



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

**CASE NO: 46654/2017**

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

.....	.....
<b>SIGNATURE</b>	<b>DATE</b>

In the matter between:

**TSHEPO NTOMBELA**

First Plaintiff

**ATHULE MPUKWANA**

Second Plaintiff

And

**THE MINISTER OF POLICE**

First Defendant

**THE NATIONAL DIRECTOR OF PUBLIC**

Second Defendant

**PROSECUTIONS**

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## JUDGMENT

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**SENYATSI, J**

### **Introduction**

[1] This is a claim for damages arising from the arrest of the first plaintiff (“Mr. Ntombela”) and second plaintiff (“the late Mr. Mpukwana”) on 9 December 2016 and their subsequent detention of the plaintiffs until 5 September 2017. The second plaintiff has passed away since the institution of the action and was substituted by the executor of his estate in terms of Rule 15(3) of the Uniform Rules of Court.

[2] The alternative claim of malicious prosecution was abandoned by the plaintiffs at the commencement of the trial proceedings. There was also a special plea filed on behalf of the Minister of Police (“the Minister”) and the National Director of Public Prosecutions (“the NPA”), the defendants for non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act<sup>1</sup>, but it was also abandoned by the defendants.

### **Background and Common Facts**

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<sup>1</sup> Act 40 of 2002

- [3] The plaintiffs were arrested by the South African police on 9 December 2016 at Vlakfontein. The arrest followed an alleged robbery that had taken place at one of the businesses in the area. The arrest was firstly carried out by members of the public who handed over the first plaintiff to the police who were at the scene of the robbery. The key member who effected the arrest passed away before the commencement of the trial.
- [4] The plaintiffs were subsequently taken to Lenasia Police Station and charged for robbery with aggravating circumstances as contemplated in section 1 of the Criminal Procedure Act<sup>2</sup> (“the CPA”) and detained under CAS No.112/12/2016. They were taken to Court and appeared on 12 December 2016 and the matter was postponed to 8 February 2017 for legal aid confirmation, further investigations and bail application. On 8 February 2017 the case was postponed to 7 March 2017 for further investigations. On 21 April 2017 the matter was transferred to the Protea Regional Court for trial. The plaintiffs appeared at the Protea Regional Court on 17 May 2017 and the matter was postponed to 23 May 2017 as the Court was too crowded.
- [5] On 23 May 2017 the matter was postponed to 30 May 2017. The plaintiffs made several appearances in the Protea Court until the charges against them were withdrawn on 15 September 2017 and the plaintiffs were released from custody on the same day. The record of the criminal

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<sup>2</sup> Act 51 of 1977

proceedings on 7 June 2017 indicates that the bail application was abandoned. Following their release from custody, the plaintiffs sued the Minister and the NPA on the grounds that the arrest was wrongful and unlawful.

[6] It is common cause that the arrest took place and it was effected by the police without a warrant. The plaintiffs were detained and spent 9 months in prison before the charges were withdrawn against them. The first respondent, bears the onus to show, on a balance of probabilities, that the arrest and the detention of the plaintiffs was lawful and also must be first to lead evidence to prove this.

### **The First Defendant's Contentions.**

[7] In his plea, the first defendant pleaded that the police when arresting the plaintiffs acted in terms of section 40(1)(b) of the CPA<sup>3</sup> due to the following grounds:

- a. **The arrestor was a peace officer;**
- b. **the arrestor entertained a suspicion;**

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<sup>3</sup> Act 51 of 1977

- c. **this suspicion was that the plaintiffs had committed an offence of robbery; and**
- d. **this suspicion rested on reasonable grounds.**

### **The First Defendant's evidence.**

[8] The Minister relied on the evidence of three witnesses, namely, the former constable Mmadiaswele Segoapa ("Segoapa"), who arrested Mr. Ntombela; Sergeant Thendo Collins Mndwambi ("Mndwambi") who arrested the late Mr. Mpukwana and Sergeant Sithembiso Mthembu ("Mthembu"), the investigating officer in the criminal case.

### *Segoapa's Testimony.*

[9] Mr Segoapa is a police officer and was stationed at Lenasia Police station on the date of the arrest. On 9 December 2016, while on duty he received a report of business robbery at Vlakfontein at a shop belonging to a Pakistani national. He went to the scene of robbery with his partner. At the scene of robbery, he interviewed the owner of the business who told him that five African males, four of them armed with firearms robbed his business of money and other items. The robbers then fled the scene. He

confirmed the list of the items taken by the robbers and took the statement from the complainant.

[10] While he was busy at the scene of crime, members of the community arrived at the scene accompanied by one young man. They stated that they had arrested the man and that he had a firearm in his possession. He described the firearm as black in colour. Segopa then questioned the members of the community about the young man they had apprehended and was told that the young man was one of the robbers who robbed the shop. He noted that apprehended suspect suspect was bleeding from one of his fingers. The complainant pointed the suspect out and this turned out to be Mr. Ntombela.

[11] He was told by the members of public who apprehended Mr. Ntombela that when he was caught, he denied involvement in the robbery and took out his cell phone and money to prove his innocence to them. The latter was then arrested by Segopa and was taken to Lenasia Police Station where he personally took him to the holding cells after reading his constitutional rights. That was the end of his involvement with Mr. Ntombela.

[12] Under cross-examination, he confirmed that he had received training on firearms and confirmed he inspected the firearm. The firearm had a serial number which he noted. The version of Mr. Ntombela was put to him,

namely that on the day of the robbery he went to withdraw money from the ATM at U-Save and slips were shown to him which he did not dispute. Constable Segopa testified that he was told the version about the withdrawal of the money at the police charge office when the suspects parents came.

[13] More versions of the Mr. Ntombela were put to him and at this stage I must mention that the versions would have been relevant in the criminal proceedings rather than the civil proceedings of this nature. This is so because the challenge was to raise doubt whether Mr. Ntombela was guilty or not, which was not relevant for the purposes of wrongful arrest claim. For instance, the witness was challenged about the firearm which he said he retrieved from Mr. Ntombela which turned out to be a toy gun according to the ballistic tests done on it.

#### *Sergeant Mndwambi's Evidence*

[14] Sergeant Mndwambi is a sergeant of the South African Police Services based at Lenasia South Police Station. On 9 December 2016 while on routine patrol driving a marked police vehicle, he was stopped by a black male person who complained of a shooting incident in Univille. Sergeant Mndwambi then called for backup and proceeded to the scene.

[15] Whilst on the other side of the bridge of Weiler's farm he was approached by a member of public informing him about a man lying on the ground complaining that he was chased by two men. He went to the scene where the man was lying and found Mr. Mpukwana, who has since passed away and was the second plaintiff in these proceedings. His estate is pursuing the claim. Sergeant Mndwambi called the ambulance to assist.

[16] Whilst at the scene waiting for the ambulance, he received a report of robbery at Vlakfontein. He proceeded with Mr. Mpukwana to the scene of the robbery in Vlakfontein. upon arrival at Vlakfontein, he found Constable Segoapa and another police officer busy with the scene of the robbery. A member of the public one; Mr Sandile Mkhize pointed out at Mr. Mpukwana as one of the suspects involved in the business robbery and as the one who was shooting at them as they gave chase. Sergeant Mndwambi asked Mr. Mpukwana if he was aware of the allegations. Mr. Mpukwana denied the allegations but said that the first plaintiff, Mr. Ntombela, is his friend and that they were coming from U-Save after withdrawing some money. He asked Mr. Mpukwana about proof of the withdrawal but was not shown any. He then read Mr. Mpukwana his rights and arrested him. He took Mr. Mpukwana to Lenasia South Police Station and detained him.

*Sthembiso Mthembu's Evidence*

[17] He was the first investigating officer on the case from 14 December 2016. He did not know the plaintiffs. He was handed the exhibit which was a black firearm which he took to for ballistics tests in Pretoria. He was however removed from the case as he was transferred to Jabulani Police station. The case was taken over by Constable Mavuso for further investigations. He was challenged that what appeared to him as a firearm turned out to be a toy gun according to the ballistics test results. He opposed bail of the plaintiffs because he did not trust them.

**The First Plaintiff's Case**

*Evidence by the first Plaintiff, Mr Ntombela*

[18] The first plaintiff was the only witness who testified for the plaintiffs case. The second plaintiff, as already stated had passed away. The first plaintiff testified that on the day of the incident, the late Mr. Mpukwana and himself had gone to U-Save to withdraw money. He withdrew R500 at 11h35 and R200 at 11h40. He gave R500 and the withdrawal slips to Mr. Mpukwana and kept R200. He did this to ensure they couldn't have their money stolen. He testified that they also had a toy gun in their possession for the same purpose. They went to buy cigarettes at the

nearby fuel station and thereafter left the place to Mr. Mpukwana's house.

[19] On the way to Mr. Mpukwana's house, they came across three males sitting under a tree who looked at them suspiciously and as they passed them, the males started chasing them. He believed they were being robbed and as they were running away from the males, he heard gunshots. He ran over the bridge and fell down and later on realised he had been shot on one of his fingers. He tried to get up but could not because he was shocked. He threw away the toy gun which was in his pocket and raised up his hands to show that he was not resisting nor a threat. He was apprehended by the men after pleading with them not to kill him and they retrieved the toy gun.

[20] Upon being apprehended he took out his cell phone and money as he thought he was being robbed. He was accused of robbing a Pakistani shop owner and he told the men he had gone to U-Save to withdraw money. His explanation was not accepted by the men and he was assaulted and taken away from the scene.

[21] After walking for about 40 minutes, they arrived at the Pakistani shop where the police had arrived and was arrested after the police were informed by the three men that he was one of the suspects in the robbery. He was put in the police vehicle but after a while, he was taken out.

Whilst standing next to the police vehicle, the complainant was asked if he was one of the persons who robbed the business and the complainant pointed him out. He denied the allegations and explained to the police that he had gone to U-Save to withdraw money but the police did not listen to him and he was taken to the back of the police vehicle. He stated that the Pakistani shop owner was about 10 to 20 meters away when he was asked to identify him.

[22] Whilst inside the police vehicle, another police vehicle came to the scene and inside was the second plaintiff. The police took Mr. Mpukwana to the shop and enquired from the shop owner whether he was also involved in the robbery. The owner said he had not been involved in the robbery but he was nevertheless, apprehended and put in the back of the police vehicle and they were taken to Lenasia Police station where their rights were read and they were detained.

[23] He gave the details about the withdrawal of the money whilst he was at the police station and furthermore that the proof of withdrawal of the money was made available at a later stage by the parents of both the plaintiffs when they came to the police station. He also testified that the money was withdrawn from a Post Office account but this was later on challenged on the basis that the Post Office records did not reveal any withdrawal.

[24] The charges against the plaintiffs were withdrawn by the State. The State noted that:-

- a. **Exhibit A12 could not link the accused to the offence.**
- b. **On consultation with A1, the complainant, could not identify or point out the persons who robbed him;**
- c. **Further the accused cannot be charged with possession of the firearm as the firearm was a toy gun; and**
- d. **No items were found on the accused.**

[25] The first plaintiff was in custody for 9 months and he testified that as a result he felt bad because he lost his job during that period.

### **The Issues for Determination**

[26] The issues for determination are as follows:

- a. **Whether or not the arrest of the plaintiffs by members of the South African Police Services on 9 December 2016 is unlawful;**
- b. **Whether or not the subsequent detention of the plaintiffs following their arrest is lawful; and**

- c. **If the arrest in subsequent detentions, I found to be unlawful, what the appropriate quantum is to be awarded to the plaintiffs by the court.**

### **Legal Principles**

[27] It is necessary, at the outset, to set out the basic principles of our law that are applicable to the determination of the liability by the first defendant following the arrest of the plaintiffs by members of the South African Police.

[28] These are the following, both wrongful and malicious deprivation of liberty are *iniuria* actionable under the *actio iniuriarum*. Wrongful deprivation of liberty (detention) takes place where the defendant himself, or his agent or employee, detains the plaintiffs. Malicious detention takes place under or in terms of a valid judicial process, where the defendant makes improper use of the legal machinery of the State. The requirements to succeed in an action for malicious detention are therefore like those for malicious prosecution namely: that the defendant instigated the detention; that the instigation was without reasonable and probable cause; and that the defendant acted with *animus iniuriandi*.<sup>4</sup>

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<sup>4</sup> Minister of Police and Another v Erasmus (366/2021) [2022] ZASCA 57 para 11; See Neethling et al Law of Delict 5 ed (2006) at 304-306.

[29] When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that: -

- a. **the culpable and unlawful conduct of the police; and**
- b. **was the factual and legal cause of the post-hearing detention. In *Woji v Minister of Police*<sup>5</sup>, 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.**

[30] In *Minister of Law and Order & Others v Hurlley & Another*<sup>6</sup>, Rabi CJ restated the onus to be discharged by the as follows: -

“An arrest constitutes an interference with the liberty of the individual concerned, in it therefore seems to be fair and just to require that the person who arrested or cost the arrest of another person should bear the owners of proving that his action was justified in law.”

[31] In *Minister of Safety and Security v Tyokwana*<sup>7</sup>, it was held that liability of the police for post hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were

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<sup>5</sup> [2014] [2014] ZASCA 108; 2015 (1) SACR 409 (SCA)

<sup>6</sup> 1986(3) SA 568 (a) at 589E-F

<sup>7</sup> [2014] ZASCA 130; 2015 (1) SACR 597 (SCA)

subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime.

[32] In *De Klerk v Minister of Police*<sup>8</sup>, the decisive consideration where the judgment was given in favour of the claimant, was that the investigating officer knew that the appellant would appear in a ‘reception court’ where the matter would be remanded without the consideration of bail. Finally, in *Mahlangu and Another v Minister of Police*<sup>9</sup>, the investigating officer deliberately suppressed the fact that a confession which constituted the only evidence against the appellants, had been extracted by torture and thus caused their continued detention.

[33] Section 40(1)(b) of the Criminal Procedure<sup>10</sup>, allows a peace officer to arrest a suspect without a warrant when the said peace officer reasonably suspects that the suspect has committed an offence listed in Schedule 1, other than the offence of escaping from lawful custody<sup>11</sup>. The jurisdictional facts required to sustain a s 40(1)(b) defence are:

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<sup>8</sup> [2019] ZACC 32; 2020 (1) SACR (CC) paras 58 and 76

<sup>9</sup> [2021] ZACC 10; 2021 (2) SACR 595(CC)

<sup>10</sup> Act 51 of 1977

<sup>11</sup> Section 40(1)(b) provides that:

‘(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’. See also *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 8; 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC) para 77.

- a. **the arrestor must be a peace officer;**
- b. **he or she must entertain a suspicion;**
- c. **the suspicion must be that the suspect committed an offence listed in Schedule 1; and**
- d. **the suspicion must be based on reasonable grounds.<sup>12</sup> If these factors are established, the arrestor becomes vested with a discretion as to how best to secure the attendance of the suspect to face the charge. The peace officer may warn the suspect to appear in court, may summon the suspect or may arrest the suspect.**

[34] Once the jurisdictional facts are established, the peace officer has the discretion of whether to arrest the suspect. However, if the suspect is arrested, a peace officer is vested with a further discretion whether to detain the arrestee or warn him or her to attend court. The arrest and detention of the suspect is but one of the means of securing the suspect's appearance in court.<sup>13</sup> It always depends on the circumstances of the offence on how to secure the suspect to attend court.

[35] The test as to whether the suspicion of the person effecting the arrest is reasonable must be approached objectively.<sup>14</sup> To decide what is a

<sup>12</sup> *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H

<sup>13</sup> *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; para 44 (*Sekhoto*).

<sup>14</sup> *R v Van Heerden* 1958(3) SA 150 (T) at 152E

reasonable suspicion, there must be evidence that the arresting officer formed a suspicion which is objectively sustainable.<sup>15</sup> In dealing with the test, Jones J in *Mabona and Another v Minister of Law and Order and Others*<sup>16</sup> said the following: -

“Would a reasonable man in the second defendant's position and possessed of the same information have considered doctor with good and sufficient grounds for such a big team that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it two have been stolen? It seems to me that in evaluating this information a reasonable plan would bear in mind but that the section authorises drastic police action. It authorises an arrest on the strength of suspicion and we thought they need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and...(t) the original men 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 you will allow himself to entertain a suspicion which will justify an arrest.”

[36] When a peace officer has an initial suspicion, steps must be taken to have the suspicion confirmed in order to make it a reasonable suspicion before the peace officer makes an arrest.<sup>17</sup> The arresting officer has a discretion

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<sup>15</sup> *Ralekwa v Minister of Safety and Security* 2004 (2) 342 at 347E

<sup>16</sup> 1988(2) SA 654 (SE) at 658E-G

<sup>17</sup> *Nkambule v Minister of Law and Order* 1993(SACR) 434(TPD); *Lifa v Minister of Police & Others* {2022} ZAGPJHC795; [2023] 1 All SA 132 (GJ).

on how to secure the attendance of a suspect to Court. The discretion must be exercised fairly, reasonably, and not arbitrarily.<sup>18</sup>

[37] The values of our Constitution must always be interpreted in favour of freedom from arbitrary arrest of a person. Our Courts have held that it could hardly be suggested that an arrest under the circumstances set out in s 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights<sup>19</sup>. The deparavation of liberty must be capricious, despotic or unjustified.<sup>20</sup>

[38] Where it is established that the unlawful conduct of the police is the probable cause of the further detention of a person, there is no onus upon the person to prove the unlawfulness of their continued detention.<sup>21</sup> Each case depends on its own merits. Where the police actively oppose bail under circumstances that are not justified such as failure to confirm the suspect residence, it may well be correct to infer that the arrestor reasonably foresaw that the continued detention would cause harm to the arrested person.

## **Reasons and Conclusion**

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<sup>18</sup> *Minister of Safety & Security v Sekhoto* 2011(1) SACR 315 (SCA)

<sup>19</sup> *Minister of Safety & Security v Sekhoto* above at para 25.

<sup>20</sup> Footnote 15 para 25.

<sup>21</sup> *De Klerk v Minister of Police* [2018] ZASCA 45 at para 62

[39] As regards the arrest of the first defendant, on the day in question, Constable Segopa was visiting the scene of the robbery when the first defendant was brought to the scene by Mr. Mkhize and other community members. His suspicion was based on what he had been told by Mr. Mkhize and other community members as well as the complainant. Constable Segopa had an opportunity to assess the strength of the suspicion by those people and verify the information given to him by the first plaintiff . He claimed in his testimony that the first plaintiff failed to proffer any explanation. This is highly unlikely. The evidence by the first plaintiff is that he informed the police at the scene of robbery and again when he was charged at Lenansia Police station. The arrest of the first plaintiff by Constable Segopa was done in haste and in my view, in violation of his constitutional right of freedom of movement. Accordingly, in so far as the arrest of the first plaintiff is concerned, the first defendant has failed to discharge the onus that the arrest was lawful and that it ought to be protected by section 40(1)(b) of the CPA.

[40] Regarding the arrest of the second plaintiff, he was pointed out by Mr. Sandile Mkhize but the complainant mentioned that the second plaintiff was not one of those who robbed his business. Seargent Mndwambi did not provide any evidence as to why he relied on the claims made by Mr. Mkhize's mainly, his basis for point out the plaintiff or whether he was

actually present when the alleged robbery took place. I find it was arbitrary for Sergeant Mndwambi to detain the second plaintiff without ensuring that he satisfied himself and formed his independent reasonable suspicion that the second plaintiff had committed the offence.

[41] The explanation that the plaintiffs had gone to withdraw money from U-Save ought to have been investigated further by the arresting officer. Accordingly, I am of the view that the arrest of the second plaintiff was also in violation of his rights and that there was no reasonable suspicion formed by Sergeant Mndwambi that the second plaintiff had committed the alleged offence.

[42] In regard to the detention of the plaintiffs, it is common cause that after their arrest and initial detention, the plaintiffs appeared in court on 12 January 2017 where the matter was remanded by the Magistrate's Court to 8 February 2017. On 8 February 2017 the plaintiffs appeared in Court, however, they abandoned their bail application and did not adduce any evidence to permit their release from detention. Effectively, the plaintiffs spent 63 days in custody where their bail was opposed.

## **Quantum**

[43] The award of quantum is always in the discretion of the Court. The previous awards in similar cases serve as a guideline and there are no

defined parameters on how the Court makes the determination on awards. Counsel for the plaintiffs referred to various judgments on the consideration of what award ought to be made for each plaintiff. These are *Mbanjwa v Minister of Police*<sup>22</sup>; *Onwuchekwa v Minister of Police & Another*<sup>23</sup>; *Richards v Minister of Police & Another*<sup>24</sup>; *Lynx v Minister of Police & Another*<sup>25</sup>; *Okonkwo v Minister of Police & Another*<sup>26</sup>; *Lebelo v Minister of Police & Another*<sup>27</sup>; *De Klerk v Minister of Police & Another*<sup>28</sup>; *Mahlangu v Minister of Police*<sup>29</sup> and *Lifa v Minister of Police & Others*<sup>30</sup>.

[44] While being useful and instructive, the awards in those cases are but mere guidelines, and I am constrained to consider the peculiar facts of this case in deciding on fair and reasonable awards of damages.

## Order

[45] Having considered the facts of this case, I am persuaded that the plaintiffs have made out a case. Accordingly, the following order is made: -

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<sup>22</sup> [2017] ZAGPPHC 176;

<sup>23</sup> [2015] ZAGPHC 919;

<sup>24</sup> [2014] ZAGPJHC 280;

<sup>25</sup> [2015] ZAECPEHC 18

<sup>26</sup> [2015] ZAECCLC 8;

<sup>27</sup> [2019] ZAGPPHC 69;

<sup>28</sup> Footnote 17 above

<sup>29</sup> [2021] ZACC 10

<sup>30</sup> [2022] ZAGPJHC 795; [ 2023] 1 All SA 132 (GJ)

- a. The first defendant is ordered to pay each plaintiff the sum of  
R350 000.00;
- b. **Interest on the legal rate on the said amount from the date of  
service of summons to date of payment;**
- c. **The plaintiffs' costs of suit; and**
- d. **Interest on the plaintiffs' costs of suit at the prescribed rate  
from *allocatur* to date of payment.**

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**SENYATSI M L**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**

**Delivered:** This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 13 February 2024.

**Appearances:**

For the Plaintiff: Mr L Naidoo

Instructed by: Logan Naidoo Attorneys

For the Defendants: Adv T Malape

Instructed by: The State Attorney Johannesburg

Date Judgment Reserved: 08 August 2023

Date of Judgment: 13 February 2024