REPUBLIC OF SOUTH AFRICA

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

CASE NO: 31236/2012

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

....
DATE SIGNATURE

In the matter between:

SITHEBE, BONGINKOSI Plaintiff

And

MINISTER OF POLICE Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] This is an action by the plaintiff for damages against the defendant arising out of an alleged unlawful arrest and detention, in the amount of R150 000, 00.

[2] The allegations are that the defendant's employees, acting within the cause and scope of their employment with the defendant, unlawfully arrested the plaintiff at Emdeni Township, Soweto on 11 November 2011 and also unlawfully and unreasonably detained him at Jabulani Police Station in Jabulani, Soweto until 14 November 2011.

[3] The defendant is defending the action.

[4] Right at the on-set of the trial on 21 July 2014 both parties agreed that the *onus* to lead evidence first and to prove rests with the defendant. Consequently, the defendant's witnesses testified first.

THE PARTIES

[5] The plaintiff, BONGINKOSI SITHEBE, is an adult male person ordinarily resident at No 5……. Emdeni North, Z…… Street, Soweto, and Johannesburg.

[6] The defendant, the MINISTER OF POLICE, is the responsible Government Department dealing among others with issues relating to police services, personnel and related aspects, cited herein in its official capacity as

employer of police officers and head of the South African Police Force, whose head office and/or principal place of business is situate at 7th Floor, Wachthuis, 231 Pretorius Street, Pretoria.

ISSUES TO BE DECIDED

[7] It is common cause between the parties herein that the plaintiff was arrested by the police officials in the employ of the defendant while executing their official duties with or for or on behalf of the defendant on 11 November 2011. It is also common cause that he was detained or kept in custody from the moment of his arrest on the evening of 11 November 2011 until he was released on the afternoon of 14 November 2011 after a state prosecutor before whom the case docket was referred to prosecute, issued a *nolle prosequi* before he could even appear in a court of law.

[8] This Court must rule on whether the arrest was lawful or unlawful, and if so, whether or not the plaintiff's detention was justified or lawful.

[9] Even though the defendant's witnesses were the first to testify in this trial, I have decided, in the relaying of the evidence led in court, to begin with what the plaintiff's witnesses testified on.

PLAINTIFF'S VERSION

[10] The plaintiff's testimony was led through two witnesses, namely, the plaintiff himself and an eye-witness to the robbery on the complainant, Ms Zanele Gumede.

BONGINKOSI SITHEBE (*alias,* "*the plaintiff*")

[11] He is a 33 year old resident of Emdeni Township, Soweto; single but with two children aged 4 and 5, respectively, a boy and a girl. He is responsible for the upkeep and maintenance of the two minor children. As at the date of his arrest on 11 November 2011 he was employed on a seasonal temporary basis as a general worker at a Fireworks outlet at Jumbo along Main Reef Road, next to China Town or Mall Johannesburg; earning R80,00 per day. His highest scholastic achievement is a standard 9.

[12] According to the plaintiff, on 11 November 2011 he had just returned home from his workplace and was relaxing on his bed in his shack situate within the erf of house 5…… Emdeni North when he heard someone knock on the door. He went to the door, opened it, at the same time inviting the knocker to come in.

[13] He was surprised to see policemen standing at the door.

[14] He asked them if there was anything wrong. Instead of answering him there and then, they called at a civilian male standing some few paces behind

them to come forward. The man did so. When they met face-to-face the man said to the police: "*This is him*". Not comprehending what the man meant by what he said this witness asked him and the police why the man was saying what he was saying; also what all that meant. The police told him he will be told all at the police station.

[15] When he insisted on knowing why he was to accompany the police to the police station, the latter told him that he (witness) was Thami (his names) and he had allegedly robbed the civilian male accompanying the police to his home, on the morning of 10 November 2011. This civilian male happens to have been the complainant in the robbery case giving rise to this suit.

[16] The plaintiff told the police his names were not Thami but Bonginkosi. They demanded that he produce his identity document so that they could verify that. He gave them his identity document and they scrutinised it.

[17] After satisfying themselves that the plaintiff was not the Thami they were looking for, one of the policemen insisted that he (plaintiff) should nevertheless still be taken into custody as a possibility existed that his ID-inscribed name may be Bonginkosi yet be known around his area as Thami. This, the policeman decided on in the face of opposition from a colleague of his who was urging him to leave the plaintiff alone as the name of the culprit they were looking for differed from that of the plaintiff.

[18] They then pushed him onto the bed and forcibly handcuffed him with his hands at his back. Thereafter they dragged him out of the shack towards the street where the police vans were.

[19] Outside in the street there were three police vans and a sedan next to which stood several other policemen who were ostensibly part of the contingent that came to arrest him. Apart from those outside, the policemen who entered his shack were five in number. There were also above 15 to 25 members of the public in the street witnessing the spectacle. Among them was one, Zanele Gumede, who was a Community Policing Forum ("*CPF*") member. It was also so, that there was a death in the street and local women were there in numbers, helping with the peeling of vegetables in preparation for the funeral service the next day – hence the many on-lookers.

[20] As the policemen dragged the plaintiff towards a police van – a process that made the handcuffs bite deeper and tighter into his wrists since they also pulled at them – Zanele Gumede came forward and asked what was happening. The plaintiff told her he was being arrested in connection with a robbery that took place nearby the previous day.

[21] He was put at the back of the police van. The tarpaulin curtains that sometimes are unrolled or rolled down to cover the windows at the back of police vans were rolled up. As such Zanele Gumede ("*Zanele*") was able to continue her conversation with him from outside in the street. Then Zanele went and spoke to the police, telling them that she was an eye-witness to the

robbery that took place the previous day where a man was robbed of a laptop in a case and cellphones nearby. She explicitly told the police that the plaintiff was not one of the two robbers who committed the deed. She further told them that two young men, well known to her, by names, Gerald and Bata, were the robbers and that Gerald occupies one of the shacks in erf 5…. where the plaintiff also lives.

[22] The police told Zanele that they were taking the plaintiff to Naledi Police Station for questioning and they would bring him back.

[23] According to the plaintiff he was taken to Naledi Police Station where he was put in a small cage or lock-up secured by a padlock.

[24] While in that cage or lock-up the complainant arrived and demanded his laptop and cellphones from him. The plaintiff told him that he knew nothing about that robbery, let alone the robbed goods. He also told him that he was the father of two small children who depended on him for sustenance and maintenance. A policeman then called the complainant aside and they sat down together compiling a statement.

[25] He was frightened and became even traumatised when the police told him that what he had been arrested for was usually punishable with direct imprisonment ranging from 15 years and which could to up to 18 or 25 years. He thought about his children and what would happen to them should he be imprisoned for a crime he knew nothing about.

[26] He started to develop hatred for the police, associating them with vengeful and heartless people who, instead of being his protectors, were insistent on incarcerating him in the face of eye-witness account of the real perpetrators of the crime he has been arrested for.

[27] He was taken to Jabulani Police Station where a document titled "*Notice of rights in terms of the Constitution*" was filled in and handed to him to sign without anything being explained to him or he being allowed to read it before he signed it. He was then booked in and allocated a cell.

[28] This surprised and traumatised him more since he was made to understand when he was arrested that he was only being taken in for questioning and would be returned home after that.

[29] The night in the cell was a nightmare. Throughout the night more people – some very drunk, others dirty and smelly – were brought into the cell. When he was initially put in there, there were 10 to 11 of them. At the end of the night, they were 23 to 25 in a small cell – definitely overcrowded as the cell could have been 10x5 metres in size. They had to share the sleeping mattresses or sponges given to them. He was given one blanket that was very dirty and smelling of urine.

[30] There was one toilet for all of them that offered no privacy at all because when one was seated there-at, he was visible to the rest of the

cellmates. It was not functioning properly. Some of the drunk cellmates just literally relieved themselves on the floor in full view of everyone. There was also no toilet paper supplied.

[31] Some of the cellmates boasted to the others of being experienced with prison life. They would tell the plaintiff and others that they must pray to God they are not sent to a proper prison because there they would sodomise them with impunity. That really heightened his anxiety and fear.

[32] The food they were given was also sub-standard and ill-cooked. He forced himself to partake in it solely to remain alive.

[33] Before he was taken to the cell on Friday, 11 November 2011, he asked to be allowed the use of a telephone to inform his people about his whereabouts or fate. The police promised to comeback to him on that and never did. On Monday, 14 November 2011 before he was taken to court he again asked to be allowed a telephone use to notify his people about his appearance at court that day. This time the police told him in his face that he will not be allowed to do so.

[34] On Saturday, 12 November 2011 one W/O Makhubela came to see him : He told him that he was the assigned investigating officer in this case. He left him and promptly returned in the company of the complainant. Noting the plaintiff's surprise at this turn of events, W/O Makhubela told him not to be

surprised as he wanted the complainant to see him or look at him with a view to confirming to him (W/O Makhubela) that he (plaintiff) was indeed one of the people who robbed him.

[35] Again the plaintiff told W/O Makhubela that he knew nothing about the complainant's robbery, and that he was seeing him for the first time when he came with the police to his shack the day of his arrest. W/O Makhubela told him that there was nothing he could do about what he was telling him.

[36] He also told W/O Makhubela about the eye-witnesses to the robbery on the complainant on 10 November 2011 as well as what Zanele told the police who came to arrest him. W/O Makhubela retorted that he was not there when all what the plaintiff was saying was said or happened. He advised W/O Makhubela to go and interview the known eye-witnesses – who according to Zanele's conversation with the police at the arrest site were numerous – if he wanted to confirm his story that he was a wrongly arrested person. W/O Makhubela responded to this by telling him that he also has his own witnesses who would testify in court about his (plaintiff's) participation in that robbery.

[37] He took his fingerprints and told him that he would be taken to court on Monday 14 November 2011.

[38] On Monday 14 November 2011 he was ordered to go take a bath as he was to be taken to court. He was not given any washing rag or soap. He had

to borrow one from a fellow cellmate. The water was ice-cold and uncomfortable.

[39] He was then taken to the holding cells at court together with other arrestees who were going to court.

[40] Only at or around 15h00 was his names called out. He felt relieved as at last he would have the opportunity to tell a magistrate his story.

[41] As he walked out of the holding cell, W/O Makhubela was waiting for him outside it. The latter told him that he was being taken to Protea Police Station where he would be tortured to tell the truth. He felt very frightened. He realised he was helpless and at the mercy of the police. A thought even passed through his mind that it was better to be dead than to be treated the way he was being treated.

[42] He took him back to the police station. There he saw his brother-in-law standing. He is the man who has married his sister. Ostensibly he and Makhubela knew each other judging from the manner in which they greeted and talked to each other. W/O Makhubela then wrote and stamped a document which he made the plaintiff to sign. Thereafter he told the plaintiff that he was being released to go home, however, he should take note that should further evidence come to light implicating him, he (W/O Makhubela) would come and re-arrest him. He warned him not to flee the area of his present abode. The plaintiff assured him that he would do nothing of the sort.

He (W/O Makhubela) then drove the plaintiff up to Naledi Police Station. From there they walked home.

[43] According to the plaintiff, this whole episode or tragedy has left him a mental wreck : Whenever he sees policemen or police vehicles he becomes fearful, fearing being arrested again. Even when he is at home, whenever he hears a car door slam outside in the street, he becomes traumatised, thinking that W/O Makhubela's threat of re-arresting him was materialising and he was just about to be arrested.

[44] His arrest have also changed the attitude of his own people towards him : As from the moment he returned home after his release, they started looking at him with fear and suspicion. Some of them tell him directly that they are wont to believe that he might have been involved in the robbery that caused his incarceration from Friday, 11 November 2011 until Monday, 14 November 2011. This makes him feel very bad and used. He imagines how his small children would react the moment they are told that their father was arrested and incarcerated for armed robbery. He imagines them playing with other children in the street and those other children telling them that they are the children of an armed robber or a jail bird. That thought to him is too ghastly to contemplate.

[45] The plaintiff's arrest and incarceration had other negative consequences : When he reported at his workplace in Johannesburg on

Tuesday, 15 November 2011, he found that somebody else had been hired in his place. He thus became totally unemployed from that day to date.

[46] The plaintiff was subjected to lengthy cross-examination. Although he gave long and rambling replies to questions, at the end of the cross-examination his story still remained intact.

ZANELE GUMEDE ("*ZANELE*")

[47] She was the plaintiff's second and last witness.

[48] According to her testimony, she resides at 4……/… Emdeni, which residence is in the same street as the plaintiff's. She is still at school at the moment but as on the date of the incident giving rise to these proceedings, she was also a member of the local CPF, having been serving as such for two months. She knew the plaintiff.

[49] Her evidence was to the effect that she knocked off duty as CPF member at 06h00 on 10 November 2011. Upon arrival at her home she took off the work uniform and proceeded to walk towards one Mbongeni's home. As she rounded a corner she saw two young men accosting an unknown young man and taking form him a bag that usually carries laptop computers from him. Those two young men ran with their loot in her direction and proceeded to run past her.

[50] At this stage she also saw Mbongeni walking out of his yard onto the street holding a cup with coffee or tea in it. He also commented about the robbery that had just taken place.

[51] They watched the two robbers run into erf 508 Emdeni, which is where the plaintiff resides. Both of them knew the fleeing young men very well. They were Gerald and Bata. Gerald resided in a shack on erf 508 Emdeni also. Bata resided a street or two away.

[52] Both she and Mbongeni went towards the robbed person who was lying in the street where the robbery took place at that stage. They assisted him to stand up. He told them that the two robbers had just robbed him of a laptop and two cellphones. They volunteered to accompany him to the Naledi Police Station.

[53] As they were walking past the library building a police van approached from their front. They stopped it and related to the policemen what had just happened.

[54] The police took them on and they lead them to Gerald's shack at erf 508. They did not find anybody there. The police then left, leaving this witness and Mbongeni there.

[55] On Friday, 11 November 2011 there were funeral arrangements being attended to in the witness and plaintiff's street. Women who included Zanele

were helping at the bereaved house with the peeling of vegetables among others in preparation for the funeral the following day.

[56] Zanele saw police vans with flashing blue lights at or alongside erf 5…. Emdeni, which is the plaintiff's home. She and others went there out of curiosity. As they arrived the police were escorting a handcuffed plaintiff out of the yard, walking him towards one of the police vans standing there. His hands were cuffed at the back.

[57] She asked the plaintiff what the matter was as he was being put at the back of the police van. He replied that he was being arrested as a suspect in a robbery that occurred nearby on 10 November 2011.

[58] Zanele promptly approached the police and told them that they had arrested the wrong person for the robbery that was perpetrated the previous day. She also told them she witnessed that robbery being perpetrated and that the culprits were Gerald and Bata.

[59] The police told her that they are just taking the plaintiff in for questioning and that they would return him home after doing so. She next saw the plaintiff on Monday, 14 November 2011.

[60] According to this witness no other robbery took place in their area on 10 November 2011 save the one involving the complainant. She also stated that she told the police that Gerald also resided in erf 5…… Emdeni where the

plaintiff also occupied a shack – hence she leading the police they met in the street there.

[61] During cross-examination she told this Court that she grew up in the same area with the plaintiff and that she knew Gerald as a nyaope (drug-concoction) smoking young man in their locality. This same evidence was also testified to by the plaintiff.

[62] When it was put to her that according to Sgt Sekati who testified on behalf of the defendant he (Sgt Sekati) was only with one colleague, one Sgt Mudau, when he arrested the plaintiff, Zanele vehemently disputed this, telling court that there were many policemen at the arrest scene having come in three vans and a sedan. She even proceeded to describe one policeman who stood out among those who were there – he was wearing spectacles and was in private clothes, wearing also a pull-over and a maroon shirt. This too was a description given by the plaintiff when he testified of one of the policemen who came to arrest him.

DEFENDANT'S VERSION

[63] The defendant's version was led through three witnesses, namely, the arresting officer, Sgt Simon Hope Sekati; the latter's colleague and immediate superior, W/O Brey Makhubela; and the victim of the alleged robbery and also complainant, Thoriso Malesa.

SGT SIMON HOPE SEKATI ("*Sgt Sekati*")

[64] According to his testimony he is a sergeant in the South African Police Force ("*SAPF*" or "*SAPS*"), at the time of the incident leading to these proceedings, stationed at Naledi Police Station in or at Naledi, Soweto. He has been with the SAPS since the year 2000, i.e. he has 14 years service with the police force to date. He was then stationed in the Community Services Centre ("*CSC*"), an acronym for the commonly known, charge office.

[65] On 11 November 2011 he reported for night shift duty at 18h00. Some time after 18h00 he was approached by Thoriso Malesa ("*complainant*") who reported to him that he had opened or laid a charge of armed robbery on him the previous day, i.e. 10 November 2011 and that he knew his assailants only by sight. He was allegedly robbed of a cellphone and computer laptop. On his enquiry the complainant furnished him (Sgt Sekati) with a case reference, being CR 99/11/2011. He checked the records and confirmed that a case of armed robbery was opened by him (complainant) on 10 November 2011. W/O Makhubela ("*W/O Makhubela*") was reflected as the investigating officer. He speed-dialled W/O Makhubela to find out if there had been new developments like arrests since the case docket was referred to him. The latter reported that no further developments took place since he received the case docket.

[66] After locating the case docket he noted that the complainant's statement stated that he was robbed by people he only knew by sight. This time round, the complainant told him that he had information about the whereabouts of one of the two men who robbed him.

[67] He (Sgt Sekati) bounced the information he received and that already on the docket with his commanding officer on the day. According to this witness, this was the accepted or required protocol at the police station to keep senior police officers in the loop about what was to be done or being done about reported cases; also to obtain further instructions about the way forward. He also further consulted with W/O Makhubela.

[68] Because the complainant was this time round indicating that one of his assailants resides at a house in Emdeni Township, he decided to record another or second statement by this witness.

[69] He then interviewed the complainant and asked him if he was sure or certain the man in Emdeni Township was one of his assailants. The latter was adamant he would identify his assailants if he sees them. He (Sgt Sekati) asked the complainant to describe man who allegedly resided at the house he wanted to take the police to in Emdeni Township. He described him as being tall, dark and lean, with a scar on his forehead.

[70] When asked what the house number was the man was resident at he stated to this witness that he can point it out to the police.

[71] To make sure the requisite reasonable suspicion of the commission of an offence existed Sgt Sekati asked the complainant if the possibility existed that he could be making a mistake. The latter was adamant that he would easily recognise any of his assailants should he see them.

[72] As a result, he (Sgt Sekati) was convinced about a crime having been committed and that a reasonable suspicion existed that the person or persons the complainant wants to point out to him could be the culprits. He thus left with the complainant for the said house in the company of a colleague of his, Sgt Mudau, who was driving the police van. The van's emergency or police lights were activated.

[73] At Emdeni Township, the complainant led them to a house in Zwane Street. As they cruised past erf number 5…., he (complainant) pointed at it and ordered them to stop. Sgt Mudau stopped, reversed until he was alongside this erf 5,,,, Emdeni North. They alighted and he and the complainant entered the erf.

[74] Inside this erf there was a main house as well as three shacks. One of the shacks's door faced directly to the entrance gate to the erf.

[75] He asked the complainant where in the erf the assailant resided – in the main house or any of the three shacks. The latter stated to him that he

did not know exactly where in the four locations inside this erf the assailant stayed. So they knocked at the door of the shack whose door faced directly to the main entrance gate. A man bid them to enter. He was alone there. The complainant immediately shrieked that that man was one of his assailants on 10 November 2011. He even wanted to rush to or tackle him while screaming at the man to produce his cellphone and laptop. He stopped him. He formally asked the complainant if that man in the shack was familiar or known to him. He replied that he was the man who robbed him on 10 November 2011.

[76] Sgt Sekati had a torrid time trying to stop the complainant from rushing or tackling the man. The latter continually bombarded the man with demands that he produce his cellphone and laptop.

[77] From the manner in which he was behaving he, Sgt Sekati, became convinced that the complainant had genuinely met one of the men who robbed him of his property. This man also fitted the description the complainant gave of him to him while they were still at Naledi Police Station – he was tall, in fact taller than him and the complainant; dark in complexion; lean and he had a scar on his forehead.

[78] He confronted this man, who happened to be Bonginkosi Sithebe ("*the plaintiff*"), and asked him to respond to the complainant's allegations. The plaintiff, instead of responding to the direct accusations of being a robber by the complainant, instead responded irrelevantly by stating that he has employment. Sgt Sekati asked him directly where he was on the date and

time the complainant was robbed. He replied by stating that he was in the company of his friends in Emdeni at that time. When the question was repeated for him to clarify his answer he became evasive and slippery – at one stage stating that he was busy with gardening chores at home at that time; and at another stage saying that he was with his friends in Emdeni Township.

[79] When asked to respond to the complainant's demand that he produce his cellphone and laptop he reverted to his inexplicable answer that he has employment or is employed. This made this witness to be convinced that the plaintiff had something to hide as he gave totally irrelevant and/or non-suited answers to straight questions put to him. That is when this witness asked him where actually he was employed. The plaintiff had no answer to give. He also asked him why he was lolling around Emdeni Township or doing gardening at home if he was gainfully employed. Equally the plaintiff had no answer to give.

[80] That also convinced this witness that the plaintiff had a case to answer pursuant to the allegations levelled against him, more-so that according to answers the witness gave during cross-examination, the plaintiff was visibly frightened and was even trembling.

[81] Sgt Sekati then warned the plaintiff that he was going to arrest him on allegations of robbery with aggravating circumstances which is a Schedule 1 offence. He repeated his (Sgt Sekati's) names to him, read him his constitutional rights and arrested him.

[82] He escorted him to the police van where he was made sit at the back. From a question put to him by the plaintiff's counsel during cross-examination, this police van had the tarpaulins at its windows and rear pulled down as was required when it was used after sun-set or at night. The plaintiff was then taken to Naledi Police Station where he was booked in as an arrested person. Sgt Sekati then reported to his commanding officer about what he had done and was also about to do. The plaintiff was then taken to Jabulani Police Station where he was detained in terms of section 40(1)(b) of the Criminal Procedure Act among others.

[83] Sgt Sekati stated further that had he not arrested the plaintiff in the face of the facts and circumstances at his disposal at the time, the complainant could have justifiably lodged a complaint against his actions – which aspect could have had disastrous or unbecoming consequences against him as a person and the police service in general.

[84] This witness was subjected to a lengthy cross-examination. I will deal with the *sequelae* thereof in my evaluation of the evidence.

W/O BREY MAKHUBELA

[85] He is a detective attached to the Naledi SAPS with 14 years service as a detective. His evidence is that he received the case docket in issue here from the CSC or charge office on 11 November 2011. There was no identified suspect on it. On 12 November 2011 he received a report that a suspect had been arrested. When he perused the docket he saw that a pointing out statement was also filed in it. It deposed to the complainant herein having taken the police to house 5…….. Emdeni North situated on Zwane Street, where he proceeded to point out somebody as being one of the two people who robbed him on 10 November 2011. The arrested person happened to be the plaintiff in this case.

[86] He decided to re-interview the complainant again because in addition to the statement of a suspect pointing out, there was a second statement by the complainant in the robbery case opened. He decided to re-interview the complainant because the first or initial complainant's statement did not mention any suspects whereas the new one did so, albeit not by name. He wanted to understand the circumstances leading to the pointing out of the plaintiff.

[87] According to this witness the complainant told him that he made enquiries around Emdeni Township and people who did not want their identities made known told him where one of the people who robbed him resided. It emerged during cross-examination that the reason why the informants did not want to be identified told him they feared the wrath of the suspects as they were notorious criminals.

[88] The above is evidence of character, which should not ordinarily be lead by a state witness. However, it became admissible this time because it was specifically and deliberately solicited by the plaintiff's counsel during cross-examination. I reminded this counsel of the dangers of eliciting inadmissible evidence as that would lead to the "*lifting of the shield …*", i.e. resulting in his adversaries doing likewise.

[89] He then visited the plaintiff at the Jabulani Police Station cells : Upon arriving there, he read him or warned him of his constitutional rights as well as his rights relative to the taking down of a warning statement from him.

[90] The warning statement forms part of the documents discovered herein and is marked exhibits C.18 to C.22 of the paginated papers herein. The suspect, i.e. the plaintiff herein, answered all the questions preceding where a warning statement would be recorded, including mentioning that he was prepared to make a statement, and however, he did not make any. As a result of the non-incriminatory nature of the so-called warning statement the parties agreed that it can be handed in as exhibit or be used by any of them in cross-examination.

[91] Another purpose of visiting the plaintiff at the police cells was to prepare him for his court appearance the following day, i.e. Monday 14 November 2011. From the above it is logical to deduce that this visit by W/O Makhubela to the plaintiff occurred on Sunday 13 November 2011.

[92] According to this witness further, he questioned the plaintiff about the alleged armed robbery on the complainant on 10 November 2011. The latter denied robbing any person on that day, let alone robbing the complainant herein.

[93] He took his fingerprints and ultimately took the docket to the public prosecutor for decision on 14 November 2011. The prosecutor declined to prosecute the plaintiff, especially because the complainant was not willing to disclose the identities of the people who gave him information about the plaintiff's house or home address, worse still, as he also did not know where those informants resided.

[94] It is the above aspects, among others, his eagerness to know who the possible state witnesses who may also happen to be eye-witnesses to the robbery were as well as where they could be found that prompted him to record the second witness statement by the complainant.

[95] He further stated that he did not find it necessary to conduct an identification parade as the complainant had already identified the plaintiff to the police on the date of the latter's arrest at his shack at Emdeni North.

[96] This witness's cross-examination by counsel for the plaintiff did not yield much. The only material aspect dealt with was whether the witness acknowledged that nowhere in the two statements made by the complainant was mention made of the latter identifying his assailant through a scar on his forehead. His answer was in the affirmative, i.e. that that appeared nowhere in the two statements.

APPLICATION BY DEFNEDANT TO RE-OPEN THEIR CASE

[97] After the plaintiff had closed its case, counsel for the defendant applied for leave to re-open the defendant's case as the complainant, who the police in the mouth of W/O Makhubela told him was refusing to come and testify in this matter, was present at court and ready to testify.

[98] Counsel for the plaintiff indicated that he did not have any objection to the defendant be allowed to re-open its case under the circumstances. I granted leave for the defendant to re-open its case.

[99] The complainant THORISO MALESA then took to the witness stand.

[100] His testimony is that he resides at 5…… Kisa Street, Emdeni South, Soweto and he is employed at Jump-start Foundation which is situate at Northcliff, Gauteng North, as a mathematics tutor and project manager.

[101] On 10 November 2011 at around 06h45 he was walking towards his usual bus stop along Nelson Mandela Road in Emdeni on his way to work. He was carrying his laptop bag containing a laptop, two cellphones, some documents relating to his work as well as a calculator.

[102] He entered a shop along the road and purchased cellphone airtime. As he continued on his way he saw at a distance ahead two young men leaning against a wall or a mural. He thought nothing of it. Visibility was good all round as it was already early morning.

[103] He took out one of the two cellphones and proceeded to load the airtime into it.

[104] He then heard the sound of flick knives opening. When he look up, the two young men he earlier saw ahead of where he was to walk past were upon him, knives at the ready. They demanded that he hand over everything he had on and/or with him to them without a fuss, otherwise they were going to stab him with their knives.

[105] One of the two robbers' face looked familiar to him although he could not say where he had seen it, albeit in or around Emdeni Township. He took a chance and addressed this particular robber, asking why he was robbing him whereas he knew him. That ruse did not deter the two young men.

[106] Somehow he found himself lying on the ground : He does not remember or know if he was tripped or he tripped over himself in that confusion. The laptop case had fallen somewhere away from where he had fallen down. He screamed for help but bystanders just stood and watched – none of them coming to his assistance.

[107] They started walking away and he thought his ordeal was over. However, one of them, the darker skinned of the two, returned and picked up the laptop bag, at the same time asking him what was in it. His knife was in a stabbing position and he advanced towards him menacingly. Fearing for his life he took evasive action and beat a retreat towards where he came from.

[108] According to this witness both robbers were taller than him. One had a lighter skin while the other was dark-skinned. The dark-skinned one had a scar on his forehead.

[109] There were people around the area of the robbery and the one he noticed first was a woman sweeping outside her yard nearby. He believes many people witnessed what had happened as they stood watching throughout the robbery.

[110] He does not remember speaking to any of the people walking or standing near the scene of the robbery.

[111] As he was walking back on his way to the police station he met his brother. He related his experiences and/or ordeal to him.

[112] He walked to the police station alone. When confronted with the evidence led by Zanele Gumede, he denied knowing any Zanele Gumede or walking towards the police station in hers and Mbongeni's company. He further stated that he is in no way to dispute Zanele's testimony that she witnessed the robbery on him.

[113] At the police station he opened a case of robbery and described among others how his assailants looked like to the police : Apart from their skin colour and the scar on the dark-skinned one, he further stated that he described the clothing they wore to the police : darkish clothes, and one of them had a denim jean on. Both had covered their heads with hoods. When asked what type of hoods, he described what is commonly known as a dry-mech. It is something like the hood seen on the head of caricatures depicting the devil or messenger of death in the print media and TV or to those that are cinema-savvy, the hood worn by Darth Vader in the film, "*Star Wars*".

[114] He further stated that after the policeman recording his statement finished writing, he read it first and was satisfied it contained all that he told him. After being that satisfied, he signed it.

[115] This statement was placed in front of this witness to read. After he had read it he stated to court that it is indeed the statement he made, was satisfied

with and which he ultimately signed on 10 November 2011. He however equally agreed that nowhere in that statement was any description of any assailant inscribed. None of the identifying skin colour, scarring or clothing worn was in this statement.

[116] One Sgt Mudau accompanied him back to the crime scene where the former wanted to look around to satisfy himself. After that he went to drop him off.

[117] For the rest of that day, he and his mother traversed the vicinity of the robbing, asking people if they saw it happen and/or know who the culprits were. At the end of the day he was satisfied he had the right information that can lead to the arrest of one of his assailants. The following day, i.e. 11 November 2011, he returned to the police station. According to him, people around the area of the robbery had assured him that if he can come back with the police, they would point out to the latter, the house or houses where the culprits stayed. He related this information to the police.

[118] His sister's husband who resides at Vosloorus, Boksburg in Ekurhuleni District or Metropolitan Municipality was with him. Together with the police they drove to the area where he was robbed – he and his brother-in-law in their own motorcar, and the police in their own vehicles.

[119] At the area around the scene of the robbery people – who were not necessarily the same people he had seen and talked to the previous day and

who agreed to give the police information about the robbers – pointed a house to the police as the place where the robbers lived. It also emerged when the complainant was under cross-examination, that the culprit's name was given as Thami.

[120] They did not find anybody at that house which was the first to be pointed out to them. The members of the public or informants then pointed out a second erf to them. This house was about 150 metres away from the house pointed out first, also in a different street. They went there. It happened to be erf 5…… Emdeni North. It had a main house and two shacks in it. Sgt Sekati said there were three shacks.

[121] He followed the police as they approached the first shack. He is not sure if the police knocked on the door. Nevertheless, they entered it. There was a young man seated on a bed. The police asked him (complainant) if that young man was one of his robbers. He looked at him, scrutinising his features. When he was convinced he was not making a mistake, he told the police that young man was definitely one of the two people who robbed him the previous day.

[122] The police arrested him.

[123] When they stepped out of the shack with the arrested young man, they found a crowd congregated in the street next to the police van they were taking the arrested young man to. Those members of the public in the street

engaged the police about the arrested person, intimating to them that they had arrested a wrong person. He kept quiet as he had been instructed by the police not to respond to any questions, utterances or statements from or by those people milling around in the street. According to him, there were between 15 and 25 people in the street.

[124] According to this witness when the police drove away with the suspect – who was the plaintiff in this matter – he and his brother-in-law also drove away homewards. He was adamant that he did not follow the police van to the police station.

[125] He further testified that he visited KwaZulu-Natal immediately after the arrest of the plaintiff on a work tour. While there W/O Makhubela phoned him and asked him to come and see him when he returned home. He had notified W/O Makhubela before he left. Upon his return he learned that the arrested suspect had been released from custody and his charges quashed. He was very disappointed and traumatised by this. He then went to the police station to find out why things had turned out as they did.

[126] He does not remember who he talked to at the police station.

[127] This witness was subjected to a withering cross-examination at the end of which his evidence was left in tatters. At the end of that cross-examination, his testimony materially contradicted that of Sgt Sekati, the arresting officer.

[128] I will deal with the aspects in my analysis.

THE LAW

[129] Section 40(1)(a) of the Criminal Procedure Act[1] ("*the Act*") states among others that –

> "*(1) A peace officer may without warrant arrest any person –*
>
> *(a) …*
>
> *(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.*"

[130] The arresting officer here was a peace officer and armed robbery is a Schedule 1 offence.

[131] Section 39(1) and (3) of the Act lays down the applicable law as follows:

> "*39(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.*
>
> *(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.*"

[1] Act No 51 of 1977

[132] It is trite law that an arrest is *prima facie* wrongful and unlawful as it interferes with an individual's right to freedom of his person and integrity. It is one of the reasons why the *onus* of proof in cases of this nature shifts onto the defendant to prove that the arrest was lawful.[2]

[133] Arrest without a warrant is one of the most oppressive means of initiating a prosecution. Personal freedom of an individual is a right which has been jealously guarded and protected by our courts in general. As a result, once the jurisdictional facts justifying an arrest without a warrant are found to exist, any enquiry into the lawfulness or otherwise of a warrant-less arrest should come to an end as the precondition for the exercise of such power would have been satisfied.

[134] The section[3] specifically mentions a person committing or attempting to commit any offence in such arresting officer's presence.[4] Where this section is relied upon, the *onus* is on the police to prove the necessary.[5]

[135] The elements or requirements for a successful reliance on section 40(1)(b) is that –

135.1 the arrestor is or be a peace officer;

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[2] *Ralekwa v Minister of Safety and Security* 2004 (2) SACR 342 (T); See also *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) at [17]; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 830
[3] 40(1)(b) of the Act
[4] *Aref v Minister of Police* 1997 (2) SA 900 (A)
[5] *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A)

135.2 he/she must entertain a suspicion;

135.3 such suspicion should be that the arrestee had committed a Schedule 1 offence; and

135.4 the suspicion must have rested on reasonable grounds.

[136] Section 7 of the Constitution of the Republic of South Africa Act[6] ("*the Constitution*") reads as follows:

> "*7. Rights*
>
> *(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom* (my underlining).
>
> *(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights*." (my underlining)

[137] Section 12 of the Constitution reads as follows:

> "*(1) Everyone has the right to freedom and security of the person, which includes the right –*
>
> *(a) Not to be deprived of freedom arbitrarily or without just cause;*
>
> *(b) Not to be detained without trial;*
>
> *(c) To be free from all forms of violence from either, public or private sources;*
>
> *(d) Not to be tortured in any way;*

[6] Act 108 of 1996

> *(e) Not to be treated or punished in a cruel, inhuman, or degrading way.*"

[138] Section 39 of the Constitution titled "*Interpretation of Bill of Rights*" lays it down that –

> "… *(2) When interpreting any legislation … every court … must promote the spirit, purpose and object of the Bill of Rights.*"

[138] South African Police Service Standing Order G.341 also has relevance on this aspect. The thrust of the standing order was clearly projected in *Minister of Safety and Security v Van Niekerk*[7] as follows:

> "*… This standing order makes it clear that arrest is a drastic procedure which should not be used if there are other effective means of ensuring that an alleged offender could be brought to court.*"

[130] Footnote 13 in *Minister of Safety and Security v Van Niekerk*[8] reads as follows:

> "*Standing Order (G) 341, issued under Consolidation Notice 15/1999 and entitled 'Arrest and the Treatment of an Arrested Person until Such Person is Handed Over to the Community Service Centre Commander', provides as follows:*
>
> *'1. Background*
>
> *Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996 (Act No. 108 of 1996), the Criminal*

[7] 2008 (1) SACR 56 (CC)
[8] *Supra*

Procedure Act, 1977 (Act No. 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated, must therefore be strictly adhered to.

…

3. Securing the attendance of an accused at the trial by other means than arrest

1) There are various methods by which an accused's attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.

2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3) below.

3) A member, even though authorised by law, should normally refrain from arresting a person if –

(a) the attendance of a person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or

(b) the member believes on reasonable grounds that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette, (at present R1500-00), in which event such member may hand to the accused a written notice [J 534] *as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 1977.*

4. The object of an arrest

1) General rule

As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. A member may not arrest a person in order to punish, scare, or harass such person.

2) Exceptions to the general rule

There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined below and constitute exceptions to the general rule that the object of an arrest must be to secure the attendance of an accused at his or her trial. These exceptions must be studied carefully and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.

(a) Arrest for the purposes of further investigation

…

(b) Arrest to verify a name and/or address

…

(c) Arrest in order to prevent the commission of an offence

…

(d) Arrest in order to protect a suspect

…

(e) Arrest in order to end an offence

…

6. Manner of effecting an arrest

…

(2) Arrest without a warrant

(a) It is only in exceptional circumstances where a member is specifically authorised by an Act of Parliament (for example, sections 40 and 41 of the Criminal Procedure Act, 1977) to arrest a person without a warrant, that a person may be arrested without a warrant. Any arrest without a warrant, which is not specifically authorised by law, will be unlawful.'"

EVALUATION AND ANALYSIS

[141] From the summary of the testimonies given by witnesses for each party herein, it is clear that there are two mutually destructive versions. To resolve such a situation the learned judge in *Stellenbosch Farmers Winery Group Ltd and another v Martell ET and Others* set out the following:

> "*The technique generally employed by courts in resolving the factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness box, (ii) his bias latent, and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or what established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his versions, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend. Apart from the factors mentioned under (a), (ii), (iv) and (v) above on (i) the opportunities he had to experience or observe the event in question and (ii) the quality integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rate one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*"(9a)

[142] To discharge the *onus* in such a situation the court in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens*[9] stated that where the versions of the plaintiff and the defendant are

[9] 1974 (4) SA 420 (W)

mutually destructive, it must be proved that the version of the party burdened with the *onus* is true and that of the other party is false.

[143] According to defendant's Sgt Sekati, the complainant came to the police station and told him that he had information concerning the people who robbed him. He further told him he was in a position to go and point out the house(s) where the culprits lived to him. He drove the police van to the area and the complainant himself caused their vehicle to stop and pointed at house 508 Emdeni North as the plea where his assailant(s) stayed. They entered that erf.

[144] According to the complainant's testimony, he told Sgt Sekati at the police station that he would take the police to people near or around the scene of his robbery who (the people) would point out the culprits' houses to them (the police). They drove to the area and members of the public (not the complainant) pointed two houses to the police.

[145] Clearly the two most important witnesses for the defendant contradicted each other materially on this aspect.

[146] About what happened when the police entered the plaintiff's shack on 11 November 2011, the following unfolded.

[147] According to Sgt Sekati, when he encountered the plaintiff inside the shack, his only other colleague, Sgt Mudau, was outside and he was a lone

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9a

police officer therein. When the complainant entered the shack he spontaneously rushed the plaintiff demanding his laptop and cellphone and he had to restrain him.

[148] According to the complainant's answers during cross-examination, inside the shack the police only asked him if the man seated on the bed therein is one of his assailants. That he first scrutinised him. Only after he had satisfied himself did he confirm to the police that indeed he was the one.

[149] The police witness flatly denied ever putting it to the plaintiff that his name was Thami. He also denied checking the latter's identity book to verify his claim of not being Thami. However, when the complainant testified, he confirmed the plaintiff's version to the effect that when the police arrived they addressed him as Thami and when he refuted or denied being Thami, police demanded his identity book which the plaintiff promptly produced.

[150] As regards happened when the police stepped outside the plaintiff's shack with him handcuffed, the evidence of the two defendant's witnesses, Sgt Sekati and the complainant is also mutually destructive.

[151] According to Sgt Sekati, when they stepped out, there were no people in and/or around the sole police van they had come in. According to the complainant, there were many members of the public around the several police vehicles and other police officers outside.

[152] There is also evidence from the plaintiff's witness Zanele Gumede as well as from the plaintiff that Zanele told the police that she and other available members of the public told the police escorting the plaintiff out of his erf to one of the three police vans and a sedan there in attendance, that they were eye-witnesses to the complainant's robbery on 10 November 2011 and that the correct culprits were Gerald and Bata. Sgt Sekati denied this ever happening. However, the complainant confirmed that indeed there were many members of the public milling around and some of them did speak to the police about the plaintiff being innocent and the real culprits being known.

[153] With regard to what the complainant told the police when he reported the robbery, the first statement he made on 10 November 2011 did not describe any features or characteristics or clothing worn by the culprits. The above sharply challenges the complainant's and Sgt Sekati's evidence in court that the complainant described how the culprits looked like or what they wore, let alone whether or not the darker-skinned of the two had a scar on his forehead. Even the second statement the complainant made after the plaintiff had been arrested and taken to Naledi Police Station does not speak about any scar on a forehead or any articles of clothing as testified to by the complainant in court.

[154] It is my considered view and finding that if any identifying features of the culprits were indeed discussed when the complainant opened the criminal charges, they would definitely have been part of the initial statement he made. Supposing he forgot to mention them in his first statement, then he ought to

have mentioned them in his second statement made a day after. It is thus my view and finding that the conclusion is inescapable that the mention in court by both Sgt Sekati and the complainant that they talked about the culprits having a scar or wearing this and that is nothing but a recent fabrication. It was the complainant's evidence that he read each statement before he could sign it after being satisfied that it contained all that he had related to the writer of the statement. Considering the complainant's level of literacy and station in life work-wise, it is my finding that such glaring omissions as those relative to how he could identify his assailants would have stuck out like a sore thump and he would have ensured they were rectified before he signed them.

[155] The defendant's witnesses' conflicting versions did not end there.

[156] According to the complainant, after the plaintiff was arrested at 508 Emdeni North, he did not follow the police to the police station. This conflicted with the plaintiff's witnesses' version that the complainant indeed followed the plaintiff to the police station where he even started to demand his laptop and cellphones. Although the complainant insisted he never went to the police station again on 11 November 2011 after the arrest of the plaintiff, this version is irreconcilable with the fact that he made the second statement at the police station on that date. The investigations diary filed in the paginated papers herein as annexures C.41 to C.48 also confirm that. When the complainant was under cross-examination, the following came out at item 94 of my court notes:

"*94.*
Q. Plaintiff testified that you even visited him at the cells demanding your laptop and cellphone?

A. I saw him and said nothing to him."

[157] This question and answer in my view characterises the complainant as an untruthful witness, especially more so that it was not the first time he conceded to not having told the whole truth.

[158] When this point was pressed further, the complainant's response was:

"*95. …*

A. Uh …! Ah …! Eh…! I don't remember well if (sic) *I ever went to the police station or not …*"

[159] When the totality of the defendant's version is assessed as a whole, I am satisfied that it is mutually destructive on its own. From their answers during cross-examination, both Sgt Sekati and the complainant either were lying to this Court or were deliberately misleading it.

[160] I am convinced that Zanele Gumede told the police who the complainant's real robbers were. The arresting police officer should have first verified Zanele's story before continuing with leading the plaintiff away. From the complainant's evidence also, it became clear that members of the public pointed at the houses where the two culprits respectively resided. This means or translates into the fact that the police had eye-witnesses at their disposal

who would have given them the identities and/or names of the two robbers. They (police) contemptuously spurned this assistance by members of the public.

[161] Even at the police station after his arrest, the plaintiff implored the police to visit the vicinity of the robbery scene and interview people who said they saw who committed the robbery. There is evidence that W/O Makhubela dismissed the plaintiff's entreaty, telling him instead that he (W/O Makhubela) also have his own witnesses who would testify to the plaintiff's complicity in the robbery. It emerged at the end of the day that W/O Makhubela had no such witnesses. His was just an empty bluff.

[162] From the evidence of the defendant alone, it is clear that the police cannot have formed a reasonable suspicion that the plaintiff was one of the two men who robbed the complainant.

[163] However, the above does not absolve this Court from evaluating the evidence of the two plaintiff's witnesses.

[164] The evidence of the plaintiff insofar as what happened or prevailed outside the erf he was arrested as was corroborated by Zanele Gumede in all material respects like the people around the area, the number of police vehicles there, the number of policemen in attendance as well as Zanele's intimation to the police about who the actual robbers were. Zanele's evidence

was virtually uncontradicted or uncontroverted. The whole of it still stood unshaken at the end of her cross-examination.

[165] When I evaluate the credibilities of the witnesses who testified in this matter, the plaintiff's witnesses were thoroughly impressive and ostensibly credible witnesses. They gave their evidence in a confident, free-flowing and logical manner. They stood well to cross-examination. Their demeanours in court were such that one could easily see that they were testifying about things that they saw or heard themselves. They both made very good impressions as witnesses to the court.

[166] The police were in my view duty-bound to investigate the plaintiff's assertion that he was at work on 10 November 2011. By not doing so, they deprived themselves of any moral high ground of alleging as Sgt Sekati did, that the plaintiff was hesitant and showed guilty conscience. There are no grounds for a lay person like Sgt Sekati to arrive at such a conclusion.

[167] On the other hand, the defendant's witnesses did not make a good impression in the witness stand.

[168] The complainant was throughout leading evidence that was speculative or conjectural. Instead of answering a straight forward question relative to what he said in his evidence-in-chief, he would respond that he does not

remember. His testimony was filled with "*if's*" and "*supposes*"; "*I believe …*", "*I think …*" etc.

[169] When he was asked during cross-examination why the perpetrator's scar or the clothing they allegedly wore during the robbery were not in his two statements, he said –

> "*… I think I was only asked if I could describe my assailants after I had made my statements …*"[10]

[170] If the above answer is anything to go by, then it would mean that the whole of the complainant's testimony and/or chronology of events were one big untruth and fabrication.

[171] When pressed as to whether he was sure of the answer he gave, he replied by stating: "*I think so*."[11]

[172] At the end of the complainant's testimony, he had undone and contradicted all material aspects testified to by Sgt Sekati and W/O Makhubela.

[173] From the totality of their evidence, it is very, very difficult to find that the defendant's witnesses were truthful and credible witnesses. The complainant only testified after the plaintiff had closed his case. His counsel applied for

[10] Bullet 34 of Judge's notes (complainant's cross-examination)
[11] Bullet 35 – complainant's cross-examination

and was granted leave to re-open the defendant's case. It should be noted or remembered that the defendant's witnesses led their evidence first. Instead of corroborating the first two of the defendant's witnesses, the complainant contradicted their versions materially.

CONCLUSION ON MERITS

[174] The plaintiff herein was in detention for a period of not less 66 hours after he was arrested on 11 November 2011 in the evening. It is not in dispute that the arresting officer, Sgt Sekati, was a peace officer. That Sgt Sekati entertained a suspicion of the commission of a Schedule 1 offence is also not in dispute. What is in dispute is whether or not Sgt Sekati, when he arrested the plaintiff, was acting on a suspicion that rested on reasonable grounds.

[175] In *Minister of Safety and Security v Sekhoto*[12] the court held as follows in part of the head note:

> "*Held, further, that once the required jurisdictional facts were present, the discretion whether or not to arrest arose. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality.*"

[176] From the totality of the evidence herein, even from the defendant's version alone, the arresting officer did not stay within the bounds of rationality when he exercised the discretion to arrest the plaintiff. There were eye-

[12] 2011 (5) SA 367 (SCA)

witnesses who told him in the face that the person he was arresting was not one of the two armed robbers who accosted the complainant on the morning of 10 November 2011. Sgt Sekati chose to ignore this information that was being drilled into and onto him. That in my view is not a reasonable exercise of a discretion to arrest in the circumstances.

[177] It is so that the plaintiff does have a scar on his forehead. The plaintiff's two witnesses, Sgt Sekati and the complainant also mentioned in their evidence in this Court that the plaintiff's scar was a major identification point that led to the complainant pointing out the plaintiff. However, what sticks out as a sore point is the fact that this major identifying feature is not mentioned in both the statement the complainant made – one before the plaintiff's arrest and another after his arrest. This non-disclosure in my view inescapably points to perceptions of this aspect being a recent fabrication.

[178] Furthermore, the complainant testified about describing the clothes his assailants were wearing when they robbed him. This aspect also is absent in the two statements the complainant made to the police. It is view and finding further, that a reasonably proficient arresting officer would have searched the plaintiff's shack for the articles of clothing the complainant testified about.

[179] This aspect also renders the decision by Sgt Sekati to arrest the plaintiff irrational and unreasonable. When all the omissions I have alluded to hereinbefore are taken cumulatively, I find that the police cannot be said to have entertained a suspicion that rested on reasonable grounds, that justified

the arrest of the plaintiff without a warrant. The situation is compounded further when what was done by W/O Maluleka at the police station after the plaintiff was taken there after his arrest : He ignored the plaintiff's impassioned pleas to go and interview eye-witnesses to the robbery who had bluntly told his colleague, Sgt Sekati and other police officials thereat present, that the plaintiff was a totally wrong suspect and that the perpetrators of the dastardly deed were known. Their names were also mentioned. Incidentally, one of them, Gerald, was reported to be residing within the same erf in Emdeni North as the plaintiff. I find that it would have been the prudent and/or rational thing to there and then return onto the erf and look for Gerald.

[180] In the pointing out statement made by the complainant, nowhere does the identification features appear. The arrest statement of Sgt Sekati, also dated 11 November 2011 does not make mention of any identifying features or marks as would have been mentioned by the complainant. The above makes the complainant's answers to the following question put to him during cross-examination quite queer:

> "*Q:. Were you satisfied* [after reading your statements] *that they* [the police] *had recorded what you told them?* (my bracketed explanatory facts)
>
> *A: Yes.*
>
> *Q: Do you agree there is no description of your assailants therein?*
>
> *A: Yes. But it is a long time ago.*
>
> *Q: Read the statement and then reply sir.* (witness reads statement in full.)
>
> Then:

Q: (Question repeated.)

A: I agree. It is possible the police did not ask me questions that could have made me state specific identification features.

Q: Are you saying it is the policeman's error or fault by not asking you the questions that would have triggered answers directly related to identification features?

A: I think so."

[181] This Court cannot visualise a scenario where a person robbed by unknown people is not asked how he identifies them. The fact that he described his assailants solely as one being light skinned and the other dark skinned in my view puts paid to the complainant's above explanations. I find that he was economical with the truth about this aspect.

[182] These answers in my further view fit in with for e.g. the following question and answer exchange between the complainant and the cross-examiner:

"*Q: In paragraph 3, page 15 of the paginated papers herein the only description you gave was that both assailants were tall.*

A: Correct.

Q: That is the only description you have in that second statement?

A: Correct.

Q: You had read it and was satisfied before you signed it?

A: I assume so. Yes.

Q: There is nothing about clothing there?

A: Correct.

Q: Nothing about scar?

A: Correct. I think I was only asked if I could describe my assailants after I had signed my statements.

Q: Are you sure?

A: I think so."

[183] The tone of the above quote accurately describes the manner in which the complainant gave his entire evidence : He was evasive, hesitant, contradicted what he said earlier in chief and under cross-examination and was speculative in his responses.

[184] I therefore find that the complainant, in addition to materially contradicting other witnesses for the defendant, was not an impressive witness at all.

[185] I also find that the only description of his assailants the complainant gave to the police is that they were both tall, one was light-skinned and the other was dark-skinned.

[186] How many dark skinned or light skinned tall men are there in Soweto in general and Emdeni in particular. This is the gist of what was decided by Mali AJ in the unreported matter of *Ramoshaba v Minister of Safety and Security*

and Cons Van den Berg[13] where the following was said at para [25] at page 11:

> "*The question then to be answered is, what was the reasonable suspicion entertained by Constable Van den Berg on the day in question? He responded to an instruction by his superior that there was a sworn statement by only one person positively who had identified the plaintiff as a suspect in an armed robbery in an incident which involved five people. Nothing was placed before me as to why was the identification parade not held nor why were the other four victims of the armed robbery not questioned about the plaintiff's identity. It was my observation that the plaintiff is not tall and neither strong built, having regard to his identity* [sic] *a thorough identification was required. Any man who is tall, strong built and good Afrikaans speaking could have been a suspect.*"

[187] What happened in the above case of *Ramoshaba and Another v Minister of Safety and Security and Another* is what happened in our present matter.

[188] I scrutinised the complainant in this matter and compared what he said with what I saw in the plaintiff. Firstly the plaintiff cannot be said to be very dark complexioned. He is what is commonly called coffee colour. He is of the same height and weight as the complainant more or less.

SYNOPSIS

[189] A peace officer who relies on section 40(1)(b) of the Act has to prove all the jurisdictional facts in that section. Once these facts are present, the

[13] Case No 41312/12, North Gauteng High Court on 3 May 2014

discretion whether or not to arrest only then arises. The decision to arrest must be based on the intention to bring the person to be arrested, especially where there is no warrant, to justice. That discretion so exercised must be to arrest in good faith, rationally and not arbitrarily. It follows then that once the jurisdictional requirement of a reasonable suspicion is proved by the defendant, the arrest is brought within the ambit of the enabling legislation and this justified.

[190] In this matter there is enough evidence pointing to the fact that the suspicion formed by Sgt Sekati was improperly formed. I am satisfied that on the evidence before this Court, the decision to arrest the plaintiff was made arbitrarily and/or premised on irrational reasoning.

[191] It therefore follows that the defendant failed to satisfy this Court that his suspicion was reasonable when he decided to arrest the plaintiff. A reasonable police officer would have listened to people professing to be eye-witnesses to the robbery on the plaintiff, analysed and assessed the quality of the information at his disposal critically. He should not have acted as he did – acting impulsively and without sufficient reason and arresting the plaintiff – on such flimsy evidence as was gleaned from the complainant.

[192] I emphasise, Sgt Sekati did not have at his disposal a reasonable basis at all to arrest and detain the plaintiff herein. He failed, neglected and/or refused to properly apply his mind to the situation and facts at hand. His conduct fell far too short of that which is expected of a police officer of his

standing and experience or position. The above also renders the plaintiff's detention unlawful.

[193] In the circumstances, the plaintiff succeeds on the merits. I have not come across any circumstances in this matter that could lead to this Court finding any contributory negligence on the part of the plaintiff in the whole unfortunate saga.

QUANTUM

[194] In *Thandani v Minister of Law and Order*[14] Van Rensburg J observed as follows on the aspect of unjustified deprivation of liberty:

> "*In considering quantum, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of man in a free society, which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual.*"

[195] Visser and Potgieter, *Law of Damages*,[15] sets out some of the factors to be taken into account in the awarding of damages as follows:

> "*The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or malice on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement) of the deprivation of liberty; the status, age and health of the plaintiff; the extent of publicity given to the*

[14] 1991 (1) SA 702 (E) at 707B
[15] 2nd Edition at page 475

> *deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous.*"cases"…

[196] The plaintiff here had his welcome rest or *siesta* interrupted by the police in the company of the complainant. He was just arrived from his workplace and was resting on his bed. He was bundled face-first on the bed and handcuffed at the back like a common and dangerous criminal. He was marched out of his shack, a policeman pulling him by the handcuffs, which progressively bit deeper and tighter into his wrists. A crowd including women who were helping with preparations for a funeral the following day gaped at the spectacle that was unfolding in front of them and the plaintiff was the unfortunate centre-piece of the comedy. Surely his standing and reputation in the eyes of the crowd, who were mostly, if not all, people who were his neighbours, must have plummeted. His own people started looking at him ask-endly and with visible contempt – in their eyes, although charges were dropped against him, he was maybe a ruthless robber who has brought the family name down.

[197] That he is entitled to a *solatium* for his arrest and detention cannot be debated or debatable.

[198] Bosielo AJA (as he was then) held as follows in *Minister of Safety and Security v Tyulu*:[16]

[16] 2009 (5) SA 85 (SCA) at 93d-f

> "*In the assessment of damages for unlawful arrest and detention it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the award they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation is viewed in our law … Although it is helpful to have regard to awards made in previous cases to serve as a guide, such an approach, if slavishly followed, can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.*"

[199] Counsel for the parties on both sides referred to and even furnished this Court with several decided cases with the request that this Court use them as a kind of template when assessing the quantum of damages here. I favour the approach enunciated by Bosielo AJA above.

[200] Jones J aptly captured the spirit of the abovementioned authorities in *Olgar v Minister of Safety and Security* [ECD 18 December 2008 (Case 608/07) at para [16]] as follows:

> "*In modern South Africa a just reward of damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money; to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty'; at the expense of the defendant.*"

[201] It was argued on behalf of the defendant that if the court is to award any damages to the plaintiff, an amount ranging between R20 000 and R90 000 is the appropriate *solatium* to be awarded. It relied on the following cases:

201.1 *Minister of Safety and Security v Seymour*[17] where the Supreme Court of Appeal reduced an award of R500 000 granted by the High Court to R90 000.

201.2 *Minister of Safety and Security v Tyulu*[18] where an amount of R15 000 was awarded for wrongful arrest and detention.

[202] On the other hand, the plaintiff persisted with his claim for R150 000 and relied on a plethora of cases, some of which are the following:

202.1 *Joshua Ramoshaba v Minister of Safety and Security and Constable Van den Berg*[19] wherein in a claim in the amount of R300 000, the amount of R275 000 was awarded for a claim similar, if not identical with the matter were are dealing with there.

202.2 *Emmanuel Tlhaganyane v Minister of Safety and Security*[20] where the claimant seeking R150 000 was awarded R140 000.

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[17] 2006 (6) SA 320 (SCA)
[18] *Supra*
[19] *Supra*
[20] Case 1661/2009 (North West High Court) per Landman J

202.3 *Henry Foster v Minister of Safety and Security*[21] where an award of R200 000 was made.

202.4 *Steven Mothoa v Minister of Police.*[22] Hutton AJ granted the award of R150 000 as sought by the plaintiff.

202.5 *Ella Raditsela v Minister of Police.*[23] An amount of R90 000 was awarded *vis-à-vis* a claim of R150 000.

202.6 In *Colin Nelson v Minister of Police*[24] the court awarded R110 000 after analysing and applying the principles set out in all the cases I have quoted hereinbefore. At today's values, the amount is around R150 000.

[203] The proper approach to assess damages include the evaluation of personal circumstances of the plaintiff, the circumstances around the arrest as well as the nature and duration of the detention[25]. It is so that previous awards may have a persuasive effect. However the exercise involves the exercise of a discretion by the trial court. All of the above should not interfere

[21] Case 10/43463 (South Gauteng High Court) per Hodes AJ on 30 August 2012
[22] Case No 5056/2011 (South Gauteng High Court) delivered on 8 March 2013
[23] Case No 20572/2011 (South Gauteng High Court) per Mphahlele AJ delivered on 5 April 2013
[24] Case No 41403/11 (SGHC); Windell AJ, on 28 March 2013
[25] *Colin Nelson v Minister of Police* (unreported SGHC case) Case No 41403/11 at para [6].

with or upon the court's general discretion. As Holmes JA put it in *Pitt v Economic Insurance Co Ltd:*[26]

> "*However, no better system of assessing damages has yet been evolved, and the court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense.*" (my underlining)

[204] The plaintiff was 30 years old when he was arrested and detained. He was single and had two small children. He was gainfully employed. His arrest and detention resulted in him losing his employment. To date he is unemployed.

[205] The manner in which he described the conditions under which he was detained was really heart-rending and deplorable to say the least : he was squeezed into a small cell and despite the fact that the cell had reached the maximum of its capacity, police kept on bringing in more and more people there-at. Most of those brought into the cell during Friday night and Saturday were dirty, smell and cantankerous drunks who did not hesitate to urinate or relieve themselves on the floor in full view of all in there. He was forced to share the mattress and one blanket he was given with the new arrivals. The blanket was dirty and smelt of urine. There were no proper ablution facilities and no necessities like toilet paper, soap and washing rags. The toilet in the

[26] 1957 (3) SA 284 (D) at 287.

cell did not offer any privacy. Anybody using it was in full view of the other cellmates.

[206] The food was deplorable. The plaintiff stated that he forced himself to eat it just to stay alive.

[207] His arrest was performed in a degrading, inhumane and humiliating manner – in front of his neighbours and family members.

[208] The aftermath of his arrest and detention was that despite the fact that charges against him were not continued with, he still remained with a stigma that led to even his close family treating and looking at him as if he was a leper. That hurt, he said.

[209] I have thoroughly assessed the circumstances of this matter and considered what the appropriate *solatium* should be. What happened to him was a drastic invasion of his liberty and right to physical integrity and dignity.

[210] As Nugent JA put it in *Minister of Safety and Security v Seymour*[27] the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.

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[27] *Supra* at para [17]

[211] Viewing the facts and circumstances of this case as a whole, it is this Court's finding that the plaintiff was wrongfully and unlawfully arrested and detained by the defendant's employees who were acting within the course and scope of their employment with the defendant. He is entitled to compensation. My view is that the amount of R140 000 is the correct or appropriate *solatium* for his suffering.

ORDER

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

1. The defendant is ordered to pay the plaintiff the amount or sum of R140 000,00 (one hundred and forty thousand rand).

2. To further pay interest on the said sum of R140 000,00 at the rate of 15,5% per annum *a tempore morae* from the date of issue of summons herein to date of final payment.

3. The defendant is also ordered to pay the costs of the action.

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N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	23 JULY 2014
DATE OF JUDGMENT	04 AUGUST 2014