

REPUBLIC OF SOUTH AFRICA



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

Case Number: 41499/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

[1]

18/10/2023

[2] DATE

SIGNATURE

In the matter between:

ZAKHELE MANYONI

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

SECOND DEFENDANT

JUDGMENT

MAUBANE, AJ:

Introduction

[1] The plaintiff, an adult male person, issued summons to this Court against the defendants claiming damages for unlawful arrest and detention as well as damages for malicious prosecution arising from his arrest.

Common cause issues

[2] The following issues are common cause between the parties:

- a. The complainant was attacked at her home on or about the 6 May 2017 by an unknown male intruder.
- b. On 19 May 2017 the plaintiff was arrested without a warrant.
- c. The police officer that effected the arrest was employed by the first defendant and was acting in the course and scope of his employment with the first defendant.
- d. The parties' locus standi.
- e. The complainant could not identify the intruder after the time of break-in at her house.
- f. The plaintiff first appeared at court on the 22 May 2017 and was further detained until the 24 January 2018.
- g. The plaintiff was denied bail on the 13 June 2017.
- h. The plaintiff spent 251 days in detention.
- i. The defendants bear the onus to prove that the arrest and detention of the plaintiff was lawful.
- j. In the event the defendants fail to prove the lawfulness of arrest and detention, the plaintiff bears the onus to prove quantum.

Issues in dispute

- [3] The defendants dispute that the arrest and detention of the plaintiff was unlawful.
- [4] This matter came before this Court as a result of an appeal granted by the Supreme Court of Appeal for matter to start *de novo*. At the commencement of the trial *de novo*, the parties informed the Court that they seek an order in terms of Rule 39 (20) of the Uniform Rules of Court that the trial be conducted in terms of the procedure set out in the agreement discussed below.
- [5] The parties agree amongst others that:
- a. The transcript of the evidence in the court *a quo* may be read by the presiding judge in the trial *de novo*.
 - b. The parties will direct the presiding judge to the relevant parts of the record that the court must have regard to in determining the issues in this trial.
 - c. The parties agree that the court may, after considering the documents directed to be read, draw any inference of fact or of law from the transcript and documents as proved at trial.
 - d. Either party may lead evidence of any additional witness, which evidence shall be considered together with the transcript and documents tendered by the parties for consideration by the court.
 - e. The parties will, upon conclusion of the trial, submit written heads of arguments for consideration by the court and make oral submissions if requested by the court on dates agreed between the parties and the court.
- [6] After reading into the record the parties' agreement, the agreement was made an order of court.
- [7] The defendants informed the court that they will call only one witness, namely Mr Masina, the state prosecutor, as a further witness and the plaintiff chose not to call any further witnesses. The parties further agreed that the onus to prove the lawfulness of the arrest and detention rests with the defendants and the

onus of proof of quantum rests with the plaintiff. The plaintiff informed the court that he is abandoning claim for malicious prosecution.

Witness testimony

[8] In the court *a quo*, the defendants called the undermentioned witnesses who testified as follows:

Warrant Officer Sithubeni ("Sithubeni")

- a. He testified that at the time of the alleged commission of the offences, he was a Warrant Officer stationed at Jabulani Police station and has since retired. The complainant opened a housebreaking and attempted rape case on 6 May 2017. She informed Sithubeni that she would not be able to identify the suspect if she saw him again. She informed him further that an intruder entered her room at the early hours of the morning, precisely at about 04h30. The complainant further told him that she fought with the intruder and as they scuffled, the intruder tried to close her mouth and as a result she bit him on his left arm.
- b. The intruder then ran out of the window he gained entry with. He further testified that the complainant told him that the intruder ran away because there were tenants in the very same yard. He was further told by the complainant that the intruder was wearing a balaclava.
- c. The complainant told him that she told people about the unknown male person who broke into her room and tried to rape her. The complainant was told by someone that the features of the intruder she described matched those of Zakhele, the plaintiff. The complainant knew Zakhele as they were staying in the same neighbourhood. Sithubeni testified that on 19 May 2017 they visited the complainant at her place of residence, and she took them to Zakhele's place. Upon arrival at the plaintiff's place, the complainant pointed the plaintiff out as the person who broke into her room and tried to rape her. The plaintiff was then and there arrested for committing the alleged crimes. At the time of the plaintiff's arrest, they observed injuries on his hand. He had a bandage around his left hand, but

they did not remove it. Sithubeni testified that *“we could not leave him when he said that he was injured in a construction because the features that he had were the same as what was said by the complainant”*. During his testimony in the court *a quo*, he was referred to the complainant’s statement that stated that the *“complainant says that the suspect was unknown to her, and she could not see him because he was wearing a cloth or a polo neck covering half his face”* and he told the court that the complainant told him so.

- d. The plaintiff asked the complainant why he was being arrested and the complainant responded that there was a house breaking at her residence by a man wearing a balaclava and during the ensuing scuffle she bit the intruder on his left hand, and he then fled.
- e. Sithubeni further told the court that the plaintiff reiterated that he was injured at his workplace assisting on a building construction. On 13 June 2017, the plaintiff applied for bail and it was opposed. Sithubeni opposed bail citing outstanding fingerprints and escape case involving the plaintiff in Krugersdorp as reasons for opposing bail. Based on Sithubeni’s information, the court denied releasing the plaintiff on bail. Sithubeni told the court that he did not verify the Krugersdorp escape case against the plaintiff, and it was later discovered he did not have such a pending case. When denying the plaintiff bail, the court said to the plaintiff *“[b]ut you have already escaped and you know they are looking for you now, the likelihood of you escaping again is now just inevitable, irresistible, some may say. So in the circumstances I refuse bail”*. This quote was put to Sithubeni and he agreed that the bail was refused as a result of what he told the court. He testified further that another reason for refusal of bail was that the plaintiff had an escape case at Krugersdorp. He further said that it was also noted, after receipt of fingerprints results, that the plaintiff had been involved in housebreaking matters.
- f. He did not seek more information from the person(s) who informed the complainant that the plaintiff had some injuries regarding their knowledge of those injuries and what made him [Sithubeni] come to the conclusion

that the injuries were caused by the plaintiff. He told the court that he arrested the plaintiff because he was wearing a bandage and had some injuries.

- g. On 31 May 2017, the plaintiff was taken, as per the public prosecutor's instructions, to a district surgeon for confirmation of his injuries and what may have caused them. On 14 May 2017 fingerprint analysis was lifted from the scene and it pointed to one Siphon Msimango. Despite the fingerprints evidence linking Siphon Msimango to the alleged crimes and excluding the plaintiff, the second defendant continued with prosecuting the plaintiff. Sithubeni further testified that he knew that the information at his disposal was insufficient and as such was hoping that the SAP69, the pending cases and the criminal profile would assist him in establishing a case against the plaintiff. He further told the court that besides the fingerprints not placing the plaintiff at the scene of crime, the DNA results also exonerated him. The case against the plaintiff was struck off the roll on 24 January 2018 due to non-availability of the DNA results.
- h. The plaintiff was summonsed to appear at court on 1 July 2018 and whilst seated there, Sithubeni told him that his case was struck from the court's roll.

Mr Khoza

[9] Mr Khoza was the regional court prosecutor at the Regional Magistrates' Court, Soweto Protea and was responsible, at the time of the plaintiff's appearance in that court, for enrolling all matters for that regional court.

- a. He testified that on 22 May 2017, Warrant Officer Sithubeni brought the plaintiff's docket to him for enrolment. Mr Khoza testified that according to the complainant's statement, the plaintiff inserted his fingers in her mouth during the altercation and as a result, she bit his fingers. He further testified that according to the complaint's statement, she pointed the plaintiff because he bit her during the altercation/scuffle. Like Sithubeni, Mr Khoza relied on the complainant's statement that the intruder, who was

wearing a baseball hat, attacked the complainant, in the scuffle, she bit his arm and the intruder exited through the window.

- b. He further told the court that after reading the docket and noticing that the police discovered the injury suffered by the accused/plaintiff on his hand was similar to the one described by the complainant, he felt there was a prima facie case against the accused/plaintiff. He further told the court that the plaintiff had to tell the court as to what caused those injuries. He was aware that the complainant did not see the perpetrator's face. The plaintiff did not provide an explanation as to how he got injured. Mr Khoza further testified that because of the non-explanation by the plaintiff regarding the cause of his injury, and after reading the complainant's statement, he enrolled the matter. He denied that he maliciously prosecuted the plaintiff.
- c. He reiterated and confirmed Sithubeni's testimony that the plaintiff should not be granted bail because he had previous convictions, additionally, the plaintiff was charged with Schedule 5 offence, housebreaking, and attempted rape. He told the court that as a result, the plaintiff was not entitled to be released on bail. According to the witness, the defendants had a strong case based on the evidence at their disposal despite the fact that they were still awaiting the blood analysis. As a result of the information at their disposal, there was a reasonable suspicion that the plaintiff committed the alleged offences.
- d. He further confirmed the complainant's statement that the intruder was wearing slippers, and he further considered the fact that there was a member of the community who informed her that the plaintiff had marks resembling the injuries suffered by the intruder. The witness further testified that he read the complainant's statement stating that she could not identify the intruder. He further told the court *a quo* that based on the police discovery of similar injuries on the accused's hand to those of the intruder as described by the complainant, the plaintiff was placed under arrest. After reading the docket, Mr Khoza felt there was a prima facie case against the plaintiff. Like Sithubeni, the witness submitted to the

court that the investigation was not completed as they were still awaiting the outcome of fingerprints and blood analysis when bail was denied. Despite all of this, he was of the view the defendants had a strong case against the plaintiff.

Mr Masina

[10] Mr Masina was the control prosecutor and doubled as a regional court prosecutor at the time of the plaintiff's criminal case.

- a. He testified that on 13 June 2017 he conducted and opposed the plaintiff's bail. He opposed bail because the plaintiff was charged with a Schedule 5 offence and had previous convictions. Like all the other witnesses who testified before him, he informed the court that the plaintiff had an escape or attempted escape case at Krugersdorp and such information was endorsed in the plaintiff's profile. According to the witness, the plaintiff's profile stated that he has an open case of escaping from lawful custody at Krugersdorp. He did not personally verify the information whether the case was finalised or not. He further told the court that the entry status on the profile stated "cancelled" and to him "cancelled" means still open.
- b. He placed the information on the profile to the court hearing the bail application and did not request further information from the investigating officer. The witness further told the court that the escape case was committed about 19 years ago and such, this information was placed before court during bail application. According to the witness, the court did not release the plaintiff on bail because there was possible parole infringement. He conceded to the court that as a prosecutor he should not only assist the State but also the plaintiff by informing the court what is in favour of the plaintiff.
- c. He further told the court he considered the complainant's statement that an unknown male person broke into her room and tried to rape her and as a result, she bit his finger. He told the court that there was sufficient evidence that the plaintiff was the intruder after he was pointed out by the complainant. He believed what the investigating officer told him that there

was sufficient evidence to deny bail. He conceded however that he did not interrogate the investigating officer further about the escape infringement.

Plaintiff's Evidence

[11] The plaintiff testified that on 19 May 2017, he was working as a guard at a taxi rank. When he arrived home in the morning, his mother told him that police officials were looking for him. He then went to the police station. Upon arrival, he introduced himself and explained that he was informed that the police were looking for him. After a while the police came with a lady by the name of Zine who was well known to him. Zine requested to see the plaintiff's injured hand as it was wrapped with a bandage. In the presence of Sithubeni, he removed the bandage for the complainant to see the wound. He enquired from the complainant regarding what happened, and the complainant told him that somebody reported to her that they saw him with an injury on his left hand.

[12] He was then arrested and detained by Sithubeni. He informed Sithubeni that he was injured at work when he was trying to leash a dog and was cut by a chain. The complainant told him that the wound did not look like a bite mark but looked like a cut. He appeared before court on 22 May 2017 and applied for bail. The application was set down for 13 June 2017. He was given a notice of rights. Bail was denied on 13 June, and he was released on 24 January 2018.

Analysis and legal principles

[13] According to the defendants, the plaintiff was arrested in terms of section 40(1) (b) of the Criminal Procedure Act¹ ("CPA") as amended. The section states that:

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

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

[14] It is a common cause that Sithubeni, a police officer who was acting within course and scope of his employment with the first defendant arrested the plaintiff on 19 May 2017 and such, the arrest was effected without a warrant, with Sithubeni

¹ 51 of 1977.

allegedly believing the plaintiff had committed housebreaking and attempted rape. As a result of the arrest and detention, which the plaintiff claims was unlawful, he issued summons and claimed pecuniary damages. It is for this court to determine whether the arrest and detention was lawful and if not, how much should a fair compensation be as an award for the plaintiff. It is worth noting that at the commencement of the trial, the plaintiff withdrew his claim for malicious prosecution against the defendants. The plaintiff claims compensation for unlawful arrest and detention against the first defendant for the period from the date of his arrest to date of his first appearance at court, that is, from 19 May 2017 to 22 May 2017, and further claims as against both defendants compensation for unlawful detention post his first appearance until his release on 24 January 2018. The plaintiff was detained for a period of 251 days.

[15] This matter was ordered by the Supreme Court of Appeal to start *de novo* before another judge. The parties approached the court after agreeing as to how the matter should proceed. They requested the court make an order in terms of Rule 39 (20) for the agreement on the conduct of the trial *de novo*, which this court did. Most of the important contents of the agreement have been mentioned above, furthermore, that order has been uploaded on CaseLines. It is not necessary for this Court to repeat all the evidence tendered by various witnesses in the court *a quo*, needless to state that the evidence of Mr Masia was tendered and recorded in this Court.

[16] As the onus of proof for unlawful arrest and detention rests with the defendants, by law, the defendants should, on a balance of probabilities show and satisfy the court that Sithubeni reasonably suspected that the plaintiff committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. In any event section 40(1)(b) does not necessarily require direct evidence but rather the arresting officer should hold a suspicion which should be formed on reasonable grounds. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a Schedule 1 offence as held in *R v Van Heerden*.² In order to ascertain whether a suspicion that a Schedule 1

² 1958 (3) SA 150 (T) at 152.

offence has been committed is “reasonable”, there must obviously be an investigation into the essentials relevant to each particular offence as was also held in *Ramakulukusha v Commander, Venda National Force*.³ In *Duncan v Minister of Law and Order*,⁴ the court held that the question of the reasonableness of a suspicion cannot be considered without first determining the meaning of the word “*suspicion*” and found the word implied an absence of certainty or adequate proof. In *Birch v Johannesburg City Council*⁵ the court held 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. In the present case, Sithubeni was informed by the complainant that she was informed that the plaintiff had a bandage on his left arm and the intruder was bitten on the left arm and as a result, suspected the plaintiff to have committed the alleged offences. He did not independently form the suspicion. He arrested the plaintiff based on the information given to him by the complainant, who also stated that she could not identify the intruder. In the cases *S v Purcell-Gilpin*,⁶ and *S v Miller*,⁷ the courts there held that a police officer who fails to substantiate his suspicion even though he has opportunity to do so, does not act reasonably. Sithubeni told the court that the complainant told him that someone in the community told her that the person who committed the offences was the plaintiff, but he did not interrogate that person.

[17] Having dealt with reasonable suspicion, to successfully rely on the provisions of section 40(1)(b) of the CPA, the defendants should satisfy four jurisdictional facts. According to the *Duncan*⁸ case the following jurisdictional facts must exist before the power conferred by section 40(1)(b) may be invoked:

- a. The arrestor must be a peace officer.
- b. He must entertain a suspicion.

³ 1989 (2) SA 813 (V) at 836G – 837B.

⁴ 1984 (3) SA 460 (T) at 465H (“*Duncan*”).

⁵ 1949 (1) SA 231 (T) at 238.

⁶ 1971 (3) SA 548 (RA) at 554C.

⁷ 1974 (2) SA 33 (RA) at 35D-E.

⁸ *Duncan* above n 4 at 818G-H.

- c. It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA.
- d. The suspicion must be on reasonable grounds.

[18] These jurisdictional facts were also emphasised by the court in *Minister of Safety and Security v Sekhoto and another*.⁹ The test which should objectively be considered in this case, as it was considered in all other similar cases, is whether Sithubeni acted lawfully when he arrested the plaintiff without a warrant. The crucial question would be whether the circumstances prevailing at the time Sithubeni effected an arrest without a warrant were such that a reasonable man finding himself in the same situation would reasonably suspect that the plaintiff has committed the alleged offence.

[19] In *Mabona and Another v Minister of Law and Order*¹⁰ the court stated the following on reasonable suspicion:

"There can be no doubt that he was given information which caused him subjectively to suspect the plaintiffs of involvement in the robbery. The question is whether his suspicion was reasonable. The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be

⁹ [2010] ZASCA 141; 2011 (5) SA 367 (SCA) ("Sekhoto").

¹⁰ 1988 (2) SA 654 (SE).

of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty".¹¹

[20] Once the jurisdictional facts are present a discretion arises whether to arrest or not. Such discretion must be exercised in good faith, rationally and not arbitrary as it was held in *Sekhoto*.¹²

[21] It is clear to the Court that Sithubeni did not independently formulate a suspicion that the plaintiff committed the alleged offences. He relied on information he received from the complainant who told him that she herself could not identify the intruder, but later on, informed him about what she heard from the member of the community about the bandage the plaintiff had around his left arm. He did not interrogate the mentioned member of the community. Sithubeni further told the court in the bail application that the plaintiff had an escape case at Krugersdorp and admitted to the court *a quo* that he did not make a follow-up on that case. As a result of this the plaintiff was denied bail. Having said this, it cannot be said that the plaintiff's arrest by Sithubeni was effected in terms of section 40(1)(b) of the CPA and it is my considered view that the plaintiff's arrest and detention was unlawful. Having been unlawfully arrested by Sithubeni on irrational grounds, the plaintiff had to endure further detention based on a version that he had a pending case against him for escaped from lawful custody.

[22] On the post-appearance liability of the police, the court in *De Klerk v Minister of Police*¹³ held:

"In cases like this this, the liability of the police for detention post-court appearance should be determined on an application of the principle 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

¹¹ Id at 658D-H.

¹² *Sekhoto* above n 9.

¹³ [2019] ZACC 32 (CC); 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC) ("*De Klerk*").

*after the 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... [e]very matter must be determined on its own facts - there is no general rule that can be applied dogmatically in order to determine liability.*¹⁴

[23] In the present case, the court relied on false information when denying the plaintiff bail, and Sithubeni conceded that bail was denied because of the information furnished to the court. Due to the false evidence about the plaintiff having escaped from detention, there could have been no argument that the factual chain of causation was disturbed by legal causation.

Detention post first appearance at court

[24] Mr Khoza, the regional court prosecutor at Soweto Protea testified that he was responsible for enrolling matters for the regional court. He read the plaintiff's case docket in preparation for the bail application. He felt there was a strong case against the plaintiff. He further testified that he relied on what he was told by Sithubeni during the discussions and what he read from the docket. During cross-examination, he was taken through the statements he relied on to oppose bail, more specifically wherein it was stated that the plaintiff had bite injuries, and he conceded that none of the statements mentioned any bite injuries found on the plaintiff.

[25] Mr Masina who was the defence' further witness did not assist the defence' case. During cross-examination he conceded that the crucial profile of the plaintiff showed that the status of the entry for the escape case was endorsed as "CRC Cancelled". He testified further that he did not make any enquiries at the Criminal Record Centre about a possible parole infringement by the plaintiff. He further testified that he did not make any endorsement on the file nor interrogate the investigating officer about the Krugersdorp escape matter, more in particular about issue of "CRC Cancelled". He further conceded that the magistrate denied the plaintiff bail because he had an outstanding escape case at Krugersdorp. It was further conceded by the witness during cross-examination that the magistrate's reasons for denial of bail were based on the information supplied by him and the investigating officer.

¹⁴ Id at para 63.

[26] Mr Masina testified further that the investigating officer submitted an affidavit which stated that the complainant was bitten by an unknown African male, he did not interrogate the investigating officer's statement. Another bone of contention was that the investigating officer stated that the complainant said the intruder was unknown, but the investigating officer stated it as a fact that it was the plaintiff who was bitten by the complainant and that he ran away through the broken window. He did not take the investigating officer to task about that issue.

[27] He further conceded to the court that he did not interrogate any information furnished to him in the bail hearing. He further did not bring discrepancies to the attention of the court. He confirmed that as a prosecutor, he is duty bound to act in terms of the constitutional guidelines for prosecutors which included placing evidence before the court that would assist the court in coming to a just decision, even if it is beneficial to the accuse.

[28] It is clear that both Mr Khoza and Mr Masina did not act as prudent and as constitutionally inclined prosecutors would do. They disregarded the plaintiff's constitutional rights as insofar as the Bill of Rights is concerned. They were both furnished insufficient information about the intruder, the profile of the plaintiff regarding previous convictions and a possible of escape from custody, but nevertheless ignored and/or failed to request further information from the investigating officer about the plaintiff's previous convictions, how the plaintiff was linked to the crime despite the complainant stating she could not identify the intruder, there was no interrogation of the member of the community who told the complainant about the plaintiff, and they did not confirm with the plaintiff's employer on the cut he suffered.

[29] It is quite clear that Mr Khoza, Mr Masina and Sithubeni prolonged the detention of the plaintiff thereby causing him immense harm. They furnished the court with wrong information.

[30] Courts are enjoined to consider constitutional imperatives in cases of arrest without warrant as was emphasised in *Le Roux v Minister of Safety and Security*.¹⁵

[31] As far as liability is concerned in *De Klerk v Minister of Police*¹⁶ the court held:

“In establishing a delictual claim, a plaintiff needs to prove that the unlawful, wrongful conduct of the police (i.e the arrest) factually and legally caused the harm (post court hearing deprivation of liberty) ... The plaintiff need only establish that the harm was not too remote from the unlawful arrest ...

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

In cases like these, 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.”¹⁷

[32] In *casu* in this matter, another important consideration this Court must consider is: was the arrest unlawful *ab initio*, if so, was the plaintiff kept in detention as a result of misleading information the court relied on in keeping the plaintiff in custody from 2 May 2017 to 24 January 2018. When the above is applied, it is clear that both defendants must be liable to compensate the plaintiff for damages in respect of the entire period of his detention.

[33] In *Woji v Minister of Police*¹⁸ the court held that the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty.

[34] On whether the prosecution also perpetrated the detention of the plaintiff post first appearance in court, the court in *Minister of Police and Another v Erasmus*¹⁹ held that like in malicious prosecution, the requirements to succeed

¹⁵ 2009 (4) SA 491 (N).

¹⁶ *De Klerk* above n 13.

¹⁷ *Id* at paras 60-62.

¹⁸ [2014] ZASCA 108 (SCA); 2015 (1) SACR 409 (SCA).

¹⁹ [2022] ZASCA 57 (SCA).

in malicious detention are the same, that is - the defendant should have instigated the detention; and the instigation was without reasonable and probable cause; and the defendant acted with *animus iniuriandi*.²⁰ Sithubeni, Mr Sithole and Mr Masina's actions led the court in denying the plaintiff bail and this resulted in the plaintiff's detention post his first appearance at court. As a result, both the first and the second defendants are held liable jointly and severally for unlawful detention of the plaintiff from 22 May 2017 to 24 January 2018, a period of 248 days.

Quantum

[35] The defendants submitted that in the event the court finds that they are liable to pay the plaintiff for unlawful arrest and detention, an amount of R 80 000,00 will be appropriate. The defendants did not substantiate how they arrived at this amount. Counsel for the defendants stated:

"In respect of unlawful arrest and detention for a period from 19 November 2017 to 24 January 2018, R80 000,00 would be reasonable to compensate the plaintiff for the arrest and detention that lasted for 3 days."

[36] I would like to believe that the counsel meant to state that detention from 19 May 2017 to 22 May 2017. It is common cause that on 22 May the matter was postponed to 13 June 2017 for a bail hearing. Bail was then denied, and the plaintiff was ultimately released on 24 January 2018.

[37] In his head of argument, the plaintiff requested the court to grant the following award in respect of the unlawful arrest and detention claim:

- a. R 150 000,00 against the first defendant for the arrest and detention from 19 May 2017 to 22 May 2017.
- b. R 850 000,00 against both defendants jointly and severely for the detention from 22 May 2017 to 24 January 2018. However, in his summons, he claims an amount of R 4 825 600.00 against both defendants.

²⁰ Id at para 11, the court referencing Neethling *et al Law of Delict* 5 ed (2006) at 304-306.

[38] The plaintiff also claims for loss of income for the period he was detained. He testified that he was earning between R 2 600,00 and R 2 800,00 per month. He further told the court that upon his release from detention, he was informed that his employer had passed on. There is no evidence before court rebutting the plaintiff's evidence that he was employed and earned the stated amounts. Having only the evidence of the plaintiff insofar as employment and loss of income are concerned, the court has no reason not to award damages to the plaintiff for loss of income. Since the plaintiff lost an income for eight months, a fair and reasonable award would be R 21 600.00, calculated at R2 700 per month for eight months.

[39] Coming back to the award to be made for unlawful arrest and detention, the court must exercise its discretion judicially and not arbitrarily.

[40] It is trite that in cases such as this one, the determining factors when considering an award to be made, amongst others, though not exhaustive are:

- a. the manner in which the arrest was effected;
- b. the age of the plaintiff;
- c. the conditions of his detention; and
- d. the duration of detention.

[41] In Law of Damages²¹, the authors state that in wrongful or malicious arrest cases, the following factors play a role in the assessment of damages:

“[t]he 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 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 defendants; awards in comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionality protected fundamental rights have been infringed; the high value

²¹ Potgieter, Steynberg and Floyd Visser & Potgieter Law of Damages 3 ed (Juta, 2012).

*of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect that the award may have on the public purse; and according to some, the view that actio iniuriarum also has a punitive function”.*²²

[42] The plaintiff was 38 years of age at the time of his arrest. He is an ex-convict. He testified that he was trying to redeem himself when he was arrested. The defendants are of the view that the plaintiff should be awarded a lower amount as compensation due to the fact that he served time in prison before. I do not think this is warranted given that the Constitution²³ is clear on the aspect of equality before the law. The plaintiff has gone more than a decade without being on the wrong side of the law, he told the court that he was redeeming himself to be a better person. During his unlawful detention, he endured overcrowdness, violence, a dirty environment, poor ablution, less food ratio and was limited in his interaction with people dear to him. There were limited mattresses and blankets which he had to share with other inmates. He encountered the power of prison gangs and less protection from prison warders.

[43] General damages are the broad term given to non-pecuniary loss such as pain and suffering, loss of amenities of life, emotional harm.

[44] In *Solomon v Visser*²⁴ the court stated:

*“where the members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which to this I am hasten or add that where an arrest is malicious and there is no basis for such an arrest, the plaintiff is entitled to a higher amount of damages, that would be awarded, absent the malice.”*²⁵

[45] In *Sandler v Wholesale Coal Suppliers*²⁶ the court said that:

“though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no

²² Id at 15.3.9.

²³ Constitution of the Republic of South Africa, 1996.

²⁴ 1972 (2) SA 327 (C).

²⁵ Id at 345A.

²⁶ 1941 AD 194.

scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty.”²⁷

[46] On the purpose of awarding damages in detention matters, the court in *Minister of Safety and Security v Tyulu*²⁸ stated:

“[26] 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 the personal liberty is viewed in our law.”

[47] It is a trend and general practice by our courts that previous similar cases are looked at and compared as a guideline when making an award. It has to be emphasised that each case has to be decided on its own merits. The court has a discretion in making an award and the discretion should be made fairly, without favour and/or prejudice.

[48] I am alive to the caution given by the court in *Dolamo v Minister of Safety and Security*²⁹ when it stated that “[f]he process of comparison is not a meticulous examination of awards, and should not infer upon the court’s general discretion”.³⁰

[49] In *Minister of Safety and Security v Seymour*³¹ the court warned further that:

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

²⁷ Id at 199.

²⁸ [2009] ZASCA 55; 2009 (5) SA 85 (SCA) (“*Tyulu*”).

²⁹ (5657/2011 [2011] ZAGPPHC 225 (24 April 2015).

³⁰ Id at para 8.

³¹ [2006] ZASCA 71; 2006 (6) SA 320 SCA (“*Seymour*”).

[50] There is unfortunately no expert that can place an exact value on the plaintiff's losses. It is not enough to compare the general nature of the pains the plaintiff suffered. All factors affecting the assessment of damages must be taken into account. Once it is established that the circumstances are sufficiently comparable, then only are comparable cases to be used as a general yardstick to the court in arriving at an award. Each case must be adjudicated on its own merits.

[51] Van Heerden J in *Dikeni v Road Accident Fund*³² stated that:

*"Although these cases have been of assistance, it is trite law that 'each case must be adjudicated upon its own merits and no one cases is factually the same as another... Previous awards only offer guidance in assessment of general damages'."*³³

[52] The award should be fair to both sides as was held in *Pitt v Economic Insurance Co Ltd*³⁴ wherein it was said:

*"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour our largesse from the horn of plenty at the defendant's expense."*³⁵

[53] I have perused the transcript of the proceedings in the court *a quo* and evaluated all the witnesses' evidence, I take note of the award made in the cases below, which I find comparable.

- a. In *Seymour*³⁶ the plaintiff was awarded R 90 000.00 for 5 days in unlawful detention.
- b. In *Tyulu*³⁷ the court awarded the respondent who was a magistrate, an amount of R 15 000,00 for his unlawful arrest and detention for a period of 15 minutes.

³² 2002 (5B4) QOD 147 (C).

³³ Id at 171.

³⁴ 1957 (3) 284 (D).

³⁵ Id at 287E.

³⁶ *Seymour* above n 31.

³⁷ *Tyulu* above n 28.

- c. In *Mvu v Minister of Safety and Security and Another*³⁸ the court awarded the plaintiff an amount of R30 000.00 after being arrested and detained for a day.
- d. In *Olivier v Minister of Safety and Security and Another*³⁹ the plaintiff was awarded an amount of R 50 000.00 for a period of 6 hours.
- e. In *Mbanjwa v Minister of Police*⁴⁰ the plaintiff, a 29-year diploma graduate employed as a manager in a casino lost his home as a result of the unlawful arrest and detention which lasted five months. He was awarded the amount of R 500 000.00.
- f. In *Onwuchekwa v Minister of Police and Another*⁴¹ the plaintiff was arrested and detained for 44 days and was awarded R 600 000.00.
- g. In *Stemar v Minister of Police and Another*⁴² the plaintiff was arrested and detained for eleven months and was awarded R 450 000,00.
- h. In *Richards v Minister of Police and Others*⁴³ the plaintiff was arrested for four months and was awarded an amount of R 500 00,00.
- i. In *Maphosa v Minister of Police*⁴⁴ the plaintiff was arrested on 25 January 2017 and released on bail on the 20 February 2017. He was awarded an amount of R 500 000,00 for detention for 26 days.
- j. In *Lifa v Minister of Police & Others*⁴⁵ the plaintiff spent 5 days in detention before his first appearance in court, where upon he applied for bail which was denied and thereafter spent 93 days in detention after his first appearance in court. The charges were withdrawn after spending 98 days in detention. The court said the defendant was clearly liable for the continued detention of the plaintiff after the first appearance. He was awarded the total of R 600 000,00. Referring to this case, it is not court's

³⁸ 2009 (2) SACR 291 (GSJ).

³⁹ 2008 (2) SA 387 (W).

⁴⁰ [2017] ZAGPPHC 176 (5 April 2017).

⁴¹ [2015] ZAGPPHC 919 (28 August 2015).

⁴² [2014] ZAGPPHC 295 (16 May 2014).

⁴³ [2014] ZAGPJHC 280 (23 October 2014).

⁴⁴ [2022] ZAGPJHC 486 (26 July 2022).

⁴⁵ [2023] 1 All SA 132 (GJ) at para 72.

intention to deal separately with the pre and post first appearance at court when dealing with quantum, but after deep thought I deemed it fit do so given that the second defendant is not liable for detention pre first appearance at court and as such, should not be made to suffer the consequences. Both parties told the court that the longer a person is unlawfully detained the amount of compensation is lowered on a daily basis.

[54] Having considered the awards made in the cases above, I have made these observations: the more days spent in detention the lower amount is awarded per day spent in detention as the intention is not to enrich the plaintiff; awards in the amounts of between R20 000.00 and R30 000.00 have been made for a day spent in detention. Most of the cases I referred to were not recently decided. After considering all the facts, and the fact that any award made should be fair to both parties, I am of the view that a fair and reasonable award to be made to the plaintiff for each day spent in detention as a result of unlawful arrest and detention would be R 3 000.00 (per day). As emphasised by various court decisions, the intention of the court is not to enrich the plaintiff but to award him compensation which is commensurate to the pain and suffering he endured.

[55] Unlawful detention by its nature infringes upon one's right to physical freedom, dignity, and good name. I did not take the plaintiff's previous convictions and his educational background to be factors necessary when considering the amount to be awarded as, in my view, equality before the law should prevail above all. I consider myself bound by the provisions of the Constitution, particularly, sections 9(1), 10(1) and 12(1) which state:

“9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

...

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

...

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.

These rights are fundamental rights entrenched in the Bill of Rights. The State is required to respect, protect, promote and fulfill these rights, as well as other rights.

[56] The plaintiff is a citizen of this country, and his freedom should never have been deprived arbitrarily.

Costs and interest

[57] The plaintiff argued for punitive costs against the defendants. The matter was previously set down for trial on 2 December 2019 wherein it was postponed *sine die* with costs reserved. The defendant argued that whoever wins should be awarded normal costs, that is, party and party. Plaintiff further requested the court to award payment of interest at the rate of 10% per annum from date of service of summons to date of payment. The summons was issued on 18 November 2018. I have considered the parties' arguments and read the authorities advanced, however, I am not persuaded to grant the plaintiff costs and interest as per his request.

Order

[58] In the result, the following order is made:

- a. The First Defendant is ordered to pay the Plaintiff an amount of R 9 000.00 for unlawful arrest and detention from 19 May 2017 to 22 May 2017.
- b. The First and Second Defendants are ordered to pay the Plaintiff an amount of R 744 000.00 jointly and severally, the one paying the other to be absolved, for unlawful arrest and detention from 22 May 2017 to 24 January 2018.
- c. The First and the Second Defendants are jointly and severally to pay the plaintiff an amount of R 21 600.00 for loss of earnings.

- d. The First and Second Defendants are to pay interest on the capital amount at the prescribed rate from the date of judgement to date of final payment.
- e. The First and Second Defendants to pay the Plaintiff's costs, on party and party scale, including the costs of postponement.

MC MAUBANE
ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' representatives by e-mail, uploading to CaseLines and release to SAFLII. The date for hand down is deemed to be 18 October 2023.

Date of Hearing: 28-31 August 2023
Date of Judgment: 18 October 2023

APPEARANCES

For the Plaintiff:
Instructed by: Lagoon Naidoo Attorneys

For the Defendants: R Netsianda
Instructed by: The State Attorney