IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 8901/16

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

19 APRIL 2022
DATE

_____
SIGNATURE

In the matter between:

PATRICK LEFA BARDA **PLAINTIFF**

AND

MINISTER OF POLICE **DEFENDANT**

THIS JUDGEMENT HAS BEEN DELIVERED ELECTRONICALLY

JUDGEMENT

SUMMARY: Action against the Minister of Police for unlawful arrest and detention. Jurisdictional requirements for valid arrest in terms of Section 40(1) Criminal Procedure Act 51 of 1977. Discretion – onus. Reasonable suspicion to have commited Schedule 1 offence. Arrest lawful.

MATSEMELA AJ

INTRODUCTION:

1. The parties are as described on the face of the summons. The plaintiff instituted action against the defendants and sued for unlawful arrest and detention.

2. At the close of the case, the plaintiff introduced additional heads of damages, namely, past and future medical expenses, by way of amendment of the particulars of claim.

3. The notice of intention to amend the particulars of claim was objected to by the defendant on the basis that it was excipiable. The plaintiff set the matter down for adjudication without first applying for leave to amend in terms of rule 28(4). I dismissed the application with costs.

4. The plaintiff then brought an application for leave to appeal the dismissal of the intention to amend. The application for leave to amend was dismissed and the plaintiff was ordered to pay the defendant’s costs.

5. Subsequent thereto the plaintiff delivered and effected the amendment and added claims for past and future medical expenses.

6. The defendant reacted to the amendment by applying for leave to reopen its case for the purpose of cross-examining the plaintiff and his

expert witness, the clinical psychologist Ms. Narropi Sewpershad (the expert witness).

7. This application was based on the fact that the plaintiff had led evidence relating to the claims for past and future medical expenses, when there was no such claim. Although the defendant did cross-examine them, I did not consider such cross-examination purposeful and sufficient since it was irrelevant for the purposes of past and future medical because then only pleaded case, was unlawful arrest and detention. Such cross-examination was rendered necessary in respect of the cause of the anxiety and depression that the expert witness diagnosed the plaintiff with.

8. The issue before the court is whether the arrest and detention of the plaintiff was lawful.

BACKGROUND FACTS

9. The plaintiff alleged the following in the particulars of claim:

(a) He was unlawfully arrested without a warrant and without any reasonable grounds by unknown members of the South African Police Service on 11 February 2015.

(b) He was detained at Potchefstroom till 12 February 2015 when he was taken to court and was released.

(c) He initially claimed for compensation in the amount of R 600 000-00. In his amended particulars of claim, he claimed R 600 000-00 broken down as follows:

(i) Past medical expenses R 22 064-25

(ii) Future medical expenses R 60 000-00

(iii) Unlawful arrest and detention R 517 000-00

10. The defendant denied the alleged unlawfulness of the arrest and detention and pleaded that the arrest and detention were lawful in terms of section 40(1)(b) of the Criminal Procedure Act.

COMMON CAUSE

11. Material common cause factors derived from the pleadings and evidence are the following:

(a) The plaintiff was arrested by Warrant Officer Stemmet (Stemmet) on 11 February 2015 at 21:00 on charges of intimidation and kidnapping.

(b) The offence of kidnapping is a schedule 1 offence.

(c) Warrant Officer Stemmet was instructed to effect the arrest by Lieutenant Colonel Morebodi.

(d) The arrest was effected without a warrant of arrest.

(e)The plaintiff was detained at Potchefstroom Police Station.

(f) He was taken to court on 12 February 2015 and was released. The case against the plaintiff was postponed to March 2015.

(g) The arresting officer was acting in the course and scope of his employment as a member of the South African Police Service.

DISPUTED FACTS

12 The following were facts in dispute:

(a) Whether the arrest and detention were lawful.

(b) Whether the plaintiff's anxiety and depression resulted from the arrest and detention.

(c) Whether the defendant is liable for the claims for past and future medical expenses.

EVIDENCE BEFORE THE COURT

DEFENDANT'S CASE

13. The defendant opened its case and called Warrant Officer Stemmet and Lieutenant Colonel Morebodi as its witnesses. Their evidence material to the issues before this court, be it in-chief, cross-examination or re-examination is summarised is summarised below.

WARRANT OFFICER STEMMET

14. He received an instruction from Morebodi to arrest the plaintiff on charges of intimidation and kidnapping. He believed that a case had been opened against the plaintiff and therefore did not doubt the lawfulness of the instruction.

15. He offered the plaintiff an option of presenting himself at the police station the following morning on 12 February 2015. The plaintiff however opted to be arrested and spend the night in custody. He therefore executed the instruction and took the plaintiff to Ikageng Police station.

16. He recorded the arrest of the plaintiff at Ikageng Police Station and took him to Potchefstroom for further detention[1]. The plaintiff was detained at 21:50.

LIEUTENANT COLONEL MOREBODI

17. He confirmed instructing Stemmet to arrest the plaintiff on charges of intimidation and kidnapping. He was asked to intervene in a family dispute between the plaintiff and his then girlfriend, Tsholofelo Maroke (Tsholofelo), by his aunt, Nonie Maroke (Tsholofelo's grandmother).

18. This request was orchestrated by the plaintiff taking away his child from Tsholofelo to Parys, where his mother resided. The child was then four months old.

19. On 10 February 2015, he received a call from Tsholofelo requesting him to go to the plaintiff's residence to assist her get the child from the plaintiff because she was afraid to go into his residence alone. It is common cause that the plaintiff and Tsholofelo had their domestic differences. Morebodi obliged to the request.

20. On his arrival at the plaintiff's residence, he found Tsholofelo on the street. They both went into the plaintiff's residence. They knocked and the plaintiff opened for them. They went inside, sat down and requested the plaintiff to give the child to them. Tsholofelo was to take the child to her residence in Ventersdorp.

21. The plaintiff refused to give the child. He was in possession of his official firearm. He then locked the burglar door and left the solid door

[1] Supplementary index bundle page 20 OB 704 and 705

open. He made threats to them that if Morebodi insisted on taking the child away, he (Morebodi) would leave the place facing upwards, meaning that he would be dead. This evidence was not challenged by the plaintiff in cross-examination.

22. When Morebodi requested him to open the burglar door so that they could leave, the plaintiff refused to open the door to let them leave. It is my view that the only reasonable explanation for the plaintiff's reaction is that he had his domestic differences with Tsholofelo and she was there to take away the child accompanied with Morebodi. This is so because in his evidence, the plaintiff testified that Morebodi was interfering in his domestic affairs with Tsholofelo.

23. Morebodi called the police for intervention at about 18:00. Constables Mue and Demandi attended to the complaint. They found the plaintiff, Morebodi and Tsholofelo in the sitting room with the burglar door locked. His residence was a two-roomed backroom.

24. The two policemen asked the plaintiff to open the burglar door and he refused till his landlord Tshepo Sothoane arrived at about 21:30[2]. The plaintiff opened the burglar door when his landlord, Tshepo Sothoane (Sothoane), arrived and asked him to open for them because he is not supposed to lock them inside against their will.

25. Sothoane also asked the plaintiff to give the child to her mother, Tsholofelo and he obliged. Morebodi and Tsholofelo then went to Ikageng Police Station and Morebodi opened a case docket. Morebodi referred to

[2] Supplementary index bundle pages 40 to 43

the statements of himself, constables Demandi, Tsholofelo and Sothoane in his evidence. The statements confirm his evidence of what transpired as far as they were involved[3].

26. Morebodi also testified and defined the charge of kidnapping and further that he believed that the evidence contained in the case docket (statements) reasonably constituted the offence.

27. He instructed Stemmet to arrest the plaintiff because he had committed a very serious offence. It is common cause that the offence of kidnapping is a schedule 1 offence. He referred to the contents of the case docket in his evidence to justify the decision to arrest the plaintiff.

28. Except for the question whether the plaintiff locked Morebodi in his residence against his will, the above evidence was not challenged in cross-examination.

THE PLAINTIFF'S CASE

29. The plaintiff and Tsholofelo also testified for the plaintiff's case. Their evidence material to the case, in-chief, cross-examination and re-examination can be summarised as follows:

THE PLAINTIFF

30. He is a member of the SAPS stationed at Buffelshoek and holds the rank of constable. He rented a backroom in Potchefstroom, where he lived with Tsholofelo. He was married to Tsholofelo at the time of the incident.

[3] Supplementary index bundle pages 40 to 43

He paid lobola and Morebodi was part of the delegation during the courtship.

31. The above statement is contrary to what Morebodi testified to the effect that Tsholofelo was his girlfriend at the time and his evidence was not challenged in that regard. The statement of Tsholofelo[4] also confirms that they were not married as she referred to him as her boyfriend. However, Tsholofelo testified that they were married to each other. Tsholofelo is related to Morebodi and he is her uncle. They have a child who was four months old at the time of the incident.

32. On 02 February 2015, he went to his maternal home in Parys with the child while Tsholofelo remained in Ventersdorp. The child was sick, and he took the child there to have his mother take care of her medical condition. He returned to Potchefstroom on 08 February 2015.

33. On the same day he called Morebodi and requested his intervention in the domestic issues with Tsholofelo. Morebodi asked him to come to him with Tsholofelo. After the meeting, he informed him that he was going to go to Parys with the child and Morebodi agreed. This version was not put to Morebodi in cross-examination.

34. On his return from Parys, he sent two sms’s to Tsholofelo informing her that he had returned from Parys. Tsholofelo did not respond to the sms’s because she was not happy that he had taken the child to Parys.

[4] Supplementary index bundle page 37

35. On 10 February 2015, he received calls from Nonie Maroke, Tsholofelo’s grandmother and Morebodi and they asked him where the child was.

36. In the week of 10 February 2015, Tsholofelo was in Ventersdorp to bury her grandfather who raised her. He has agreed that she stayed there for a week. Her personal belongings were in Potchefstroom.

37. He did not have any problem if Tsholofelo took the child with her to Ventersdorp. He had earlier so informed Morebodi. The reason why Tsholofelo did not talk to him and requested to take the child with her to Ventersdorp without the involvement of Nonie and Morebodi was never explained. It is my view that this confirms that there was a rift between the plaintiff and the Tsholofelo.

38. On 10 February 2015 at about 18:20, Morebodi and Tsholofelo arrived at his residence in Potchefstroom and knocked at the door. He opened for them and asked them to come in but Morebodi refused and said that they were there to fetch the child. He did not want to enter into any discussion but to fetch the child.

39. Morebodi and Tsholofelo eventually went inside however Morebodi did not sit down. He wanted to take the child and go. He did not like the manner in which he was approached by Morebodi. An argument ensued, and he then decided to lock the burglar door to prevent Morebodi taking the child away.

40. He phoned his mother and asked her to come to Potchefstroom to help sorting out the issues. His mother asked him that Morebodi had to be there when she arrived. It is common cause that she never arrived, and no explanation was tendered for her not arriving. It is my view that this is highly improbable since it was late afternoon and Parys is about 50 kilometres away from Potchefstroom. He testified that she would look for transport to travel to Potchefstroom. It is common cause that she never arrived.

41. He confirmed that he locked the burglar door and that he refused to open it. He did not want Morebodi to take Tsholofelo and his child with him. He testified that he told Morebodi if he wanted to leave then he should leave his wife and child behind. This version was not put to Morebodi.

42. Morebodi called the police and asked them to hurry because he was being held hostage and that he was in danger.

43. Constables Demandi and Mue came. They stood at the door and said nothing. He asked them why they were there, and they responded that they were called by Morebodi. This version contradicts that of Morebodi and the two policemen in their statements. Morebodi’s evidence in this regard was not challenged in cross-examination.

44. Morebodi did also not talk to the two constables. It is my view that this is strange because he had called them and explained his situation, which required them to act as members of the SAPS.

45. He called Sothoane, his landlord and also a member of the SAPS because Morebodi had called Demandi and Mue as his witnesses. Sothoane arrived after about 15 to 20 minutes. He did not say anything. This evidence is contrary to Morebodi's version that Sothoane asked the plaintiff to open the door and he did so. The statement of Sothoane also confirms that he did ask the plaintiff to open the door and let them out[5]. Morebodi referred to the statement in his evidence.

46. He opened the burglar door and Morebodi went outside. He gave the child but could not remember whether to Morebodi or Tsholofelo. They all left the premises.

47. Constable Kgori, his colleague at Buffelshoek, arrived at his residence late at night. He was sent to fetch his official firearm after his station commander received a report of the incident that had happened between him and Morebodi. He was then moved to do administrative work because he did not have a firearm. He received his firearm back after a year.

48. On 11 February 2015, the investigating officer in the case, Warrant Officer Mokolo arrived at his residence. Mokolo asked him to sign a warning statement. He signed the warning statement without stating the facts in defence of the case against him. Mokolo informed him that he would take the case docket to the public prosecutor for decision.

49. On 11 February 2015, Stemmet arrived and informed him that he had been instructed by Morebodi to arrest him. Stemmet gave him two options, whether he should arrest him and let him spend the night in the

[5] Supplementary index bundle page 66.

cells or to meet him at the police station in the morning on 12 February so that he would take him to court. The plaintiff chose to be arrested and spend the night in the cells.

50. He had no problem sleeping in the cells. He chose to be arrested because he thought Morebodi would have thought that he refused to be arrested and he avoided being charged for such refusal.

51. Stemmet took him to Potchefstroom Police Station and detained him after making him to sign his constitutional rights notice. He denied that Stemmet ever took him to Ikageng first, however, Stemmet's testimony was not challenged in that regard.

52. He was detained alone in the cell till 08:00 on 12 February 2015. It is common cause that he was taken to court on 12 February 2015, and he was released. The case against him was withdrawn on 13 March 2015.

53. With regard to the detention conditions, he testified that the cell was smelling, he slept on the 'stoep', he had two blankets, the water was cold and he therefore went to court without bathing, as a result he contracted tonsils in the cell. However, there was no medical evidence before the court that tonsils can be contracted by spending a night in a cell. It was first time that he was detained in a cell.

54. His highest education is matriculation. He had attended many SAPS courses. He enrolled for LLB degree with Unisa in 2014. He dropped out in 2015 because he suffered from depression occasioned by his arrest. This

evidence contradicts the information contained in Dr Narropi Sewpershad's report that he dropped out because of financial problems[6].

55. The depression would deprive him of automatic promotion in the SAPS because it is the SAPS policy that members with depression cannot be promoted.

56. He has eleven and half years of service in the SAPS and he expected to be promoted when he completed twelve years as other members were promoted when they completed twelve years of service.

57. He however did not refer to any policy in the SAPS that negatively affects his promotion chances on the SAPS. He did also not call a witness from the SAPS to confirm this. It is my view that such a policy does not exist as it would be unfair and contrary to section 23 of the Constitution, which entrenches fair labour practices.

58. He further testified that he consulted Dr Thekiso, a clinical psychologist, who later referred him to Dr Moller, a specialist psychiatrist. In this regard, he referred to his medical bill.

59. Counsel for the defendant submitted that the evidence with regard to the plaintiff's loss of chances of promotion should be disregarded as irrelevant as such a case has not been pleaded in the particulars of claim. I agree.

60. He conceded under cross-examination that Morebodi did not intervene in the rift between him and Tsholofelo on his own. He was asked to do so.

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[6] Page 8 para 7.3.6 of plaintiff's expert report

61. He further admitted the content of Constable Demandi’s statement referred to in Morebodi’s evidence.

TSHOLOFELO MAROKE

62. Tsholofelo testified and confirmed that she got married to the plaintiff on 09 February 2014. This version was however not put to Morebodi when he testified that they were boyfriend-girlfriend in February 2015 when the incident happened.

63. She confirmed that Morebodi intervened in her rift with the plaintiff on the request of her grandmother. She confirmed that she went to the plaintiff’s residence to fetch the child. When she and Morebodi arrived at the plaintiff’s residence, she knocked, the plaintiff opened, and they entered and sat down.

64. Morebodi told the plaintiff that they were there to fetch the child. The plaintiff wanted them to talk and Morebodi refused to talk and wanted to leave with her and the child. The plaintiff locked the burglar door and told Morebodi that he would leave alone.

65. An argument ensued between Morebodi and the Plaintiff. The plaintiff phoned his mother and requested Morebodi to speak with his mother. Morebodi refused to talk to the plaintiff’s mother on the phone. The plaintiff locked the door because he said his mother was coming. It is common cause that the plaintiff’s mother never came by the time the plaintiff opened the burglar door at about 21:30 when Sothoane arrived.

66. Morebodi called the police and two policemen arrived and never talked to them. The plaintiff called Sothoane, and the latter arrived after about fifteen minutes. The plaintiff then opened the burglar door and Morebodi moved outside.

NARROPI SEWERSHAD, CLINICAL PSYCHOLOGIST

67. She confirmed that the factual information that is in her report in the plaintiff's expert bundle was given to her by the plaintiff[7].

68. Her evidence supports the plaintiff's claim for past and future medical expenses. The claims for medical expenses are based on her findings that he suffers from anxiety and depression as a result of the arrest and detention. This evidence contradicts that of the plaintiff in which he was suffering from depression already in 2014 and that caused him to abounded university.

THE LAW

69. The main issue before this court is whether the evidence supports the plaintiff's claim that the arrest and detention were unlawful. If the evidence supports the claim for unlawful arrest and detention then I have to proceed to determine the issue of quantum. Therefore, the first cardinal point to be derived from the evidence is whether the plaintiff intentionally and unlawfully locked Morebodi and Tsholofelo inside his residence against their will, thereby committing the offence of kidnapping.

[7] Page 5 para 2.1 of the plaintiff's expert bundle

70. The plaintiff conceded on several occasions that he in fact locked Morebodi and Tsholofelo inside his residence. He then testified that he wanted his mother to find him there when she arrived from Parys.

71. The plaintiff testified that Morebodi intended to forcefully take the child away against his will. However there is evidence that Tsholofelo, was to take the child with her to Ventersdorp.

72. There was no reason for locking Morebodi in the house. Morebodi was a senior policeman and Tsholofelo's uncle. There was no reason that he could do the child any harm. It was the same Morebodi whom the plaintiff testified that she asked for him to assist sort out his problems with Tsholofelo.

73. The plaintiff agreed to let the child go away with Morobedi and Tsholofelo when Sothoane asked him to do so. The question is, why. Nothing had changed. It is my view that the only reasonable explanation for locking the burglar door was to deny Morebodi his freedom to leave the house against his will.

74. During cross examination of the plaintiff, the plaintiff raised an issue with regard to Morebodi deciding not to arrest him on the scene on the kidnapping. In the same vein, it cannot be justifiably questioned why the decision to arrest the plaintiff was made at a later stage when the offences were committed in Morebodi's presence.

75. As Morebodi explained, what he called '*situational appropriateness*' justified his decision not to effect the arrest of the plaintiff immediately on

the scene as that would have rendered the already hostile situation more hostile. It is my view that Morebodi correctly exercised his discretion within his powers conferred in section 40 (1) (b) of the Criminal Procedure Act.

76. The offence for which the plaintiff was arrested is a schedule 1 offence. The next question is whether the defendant has complied with jurisdictional facts as contained in section 40 (1) (b) of the CPA.

77. The undisputed evidence before this court is that the plaintiff was arrested on the charge of kidnapping. Morebodi, in his evidence defined the offence of kidnapping and showed his understanding of the offence.

78. The Defendant pleaded that the arrest and detention were lawful in terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 which in summary provides that:

> (a) The arresting officer must be a peace officer as defined in the Criminal Procedure Act 51 of 1977 at the time of the arrest.
>
> (b) The person being arrested must be reasonably suspected of having committed the offence contained in Schedule 1 of the CPA.
>
> (c) The plaintiff was suspected of having committed offence of kidnapping which is contained in Schedule 1 of the CPA

79. It is trite that the onus rests on a defendant to justify an arrest. As Rabie CJ explained in ***Minister of Law and Order v Hurley***[8]:

[8] *1986 (3) SA 568 (A) at page 65*

> '*An arrest constitutes an interference with the liberty of the 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.*'

80. It is also trite that the question whether the suspicion relied on is reasonable must be approached objectively[9]. The test is not whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee has committed a schedule 1 offence. Such information must be within the arresting officer's knowledge prior to the arrest. The subsequent withdrawal of the charges does not affect the lawfulness of the preceding arrest[10].

81. The test whether a suspicion was reasonably entertained within the meaning of Section 40(1) (b) was enunciated by Jones J in ***Mabona and Another v Minister of Law and Order and Others***[11] as follows:

> "*The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession*

[9] *Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ) at para 9*
[10] *Victor v Minister of Police 39197/2011, 22 October 2014 at 49 - 50*
[11] *1988 (2) SA 654 (D) at 658 D-H*

of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

82. The court held in ***Ramakulukusha v Commander, Venda National Force***[12] that, ordinarily, to establish whether reasonable grounds exist for a suspicion, there must be an investigation into the essentials relevant to the particular case. The officer does not have to be convinced that there is in fact evidence proving the guilt of the arrestee beyond reasonable doubt.

83. It is apparent from the above that at the time of the plaintiff's arrest, the *de facto* arresting officer, Morebodi, did have reasonable grounds to believe that the plaintiff had committed a schedule 1 offence of

[12] *1989 (2) SA 813 (V) at 836G – 837B*

kidnapping in that he was the victim of the kidnapping. In his evidence, he defined the offence of kidnapping, hence he understood the elements of the offence of kidnapping at the time he instructed Stemmet to arrest the plaintiff.

84. Based on the case law referred to above, it is my view that the arrest of the plaintiff was lawful in terms of section 40 (1) (b) of the CPA. It is apparent that the arresting officer arrested the plaintiff for the purpose of bring him before court. This is confirmed by the fact that the plaintiff was indeed taken to appear before the court on 12 February 2015. The plaintiff did not allege and prove that the arrest was aimed at anything else than bringing him before the court.

85. The plaintiff pleadings and cross examination of defendant's witnesses seems to be following a similar reasoning followed by Bertelsmann J in ***Louw v Minister of Safety and Security***[13], where he purported to widen the set of jurisdictional facts which a lawful arrest has to satisfy. According to the court, in addition to satisfying the traditional jurisdictional facts for a lawful arrest, time was ripe to evaluate the lawfulness of an arrest through the prism of the Bill of Rights.

86.In summary the Court went on to say that there is no need in a society founded on the values of equality, dignity and freedom to deprive individuals of their freedom where less invasive means could be used to achieve the objects of arrest, which is, to bring a person suspected of having committed a crime to court. In essence, Bertelsmann J demanded

[13] *(2006 2 SACR 178 (T) 185A-187G)*

that the police action of arrest, in addition to satisfying the traditional jurisdictional facts, has to be objectively reasonable, taking into account whether milder methods of bringing a suspect before court could not be as effective as an arrest. This means that where methods short of arrest could ensure that the suspect appears in court to answer the charges against her, such milder methods should be preferred over arrest.

87. However it is my view that the plaintiff did not really the challenge the lawfulness of the arrest based on the provisions of section 40 (1) (b) of the CPA, but on whether it was reasonable for Morebodi to order the arrest of the plaintiff a day after the commission of the alleged offence.

88. This fifth jurisdictional fact was dealt with in ***Minister of Safety and Security v Sekhoto***[14]*(SEKHOTO)* , where the SCA stated the following:

> "*That leads to the next question, which none of the high courts has considered, namely whether s 40(1) (b), properly interpreted, is unconstitutional and, if so, whether reading in the fifth jurisdictional fact can save it from unconstitutionality. Absent a finding of unconstitutionality, they were not entitled to read anything into a clear text*".

89. The court further stated that[15]:

> "*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*

[14] *2011 (1) SACR 315*
[15] *Ibid para 25*

Bill of Rights. A lawful arrest cannot be arbitrary. And an unlawful arrest will not necessarily give rise to an arbitrary detention. The deprivation must, according to Canadian jurisprudence, at least be capricious, despotic or unjustified".

90. The court accordingly dismissed the notion of a further jurisdictional fact for a lawful arrest without a warrant. In this regard, reference is made to the decision in ***Duncan v Minister of Law and Order***[16], where the court stated that care must be taken not to unnecessarily hamper the power of the police to arrest without a warrant by creating extra limitations not intended by the legislature.

91. It is my view that, in any event, the constitutional rights that the plaintiff is claiming to have been infringed are not absolute but are limited within the confines of section 36 of the Constitution. I agree with the decision held in ***Sekhoto*** supra that up until section 40 (1) (b) has been ruled unconstitutional, there can be no fifth jurisdictional fact.

92. In ***Sekhoto***, the court dealt with the question of discretion and stated that once the jurisdictional facts are satisfied, discretion arises[17]. The officer is not obliged to arrest and if he does so, the decision to arrest must be based on the intention to bring the arrested person to justice as contemplated in section 38 of the Criminal Procedure Act. An exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose other than to bring the arrested person to justice.

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[16] 1983 (3) at 466 para D-E
[17] Para 28

93. The court further stated in ***Sekhoto***[18] that:

> *" .... It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or a senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime as listed in Schedule 1, a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial or where there is serious doubt as to the identity of the suspected person, where the circumstances are such that it would clearly be irrational to arrest.....".*

94. This court is not faced with the latter situation. The suspicion for the commission of the offence in the present case is solid as all the essentials for the offence of kidnapping are disclosed in the evidence before the court.

95. In paragraphs 39 to 41, the court stated the following:

> "[39] *... peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall*

[18] At para 44

within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.

[40] This does not tell one what factors a peace officer must weigh up in exercising the discretion. An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute read in the light of the Bill of Rights. Where the statute is silent on how they are to be exercised that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner described by Langa CJ in Hyundai.

[41] In this case the legislature has not expressed itself on the manner in which the discretion to arrest is to be exercised and that must be discovered by inference. And in construing the statute for that purpose the section cannot be viewed in isolation, as the court below appears to have done".

96. I am satisfied that the arresting officer arrested the plaintiff for the purpose of bringing him before the court and in doing so, he exercised his discretionary powers to arrest within the bounds of rationality. The plaintiff was taken to appear before the court as soon as reasonably possible on 12 February 2015, which was the day following the date of his arrest.

97. It is my view that Morebodi cannot be said to have exercised his arresting powers in a manner that violates the decision in ***Sekhoto*** a with

regard to the exercise of the discretion to arrest. Therefore the arrest of the plaintiff was lawful. In the premises I make the following order

Order

The plaintiff's claim for unlawful arrest and detention is dismissed with costs.

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MOLEFE MATSEMELA

ACTING JUDGE OF THE GAUTENG HIGH COURT

Heard on the 21/11/2018; 22/11/2018; 23/11/2018; 28/112018; 15/07/2019; 04/02/2020; 17/02/2020 and 24/02/2022.

Delivered on 19/04/2022

For the plaintiff	Adv Mosikili
Instructed by	Mphela and Associates
For the defendant	Adv. Steven Mbhalati
Instructed by	State Attorney Pretoria