IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2014/39550

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

03 APRIL 2023

DATE **PM MABUSE**

MAROPENG JELOUS SERAKWANA Plaintiff

v

MINISTER OF POLICE Defendant

JUDGMENT

MABUSE J.

[1] This is a claim for payment of money.

[2] By the combined summons issued by the Registrar of this Court on 29 October 2014 and subsequently amended on 1 February 2023 and again on 23 February 2023, the Plaintiff, an adult male who resides at Moletsane, Soweto,

Johannesburg, claims from the Defendant, the Minister of Police, payment of money following his arrest that took place on 1 July 2014.

OVERVIEW

[3] It is the plaintiff's case that on 1 July 2014 and at Jabulani, Soweto, he was arrested by members of the South African Police Services who at that material time were acting within their course and scope of employment with the Defendant and furthermore that the said arrest was effected without a warrant of arrest and was therefore unlawful. He was arrested on a charge of assault with intent to do grievous bodily harm (gbh).

[4] According to the plaintiff, his arrest was unlawful by reason of the fact that he had not committed the crime of assault with intent to do grievous bodily harm. He contends that his arrest was not justified under the provisions of section 40 of the Criminal Procedure Act 51 of 1977 (the CPA).

[5] Subsequent to his arrest, the Plaintiff was detained at Jabulani Police Station cells until 2 July 2014 when he was taken to court where he was released on warning.

[6] The Plaintiff pleads in the alternative that should the Court find that his initial detention was necessary for the purpose of processing him administratively, then his further detention after being processed, was unlawful by reason of the fact that the arresting officer, alternatively the senior officers on duty, or the investigating officer on duty during his detention incorrectly, alternatively failed

to exercise his or her discretion in favour of releasing him on warning in terms of the provisions of the CPA, alternatively on bail for reasons that he set out in his pleadings.

[7] As a consequence of the said unlawful arrest and detention, he suffered general damages for pain and shock, violation of his constitutional rights including deprivation of liberty, the impairment of dignity and self-esteem, embarrassment and contumelia.

[8] AMENDMENTS

[8.1] On 23 February 2023 he Plaintiff brought an application for amendment of his particulars of claim in terms of rule 28(10) of the Uniform Rules of Court. The purpose of the amendment was to ameliorate paragraphs 6.1 to 6.6 of the particulars of claim.

[8.2] The notice of amendment was served on the Defendant's attorneys on 23 February 2023. The said notice had some flaws. It did not state that unless written objection to the proposed amendment was delivered (within 10 days or any period the Plaintiff might have chosen) of the notice, the amendment will be effected. Despite this flaw, the Defendant did not deem it necessary to object to the contemplated amendment. The defendant could have dealt with this notice of intention amend in terms of rule 28(3) or rule 30 or rule 30A of the rules. As the Defendant chose not to react to the contemplated amendment, the amendment went through.

[8.3] The amendment was as follows:

> *"6.1 this site had a leaking toilet, and it was not flushing.*
>
> *6.2 The toilet in the cell had faeces and was openly used by the detainees irrespective of his condition.*
>
> *6.3 The windowpanes of the cell were broken.*
>
> *6.4 The cell was stuffy and smelly, and the walls were smeared with blood and faeces.*
>
> *6.5 The detainees in the cell were smoking dagga and drugs.*
>
> *6.6 the blankets in the cells were dirty, smeared with blood and faeces: and,*
>
> *6.7 the detainees in the cells posed a threat to the plaintiff."*

[8.4] These amendments in paragraph 6.1 to 6.7 went through in terms of rule 28(5), despite the Plaintiff of having given notice that he intended amending only paragraphs 6.1 to 6.6. Much of the amendment had already been tendered as evidence by the Plaintiff. The amended pages were not effected as required by rule 28(7) of the Rules.

[9] Therefore, the Plaintiff claims from the Defendant payment of the sum of R400, 000 plus further ancillary relief. The Defendant resists the Plaintiff's claim. For that purpose, the Defendant has delivered a plea in which he denies that the Plaintiff was unlawfully arrested and detained. The Defendant's position is that the Plaintiff was lawfully arrested and detained by a peace officer on 1 July

2014 at 15h10 on reasonable suspicion that he had committed the offence of assault with intent to do or to commit grievous bodily harm, which is an offence involving the infliction of grievous bodily harm. According to the Defendant's plea, the arrest of the Plaintiff and subsequent detention was lawful and justified by the provisions of section 40(1) (b) and section 50(1)(a) of the CPA. Based on these denials, the Defendant claims the dismissal of the Plaintiff's action.

[10] The battlefield of the parties in this matter is whether the arrest of the Plaintiff was lawful or not. The Defendant has admitted the arrest but denied that it was unlawful. This is the issue that this court must determine. The court must therefore determine whether the arrest was lawful, as contended by the Defendant or unlawful, as claimed by the Plaintiff. Some of the issues raised cannot be decided outside the lawfulness or unlawfulness of the arrest.

[11] Alongside the issue of the unlawfulness, the court must decide whether the Plaintiff had committed the offence of assault with intent to do grievous bodily harm.

[12] In view of the fact that he had admitted arresting the Plaintiff, the Defended had to testify first. He had to justify the arrest of the Plaintiff to satisfy the Court that such arrest was not unlawful. The onus was on the Defendant to show the lawfulness of the Plaintiff's arrest.

[13] THE EVIDENCE

[13.1] The evidence of the Defendant was given through Matlhomola Chris Leota, formally a Police official, currently unemployed. According to him, he used to be a Detective Constable stationed at Jabulani Police Station. His duties included, taking down statements, tracing suspects, handling, and managing case dockets and taking the case dockets to court.

[13.2] On 1 June 2014 he reported for work at 07h30. After his arrival at work, he attended a parade. During this parade, there was a meeting where he was allocated case docket 490/6/2014. The charge against the suspect in that case docket was assault with intent to do grievous bodily harm, in brief assault GBH.

[13.3] After receiving the case docket, he perused it. At that stage the case docket contained A1, which was a statement by the complainant and A2, which was a medico-legal report by the injuries suffered by the complainant, of a medical doctor. The complainant was a certain woman by the name of Carol Maipato Gaje (Gaje). There was in the case docket no statement by the suspect and the suspect had not been arrested.

[13.4] During the day he proceeded to Tladi, Soweto, where he picked up the complainant. He was in the company of his colleague, a certain Madzena. He interviewed her and the complainant made a report to him about the assault. She showed him the injuries she had sustained

during the assault. He noticed an open wound on her left thigh and other injuries on the left-hand side of her stomach and bruises on the left side of her body.

[13.5] He asked the complainant her if she knew where the suspect stayed, and she said she did. The complainant led him to the suspect's house at Moletsane. On their arrival there, they met an African male who became known to him as Maropeng Jealous Serakwane, the Plaintiff in this matter. They asked the Plaintiff if he knew the complainant. He said he did. He explained to the Plaintiff that they were at his house about the case the complainant had laid against him. He then told him that he was at this house to arrest him for having committed assault GBH. He told him that the injuries he had inflicted on the complainant were serious. He explained his constitutional rights to him, handcuffed him and led him to Jabulani Police Station where the plaintiff was locked up in the Police detention cells. The complainant was driven back home by Mr Madzena.

[13.6] In the Police cells he made an entry 74/7/2014. The Plaintiff’s rights were explained to him. He was inspected for any injuries by the Police in the cells to establish whether he had any injuries on his body. He did not.

[13.7] The following day he took the Plaintiff and the relevant case docket to court. He received the case docket from court later that day. It had

instructions from the Public Prosecutor. He did not know what had happened to the Plaintiff at court on that day. At this stage Advocate Malema came to his assistance and informed the court that on 2 July 2014 the Plaintiff was released by the court on warning. According to the charge sheet, the criminal case against the Plaintiff was finalised by the court on 19 August 2014 when the Plaintiff was found Not Guilty and Acquitted. This in brief was the Defendant’s evidence.

[13.8] During cross examination by Mr Malema he was referred to the J88 and asked if he saw any open wound. He told the court that it was not there on the J88 but that notwithstanding that, he saw it on the complainant’s left thigh. When he was told that the doctor who examined the complainant and completed the J88 did not report that there was an open wound anywhere on the body of the complainant, he said he could not comment on the doctor’s findings. He told the court furthermore that he could not contest the doctor's comments.

[13.9] He told the court furthermore in cross-examination that he arrived at Moletsane where he found the Plaintiff at around 15h00. When it was put to him that the Plaintiff will testify that he was not at home on 1 July 2014; that when he, Mr Madzena and the complainant arrived at the Plaintiff’s house on 1 July 2014 he was not home; that on that particular day the Plaintiff was arrested not his house but at Jabulani Police Station; that the Policeman did not even read him his constitutional rights; that the Plaintiff would dispute that the section 35 Notice was

given to him on 1 July 1014, he said it was not true. He disputed the statement put to him that the section 35 notice was only given to the Plaintiff on 2 July 2014 before he was taken to court. Evidence of Mr Leota concluded ethe evidence of the Defendant.

[13.10] On a question by the court he testified that he arrested the Plaintiff without a warrant of arrest because, according to him or his assessment, the injuries the complainant had suffered were serious. Another reason why he arrested the Plaintiff was that the court was closed for him to obtain a warrant of arrest. He would have been able to obtain a warrant of arrest for the Plaintiff if he had applied for it.

[13.11] On a further question by Mr Malema he told the court that his supervisors at the time took gender-based violence cases against women very seriously and the Plaintiff was therefore to be arrested. This concluded the Defendant’s evidence.

[14] THE PLAINTIFF’S EVIDENCE

[14.1] The Plaintiff testified in the matter. He told the court in his testimony that on 1 July 2014 he had just returned from town. He got off at Jabulani Mall because he wanted to play lotto there. While he was still at the said mall, he received a telephone call from his wife, Naume Monyake, who told him that there were two police officers from Jabulani Police Station who were looking for him at his house. He then went to Jabulani Police Station where on his arrival he told the Police

that he had received information that they were looking for him. He arrived at the said Police Station at 10h00. The Police told him that they would investigate and let him know who was looking for him.

[14.2] The Police left and, on their return, asked him to follow them. He obliged. He was taken to the police cells where he was told to wait for Mr Leota, who eventually arrived. Mr Leota called him by his name and told him that he was going to arrest him because he had assaulted a woman. He took a book, wrote something in it and told him he would be back. He left. When he returned, he took him to the Police cells which was leaking water. He did not sit down until 21h00. The Police called him later and took his belongings.

[14.3] In the cells he could not sleep. The following day the Police gave him a form. He identified that form as the section 35 notice. He was thereafter informed that he would be taken to court. He was indeed taken to court on 2 July 2014. He appeared before court and was released on warning. She attended all the court sessions until the matter was finalized.

[14.4] On 1 July 2014 at the police station the Police refused him with permission to use the telephone. He had to use his own cell phone to call his wife to explain to her that he had been arrested. His wife came to the Police station later and brought him food. He gave his laptop to the Police and requested them to give it to his wife.

[14.5] At that stage in 2014 he was staying at house 1168 Moletsane. He was a member of SANCO, which stands for South African National Civic Organization. He held the position of convener for Zone 8 region. In 2014 had been that position for a year. Before 2014 he was in the leading position of the ANC Youth League.

[14.6] The cell in which he was detained was 4x3 meters. Its condition was bad. There was leakage in the cell. The toilet could not flush but that did not stop the detainees from using it. A detainee would sit on the toilet seat and relieve himself in full view of other detainees. There was blood on the walls and faeces. There was a miasma in the cell. The windowpanes were broken. They were not offered any food while they were detained in the cells.

[14.7] During cross-examination, he told the court that he did not ask his wife why the Police were looking for him. He further said that upon his arrival at the Police station, he did not ask why the Police were looking for him. He admitted that he signed the section 35 notice without verifying his names. He admitted furthermore that the said notice was dated 1 July 2014. The Police did not leave anything at his home.

[14.8] The Plaintiff's witness was his wife, Ms Naome Monyake. According to her testimony, she and the Plaintiff were staying at house number 1168 Moletsane in the year 2014. On 1 July 2014 two men, in the company

of a woman, arrived at her house. They were looking for the Plaintiff. At that time the Plaintiff was not at home. They asked her to inform the Plaintiff that he was required a Jabulani Police station. Thereafter they left. She called the plaintiff and made a report to him about the two men and the woman.

[14.9] Plaintiff later called her from the said Police station and told her that it appeared he would be arrested. He asked her to come to the Police station, which she did. She arrived there between 17H30 and 18h00. She brought him food. The police refused her permission to see him but gave her a bag containing the Plaintiff's laptop.

[14.10] She said that she did not ask the Police why they were looking for the Plaintiff. The reason was that the Plaintiff worked with Police officers sometimes. Her evidence completed the evidence of the Plaintiff.

[15] As correctly pointed out by both counsel, the issue for determination in this matter was whether the Plaintiff's arrest by the Defendant's employees was lawful. Ms Mbhalati contended that the arrest was lawful while on the other hand Mr Malema argued that the arrest was unlawful. The principle of our law is that where, like in the present matter, the Defendant admits the arrest of the Plaintiff, there is cast on the Defendant a duty to prove that such an arrest was lawful. It is therefore trite that the onus rests on the Defendant to justify an arrest. In this regard, see ***Minister of Law-and-Order v Hurley*** **1986 (3) SA 568 at 589E-F**, where the court had the following to say:

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

In my view, the only issue between the parties was where the peace officer had reasonable grounds for the arrest.

[16] THE LAW

[16.1] The bases of the Plaintiff's claims are two grounds, one based on the Constitution and the other 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 a person and s 35(2)(e). 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 a beautifully 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."

Accordingly, any deprivation of freedom is always regarded as prima facie unlawful. It requires justification by the arresting officer to prove justification. In the ***Minister van Wet en Orde v Matshoba*** **1990(1) SA 280 AA,** the court cited with approval the following paragraph in the majority judgement of ***Minister of Law and Order and Another v Dempsey*** *1998(3) SA 19 (A) at page 38B*:

> *"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.*"

Although this passage was cited in respect of the arrest, it applies in equal measures to the subsequent detention.

[16.2] It was argued by Ms Mbhalati that the arrest of the Plaintiff was justified as it had been effected in terms of s 40(1)(b) of the CPA. She submitted that in terms of the four established jurisdictional factors:

1. the defendant's witness was a peace officer within the definition and meaning of peace officer within the provisions of section 40 complainant (1)(b) of the CPA;

2. the peace officer entertained that suspension (should be suspicion);

3. the peace officer ‘s suspicion was that the Plaintiff’s offence of assault GBH fell within the crimes listed in Schedule 1 of the CPA by virtue of a dangerous would being inflicted on the.

4. The suspicion that the plaintiff committed an offence listed in Schedule 1 of CPA rested on reasonable grounds as the information in the docket implicated plaintiff.

[16.3] It does not look like that there is any authority or precedent in our law as to what should be alleged in the pleadings by a party that relies on the provisions of the Bill of Rights or on violation of his Constitutional rights. As a consequences parties are inclined to allege that “my Constitutional right in terms of section so-and-so of the constitution was violated”. The Plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove in order to justify his cation. In this regard see ***Minister van Wet en Orde v Matshoba*** **1990(1) SA 286 AA at page 286B-C**, the court stated that:

> *“Die reg op persoonlike vryheid is meer fundamenteel as eiendomsreg, en daar kan myns insiens geen twyfel bestaan dat ‘n person wat teen sy aanhouding beswaar maak, in eerste instansie niks meer hoef te beweer as da hy deur die verweerder of respondent aangehou word nie……. Die verweerder of respondent dra dan die bewyslas om die aangehoudene se aanhouding te regverdig.:*

The claim under the Constitution was not properly pleaded hence the Plaintiff's application to amend which was made after judgment was reserved but before it was delivered.

[17] The Defendant's 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) the Criminal Procedure Act 51 of 1977 (the CPA). The said section provides that:

"40 (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."

Schedule 1 of the CPA contains a list of serious offences. Among these offences is "assault, when a dangerous wound is inflicted.". This means that, in terms of section 40(1)(b) a peace officer may arrest without a warrant a person who has committed *"assault*" in which *"a dangerous wound"* is inflicted on the victim. The CPA does not define "*dangerous"* or "*dangerous wound".* The assessment of the wound, whether dangerous or not the arrestor or peace officer. He must look objectively at the wound and assess whether, in his opinion, it is a dangerous wound.

[18] In order to successfully rely on the provisions section 40(1)(b) of the CPA, the Defendant satisfy the following four jurisdictional facts. According to ***Duncan v***

Minister of Law and Order **1986 (2) SA 805 AD at 818G-H** the following jurisdictional facts must exist before the power confirmed by section 40 (1)(b) of the CPA may be invoked:

[18.1] the arrestor must be a peace officer.

[18.2] he must entertain a suspicion.

[18.3] it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA

[18.4] this suspicion must be on reasonable grounds."

The law as set out in Duncan's case supra was applied with approval in many subsequent decisions including the *Minister of Safety and Security v Sekhoto and Another* 2011(5) SA 367 (SCA). If these four jurisdictional facts are satisfied, the policeman may arrest the suspect.

[19] The test employed in the determination of whether a peace officer acted lawfully when he arrested someone without warrant is objective. The crucial question would be whether the circumstances prevailing at the time the policeman effected an arrest without a warrant were such that a reasonable man finding himself in the same situation as the policemen involved, would form an opinion reasonably that the Plaintiff has 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 Policeman shall consider the situation and decide objectively whether it warrants an arrest.

"*The test of whether a suspicion is reasonably entertained within the meaning of section 40 (1)(b) is objective. (S v Nel and Another 1980(4) SA 28 at p 334). 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 Plaintiffs were guilty of conspiracy to commit a robbery or possession of stolen property knowing it to have been stolen.".* See ***Mabona and Another v Minister of Law and Order and Others*** **1988 (2) SA 654 (SECLD) at 658D-F**. See also *Duncan's* judgment at 814D-E. where the Court stated:

> *"It was common cause that the question whether a Police of Officer reasonably suspects a person of having committed an offence within the meaning of section 40(1)(b) of the Act is objectively justiciable. And it seems clear that the test is not whether Policeman believes that he has a reason to suspect but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. We know that section 40(1)(b) requires suspicion and not certainty."*

[20] Having set the law out above, I now turn to analysing the evidence of the Police officer. Firstly, there is no doubt that at the time he arrested the Plaintiff as testified above, Mr Loeto was a peace officer as defined in the CPA. In this regard he satisfied the first jurisdictional requirement of Duncan judgment. He testified that on one July 2014 he was allocated case docket 490/6/2014. The charge against the suspect in that case docket was assault with intent to do

grievous bodily harm. Quite clearly, he was not the one who had formulated the charge against the suspect. The charge had seemingly been framed by the Police officer who opened the case docket on 30/6/2014 and who most probably took down the statement of the complainant in that matter. He was therefore convinced that a proper charge had been framed against the suspect.

[21] Inside the case docket there were only two documents, namely the complainant's statement, which had been marked "A1" and a medical legal report by a certain medical doctor. This report is known as J88. In this J88, the doctor had recorded the following injuries:

[21.1] a 2 x 2 cm bruise on the back of the complainant just underneath the left scapula.

[21.2] a 2x 2 cm bruise on the back of left thigh.

[21.3] a 1 cm (…. cannot be read) on the left middle finger.

In my view, it was on the basis of these two documents that the policemen should have ascertained wherher the charge of assault with intent to do to commit grievous bodily harm against the suspect was appropriately framed. In the language of the Schedule 1, it was from these two documents that he should have been able to establish whether there had been an assault in which a dangerous wound had been inflicted.

[22] He noticed, on receipt of the case docket, that it did not have the suspect's statement and furthermore that no suspect had been arrested in connection

with the alleged assault. He said that he perused the complainant's statement. During the day he went to Tladi, in Soweto, to collect the complainant. He interviewed the complainant who made a report to him. The complainant showed him the injuries that she had sustained and made a report to him about how she is she had sustained those injuries. He noticed an injury on her left thigh and on the left stomach. He also saw bruises on the left side of the body. She had an open wound on the left thigh of the complainant. Thereafter they, together with another member of the SAPS, drove to the suspect's house where the suspect, the Plaintiff in this matter, was arrested. He told the Plaintiff that he would arrest him for assault with intent to do grievous bodily harm. There is a dispute between the parties as to the exact place where he was arrested. The place of arrest is, in my view, not very important than the arrest itself. The most important thing is that he was arrested.

[23] During cross examination Mr Malema, counsel for the Plaintiff, referred him to the J88 and asked if he saw any recording by the doctor of any open wound. He admitted that there was record of an open wound on the J88 but was adamant that he saw on the left thigh of the complainant was an open wound. When it was put to him that the doctor did not remark anything about an open wound in the J88 he responded by saying that he could not dispute the doctor's comments. Indeed, there was no open wound on the left side of the complainant's left thigh on the J88.

[24] The absence of an open wound on the J88 is decisive. It means that there was no open wound on the left thigh of the complainant. It also means that there were no objective facts upon which an inference could be drawn that the complainant had been inflicted with a dangerous wound. Accordingly, the Policeman could not reasonably have suspected that the Plaintiff had committed an offence listed in the Schedule 1 of the CPA. It also means that he had no lawful grounds to arrest the Plaintiff. The suspicion was not based on reasonable grounds.

[25] It must be recalled that the arrest of the Plaintiff by the Policeman emanated from the fact that he had seen an open wound on the left thigh of the complainant. He did not say a dangerous wound. The doctor who compiled the J88 on the complainant did not testify. If he had done so, he might have clarified any confusion that could have existed between an open wound and a bruise. The Defendant was certainly not confused by the difference. The Defendant knew that a bruise is not an open wound and that a bruise is not a dangerous wound. It is for that reason that the Defendant did not deem it necessary to call the doctor to testify. Even though the relevant doctor had been called as a witness at the criminal trial of the Plaintiff, the record of the proceedings in the criminal trial was never handed in during the civil trial.

[26] Accordingly, I find that the arrest of the Plaintiff by the Police official, Mr Leota, was unlawful.

[27] I now turn to the issue of damages. To extract maximum benefit from the situation, the following factors relating to the Plaintiff were placed on record. The Plaintiff was an active member of a certain political party. According to his counsel, he was a known businessman. It is difficult to accept this explanation by the Plaintiff's counsel that:

"He was a known businessman locally in construction and since his arrest his has declined as he was referred to as a person who was involved in gender based violence."

This statement by counsel for the Plaintiff cannot be true firstly, in the combined summons, the Plaintiff is described as "*an adult self-employed/salesman."* Nowhere in the combined summons is it stated that he was a businessman normally in the construction. Secondly, in his evidence he never testified that he was a businessman locally in construction. His evidence was that he was a contractor.

[28] He did however testify about the detention cell in which he was detained the night of 1 July 2014. About the cell he said that it was 4 x 3 metres. It is not known how the size of the cell in which he was kept during the night of 1 July 2014 fits into the picture painted in this matter.

[29] He testified about the condition of the cell. About the cell he said there was a leakage in the toilet. This must have irritated him. The toilet could not flush but some of the detainees could use it, nevertheless. A detainee would sit on the

toilet seat and relieve himself in full view of the other detainees. This was obviously discomforting. It was also unhealthy. There was blood and faeces on the walls. This evidence was never contested. Detaining a person in conditions described by the Plaintiff is a violation of such person's Constitutional right as contained in s 35(2) (e) of the Constitution. This section provides that:

"Everyone who is detained, including every sentenced prisoner, has the right-

(f) *to conditions of detention that are consistent with human dignity including at least exercise and provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;"*

This condition was not observed by the Defendant's employees. They detained the Plaintiff in deplorable conditions. He also testified that he was not given any food by employees of the Defendant, another violation of his constitutional rights, in particular s 35(2) (e), which ordains that the detainees must be provided with nutrition at state expense. The Plaintiff's evidence that he was not given food by the employees of the Defendant was never contradicted by the Defendant's witnesses.

[30] The claim based on the violation of human dignity is constitutionally a claim based on the violation section of the Bill of rights contained in the Constitution. With the *actio injuriarum* the Plaintiff claims compensation or *solatium* in satisfaction of the so-called moral or sentimental damages he has sustained. It is the action employed when the Plaintiff's personality has been impaired. The interest of personality protected by the *actio injuriarum* are those interests:

"which everyman has, as a matter of natural right, in the possession of an unimpaired person, dignity, and reputation."

[31] To succeed with his claim based on *actio injuriarum,* the Plaintiff must show that the act complained of constitutes an impairment of his dignity or his reputation. In my view, detaining a person in conditions set out in the evidence of the Plaintiff constitutes a violation of his constitutional right as enshrined in s 35 (2)(e) of the Constitution and it is a conduct inconsistent with the Constitution. The real purpose of the *actio injuriarum* is not so much to obtain compensation as it is to establish some right contained in the Constitution, the protection of dignity and reputation. In such a case, if the Plaintiff successfully establishes his right, he is entitled to nominal damages, although he proves no loss. The leading case on this aspect is ***Edward v Hide*** **1903 T.S 381**. In this judgement Solomon J had the following to say:

"There are many cases where, though in form the action is one for damages, it is really to substantiate and establish some right, and if the plaintiff succeeds in establishing his rights, though he proves no damages, he has substantially succeeded in his action, and the court is therefore bound to give judgement in his favour for nominal damages."

These constitutional damages were awarded by Justice Dikgang Moseneke who, as arbitrator, was tasked with determining the nature and extent of equitable redress in Life Esidimeni arbitration. He was basically empowered to determine any form of redress he deemed appropriate including, an award for constitutional damages.

"For those unfamiliar with this sui generis concept, constitutional damages are monetary damages awarded as appropriate relief in terms of section 38 of the Constitution in recognition that constitutional right has been threatened or infringed. Such damages are meant to serve a greater purpose than simply compensating somebody who has been wronged. They are generally awarded where more traditional forms of redress, such as common law damages would be meaningless or ineffectual and they are intended to promote the values of the Constitution and deter future infringements by effectively operating as punitive damages." Justin Mackie under the heading "**The Problem With The Esidimeni Arbitration Award**" 4 August 2018. It is important, in my view, to point out that the Plaintiff has, however not claimed any Constitutional damages. I will therefore let sleeping dogs lie.

[32] The Plaintiff was detained not for 24 hours as claimed by counsel in his heads of argument. There is no evidence of the time of arrest and detention. There was no evidence tendered about the he was released from the cells to be taken to Court. This Court accepts though that the Plaintiff spent the evening of 1 July 2014 and the morning of 2 July 2014 in the police cells.

[33] In the matter of ***Rahim v Minister of Home Affairs*** **[2015] ZA SCA 92:2015 (4) SA 433 (SCA),** to which I was referred by counsel for the Plaintiff, the court dealt with the circumstances that should be taken into account in the determination of the amount of damages to be awarded in a deprivation of liberty. This judgment could, in my view, be followed where the claim is based

on unlawful arrest and detention. We are enjoined to take into account the (a) circumstances under which the unlawful arrest and detention or deprivation of liberty took place, which would include the fact that the arrest was not only arbitrary but was preceded by arbitrary brutality; (b) the torture by the arresting officer; (c) the conducts of the defendants; (d) the arresting officer's continued attempts to influence the Public Prosecutor after the unlawful arrest to ensure the applicants would remain in custody despite knowing that such arrest was unlawful; and (e) the nature of the duration of the deprivation. None of what happened to the plaintiff in the Rahim matter happened to the Plaintiff in the current matter. In my view, the only blot on the Defendant's employees' conduct in the current matter is to unlawfully arrest and detain the Plaintiff. The deprivation of liberty in this current matter was, in my view, a little over 12 hours, but certainly not 24 hours.

[34] Both counsel referred the court in their heads of argument to the judgment of ***Minister for Safety and Security v Tyulu* 2009 (5) SA 85 (SCA),** in which the court had the following to say:

> "*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 injured feelings. It is therefore crucial 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 right to personal liberty is viewed in our law. I readily concede that it is*

impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regards 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 all the facts of a particular case and determine the quantum on such facts."

A determination of an amount to be awarded as damages cannot, in the nature of things, be a matter for precise calculation. There are no scales by which these damages can be measured and there is no relationship which makes it possible to express them in terms of the award.

[35] I also found guidance in the judgment of ***Dilijan v Minister of Polic*****e, SCA 746/202 [2022] 703**. I was referred to this judgement by counsel for the Defendant. In this judgment, as it was submitted by Ms Mbhalati, the court emphasised that the purpose of awarding damages is not so much to enrich an aggrieved party as it was to offer solatium for the feelings and that the damage should consummate the injury as the Minister is not a cash cow with infinite resources.

[36] Counsel for the Defendant submitted that the court should consider the following factors in awarding damages (a) the circumstances under which the deprivation of liberty took place; (b) the presence or absence of malice or improper motive on the part of the defendant ; (c) the duration of the deprivation of liberty; (d) the social status of the plaintiff; (e) the degree of

publicity of afforded the deprivation of liberty; (f) whether the defendant apologised or provided a reasonable explanation for what happened.

[37] Counsel for the Defendant proposed compensation in the sum of R25,230 to R30,000.

[38] Finally I take guidance from the judgment of the ***Minister of Safety and Security v Seymour* 2000 (6) SA 320 (SCA) at 326 par 20**, where Nugent J stated that:

> *"Money can never be more than a crude solatium the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs to be kept in mind that when making such awards there are many legitimate calls upon the public purse to ensure that the other rights that are no less important also receive protection."*

[39] In conclusion, Mr Malema proposed an award in the sum of R120,000.00. In my view, this is a reasonable proposition. He has referred me to several authorities in which various awards were made. Amounts varying between R50,000 and R120,000 were made by the various courts. The last of these cases was the matter of *Lepasa v Minister of Police* Case number 04299/15 in which Francis J, awarded a sum of our R120000 the case in which the plaintiff was detained unlawfully for 24 hours. It is not clear when this award was made.

[40] In the result I make the following order:

1. The Defendant is hereby ordered to pay the Plaintiff a sum of R120,000.00

2. The Defendant is hereby ordered to pay the Plaintiff interest on the said amount of R120,000 at the rate 9% commencing 15 days after the date of this order.

3. Defendant is hereby ordered to pay the Plaintiff's costs of this action.

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MABUSE J
JUDGE OF THE HIGH COURT

APPEARANCES

FOR PLAINTIFF	:	ADV JVM MALEMA INSTRUCTED MADELINE GOWRIE ATTORNEYS
FOR DEFENDANT	:	ADV LW MBHALATI INSTRUCTED BY STATE ATTORNEY, JOHANNESBURG
DATE OF HEARING	:	20 FEBRUARY 2023
DATE OF JUDGMENT	:	03 APRIL 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Caselines. The date and time for hand-down is deemed to be 10h00 on 03 April 2023.