriend and her friend, he left them in Mpumelelo's room to buy fat cookies. On the way he met his friend and he asked him to accompany him to Naledi. He spent about 2 hrs with his friend. His girlfriend and her friend left the property whilst he was away; the gate was not locked. His junior brother discovered that his carvela was missing. His brother told him that his shoe is missing and his little brother also called his mother and told him about the missing shoe. The plaintiff went to where the girls were residing, he couldn't find them but they later came back and disputed that they stole the shoe. His mother went to the police with the girls. The plaintiff made an undertaking to her mother to investigate the matter. He later found out that the girls sold the shoe to Sakhile who stayed in the same street with the plaintiff.

[37] The plaintiff was referred to the Notice of Arrest which stated that he was arrested for housebreaking and theft. He stated that he was told by the police that he stole his brothers' shoes. He was not aware of the household items that were stolen and was told by his mother after his release that his late uncle saw Mpumelelo, his friend with the plastic with the stolen household items, but the plastic according to his mother was now halved and when she asked his late uncle about the missing items from the plastic, he accused his cousins who were in the house. His mother told him that his uncle has a hand in the missing items that were stolen from her room.

[38] He testified that he was not at home when these items were discovered by his late uncle. He was only made aware of the household items when he arrived and found his mother home. The day when the carvela was stolen is not the same day as the day when the household items were discovered.

[39] Regarding the arrest, he testified that he was held in the holding cells in Jabulani Police Station. He was interviewed by Baloyi the detective known to him. He slept overnight in the cell and in the morning, he went to court. In court he was told that the bail is R2000. He told the court that he did not have the R2000. There were no family members in court. He was remanded to Sun City Correctional Services Centre. He only spoke to his mother after his release outside court on 7 August 2019.

[40] In prison he slept on the floor, given 1 blanket, and a very thin dirty sponge with bugs and holes. He was sleeping in the floor with broken windows. With regard to food, they were given porridge in a cup and a slice of bread. For lunch they were fed with pap, cabbage and boiled eggs. He didn't have visitors to get him blankets and food. One could buy food and fat cakes. The toilet was situated in the room he was sleeping in. One could see a person relieving himself.

[41] The plaintiff was emotional and started crying during his testimony regarding prison conditions. He disputed Baloyi's version that he told him that he sold the shoes to Sakhile. He was not familiar with ADR. He conceded that he took Baloyi to Sakhile to get carvela and to take him to the girls who sold the carvela to him. Baloyi did not tell the truth about the girls and he did not follow up regarding the girls.

[42] Under cross examination, it was put to him that it was his late uncle and his mother who reported the case to the police and pointed him as a suspect and he cannot now blame the police for his arrest and detention. The plaintiff stated that he blames the police for his arrest because he told constable Baloyi about the involvement of the girls in the theft of carvela but he never investigated that. The girls were not arrested and Sakhile was not arrested. The plaintiff contends that the case was not properly investigated.

[43] Regarding the keys it was put to him that if regard is heard to the fact that the main door to the main house has not been tempered with but only his mother's bedroom, that rules out the possibility of outside intruders. He agrees.

[44] He denies running away from home in order to evade police.

[45] It was put to him that he was taken to court within 48 hours and was granted the bail of R2000 therefore he cannot blame the police for further detention. The plaintiff stated that he does blame the police because they did not investigate the matter thoroughly if one looks at the time taken to investigate and the time of arrest. He stated that he did inform the prosecutor that he did not have any money.

[46] A question was asked on the possibilities of his late uncle breaking in the plaintiff's mother's room and give Mpumelelo the stolen items. Plaintiff did not agree with that suggestion. He stated that his uncle did not like that he was staying in his parent's home. His girlfriend and her friend came to visit for a dagga smoking spree. He left them to buy fat cakes for 2hrs. He questioned why constable Baloyi did not arrest another suspect.

[47] On re-examination the plaintiff was referred to the complainant's statement and asked if the police could have formed a reasonable suspicion. He answered in the negative. The plaintiff closed his case. The plaintiff's evidence corroborated his mother's evidence in all material aspects .

The legal principles

Constitution

[48] Section 12(1)(a) of the Constitution guarantees the right of security and freedom of a person, which includes the right 'not to be deprived of freedom arbitrarily and without just cause'. Tshiqi J said in JE Mahlangu [3]

> [25] "The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity,[4] are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights.[5] They are also part of the founding values upon which the South African constitutional state is built.[6]

[3] JE Mahlangu and Another v Minister of Police [2021]

[4] Section 10 of the Constitution states that every person has inherent dignity and everyone has the right "to have their dignity respected and protected".

[5] Section 7(2) of the Constitution. Note too that section 7(1) provides that "[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".

[6] Section 1(a) of the Constitution states that "[t]he Republic of South Africa is one, sovereign state founded on the following values" including, "human dignity, the achievement of equality and the advancement of human rights and freedoms".

[49] It is trite that the deprivation of liberty, through arrest and detention is *prima facie* unlawful[7].

[50] In an action for wrongful arrest and detention, a plaintiff only bears the onus of proving the arrest and detention [8] In *Relyant Trading (Pty) Ltd v Shongwe and another*[9] the Supreme Court of Appeal (per Malan AJA) reiterated this position as follows (para 6) :

> 'To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.'

[51] In ***Minister of Police and Another v Du Plessis***[10] Navsa ADP stated as follows:

> "Police bear the onus to justify an arrest and detention. In *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F the following is stated:
>
> '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.'

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[7] Zealand v Minister of Justice and Constitutional Development 2008 (2) SACR 1 (CC) ,2008 (4) SA 458 , 2008 (6) BCLR 601; 2008 ZACC 3 para 22.

[8] *Matsietsi v Minister of Police* (A3103/2015) [2017] ZAGPJHC 29 (20 February 2017)

[9] [2007] 1 ALL SA 375 (SCA)

[10] 2014 (1) SACR 217 (SCA) at paragraphs 14 – 17.

Provisions of sec 40 (1) (b) of Criminal Procedure Act

[52] The arrest and detention have been admitted by the defendant. The defendant relies on the ambits of section 40 (1) (b) of the CPA[11] , which as a general rule permits the arrest by the police officers without a warrant. A party who relies on this section must prove the existence of the jurisdictional factors as laid down in Duncan v Minister of Law and Order [12], the court held that the jurisdictional facts for a Section 40(1)(b) defence are that (i) the arrestor 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.[13]

[53] In S **v Nel and Another[14] , the court held that**

"The test of whether a suspicion is reasonably entertained within the meaning of section 40 (1) (b) is objective, would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good grounds of suspecting that the plaintiffs were guilty of conspiracy to committing robbery or possession of stolen property knowing to have been stolen? A reasonable man must analyse and assess the quality of the information at his disposal critically, and will not accept it lightly or without checking it where it can be checked.

[11] Criminal Procedure Act 51 of 1977
[12] 1986 (2) SA 805 (A).
[13] At 818H-I; See also ***Minister of Safety and Security v Sekhoto and Another*** 2011 (5) SA 367 (SCA).
[14] 1980 (4) SA 28 (E) at 33H

[54] would a reasonable man in the Baloyi's position, possessed with the statement from the complainant have considered that there were sufficient grounds for suspecting that the plaintiff was guilty of housebreaking with the intention to steal? The defendant Sergeant Monyela, an arresting officer who carried out physical arrest on behalf of Baloyi did not have to have reasonable suspicion to arrest the plaintiff because he was on tracing duty and he received instructions from the charge office to go and arrest the suspect. The defendant relied on the matter of the Minister of Justice v Ndala[15] for its submission that the arresting officer who carried out the arrest on behalf his superior does not have to form reasonable suspicion before arrest, It is his superior that must form the reasonable suspicion.

[54] In Duncan v Minister of Law and Order[16], Van Heerden JA explained that once the jurisdictional requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace officer.

[55] The jurisdictional fact for an arrest are present in this matter, the defendant bears the onus to justify the arrest. It is important for this court in determining the justification of the arrest by the defendant to analyse the circumstances of

[15] 1956 (2) SA 777 (T) at 780
[16] 1986 (2) SA 805 (A) at 818G-H

arrest whether under the circumstances of this case it meets the test as laid above in the case above. I now deal with the facts;

55.1 Defendant became aware of the case of the housebreaking with intent to steal and theft against the plaintiff as early as the 22nd March 2019, the arrest took place on the 26th June 2019 approximately 3 months after the alleged incident.

55.2 Before the arrest Baloyi only relied on the statement of the complainant and his interview with the complainant who informed him that he suspected that plaintiff was the one who broke in and stole the items at Sibongile's room, and that it was Albert who raised a suspicion that plaintiff and Mpumelelo were suspected to be the ones who committed the offence. Baloyi explained that he formed the reasonable suspicion when he attended the crime scene and found that it has high walls and that the main door in the main house was not tampered with in addition with the information that only the plaintiff and his mother had keys to the main house. He was then of the view that the no outsider was involved in the housebreaking and theft.

55.3 Although he was aware that the complainant was not the owner of the household items alleged to have been stolen by the plaintiff, he never interviewed the plaintiff's mother before the arrest. The items were recovered. The carvela shoe was not stolen on the day Mpumelelo was seen by the complainant carrying the plastic with household items.

55.4 The explanation given by the police regarding the amount of

investigation made to entertain the suspicion is not satisfactory. A peace officer is supposed to avail himself of any information at his disposal, this cannot be said to have been done in the present case.

55.5 The evidence of Sibongile did not corroborate the statement made by his brother Albert and regarding her statement of 27 June 2019 cannot be said to have been part of the statements which led to entertainment of the suspicion as she only made a statement after the arrest of the plaintiff.

55.6 Defendant had not even placed before the court any reason as to why they did not apply for a warrant of plaintiff's arrest in particular because they had an ample time to do so.

55.7 As much as the housebreaking with intent to steal and theft fall within the offences laid out in schedule 1, there were no facts that supported reasonable suspicion that plaintiff was involved in the commission of the schedule one offence.

[56] Lowe J said in Mahleza [17]

"It is trite that police officers purporting to act in terms of Section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest.[18] It is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form reasonable suspicion that will justify an arrest.[19]

[17] Mahleza v Minister of Police 2020 (1) SACR 392 (ECG)
[18] ***Louw & Another v Minister of Safety and Security & Others*** 2006 (2) SACR 178 (T); ***Liebenberg v Minister of Safety and Security*** [2009] ZAGPPHC 88 (18 June 2004).
[19] ***Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654(SE)***

.The defendant contends that the plaintiff did not give any exculpatory statement to the arresting.

All the above is of course subject to the discretion to arrest as explained in ***MR v Minister of Safety & Security***[20]. In short police officers are never obliged to effect an arrest, when all the jurisdictional factors are present, in the conduct of their discretion whether to do so or not.[21]"

[58] Having considered the evidence of defendant's witnesses, I am of the view that there were no facts that would have supported reasonable suspicion. The police only relied on the complainant's statement. Baloyi failed to exercise his discretion on the detention of the plaintiff even after he interviewed him . In my view the defendant has failed to justify the arrest. The arrest was therefore unlawful.

Unlawful Detention -Plaintiff's pleaded case

[58] The plaintiff's pleadings were not a model of clarity. However, the unlawful detention was argued before me despite the fact that it was not elegantly pleaded. The particulars of claim in relation to detention reads as follows:

"Subsequent to the wrongful arrest, the plaintiff was taken and detained at Naledi Police Station on the 27th of June and was subsequently transferred to Sun City Prison on the 27 June 2019 for incarceration whilst awaiting trial.[22]

[20] 2016 (2) SACR 540 (CC) at [40] – [48]
[21] *Cf* ***Sekhoto supra*** [22] and ***MR supra*** at [57]-[65].
[22] Para 5 of Pariculars of Claim

The matter was withdrawn by the State on 07th of August 2019 at Protea Magistrate's Court due to lack of evidence.[23]

At all relevant times the Police officers who unlawfully and wrongfully arrested and kept the Plaintiff were members of the South African Police Services and they were acting in the course of their employment with the defendant, and at the time when they unlawfully and wrongfully arrested and detained the Plaintiff.[24]

The Defendant is liable to compensate the Plaintiff by virtue of being the employers of the police who effected the unlawful and wrongful arrest and detention and they are still employed by it and has failed to ensure that its employees are properly trained to carry out lawful investigations and detain correct suspects.[25]

As a result of the aforesaid negligence by the police officers, failure by the Defendant to provide proper training to its employees, its failure to interfere and take correct actions, the plaintiff suffered General Damages in the amount of R2 000 000.00(**Two Million Rands**).[26]

[59] In Minister of Police v Mahleza [27] , a full court Judgement of the Eastern Cape Division, the court held that

> "Where a suspect has been unlawfully arrested and detained before being taken to court, he has two separate claims against his arrestor. The one is for his unlawful arrest and the other for his unlawful detention.[28] Those claims should be separately pleaded. It is trite that, in respect of the arrest, all that a plaintiff is required to plead is that he was arrested. In respect of the detention, it would be

[23] Para 5 of the POC
[24] Para 6 of the POC
[25] Para 7 of the POC
[26] Para 8 of the POC
[27]
[28] *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) at para 39.

sufficient for him to plead that he was detained"

[60] The defendant contends that the case of the unlawful arrest in the first period is dependent upon the failure by the authorities to establish that the arrest was lawful. On the second period the legality of detention is dependent upon the lawfulness of the court and its orders. He places his reliance on Sekhoto.

[61] The defendant denies liability for the period of detention after the plaintiff's first court appearance. The defendant contends that plaintiff was brought to court in less than 48 hours. He was granted bail of R2000 on his first day and was remanded to custody due to his inability to pay bail. The police did not take interest in what happens to the plaintiff on his first appearance and they were not dishonest with the court processes. Baloyi did not foresee that the bail would be set at R2000 and that the plaintiff will be unable to pay bail or his family will be unable to pay. These events should be viewed as intervening events that broke the chain of legal causation.

Discussion

[62] Having determined that the arrest was unlawful, it follows that the detention prior the court appearance is unlawful. I must now determine whether the defendant can be held liable for the period after his first appearance in court. It is common cause that after the arrest the plaintiff was processed and was brought to court before 48 hours. On his first appearance the plaintiff was afforded an opportunity to apply for bail. Bail was fixed at R2000. He was remanded to custody because he failed to pay bail amount.

[63] The principles in relation to the liability of the police post court appearance were neatly summarised as follows in *De Klerk's* case:

63.1 The deprivation of liability, through arrest and detention, is *per se prima facie* unlawful[29].

63.2 Every deprivation of liberty must not only be affected in a procedurally fair manner but must also be substantively justified by acceptable reasons.

63.3 a remand order by a magistrate does not necessarily render subsequent detention lawful but what matters is whether substantively, there was a just cause for the later deprivation of liberty'

63.4 In cases of this nature, the liability of the police for detention post court appearance should be determined on an applicable principle of legal causation, having regard to the applicable tests and policy consideration. This may include a consideration that will serve as a measure of control to ensure that liability is not extended too far.

63.5 Every matter must be determined on its own facts. There is no general rule that can be applied dogmatically in order to determine liability.

[64] Theron J writing for the majority stated as follows:

"In cases like this, the 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 and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far**. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation**. In addition, every matter must be determined on its own facts there is no general rule that can be applied dogmatically in order to determine liability."

[29] Zealand v Minister of Justice and Constitutional Development 2008 (2) SACR 1 (CC) ,2008 (4) SA 458 , 2008 (6) BCLR 601; 2008 ZACC 3 para 22.

[65] This matter hinges on causation being the element to be ventilated in this matter.

[66] The parties agree that I must determine this matter on the element of causation.

[67] Causation has two elements: factual causation and legal causation. Factual causation is the classical application of the *causa sine qua non or "*but for" test. if had it not been but for X, the wrongful conduct of the wrongdoer, then Y the harm would not have happened. Therefore, if Y is contingent on the occurrence of X, then factual causation is established.[30]

[68] Nugent JA in *Minister of Safety and Security v Van Duivenboden*[31], in development of the test aptly stated that

> "A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics"

[69] Regard being had to the "but for test" , I am of the view that but for the unlawful arrest of the plaintiff ,the plaintiff would not have been brought to court , thus remanded to custody due to inability to pay the bail amount . The

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[30] Corbett JA writes this neatly *in International Shipping Company (Pty) Ltd. v Bentley* (138/89) [1989] ZASCA 138 at 65:

> 'The enquiry as to factual causation is generally conducted by applying the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; *aliter,* if it would not have ensued."

[31] 2002 ZASCA 792

plaintiff has in my view established the factual causal link between the harm he suffered and the conduct of the police.

[70] Now I consider whether the plaintiff has established legal causation. For the defendant to be held liable for the plaintiff's detention after his first appearance in court, the plaintiff is required to show that he sustained harm and that the harm was caused by a wrongful and intentional act (or failure to act) on the part of the defendant or his employees.

In *Nohour and Another v Minister of Justice and Constitutional Development* [32]the court held that:

> "In order to prevent the 'chilling effect' that delictual liability in such cases may have on the functioning of public servants, such proportionality exercise must be duly carried out and the requirements of foreseeability and proximity of harm to the action or omission complained of should be judicially evaluated."

[71] The plaintiff was arrested unlawfully by sergeant Monyela at about 23:30 on 25 June 2019 and was processed by an investigating officer at about 00.00 on the 26 June 2019. At 12:30, he was interviewed and a statement was obtained from him. At 12:55 he was booked out for a pointing out. At 1:10 he was charged by the investigating officer. He was detained until his first appearance in court on 27 June 2019.

[72] The Magistrate court transcript shows that the plaintiff was afforded the opportunity to apply for bail. It is recorded that the plaintiff's legal rights were explained and he understood and elects to defend himself. Provisions Section 60(11)(B) of the Criminal Procedure Act and Sec 68 and all the penalties

[32] 2020 ZASCA 27

explained and he understands. It is recorded that the plaintiff had no pending cases. The prosecutor submitted that the bail be fixed at R2000, the value of the property is R4000. It is further recorded that there was no comment from the accused regarding the bail money. The presiding magistrate therefore ruled that bail is fixed at R2000.

[73] The plaintiff testified that during the bail hearing he told the court that he was unemployed and he could not afford the bail amount. The matter was withdrawn by the State on 7 August 2019. It is recorded that the matter was sent for informal Alternative Dispute Resolution.

[75] The defendant contends that there is no nexus between the police conduct and the further detention of the plaintiff post-court appearance. The submission further states that this matter is distinguishable from the De Klerk in that the police did not influenced the court's decision . What happened in court in this matter was an unexpected, unconnected and extraneous causative factor. He did not foresee that the plaintiff would be granted bail at R2000 and will be unable to pay bail money, thus bail proceedings constitute an intervening factor that broke the legal causation chain.

[76] Eksteen AJA in *Minister of Police & Another v Muller* [33] summarised the legal causation as stated in De Klerk as follows:

> "What emerges from the various judgments in *De Klerk* is that one half of the court considered that a deliberative judicial decision in respect of the further detention of the arrestee constitutes an intervening act which truncates the liability of the police for the wrongful arrest and detention. The remainder

[33] 2019] ZASCA 165

considered that it may do so, but not necessarily. Theron J summarised the applicable principles thus:

'The principles emerging from our jurisprudence can then be summarized as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be affected 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 deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.'[34] "

[77] In determining whether the defendant is liable for further detention I must evaluate the conduct of Baloyi after the unlawful arrest. Baloyi testified that he never participated in the court proceedings except that he went to court on the day in question to deliver the docket to the prosecutor. He explained when the matter is in court he does not get involved unless he gets subpoenaed. I don't agree. The police's involvement includes the obligation to disclose all relevant factors to the prosecutor. The police don't just "dump" the docket on the prosecutor leaving the prosecutor to decide whether to prosecute or not. They are obliged to provide the prosecutor with the facts relevant to further detention of the accused.

[78] In JE Mahlangu and Another v The Minister of Police [35] the police unlawfully arrested Mr Mahlangu and Mr Mtsweni and tortured them with the aim of obtaining confession from them. When the plaintiff appeared in court, they failed to disclose that it was their conduct that led to the further detention. The Constitutional Court held at paragraph 40:

[40] In *Botha*[36] the Court stated:

[34] *De Klerk* para 62.
[35] 2021 (7) BCLR 698 (CC) (14 MAY 2021).
[36] *Botha v Minister of Safety and Security*, *January v Minister of Safety Security* 2012 (1) SACR 305 (ECP).

"It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of section 12(1) of the Constitution. . . . These provisions, therefore, place an obligation on police officials who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention.

This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case and the law casts an obligation on the police official to do so. In *Mvu v Minister of Safety and Security* Willis J held as follows:

> '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.'

It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to have an informed decision whether or not there is any legal justification for the further detention of the person."[37] (Footnotes omitted.)

And in *Tyokwana* the Court reasoned:

[37] Id at paras 29-30.

"[T]he duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not."[38]

At paragraph 43 the court stated that:

"It is now trite that public policy is informed by the Constitution.[39] Our Constitution values freedom, and understandably so when regard is had to how before the dawn of democracy freedom for the majority of our people was close to non-existent. The primacy of "human dignity, the achievement of equality and the advancement of human rights and freedoms" is recognised in the founding values contained in section 1 of the Constitution. Section 7(1) of the Constitution provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". These constitutional provisions and the protection in section 12 of the right of freedom and security of the person are at the heart of public policy considerations.

[79] In this case the investigating officer dumped the docket without informing the prosecutor that the household items that the plaintiff is alleged to have stolen were recovered. Baloyi also failed to inform the prosecutor that the plaintiff made a statement regarding the carvela shoe. In his statement the plaintiff stated that the shoe was bought by Sakhile for R200. He went looking for it and Sakhile needed his R200 that he bought the shoe with back. In this statement the plaintiff does not state that Sakhile bought the shoe from him. In his testimony, the plaintiff stated the circumstances upon which the shoe was lost. His evidence was corroborated by the state Witness, Sibongile Hlomla. Baloyi's investigation was not complete as he had not taken any statement

[38] *Tyokwana* above n 8 at para 40. See also *Prinsloo v Newman* 1975 (1) SA 481 (A) at 492G and 495A. In *Carmichele* above n 39 at para 63, it was held that the police have a clear duty to bring to the attention of the prosecutor any factors known to them relevant to the exercise by the magistrate of his discretion to admit a detainee to bail.

[39] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57. See also *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 87.

from Sibongile Hlomuka, Sakhile , Mpumelelo Dlamini and others. I am of the view that if this information was given to the prosecutor, the plaintiff was going to be released on warning. Baloyi failed to give a fair and honest statement of the relevant facts to the prosecutor in order to make an informed decision of whether to prosecute or not. The defendant should be held liable for the entire period of detention.

[80] The defendant contends that the plaintiff's failure to bail coupled with his failure to alert the court that bail of R2000 will be beyond reach for him should be viewed as an intervening event as it was not foreseen by the defendant.

[81] Regard being had to the fact that an enquiry was conducted as to whether it was in an interest of justice to release the plaintiff on bail, equally, the Magistrate was mandated to conduct an enquiry as to the ability if the plaintiff to pay bail as enjoined by Section 60(2B) (a) (1). The transcript does not show that this was done. Setting the bail amount beyond reach of the suspect/accused person violates his rights in terms of s 35(1) (f) of the Constitution. The Magistrate failed to consider the personal circumstances of the accused regarding the affordability of bail amount. Had the court considered the personal circumstances of the plaintiff it would have been satisfied that he could not afford the set amount. This led to the plaintiff's detention for 6 weeks on the basis that he is an indigent. Had Baloyi informed the public prosecutor of the relevant facts. The results were not going to be the same.

[82] Having considered the matter and the case law, I am of the view that public policy as informed by the Constitution and the principles set out in De Klerk's case, the defendant is liable for a period for the whole period of the plaintiff's detention.

Quantum

[83] Regarding the quantum in these matters, Tshiqi J in Mahlangu said:

"It is trite that damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place. In *Seymour*,[40] the Supreme Court of Appeal encapsulated the purpose of damages and said:

"Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss."[41]

And then in *Tyulu*,[42] the Court re-affirmed it as follows:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. 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."[43]

[84] The plaintiff testified of the prison conditions I will not repeat them. The defendant objected that the condition of the prison be taken into consideration as they were not pleaded. The plaintiff applied for the amendment of

[40] *Minister of Safety and Security v Seymour* [2006] ZASCA 71; 2006 (6) SA 320 (SCA).

[41]

[42] *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA).

[43]

particulars of claim to include the conditions of prisons. I am inclined to grant this amendment.

[85] I have considered the many comparable cases. In J E Mahlangu and Another [44] awarded an amount of R550 000 and R 500 000 to the first and second plaintiff who were detained for eight months and 10 days having been accused of murder of their relative. The plaintiff in this case were tortured and were humiliated.

[86] In Manyoni v Minister of Police[45] and others, the plaintiff was awarded an amount of R600 000 plus interest. He was detained for 8 months in prison.

Order

[87] In the circumstances, I make the following order

1. The Second defendant is ordered to pay the applicant an amount of R500 000 to the plaintiff as damages.
2. Interest at 7.5 % from the date of judgement.
3. The Second defendant to pay Costs of suit.

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FLATELA LULEKA

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 25 March 2022

[44] 2021 ZACC 10
[45] [2021] ZAGPJHB 84 (24 June 2021)

COUNSEL FOR PLAINTIFF	**:**	**Adv Karabo Mvubu**
INSTRUCTED BY	**:**	**Yonela Bodlani Inc.**
Email	**:**	**info@yonelabodlaniattorneys.co.za**
COUNSEL FOR DEFENDANT	**:**	**Adv EB Mafoko**
INSTRUCTED BY	**:**	**Ramsurjoo Keshnee**
		The State Attorney;JHB
Email	**:**	**keshneer@gmail.com**

HEARD ON	**:**	**18 -22 October 2021**
DELIVERED ON	**:**	**25 March 2022**