

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 13/13609

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

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DATE

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SIGNATURE

In the matter between:

**NDIZANA MZOLISI BANTU**

Plaintiff

And

**MINISTER OF POLICE**

First Defendant

**PASSENGER RAIL AGENCY OF SOUTH AFRICA  
(PRASA)**

Second Defendant

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**J U D G M E N T**

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**MAKUME, J:**

**BACKGROUND**

[1] In this action the plaintiff claims damages against the defendant arising out of his arrest, detention and assault at the hands of policemen and officials employed by the first defendant. The claim against the second defendant was by agreement withdrawn and each party agreed to pay own costs. This judgment is accordingly only against the first defendant.

### THE PLEADINGS

[2] The plaintiff claims the sum of R180 000,00 (One Hundred and Eighty Thousand Rand) being in respect of the unlawful arrest, detention, discomfort and *contumelia* and the sum of R100 000,00 (One Hundred Thousand Rand) being for the assault.

[3] The plaintiff detailed that his arrest by W/O Hobjane, Shibambu as well as one Mavhunda was unlawful as there were no reasonable grounds for such arrest and that it was carried out maliciously without intending to bring him before a court of law. He remained in custody for 48 hours.

[4] The plaintiff further detailed the assault perpetrated by the police officers on him during his arrest and states that he was handcuffed tightly and his wrists twisted, he was threatened with shooting and whilst at the back of the police vehicle it was driven erratically as a result he was flung around inside the moving police vehicle.

[5] In his plea the defendant admits that its employees namely Hobjane and Shibambu arrested the plaintiff without a warrant of arrest on the 30<sup>th</sup> October 2012. The defendant pleads that such arrest was lawful as in terms of section 40(1)(a) of Act 51 of 1977 the plaintiff attempted to commit an offence or was committing an offence of interfering with police duties in the presence of the said police officers. The defendant denies that any of its employees assaulted the plaintiff.

### EVIDENCE

[6] Having accepted the *onus* to begin and prove his case the plaintiff testified and called two witnesses who testified in support of his case. *Inter alia* the plaintiff testified that:

- 6.1 He was born on the 4<sup>th</sup> February 1984 and was 30 years old when he testified.
- 6.2 He is employed as a security officer by a company called 24/7 Security Services in Roodepoort and lives at Kagiso in the West Rand. He passed matric.
- 6.3 On Tuesday the 30<sup>th</sup> October 2012 he was in the company of his wife/girlfriend a certain Ms Ennie Modiehi Pankisi they both boarded a train at about 11h50 at Roodepoort Railway Station

en route to their home in Kagiso. They were to alight at Luipaardsvlei Station.

- 6.4 At about 12 midday the train stopped at Princess Station. Members of Metro Railways conducted what is known as a stop and search. This involves ticket examiners getting onto the train and requesting passengers to produce valid tickets for the journey.
- 6.5 Persons who did not have valid tickets were ordered off the train whereafter they paid fines and purchased tickets before being allowed back onto the train. Those who could not pay were locked up in a cell or a room adjacent to the railway line at the exit of the station.
- 6.6 After about ten minutes a man wearing a brownish jacket and a white cap spoke on a loudhailer signalling the train to move on out of Princess Station. The train moved but was stopped again to allow some of the people who had now paid the necessary fines to get onto the train. People paid R40,00 fines.
- 6.7 Some people got onto the train and it left only to be stopped for the second time as there were people screaming that they should not be left behind. There apparently was some argument between those persons and the Metro officials.

- 6.8 This argument lasted for close to 30 minutes. The plaintiff testified that he was seated next to the window nearest to the platform. He peeped through the open window and asked the Metro official who was in possession of the loudhailer as to when will the train depart as it is delaying them. This Metro official said to him “*Voetsek*” telling him that he was too forward and must sit down. Further insults and derogatory words were said of the plaintiff. Despite his plea the Metro official told him that the train will leave anytime even the following day.
- 6.9 At that time a member of the South African Police who was on the platform joined in the altercation and told the plaintiff to go and ask the driver of the train because the man with the loudhailer does not drive trains.
- 6.10 The police officer entered the coach, grabbed the plaintiff by the collar of his shirt whilst insulting him. Plaintiff pleaded that he was just asking and apologised. He was told that his apology meant nothing. The police officer hit him on the face with a fist and pushed him away as a result plaintiff fell on the chair across where he had been seated.
- 6.11 The man with the loudhailer hit him on the chest with the loudhailer. The police officer grabbed him and punched him

again telling him to get out of the train. The plaintiff asked why he should get off because he is in possession of a valid train ticket. They did not tell him why he should get off. The plaintiff resisted getting off and the two men were joined by other officers and pulled him. He held onto a pole in the middle of the coach resisting to be taken off. They continued hitting him by clapping him. The police officer eventually held him by his testicles and squeezed them hard as a result he let go.

6.12 He was then taken into the waiting cells at the station after being assaulted further. Whilst inside the cells he took out his cellphone and recorded the insults as they were continuing and also took pictures including a picture of himself showing his swollen face and eyes. The photos were handed up as exhibits.

6.13 Amongst the pictures are those showing blood on the clothes that he was wearing. The plaintiff sustained the following injuries:

- (a) Bleeding nose;
- (b) Swollen eyes;
- (c) Chest back pain.

6.14 The plaintiff had severe pain on his back and had difficulty breathing. He was taken to Roodepoort Police Station and then

to the hospital. He was handcuffed tightly causing injury or discomfort on his wrists. When the police officer drove off from Princess Railway Station they drove irrationally causing him to bump around at the back of the police van.

- 6.15 The police did not tell him why he was being arrested they kept on telling him to "*Voetsek*".
- 6.16 He received treatment at Discovery Hospital and was then taken back to Roodepoort Police Station where he was locked up in a cell. He was handed a notice of his rights in terms of section 35 of the Constitution indicating that he is arrested for interference with the police in their duty. He was locked up with five people. The cell was dirty and smelly as the toilet did not flush. He slept on a dirty smelly sponge.
- 6.17 At some stage the police took his cellphone and deleted the recording he had done at Princess Station. One of the officers threatened to shoot him. This scared him a lot as he knows it is possible. He spent the Tuesday night and Wednesday in the cells and on the Thursday the 1<sup>st</sup> November 2011 he was taken to court and was released. The prosecutor declined to prosecute.

6.18 When he left the court cells at about 12 noon he went to see a Dr Bhika who examined him and gave him painkillers to treat the swelling and inflammation. An injection was also administered.

6.19 He testified that the whole experience has affected him badly as he is now scared of police officers, he does not trust them anymore. He did open a case of assault against the police but does not know what happened to the case. He denies that he interfered with police in executing their duties.

[7] During cross-examination it was put to him that he was interfering with police duties that is why he was arrested. The plaintiff denied this. It was also put to the plaintiff that the cause of the injury is because he fell off the train as he was stepping out and this injured his eye. The plaintiff denied this.

[8] On the day in question he was to report for work at 18h00 for night duty and was in a hurry to get home so as to prepare himself to go to work. He uses a train daily to and from work. He admitted that he did not feel good about the train having to stop for such a long time as this was consuming his time. He however did not lose his temper. He was not angry and was just concerned.

[9] It was put to the plaintiff that W/O Hobjane will testify that he and his fellow police officers were called to the station and when he and the other officers were searching one passenger he the plaintiff objected and asked



why has the train been stopped and why are they searching that person. The plaintiff denied this and told the court that no one was being searched.

[10] It was further put to the plaintiff that W/O Hobjane took exception to his question as he regarded same as interference with his duties. The plaintiff denied that he ever interfered with the police duties because the people who were checking tickets were the Metro officials and not the South African Police.

[11] It was put to the plaintiff that he became angry and verbally abused the police calling them stupid whereupon W/O Hobjane told him that he will arrest him for interference. The plaintiff replied that W/O Hobjane will be telling a lie. He reiterated that the police arrested him for nothing and just told him that he is too forward.

[12] It was put to the plaintiff that W/O Hobjane will testify that he grabbed the plaintiff with the intention to arrest him and that he the plaintiff resisted until his colleague Shibambo came to his help. The plaintiff said that inside the train there was only one police officer the rest of the people were Metro officers who pulled and pushed him. His testicles were painful as a result of being squashed hard by W/O Hobjane.

[13] It was put to the plaintiff that at the door of the train as he and W/O Hobjane and Shibambo were taking him out of the train he the plaintiff slipped and fell as he lost his footing and that he fell face down on the platform and in

the process injured his right eye. The plaintiff vehemently denied that is what happened and said that W/O Hobjane will be lying and questioned how could he trip and fall if the two police officers were holding him.

[14] Indeed as the plaintiff responded I find it difficult to understand how he, the plaintiff, alone fell. He should have taken along the two police officers holding him on each side. This version by the police officer seems strange.

[15] W/O Hobjane confirmed that the plaintiff was then handcuffed. When he was forcefully removed from the train there were about 20 passengers in there and they all saw what happened.

[16] It was put to the witness that it is impossible that the police officers would assault him in that fashion in full view of the public. The plaintiff responded that it is not impossible. The police have always done that and assaulted and manhandled other people in full view of the public. His girlfriend was there and saw what happened. She also did not give any objection like the members of the public.

[17] When the police took him to Discovery Hospital one of them Shibambo pulled him by the handcuffs. Mavhunda also a police officer handcuffed him tightly.

[18] It was put to the plaintiff that there is a contradiction between what is contained in his letter of demand namely Annexure "B" dated the 19<sup>th</sup> November 2012 and paragraph 14 of his particulars of claim, in that in the

letter of demand he only mentions W/O Hobjane as the only police officer who assaulted him and yet the particulars of claim mentions two other police officers namely Shibambo and Mavhunda. He responded that Shibambo twisted the handcuffs tightly on his wrists.

[19] The plaintiff responded that he cannot answer to what his legal representative decided to put down on paper. He stuck by his version that only W/O Hobjane assaulted him inside the train and that Shibambo only handcuffed him and tightened the handcuffs making his wrists sore. He added that the reason why Shibambo and Mavhunda are mentioned in the particulars of claim is because they were with W/O Hobjane at the time of his arrest.

[20] The balance of the cross-examination did not detract the plaintiff from his version that W/O Hobjane assaulted him inside the train by hitting him with a clenched fist in the face. It was once more put to the plaintiff that W/O Hobjane will testify that he the plaintiff insulted the police officer by calling him "*stupid*" and that is why they arrested him. The plaintiff denied having insulted the police officer. He denied that he was not friendly to the officers. He asked and expected an explanation why is the train not leaving he was not angry but was worried because it was getting late.

[21] He resisted to get off the train because there was no reason for him to do so as he had a valid train ticket for the journey. If there was a good and

valid reason given to him to get off the train he would have obeyed the instructions from the officers.

[22] It was put to the plaintiff that if he did not do anything violent the police would not have taken him off the train. The witness testified that he did not fight with the police and he was not in any manner violent.

[23] It was again repeated to him that W/O Hobjane and Constable Shibambo were escorting him out of the train when he the plaintiff tripped on the train step which is higher than the platform as a result he fell face down on the platform injuring his eye. Once more the plaintiff said it is a lie.

[24] It was put to the plaintiff that the train was stopped to check for tickets but not to allow people to pay fines. The plaintiff said that is what happened and if they now deny it means the police and the Metro officials were busy with something unlawful and were now hiding it because they had assaulted him.

[25] He was only told of the reason for his arrest at the time when he was taken to the cells at Roodepoort and after he had been handed the notice of rights in terms of the Constitution.

[26] Whilst the plaintiff was held in the cells at Princess Station he managed to use his phone to take pictures and record conversations of those Metro officials who were insulting him. When they noticed this they told W/O

Hobjane who then took the phone and deleted all that he had photographed and recorded.

[27] The plaintiff concluded by saying that when the police took him away he did not even think that he was under arrest. He kept on asking them where they are taking him to whereupon the police said that they were going to beat him up more and more because he was cheeky.

[28] Answering questions by the court the plaintiff said that he had a swollen eye which according to the doctor bled internally, his nose were bloody, his hands felt numb like it had cramps, he also had back pain and his wrists had abrasions.

[29] Mr Tebogo Reginald Molokwane testified that he is 33 years old and lives in Kagiso. He knows the plaintiff Mr Ndizane as they live in the same section called Singobile. It is not long that they have known each other. They are not friends. He was in the same train with the plaintiff on the 30<sup>th</sup> October 2012.

[30] The witness Mr Molokwane heard an altercation taking place when the plaintiff enquired from the Metro official as to when the train will be leaving. He saw one police officer and two Metro security officers enter the train and went to the plaintiff. He then saw them pull him out of the train. Between where he was seated and where the plaintiff was with the police there were

people obscuring him. The police and the Metro officials stood with their backs to him.

[31] The next thing he saw the police officers holding the plaintiff by his belt and two officers held him each one on his side and they walked off the train with him. He denied that the plaintiff tripped and fell. He never testified that the police officer assaulted the plaintiff inside the train because he was seated and could not see everything.

[32] Ms Ennie Modiehi Pankisi testified that she is 31 years old and lives at 148 Mompoti Street in Kagiso. She works at a Chicken Licken outlet in Krugersdorp. On the 30<sup>th</sup> October 2012 she was in the company of the plaintiff. Both of them had boarded a train at Roodepoort Train Station en route to Luipaardsvlei. The time was about 11h00 in the morning when they went to catch the train. They sat next to each other.

[33] She testified further that she and the plaintiff have been living together as husband and wife for five years and that they have three children. They are not married to each other.

[34] When the train arrived at Princess Station it stopped and the Metro officials conducted a stop and check i.e. checking out all those persons inside the train who were not in possession of valid train tickets. Those who did not have tickets were ordered off the train and once they had paid a fine they were allowed back onto the train.

[35] The train stopped for a long time at the station as a result the plaintiff enquired from the Metro officer who instead of answering him told him to “*voetsek*” and to sit down. Then the police officer entered the train, came to the plaintiff and asked him what was wrong with him. He was then punched in the face by the police officer and with the assistance of the Metro officers the plaintiff was pulled and pushed off the train and when he resisted by holding onto a pole in the middle of the coach they hit him from behind and the police officer held him by his testicles.

[36] The Metro officers and the policeman succeeded in taking the plaintiff out of the train to a room next to the platform. It was at about 12h30 when this happened and at about 17h00 she saw the plaintiff at Roodepoort Police Station. His eye was swollen and his clothes and shoes were full of blood.

[37] On the 1<sup>st</sup> November 2012 she was at the Magistrate’s Court in Roodepoort when the plaintiff was released without having appeared in court. The plaintiff was weak and powerless.

[38] During cross-examination she denied that the plaintiff was rude and abusive to the police. It was put to the witness that the Metro officers whilst conducting the stop and check came across a person who had no ticket. They then called W/O Hobjane to attend to that man who had no ticket and when W/O Hobjane entered the coach the plaintiff said to Hobjane why had

he stopped the train and then said that the police are stupid. The witness denied that the plaintiff said that to the police officer.

[39] The witness was questioned repeatedly on one and the same issue and she stuck to her version that the police officer struck the plaintiff on the face with a fist. Further cross-examination elicited no material contradiction nor did it destroy the credibility of this witness. She described the plaintiff as a soft spoken person who does not even speak when he is stressed. She added further that the plaintiff was not angry or seemed agitated when he made enquiries about the train. He was just like her concerned as both had to go to work later that day. She had left a three months old baby at home with the neighbour.

[40] She confirmed that the police officer who hit the plaintiff was a big gigantic man and that the plaintiff is smaller and that when he hit him with a fist it was a powerful and forceful strike.

[41] The witness like the previous one were adamant that the plaintiff did not fall as he was being taken out of the train. He could not have fallen because the police officers were holding him.

[42] The plaintiff's case was closed and W/O Freddie Hobjane as well as Constable Gezani Michael Shibambo testified for the first defendant.

[43] W/O Freddie Hobjane (Hobjane) testified that he is an officer in the South African Police Services and is presently stationed at Protea Glen Police



Station. During 2012 he was stationed at Krugersdorp South African Police where his duties were that of crime prevention. As part of which the police assisted Metrorail and Vhintsiri Security Services in conducting stop and search as well as to look out for illegal weapons and drugs inside the trains. He at that time patrolled the trains between Randfontein and Langlaagte.

[44] He explained that when they conducted a stop and check the duties are divided as follows:

- The Metrorail Customer Service people do the actual checking of valid and invalid tickets.
- The South African Police Services search suspect passengers for knives, drugs and illegal arms.
- Vhintsiri Security provides backup support and assistance to the police and to the Metrorail Customer Services Unit.

[45] When there are any contraventions of the law the power to effect arrest lies only with the South African Police Services.

[46] On the 30<sup>th</sup> October 2012 he was on duty when he was called by one of the Customer Services persons to assist as there was a problem with one person who did not have a ticket. The plaintiff then started interfering. Hobjane said that the plaintiff said that what they were doing was unlawful

and that they were stupid and do not know how to perform their duties. He questioned how could they as police allow that a train stop for such a long time. When the plaintiff said this he was with Constable Shibambo. When the report was made to him about the person with no ticket it was with the intention that they should arrest that person. When the plaintiff uttered the words as described above he Hobjane told him that he will arrest him for interfering in police duties.

[47] The plaintiff spoke loud and was making a show off showing the other passengers that he is clever. He then approached the plaintiff and told him that he can be arrested for interfering with police duties and thereafter he arrested him.

[48] The witness did not explain explicitly how the plaintiff interfered with his duties except to say that the plaintiff said they are stupid and how could they allow the train to stop for such a long time. When he effected an arrest he held the plaintiff by his arm and on his belt and then pulled him. The plaintiff resisted and wanted to fight. Constable Shibambo assisted him by holding the plaintiff on the other arm whilst he held him on the one arm as well as by his belt.

[49] He testified that they told him the reason for arresting with was because he was interfering with police duties. When he and Shibambo were holding the plaintiff and taking him out the plaintiff was resisting and struggling and when they reached the door of the train the plaintiff slipped and fell off the

train onto the platform. The plaintiff slipped because the platform is some 20 to 30 cm below the step of the train i.e. that is not even with the platform. When he slipped and fell he and Shibambo were still holding him but let him loose as he tripped.

[50] The plaintiff fell on his own face down and landed on his right eye. They picked him up but did not see that he had injured himself. He only noticed the injury on the eye of the plaintiff when they arrived at Roodepoort Police Station. The eye was swollen. Prior to putting the plaintiff inside the van he had handcuffed him. He denies that the plaintiff was first locked in the room or cell at the station. He denies having assaulted the plaintiff in the train or at all and insists that the plaintiff sustained the injury on his eye when he tripped and fell. When he handcuffed him it was with hands at the back and denies that he tightened the handcuffs.

[51] When he effected the arrest on the plaintiff he acted in accordance with section 40(1)(a) of the Criminal Procedure Act 51 of 1977 which grants him the power to arrest any person who commits an offence in his presence.

[52] Hobjane denies that the plaintiff was ever kept in the cells at Princess Station he also denies having deleted any material from the plaintiff's cellphone. When they put the plaintiff inside the van he testified that they had removed the handcuffs. It was Constable Shibambo who removed the handcuffs.

[53] He confirmed that when they arrived at the Roodepoort Police Station they refused to accept the plaintiff and said to him they must first take the plaintiff to hospital which is what he and Shibambo did. They were now accompanied by Constable Mavhunda. Constable Mavhunda was not at the station when the arrest took place. He joined them at the Roodepoort Police Station.

[54] When the nurse at the Hospital enquired what had happened to the plaintiff he as Hobjane told the nurse that the plaintiff fell and injured himself.

[55] He testified further that when he arrested the plaintiff he intended that plaintiff should be charged and appear in court and explain to the court. The plaintiff was taken to court at 08h30 on the 1<sup>st</sup> November 2012 having been detained from the 30<sup>th</sup> October 2012 at 13h30.

[56] Before he detained the plaintiff he read out to him and explained the notice of rights in terms of section 35 of the Constitution.

[57] During cross-examination he testified that people who are found not to be having valid tickets are made to pay a fine they are never arrested. Customer Services imposes fines on them. In the event that there are many people with no fines and are taken off the train he does not know where those people are kept whilst waiting to pay fines.

[58] The witness was shown a photo of a building that appears on Bundle A being photo number 9 and was asked what that building was. He answered that he does not know the building and has never seen it before. When he was told that that building is at the Princess Station he repeated that he had never seen it and does not know what building that is.

[59] He denies having locked up the plaintiff in that building and said that when he arrests a person he takes him to the police station.

[60] Hobjane testified further that he signed his own arresting statement after he came back from Hospital with the plaintiff. Evidence was that they only came back from Hospital after 16h00 and yet his statement indicates that he signed it at 13h10. Hobjane then said the times are not correct because by that time the plaintiff had not been detained but was still waiting to be taken to Hospital.

[61] When it was put to him that a distance of 5 km which is how far the Hospital is from the police station will take him no more than 35 minutes to drive there he said he does not know and does not want to commit himself.

[62] Hobjane was shown Exhibit A13 which is a copy of the face of the docket where the prosecutor in declining to prosecute the plaintiff made the following note: "*No prima facie case.*" Hobjane replied that it was the first time he had heard that. It was explained to him that the prosecutor reached a conclusion based on his Hobjane and Shibambo's statements that no criminal

act was committed by the plaintiff. Hobjane once more replied glibly and said that is how he saw the plaintiff's action against him. He says he reasonably suspected that the plaintiff made himself guilty of interfering with police duties. He however agreed that as a police officer he has a discretion to arrest and not to arrest and this depends on the circumstances of each event. He also agreed that in terms of the Police Standing Orders arrest should be resorted to as a last resort.

[63] Hobjane was then asked why in this instance he did not use his discretion not to effect an arrest. His answer was strange if not plainly dishonest. He responded by saying that he did not manage to do that and when he was pressed to explain what he meant by that he says it is because of the manner in which the plaintiff behaved he felt he should not leave him but arrest him.

[64] He conceded that it was not common for a suspect to spend two nights in detention before being taken to court.

[65] The court put a few questions to the witness Hobjane and some of his answers were rather shocking. For instance he says that when the plaintiff slipped and fell they were still at the door of the train and had not as yet stepped on the platform. When he fell they did not fall with him despite the fact that they held him by both hands that is he and Shibambo jumped after the plaintiff had fallen. He says that the plaintiff was not trying to run away.

[66] Constable Gezani Michael Shibambo told the court that he and Hobjane were inside the train when they were called by the Metro officials to assist about a person who did not have a train ticket. The plaintiff who was seated not far from that other person spoke loud in Zulu and said the police are stupid why did they allow the train to stop for such a long time. He testified that because of those words W/O Hobjane decided to arrest the plaintiff. They grabbed hold of the plaintiff and whilst walking him out of the train the plaintiff fell onto the platform. He denies that W/O Hobjane assaulted the plaintiff.

#### EVALUATION OF THE EVIDENCE AND ARGUMENTS RAISED

[67] The defendant bears the *onus* to prove that when W/O Hobjane arrested the plaintiff it was because the plaintiff had committed an offence in the presence of Hobjane namely interfering with police in the execution of their duties.

[68] The defendant pleaded in paragraph 8.4.1 of its amended plea that in terms of section 40(1)(a) of Act 51 of 1977 the plaintiff attempted to commit an offence and/or was committing an offence of “*interfering with police duties*” in front of and in the presence of the police officer on the 30<sup>th</sup> October 2012.

[69] Section 40(1)(a) of the Criminal Procedure Act provides that a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence. The test in this instance is not whether the defendant had a reasonable suspicion but is a factual one. The defendant must prove on a balance of probabilities that the plaintiff had interfered with the police in the execution of their duties and this must have happened in their presence.

[70] This Court is faced with two dramatically opposed versions of what happened that led to the arrest and injury of the plaintiff. The plaintiff's version is that W/O Hobjane confronted him when he was asking about the delay of the train. He was then assaulted and taken out of a train and later locked in a cell at the Roodepoort Police Station. The police officers say that the plaintiff called them "*stupid*" when they were attending to a case of a passenger who had no valid train ticket and as a result of that utterance Hobjane decided to arrest the plaintiff for interfering in police duties and when the plaintiff was getting off the train he fell off the train injuring his face.

[71] Only one of these versions is true and in deciding which one is true it is incumbent on the court to look into the credibility of the factual witnesses, their reliability and the probabilities.

[72] Both W/O Bobjane and Constable Samuel Shibambo deposed to affidavits about the events that led to the plaintiff's arrest. In his affidavit Shibambo does not say what the plaintiff said. All that he says is the following:



*“At about 12h30 we were at Princess Station at Roodepoort Area performing our normal duties stop and search when an African male in the name of Mzolisi Ndizana interfered our duties by words towards us. Then we arrested the suspect.”*

W/O Freddie Bobjane’s affidavit reads as follows:

*“On 2012-10-30 at about 12h30 I was on duty performing my official duties crime prevention under railway. I was at Princess Station doing stop and check duties when the black African by the name of Mzolisi Ndizana interfering when he started to used words towards us and saying that why we stopping a train so long and further saying that you police stupid.”*

[73] I find it strange that in his affidavit Shibambo does not say exactly what the plaintiff did or said. His affidavit is short and does not explain the crucial reason why the plaintiff was arrested. This lack of detail and clarity in his affidavit corroborates the plaintiff and his witness’s version that Shibambo was never at any stage inside the train it was only W/O Hobjane.

[74] During cross-examination it was put to the plaintiff was Hobjane would testify that when he was called to assist about a passenger who had no valid ticket the plaintiff said the following to Hobjane:

*“Why has the train stopped? Why is that person being searched you are stupid.”*

[75] In his evidence-in-chief in describing the incident W/O Hobjane testified that the plaintiff started interfering by telling them that what they were doing

was unlawful and that they were stupid and do not know how to perform their duties and how can they allow a train to stop for such a long period.

[76] It is evident that W/O Hobjane has given different versions as to exactly what the plaintiff said or did. In his evidence he never said that the plaintiff questioned him as to why they were searching that person presumably the passenger that had no ticket. This aspect is also not mentioned in his affidavit. In my view W/O Hobjane's version is a concocted version which is not corroborated by Shibambo. There was no attempt to call the Metrorail official who was present to corroborate his version. This was not done because he Hobjane knows that his version will not be supported by the witnesses.

[77] The police dispossessed the plaintiff of his cellphone in order to delete vital evidence. The taking of the photos further angered the police and they became determined to delete whatever unlawful activities they were doing at the Princess Station.

[78] The reality of the facts placed before me is that the plaintiff did not commit any offence falling within the purview of section 40 of the Criminal Procedure Act. It is therefore not surprising that when the State Prosecutor read the affidavits of W/O Hobjane and Shibambo he did not hesitate to come to a conclusion that no *prima facie* case has been made out and declined to prosecute.

[79] W/O Hobjane was not only dishonest but contradicted the evidence of Shibambo. Hobjane when being shown a photo of the holding cell at Princess Station vehemently denied that such a building exists at that station. He was even prepared that if the court would adjourn to that place there is no such a building. The evidence of Shibambo was that the building is there. I find the denial by Hobjane to be very disingenuous. The only inference to be drawn is that he wants to distance himself from the version that the Plaintiff was held in that building immediately after being assaulted by the police officer.

[80] The version of the police officers as to how the plaintiff sustained the injury is replete with improbabilities. It must be remembered that the plaintiff according to the police was now under their arrest. His safety and well-being was now in the hands of the police and yet when he reaches the steps on the train they let him go off to fall on his face. The question is if two police officials held him on his side by his hand including his belt how did he manage to fall by himself. Their version would perhaps have made sense if all three of them had tripped and fallen.

[81] Secondly, it is strange that only the plaintiff tripped and fell no other passenger tripped and fell on the steps on that day. Otherwise there would be several claims against the Metro trains by passengers falling off as they got off or onto the train.

[82] The injuries sustained by the plaintiff are not compatible with an injury caused by a fall. Even though no medical evidence was presented a look at

the photos of the plaintiff taken shortly after he sustained the injury explains favourable to an injury sustained by a blunt force applied to the eye and nose. If the plaintiff fell on his face on hard ground like the platform at train station his face would have been bruised not one eye only.

[83] The plaintiff and his witnesses on the one made a very good impression on me when they testified. The plaintiff himself did not contradict himself in any material respect. He stuck to his version.

[84] Section 40(1)(a) requires the existence of a particular factual situation before the peace officer's power to arrest without a warrant can come into existence. If the circumstances do not exist no lawful arrest can take place. Secondly, even though the circumstances may exist it was held in *Minister of Safety and Security v Sekhoto and Another* 2001 (1) SACR 315 (SCA) at paragraph 28 thereof that the police officer has a discretion whether to arrest or not to arrest. It was held that a police officer is not obliged to arrest.

[85] It is not clear whether the plaintiff was arrested because he asked why the train had stopped for so long or whether he was arrested for saying the police are stupid or whether he was arrested because he said the police do not know how to do their work. There is simply no evidence that the plaintiff interfered or obstructed the police from searching anybody inside or outside the train. As such the plaintiff's arrest, assault and detention were wrongful and unlawful.

[86] The arguments advanced in support of the defendant's contentions are so far-fetched and legally untenable that they require no further consideration. I carefully examined the various aspects of the defendant's evidence and have come to the conclusion that the gross weight of improbabilities in the defendant's version are sufficient to leave me with no doubt that their version is false and was fabricated.

### QUANTUM

#### (i) UNLAWFUL ARREST AND DETENTION

[87] I turn now to determine the quantum of damages. In *Minister of Safety and Security v M Tyulu* 2009 (5) SA 85 (SCA) Bosielo JA said the following at paragraph [26] of his judgment:

*"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 the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide such 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 on such facts."*

[88] In this matter I was referred to a number of cases dealing with the amounts awarded for unlawful arrest and detention amongst them are: *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA). In that matter the plaintiff a 63 year old man had been unlawfully arrested and detained for a period of 5 days was awarded R90 000,00. The court took into account that he had free access to his family and doctor during his detention; that he had suffered no degradation beyond that inherent in being arrested and detained; that after the first 24 hours he had spent the remainder of his detention in hospital bed, that although the experience had been traumatic and distressing it warranted no further medical attention after his release.

[89] In the unreported matter of *Phasha Thabo Sydney v Minister of Police* Case Number 25524/2011 South Gauteng High Court a judgment by Epstein AJ delivered on 21<sup>st</sup> November 2012 the plaintiff who was 40 years old and a father of three children employed as a Debt Collector in the office the State Attorneys, Johannesburg was awarded R80 000,00 for being detained for 9 hours. He had been arrested in full view of people who knew him at a shopping centre in Soweto and handcuffed. He was walked from the shop to the awaiting police van through the parking lot much to the embarrassment of people who knew him well. The court found that he had suffered great indignity and humiliation of being arrested, detained and placed in a cell which was in a filthy condition.

[90] In *Masisi v Minister of Security and Security* 2011 (2) SACR 262 (GNP)

at page 267 paragraph [18] Makgoka J held as follows:

*“The right to liberty is an individual’s most cherished right, and one of the fundamental values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundamental of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection and sparingly. In Solomon v Visser and another 1972 (2) SA 327 (C) at 345C-E, it was remarked that where members of the police transgress in that regard the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which result. To this I add that where an arrest is malicious the plaintiff is entitled to a higher amount of damages than would be awarded absent malice.”*

[91] In this matter the plaintiff is 30 years old. He lives with the mother of his three children the youngest of whom is three months old at the time of this incident. He is employed as a security officer. It is common cause that he was in custody for two days. There was simply no legal basis for his arrest. He had committed no offence. His only mistake was to ask why the train was being delayed and instead of getting an explanation to which he was entitled he was told that he was too forward and thinks he is clever. He was assaulted and manhandled not only in the presence of his wife but in full view of passengers in the train. He was taken off the train and shoved into a room of holding cells at the station where he spent one and a half hours. He was later taken out, handcuffed and bundled into a police van which drove at high speed causing him to fall and be tossed about at the back of the police van. The handcuffs had been tightened.

[92] In the cells at Roodepoort there were eight of them in a small cell which had no sufficient space for all of them. He slept on a dirty smelly sponge with

two smelly blankets. There were no washing facilities. The plaintiff's human rights were violated. The arresting officer lied about the actual reason for the plaintiff's arrest. I have reason to disbelieve that the police actions were actuated by an improper motive and malice.

[93] Having taken into account the facts of this case as well as past awards in recent cases I am of the view that the amount claimed by the plaintiff in his particulars of claim is not only modest but is fair and reasonable. I accordingly award the plaintiff the sum of R180 000,00 for unlawful arrest and detention.

### ASSAULT

[94] Under this heading the plaintiff claims compensation in the sum of R100 000,00.

[95] The plaintiff was assaulted in full view of passengers and his wife. He was held by his testicles when he resisted being taken out of the train. He had the right to resist that unlawful act. His wife was clearly embarrassed in court in having to explain this aspect to the court when giving evidence.

[96] In the matter of *Capke v Minister of Police and Others* 1979 C&B (E) a 54 year old married woman received an award of R1 000,00 (today worth R23 560,00) for shock, pain and suffering after she was manhandled, struck, throttled by two policemen, dragged to the police station and detained there.



She had suffered a considerable amount of pain as a result of the assault for two weeks.

[97] In *Van der Westhuizen v Minister van Polisie en Andere* 1979 (3) C&B 33 (C) a man was awarded R500,00 (today worth R11 780,00) when he was assaulted by a policeman in the face. He suffered a black eye and injury to the thigh caused by a kick, facial scrapes and cuts, a smashed tooth and cut lip.

[98] In the present matter the plaintiff was subjected to excruciating pain when W/O Hobjane held him by his testicles. The injuries to his eye required him to be given analgesics and pain killers at the hospital.

[99] Having regard to the nature of the assault, the extent of the injuries the pain suffered as well as the contumelia suffered by the plaintiff I hold the view that an amount of R80 000,00 is fair and reasonable as compensation to the plaintiff under this heading.

[100] I accordingly make the following order:

(a) The first defendant is ordered to pay to the plaintiff:

(i) The sum of R260 000,00 (Two Hundred and Sixty Thousand Rand) plus interest thereon at the rate of 9% per annum from date of judgment to date of payment.

- (b) Costs of suit on a party and party scale including interpreter's fees.
- (c) Interest on the taxed costs at the rate of 9% from date of taxation to date of payment.

DATED at JOHANNESBURG on this the 21<sup>st</sup> day of NOVEMBER 2014.

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**M A MAKUME**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATES OF HEARING	5-11 SEPTEMBER 2014
DATE OF JUDGMENT	21 <sup>st</sup> NOVEMBER 2014
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