

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)

**REPUBLIC OF SOUTH AFRICA**



(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

30/6/2017

DATE

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SIGNATURE

Date of hearing: 6 June 2017

Date of judgment: 30 June 2017

In the matter between:

Case number 03170/2016

**NKOSINATHI EMMANUEL TYINDYI**

Plaintiff

and

**THE MINISTER OF POLICE**

Defendant

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**JUDGMENT**

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**BRENNER, AJ:**

1. The plaintiff, Nkosinathi Emmanuel Tyindyi ("Tyindyi"), sued the Minister of Police as defendant, ("the Minister"), for damages of R500 000,00 for unlawful arrest and unlawful detention.
2. The arrest occurred on 2 November 2015 at about 18h00 in Fanbelt Street, in the vicinity of the Shoprite Checkers shopping centre in Eldorado Park, Gauteng, without warrant. Tyindyi was detained at the police holding cells until 08h00 on 3 November 2015, whereafter, he was escorted to the holding cells at the Kliptown Magistrates Court, and released at about 16h00 on 3 November 2015 without appearing in court.
3. In its plea, the Minister gave a bare denial of all allegations raised in the above regard. It failed to admit that the arrest was without warrant, nor did it allege that the arrest was lawful, in that a reasonable suspicion was formed that Tyindyi had committed an offence listed in section 40 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). Strictly speaking, its plea was excipiable.
4. Tyindyi was arrested without warrant. The section of the CPA in terms of which he was arrested was not articulated in the plea but, at inception of the hearing, it was stated to have been founded on section 40(1)(a) of the CPA. The lawfulness of the arrest being the fundamental issue, the Minister accepted the onus of proof. It is trite that the onus of proving that a crime was committed in his presence is on the peace officer. Vide **Brand v Minister of Justice and another 1959 (4) SA 712 (A).**
5. Three witnesses testified for the Minister, and Tyindyi testified on his own behalf. The Minister's witnesses were: Warrant Officer Ignatius Zwane ("Zwane"), Detective Constable Reuben Hasani Nobela ("Nobela"), and Sergeant Vorster Netshiongolo ("Netshiongolo").

6. Zwane who was the arresting officer, testified that he had been a police officer for 26 years. He was stationed at the Eldorado Park police station on 2 November 2015 and had been there for about ten years. At about 19h30, on this date, he was on patrol, in the company of Constable Mdluli ("Mdluli"), at the Shoprite Checkers shopping centre. They were on the lookout for irregular behaviour by people who might be in possession of drugs, or unlicensed firearms or selling alcohol, or counterfeit goods, or stolen goods, or the like. He was in police uniform.
7. He testified that he saw Tyindyi inside the centre just outside the entrance to the Shoprite store, selling compact discs ("CDs"). Tyindyi was standing and shouting out to passersby that he had CDs for sale. There were several CDs laid out on the floor where he was standing. Zwane looked at the CDs and observed that they were counterfeit. Several of them were pornographic as there were pictures of naked people on the covers. Some had pictures of violent scenes on them with people carrying firearms. The packaging was not the same as an original CD, as the plastic covers were flimsy, not hard, and the CDs carried no bar codes. He approached Tyindyi and told him he was not allowed to sell counterfeit CDs. He asked Tyindyi why he was doing so, to which Tyindi replied that he needed the money to feed himself.
8. Zwane said that he took possession of the CDs and arrested Tyindi, cuffing him on the spot. He said he had arrested Tyindyi because selling counterfeit goods was a serious crime. He escorted Tyindyi to the police van parked at the centre. The police station was about 2 kilometres away and he and Mdluli took Tyindyi straight to the station where Zwane recorded the CDs on an SAP13 form and then he completed and read Tyindyi's constitutional rights to him in an SAPS 14A form. The SAPS 14A form is headed "Notice of Rights in Terms of the Constitution" and refers to Tyindyi's detention as being for "Poss of Counterfeit CDS". Zwane signed the form. This occurred at about 20h30 that night. Zwane said that Tyindyi read the document in front

of Zwane and signed it. Zwane had no further dealings with Tyindyi and had no knowledge of what had happened to the confiscated CDs or to the case. In his view, it was not within his power to decide whether to release Tyindyi on warning or police bail. This decision fell under the jurisdiction of the investigating officer. While there were normally standby detectives available at the station, the detectives would more frequently receive the docket the following day. He noted that Nobela was the investigating officer.

9. Zwane did not know of the outcome of the case against Tyindyi. In his experience, most offenders admitted guilt and were released after paying fines. He had never testified in court in a case where he had arrested someone for possession or selling of CDs. He had arrested about 3 or 4 people for selling counterfeit goods. He was unable to specify the precise law which made selling or possession of counterfeit goods an offence, other than to state that the offence fell under the Counterfeit Goods Act. He conceded that he did not know the law on the subject well.
10. He could not explain why the rights document mentioned "possession" and not "selling". Zwane could not explain why he had not mentioned that Tyindyi was detained for selling CDs when this was consistent with his version. He still persisted in his version when it was put to him that Zwane had arrested Tyindyi while Tyindi was walking near the centre with CDs in his backpack.
11. Nobela was the investigating officer, who had 11 years' experience in the force. He received the docket in Tyindyi's case at about 07h30 on 3 November 2015. He referred to the SAPS 10 form which recorded that Tyindyi was taken from the police holding cell on 3 November 2015 at 08h58, and transported to Kliptown Magistrates Court. He said he spent about 3 days in the Kliptown, Lenasia and Protea courts per week on average. The offence is again mentioned in the book as "Possession of counterfeit CDS". Nobela said that he placed Tyindyi in

the holding cells at court and gave the docket to the control prosecutor to read.

12. At some stage that morning, before lunch, an African male lawyer, whom he could neither name nor identify, arrived at the prosecutor's office to tell him he wanted to negotiate an admission of guilt fine for Tyindyi. Nobela was unable to describe the lawyer in any further detail. Nobela said he did not know most of the lawyers in any of the courts frequented by him, even though he had been doing this particular work for several years. The prosecutor negotiated a fine of R300 with the lawyer and told Nobela to take the docket to the clerk of the court, for the fine to be paid and a receipt to be issued. The lawyer went with him, paid the fine, and a receipt was issued.
13. Nobela said he returned the docket to the prosecutor, then issued a release form which he gave to a policeman guarding the holding cells at court. This meant that Tyindyi did not have to appear in court. He then left court. The prosecutor appears to have endorsed an unidentified form as follows: "Charges withdrawn as per A.G. no 12715AOG000431 and the amount R300". It notes the offence as "Possession of fake CDs". Although provision is made therefor, it bears no signature by the prosecutor, nor the clerk of the court, nor a Magistrate, nor any official court stamp. It bears the signatures of an unidentified Constable and of Major Mavunda. The serial number correlates with the number on the receipt. The admission of guilt receipt is for R300 in cash. The depositor's name is reflected as "N TYNOLYI". It bears a court stamp of the same date. It mentions a summons number but not the offence.
14. The front of the docket yet again mentions the offence as "possession of 20 counterfeit CDs worth R200. It is endorsed and signed by the prosecutor with the note that the charge is withdrawn "as per A-G". the date is 3 November 2015. He considered both possession and selling of counterfeit CDs to be illegal.

15. Nobela stated that he had been involved in the investigation of about 5 cases in which counterfeit goods were found. In his view a CD was counterfeit if the writing or pictures on the cover were unclear. He had never been to court in a case involving counterfeit goods. He confirmed that, in this case, he was responsible for taking the CDs to "CIPRO" in Braamfontein. He said he personally took them there with an instruction to destroy them. This was on or about 6 November 2015. There was no instruction to analyse them, as the case had been finalized. He confirmed that if the case had gone to court, the police would have used CIPRO to analyse the CDs because the police were not reliable experts to confirm whether or not the goods were fake.
16. Nobela conceded that police bail could have been granted to Tyindyi or he could have been released on warning to appear in court. What was required was the verification of Tyindyi's ID number and address and a search for any prior convictions. The latter function was performed via the mainframe computer at the police station. Once this was done, the branch commander or any warrant officer or any policeman above this rank could grant police bail.
17. It was the evidence of Netshiongolo that he had been in the police force for 14 years and was stationed in the detectives' department at Eldorado Park police station at 18h00 on 2 November 2015. He was assigned to Tyindyi to obtain a warning statement from him following his arrest. He testified that he removed Tyindyi from the cells, took his fingerprints and then completed and signed the warning statement in Tyindyi's presence. Tyindyi told him that he would speak in court. The statement provides: "I will speak at court". He said he could not recall having informed Tyindyi that he had the right to make a phone call to a member of his family or anyone else.
18. He cited several instances where suspects were regularly released on warning or bail. Examples were where the offence was one of

shoplifting or common assault or petty theft. In such cases, he said he would voluntarily inform the suspect that he could be released at the police station. He was unsure about whether possession of counterfeit goods might permit such release. He confirmed that a senior police officer with the power to grant such bail was stationed at the police station on a twenty four hour basis. In deciding to grant bail, he would establish the physical address of the suspect and then he would speak to the officer with the power to grant bail. A document in the police docket indicated that a search appears to have been performed for Tyindyi on previous convictions and none were found.

19. In cross-examination, Netshiongolo admitted that the offence with which Tyindyi was charged was minor, and that, with a fixed address and a record of no previous convictions, this justified his release on warning or police bail.

20. Tyindyi was 24 years of age at the date of trial. He testified that he had matriculated in 2014 and thereafter, obtained a certificate in call centre operation. He was employed on a probationary basis from May 2015 to December 2015 as a telesales consultant at a Leisure company in Braamfontein. His job was to sell discounts on accommodation and travel costs to potential customers, including recreational and business travelers. His fixed salary was about R4 000,00 per month plus commission. His average income was about R4 500,00 per month, his highest in one month being about R7 000,00.

21. On Monday 2 November 2015, he went to work in the early morning to find that the personnel had voiced their dissatisfaction with the employer's unilateral reduction of commission per sale from R150,00 to R75,00. The staff decided not to work that day in protest. At about 07h00, he and his colleague, Dylan Petersen ("Petersen"), left the office for the Bree Street taxi rank. On arrival, there were the usual street hawkers selling food and other commodities. He saw a hawker selling compact discs containing movies. Since he had some money on

him, he bought about five or six CDs at a price of R10,00 each. Some were cartoons for his younger brother, some were biblical in nature for his mother and a few were action movies. He put them in his shoulder bag.

22.A while after that, Tyindyi and Petersen caught the taxi for home. It was late in the morning. They used the same taxi but were stopping off at different places. Tyindi got off the tax at Eldorado Park Extension 5. He walked to the Shoprite Checkers shopping centre nearby. Petersen stayed in the taxi, destined for Klipspruit. Tyindi went to Shahim's Takeaways where he had a bunnychow. He said he spent about two hours there.

23.In the late afternoon, when it was starting to get dark, he left the centre and started to walk home. He was still near the parking area outside the centre when a police van drove up to him, with two policemen inside. He was unable to name or identify the policemen. He was told to stop. One of them got out of the van, told him to take off his shoes, and searched him. He was told to open his shoulder bag and this was searched. The CDs were found. When the policeman asked him where he had obtained the CDs he told him he had bought them at the Bree Street taxi rank. Nothing further was said to him, and his bag was removed from him. He was told to get into the back of the van, which was unoccupied. He duly complied, and the van drove away. Then, for several hours, the van drove around, stopping intermittently to stop and search other pedestrians. Eventually about 6 or 7 other people were apprehended and put in the van.

24.Tyindi denied that he had been selling the CDs in the centre. He made it plain that he had just received his income for October 2015 from his employer and had no need for money. He testified that he had no idea whether or not the CDs were counterfeit. He mentioned that he and many other people acquired CDs from hawkers at the Bree Street taxi rank and from street hawkers in Eldorado Park.



25. He said he arrived at the Eldorado Park police station at about 20h00. His Belt and shoelaces were removed and his personal information obtained, in the form of his name, date of birth and physical address. The policeman who had arrested him completed and gave him a document to sign. He did not read the document and did not know what it said. He simply signed it. He asked this policeman "Don't I get a chance to tell my side of the story?". The policeman gave no answer.

26. Tyindyi was sent to a holding cell. Later, he was removed from the cell by another policeman who took his fingerprints and completed a form in front of him without asking him any questions. He was not asked if he wanted to make a statement. He was told to sign in several places and he simply complied with what he was told to do. He said that he was one of several people who were lined up in a queue to go through the same process. Everything seemed to happen in a hurry, and the authoritarian atmosphere was intimidating. He therefore submitted to whatever he was told to do.

27. Nobody at the police station that night told him that he could make a phone call to his family, nor was he told that he could apply for release on warning or on police-authorized bail, nor was he aware that he could do so. He confirmed that he had no previous criminal record.

28. Tyindyi testified that his cell was full, being occupied by at least 20 people who had been arrested for, amongst other things, possession of dagga or tik or other drugs. He was unable to sleep that night. They were offered no supper or water. Breakfast took the form of bread and tea. He was in a state of shock and did not have the appetite to eat.

29. On the morning of 3 November 2015, Tyindyi said he was taken by van to the Kliptown Magistrates Court. He was placed in a holding cell with several other suspects. They were led into Court by a policeman throughout the day. In the late afternoon, when he learnt that the Court was about to close for the day, he was the last person remaining

in the cell when this policeman asked him what he had been arrested for. He told him. The policeman remarked that the case against him was "irrelevant", and asked Tyindyi how much money he had. Tyindi had about R130,00 which he had kept in his sock. He gave this to the policeman, who left the cell. A short while later, the policeman returned to inform him that he could leave the Court. He left and walked home.

30. Tyindyi denied that he had had any dealings with a lawyer that day, and denied that he had instructed anyone to pay an admission of guilt fine for him.
31. He returned to work after the incident. In November 2015, he was subjected to a screening test by his employer because it was considering offering him permanent employment. In the process, the employer established his previous criminal record for possession of counterfeit goods, and that he had paid an admission of guilt fine for R300,00. His employment was terminated in early December 2015.
32. He testified that he and his family had tried to expunge this record and obtain a police clearance so that he could find work again, to no avail. He said he had tried to find work through recruitment agencies, mentioning Kelly and Quest in particular. He was unsuccessful, and surmised that this was because of his criminal record. He testified that he was certain that his position with his previous employer would have been made permanent had this incident not occurred. He had since been informed that he would have to wait for 10 years to clear his record.
33. He had remained unemployed since December 2015, and was concerned about finding employment in the immediate future. He still lived with his mother and three younger brothers in Freedom Park.

34. I turn to an analysis of the evidence. It was an uncontested fact that the CDs confiscated from Tyindyi were never analysed, nor returned to his possession. Although Mdluli was allegedly in the company of Zwane at the time of arrest, Mdluli was not called to testify. Nor was an explanation proffered for his failure to do so. There was no viva voce corroboration for the circumstances under which Tyindyi was arrested. These circumstances were a factual issue of materiality, with legal consequences concerning whether an offence was indeed committed in Zwane and Mdluli's presence.

35. There was a material inconsistency in the evidence for the Minister concerning the grounds for the arrest: Zwane said that he had found Tyindyi selling CDs yet all of the documents in the police docket, including the rights document, which Zwane had completed and signed, specifically mentioned "possession of counterfeit goods". In none of the documents is there any reference to Tyindyi purportedly selling counterfeit CDs in the shopping centre. The "offence" mentioned in the documents in the police docket, taken with the credible, reliable testimony of Tyindyi, (who was intelligent, courteous, well-spoken and unshaken under relentless cross-examination), draws me to the conclusion that he was probably not selling CDs at the centre but was apprehended while walking home. This was consistent with the modus operandi of Zwane and Mdluli of driving around the area, and arresting pedestrians. This evidence by Tyindyi was not challenged under cross-examination.

36. To compound matters, none of the police officers who testified, and in particular, the arresting officer, Zwane, could point to the law in general, nor indeed the precise section in the CGA, which made it an offence to possess counterfeit goods without selling them. Moreover, the goods were valued by the police in their own docket at R200,00. Messrs Nobela and Netshiongolo conceded that Tyindyi could have been released on warning or police bail that same evening of his arrest.

37.The circumstances under which the acknowledgment of guilt fine was paid remain an insoluble issue. Nevertheless, it has no impact on the issue of direct relevance, and that is, whether Tyindyi was proven by the Minister to have committed an offence in the presence of Zwane and Mdluli. The answer, based on the overwhelming probabilities, is ineluctably no.

38.The cause of action in this case is based on the action iniuriarum, for which general damages may be claimed. Special damages may be claimed under the lex Aquilia. In this case, only general damages were claimed.

39.In casu, the arrest was alleged to have occurred under section 40(1)(a) of the CPA. The onus is on the Minister to prove the lawfulness of the arrest. Section 40(1)(a) provides:

*"40(1) A peace officer may without warrant arrest any person-*

*(a) who commits or attempts to commit any offence in his presence;"*

40.I was referred to the Counterfeit Goods Act number 37 of 1997 ("the CGA") as the source of the offence. Despite repeated enquiries to Counsel for the Minister as to the precise section in the CGA on which the Minister relied, it was not identified. Section 2(1) of the CGA prohibits dealing in counterfeit goods, and provides in section 2(2) that it is an offence. In section 19, for a first offender, the CGA provides for a fine of R5 000,00 or imprisonment not exceeding three years or both such fine and imprisonment. I could find no offence in this statute for the possession simpliciter of counterfeit goods.

41.Section 2(1) of the CGA provides:

***"2 Dealing in counterfeit goods prohibited and an offence***

*(1) Goods that are counterfeit goods, may not-*

- (a) *be in the possession or under the control of any person in the course of business for the purpose of dealing in those goods;*
- (b) *be manufactured, produced or made except for the private and domestic use of the person by whom the goods were manufactured, produced or made;*
- (c) *be sold, hired out, bartered or exchanged, or be offered or exposed for sale hiring out, barter or exchange;*
- (d) *be exhibited in public for purposes of trade;*
- (e) *be distributed-*
  - (i) *for purposes of trade; or*
  - (ii) *for any other purpose to such an extent that the owner of an intellectual property right in respect of any particular protected goods suffers prejudice;*
- (f) *be imported into or through or exported from or through the Republic except if so imported or exported for the private and domestic use of the importer or exporter, respectively;*
- (g) *in any other manner be disposed of in the course of trade."*

42. In **Hiemstra's Criminal Procedure Lexis Nexi's Issue 9 at 57**, the following is stated:

**"In Duncan v Minister of Law and Order 1986 (2) SA 805 (A) @ 818 F-H** the jurisdictional facts which must exist before the power conferred by section 40 (1) (b) may be invoked, were set out as follows (1) the arrestee must be a peace officer, (2) the peace officer must entertain a suspicion, (3) it must be a suspicion that the arrestee committed a Schedule 1 offence (other than escaping) and (4) that suspicion must rest on reasonable grounds.

43. Arrest without warrant under section 40(1)(b) was summarised in **Sekhoto** as follows (vide **Hiemstra op cit at 5-8**):

- (i) the jurisdictional prerequisites for S 40 (1) (b) must be present;
- (ii) the arrester must be aware that he or she has a discretion to arrest;

- (iii) the arrester must exercise that discretion with reference to the facts;
- (iv) there is no jurisdictional requirement that the investigating officer should consider using a less drastic measure than arrest to bring the suspect before court.

44. "Reasonable grounds" are to be interpreted objectively – Vide **Duncan** supra at 814 D Per **Hiemstra op cit 5-8**:

*"... the section requires suspicion, not certainty. Such suspicion must, however, make sense, otherwise it is frivolous or arbitrary and not reasonable. There must be evidence that the arresting officer formed a suspicion which is objectively sustainable. See **Ralekwa v Minister of Safety and Security 2004 (1) SACR 131 T par 1.**"*

45. I refer to the case of **Olivier v Minister of Safety and Security and another 2008 (2) SACR 387 WLD.** The following occurred: Olivier, a superintendent in the SAPS based in Heidelberg, was arrested without warrant and detained for six and one half hours on a charge of theft alternatively fraud. The charges were later withdrawn. Another superintendent (who had received a call from an unidentified person) had told the arresting officer, Senior Superintendent Mokoena ("Mokoena"), that Olivier had retained certain cigarettes, alcohol, clothing and shoes seized in another case, instead of incinerating them or throwing them down a mine shaft, which was their standard modus operandi. Olivier had retained five cartons of cigarettes which lay openly on his desk in his office but explained to Mokoena that he had done so because he had to check with the area commissioner about the manner in which they were to be disposed of.

46. Following Olivier's arrest, inspections of his office and home revealed no evidence of his possession of these goods. He was released on bail at 20h00 that night. Following a damages claim for unlawful arrest, he was awarded damages of R50 000,00. At p395f of **Olivier**, the Court remarked:

*"The plaintiff gave an exculpatory explanation which should have alerted the second defendant (Mokoena) to the real possibility that the plaintiff at the time lacked the requisite mens rea for theft or fraud. Indeed, the second defendant seemed to know very little of the requirements of s40(1)(b) where a peace officer effects an arrest without warrant."*

47. The Court held that the enquiry must be decided on its own facts but enunciated certain general principles at p398 d-f:

*"This entails that the adjudicator of fact should look at the prevailing circumstances at the time when the arrest was made and ask himself the question "was the arrest of the accused in the circumstances of the case, having regard to flight risk, permanence of employment and residence, co-operation on the part of the accused, his standing in the community or amongst his peers, the strength or weakness of the case, and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain objectives of the police investigation?" The interests of justice may also be a factor."*

48. In **The Minister of Safety and Security v Tyulu 2009 ZASCA 55**

**SCA dated 27 May 2009**, a 48 year old magistrate was arrested on suspicion of being drunk in public when he walked to a nearby filling station to buy a soft drink. The police had been on the lookout for a person whom a witness, one Hendricks, had identified as being drunk while driving a vehicle. Tyulu denied being drunk while walking to the filling station and denied driving the vehicle at all. A medical report indicated that Tyulu's blood alcohol content was 0,23g per 100 millilitres, more than twice the legally permissible limit. Tyulu admitted having consumed six beers at home shortly before going to the petrol station. The charge that Tyulu was drunk in public was under section 154(1)(c) of the Liquor Act 27 of 1989 and section 40(1)(a) of the CPA was invoked. The drunken driving offence was in terms of section 40(1)(f) of the CPA. Hendricks eventually conceded that he was unsure whether the driver of the vehicle was indeed drunk.

49. On appeal it was found that there was no reliable evidence to prove that Tyulu was found to have been drunk at all. The DPP declined to prosecute. Tyulu was released after 15 minutes in detention. He was awarded damages of R15 000,00 on appeal.

50. In **Minister of Safety and Security and Jonathan Daniels v Johannes Francois Swart 2012 ZASCA 16 (SCA) 22 March 2010,**

Johannes Swart ("Swart"), a sergeant of 16 years' standing, was arrested without warrant, under section 40(1)(b) of the CPA, by a co-officer, constable Jonathan Daniels ("Daniels"), from the same police station at De Doorns, on a suspicion of driving a motor vehicle on a public road while under the influence of intoxicating liquor. He spent four and one half hours in detention. The charge against Swart was withdrawn the following day after a blood test revealed that his blood alcohol limit was below the permissible limit.

51. The SCA found that the only basis for Swart's arrest was the evidence from Daniels that he smelt of alcohol and that Swart's vehicle had left the road and landed in a ditch. There was no evidence that he was unsteady on his feet, that his speech was slurred that he could not walk in a straight line or that his eyes were bloodshot. On the contrary, Swart appeared to have been in full control of his senses and spoke in a friendly and coherent manner. See paragraphs 21 and 22 of the judgment. His damages award of R50 000,00 was confirmed on appeal.

52. I am mindful of the premise that the suspicion must be objectively reasonable but does not require certainty. In **Shabaan Bin Hussein and others v Chong Fook Kam and others 1969 3 All ER 1626 PC at 1630,** the Privy Council said:

*"suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, I suspect but I cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."*

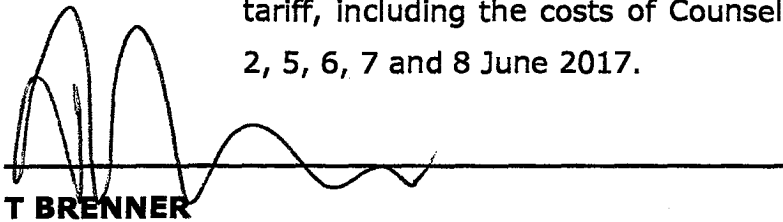
53. The critical question to be asked is whether Zwane had enough evidence at his disposal on 2 November 2015 to create reasonable grounds for arrest without warrant, which grounds were objectively sustainable.



54. In casu, Zwane unreasonably and incorrectly believed that Tyindyi's possession of CDs in his shoulder bag constituted an offence. It was not an offence. No offence was committed in Zwane's presence. On this ground simpliciter, Zwane unlawfully arrested Tyindyi and failed to discharge the onus of proving the contrary.
55. For the reasons adumbrated above, the arrest of Tyindyi on 2 November 2015 and his detention until 3 November 2015 was unlawful and his claim for damages against the Minister for this period is legally actionable.
56. In the instant case, Tyindyi was in custody for about twenty two hours. The experience was traumatic for a person who was still young in age, who had never had a brush with the law before, and who was on the verge of securing permanent gainful employment. He was subjected to an unduly humiliating and intimidating experience for which recompense is appropriate.
57. His reputation and future employment prospects have been severely compromised by a criminal record which he should not have, and which is attributable, in the main, to the precipitate and unlawful actions of the arresting officer, Zwane.
58. An award of R50 000,00 is fair and reasonable in the given circumstances.
59. No issue was raised concerning an order for Magistrates' Court costs. This does not derogate from the Court's discretion to award such costs, mero motu. Lawyers should be cautioned against the launch of litigation in the High Court for cases which fall squarely within the jurisdiction of the Magistrates' Courts.
60. Nevertheless, the Minister was vexatious in its defence of the case and this calls for a punitive award of costs.

61. The following order is granted:

- a. The defendant is directed to pay to the plaintiff the amount of R50 000,00;
- b. The defendant is directed to pay interest on the above amount at the rate of 10,25% per annum rate from 30 June 2017 to date of payment;
- c. The defendant is directed to pay the plaintiff's costs on the attorney and client scale, according to the Magistrates' Court tariff, including the costs of Counsel, and including the costs of 2, 5, 6, 7 and 8 June 2017.



T BRENNER

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG  
30 June 2017**

Appearances

Counsel for the Plaintiff:

Advocate W Louw

Instructed by:

CH Oguike Attorneys

Counsel for the Defendants:

Advocate R Liphosa

Instructed by:

The State Attorney