

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2018/14594

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

DATE

SIGNATURE

In the matter between:

NQIBISA, MZWANDILE

Plaintiff

AND

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Defendant

THE MINISTER OF POLICE

Second Defendant

JUDGMENT

FF OPPERMAN AJ

Introduction

- [1] This is an action for damages by the plaintiff for unlawful arrest and detention against the defendants arising from his arrest on 24 November 2017 and subsequent release on 28 November 2017.
- [2] The following facts are common cause:
- 2.1 The plaintiff was arrested by members of the first defendant (hereinafter referred to as the “JMPD officers”) on 24 November 2017 on a suspicion of common robbery;
 - 2.2 The plaintiff was detained in police custody in detention cells at Moroka Police Station from 24 November 2017 at approximately 22h45 to 28 November 2017 when he was released from Protea Magistrates’ Court;
 - 2.3 At the time of the arrest, all relevant JMPD officers acted within the course and scope of their employment with the first defendant. The police officials, during the detention of the plaintiff, 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 40 of 2002 after a successful application for condonation; and
 - 2.5 That the defendants bore the onus of proving that the arrest and detention of the plaintiff were lawful and further, that the defendants had the duty to begin.
- [3] The issues for determination at the trial were the following:
- 3.1 The lawfulness of the plaintiff’s arrest by the JMPD officers;
 - 3.2 The lawfulness of the plaintiff’s detention; and
 - 3.3 The *quantum* to be awarded to the plaintiff, if any, including which of the defendants was liable for the plaintiff’s damages resulting from his arrest and subsequent detention at the Moroka Police Station.

Evidence

Evidence for the First Defendant: JMPD Officer - Thabo Mathews Mashita
(“Mr Mashita”)

- [4] Mr Mashita testified that he was patrolling in Soweto with his colleague, Mr Tshepo Rakgogo on the evening of 24 November 2017. He was then stopped by the complainant who informed them that he had a case of common robbery which he had opened at Moroka Police Station. The complainant then showed Mr Mashita and his colleague a document which had a police stamp, a CAS number and the offence.
- [5] Mr Mashita testified further that the complainant informed him that he knew where the suspects were and the complainant directed them to the suspect’s house. When he went to the house the same evening, Mr Mashita, his colleague and the complainant found the suspects standing outside a house in Shabangu Street, White City, Soweto. As soon as Mr Mashita exited his vehicle, the 3 suspects ran. Mr Mashita chased after the third suspect, who is the plaintiff in this matter, into the house.
- [6] Mr Mashita testified that the plaintiff had locked himself inside a bedroom and he knocked on the door asking the plaintiff to come out. An elderly woman who had been in the house then asked the plaintiff to come out, which the plaintiff then did. Mr Mashita grabbed him by his waist and then asked the plaintiff where the cell phone and the money were, to which the plaintiff responded that he didn’t know anything. According to Mr Mashita, the plaintiff was acting violently and using derogatory language which made Mr Mashita see the plaintiff as a threat to his safety. Mr Mashita’s colleague, who had been outside unsuccessfully attempting to catch the other 2 suspects, then joined Mr Mashita in the house. They both grabbed the plaintiff and took him outside. The complainant then pointed out the plaintiff as the suspect who robbed him. The plaintiff was asked if he had any witnesses to which he responded no. Mr Mashita and his colleague then proceeded to arrest the plaintiff and detained him at Moroka Police Station.
- [7] When asked why he arrested the plaintiff, Mr Mashita testified that he did so because of the following:

- 7.1 The complainant had in his possession a document with a CAS number;
- 7.2 The plaintiff fled when Mr Mashita exited the JMPD vehicle;
- 7.3 The plaintiff acted in a violent manner; and
- 7.4 The plaintiff failed to answer when he was asked about any witnesses.

[8] During cross-examination, Mr Mashita was asked about the process of detention after arrest. He generalised that when he detains an accused, he prepares preamble statements and makes an entry in a diary about the arrest. During that time, his colleague would be placing the accused in the cells. The accused has his rights read out to him by the colleague and he is made to sign a notice of rights while he is already in the cells.

[9] Mr Mashita was also asked about what the purpose of the arrest was, to which he answered that he wanted justice to prevail. When asked what that meant, he explained that he wanted the plaintiff to be locked up and he wanted the police to deal with him. Upon further questioning, Mr Mashita testified that the purpose of his arrest was so that the plaintiff would be detained and taken to Court.

[10] Mr Mashita confirmed that his functions and powers were to enforce traffic by-laws, crime prevention and traffic policing. He confirmed that the municipal police do not have the power to investigate crime. At the police station, he did not notice Officer Rakgogo making a statement and could not remember him doing so. If he had made a statement, he would have known about it. He confirmed that it was important for Rakgogo to make a statement as this would have corroborated his evidence that the plaintiff and other suspects fled and that the plaintiff resisted arrest.

[11] That was the case for the first defendant.

Evidence for the Second Defendant

[12] The second defendant did not call any witnesses and closed its case.

The Plaintiff's Evidence: Mr Mzwandile Nqibisa ('the Plaintiff')

[13] The plaintiff testified that the day before his arrest and detention on 23 November 2017, he was at a shop across his house. He saw three people running past him. He then chased after them and two people jumped into his yard. He failed to catch the people as they jumped over a wall into another yard. He testified that when he came back from chasing them, he found the complainant who had been chasing the suspects initially.

[14] He further testified that the complainant proceeded to accuse him of knowing the suspects that he was chasing. The plaintiff denied knowing the suspects and the complainant told him that he would return. He also testified that on 24 November 2017 in the evening, he had been watching television with his mother when he heard a knock on the door. When his mother opened the door, there were two officers accompanied by the complainant. He testified that the officers asked where the other suspects were who jumped over the wall and he said he didn't know them.

[15] He testified that the officers told him that they have to take him to the police station and his mother agreed that it is better for him to go with them. He was thereafter taken to Moroka Police Station where he was placed in the cells and detained and read his rights.

[16] When asked about the condition of the cells, he testified that:

16.1 He was given a sponge (which he later clarified to be a mattress) and 2 blankets;

16.2 The blankets were dirty;

16.3 He was told by fellow inmates that he had to sleep next to the toilet which was not functioning properly and would sometimes have water coming out;

16.4 There were four other inmates in the cell; and

16.5 The cell was generally not in a good condition.

[17] The plaintiff further testified that he was still in high school when he was arrested and that he was only released on Tuesday from Protea Magistrates' Court between 10h00 and 11h00 am. He testified that he was not familiar with

jail when he was arrested and he was frightened throughout his detention. He never appeared in court and was released from the court holding cells. On the morning of his release, his hand was stamped and he was given a piece of paper which allowed him to leave the court cells.

[18] During cross-examination, the plaintiff was asked about his knowledge of police bail and he explained that he did not have knowledge of what police bail is. He was never informed of his right to apply for police bail. He was not asked any questions during his first 48 hours of detention and was given no explanation as to why he was not released on 27 November 2017.

[19] It was further put to him that he had no independent recollection of what transpired on 23 November 2017 and that his version of that night was a fabrication to which he agreed, but upon further clarification he disagreed that it was a lie.

The Law

[20] The first defendant's pleaded defence, as already pointed out, is that the plaintiff's arrest was lawful as it had been executed in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The said section provides that:

"(1) A peace officer may without warrant arrest any person—

(a) ...

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

[21] In order to successfully rely on section 40(1)(b) of the CPA, the first defendant must satisfy the four jurisdictional facts. According to *Duncan v Minister of Law and Order*,¹ the following jurisdictional facts must exist before the power confirmed by section 40(1)(b) of the CPA may be invoked:

21.1 The arrestor must be a peace officer;

21.2 He must entertain a suspicion;

¹ 1986 (2) SA 805 (A) at 818G-H.

21.3 It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA; and

21.4 This suspicion must be on reasonable grounds.

[22] Before dealing with these aspects, I had to consider the duties of JMPD officers and the origin of these duties. In respect of their duties, we are guided by the South African Police Service Act² (“SAPS Act”) and the CPA. The JMPD derives its mandate from section 64E of the SAPS Act which provides that:

“The functions of a municipal police service are—

- (a) traffic policing, subject to any legislation relating to road traffic;
- (b) The policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and
- (c) the prevention of crime.”

[23] The SAPS Act further stipulates in section 64F in relation to a JMPD officer’s powers that:

“(3) Every member of a municipal police service is a peace officer and may exercise the powers conferred upon a peace officer by law within the area of jurisdiction of the municipality in question: Provided that a member may exercise such powers outside the area jurisdiction if it is done—

- (a) In pursuit of a person whom the member reasonably suspects of having committed an offence, and if the pursuit commenced within the area of jurisdiction of the municipality; or
- (b) In terms of an agreement between the municipal council and another municipal council in terms of section 10C (7) of the Local Government Transition Act, 1993 (Act No. 209 of 1993).”

[24] The SAPS Act provides the steps that should be taken by a JMPD officer who has executed his/her duty to arrest without a warrant. Section 64H provides the following:³

² 68 of 1995.

³ See also section 50 of CPA which provides that:

“(1)(a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.”

“A person arrested with or without a warrant by a member of a municipal police service shall as soon as possible be brought to a police station under the control of the Service or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant, to be dealt with in terms of section 50 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).”

[25] In summary, the SAPS Act defines a JMPD officer as a peace officer who may arrest a person accused of committing an offence with or without a warrant. The Act further provides that once a JMPD officer has arrested an accused person, he/she shall take the accused person to a police station as soon as possible.

[26] It is therefore not disputed that Mr Mashita was a peace officer at the time of the plaintiff's arrest and that the offence of robbery is an offence listed in Schedule 1. The law as set out in *Duncan* was applied with approval in many subsequent decisions including the *Minister of Safety and Security v Sekhoto and Another*.⁴ If these four jurisdictional facts are satisfied, the policeman may arrest the suspect.

[27] The remainder of the factors, i.e. whether Mr Mashita entertained a suspicion and whether it was based on reasonable grounds, will determine whether he acted lawfully when he arrested the plaintiff without a warrant and are objective. The crucial question would be whether the circumstances prevailing at the time Mr Mashita effected an arrest without a warrant were such that a reasonable man finding himself in the same situation as Mr Mashita, would form an opinion reasonably that the plaintiff had committed an offence listed in Schedule 1. It is no excuse for a peace officer to answer an allegation of unlawful arrest by saying that he acted faithfully. The peace officer shall consider the situation and decide objectively whether it warrants an arrest.

[28] This was confirmed in *Mabona and Another v Minister of Law and Order and Others*.⁵ Jones J, in employing the reasonable man test, said:

⁴ 2011 (5) SA 367 (SCA).

⁵ 1988 (2) SA 654 (SE) at 658F-H.

“[A] reasonable man would bear in mind that [section 40 (1)] authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty.”

What the reasonable man would do, according to Jones J is the following:

- (i) analyse and assess the quality of the information at his disposal critically;
- (ii) not accept it lightly or without checking it where it can be checked;
- (iii) only after an examination of this kind will he allow himself to entertain a suspicion which will justify an arrest; and
- (iv) ensure that the suspicion must be based on solid grounds otherwise it will be flighty or arbitrary and not a reasonable suspicion.⁶

[29] The test espoused by Jones J in the *Mabona* applies equally herein. Mr Mashita conceded that he did not do any of these things that a reasonable man would do. Just like in the matter of *Manqalaza v MEC for Safety & Security, Eastern Cape*⁷ where Jafta J (as he then was) stated:

“Zotweni did none of these things. All that he did was to verify the accuracy of the statement by the complainant and on the basis of that statement he decided to arrest the plaintiff. It is common cause that the complaint was lodged on 25 February and that the plaintiff was only arrested on 27 February. Therefore, Zotweni did not act on the spur of the moment with no time to reflect on the allegations made by the complainant. The statement upon which he acted was obtained from the complainant on 25 February. In the circumstances he could have and should have investigated the allegations before deciding to arrest the plaintiff. Although it was not relevant to the enquiry before this Court, it was also common cause that it later transpired that the complainant’s goods were not stolen but merely misplaced in his car. See also *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 836H – 837 B.”

With reference to *Manqalaza* above, Mr Mashita did not have sight of the complainant’s statement, the docket, or the actual point out note that was issued by the Moroka SAPS.

⁶ Id.

⁷ [2001] 3 All SA 255 (Tk) at para 18.

Discussion and argument

[30] Counsels made comprehensive heads of argument available to me for which I am most grateful.

[31] It is trite that the *onus* to prove the lawfulness of the arrest rested on the first defendant and the *onus* for continued detention rested with the second defendant. In light of the burden placed on the defendants, I considered the evidence below.

31.1 The first defendant's plea refers to the plaintiff being chased by the complainant on the night of 23 November 2017 and is therefore in direct contradiction to the evidence of Mr Mashita that he and his colleague were chasing the plaintiff.

31.2 When called upon to explain why this version of chasing the plaintiff and other suspects was not contained in his arresting statement made to the police, and why his arresting statement did not contain a large part of the evidence given in court, his response was that he summarised the statement. Later on, he conceded that it was important to write down the reasons for the arrest.

31.3 Regarding the discrepancy in his statement in which he stated that the perpetrators were not there when he arrived at the plaintiff's house, but in court, he explained that in fact the suspects fled from the plaintiff's house, he explained that he had a problem with English and therefore could not complete the statement properly. Mr Mashita was extremely evasive on this issue and stated that "sometimes people tend to catch us out here and therefore we do not prefer to write a whole lot of things." He explained that he writes summarised statements so that if asked about certain issues, he would be able to respond in court. He summarises because if he is called to testify, he will know what he meant when he wrote certain things on the document. On clarification from Court regarding motor vehicle accidents where JMPD officers take statements from drivers, he stated that with accident reports it is important to write detailed statements. His explanation that he summarised the arrest statement so as not to be caught out, is

shocking to say the least, considering that Mr Mashita has 16 years' experience as a JMPD officer.

- 31.4 The paper that was shown to Mr Mashita by the complainant was a quarter of a A4 page with the CAS number, the offence, and the Moroka Police Station stamp on it. He conceded that he was not shown a point out note issued by the Moroka SAPS. However, in paragraph 2 of this statement he wrote that the complainant came up to them and gave them a point out note. The point out note that he was referring to, was the same piece of paper that he described. He had never seen a point out note issued by the South African Police before and the reason why he referred to the document shown to him as a point out note was because the complainant pointed it out to them and showed it to them.
- 31.5 The point out note in the docket, which was Exhibit "B", was shown to Mr Mashita. He stated that it was the first time that he had seen this document. The complainant did not show them Exhibit B but only the piece of paper described by him. He agreed that it was a problem that the point out note indicated that the suspects were unknown but the complainant was able to point the plaintiff out. He conceded that as a traffic officer who is unaware of the contents of the case docket, he is not allowed to investigate criminal cases.
- 31.6 He conceded that he did not ask the complainant how he knew the suspects or how he was able to identify them. He understood that it was dangerous to simply arrest people when pointed out by a complainant without knowing the contents of the case docket. When he testified that the complainant mentioned that the suspects were seen at a house in White City, he said this was a mistake as the complainant did not mention White City. He simply added White City because he knew the area. The complainant also did not attest to a pointing out statement after the alleged pointing out and arrest of the plaintiff.
- 31.7 The plaintiff's version contained in paragraphs 4 and 5 of the particulars of claim was put to Mr Mashita. He had no knowledge of what occurred on 23 November 2017. He only knew, according to what the

complainant told them, that he was robbed the previous day and that he went to the police station, opened a case and that the police drove around looking for the suspects but could not find them. He did not enquire from the complainant how the robbery had occurred the previous day. With this in mind, as well as the pleaded version of the first defendant, they ought to have known that this was one of the issues in dispute as it was not common cause, and therefore, the only person that could have assisted this Court in resolving this was the complainant.

31.8 Mr Mashita could not explain why the version in the first defendant's plea shows that the suspects were chased by the complainant after the robbery because he knew nothing about it. The defendants also did not call any witnesses to corroborate this version.

31.9 Mr Mashita did not lay a charge against the plaintiff for resisting arrest but stated that if the plaintiff did not commit an offence he would not have resisted. He testified that he wanted to know if the plaintiff had a witness because he wanted to hear the plaintiff and his witnesses' version compared to the version of the complainant in his presence. He conceded that this was the duty of the investigating officer. It was put to Mr Mashita that he had exceeded his powers as he did not have the authority to investigate the offence, with which he agreed. He conceded that the investigation diary did not show that the complainant was taken to look for the suspects.

31.10 His evidence that there was no statement from Constable Rakgogo was inconsistent with paragraph 2.1 of the pre-trial minutes where the first defendant's attorney recorded that Constable Rakgogo had made a statement but that it was not in the docket. Mr Mashita's reasons for the arrest of the plaintiff were also inconsistent with the reasons set out in the plea.

[32] The plaintiff's claim is based on two grounds, firstly, on the Constitution and secondly, on the principles of ordinary delict. The claim based on the Constitution is anchored on section 12(1) which deals with the right to freedom and security of the person. This section of the Constitution provides that:

“12(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;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in anyway; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

[33] It was argued on behalf of the first defendant that the arrest of the plaintiff was justified as it had been effected in terms of s 40(1)(b) of the CPA. Counsel submitted that the first defendant has established the four jurisdictional factors. The suspicion that the plaintiff committed an offence listed in Schedule 1 of the CPA would have been confirmed had Mr Mashita assessed the docket, especially the point out note and the complainant’s statement contained therein in which the complainant states that the suspects were unknown. Mr Mashita conceded this, and as a result, Mr Mashita’s suspicion could not have been based on reasonable grounds.⁸

[34] Further, if the peace officer who carries out the arrest is not himself aware of any crime, and acts in response to instructions from a person who is not a peace officer and not entitled to give such a command, such arrest by the peace officer is unlawful.⁹ In *Ralekwa v Minister of Safety and Security*¹⁰ the court correctly conducted its examination into the lawfulness of an arrest against the backdrop of the Constitution. The court held that section 40 provides no protection to a police officer who did not form his own suspicion but relied on the opinion of somebody else.¹¹ In this instance, Mr Mashita relied on what was told to him by the complainant and a piece of paper that was shown to him. In light of *Birch* and *Ralekwa*, Mr Mashita should have at least made an attempt to verify the information told to him by the complainant before

⁸ See *Mabona* n 5 above.

⁹ *Birch v Johannesburg City Council* 1949 (1) SA 231 (T) at 239.

¹⁰ 2004 (1) SACR 131 (T).

¹¹ *Id* at paras 11-2 and 14.

completing the relevant registers and booking the plaintiff in the cells. Mr Mashita gave no evidence that he was unable to verify the information or that he did not have access to the docket.

[35] Accordingly, any deprivation of freedom is always regarded as *prima facie* unlawful. It requires justification by the arresting officer. In *Minister van Wet en Orde v Matshoba*,¹² the court cited with approval the following paragraph in the majority judgment of *Minister of Law and Order and Another v Dempsey*:¹³

“I accept, of course, that the onus to justify an arrest is on the party who alleges that it was lawfully made, since an arrest can only be justified on the basis of statutory authority, that the onus can only be discharged by showing that it was made within the ambit of the relevant statute.”

[36] I was not impressed by both witnesses as they both failed to answer relatively simple questions in an open and direct manner. Concessions that one would ordinarily expect of an open and forthright witness, were not forthcoming. Both Mr Mashita and the plaintiff contradicted themselves.

[37] However, in the absence of establishing that Mr Mashita suspected the plaintiff of having committed an offence referred to in Schedule 1, one of the necessary jurisdictional facts is missing. I am accordingly unable to find that the first defendant has discharged the onus and, on a balance of probabilities, that the plaintiff's arrest without a warrant is lawful in terms of section 40(1)(b). I therefore find, for reasons set out above, that the arrest of the plaintiff was unlawful and was therefore effected without reasonable and probable cause.

[38] With that said, the arrest by the JMPD officials in terms of section 40 of the CPA, and the subsequent detention of the plaintiff by SAPS at the police station in terms section 50 of the CPA, are separate statutory acts.¹⁴ Both the defendants were burdened with the justification and the onus thereof.

¹² 1990 (1) SA 280 (A).

¹³ 1988 (3) SA 19 (A) at 38B.

¹⁴ *Mvu v Minister of Safety and Security & Another* 2009 (6) SA 82 (GSJ) at para 9 ('Mvu').

[39] Once the plaintiff was placed in the custody of the second defendant, the SAPS members were obliged to consider afresh, prior to detaining the plaintiff further, whether the continued detention by the second defendant of the plaintiff was justified and lawful,¹⁵ in fact, “whether detention [was] necessary at all”.¹⁶

[40] The failure of the SAPS members to do so was unlawful.¹⁷

[41] The burden of proof fell upon the second defendant to establish that the further detention of the plaintiff at the police station was lawful. The second defendant did not call any witness and the second defendant was obliged to rely upon the evidence of Mr Mashita. Given that Mashita was a JMPD official and not a SAPS member, his evidence therefore did not suffice to show that the further detention of the plaintiff by the SAPS at the police station was justified.

[42] The second defendant did not call any of the police officers who were at the police station on the night in question or during the course of the plaintiff's detention until his release to deal with the matters relating to the further detention. That, of course, was well within the second defendant's right to conduct its case as it deemed fit. Its failure to call a witness is not in itself a *carte blanche* to make an adverse finding against the second defendant. Professors Zeffert and Paizes in their work entitled, *The South African Law of Evidence*, when discussing the rule in *Galante v Dickinson*,¹⁸ stated:

“In civil cases the fundamental question is still whether the party who bears the onus has discharged it. Sometimes the absence of an explanation is no more than a circumstance to be taken into account in arriving at a conclusion (*New Zealand Construction (Pty) Ltd v Carpet Craft* 1976 (1) SA 345 (N) at 349).”¹⁹

[43] The reasons for the detention of the plaintiff are matters that are within the second defendant's particular knowledge, who, in any event agreed that it bore the onus to prove that the detention of the plaintiff was justified. I had regard to the caution sounded by the authors above at page 147:

¹⁵ *Botha v Minister of Safety and Security & Others; January v Minister of Safety and Security & Others* 2012 (1) SACR 305 (ECP) at para 29 ('*Botha*').

¹⁶ *Mvu* above n 14 at para 10; *Rowan v Minister of Safety and Security NO* [2011] ZAGPJHC 11 at para 57.

¹⁷ *Hofmeyr v Minister of Justice & Another* 1992 (3) SA 108 (C) at 110D.

¹⁸ 1950(2) SA 460 (A) at 465.

¹⁹ Zeffert and Paizes *The South African Law of Evidence* third edition (LexisNexis, Durban 2017) at page 145, para 5.3.2.

“But one should never lose sight of the fundamental consideration that it is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon ‘the particular circumstances of the litigation’ in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness (See: *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133 E-F per Miller JA.)”

[44] I am satisfied that the second defendant, by electing not to call a witness to justify the detention of the plaintiff can only lead to one conclusion: that there was no reasonable and probable cause to detain the plaintiff. I accordingly find that the second defendant failed to discharge the onus resting on it to justify the detention. The plaintiff must accordingly succeed in his claim against the second defendant.

Quantum

[45] The right to liberty is a precious right, consequently, a high premium is placed on the right to freedom. The supreme law of our country enshrines this and failsafe’s the right of everyone to freedom and security of the person and the right not to be deprived of freedom arbitrarily or without just cause and not to be treated in a cruel, inhuman or degrading way as provided in section 12(1)(a) of the Constitution.

[46] In *Rahim and Others v The Minister of Home Affairs*,²⁰ it was held:

The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed, the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff from adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. Inter alia the following factors are relevant:

- (i) circumstances under which the deprivation of liberty took place;
- (ii) the conduct of the defendants; and

²⁰ [2015] ZASCA 92; 2015 (4) SA 433 (SCA) at para 27.

(iii) the nature and duration of the deprivation.

Having regard to the limited information available and taking into account the factors referred to, it appears to me to be just to award globular amounts that vary in relation to the time each of the appellants spent in detention." (Emphasis added.)

[47] In *Olgar v The Minister of Safety and Security*,²¹ it was remarked that:

"In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant." (Emphasis added.)

[48] The familiar legal metaphor that each case will be adjudicated on its own peculiarities and exigencies always finds application. In *Law of Damages*, the following factors are listed that can play a role in the assessment of damages:

"In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bona*. 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".²²

²¹ 2008 JDR 1582 (E) at para 16.

²² Visser and Potgieter *Law of Damages* third edition (Juta Legal and Academic Publishers, South Africa 2017) at pages 545-548.

[49] In *Minister of Safety and Security v Tyulu*²³ the following was advanced regarding the assessment of damages:

"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 -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 conceded 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 Others 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26-29). (Emphasis added.)"

[50] In *Diljan v Minister of Police*²⁴ Makaula AJA, addressed exorbitant claims in particulars of claims as follows:

"A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be 'thumb-sucked' without due regard to the facts and circumstances of a particular case. Practitioners ought to know the reasonable measure of previous awards, which serve as a barometer in quantifying their clients' claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the above principles enunciated above."
(Emphasis added.)

Comparable case law

²³ [2009] ZASCA 55; 2009 (5) SA 85 (SCA) at para 26.

²⁴ [2022] ZASCA 103 at para 20.

[51] With the above in mind and from the evidence, it appears that the plaintiff was arrested between 22h00 and 22h45 on Friday, 24 November 2017 and was released, according to the plaintiff, on Tuesday 28 November between 10h00 and 11h00. The total duration of his detention was therefore 3 days and 11 hours.

[52] The plaintiff's uncontested evidence was that he remained in the police holding cells, without an option of bail and that he was left there without access to a legal representative until he was released from the court cells on 28 November 2017. The conditions of his detention were previously discussed.

[53] I was referred to a number of cases by all parties and I considered the most relevant, taking into account the factors espoused by the learned authors *Visser and Potgieter* above. Mr Naidoo for the plaintiff referred me to *Mogakane v Minister of Police*,²⁵ *Radasi v Minister of Police*,²⁶ and *Nhlapo v Minister of Police*.²⁷ Mr Hayward for the first defendant referred me to, amongst others, *Botha v Minister of Police*,²⁸ *Kammies v Minister of Police and Another*,²⁹ and *Dolamu v Minister for Safety and Security*.³⁰ Advocate Muthige referred me to the cases of *Fubesi v Minister of Safety and Security*,³¹ and *Hoco v Mtekwana and Another*.³²

[54] Some of the other awards referred to ranges in the region of R105 000.00 and R540 000.00 and the plaintiff's evidence pertaining to the circumstances surrounding his arrest and conditions of his subsequent detention do not warrant these excessive awards. There was no evidence that the plaintiff was assaulted, handcuffed, or that his arrest was done in public in front of onlookers. There was also no evidence from the plaintiff that he had any medical condition or suffered any medical ailment subsequent to his arrest and

²⁵ [2017] ZAGPPHC 817.

²⁶ [2021] ZAGPJHC 79.

²⁷ [2022] ZAGPJHC 99.

²⁸ 2014 (2) SACR 601 (GP).

²⁹ [2017] ZAECPEHC 25.

³⁰ [2015] ZAGPPHC 225.

³¹ [2010] ZAECGHC 91.

³² [2010] ZAECPEHC 42.

detention. However, the plaintiff was still a scholar at the time of his incarceration.

[55] I had regard to all of these cases and I am therefore satisfied that an amount of R210 000.00 will constitute fair and reasonable compensation for the violation of the plaintiff's constitutional rights. This award is made up as follows:

55.1 The first defendant is liable to pay the plaintiff damages in the amount of R35 000.00 for the unlawful arrest of the plaintiff.

55.2 The second defendant is liable to pay the plaintiff damages in the amount of R175 000.00 for the unlawful detention of the plaintiff.

Final remarks

The lacuna between the South African Police Services and Metro Police Officers

[56] It would appear that metro police officers are not subjected to standing orders or strict guidelines when it comes to arrest and detention, compared to their counterparts in the SAPS. The only reference to them is contained in Chapter 12 of the SAPS Act.

[57] The danger therein lies that metro police officers' conduct does not undergo the same scrutiny as ordinary police officers would and it therefore appears that there is a lacuna in our law pertaining to the conduct and duties of metro police officers when it comes to matters of arrest and detention specifically. The lacuna is evident in this matter where the JMPD officers simply arrested the plaintiff without any reasonable grounds or justification and left the plaintiff's fate in the hands of the SAPS without any real consequence or just a slap on the wrist. This resulted in the plaintiff only being interviewed on Monday, 27 November 2017 and taken to court the following day and, to add insult to injury, without appearing in court.

[58] Accordingly, this judgment must be circulated to the relevant authorities.

Interaction between Judge and witnesses

[59] Finally, it was implied that I entered the arena by seeking clarification, alternatively, asked leading questions. I wish to address this issue and clarify this once and for all.

[60] In *S v Rall*,³³ the court said the following:

“First, some general observations.

According to the well-known dictum of Curlewis JA in *R v Hepworth* 1928 AD 265 at 277, which the learned Judge *a quo* obviously had in mind in his remarks quoted above:

‘A criminal trial is not a game . . . and a Judge's position . . . is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.’

Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case. (Wigmore on *Evidence* 3rd ed vol 3 para 784 at 151-2.) And for that purpose, according to the learned author (*ibid* at 159), he may put the questions in a leading form:

‘simply because the reason for the prohibition of leading questions has no application to the relation between judge and witness.’”

[61] This view of the role of a Judge was endorsed in *S. v Dlamini; S. v Dladla and Others; S. v Joubert; S. v Schietekat*,³⁴ with respect to bail proceedings, and by the SCA in *Take and Save Trading (CC) v Standard Bank of SA Limited*,³⁵ where the Court continued as follows:

“Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence”

³³ 1982 (1) SA 828 (A) at 831A-F.

³⁴ [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 99.

³⁵ [2004] ZASCA 1; 2004 (4) SA 1 (SCA) at para 3.

[62] For the novice this might be difficult to comprehend but it has been practice, without being bias, for judges to “elicit or elucidate the truth more fully in respect of relevant aspects of the case”³⁶ which, at the end of the day, assisted me in ventilating the issues between the parties and to apply my mind to the real issues at hand.

Order

[63] As a result, I make the following order:

1. First defendant is liable to pay the plaintiff damages in the amount of R35 000.00 for the arrest of the plaintiff, together with interest thereon a *tempore mora* at the rate of 10.5% *per annum* from date of service of summons, being 20 April 2018, to date of final payment.

2. Second defendant is liable to pay the plaintiff damages in the amount of R175 000.00 for the detention of the plaintiff from 24 November 2017 to 28 November 2017, together with interest thereon a *tempore mora* at the rate of 10.5% *per annum* from date of service of summons, being 20 April 2018, to date of final payment.

3. Costs of suit.

FF OPPERMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

Heard On: 15, 16 and 17 May 2023

Closing Argument: 19 May 2023

³⁶ *S v Rall* n 33 above.

Heads of Argument Filed: 26 May 2023

Date of Judgment: 11 August 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 11 August 2023.

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