REPUBLIC OF SOUTH AFRICA

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

CASE NO: 02441/2015

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

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DATE SIGNATURE

In the matter between:

TSUANG WISEMAN LEQUOA Plaintiff

And

THE MINISTER OF POLICE Defendant

J U D G M E N T

KEIGHTLEY, J:

[1] Like so many other matters that appear on the civil trial roll every week in this division this case involves an action for damages against the Minister of Police for wrongful arrest and detention. The plaintiff, Mr Lequoa, was arrested by SAPS officers. The officers were on duty patrolling the streets of Vanderbijlpark in a marked police vehicle on the night in question.

[2] There are some minor disputes regarding the events surrounding the arrest, but none of much consequence.

[3] Mr Lequoa was together with approximately 10 friends at the time of his arrest. They were on foot, having left a 21st birthday party shortly before the police came across them. The police asked to search them for dangerous weapons (and dagga, but this fact is disputed). None were found in the possession of any of the group.

[4] The police then accused Mr Lequoa and his friends of being drunk. They denied this. Nonetheless, the police officers arrested the whole group, put them into the back of one or two patrol vans (the number is in some dispute), and drove them to the Vanderbijlpark police station. There they were handed their notices in terms of section 35 of the Constitution, indicating that they were being arrested on charges of drunkenness. They were released the following morning. Charges were not pursued against them.

[5] On the plaintiff's version of events, he was arrested at 11pm on 13 November 2014 and was released at 8.45 am the following morning. On the

defendant's version, which is confirmed by the cell register from the night in question, Mr Lequoa was arrested at 1.20am on 14 November 2014 and released at 6am that morning. Not much turns on this discrepancy for purposes of determining the merits of the matter and the quantum of damages. I will proceed on the basis that he was detained for between 5 and 9 hours. What is more significant is that the period of detention spanned the dead hours of the night and some way into the following morning.

[6] In arresting Mr Lequoa the police proceeded under section 40(1)(a) of the Criminal Procedure Act 51 of 1977. This section provides that:

> "A peace officer may without warrant arrest any person … who commits or attempts to commit any offence in his presence."

[7] The offence in question in Mr Lequoa's case was that of being intoxicated in or near a public place, including any road, street or thoroughfare in terms of section 127(c) of the Gauteng Liquor Act 2 of 2003 ("the Liquor Act"). This Act defines "*intoxicated*" as follows:

> "… the condition a person is in when his or her capabilities are so impaired by liquor that he or she is likely to cause injury to himself or herself or be a danger or nuisance or disturbance to others".

[8] It is well established that the onus rests on the police in a case such as the present to establish the lawfulness of the arrest.[1] The first question I need to consider is whether the police have satisfied the jurisdictional requirements

[1] Minister of Law and Order v Hurley 1986 (3) SA 568 (AD)

for the lawful arrest of Mr Lequoa in terms of section 40(1)(a) on the charge of intoxication.

[9] Unlike an arrest under section 40(1)(b), the lawfulness of an arrest without a warrant under section 40(1)(a) does not depend on the reasonable suspicion of the arresting officer. The latter section requires that the arrested person must commit or attempt to commit an offence in the presence of the arresting officer.

[10] Warrant Officer Mankhe was the arresting officer. He testified that Mr Lequoa was behaving like he was drunk. He smelt of liquor and wasn't able to speak properly or to stand properly. It was on this basis that Warrant Officer Mankhe concluded that Mr Lequoa was drunk. Warrant Officer Mankhe told Mr Lequoa that he was drunk, but he didn't want to listen to him. Instead, he started insulting the Warrant Officer. It was then that he decided to arrest Mr Lequoa along with his friends.

[11] Warrant Officer Boroko accompanied Warrant Officer Mankhe in the patrol van on the night in question. He corroborated the former's testimony, adding that Mr Lequoa had a bottle of liquor in his possession at the time (a fact not alluded to by Warrant Officer Mankhe), and that he and Warrant Officer Mankhe concluded that it was not safe for Mr Lequoa to be walking around that area at night, so they took him into custody.

[12] It is common cause that the police did not conduct any tests on Mr Lequoa to determine whether he was inebriated or not.

[13] Mr Lequoa vehemently denied that he was intoxicated when he and his friends were arrested. He conceded that he had consumed some alcohol, but testified that this was limited to a six-pack of beers that he had shared with a friend. According to Mr Lequoa, he had only consumed 3 beers that night.

[14] It is so, as counsel for the defendant contended, that Mr Lequoa's testimony in this regard was not corroborated by any of his 10 friends who were with him on the night in question. If Mr Lequoa bore the onus to establish the unlawfulness of his arrest this may have constituted a serious obstacle for him. However, the onus does not rest upon him. It is for the police to provide sufficient evidence to establish on a balance of probabilities that Mr Lequoa was intoxicated, within the meaning of section 127(c) of the Liquor Act, on the street in question on that night.

[15] In my view, the testimony of both police witnesses did not go far enough to establish that Mr Lequoa was intoxicated. He admits that he had three beers to drink. This would account for the smell of alcohol on him. It may also have lead to a suspicion on the part of the arresting officers that he was intoxicated. However, section 127(c), read with section 40(1)(a) requires more. It requires that it be established that the arrestee was in fact intoxicated in a public place, and that his level of intoxication was such that "he or she is likely to cause injury to himself or herself or be a danger or nuisance or disturbance to others". The police witnesses proffered no evidence to indicate that in consequence of his intoxication Mr Lequoa posed

a danger or nuisance to himself or others, or that he was likely to cause a disturbance. If facts existed to support this, they were not related by either Warrant Officer Mankhe or Warrant Officer Boroko.

[16] In the circumstances, I conclude that the defendant has failed to establish that Mr Lequoa's arrest was lawful. If his arrest was unlawful, then it follows that his detention also was unlawful.

[17] This leaves me with two remaining issues to consider: that of quantum, and that of the scale of costs that ought properly to apply in this case.

[18] As far as quantum is concerned, the initial amount claimed in the summons was R500 000. 00. When the trial commenced counsel for the plaintiff indicated that this amount would be revised and reduced. During the course of presenting closing arguments, counsel for the plaintiff indicated that he could not realistically submit that Mr Lequoa was entitled to any more than an amount of R55 000. 00 by way of damages. This is a massive reduction from the R500 000. 00 originally sought.

[19] Mr du Bruyn, for the plaintiff, quite correctly accepted that while the amount of damages awarded in similar cases may be a useful guide to courts in later cases, reliance on them should not be taken too far. Nugent JA in *Minister of Safety and Security v Seymour* [2] warned of the "*dangers of relying*

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2 2006 (6) SA 320 (SCA)

excessively on earlier awards"[3] in these types of cases. He remarked further that:

> "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."[4]

[20] The court held further that:

> "Money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernable pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection." (emphasis added)

[21] Looking at the facts of the present case as a whole, the context of the arrest is a useful starting point. Mr Lequoa and his relatively large group of friends were walking in a public street in an area described by the police witnesses as being dangerous late at night. They were on their way home (according to their version) from a party. Mr Lequoa had been drinking, although I have

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3 Para 18
4 Para 17

accepted his version that he was not intoxicated within the meaning of the Liquor Act. This conduct on the part of Mr Lequoa and his friends, although not unlawful, carried with it some risk that they would invite the attention of the police on patrol. Warrant Officer Mankhe attested to Mr Lequoa's "insulting" behaviour towards the two officers, and his unwillingness to listen to what they were saying. Mr Lequoa himself attested to his anger towards the police for, in his mind, falsely accusing him and his friends of being drunk.

[22] As I have indicated, these circumstances did not warrant Mr Lequoa's arrest within the ambit of the law. However, they go some way towards mitigating the conduct of the arresting officers. They are also relevant to the issue of an appropriate *solatium*, in that they indicate that Mr Lequoa's own conduct played a role in the predicament in which he found himself. This does not excuse the infringement of Mr Lequoa's constitutional rights as a result of his arrest. However, it is an element that ought properly to be taken into account in assessing the extent of the injury to his feelings resulting from his unlawful arrest and detention, and hence of the appropriate measure of the *solatium* to which he is entitled.

[23] The unlawful conduct of the defendant in this case is restricted to the unlawful arrest and the detention for between 5 to 9 hours. There is no evidence that the police officers manhandled, threatened or assaulted Mr Lequoa in any way, or that they placed him in the way of any danger. Mr Lequoa was detained in a police cell overnight. He was not in any danger

there as, on his own evidence, he was together with his friends who had been arrested with him.

[24] I accept that on the evidence of the police, the cell in which Mr Lequoa and his friends were held was designed to hold 8 persons, and that there were 11 persons housed in it for the night. I also accept Mr Lequoa's evidence to the effect that there were not enough mattresses for all of them. He and his friends joined the mattresses together and, it appears, in so doing they were all accommodated on them.

[25] He also testified to the fact that the toilet that was housed in the cell was not closed off to ensure privacy. There was apparently one low wall that provided a limited screen from the other cellmates. Mr Lequoa testified that the toilet was blocked and that there was no toilet paper. The defendant did not bring any evidence to contradict this, save for the evidence of Warrant Officer Boroko who testified that generally the toilets were cleaned every day.

[26] Clearly the conditions in the cell were such that most people would feel an affront to their dignity on being confronted by them. Mr Lequoa gave no evidence of any additional or particular impact that he had suffered as a result of his unlawful arrest and detention. When asked about how he felt about the incident, he testified that he felt anger at the police for what they had done. He did not say that he felt humiliated or that his reputation had suffered. However, this does not exclude the existence of what I accept must have been a measure of inherent prejudice to Mr Lequoa's dignity and self-worth flowing from the circumstances in which he found himself.

[27] Taking all of these factors into account, I am unable to agree with Mr du Bruyn's submission that R55 000. 00 represents a fair quantum of damages. The plaintiff is a young man who was arrested with a group of his friends late at night after they had attended a party at which Mr Lequoa had admittedly imbibed alcohol, and while they were walking down a public street. The police cannot be faulted for being vigilant and paying attention to them. The plaintiff's own conduct did not assist him when the police confronted them. It was clearly a factor that contributed to the decision to arrest him and his friends. While the conditions in the cell were not pleasant, and there was an element of overcrowding, on Mr Lequoa's own evidence he shared this experience with his friends, rather than in isolation or with a group of strangers.

[28] In addition, as I have already said, much of Mr Lequoa's period of detention was served in the dead time of night. He was not provided with a meal, but in these hours, and given his relatively early release in the morning, it could hardly have been expected of the police to provide him and his cellmates with much by way of meals.

[29] In these circumstances, and bearing in mind the principles laid down in the dicta cited above from the *Seymour* judgment, in my view an amount of R25 000. 00 is adequate recompense for the infringement of Mr Lequoa's rights.

[30] This brings me to the issue of costs. Of course, costs must follow the result. However, the question that arises is on what scale? This question stems from the fact that counsel for Mr Lequoa ultimately accepted that he would be

entitled to no more than R55 000 by way of damages. This is a massive reduction from the amount originally claimed in the summons. At the end of the day, the amount awarded to Mr Lequoa falls well within the jurisdiction of the magistrate's court.

[31] Where a case could have been heard in a less expensive forum, such as a magistrate's court, but is brought in the High Court, it is within the discretion of that court to award costs on the scale of the appropriate court, rather than on the High Court scale. In such a case, the plaintiff bears the onus to justify his or her recourse to the more expensive tribunal and, accordingly, to his or her entitlement to costs on the High Court scale.[5] In determining the issue of which scale of costs ought to apply, the judge must exercise his or her discretion judicially, with reference to all relevant facts of the case.[6]

[32] Some of the factors that have been identified as being relevant to this inquiry include the factual or legal difficulties of the case; the public interest element involved; the importance of the case for the plaintiff; whether serious allegations, such as fraud, are made; whether the plaintiff might reasonably have anticipated that he or she might be awarded an amount in damages

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5 *De Winter v Ajmeri Properties and Investments* 1957 (2) SA 297 (D); *Rajah v Manning 1959* (1) SA 834 (N); *Palmer v Goldberg* 1961 (4) SA 781 (N); *Ramsuran v Yorkshire Insurance Co Ltd* 1965 (2) SA 263 (D); *Jeftha v Williams* 1981 (3) SA 678 (C)

6 *Palmer v Goldberg*, above; *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W)

exceeding the monetary jurisdiction of the magistrate's court; and whether the plaintiff's recourse to the High Court constitutes an abuse.[7]

[33] The plaintiff seeks costs on the High Court scale. As I have recorded already, the initial quantum of the claim was fixed at R500 000. 00 in the summons. In addition to the infringement of the plaintiff's personal rights, the claim was supported by allegations in the particulars of non-patrimonial loss suffered including shock, psychological trauma and emotional shock. Whether or not this was factored into the substantial quantum of the claim is not clear. What is clear, however, is that:

[33.1] The quantum claimed far exceeded the bounds of what the plaintiff ordinarily would be entitled to in a matter of this nature.

[33.2] No attempt was made at trial to justify the substantial amount of the claim. No evidence was led as to the alleged shock and trauma occasioned by the arrest. In fact, as I have already indicated, Mr Lequoa testified only to feeling anger at the police as a result of the incident.

[33.3] At the closing stage of the trial, it was conceded by the plaintiff that a more realistic amount of damages would be approximately one tenth (R55 000) of what had been claimed originally.

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[7] Van Loggerenberg et al Erasmus Superior Court Practice [Original Service, 2015] d5-15

[34] Given these circumstances, I asked Mr du Bruyn why costs should not be awarded on the magistrate's court scale. I am grateful to Mr du Bruyn for the well-referenced heads of argument that he presented in his efforts to persuade me that I ought to award costs on the High Court scale.

[35] From the case law presented, it seems that there is not necessarily uniformity on the parts of the courts as regards the scale of costs applied in wrongful arrest and detention matters. Of course, I am referring to cases in which the quantum falls within the jurisdiction of the magistrate's courts, but the plaintiff elects to proceed in the High Court with the prosecution of his or her claim.

[36] In a number of cases this court has awarded damages within the jurisdiction of the magistrate's court but has nonetheless awarded costs on the High Court scale without giving any reasons therefor. The following recent cases fall into this category: *Gobuamang v Minister of Police*;[8] *Rowan v Minister of Safety and Security NO*;[9] *Greenburg v Du Preez & Another*;[10] *Letlalo v Minister of Police*;[11] *Moses v Minister of Safety and Security*.[12]

[37] There also a number of cases in which, in similar circumstances, this court has awarded costs on the magistrate's court scale. In some, such as

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8 Unreported judgment of Saldulker J, SGHC, case number 2011/25524, dated 26 August 2011

9 [2013] All SA 443 (SGJ)

10 Unreported judgment of Meyer J, SGHC, case number 2002/23302, dated 31 March 2013

11 Unreported judgment of Francis J, SGHC, case number 2012/28575, dated 28 March 2014

12 Unreported judgment of Baloyi AJ, GLD, case number 2013/6983, dated 20 February 2015

Mashigo v Minister of Police,[13] the court has not provided reasons for this. In others, the court made the costs award on the basis that the quantum of damages fell within the monetary jurisdiction of the magistrate's court. This was provided as the reason in *Tladi v Minister of Safety and Security*;[14] *Guidone v Minister of Safety and Security*;[15] and *Ngcobo v Minsiter of Police*.[16]

[38] Mr du Bruyn pointed out that while the value of the quantum is a factor to be considered in determining which scale of costs should apply, this is not the sole relevant factor. In *Vermaak v Road Accident Fund*,[17] it was held that the amount of the judgment is not the only consideration in determining this issue, although it is always an important consideration.

[39] One of the factors that has been recognised as being of significance by this court is the importance of the constitutional rights that underlie matters of this nature. Any claim based on unlawful arrest and detention necessarily involves the violation of the plaintiff's rights to, among others, freedom and security of the person,[18] and the section 35 rights that are applicable to accused, arrested and detained persons. That such violation usually occurs at the hands of public officials entrusted with maintaining law and order is a

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13 Unreported judgment of Mudau AJ, GLD, case number 2013/9075, dated 11 September 2015

14 Unreported judgment of Moshidi J, SGHC, case number 2011/5112, dated 24 January 2013

15 Unreported judgment of Vilakazi AJ, GLD, case number 2008/37480, dated 11 June 2015

16 Unreported judgment of Chaitram AJ, GLD, case number 2014/34632, dated 21 October 2015

17 2006 JDR 0182 (SE)

18 In terms of section 12 of the Constitution.

further factor pointing to the seriousness of the situation. As was noted in *Mvu v Minister of Safety and Security*,[19] the grant of costs on a High Court scale for awards that fall within the jurisdiction of the magistrate's court is often justified on the basis of the importance courts attach to questions of unlawful arrest and detention, and the inherent public interest in these matters.

[40] This principle was very recently referred to in *R A and Others v Minister of Police*.[20] In that judgment, two judges of the Gauteng Division, Pretoria noted that:

> "This matter dealt with the violation of important constitutional rights and rights of privacy and personal integrity of the appellants. This case also bears a public interest element as, inter alia, it relates to unlawful conduct by the SAPS and the protection of the rights of citizens. An attack on the rights of the individual is an attack on the community and the grinding down of individuals' rights erodes the rights of the community as a whole. Therefore in this type of case the impact is not limited to the individuals but extends to the community of which they form part. This underscores the importance of the matter."

[41] I pause to point out that the case of *R A & Others* involved what can only be described as rampant abuse by the police of their powers of entry and arrest.

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19 2009 (6) SA 82 (GSJ)

20 Unreported judgment of Tolmay & Tuchten JJ, GDP, case number 2010/19296, dated 21 April 2016, at para 34

They entered a family home in the middle of the night, and held the family up at gunpoint while searching for a suspect. They failed to identify themselves as police officers until well into the saga. It transpired that they had come to the wrong address. The plaintiffs in that matter relied on the testimony of medico-legal experts to prove their damages in respect of the anxiety, depression and PTSD suffered by the plaintiffs as a result of the police's conduct. It was, as the court described it, a case of "*more than ordinary difficulty*".[21] Despite awarding each of the plaintiff's an amount of R200 000. 00 in damages, the court awarded costs on the High Court scale.

[42] Mr de Bruyn suggested that other factors that might warrant High Court costs being awarded in these types of cases include the nature of the conduct of the police officials concerned; the conduct of the defendant in the course of the proceedings; the unintentional and unjust results of an award of costs on a lower court scale; and the deterrent effect of awarding costs on a High Court scale.

[43] I accept, as indeed I must, that where constitutional rights are violated a party may be justified in instituting proceedings in the High Court albeit that the quantum of their damages falls within the magistrate's courts monetary jurisdiction. Further, that such a party will not necessarily run the risk of being limited to an award of costs on the magistrate's court scale.

[44] However, the flip side of the coin also applies. In other words, simply because wrongful arrest and detention matters inherently involve the

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21 Para 37

violation of important constitutional rights does not mean that a plaintiff is protected from this risk. To protect their own interests plaintiffs in these matters should avoid proceeding on the assumption that the High Court will always be the appropriate forum.

[45] The present case is a good example of the dangers of this approach. As I have already noted, the plaintiff made no attempt to justify the substantial amount of the quantum cited in the summons. Although this may be justified at a superficial level on the basis that it was simply an estimate at the commencement of proceedings, the plaintiff did nothing in the run-up to the trial to re-assess the quantum. It was only when the trial commenced that a more realistic assessment was given by the plaintiff. In fact, it was only in closing argument that plaintiff's colours were pinned to the mast on this score, and it was accepted on his behalf that a substantially reduced quantum would be appropriate. I should add that this was not as a result of the trial taking an unpredictable course. On my assessment, it should have been clear from the time that the claim was instituted that the quantum was unreasonable given the facts of the case.

[46] From the pre-trial minutes it appears that the parties gave no consideration to the issue of whether the quantum claimed was realistic, or whether the matter should be transferred to the magistrate's court. The plaintiff gave no indication that it intended to call expert witnesses to prove the alleged damages arising from trauma, emotional shock and psychological harm.

There was no attempt to lead any evidence by the plaintiff that he had suffered any injury of this kind. The matter was simply not canvassed at all.

[47] The trial proceeded in a pedestrian manner. There were only three witnesses in all. Their evidence was brief. None of the witnesses was subjected to lengthy or probing cross-examination from the other side. The factual issues raised by the evidence were far from complex, as were the legal issues. It is a matter that quite easily could have been dealt with by attorneys in court.

[48] But for my queries regarding the issue of costs (and Mr de Bruyn's very helpful submissions in this regard), no issue of any significance troubled the court or counsel. In short, it was a trial that was eminently suited to being conducted in the magistrate's court.

[49] While a plaintiff like Mr Lequoa has the election to proceed in the High Court, in my view this is an election that must be very carefully considered before the proceedings are launched. The plaintiff's legal advisers have the responsibility to give proper guidance to a litigant in this regard.

[50] The assumption ought not to be that all unlawful arrest and detention matters must be heard in the High Court. Much will depend on the facts of each case, and factors such as the complexities involved, the level of violation of the rights involved, the conduct of the arresting officers, and the public interest element in ensuring that appropriate matters are ventilated in the higher courts. Of course, the quantum of the claim is an essential factor although

not necessarily decisive. However, a plaintiff who unrealistically over-estimates his or her quantum to bring it within the jurisdiction of the High Court runs the very real risk that they will be deprived of costs on a High Court scale.

[51] It is unfortunate that in a case like the present neither of the parties paid much heed to whether the High Court was the appropriate forum, or to the question of the appropriate scale of costs. While the primary obligation rests with the plaintiff to ensure that he or she selects the correct forum there is also a responsibility on the state's legal advisers to indicate, as early as possible, that they will take issue with the plaintiff's election to proceed in the High Court, if such an objection is appropriate. If this is done, the result may well be that at the pre-trial stage the parties agree to the matter being transferred to the magistrate's court, for the benefit of both parties and, I might add, for the benefit of the courts involved.

[52] Furthermore, a proper assessment as to the correct forum may avert the risk of a plaintiff's modest damages award being decimated by his or her liability to pay for disbursements (such as counsel's fees) that are not recoverable to the full extent from the defendant because the costs are awarded on the lower, magistrate's court scale.

[53] In summary, then:

[53.1] A plaintiff has the right to elect to institute his or her claim for damages for unlawful arrest and detention in the High Court

regardless of the fact that the quantum of damages falls within the monetary jurisdiction of the Magistrate's court.

[53.2] However, plaintiffs in such cases ought to be aware of two related factors before they institute proceedings:

[53.2.1.] First, the quantum of damages awarded for claims based on unlawful arrest and detention in most cases will fall well within the monetary jurisdiction of the magistrate's court.

[53.2.2.] Second, if they nonetheless elect to proceed with their claim in the High Court, they run the real risk that they will not recover costs on the High Court scale.

[53.3] A plaintiff should give careful consideration, prior to launching an action for unlawful arrest and detention, and thereafter, up to and including at the pre-trial stage, as to whether the elected forum is appropriate given the particular facts of his or her case. At the end of the day, the plaintiff bears the onus of justifying his or her election.

[53.4] If a plaintiff elects to proceed in the High Court, he or she runs the risk that costs may be awarded on the Magistrate's court scale. In such a case, the plaintiff may find that he or she is liable to his or her instructing attorney for disbursements expended on the High

Court scale (counsel's fees being the obvious example) that are not recoverable from the defendant under the costs order. The effect of this may be to render nugatory the damages awarded.

[53.5] This is one of the reasons why the plaintiff's legal advisers have a particular obligation to ensure that a plaintiff is correctly guided in his or her election as to whether to proceed in the High Court or the magistrate's court.

[53.6] Similarly, the defendant's legal advisers also have an obligation to consider the issue and to raise any dispute regarding the appropriate forum and scale of costs as early as possible.

[54] As far as the facts of the present matter are concerned, I have already indicated that there seems to have been an unrealistic estimate of quantum from the word go. This brought the case within the jurisdiction of the High Court on an erroneous basis, and clouded the actual complexities and import of the matter. The plaintiff re-assessed quantum at a very late stage, providing little opportunity for the parties to consider in time whether the matter was more suited to being ventilated in the magistrate's court. Effectively, when the issue of the appropriate forum and the scale of costs arose, counsel was already on brief in the matter and the disbursements relating to his fees were inevitable.

[55] Neither the complexities of the matter, or the nature of the police conduct in effecting the unlawful arrest and detention in my view warrant costs being

awarded on a High Court scale. This matter falls on the opposite end of the spectrum to cases like *R A & Others* that involved extremely serious misconduct on the part of the police. The police misconduct in that matter spilled into the trial, with police witnesses giving patently false evidence. None of that applies here. In the matter before me, the police arrested Mr Lequoa and his friends. They thought that the arrest was warranted under the Liquor Act. It was not. Mr Lequoa spent a relatively short time in custody, in conditions that, while by no means hospitable, were not horrendous. The police witnesses gave straightforward evidence at the trial and I have no reason to think that they were trying to mislead the court.

[56] Mr de Bruyn submitted that the defendant ought to have settled this matter a long time ago and that the failure to do so warranted a costs award on a High Court scale. He also pointed out that the defendant had put in a bare denial plea, and that there had been a delay on the defendant's part.

[57] In my view these are not issues that warrant the grant of costs on the High Court scale. The plaintiff's own particulars of claim are hardly a model of specificity. This is illustrated by what must surely have been the rote inclusion of emotional shock and psychological trauma in the particulars of claim without any attempt to establish this at the trial. In these circumstances, I do not believe that the nature of the defendant's plea deserves particular censure.

[58] Furthermore, this was also not the kind of case where it can be said that the defendant unreasonably persisted with his defence. This is particularly so

given that the plaintiff persisted in the unrealistic claim of damages in the amount of R500 000. 00. This is not a reason to order costs on the High Court scale.

[59] The only issue I need to give particular consideration to is the possibly unjust consequences for the plaintiff if I order costs on the magistrate's court scale. More particularly, if I do this, then the plaintiff runs the risk I referred to earlier. His relatively modest award of damages may well be eaten up in its entirety if, as a result of being awarded costs on the magistrate's court scale, he becomes liable to his attorney for the costs of his counsel's fees, and similar disbursements, the full extent of which will not be recoverable from the defendant.

[60] Mr de Bruyn suggested that a via media would be for the court to order costs on the magistrate's court scale, but to include the costs of counsel's fees (at the High Court level at which they have been disbursed) in the costs order.

[61] I have thought carefully about this suggestion. However, one of the important considerations in my view is that it is the plaintiff's legal representative's duty to properly advise a client as to the appropriateness of his or her legal forum (and hence as to the scale of fees that will be applicable should he or she succeed). On the facts I have already cited, it seems to me that there was a failure to give proper consideration to this issue from inception. It is difficult to understand on what basis the plaintiff was advised that his particular arrest and detention warranted damages

falling within the jurisdiction of the High Court. The only reasonable conclusion I can draw is that not much consideration was given to this issue.

[62] The plaintiff is a young man of modest education. He testified that he obtained a Grade 11 at school and at the time of the arrest was employed as a shop assistant at Pep Stores. He has no legal training. It is safe to say that he was dependent on his legal advisers to guide him in his litigation. In my view, he should not have to carry the costs of counsel's fees as a result of these not being recoverable from the defendant. Equally, though, this is not a cost that should be borne by the defendant in circumstances where the case warrants only costs on a magistrate's court scale.

[63] I conclude in this regard that the plaintiff's attorney must bear the costs of counsel's fees to the extent that they are not recoverable from the defendant. As I have said, it was ultimately plaintiff's legal representatives who bore a responsibility to ensure that the plaintiff was protected from this risk. They ought to bear the consequences.

[64] In the final result, while Mr Lequoa succeeds in his claim for damages, I find that he is only entitled to costs on the magistrate's court scale.

[65] I make the following order:

1. The defendant is ordered to pay damages to the plaintiff in the amount of R25 000. 00 (twenty five thousand rand) together with interest as prescribed by law for his unlawful arrest and detention;

2. The defendant is directed to pay the plaintiff's legal costs of the action on the magistrate's court scale;

3. It is ordered that the plaintiff's attorneys may not recover from the plaintiff the cost of counsel's fees to the extent that these are not recoverable from the defendant.

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R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard:	6-7 May 2016
Date of Judgment:	10 May 2016
Counsel for the Plaintiff:	Adv L du Bruyn
Instructed by:	Bessinger and Keyser Attorneys
Counsel for Defendant:	Adv Zondi
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