



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

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

**(3) REVISED.**

**DATE**

**SIGNATURE**

**04/07/2023**

**CASE NO: 20412/2016**

**DATES OF HEARING: 24<sup>th</sup> April to 26<sup>th</sup> April 2023**

In the matter between:

**NAIDOO: JOSEPH**

Plaintiff

and

**THE MINISTER OF POLICE**

Defendant

**JUDGMENT**

## CAJEE AJ:

1. This is a very long outstanding delictual action in which the Plaintiff claims damages in the amount of R400 000 from the Defendant for his alleged unlawful arrest and detention at the Lenasia Police Station on the 9<sup>th</sup> of June 2015 on an alleged charge of common assault, without a warrant, by members of the South African Police Services acting in the cause and scope of their employment with the Defendant. The Plaintiff further alleges that the detention lasted for approximately 14 hours.
2. In the amended particulars of claim, an amount of R300 000 was claimed in respect of "General Damages for pain and shock, violation and constitutional rights including; Deprivation of liberty, impairment of dignity and self-esteem, and embarrassment". A further R100 000 was claimed under the exact same heading.
3. In its plea the Defendant admits the arrest and detention, but denies that it was unlawful. It was further pleaded that the Plaintiff was arrested at 07h30, was charged at 12h40 and released at 13h10 on the 9<sup>th</sup> of June 2015, and that the relevant members of the South African Police were acting in the cause and scope of their employment with the Defendant.
4. In his opening statement Adv. Mmutle stated that the police officers concerned were acting in terms of the provisions of section 40(2) of the Criminal Procedure Act.

5. The original summons was served on the Defendant on the 21<sup>st</sup> of June 2016, almost seven years before the start of the trial of this matter. The matter was only first set down for hearing on the 30<sup>th</sup> of January 2023, when it was postponed due to a death in the family of Adv. Mmutle, who appears for the Defendant. A preferential trial date was obtained from the office of the DJP, being the 26<sup>th</sup> of April 2023, when it was allocated to me.
6. Despite the long delay, there appears to have been material non-compliance with the rules of court and the Practice Manual. In particular, there was no proper pretrial conference held between the parties, either virtual or physical. It was held by exchange of correspondence. I only allowed the matter to proceed to avoid any further delay in the finalisation thereof.
7. It was common cause, alternatively not disputed, that on the 8<sup>th</sup> of June 2015 the Plaintiff appeared to have gotten into an altercation with a client of his, a Ms. Hajira Hattia and her companion. Separately from each other both the Plaintiff and Ms. Hattia laid charges against each other at the Lenasia SAPS. Dockets were opened for each complaint. Case number 144/06/15 was allocated to the complaint made by the Plaintiff, whereas case number 147/06/15 was allocated to the complaint made by Ms. Hattia. Sergeant Sitwe was appointed as the investigating officer in the complaint by Ms. Hattia. Only the docket under case number 147/06/15 was discovered and made available to the court. Despite an invitation to do so, the docket under case number 144/06/15 was not.
8. Adv. Mmutle, acting for the Defendant, accepted that the Defendant bore the onus of justifying the arrest and detention and the onus to begin. He called one witness, Sgt. Ishmail Sitwe, who is and at the time of the arrest was stationed at

the Lenasia SAPS. The start of the trial was delayed for an interpreter, after Sgt. Sitwe insisted, as was his right, that he needed the assistance of one. I was informed that the services of an interpreter was not procured because they are reluctant to testify for the State Attorney as they battle to obtain payment for their services due to the documentation they have to submit, including tax certificates. As it happened, it was the Plaintiff's legal representatives who managed to procure the services of the interpreter who assisted Sergeant Sitwe.

9. According to Sergeant Sitwe, he first had sight of both dockets on the evening of the 8<sup>th</sup> of June 2015 at around 19h30. He started work at 05h00 on the 9<sup>th</sup> of June 2016. His duty, along with a team of some fourteen other police officers stationed at Lenasia SAPS, was to trace and arrest suspects according to a list in their possession. Their duties also included picking up complainants so that they could identify the suspects.
10. Sergeant Sitwe further testified that they first visited the Plaintiff at his home. The purpose of this was to pick him up so that he could point out the suspects against whom he had laid a charge. They then visited the house of Ms. Hattia, who wasn't home. It was at this point that they realised that the Plaintiff was the suspect in the case opened by Ms. Hattia. The confusion apparently arose because she had given his name as Shaun Padiachee and not Shaun Naidoo when she laid the charge against him.
11. According to Sergeant Sitwe a decision was taken to charge the Plaintiff and to take him to Lenasia Police Station. The purpose of the arrest and detention was to process the Plaintiff, charge him and warn him to appear in court the next day, where the prosecutor would make a decision whether or not to proceed with the

case against him. According to Sgt. Sitwe, they did not have any dockets in their possession at the time that the Plaintiff was picked up. They had instead written down the details of the various complainants and suspects on a piece of paper.

12. Sgt. Sitwe testified that the Plaintiff was then taken to the Lenasia police station where they arrived at around 07h30, and where according to Sergeant Sitwe, he intended to register him in the custody cell register and thereafter charge him. When asked why he decided on this course of action as the Plaintiff was also a complainant, Sergeant Sitwe testified that he used his discretion to arrest the Plaintiff as he wanted to ensure that the Plaintiff appeared in court the following morning.
13. According to Sergeant Sitwe the procedure to be followed was to first register the Plaintiff in the Custody Book, thereafter in the Occurrence Book, and thereafter to read to him his rights and warn him to appear in court the following morning.
14. However, according to Sgt. Sitwe, before he could process the Plaintiff, they received a call that an escapee was seen somewhere. He and a number of his colleagues were obliged to attend to this call and he was only able to start processing the Plaintiff by 12pm during which time he had to be detained.
15. Sergeant Sitwe was asked if the Plaintiff made a statement, to which he replied that he did so the day before and that the statement was to be found in docket 144/06/15. According to Sergeant Sitwe the Plaintiff was released on warning at around 13h10 and warned to appear in court the following morning, which he did.

16. In cross examination Adv. Makopo pointed Sgt. Sitwe to a document titled “Notice of Rights in Terms of the Constitution” that appears at page 005-5 of caselines. She pointed out that the case number written at the top thereof, namely 144/06/15 was that assigned to the docket in which the Plaintiff was the complainant. Sgt. Sitwe said this was a mistake and further that it was not completed by him but by a colleague, officer Ingwan, who had given it to the Plaintiff before his release. He conceded that he himself had not read the Plaintiff his rights.
17. Adv. Makopo put to Sgt. Sitwe that the Plaintiff was arrested and detained in respect of a case wherein he was the complainant. This was denied by Sgt. Sitwe.
18. Adv. Makopo asked Sgt. Sitwe if the suspects in the case in which the Plaintiff was a complainant were ever arrested. Sgt. Sitwe answered that the suspects came to the police station after they heard that they were being sought by the police, and were arrested by a colonel Ndlovu. He was asked how he knew this was so, and he answered that he saw the arrest statement. He testified further that colonel Ndlovu had informed him that the suspects had been arrested, detained and given station bail and warned to appear in court. He could not say how much bail, if any, was paid.
19. Sgt. Sitwe admitted that he and a number of police officers arrived at the Plaintiff’s home on the morning of the 9<sup>th</sup> of June 2015 at around 05h45. It was put to Sgt. Sitwe that two of them, officers Nkosi and Sindi, went inside the house while he and the others remained outside in their vehicles. He denied this, saying that all of them went inside the house.

20. Sgt. Sitwe denied that the Plaintiff was still sleeping in his boxer shorts and wasn't given a proper opportunity to dress, which he had to do in the presence of police. He stated that at this stage the Plaintiff was still regarded as a complainant. He only became aware that the Plaintiff was also a suspect when they arrived at Ms. Hattia's house. He denied that they went to other addresses where other suspects were picked up, saying they went to Ms. Hattia's house after picking the Plaintiff up. Sgt. Sitwe testified that the Plaintiff's house was not very far from that of Ms. Hattia. He further testified that her home was about 4km from the police station.
21. According to Sgt. Sitwe, when they got to Ms. Hattia's home, they received a call that she was already at the police station. Upon further questioning by Adv. Makopo, Sgt. Sitwe denied that after picking up the Plaintiff they had proceeded to Thembelihle to arrest other suspects, but admitted that they had they picked up one or two other suspects that morning before proceeding to the police station with the Plaintiff. This stands in contrast to his testimony in chief.
22. Sgt. Sitwe testified that he had attended court the following day to leave the two dockets with the prosecutor, whereafter he left. Sgt, Sitwe further testified that he issued the SAP 496, which is the warning to the Plaintiff to appear in court the next day, and which appears at page 011-50 of caselines. It forms part of the discovered docket in which the Plaintiff was the accused under case number 147/06/15. It was put to Sgt. Sitwe that the Plaintiff would testify that the case number on the SAP 496 was altered from 144/06/15 to 147/06/15 by the prosecutor in his (the Plaintiff's) presence the following day after it was pointed out to him. Sgt. Sitwe, while conceding that he had not made the alteration, stated that he could not answer the question as to who had. Sgt. Sitwe however

insisted that the Plaintiff was arrested under case number 147/06/15 and not 144/06/15.

23. Adv. Makopo further put to Sgt. Sitwe that the Plaintiff would testify that the prosecutor and a colleague of his laughed at him that he was arrested under a case number in which he was the complainant. Sgt. Sitwe stated that the prosecutor had decided not to proceed with the case against the Plaintiff, but that it was for other reasons than the fact that he was arrested under the incorrect case number. It was also put to Sgt. Sitwe by Adv. Makopo that the prosecutor had called the police in front of the Plaintiff to inform them about the error. Sgt. Sitwe stated that he didn't receive any phone call from the prosecutor.
24. It was also put to Sgt. Sitwe that he wasn't obliged to detain the Plaintiff in order to charge him. Sgt. Sitwe testified that it wasn't his intention to detain the Plaintiff. He was supposed to charge him and release him, but because of the delay caused by the emergency which he was called to attend to, that wasn't done.
25. Sgt. Sitwe was referred to a document appearing at page 011-66 of caselines. It forms part of docket number 147/06/15 and is a copy of an extract from the cell register. In it, among a list of other detainees, it is reflected that a thirty five year old male by the name of Joseph Naidoo was arrested for the crime of common assault at 07h30 on the morning of the 9<sup>th</sup> of June 2015. The CR/case number was initially recorded as 144/06/15 but later changed to 147/06/15. It is further recorded that he was issued with a Notice of Constitutional Rights under reference number Q9151818 at 07h43. This would correspond with the number appearing on the Notice of Rights in Terms of the Constitution appearing at page



005-5 of caselines. Sgt. Sitwe was asked where he sourced the information that appears in the cell register. He was unable to provide an answer.

26. Interestingly, although Sgt. Sitwe was not asked to testify on it, there is also an entry on the same page of the cell register according to which a 37 year old female, Hajjira Hattia, was arrested at 16h45 on the 9<sup>th</sup> of June 2015 for the crime of Assault GBH and a Notice of Constitutional Rights was issued at 16h55, under case number 144/06/15.
27. Sgt. Sitwe was asked which docket the Notice of Rights in Terms of the Constitution appearing at page 005-5 of caselines came from. He stated that it was supposed to be from docket 147/06/15. He confirmed that he was not present during the altercation the Plaintiff had with Ms. Hattia and her companion, and that the Plaintiff was charged with common assault which was allegedly committed with the use of his hands only.
28. Sgt. Sitwe maintained that in order to ensure that the Plaintiff appeared in court the next day he needed to be arrested. Adv. Makopo asked him why he exercised his discretion to detain the Plaintiff, to which he once again replied that he only intended to process the Plaintiff, but was called away on an emergency and the Plaintiff had to be detained until he came back. He insisted that the Plaintiff was released at 13h10, and denied that it was already dark when he was released. There is an entry in an extract from the occurrence book at page 011-97 of caselines that corroborates his version. The relevant extracts read as follows:

| Serial | Time | Nature of Occurrence |
|--------|------|----------------------|
|--------|------|----------------------|

| Number |       |  |
|--------|-------|--|
| 436    | 12:40 | D/Sgt Sitwe charges Joseph Naidoo SAP 14/78/06/15 on a case of assault common CAS 147/06/15 for Lenasia Court  |
| 439    | 13:10 | Suspect Released: D/Sgt Sitwe releases Joseph Naidoo SAP 14/78/06/15 on a case of assault common CAS 147/06/15. He was released on warning A5618695 completed. He has no visible injuries or complaints. |

29. The next witness called by the Defendant was Colonel Johannes Monama, a member of the SAPS for 34 years and who has been stationed at Lenasia SAPS since 2016. Ms. Makopo objected to him being called as he wasn't stationed at the station in 2015, when the Plaintiff was detained. I upheld the objection. The Defendant thereafter closed its case.
30. The Plaintiff thereafter took the stand. He testified that he was born on the 16<sup>th</sup> of February 1980, and was residing at 37 Gladioli Avenue, Extension 2 in Lenasia. He testified that he was arrested at 05h45 on the 9<sup>th</sup> of June 2015.
31. He testified that on the 8<sup>th</sup> of June 2015 he had an altercation with some former clients of his who assaulted him. It was a female (Ms. Hajira Hattia) and her male companion. He was allegedly stabbed with a nail file. He reported the incident to the Lenasia police station where he was given a J88 form which needed to be completed by a medical practitioner. He visited a Dr. Cassim, who after examining him, completed it and he returned with it to the police station. A case

was opened under case number 144/06/15. The J88 form can be found at page 005-8 of caselines.

32. In the early morning of the 9<sup>th</sup> of June 2015, according to the Plaintiff, while he was still asleep he heard a loud knocking on his door. His 16 year old son opened the door and some police officers rushed in and proceeded to his bedroom. He was told that he needed to come with them to identify the suspects. There were five male officers and one female officer. He says he was still in his underwear and asked them to go out while he put on his pants. They refused to do so. He managed to put on his shorts, but was not allowed to put anything else on. They claimed to be in a hurry.
33. According to the Plaintiff, he was able to recognize two of the officers, an officer Simon Nkosi and an officer Sindy, whom he recognised as he was previously acquainted with them. He was put into an unmarked Quantum. There were a total of eight vehicles outside and over fifteen police officers present.
34. The Plaintiff testified that he wasn't handcuffed. The convoy then drove to different locations where some fifteen suspects were arrested, who were put in the same vehicle he was in. They were however handcuffed. According to the Plaintiff, they never drove to the home of Ms. Hattia, but drove straight to the police station, where they were made to jump out including himself.
35. According to the Plaintiff, despite his protestations that he was a complainant he, together with the other people who were arrested, was lead to the holding cells. He testified that the officer in charge of the holding cells told him his job was to keep the Plaintiff there. This was around 08h00 in the morning, according to the Plaintiff.

36. According to the Plaintiff he was kept in a cramped holding cell with many others. When he made further enquiries an hour later, he was told to wait for the investigating officer. He was never formally arrested for any offence.
37. The Plaintiff testified that sometime later at around 11h00, the CID officer came in with a number of dockets. He asked this officer what was happening with his case. The officer went back to the charge office and came back and told him that he couldn't find the case docket in respect of his complaint, namely 144/06/15. He asked this officer why was he arrested. The officer took down his identity number and name, checked and said that there was no case opened against him.
38. The Plaintiff testified further that around 14h00, his wife came to the holding cells. He was informed that the investigating officer was on his way. The investigating officer only came in the evening and wanted him to make a statement. The Plaintiff refused, saying he had already made a statement when he opened his case under case number 144/06/15. The investigating officer then left, informing him that it was a shift change.
39. According to the Plaintiff, at around 19h30 officer Nkosi came and told him that he must give a statement or else he would be kept in custody till the next day. At around 19h45 he was taken out of the cells and fingerprinted, but the officer could not tell him why he was arrested.
40. The Plaintiff was referred to the Notice of Rights appearing at page 005-5 of caselines by Adv. Makopo. He testified that he recognized it as a document given to him by the officer in the holding cells, but that the time was 19h40 and not the 07:40 recorded on the notice.

41. The Plaintiff was next referred to the J88 appearing at page 005-8 of caselines. He testified that this was filled in by a Dr. Cassim on the 8<sup>th</sup> of June 2015 in relation to the case he had opened. He testified that he had been stabbed by a female and a male with a nail file during an altercation.
42. The Plaintiff was further referred to the Warning to Appear in Court appearing at page 005-4 of caselines. He recognized this as the document that was given to him after he had signed for the Notice of Rights. According to the Plaintiff he took this document with him to court the next day, where the prosecutor altered the case number from 144/06/15 to 147/06/15 in his presence.
43. Plaintiff testified that the prosecutor and one of his colleagues laughed at him, saying he had been arrested under a case number in which he (the Plaintiff) was the complainant. He was never taken before a magistrate and he was informed that the case against him was withdrawn. He testified further that the Warning to Appear in Court was filled in in triplicate the night before.
44. The Plaintiff was referred to a document appearing at pages 011-52 to 011-63 of caselines. It is titled "Statement Regarding Interview With Suspect" and is part of docket 147/06/15. The interview purportedly took place in the presence of Sgt. Sitwe even though Sitwe's signature does not appear on all the pages of the document. In it, the Plaintiff purportedly told Sgt. Sitwe that he had already given a statement as per case number 144/06/15 and further that he knows Hajjira, that he used to do electrical jobs for her but that she never paid him and owes him money. What purports to be the Plaintiff's signature does appear at the bottom of some of the pages of this document (011-53 to 011-60) and not others (011-61 to 011-63). What appears to be Sgt. Sitwe's signature appears at pages

011-53 to 011-57 but not the others. Pages 011-53 and 011-54 are duplicates of each other. Page 011-52 is the cover page. The statement was not deposed to in front of a commissioner of oaths and Sgt. Sitwe was neither lead nor cross examined on it.

45. According to the Plaintiff, he knew Sgt. Sitwe. He did not recall any interview he had with Sgt. Sitwe. According to him, it was officer Nkosi who interviewed him at around lunchtime. This stands in contrast to what he testified earlier, namely that he was only asked to give a statement at around 19h30 by officer Nkosi. The Plaintiff maintained that he was only released at between 19h45 and 19h55 in the evening and not at 13h10, and that it was already dark when he was released.
46. The Plaintiff testified that as a result of his experience he no longer had any faith in the justice system. He testified that the shower and toilet in the communal cell he was kept in were blocked and overflowing. He couldn't use the toilets as a result. He did not know any of the other people with whom he was detained. He declined to drink the tea and bread that was offered to him for breakfast. According to him no lunch nor any other meal was offered to him.
47. In cross examination, the Plaintiff was asked that since he had laid a complaint on the 8<sup>th</sup> of June, wasn't he surprised that the police had hurried him up. The Plaintiff testified that at the time of his arrest officer Nkosi had his docket in his hand.
48. The Plaintiff testified that he lived about one and a half kilometers from the police station. He was asked if he was called Shaun Padayachee, and he answered

that everyone knew him as Joseph Naidoo. He again denied that Sgt. Sitwe played any role in processing him.

49. The Plaintiff was referred to the copy of the cell register appearing at page 011-66 of caselines. The Plaintiff said he could not comment, in particular in respect of the time appearing thereon that he was given the Notice of Rights in Terms of the Constitution at around 07h38.
50. The Plaintiff was asked by Adv. Mmutle how it came about that he was arrested by officer Nkosi and not Sgt. Sitwe. He testified that he knew Sgt. Sitwe from the community since before the incident, and that he was one of the officers who came inside his house that morning. However, officer Nkosi had his docket in his hand. The Plaintiff was asked if he had complained about the overflowing toilet. He stated that he had to an officer whom he could recognise but that he didn't know his name.
51. He further testified that he earned between R10 000 to R 15 000 per month. He testified that as a result of the arrest and detention he was forced to step down as an usher at his local church and from doing other jobs there because people didn't trust him anymore. He insisted that his rights were never read to him but testified that he did see Sgt. Sitwe in court the next day.
52. Upon questioning by the Court, the Plaintiff stated that it was Sgt. Sitwe who had given him his Warning to Appear in Court the next day, which appears at page 005-4 of caselines. He further testified that he saw Sgt. Sitwe twice on the 9<sup>th</sup> of June 2015, in the morning and later in the evening.

### **Assessment of the Evidence**

53. I find the Plaintiff's version that after picking him up, the police convoy picked up a large number of other suspects more probable in the light of the fact that it took about an hour and forty five minutes (from 05h45 to 07h30) from the time he was picked up at his home until the time they arrived at the police station. If it was only one or two other suspects who were picked up, as testified to by Sgt. Sitwe, not only would it have taken less time, but it would also not be consistent with the relatively large number of police officers who participated in the raid operation.
54. It was the Plaintiff's testimony that he was never handcuffed, unlike the other people who were picked up that day. This is an anomaly that would suggest that he wasn't arrested when he was picked up and would support Sgt. Sitwe's version that he was at that stage only a complainant. However, apart from this fact, the way the Plaintiff was picked up, rushed to dress, and treated bear all the hallmarks of an arrest. Further, by the time the police arrived at his home they should or would have been aware that he was a suspect in a related matter since they would already have had the address of Ms. Hattia as a complainant in docket 147/6/15. I find Sgt. Sitwe's version that they only found this out when they got to Ms. Hattia's home to be improbable.
55. I also do not accept Sgt. Sitwe's explanation that three different documents, the Notice of Rights, the Warning to Appear in Court as well as the Cell Register all contained the same mistake as regards the incorrect case number (144/05/15 instead of 147/05/15) under which the Plaintiff was arrested.
56. Sgt. Sitwe is correct when he said that the purpose of an arrest is to secure the attendance of an accused in court. An arrest is not the only way an accused can



be brought to court, even though once a proper and lawful decision is taken to arrest a suspect, there is no duty on a police officer to use the least invasive means of securing his attendance in court<sup>1</sup>. However, before an arrest without a warrant can be effected the jurisdictional requirements of the relevant portions of section 40(1) of the Criminal Procedure Act have to be satisfied. The relevant portions of the section reads as follows:

Arrest by peace officer without warrant

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

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

57. Common assault, which is the offence with which the Plaintiff was allegedly charged, is not one of those offences mentioned in schedule 1. Even if it was, at no point during his testimony did Sgt. Sitwe testify that he had formed a reasonable suspicion that the Plaintiff had indeed committed the said offence. His testimony was that he wanted to secure the Plaintiff's attendance in court so that the prosecutor could make the necessary decision about whether to proceed with the case against him or not. Thus on his own version there was no basis for arresting the Plaintiff.

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<sup>1</sup> Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)

58. Adv. Mmutle also sought to rely on the provisions of section 40(2) of the Criminal Procedure Act as a justification for the arrest. This too was not specifically pleaded but there was no objection by Adv. Makopo. Section 40(2) reads as follows:

(2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.

59. No evidence was lead as to what law Sgt. Sitwe sought to rely on in arresting the Plaintiff. In the circumstances this defence has to fail too.

60. Adv. Makopo submitted that the Plaintiff was charged under a case number in respect of which he was a complainant. While there is much merit in this argument, I need not decide this issue in light of the finding I've made above.

61. The next issue that has to be decided is the duration of the Plaintiff's detention.

62. Even if the Plaintiff received his Notice of Rights at 07h40, which would be in correlation with the details captured in the cell register, this does not assist in determining whether he was released at 13h10 or closer to 20h00. No evidence was lead of officer Ingwan whose signature appears at the bottom of the document and who, according to Sgt. Sitwe, gave it to the Plaintiff. There is thus nothing to gainsay the evidence of the Plaintiff that he was only given the document some twelve hours later by officer Nkosi. Sgt. Sitwe testified that it was given to him at the time of his release, which according to him was 13h10. It is not inconceivable that the document was only given to him later than it may have been generated.

63. However, the Plaintiff did contradict himself as to the time a statement was taken from him. In examination in chief he testified that he was told by officer Nkosi at around 19h30 that he was required to make a statement or else he would be detained overnight. However, under cross examination he testified that he was asked to make this statement at around midday. This would be consistent with the time of 12h30 reflected on page 011-53 of caselines on the Statement Regarding Interview With Suspect. Of course, the fact that the statement may have been taken at 12h30 does not necessarily mean that the Plaintiff was released at around that time.
64. I accept the Plaintiff's testimony concerning the unacceptable and unhygienic conditions under which he was detained. However, as far as the duration of the detention is concerned, I am of the view that the probabilities are evenly balanced. I cannot, on the evidence before me, decide whether the Plaintiff was released at 13h10 or 19h55. The only objective evidence, namely the entry as contained in the occurrence book, would appear to support Sgt. Sitwe's version on this aspect.
65. While the onus to establish the legality of the arrest lies with the Defendant, in my view the onus is on the Plaintiff to establish the duration of his detention in order to establish the quantum of his damages. However, I can't find any case law or authority on point.
66. Since the probabilities on the duration of the detention of the Plaintiff are evenly balanced, and in my view the onus rests on the Plaintiff to establish the duration of such detention, I find that the Plaintiff fails in discharging such onus<sup>2</sup>.

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<sup>2</sup> National Employers' Mutual General Insurance Association v Gany 1931 AD 187 at 199

67. Hence I find that the duration of the detention can only be established as being about seven and a half hours long (from 05h45 to 13h10) as contended by Adv. Mmutle rather than the approximately fifteen hours contended by Adv. Makopo.

68. In *Minister of Safety & Security v Tyulu*<sup>3</sup> the following was said:

“[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 personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*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 Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 - 29).”

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<sup>3</sup> 2009 (5) SA 85 (SCA) at paragraph [26]

69. I was referred to case of Mathe v Minister of Police<sup>4</sup>, a judgment of Opperman J in this division. I found the cases cited therein extremely helpful in determining an appropriate award in this matter.
70. I am of the view that in the particular circumstances of this case the sum of R40 000-00 (forty thousand rand) would provide adequate compensation to the Plaintiff. While he testified that he had been forced to step down from certain duties at his church because, according to him, people no longer trusted him, I find this hard to accept unreservedly as he was arrested for a common assault and not an offence concerning dishonesty. There is also no evidence, nor was it pleaded, that Sgt. Sitwe or any of the other officers involved in his arrest or detention were motivated by any malice. Nor is there any evidence that the Plaintiff suffered any loss of income as a result of his ordeal. Further, unlike the other suspects arrested and with whom he was transported to the Lenasia police station, the Plaintiff was never placed in handcuffs.
71. As far as costs are concerned, I am of the view that these should be awarded on the appropriate Magistrates Court scale<sup>5</sup>. While the Plaintiff was fully entitled to bring this case in the High Court<sup>6</sup>, in my view it would have been far more expeditiously and cost effectively dealt with in the Magistrates Court, and should have been instituted or transferred there. This was communicated to the Plaintiff's attorney by the State Attorney in a correspondence dated 22 May 2019 which can be found at pages 011-8 to 011-9 of caselines.

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<sup>4</sup> [2017] 4 All SA 130 (GJ)

<sup>5</sup> Goldberg v Goldberg 1938 WLD 83 at 85 to 86

<sup>6</sup> Standard Bank of SA Ltd and Others v Thobejane and Others 2021 (6) SA 403 SCA)

72. I make the following order:

- 72.1. The Plaintiff is awarded damages in the sum of R40 000.
- 72.2. The Defendant shall pay interest at the prescribed rate from date of service of summons to date of payment.
- 72.3. The Defendant shall pay the costs of suit on the appropriate Magistrates Court scale.

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**CAJEE AJ**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**  
**JOHANNESBURG**

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: Adv. N. Makopo

INSTRUCTED BY: Madelaine Gowrie Attorneys

COUNSEL FOR DEFENDANT: Adv. P. Mmutle

INSTRUCTED BY: State Attorney

DATES OF HEARING: 24<sup>th</sup> to 26<sup>th</sup> April 2023

DATE OF JUDGMENT: 4<sup>th</sup> July 2023