IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 1177/12

ECD 2577/12

Heard on: 21 November 2014
Delivered on: 11 December 2014

In the matter between:

WAYNE NOEL STAUDE **Plaintiff**

and

THE MINISTER OF SAFETY & SECURITY **Defendant**

JUDGMENT

BROOKS AJ:

The nature of the claim

[1] This is an action brought by the plaintiff for damages which he alleges he has suffered as a consequence of a wrongful and unlawful arrest and

detention. In the plea, the defendant admits the arrest but denies any liability for the payment of damages, pleading that the arrest was authorised by a warrant of arrest and was accordingly lawful. It is also pleaded that the detention of the plaintiff subsequent to his arrest was lawful.

The history of the matter

[2] It is necessary to record something of the history of the matter. The plaintiff's business, known as Used Spares Association (USA), a close corporation which conducts sales of used motor vehicle spares and accident damaged motor vehicles, works primarily on the instructions of its principal, Salvage Car Dealers (SCD*),* which is based in Pretoria. USA acts on an instruction from SCD to uplift particular motor vehicles which have been made available to SCD by insurance companies. These motor vehicles include motor vehicles which were stolen and then recovered after a relevant claim made by the registered owner has been settled by the insurance company. Amongst the motor vehicles made available to SCD are also wrecked motor vehicles in respect of which a claim against the insurance company concerned has been settled in favour of the registered owner.

[3] It is not necessary to record the details of the commercial transaction between SCD and USA.

[4] By way of background, something must be said about what the evidence revealed of the process of motor vehicle registration in South Africa.

Responsibility for the process of the registration of all motor vehicles in South Africa occurs at municipal level. Specially dedicated municipal authorities are the custodians of all source documentation referring to the transfer of ownership of motor vehicles. A record of the status of every motor vehicle registered in South Africa is maintained electronically on a system known as eNATIS.

[5] All new motor vehicles purchased and registered for the first time in South Africa are allocated a status on eNATIS known as Code 1. Previously registered motor vehicles which change hands are allocated a Code 2 status. Previously owned motor vehicles which have been damaged in an accident but in respect of which the insurance company concerned has elected to sell the motor vehicle on and to settle the insurance claim financially rather than to repair the vehicle, may be included in this category. A code 3 status indicates a motor vehicle that has either been written off because of accident damage and deregistered accordingly, or has been stolen and then deregistered by the owner because of the theft. A code 4 status is allocated to a motor vehicle which has been so badly damaged that it needs to be demolished and can never be re-registered.

[6] A parallel system is maintained electronically by the South African Police Service. That system provides for any motor vehicle which has been reported as stolen to be endorsed with the tag of a letter S. Again, the system operates throughout South Africa. If a motor vehicle is reported as stolen and

is then recovered, it is necessary to present that motor vehicle for physical inspection by a designated member of the SAPS in order to obtain clearance of the motor vehicle before the transfer of its ownership can be registered. Usually, this process involves an identification of the motor vehicle in the presence of the designated SAPS member. A successful clearance results in the deletion of the tag of the letter S from the records pertaining to that motor vehicle maintained on the SAPS electronic system.

[7] Currently, the eNATIS system is linked to the SAPS electronic system and no registration of the transfer of ownership of any motor vehicle can occur on the eNATIS system whilst the SAPS electronic system maintains the tag of a letter S against its records pertaining to that motor vehicle.

[8] During 2007, the electronic system maintained at Municipal level was known as NATIS. It was not automatically linked to the SAPS electronic system. Information from the SAPS system would have to be uploaded manually onto NATIS.

[9] Whether one has regard to the manner in which the two systems operated independently during 2007, or operate as inter-linked systems currently, information is initially loaded onto each system manually.

[10] In making a motor vehicle available to SCD it is incumbent upon the particular insurance company involved to attend to all the procedures necessary to ensure the legal transfer of ownership to SCD. If the motor vehicle concerned requires police clearance, this must be attended to by the

insurance company. Once all the documentation has been completed satisfactorily by the insurance company, notification goes out to SCD.

[11] During July 2007, a 2006 Volkswagen Golf (the motor vehicle) was offered by an insurance company to CSD. The motor vehicle was in East London. SCD contacted USA and issued an upliftment instruction *(Exhibit A16).* The motor vehicle was available from the depot operated by CMH Car Hire (Pty) Ltd under the name and style of National Car Rental. On 30 July 2007, the plaintiff was advised by Mr Mare, the manager of SCD that the motor vehicle had been cleared and designated as a Code 2 motor vehicle. In the circumstances, USA presented at the municipal licensing department and arranged for the transfer of ownership of the motor vehicle into its name for the purposes of taking the motor vehicle into stock. There being no impediment to the transfer, a registration certificate was issued in the name of USA *(Exhibit A 22).*

[12] The motor vehicle was then sold on to one M N Marillier *(Exhibit A 20).* A transcript of the transfers of ownership of the motor vehicle from its origin with Volkswagen of South Africa up to the registration of Marillier's ownership was drawn from the eNATIS system on 24 January 2012 for the purposes of this litigation *(Exhibit A 23).*

[13] During 2011, the plaintiff was contacted telephonically by Marillier, who informed him that there was an issue with the engine of the motor vehicle. On

drawing the file, the plaintiff assured Marillier that if there were any problems they arose subsequent to the involvement of USA.

[14] On 19 September 2011 Marillier presented himself at the premises of USA together with Detective Sergeant Mpahlwa and Warrant Officer Tekula of the South African Police Services. Mpahlwa questioned the plaintiff in connection with the sale of the motor vehicle to Marillier during 2007. The plaintiff gave his full co-operation. He drew the file and showed Mpahlwa its contents. Mpahlwa told him that he had not followed the correct procedure as he had not obtained police clearance for the motor vehicle, which according to the South Africa Police Services electronic system had the tag of a letter S marking it as stolen.

[15] The plaintiff demonstrated to Mpahlwa from the paperwork that USA had not been required to obtain a police clearance. The plaintiff stated that Mpahlwa would not listen to him and insisted that he should have followed clearance procedure. The plaintiff's elderly father then joined the group and became offended by the suggestion that the plaintiff was at fault. Mpahlwa then informed the plaintiff that the only way he could make the problem go away was to provide the client (Marillier*)* with another engine, otherwise the plaintiff would be arrested. The response of the plaintiff was to state that he need not do that because he had done nothing wrong. He pointed out that if there was an error it must have been made by the South African Police Services.

[16] The plaintiff described the attitude of Mpahlwa as very arrogant, almost aggressive. He stated that either the plaintiff must comply or Mpahlwa would follow through with an arrest. The more the plaintiff tried to show Mpahlwa the documentation the more aggressive the policeman became. He informed the plaintiff that he would return on the following day.

[17] On 20 September 2011 Mpahlwa returned to the premises of USA. He had adopted a different attitude and the plaintiff thought that at least he had seen reason. He took a statement from the plaintiff *(Exhibit A 3).* The plaintiff also furnished him with copies of the documentation from his file.

[18] Once Mpahlwa had left, the plaintiff decided to be pro-active rather than complacent and contacted the offices of SCD in order to obtain contact details of relevant people at NCR, now trading as First Car Rental (FCR). He was given the contact details of a Miss Jennings. The plaintiff wanted to contact Jennings to ask her to go to the police station the theft of the motor vehicle had first been reported and to make a statement there in order that the endorsement tag of a letter S could be removed from the SAPS electronic system. He tried on several occasions to make an appointment to see Jennings, but failed. However, the plaintiff believed that Jennings did go and make a statement.

[19] The plaintiff also established that the SAPS liaison officer was a Captain Alexander. The plaintiff further made contact with Sergeant Swanepoel, a member of the SAPS known to the plaintiff through his business

dealings at Camp 13, the SAPS camp where stolen and damaged motor vehicles are kept. He discussed the matter with him. Swanepoel did some investigation of the circumstance where the SAPS electronic system tagged the motor vehicle as stolen but the eNATIS system showed it as unrestricted in any way. This produced some theories about why the two systems did not agree with each other.

[20] In addition, the plaintiff consulted Warrant Officer Benito, a member of the SAPS who is stationed at the Fleet Street Police Station and who was previously employed in the motor vehicle clearance department of the SAPS.

The plaintiff's personal circumstances

[21] At the time of the arrest, the plaintiff was 45 years of age, married with two young sons, then aged 13 and 6 respectively, and was permanently resident in Beacon Bay, East London. He holds a B.com degree from Rhodes University and has an employment history with the Department of Inland Revenue (now the South African Revenue Service). He is a well respected businessman and member of the East London community. He is the operations manager of his own business.

The arrest

[22] The plaintiff was arrested at his home at approximately 19h20 on 14 December 2011. The arrest was carried out by Mpahlwa, assisted by Tekula

and two unidentified members of the SAPS who were in uniform and armed with rifles. At the time, the plaintiff was on leave ahead of the public holiday on 16 December 2011 and the ensuing holiday season. The plaintiff's wife and two minor children were present. To the obvious distress of the plaintiff, his family was traumatised by the arrest, particularly the younger son, who became hysterical.

[23] The plaintiff was not provided with a copy of the warrant of arrest relied upon by Mpahlwa. Against the background of the history of the matter, the plaintiff was shocked and taken aback when Mpahlwa told him that he was being arrested for the theft of a motor vehicle alternatively for being in possession of a stolen motor vehicle. He tried to reason with Mpahlwa and told him that Mpahlwa knew that what he was doing was incorrect because the plaintiff had provided him with all the documentation relevant to USA's involvement with the motor vehicle. The plaintiff advised Mpahlwa that if he went ahead with the arrest it would lead to litigation.

[24] Notwithstanding his view of the matter, the plaintiff was co-operative. He changed into more appropriate clothing and took the opportunity to telephone Swanepoel, asking him to go to the Beacon Bay Police Station to see what he could do to help the plaintiff. The plaintiff was then led up the pan-handle driveway of his property, in the full view of his neighbours, and was placed in the back of the police van.

[25] The plaintiff was then driven to Beacon Bay Police Station. There, his fingerprints were taken by Mpahlwa, who asked him if he wanted to make a warning statement. The plaintiff refused, indicating that he had nothing to add to the statement which he had already made to Mpahlwa. This response was entered by Mpahlwa on the pro-forma declaration which serves as a preface to any warning statement and which was completed by Mphahlwa *(Exhibit A 2).* The plaintiff was directed to sign the document. It is apparent from its content that although provision is made for its signature by a member of the SAPS, Mpahlwa did not sign it.

[26] Thereafter, the plaintiff was able to telephone Mare, the manager of SCD, who agreed to speak to Mpahlwa about the circumstances which led to the possession of the motor vehicle by USA. Although Mpahlwa engaged in the conversation with Mare, it had no positive effect on the situation.

[27] Swanepoel presented himself at the Beacon Bay Police Station. So, too, did Benito, who in turn phoned a General Hloba, described by the plaintiff as the cluster commander under whose command Beacon Bay Police Station fell. Notwithstanding their collective attempts at intervention, Mpahlwa announced that he was taking the plaintiff to the Fleet Street Police Station to spend the night in the cells. The plaintiff's mother, father and brother had by now arrived at the Beacon Bay Police Station. The plaintiff gave his wallet to his brother.

[28] The plaintiff was then placed in the back of an unmarked police motor vehicle which was used by Mpahlwa for official duties. Mpahlwa and Tekula drove first to the West Bank where they parked in the vicinity of the prison reserve. Mpahlwa told the plaintiff that they were going to wait there for Marillier. The wait took about half an hour, during which time Tekula, who smelled of alcohol, drank from a bottle concealed in a brown paper packet which the plaintiff presumed contained alcohol. Marillier presented himself in due course and Mpahlwa drove the vehicle to Fleet Street Police Station.

The detention

[29] On arrival at Fleet Street Police Station the plaintiff could see that his wife and his attorney had presented themselves. However, the plaintiff was kept away from them and he was unable to communicate with them.

[30] Alexander also gave evidence in respect of the circumstances surrounding the detention of the plaintiff. He was telephoned on the evening of 14 December 2011 and informed of the plaintiff's arrest in connection with an East London case of the theft of a motor vehicle. He could not remember who made the call but he was asked to come down to the Fleet Street Police Station. It was close to 20h00. On arrival there, he went first to his office to check the case number given to him against his records. This revealed that the case number referred to a docket which he had supervised previously and which had been closed by him.

[31] Alexander had been given Mpahlwa's telephone number by his caller. He telephoned Mpahlwa and asked him to come up to the office. Mpahlwa complied with this request. He told Alexander that he was arresting the plaintiff for possession of a stolen motor vehicle. In answer to a question from Alexander, he confirmed that the plaintiff had not been found in possession of the stolen motor vehicle. This prompted Alexander to ask him on what basis he could then arrest the plaintiff. He said that Mpahlwa's answer to this question was to say that he had been instructed to arrest the plaintiff by a commanding officer. Alexander expressed his view to Mpahlwa that it was for an investigating officer to apply his mind to the facts and to make a decision whether to arrest or not. He stated further that in his experience, arrests such as the arrest of the plaintiff can lead to problems and a claim arising for wrongful arrest.

[32] At this point, Jennings joined them in the office. She brought with her the statement which she had made previously in connection with the matter, together with other documents. She stated that the motor vehicle was a stolen vehicle, which had been recovered and bought by the plaintiff. Alexander went through the documentation with Mpahlwa and expressed the view that the SAPS were at fault in not updating the police system to reflect that the motor vehicle had been recovered. He proposed that the situation could be rectified and any repercussions from the arrest avoided. He suggested taking a statement from the plaintiff and placing it before the public prosecutor. He described how Mpahlwa was very arrogant and did not want to listen to advice. He would not show Alexander the contents of the docket

or the warrant of arrest. He refused to listen to the suggestion that a prosecutor be called out then and there be arrange for the release of the plaintiff on bail. He was adamant that he wished to proceed with the detention.

[33] On the following morning, Alexander went down to the holding cells for a different purpose and found Mpahlwa there together with the Station Commander. He asked Mpahlwa why he did not arrange to take the plaintiff to the East London Magistrate's Court, transferring the warrant of arrest. Mpahlwa would not budge. Throughout, Alexander was frustrated because he felt under an obligation to see that things were done properly and was trying to help Mpahlwa. He confirmed that in the circumstances he would never have arrested the plaintiff.

[34] Jennings confirmed the interaction between her, Alexander and Mpahlwa which had been described by Alexander. She again told Mpahlwa that the documentation in her possession revealed that the motor vehicle had been recovered and sold to the plaintiff lawfully. Mpahlwa refused to listen to her and she went home in frustration.

[35] Sergeant Swanepoel confirmed that he too had proceeded to Fleet Street Police Station. There he tried to explain to Mpahlwa how the discrepancy between the police system and the eNATIS system could have occurred. Mpahlwa's response was one of disinterest and he told Swanepoel in harsh terms to mind his own business. He expressed the opinion to the

court that when a policeman picks up the sort of discrepancy between the police system and eNatis which was evident in this matter, he or she must take steps to resolve the discrepancy.

[36] The plaintiff was detained for the whole night in one of the holding cells. Part of the cell in which he was placed with Marillier was open to the elements. It was drizzling that night. The covered section of the cell was a sleeping area which also contained a leaking toilet around which a soggy blanket had been placed. The plaintiff described the toilet facilities as horrific, smelling like a sewer. He generously described condition in the cell as *'*spartan*',* there being only a thin mattress and a foul smelling blanket provided.

[37] The plaintiff was unable to sleep that night. He had never been detained before and did not know what to expect next. Only the next morning were he and Marillier offered bread and coffee.

[38] Although it became apparent that the plaintiff's attorney had proposed that arrangements be made to transfer the matter to East London to enable a bail application to be made in the East London magistrate's court, Mpahlwa insisted that the plaintiff be driven by him to Mthatha for that purpose. The plaintiff was accompanied by Marillier. On arrival after a shocking journey, a bail application ensued. The plaintiff was released on payment of R1000,00 as bail.

The onus and evidence in dispute

[39] Mr Cole, who appeared on behalf of the plaintiff, readily accepted that in these circumstances the plaintiff bore the onus of proving that the arrest and detention were unlawful and that he was entitled to damages.

[40] It is trite that in any civil case the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and as a consequence thereof acceptable and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. On deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If the probabilities are evenly balanced, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.[1]

[1] National Employers General Insurance Co Ltd v Jager 1984 (4) SA 437 (E) 440 D to G; Alex Carriers (Pty) Ltd v Kempston Investments (Pty) Ltd and Another 1998 (1) SA 662 (E) 678 B to C

[41] Whilst much of the evidence that was led in this matter emerged as being common cause, on certain elements the respective versions were mutually destructive. These elements related to the evidence led on behalf of the plaintiff from Alexander, Jennings, Swanepoel and Benito in respect of their attempts to intervene after the arrest in order to prevent an ill-advised detention of the plaintiff from occurring and in respect of the degree of arrogance and dismissiveness demonstrated by Mpahlwa in response thereto.

[42] An evaluation of the probabilities inherent in the evidence which produces differing versions on the arrest and detention of the plaintiff by Mpahlwa must, in my view, be informed by the extensive evidence led about the history of the matter which led to the arrest and detention and which was largely common cause between the plaintiff, his witness and Mpahlwa.

[43] The assessment of the credibility of a witness is inextricably bound up with the assessment of the probabilities. Aspects such as the general demeanour of the witness, the presence or absence of inconsistencies and self contradictions in their evidence, and their preparedness to make concessions where necessary are all factors which influence the assessment of credibility.

[44] The plaintiff and his witness were exemplary. Their evidence was consistent and, where possible, mutually corroborative. No criticism could be levelled against their demeanour in the witness box. To the extent that the evidence led on behalf of the plaintiff seemed at times to be bizarre, and

accordingly open to the submission that it was against the general probabilities, the reason does not flow from any inaccuracy or dishonesty on the part of the plaintiff of his witness. Rather, the bizarre nature of the evidence led is attributable to the attitude of Mpahlwa.

[45] Whilst Mpahlwa can be described as an appalling witness who contradicted himself on a number of occasions and who disputed a number of key pieces of evidence led from the plaintiff and his witnesses without having challenged the evidence initially when those witnesses were cross examined, it is plain from his evidence throughout that Mpahlwa considered that he had no discretion to exercise in the arrest and subsequent detention of the plaintiff and that he was obliged to carry out what he described as “the order” of the magistrate.

[46] In my view, it becomes unnecessary to analyse the many areas in the evidence where disputes arose. It is clear that even if the inference arises from the manner in which those disputes manifested themselves only during the evidence of Mpahlwa, that he departed with frequency from the version that he probably gave initially to Ms Da Silva, who appeared on behalf of the defendant, in all probability Mpahlwa was determined to challenge any evidence which showed that he was cautioned about the circumstances in which he sought to arrest and to detain the plaintiff, or was offered help and guidance by fellow members of the SAPS, because he was convinced that he was right in his view that he had no discretion in the execution of the warrant of arrest or the subsequent detention of the plaintiff.

[47] In defending his position under cross examination, Mpahlwa demonstrated something of the arrogance and defiance which was described by the plaintiff and some of his witnesses as characterising parts of the investigation conducted by him prior to his application for a warrant of arrest. I have no doubt that these tendencies were provoked in both sets of circumstances by what Mphalwa saw and described in the evidence as attempts to challenge or undermine his authority. When coupled with Mpahlwa's view that he had no discretion in the execution of the warrant and arrest, these tendencies on his part militated strongly against Mpahlwa hearing any of the advice and guidance offered to him. They also appear to have made him unable to make any concession in the witness box and to have assisted him in an apparent decision to deviate from his initial instructions to Ms Da Silva in order to try and demonstrate the plaintiff and his witnesses as dishonest. Unfortunately for Mpahlwa, the opposite result emerges.

[48] In the circumstances, I am of the view that where the evidence of the plaintiff and his witnesses was disputed by Mpahlwa, his version is to be ignored as false.

[49] Mpahlwa's evidence that he saw himself as having no discretion whether or not to effect the arrest and to detain the plaintiff thereafter is consistent with the plaintiff's version and, in my view, must be accepted. Together with the facts which are common cause, this belief on the part of

Mpahlwa and the manner in which it found expression in his actions, forms the evidential basis upon which the defendant's liability falls to be assessed.

The issues

[50] The issues which emerged from the pleadings and the evidence are the following:

1. Whether the warrant of arrest was obtained by means of fraud or deceit on the part of Mpahlwa;
2. whether the execution of the warrant of arrest and the subsequently detention of the plaintiff was wrongful and unlawful; and
3. whether the plaintiff is entitled to compensation for damages in the circumstances and, if so, the quantum thereof.

[51] In view of the evidential basis which has emerged as the basis upon which the matter is to be determined, and whilst it seems from the evidence that Mpahlwa may well have acted with malice in applying for the warrant of arrest, in my view it is not necessary to determine the issue of the manner in which the warrant of arrest was obtained. It is sufficient to consider the effect on both the arrest and the detention of the plaintiff of the belief held by Mpahlwa that he had no discretion in the execution of the warrant of arrest.

[52] It is now well established that even when a warrant of arrest has been issued a peace officer has a discretion as to whether or not to execute it.[2]

[53] The discretion to arrest or not must be exercised properly[3]. It must be exercised in good faith, rationally and not arbitrarily[4]. Ultimately, the inquiry must be whether, when he took the decision to execute the warrant of arrest, Mpahlwa took into account relevant considerations and whether his decision was rational[5].

The decision to execute the warrant of arrest

[54] It is plain from Mpahlwa's evidence that he considered himself under an obligation to execute the warrant of arrest that had been issued by the magistrate in Mthatha on 16 November 2011 (*Exhibit A9*). He could not see his way clear to give consideration to any factors which may have informed him that it was unnecessary, or indeed improper, to execute the warrant of arrest. To do so, he stated, would have amounted to a disobedience of the order of the magistrate. In my view, it can never be said that burdened with

[2] Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) para 28; Theobald v Minister of Safety and Security and Others 2011 (1) SACR 379(GSJ) para 310; Christiaan Benjamin Weitz Minister of Safety and Security and Others ECG 22 May 2014 (Case no 487/11) unreported judgement, para12.
[3] National Commissioner of Police and Another v Coetzee 2013 (1) SACR 358 (SCA) para 14; Reynolds and Another v Minister of Safety and Security 2011 (1) SACR 594 (SCA) para 24; Christiaan Benjamin Weitz v Minister of Safety and Security and Others ECG 22 May 2014 (Case no 487/11) unreported judgement, para 12.
[4] Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) para 38.
[5] Christiaan Benjamin Weitz v Minister of Safety and Security and Others ECG 22 May 2014 (Case no 487/11) unreported judgment.

this misapprehension, the decision of a peace officer to execute a warrant of arrest took into account relevant considerations and was rational.[6]

[55] Moreover, had Mpahlwa applied his mind to relevant considerations, he would have had regard to the following:

1. The warrant of arrest directed the arrest of the plaintiff on a charge of theft, alternatively possession of and/or receiving a stolen motor vehicle, it reflecting that the offence was committed on 16 November 2011 in the district of Mthatha;

2. Mpahlwa knew that the plaintiff had not been in Mthatha on 16 November 2011;

3. Mpahlwa knew from a statement provided to him by the plaintiff that his business, USA, had taken lawful possession of the motor vehicle during 2007 and had sold it on lawfully that same year;

4. Mpahlwa had been told by Jennings that the motor vehicle had been stolen but had then been recovered in a damaged condition and sold to SCD;

5. Mpahlwa knew that the plaintiff was a businessman in East London whom Mpahlwa had experienced as being thoroughly co-operative;

6. Mpahlwa knew that the plaintiff lived permanently in East London;

[6] Domingo v Minister of Safety and Security (CA 429/2012) [2013] ZAECGHC 54 (5 June 2013) para 3, a decision in which Chetty J held that the trial court's finding that, once armed with warrant, the arrestor ...was duty bound to arrest the plaintiff without further ado, was wrong and amounts to a clear misdirection.

7. Nothing in the circumstances of Mpahlwa's investigation pointed to the possibility that the plaintiff constituted a flight risk or indicated that he would not co-operate further by attending court if called upon to do so;

8. Mpahlwa's investigation was incomplete in that no statement had been obtained from the original employee of CMH who had reported the motor vehicle as being stolen and whom Mpahlwa regarded as being the original complainant notwithstanding the fact that Mpahlwa had been in telephonic communication with him and he was available in Cape Town;

9. All the evidence available to Mpahlwa, as investigating officer, pointed to the overwhelming conclusion that the endorsement of the police records pertaining to the motor vehicle with the tag of the letters had persisted due to police error subsequent to the recovery of the motor vehicle.

[56] In my view, when faced with the relevant considerations referred to in the preceding paragraph, the discretion of a peace officer whether to execute a warrant of arrest or not, if exercised rationally, could only result in a decision not to arrest.

[57] The evidence discloses that shortly after the arrest attempts were made by Alexander, Benito and Swanepoel, as fellow members of the SAPS, to advise Mpahlwa against the arrest and detention of the plaintiff in the circumstances of the matter. Offers to organise an immediate hearing for a

bail application to be made that night, or for arrangements to be made for the transfer of the docket to East London to allow for a bail application to be made locally on the following morning, and a concomitant offer to take responsibility for the plaintiff overnight, were all made with a view to avoiding the overnight detention of the plaintiff in the holding cells in Fleet Street police station. The advice was brushed aside by an indignant Mpahlwa who took the view that the attempts to advise him constituted unwelcome interference with the exercise of his duty.

[58] Importantly, it was the evidence of both Alexander and Jennings that the latter presented herself at the Fleet Street police station and handed Alexander documentation which included a copy of the statement which she had made on an earlier occasion to a police officer in the same station and in which she recorded the fact that the motor vehicle had been recovered in a damaged state. Alexander testified that he went through the documentation with Mpahlwa. Offering inconsistent and implausible versions, Mpahlwa denied this evidence. His denial cannot stand. In my view, the facts placed before Alexander by Jennings would have been relevant to the exercise of Mpahlwa's discretion but were not considered by him. The failure to consider them and to take them into account is consistent with his view that he had no discretion, with the result that the arrest and detention were unlawful.

The entitlement of the plaintiff to damages

[59] It follows that the plaintiff must be compensated for the wrongful and unlawful arrest and detention.

[60] In the particulars of claim the plaintiff formulates his claim for damages in the following amounts:

1.	wrongful and unlawful arrest	R150 000,00
2.	wrongful and unlawful detention	R250 000,00
3.	*contumelia* and impairment of dignity	R100 000,00
	Total	R500 000,00

[61] It is frequently stated that no two cases are alike and that an appropriate award of damages will be informed by a consideration of those factors which are unique to the matter under consideration. Whilst this is undoubtedly so, the awards in previous cases serve as a useful guide.[7] An element common to all, which informs the assessment of quantum, is that the

[7] Stoltz v Minister of Safety and Security [2006] JOL 16612 (SE) para [9]

courts regard the right of an individual to personal freedom as right to be jealously guarded. The deprivation of personal liberty is a serious injury[8].

[62] There being no fixed formula for the assessment of damages for non-patrimonial loss, it is recognised that the court enjoys a wide discretion to estimate an amount *ex aequo et bono*, with fairness as the dominant norm.[9]

[63] In order to make a proper assessment of the matter, it is apposite to consider the plaintiff's personal circumstances and background. These have been summarised elsewhere in this judgement.

[64] In my view, the fact that the plaintiff was arrested whilst on leave and on the eve of the holiday season, at his home and late in the evening, are factors which may be regarded as aggravating. His awareness of the immediate distress which his arrest caused his wife and young sons, and his powerlessness to ameliorate that distress in any way, added heavily to the personal humiliation which the arrest caused him. That much was clear from the evidence. So, too was the additional humiliation caused by him being escorted to the awaiting police van in the full view of his neighbours and his encounter, later on during his detention, with a member of the East London community with whom he did business. Further aggravation is to be found in the plaintiff's exposure to a terrifying trip to Mthatha on the morning following his arrest, when his sense of vulnerability and fear was heightened by the bad

[8] Ochse v King Williams Town Municipality 1990 (2) SA 855 (E) 860 F-H; Minister of Correctional Services v Tobani 2003 (5) SA 126 (E).
[9] Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) at 287 E-F; Seria v Minister of Safety and Security and Others [2005] 2 ALL SA 614 CC 631 h.

driving of Mpahlwa. I also take account of the high-handed and aggressive attitude demonstrated with consistency during the arrest, and parts of the detention, by Mpahlwa. This was described by the plaintiff in his evidence. It was demonstrated by Mpahlwa when he, in turn, gave evidence.

[65] Whilst detained in the holding cells at Fleet Street police station, the plaintiff was exposed to extremely unhygienic and unpleasant conditions. Throughout the entire night, the plaintiff was fearful and anxious.

[66] The total period of the unlawful detention was approximately seventeen hours.

[67] The plaintiff has included a claim for *contumelia* in a separate amount. In my view, *contumelia* is really an indivisible element of the strong sense of humiliation, indignation, vulnerability and fear which characterised the plaintiff's experience in the unlawful arrest and detention to which he was subjected. Accordingly, in my view, no separate award should be made for *contumelia*. Rather, it is apposite that a single composite award be made for damages for unlawful arrest and detention.

[68] In considering an appropriate award, I have also had regard to amounts awarded in cases such as *Seria v Minister of Safety and Security*;[10] *Rudolph and Others v Minister of Safety and Security;*[11] *Olgar v Minister of*

[10] 2005 (5) SA 130 (C)
[11] 2009 (2) SACR 271 (SCA)

Safety and Security[12]*; Peterson v Minister of Safety and Security*[13] *and Fubesi v The Minister of Safety and Security*.[14]

Costs

[69] Ms Da Silva submitted that in the event of the award for damages falling below R300 000,00 the plaintiff should only be awarded costs on the Magistrate's Court scale. The basis for the submission is the argument that there is nothing unusual or remarkable about the plaintiff's case which warranted him presenting it in this court. I am unable to agree with this submission. Any violation of human rights should be viewed as serious, particularly where the defendant is one of the organs of state charged with ensuring that the rights of members of the community should be respected and protected. To litigate in the High Court with the purpose of protecting or enforcing basic human rights, or with the purpose of exposing their violation and receiving compensation therefor, is not uncommon in our constitutional democracy.[15]

[70] In my view, the plaintiff was fully justified in bringing his action in the High Court and should be entitled to his costs of suit taxed on the High Court tariff.

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[12] ECD 18 December 2008 (case no 608/07) unreported judgment.
[13] [2009] JOL 24495 (ECG).
[14] ECD 30 September 2010 (case no 680/2009) unreported judgment.
[15] Marwana v The Minister of Police ECPE 28 August 2012 (case no 3067/2010) unreported judgment, para [23].

[71] One more aspect remains for determination. Mr Cole submitted that the behaviour of Mpahlwa, details of which has emerged from the evidence, warrants a referral of the matter to the National Commissioner of Police for her consideration of the prospect that Mpahlwa be held personally liable for the costs of this action. In my view, whilst the attitude and actions of Mpahlwa are worthy of censure by this court, demonstrating as they do an extremely poor grasp of basic principles relating to the exercise by a peace officer of the power of arrest, they fall short of the type of attitude and behaviour which would justify such a referral. Such an order should be reserved for circumstances where assault, brutality, rape or some other form of violence on the part of the arresting officer forms an element of the evidence placed before the court. Accordingly, I decline to make such a referral.

Order

[72] In the circumstances, the following order shall issue:

1. There shall be judgment in favour of the plaintiff;
2. The defendant is directed to pay to the plaintiff the sum of R150 000,00 as and for damages for the unlawful arrest and detention on 14 December 2011 and 15 December 2011, together with interest thereon to be calculated at the rate of 9% per annum from a date fourteen days after the date of delivery of this judgment to date of payment.
3. The defendant is directed to pay the plaintiff's costs of suit on the High Court tariff, together with interest thereon to be calculated at the rate of

9% per annum from a date fourteen days after allocatur to date of payment.

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RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Appearances

Plaintiff	:	Adv S.H.Cole instructed by Cooper and Conroy, Bell and Richards Inc.
Defendant	:	Adv A. Da Silva instructed by the Office of the State Attorney.