

In the matter between:

Cynthia Nobuhle Khedama

Plaintiff

and

The Minister of Police

Defendant

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Judgment

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Lopes J

[1] The plaintiff in this matter is Cynthia Nobuhle Khedama ('Ms Khedama'), who instituted action against the Minister of Police (now the Minister of Safety and Security, and to whom I shall refer as 'the Minister') in December 2013. Ms Khedama claims payment of the sum of R1 million, being damages which she suffered as a consequence of her being unlawfully arrested on the 3<sup>rd</sup> December 2011, and her subsequent unlawful detention until the 12<sup>th</sup> December 2011.

[2] Ms Khedama alleged that her arrest and detention were wrongful, or a negligent breach of her rights and liberties by the members of the South African Police Service ('the police' or 'the SAPS'). She alleged, in addition, that the personnel of the SAPS had no reasonable, nor any probable cause, for arresting and detaining her, because they could not have had, and did not have, any

reasonable belief in the truth of the information and/or evidence upon which they acted. In the alternative, she alleged that the information they received or evidence upon which they relied, could not have justified her arrest and detention, nor a conviction. In the further alternative, Ms Khedama claimed that the SAPS owed her a duty of care: not to cause her any delict; or harm; or to cause her to suffer any damages in the pursuit of the case against her. The SAPS breached that duty by arresting her, and in the course of detaining her.

[3] Ms Khedama pleaded that as a result thereof, she has suffered damages for:

- (a) her embarrassment and humiliation;
- (b) the defamation of her character;
- (c) her discomfort, pain and suffering;
- (d) the deprivation of her freedom of movement and wrongful detention and incarceration;
- (e) the psychological shock and trauma suffered by her; and
- (f) travel and subsistence expenses and disbursements incurred by her in relation to her movements;

taken all together, in the sum of R1 million.

[4] The Minister defended the action on the basis that the SAPS had acted within their powers and authorities, in that a warrant of arrest had been issued by the magistrate of Philippi East in Cape Town on the 12<sup>th</sup> July 2007, when the plaintiff failed to attend court on a charge of fraud. The arresting officers had acted on the strength of the warrant, and the fact that the identity of Ms Khedama had been circulated by the SAPS as a wanted person, having committed fraud using her identity number. Her details had been circulated to the South African Airports, the Department of Home Affairs and other Government departments.

[5] On the 23<sup>rd</sup> April 2018, an order was granted by consent of the parties, in this court, in the following terms:

- ‘(a) The defendant is to compensate the plaintiff for her proven or agreed damages arising from her unlawful arrest and detention.
- (b) The defendant is to pay the plaintiff’s costs, such costs to include but not limited to:
  - (i) The preparation done by counsel including the reading of documents.
  - (ii) Costs associated with the appearance by counsel at the Case Flow Conference (sic) held on the 23<sup>rd</sup> June 2017 and the 4<sup>th</sup> August 2017.
  - (iii) Consultation (sic) held with the necessary witnesses:
    - 1. Mr P Khedama
    - 2. Mr B Mart.
- (c) The matter is adjourned sine die for the hearing of quantum.’

[6] The matter then came before me on the 2<sup>nd</sup> and 3<sup>rd</sup> November 2021 on the matter of the quantum of Ms Khedama’s damages. From the terms of the consent order, it is necessary for me to determine the nature and extent of the damages that Ms Khedama has suffered.

[7] The evidence of Ms Khedama may be summarised as follows:

- (a) on the 3<sup>rd</sup> of December 2011 Ms Khedama, then aged thirty, was at the King Shaka International Airport in Durban, together with her boss and his wife. They were in the international departures lounge, about to leave for Turkey on a business trip, to source new fashion items for a store owned and operated by her boss in Durban;
- (b) Ms Khedama was approached by two uniformed members of the police (one black female, and one black male), who led her to a room at the airport where she was questioned for approximately two

- hours. They questioned her about where she was going to, whether she had any fraud matters pending, and who was accompanying her;
- (c) the police officers also asked her about the nationality of her boss, and she told them he was from the Cameroon. They then indicated to her that they would have to get her suitcase to check whether she was carrying drugs, and that she would have to be searched. This was because, as they put it, she was in the company of a 'kwerekwere';
  - (d) they then said that they would obtain the assistance of another female police member to search her, and they indicated to Ms Khedama that she was going to be arrested. They took her to the airport charge office once her suitcase had been retrieved. As they accompanying her , they opened her suitcase and all her belongings fell out of it, to her great embarrassment. This was because her clothing, etcetera was scattered in full view of the public;
  - (e) Ms Khedama was later searched by a female police member, but neither that search, nor the search of her luggage, revealed anything untoward;
  - (f) at the charge office, Ms Khedama was told to phone her parents – she told the police officers that her parents were deceased. She asked them to phone a police officer in Cape Town who had once spoken to her about averments relating to fraud by perpetrators falsely using her identity card/number, and in circumstances where other people had been arrested. She informed the police members at the airport that this had occurred in Cape Town after she had lost her identity document, which had been used by the fraudsters. The loss was reported to the SAPS, and she had opened a case with them, and deposed to an affidavit in that regard;

- (g) Ms Khedama heard the Durban police members talking to the police officer in Cape Town, one Captain Bernard. He confirmed that he knew who she was, and what she had said. Ms Khedama was then instructed to phone her boyfriend (to whom she has subsequently become married), because she was being arrested, and her suitcase needed to be removed. He arrived at the airport in due course, together with a friend of Ms Khedama. They tried to reason with the members of the police, but they would not listen to them. During the conversation, the members of the police asked Ms Khedama about her boyfriend's nationality, and she confirmed that he was not a South African, whereupon they accused her of having an affair with a 'kwerekwere';
- (h) from the airport charge office, she was taken by the police to Tongaat Police Station in the back of a police van. She was handcuffed with her hands behind her back for the duration of her removal from the airport to the police van, where they were removed;
- (i) Ms Khedama described the attitude of the members of the police as harsh and unacceptable in the way they handled her response. They did not wish to listen to anything she said and this affected her very negatively;
- (j) at the Tongaat Police Station charge office she was told to remove her jewellery, which was placed into safe keeping. This was because she was being detained at the police station;
- (k) Ms Khedama testified that she was placed in a small cell, where she was kept on her own for the duration of her ordeal at the Tongaat Police Station. The toilet in the cell was very dirty with faeces and smelt terribly. There was also a filthy grey blanket in the cell. She placed the grey blanket onto the cement bed and sat on it in her

tracksuit. She had no blanket with which to cover herself, and she sat there until day-break, traumatised and unable to sleep. She was not offered any food. She told the court that she was very confused and uncertain as to what would happen to her. She prayed because she knew that she had done nothing unlawful. She also developed an intense headache;

- (l) the next morning, her fingerprints were taken. She asked the member of the police attending to her to ask her boyfriend to bring her a jacket and some socks. Photographs were taken of her and she was returned to the same cell. The cell was too small to accommodate another inmate;
- (m) breakfast, bread and tea were, as she described it, 'thrown through a hole in the door';
- (n) as a result of her distressed state, she was unable to eat or drink and had completely lost her appetite. The stench of the faeces ensured that she had no appetite whatsoever. At lunch time they placed a bowl of rice in soup through the hole in the cell door. She was still so upset that she could not bring herself to eat. This was both because of the shock of her arrest, and the dreadful surroundings in which she found herself;
- (o) at some stage a female police member brought her some headache tablets. Ms Khedama asked her to remind her boyfriend and her friend to bring her a jacket, some socks and some food from KFC. These were later brought to her but she could not eat the food;
- (p) Ms Khedama asked the members of the police to bring her some more water and headache tablets. When they were given to her, she did not take them, but later asked for some more. She was so distressed that she had formed the intention to accrue enough tablets,

eventually to be able to kill herself. She took the tablets but did not count how many there were;

- (q) that night she was unable to sleep although she used her jacket to cover herself. She was kept at the Tongaat Police Station from Saturday, the 3<sup>rd</sup> December 2011 until Friday, the 9<sup>th</sup> December 2011. On Monday, the 5<sup>th</sup> December 2011, she appeared in the Verulam Magistrates' Court, when she was told she would be transferred to Cape Town. She was given no opportunity whatsoever to apply for bail. The magistrate simply informed her of the fact that she would be transported to Cape Town, and she was taken down to the cells at the Magistrates' Court;
- (r) during the period of her incarceration at Tongaat, she was at no stage offered any opportunity to exercise, nor the ability to bathe or wash and clean herself. On Friday, the 9<sup>th</sup> December 2011, the police members from Cape Town arrived, removed her from her cell, handcuffed her, informed her who they were and that they were to transport her to Cape Town. There was one male and one female police member;
- (s) Ms Khedama was then placed in a police vehicle and her journey to Cape Town began. En route, she explained to the police members what had happened to her. Their attitude was that if she had not done anything wrong, then her ordeal would soon be over. They stopped at a garage, and Ms Khedama was asked if she wanted something to eat. She declined, but the female member insisted and bought her 'amahewu' (a soft porridge) and water. Although she drank the water, because of her condition she could not eat. She had tried to do so, but she could not stomach food. Ms Khedama tried to sleep as much as she could in the vehicle on the road to Cape Town;

- (t) when they arrived at Mthatha in the Eastern Cape, she was detained in a police cell overnight and the police members told her that they would fetch her the next day. It was very windy and rainy and the cell had a leaking roof and a door open to the elements. Wind and rain could enter into the cell. A blanket was hanging down from the roof and was similar to the one she had been provided with in Tongaat – ie filthy, and in such a condition that she could not even use it as a form of cushion on the cement bed;
- (u) Ms Khedama spent the whole night sitting and crying. The next morning, the female police member asked her if anything had happened to her. She did so because it was clear that Ms Khedama was in a distressed state. She told the member that she had not been able to sleep because of mosquitos, wind, rain, cold, etcetera. She had not been offered anything to eat, because they had arrived at the police station late in the evening. Ms Khedama was unable to recall the names of the individual police members.
- (v) They continued their journey and eventually stopped at another South African Police Station in Monti in the Eastern Cape (apparently, approximately 240kms away, but curiously, not towards Cape Town, but back towards Durban, if travelling from Mthatha). They had stopped at one or more garages on the way, and Ms Khedama declined any food, but drank water. That night she was placed into a police cell in Monti, together with other female prisoners. Although she had her jacket with her, she was obliged to share a blanket with another female prisoner, a complete stranger to her. The next morning the police members arrived early to fetch her, and they continued their journey to Cape Town. Along the way she was asked by the female member whether she wanted to freshen up,



and she was given a face cloth, toothbrush and toothpaste and allowed to wash herself in a petrol station washroom;

- (w) in the nine days which had elapsed, she had not been able to change any of her clothing, and had not once been given the opportunity to shower or bathe. The extent of her being able to 'freshen up' was that she was once given the opportunity to brush her teeth, wash her face and her under-arms. This was all done under the eye of the female police member;
- (x) they arrived in Cape Town late on the 11<sup>th</sup> December 2011. A female police officer took her fingerprints in order to verify whether she was the person being sought. The fingerprints showed that she was not the person who was sought. She was taken to a cell with other females, and she at last felt more comfortable, because of the presence of females who were leading the prisoners in prayer. She was obliged to sleep next to an elderly lady and share a length of sponge with her. This person was also a complete stranger to her;
- (y) the next morning, she was given a breakfast of soft porridge, bread and tea, and taken to court. Once again, she did not eat the food. She explained her position to the Philippi magistrate and requested bail, stating that she cared for her brother's child who was ten, as well as a child of 15. They had been left at her neighbour's home. She remained concerned that her brothers did not know where she was;
- (z) the magistrate granted her bail of R1 000, but Ms Khedama indicated that she had no money. Bail was then set at R500. The only way in which she was able to secure the bail money, was for it to be sent to the account of the female police member who had accompanied her from Durban. Ms Khedama was eventually released on bail on Monday, the 12<sup>th</sup> December 2011, and instructed

to return in March 2012. She was then able to contact a friend in Cape Town via the female police officer, and was taken to her residence. She was then able properly to clean and refresh herself, and obtain funds from her boyfriend, so that she could fly back to Durban;

- (aa) Ms Khedama had told the magistrate that she had made an affidavit concerning her lost identity document, and the members of the police then wanted another set of finger prints to ascertain whether she was the person she claimed she was.
- (bb) In March 2012 she returned to Cape Town. After again relating her version of events, the magistrate compared her finger prints with those of the person sought by the SAPS. The SAPS members realised she was not the person being sought, and told her that the matter was finalised. She went and recovered the bail money, purchased an aeroplane ticket, and was able to return to Durban, and to her employment;
- (cc) at her place of employment, she encountered suspicion and mistrust. After a period of difficulty, her boss eventually gave her a second chance to travel with him overseas to purchase fashion items. When she arrived at the Durban International Airport on this second occasion, she was again confronted by the same two members of the police who had originally detained her. She was taken to the same room as before, where she explained what had happened after her first arrest, and that the matter was finished. She was very scared and the members of the police eventually then told her that they were 'joking', and had only wanted to establish what had happened after her first arrest. Ms Khedama said that being taken to, and being in the same room with them, was very frightening, because

she feared that the same fate would befall her. She was very upset, but they let her go after approximately an hour;

- (dd) Ms Khedama explained how the trauma of her experience had affected her. She had lost all trust in herself and faith in the police. She was scared and wary, and began to fear members of the police force. She became so ill that she went to see a doctor, but was still so traumatised that she was unable to explain to him what had happened to her. She was treated for blisters on her face and chest, and was asked if something was bothering her. She could not reveal what had happened because of her state of mind;
- (ee) Ms Khedama later explained to another doctor what had happened. This was when she was experiencing severe constipation and stomach problems; and
- (ff) in addition, her relationship with her boss was materially affected. He mistrusted her, and demanded that she pay for the first aeroplane ticket which was wasted. His attitude rubbed off on other persons with whom she was employed, and they did not trust her either. When she had left on the first occasion to travel overseas, she was a sales manager, but on her return, another manager had taken over her store, and she was demoted to a sales lady. Because of her experience and ability, she was nonetheless asked to go on the second trip by her boss, although he still mistrusted her. Her relationship with him was completely destroyed. Her boyfriend, however 'stood by' her.

[8] Ms Khedama was cross-examined by Mr *Mbambo*, who appeared for the Minister. Aspects of his cross-examination were:

- (a) he suggested that Ms Khedama was arrested by a Sergeant Arnold Pather ('Sergeant Pather') and another SAPS member, and they

approached her at the airport. Ms Khedama confirmed that she had been approached by one male and one female police member who were together. She was certain that they were both black persons. They informed her boss that they wanted to take her to a room to speak to her, because she was a wanted person;

- (b) Mr *Mbambo* stated that Sergeant Pather would testify and would say that:
- (i) Ms Khedama was not searched;
  - (ii) he phoned Cape Town but was unable to get hold of Captain Bernard;
  - (iii) he verified the arrest warrant which had been issued for Ms Khedama and thereafter arrested her;
  - (iv) she was treated with respect at all times and he would deny that anyone had used the word 'kwerekwere' in his presence; and
  - (v) Ms Khedama was never accused of carrying drugs.
- (c) Ms Khedama was briefly cross-examined on the journey she underwent, the fact that she wanted to take tablets to kill herself and that she had confused in her evidence where she had been bitten by mosquitos.

[9] The next witness for the plaintiff was Doctor Ebrahim Ajee Chohan ('Dr Chohan'), a practising clinical and educational psychologist. His qualifications and experience, which were not challenged, revealed a practitioner of 40 years' standing, who had been lecturing at Durban Westville University his entire professional life, and continued to do so. He had seen Ms Khedama for the first time approximately nine years after her experience and had interviewed her for about five hours. He was convinced by his interview with her that she would have had symptoms of anxiety, flashbacks, hypervigilance, sleep deprivation

and reduced libido after the incident, and concluded that she had probably suffered from post-traumatic stress disorder. His view was that it was entirely probable that she would have behaved as she claimed during her arrest and imprisonment, including the unsuccessful attempt to commit suicide. His view was also that although Ms Khedama would have returned to her normal activities of life after her experience, she would have experienced a shift in her life. She was withdrawn did not wish to socialise, but would continue with her activities of daily living. He referred to her personality and character, (a reference to her long-standing habits and character), and although the incident would have caused a shift in her day-to-day activities, it would have been transient and she would eventually have stabilized.

[10] With regard to the possibility that Ms Khedama could have been malingering, Dr Chohan drew a distinction between malingering and merely exaggerating. He said that all patients tend to exaggerate their symptoms somewhat, but that malingering was an invention of a sequence of events which had occurred, and a patient guilty of malingering would be lying. In this regard he differed from the opinion of Ms Amina Bhayat ('Ms Bhayat'), the expert for the Minister. He said that although some of the tests he had used in interviewing Ms Khedama were the same as those Ms Bhayat had used, he had used some which she did not use. Dr Chohan said that he had had the advantage of seeing Ms Khedama some months after Ms Bhayat had seen her, he had studied her report, and he had made a special effort to keep an eye out for indications of malingering. He said that, importantly, with regard to the REY-15 assessment, Ms Khedama achieved a score which clearly indicated that there was no malingering present. She had scored 12 out of 15, when a score of seven would point to the possibility of malingering (the higher the score, the less the probability of malingering).

[11] That was the case for the plaintiff. The defendant called two witnesses, Sergeant Pather (formerly Constable Pather) and Ms Bhayat. The evidence of Sergeant Pather may be summarised as follows:

- (a) on Saturday, the 3<sup>rd</sup> December 2011, he was on duty at the international departures area at the King Shaka International Airport in Durban;
- (b) at approximately 5.15pm he had received an alert in respect of Ms Khedama on the computer system which scans travel documents, and on which outstanding warrants of arrest show up. He went to search for Ms Khedama, in respect of whom there was an outstanding warrant, found her and introduced himself to her. He asked to view her travel documents and established that she was the person for whom he was searching. He then asked her about her outstanding cases, and asked her to accompany him to the Movement Control Office to phone the Philippi East Police Station in Cape Town. Although the phone rang, it was not answered at the police station;
- (c) Sergeant Pather then asked Sergeant Maphumulo for assistance because he was trained on a particular mobile device used for scanning documents. This device indicated that there was a document in circulation indicating that Ms Khedama was wanted with regard to a fraud or forgery matter. He then contacted Captain Jacques Meyer ('Captain Meyer') from Interpol, who was stationed within international departures, to verify that Ms Khedama was in fact a wanted person;
- (d) Sergeant Pather indicated that he had treated Ms Khedama with respect and courtesy, and, in fact, he had tried to go the 'extra mile' to assist her, considering that three different people had consulted

with her after he had established that the warrant of arrest was in circulation. He then considered the matter out of his hands;

- (e) Sergeant Pather was unable to say whether Ms Khedama's luggage was retrieved, and he said that she only had her handbag and cell phone with her when he spoke to her. He said that he had accompanied her to the charge office (now referred to as the 'Community Service Centre'). Sergeant Maphumulo had then arrested Ms Khedama, and she was taken to the Tongaat Police Station. He said that he did not see her again until this hearing;
- (f) it was suggested to Sergeant Pather that Ms Khedama had been approached by two black officers. He said that he did not know about that, and that he was confused. He also said that he was not present when she was searched by a black female member of the police;
- (g) Sergeant Pather said that there was only one black police member working with him, and that had Sergeant Maphumulo. He said he did not know about a black member of the police asking Ms Khedama where she was travelling to, or commenting on the fact that she was accompanying a 'kwerekwere';
- (h) Sergeant Pather then said the only police members present had been himself, Sergeant Maphumulo and Captain Meyer;
- (i) in cross-examination, Sergeant Pather conceded that he was not in the presence of Ms Khedama all the time she was under arrest, and did not know what had happened after she had been formally arrested. He did not know who had ordered that her luggage be taken off the flight.

[12] In contradiction to what Mr *Mbambo* said he would say, Sergeant Pather admitted that he knew that Ms Khedama had been searched, as he put it, 'for

weapons etc'. He also had no knowledge whether Ms Khedama's boyfriend and friend had arrived at the airport to assist her. He told the court that Ms Khedama had been arrested by Sergeant Maphumulo in his presence, who told her that she was being arrested for fraud/forgery. Again, in contradiction to what was foreshadowed by Mr *Mbambo*, he admitted that Ms Khedama had given him Captain Bernard's telephone number and that Captain Bernard had said that there was a warrant of arrest which had been issued for Ms Khedama, and that the investigating officer was Captain Bricks. Captain Meyer had spoken to Captain Bernard on the speaker phone in his presence. Sergeant Pather did not reply to the question put to him whether Captain Bernard confirmed that Ms Khedama was not the person being sought.

[13] When cross-examined about the assumption which he had made when Ms Khedama was arrested, Sergeant Pather said he had relied on the alert from his computer system, and the identification by what was referred to as 'the MCD device'. Crucially, Ms Khedama's identity number and passport had not been disclosed by the initial computer alert. Sergeant Pather then suggested that he had never known that Ms Khedama had had her identity card stolen.

[14] In re-examination by Mr *Mbambo*, Sergeant Pather said that he had not arrested Ms Khedama as Sergeant Maphumulo had done so, relying on the 'MCD device'. In answer to a question by the court as to whether Ms Khedama's suitcase had been opened, or fallen open, on the way to the charge office, Sergeant Pather said he did not know, but he had been with her every step of the way to the charge office. He said the suitcase was never opened in his presence but it could have been opened before then.



[15] The next witness for the Minister was Ms Bhayat whose qualifications and experience were not in issue. She explained why she believed that Ms Khedama was, as she put it, ‘magnifying and exaggerating her symptoms’. Unlike Dr Chohan she drew no distinction between the mere exaggerating by a patient of her symptoms, and malingering. Ultimately, Ms Bhayat agreed with the views of Dr Chohan that Ms Khedama showed residual symptoms of post-traumatic stress disorder, and that her activities of daily living would have eventually recovered. She also agreed that there was not much difference between their reports, save for the extent to which she felt Ms Khedama had exaggerated. She felt that it was unlikely that, given her symptoms, Ms Khedama would have been unable to do without psychological or psychiatric management after the incident. She said that the effect of the incident would have affected all areas of Ms Khedama’s life, such as her personal, social, psychological, physical and vocational faculties. She said that matters such as insomnia and inability to eat and becoming socially withdrawn, would have triggered post-traumatic stress disorder.

The State then closed its case.

[16] Mr *Maharaj*, who appeared for Ms Khedama, submitted that there was essentially no dispute regarding the arrest of Ms Khedama, the dreadful conditions to which she was subjected, and the dehumanising experience she endured, especially as a female person. There was no explanation from the Minister as to why she was not given the simple necessities of normal living during her incarceration, nor, indeed, why the incarceration had to endure for the length of time which it did.

[17] Mr *Maharaj* referred me to *Mathe v Minister of Police* [2017] 4 All SA 130 (GJ), where the complainant had been detained for 37 hours and was

awarded damages in line with approximately R76 923 per day. The plaintiff in *Mathe* was arrested on suspicion of being a prostitute, and had suffered a great deal of humiliation as a result. Opperman J, in viewing past cases as a guide to calculating the plaintiff's damages recorded:

[23] Conscious of the limited value that previous cases provide, I will refer to certain decided cases and work my way to an appropriate assessment of damages in this case.

[24] In *Seymour (supra)* a 63 year old man had been unlawfully arrested and imprisoned by the State for a period of 5 days. The Court held that an appropriate award was the sum of R90 000. This was in 2006, an inflationary adjustment would yield approximately R180 000 today. He had had free access to his family and a doctor throughout his detention. He had suffered no degradation beyond that which is inherent in being arrested and detained and after 24 hours he had spent the remainder of this detention in a hospital bed.

[25] In *Van Rensburg v City of Johannesburg*, the plaintiff was a 74 year old male retiree. The plaintiff was detained in a holding cell at the Johannesburg Central Prison. The plaintiff spent about 6 hours in custody. The plaintiff was awarded general damages of R75 000. Adjusted for inflation this is approximately R120 000 in today's money.

[26] In *Pasha v Minister of Police* Epstein AJ awarded general damages of R80 000 (in today's money approximately R110 000). The plaintiff had spent about 9 hours in custody. He was 40 years old at the time of his arrest. He had a wife and children. He worked as a Debt Collector at the office of the State Attorney in Johannesburg. The plaintiff knew the police officials who arrested him as they were colleagues of his wife. After having been handcuffed, the plaintiff was led through a shopping mall which caused him to feel humiliated, embarrassed and his dignity was impaired. People who knew the plaintiff were surprised to see what was happening. He was detained in the holding cell with about 7 other detainees. The toilet in the cell was filthy and there was no toilet paper. The blankets provided were dirty. The plaintiff felt that the community no longer had confidence in him and regarded him as a robber. Sometimes colleagues made negative comments towards him.

[27] In *Mothoa v Minister of Police*, a matter decided during 2013, the plaintiff was forced to endure a detention lasting twenty two hours in the holding cells of the Johannesburg Central police station under appalling conditions. The plaintiff was awarded R150 000 (approximately R190 000 today) as damages for his unlawful arrest and detention.

[28] In *Black v Minister of Police* (decided during 2013), the plaintiff was sleeping inside his parked vehicle outside a building of flats when he was arrested. He had pneumonia and was under medical treatment. He was arrested for drunkenness. He was refused access to a bathroom and defecated in his pants. He was kept in over crowded holding cells both at the police station and at court. It was mid-winter. This ordeal lasted 40 hours. Damages in the amount of R140 000 (approximately R180 000 today) were awarded for his unlawful arrest and detention.

[29] In *Keitumetsi Letlalo v Minister of Police*, the plaintiff, a hairdresser, photographed with his cell phone, police officers assaulting two persons. The police demanded the phone, when he refused he was arrested and detained for 24 hours. There was no legal basis for his arrest. He was kept in appalling circumstances. He was awarded R110 000 (approximately R130 000 today).

[30] In *Mandleni (supra)*, the plaintiff, a 28 year old man who was unlawfully detained for 12 hours in appalling conditions, was awarded R110 000 during April of 2017.' (Footnotes omitted).

[18] Mr *Maharaj* also submitted that the plaintiff was entitled to interest pursuant to the judgment of Ledwaba DJP in *GFE Blything v Minister of Safety and Security & another* (8281/2013) [2016] ZAGPPHC 770 (31 August 2016) and *Drake Flemmer & Orsmond Inc v Gajjar NO* 2018 (3) SA 353 (SCA), as well as s 2A(v) read with s 2(2)(a) of the Prescribed Rate of Interest Act, 1997.

[19] Mr *Mbambo* submitted that the award of compensation is not designed to, nor is the complainant entitled to, be enriched as the result of the award. In this regard he referred to me *Minster of Safety and Security & others v Van der Walt & another* 2015 (2) SACR 1 (SCA) and *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N). He submitted that *Sibiya* sets out how the quantum of damages is to be established. He also referred to *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325, where damages of R500 000 for five days' imprisonment was reduced to R90 000. Mr *Mbambo* submitted that the facts of each case have to be carefully analysed and

suggested that the circumstances of deprivation of liberty set out in *Rahim & others v Minister of Home Affairs* 2015 (4) SA 433 (SCA) para 27 and *Minister of Home Affairs v Rahim & others* 2016 (3) SA 218 (CC) are relevant.

[20] With regard to my assessment of the witnesses who testified:

- (a) Ms Khedama was, in my view, unshaken in her recollection of events. Whatever small discrepancies may have arisen between the statement she previously made and her evidence in court, were matters which one would expect to have occurred after the lapse of such a long period of time. She was, in my view, a credible witness who clearly suffered from her terrible experience, and the emotions which she expressed in the witness box were heartfelt and genuine. Her evidence was coherent and was logical;
- (b) Sergeant Pather, on the other hand, was confused about a number of matters, and contradicted his own evidence, and what Mr *Mbambo* had said he would say. That was probably because this was one incident, not an apparently unusual one, which took place during his working life over ten years ago. There are several important differences between his evidence and that given by Ms Khedama. I unhesitatingly accept her version in preference to his, because she was the person who suffered a traumatic experience, and is more likely to have remembered it in greater detail. Part of Sergeant Pather's confusion arises from the fact that various police officers dealt with Ms Khedama at the airport, and matters may have occurred when he was not present, or subsequent to the duration of the time he was with Ms Khedama. It seemed very probable to me that Ms Khedama was initially approached by two black members of the police, one male and one female, and thereafter came into contact with Sergeant Pather. The fact that Ms Khedama would have

been suspected of carrying drugs by the police members, have been questioned with regard to the nationality of her boss and her boyfriend, and the fact that they were derogatorily referred to as 'kwerekweres', all have the ring of truth in my view. My assessment of the conflicting evidence is strengthened by the fact that Ms Khedama would have only been searched by a female officer, which is what she said happened. In addition, and in confirmation of Ms Khedama's credibility, it was noteworthy that she did not seek to gloss over the kindnesses shown to her by the female police member who accompanied her to Cape Town;

- (c) with regard to conflicts between the evidence of Dr Chohan and that of Ms Bhayat, they relate almost solely to the allegation that Ms Khedama was malingering, in the sense that she was lying about the arrest and the detention she endured. Given that Dr Chohan had been alerted to the possibility of malingering prior to his interview with Ms Khedama, I accept his statement that he was alert for signs of malingering. The fact that he and Ms Bhayat differed on the interpretation of malingering versus exaggeration, does not create a significant problem with regard to the acceptance of the evidence. I have no hesitation in accepting the evidence of Ms Khedama with regard to the circumstances of her arrest, and what happened. In those circumstances the probability of her having suffered as indicated by Dr Chohan is highly probable.

[21] The next issue to be considered is the quantification of the damages suffered by Ms Khedama. In doing so I have taken heed of the helpful approach set out by Opperman J in *Mathe* (supra, paras 18-22) by which my approach is guided, together with the evidence of Ms Khedama and my acceptance thereof.

[22] I deal with the heads of damages as they are reflected in Ms Khedama's particulars of claim, although not in that order:

- (a) the unlawfulness of her arrest. What was inexplicable and unacceptable in the circumstances of this matter, was that the police did not take the time, nor did they make the effort upon the original arrest of Ms Khedama, to verify that she was the correct person. This could easily have been done by having the fingerprints in the possession of the SAPS in Cape Town scanned, copied or otherwise transmitted to the SAPS authorities in Durban, and a comparison carried out of the fingerprints. This would, as was later revealed, have indicated unequivocally that Ms Khedama was not the person for whom the police were seeking. In all the circumstances it would have been a simple matter for the members of the police at the airport to have determined the validity of the identity of Ms Khedama as the wanted person. This is particularly so, if, as Sergeant Pather put it, that he merely wanted to see that she could board the plane and not be delayed;
- (b) the refusal to grant Ms Khedama an opportunity to apply for bail. Whilst this may be something which concerns the Minister of Justice, rather than the Minister of Safety and Security, and the fact that no malicious conduct was demonstrated on the part of the learned magistrate, the police officials could have dealt with this aspect in the first instance (see: *Minister of Safety and Security & others v Van der Walt & another* 2015 (2) SACR 1 (SCA) paras 20-25, and *De Klerk v Minister of Police* [2019] ZACC 32, paras 104-113). Ms Khedama was no threat to society in general, and was not considered dangerous or violent;
- (c) the continued detention of Ms Khedama. No explanation whatsoever was given as to why it was necessary to continue to detain Ms

Khedama at the Tongaat Police Station. No suggestion or explanation was given as to why a female police officer could not have accompanied her on a flight to Cape Town immediately after her appearance in court in Tongaat on the Monday. I have no doubt that it would have been a far less expensive exercise than two officers driving from Cape Town to collect Ms Khedama at Tongaat, and then driving back again with her over three days. It would certainly have been more efficient. There was not a shred of evidence to suggest that Ms Khedama was in any way a violent person, or a person wanted for crimes involving violence, which may have precluded a more efficient and less expensive method of transporting her to Cape Town;

- (d) an inexplicable aspect of the journey to Cape Town was the stop-over at Monti in the Eastern Cape. That area is approximately 240 kms from Mthatha, and in the direction of Durban (and not Cape Town, where they were headed), resulting in the journey being extended to three days instead of two days. There is absolutely no reason why a comfortable car journey from Tongaat to Cape Town cannot be achieved in two days. There may have been other reasons for the visit to Monti, but no explanation by any official regarding the necessity to have done so, was put before me;
- (e) the circumstances of her imprisonment. The Bill of Rights contained in chapter two of the Constitution is described therein as a cornerstone of democracy, which affirms the democratic values of human dignity, equality and freedom. All organs of State are bound by it. Under s 12, which deals with freedom and security of persons, everyone has the right not to be treated in a cruel, inhuman or degrading way, and the right to bodily and psychological integrity. In addition, under s 35, every arrested person has the right 'to

conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'. The manner in which Ms Khedama was treated was appalling, and should not have been endured by any person who is arrested. It made a mockery of the provisions of the Bill of Rights. The members of the SAPS have a duty to pursue criminals of all kinds, and to arrest them, and ensure that they attend court. The principal purpose of pre-trial imprisonment is to ensure the attendance at court of persons accused of crimes. Pre-trial detention is in no way, shape or form designed to be a form of punishment. In this modern age, and given the resources available to the State, it is inexplicable and unacceptable that persons who are arrested, should be held in filthy, unsanitary and unsuitable conditions. The restriction on Ms Khedama's liberty for 12 days was bad enough. The fact that it was attended by the dreadful treatment of her by members of the police and the State viewed collectively, does not accord with the values of the new South Africa, or the obligations of the State in our Constitution;

- (f) the defamation, embarrassment and humiliation endured by Ms Khedama. She had the humiliating experience of being taken away by the police in front of her boss, and accused of fraud/forgery, a fact which must have become known to all who knew her. This fact manifested itself in her being mistrusted at work. This was compounded by the most humiliating aspect of this saga for Ms Khedama, when the two police officers who initially detained her, again detained her on her second trip to Europe, and again in the presence of her boss. This was after Ms Khedama had been able to convince her boss by her experience and ability, to give her a second



chance to travel with him to purchase fashion items in Europe. The act of the members of the police in this regard would have only strengthened the belief of Ms Khedama's boss that she was in fact involved in some nefarious activities, and was not to be trusted.

- (g) Ms Khedama's loss of employment, and damage to her reputation. She testified that, as the direct result of her being arrested and detained, her boss completely changed his attitude towards her, became suspicious and mistrusting of her, then gave her a second chance, and was again disappointed in her. The consequence of this was that she was forced to abandon her employment. One can only imagine how this played out when she sought employment elsewhere. All this ensured that the humiliation and embarrassment continued, and would, no doubt, have extended her suffering and inability to put the incident behind her, and move on with her life.
- (h) The psychological shock and trauma suffered by Ms Khedama. Both Dr Chohan and Ms Bhayat were in agreement that Ms Khedama would probably have suffered from post-traumatic stress disorder, and would have required professional assistance. This includes the terror suffered by Ms Khedama at being questioned again about the matter, which had been clearly resolved. This is to say nothing of the fear and discomfort which she would have felt in addition to her humiliation before her boss. Ms Khedama's appalling experience was undoubtedly made worse by the suggestion by the members of the police who questioned her on the second occasion that they were only 'joking' prior to releasing her.

[23] There is no doubt that several of the constitutional rights of Ms Khedama were ignored, and she suffered cruelly at the hands of the members of the police

in both her arrest and subsequent treatment. The act of the police members in detaining and questioning her for a second time was clearly malicious. Malice was not pleaded by Ms Khedama, but was clearly demonstrated in the evidence led before me. Members of the SAPS are not appointed to use their powers to play games, which is what happened. All this was further exacerbated by the appalling conditions which were provided by the State for her to be detained as an awaiting trial prisoner.

[24] Ms Khedama has claimed damages collectively in the sum of R1million. In *Rahim*, persons were arrested as illegal aliens and detained for various periods of time. *Rahim* is distinguishable because the circumstances under which they were detained were not dealt with, nor was any evidence led about the effect of their detention upon them. Globular amounts were awarded according to the length of time each appellant spent in prison. They were detained at either the Lindela Detention Facility in Krugersdorp, or at St Albans Prison, or at KwaZakhele Police Station. The awards made in the Supreme Court of Appeal (and not challenged on appeal to the Constitutional Court) ranged from R1 333 per day to R1 600 per day. These values are, however, not in accordance with other awards made by our courts, no doubt due to the circumstances of that case. Mr *Mbambo* also referred me to *Sibiya* where the plaintiff was awarded R5 000 per day for 43 days' imprisonment. That was in 2008.

[25] A common feature of many of the cases dealing with unlawful imprisonment is the description of the conditions of imprisonment, involving filthy cells and blankets; appalling, unclean and patently unhealthy toilet conditions with no toilet paper; and a complete lack of facilities for exercising, bathing, etcetera for persons held as awaiting trial prisoners. That Ms Khedama had to share a blanket with a fellow-prisoner, and on another occasion share a

foam mattress with another, demonstrates a total lack of respect for both parties in each case. Courts are all too aware of the budgetary constraints applicable to new prison facilities, but those constraints cannot be raised as a defence to forcing detained persons to survive in appalling conditions. It is unacceptable and inexcusable for the State to do so. It is significant that both in cross-examination and argument, Mr *Mbambo* wisely skirted the conditions under which Ms Khedama was held. The conditions of pre-trial detention, as disclosed in this and other cases, especially for non-violent crimes, are archaic and primitive, and have no place in a modern democratic society, allegedly concerned with the welfare of its citizens. Most of these structures were designed and constructed at a time when the State had little or no compassion or concern for the majority of our citizens. A ‘world-class’ Constitution, however, is worth nothing if it is not implemented. The motto of the SAPS- ‘Protect and serve’ rings hollow in the light of the facts of this matter. The principles of ‘Batho Pele’, were simply ignored throughout the arrest and detention of Ms Khedama. Urgent reform is very obviously necessary, and as long as the State continues using unconstitutional methods and appalling facilities within which to detain persons, it cannot be heard to complain about the extent of the awards of damages against it.

[26] I compute Ms Khedama’s damages as follows:

- (a) wrongful arrest – R100 000;
- (b) wrongful detention, including the deprivation of her liberty and her loss of amenities of life – R80 000 per day for a period of 12 days– R960 000;
- (c) defamation of character, including her embarrassment and humiliation before her employer on two occasions, the loss of her reputation and her loss of employment – including the insulting treatment of her by members of the police in suggesting that she was

carrying drugs because her employer was a foreigner, and similar insults with regard to her then boyfriend on the same basis – R500 000; and

- (d) general damages for suffering, and psychological shock and trauma as the result of the appalling conditions to which she was subjected and the repeated behaviour of the police members in detaining her and questioning her for a second time – R200 000.

As Ms Khedama has only claimed the sum of R1 million, that is the maximum amount I am able to award.

[27] With regard to an award of interest, the Prescribed Rate of Interest Act, 1975, provides for the payment of interest on unliquidated debts in s 2A, the relevant portions of which are:

**‘2A. Interest on unliquidated debts.-**(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law. . . shall bear interest as contemplated in section 1.

(2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.

...

(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law. . . may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.

(6) The provisions of section 2 (2) shall apply *mutatis mutandis* to interest recoverable under this section.’

[28] In *Takawira v Minister of Police* (A3039/2011) [2013] ZAGPJHC 138 (11 June 2013) the court dealt with the award of interest on unliquidated damages as follows:

‘55. *Mr Oppenheim* on behalf of the appellant argued that in terms of the Prescribed Rate of Interest Act 55 of 1977 a plaintiff suing in delict is entitled to interest reckoned from date of demand or at least from date of service of summons.

56. I do not agree that the Act can be construed as applying indiscriminately to all illiquid claims. On the contrary common sense dictated that the starting point is the date upon which the damages are assessed. The learned magistrate purported to assess them not at date of demand or at date of summons, but at date of judgment. The amount ordered was therefore not an amount that came into existence on any date sooner than the date of judgment- any such amount would have been less if regard is had to the erosion of the value of money. The corollary is that the amount actually determined was not an amount due and payable at any date sooner than the date of judgment.

57. If the magistrate had purported to calculate the quantum at some earlier date then there would be merit in the contention advanced. Such a course to the best of my experience is unheard of. Damages of this nature are assessed at date of judgment and any attempt to claim interest on it from an earlier date would negate the very basis of the determination, and require a discounting value for inflation or CPI to be taken into account- a most unrealistic and futile task when the obvious route is to calculate damages at current values at the date when judgment is delivered.

58. The methodology adopted by magistrate in calculating damages at the present day values at date of judgment therefore renders the provisions of section 2A(3) of the Prescribed Rate of Interest Act operative and precludes reliance on section 2A(1). Accordingly the submission that the learned magistrate erred in not allowing interest from a date earlier than date of judgment is unsuccessful.’

[29] In *Blything*, the learned Deputy Judge President declined to follow this approach. Ledwaba DJP dealt with these passages as follows, at para 15:

‘I am in agreement with the submission made by the plaintiff that the court in *Takawira*, incorrectly relied on section 2A (3) in coming to the conclusion that the

unliquidated damages could not incur interest due to it being undetermined until date of judgment.’

[30] In *Drake Flemmer*, para 63, Rogers AJA stated:

‘The legislature exercised that policy choice by inserting s 2A into the Interest Act with effect from 11 April 1997. That section provides that interest at the prescribed rate runs on an unliquidated debt from the date on which payment was claimed by service of a demand or summons, whichever is the earlier, unless the court in the interests of justice determines a different date or rate.’

The learned Acting Judge of Appeal referred to the bar in RAF cases with regard to pre-trial interest, but we are not concerned with that legislation here. I know of no similar legislation governing wrongful arrests and detention, and I was not referred to any in argument before me.

[31] In my view interest on the amount of damages awarded should run from the date of service of the summons, and not, as claimed in the amendment of Ms Khedama’s particulars of claim delivered on the 2<sup>nd</sup> August 2018, from the date of Ms Khedama’s imprisonment. The summons was served on the Minister on the 20<sup>th</sup> December 2013, and interest was then sought ‘*a tempore morae* to date of payment’.

[32] With regard to the question of costs, there is no reason why the Minister should not pay Ms Khedama’s costs. The Minister’s original plea, which was delivered on the 26<sup>th</sup> March 2014, and only after a Notice of Bar was delivered on the 19<sup>th</sup> March 2014, denied every averment in Ms Khedama’s particulars of claim, save her identity. An amended plea was delivered on behalf of the Minister on the 14<sup>th</sup> June 2017. Only then was it admitted for the first time that Ms Khedama was arrested. The plea then sets out the following:

- (a) that Ms Khedama was not deprived of blankets, food or basic needs at Mthatha;
- (b) that Ms Khedama was refused bail at the Verulam Magistrate's Court; and
- (c) that the fingerprints revealing that Ms Khedama was not the person sought by the SAPS may have been caused by an error caused by the person taking her fingerprints.

The consent order in which the Minister conceded liability, was taken on the 23<sup>rd</sup> April 2018, more than five years after the summons was served.

[33] In the circumstances, I make the following order:

- (a) the defendant is directed to pay to the plaintiff the sum of R1 million;
- (b) the defendant is directed to pay to the plaintiff interest on the sum of R1 million at the rate of 15.5 percent per annum calculated from the 20<sup>th</sup> December 2013 to date of payment;
- (c) the defendant is to pay the plaintiff's taxed or agreed costs within 14 days of agreement or taxation, failing which it is to pay interest thereon at 7 percent per annum, calculated from the expiry of the 14 days to date of payment.

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Lopes J

Date of hearing: 2<sup>nd</sup> – 3<sup>rd</sup> November 2021.

Date of judgment: 17<sup>th</sup> January 2022.

For the plaintiff: Mr M Maharaj (instructed by Abdul Shaikjee Attorneys).

For the defendant: Mr ME Mbambo (instructed by the State Attorney (KwaZulu-Natal)).