REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***5th October 2021*** Signature: _____

CASE NO: 18693/2017

DATE: 5TH OCTOBER 2021

In the matter between:

MORWANQANA, VUYOKAZI CYNTHIA First Plaintiff

MATSHAKA, NOMATAMZANQA EUNICE Second Plaintiff

and

THE MINISTER OF POLICE Defendant

Coram: Adams J

Heard: 30 and 31 August 2021, 1, 2 and 3 September 2021.

Delivered: 5 October 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 5 October 2021.

Summary: Criminal law and procedure – delict – unlawful arrest and detention – arrest, without a warrant, on a charge of robbery – s 40(1)(b) of the Criminal

Procedure Act 51 of 1977 – whether arresting officer held a reasonable suspicion that appellants had committed an offence listed in Schedule 1 to the Act – robbery – what enquiry is police officer required to conduct when suspects are pointed out by the victim months after the alleged robbery.

ORDER

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(1) Judgment is granted in favour of the first plaintiff against the defendant for: -

(a) Payment of the sum of R250 000;

(b) Payment of interest on R250 000 at the applicable legal rate of interest of 9% per annum from date of service of the summons, namely 21 September 2015, to date of final payment;

(c) Costs of suit.

(2) Judgment is granted in favour of the second plaintiff against the defendant for: -

(a) Payment of the sum of R290 000;

(b) Payment of interest on R290 000 at the applicable legal rate of interest of 9% per annum from date of service of the summons, namely 22 September 2015, to date of final payment;

(c) Costs of suit.

JUDGMENT

Adams J:

[1]. The first plaintiff and the second plaintiff were complete strangers to each other. They had never met until, in a cruel twist of fate, their paths crossed on Friday, 3 October 2014, at the bus terminus at Park Station in Johannesburg. Both of them were on their way to their respective hometowns in the Eastern Cape and were about to board the same bus. The first plaintiff, who had recently

been retrenched from her employment as a security guard in Johannesburg, was about eight months pregnant, and was on her way to her family home, where she was to give birth. She was travelling all by herself and was carrying big heavy bags. The second plaintiff, a primary school teacher at the time, who was also traveling by herself, saw that the first plaintiff was not having it easy, took pity on her and, out of the goodness of her heart, offered to assist her with her luggage. They then spent some time in each other's company whilst waiting in the queue for their bus to arrive. This random act of kindness by the second plaintiff unfortunately and regrettably turned out with dire consequences for the pair.

[2]. Also at the bus terminus at the time was the complainant in a robbery charge, which dated back to Monday, 27 January 2014. On that day, the complainant had been robbed of cash and other valuables worth about R30 000 by two ladies, who seemingly fitted the description of the two plaintiffs – the one small and petit and the other of a bigger built. This incident happened in Centurion and, as already indicated, occurred some eight months prior to the *dramatis personae* in this matter encountering each other at Park Station. The said complainant was convinced that the other two ladies – being the first and second plaintiffs – who she happened to see in each other's company at the terminus, were the same persons who robbed her of her belongings and cash all those many months ago. She had little doubt about this and she alerted the police to this fact, which resulted in the plaintiffs being hauled off the bus whilst en route and arrested by the flying squad in Vanderbijlpark.

[3]. The plaintiffs were arrested at about 19:30 on Friday, 3 October 2014, by Warrant Officer Werner Henning (Warrant Officer Henning) of the South African Police Service (SAPS) without a warrant, on a charge of robbery. The second plaintiff was detained until shortly after her court appearance on Monday, 6 October 2014, after posting bail at the Kgosi Mampura Prison in Pretoria at about 19:00. The first plaintiff was only able to post bail on the next day, being Tuesday, 7 October 2014, whereupon she was released at about mid-morning. They contend that their arrest and subsequent detention was wrongful and unlawful and they issued two separate summonses against the defendant (the Minister) out of this court for damages. The Minister admits that the plaintiffs were arrested

without a warrant, but denied that it was wrongful or unlawful. He contended that the arrests had been effected in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 as they were reasonably suspected of having committed an offence referred to in Schedule 1 (robbery).

[4]. The issue to be decided in this action is simply whether, in the circumstances of the matter, the police acted reasonably in arresting and detaining the plaintiffs, it being common cause that all of the other jurisdictional requirements for an arrest without a warrant were satisfied.

[5]. During the trial, the Minister presented the evidence of the investigating officer from the Wierdabrug Police Station, Constable Sithole, and the arresting officer, Warrant Officer Henning, as well as the evidence of the complainant herself, whereas the plaintiffs gave evidence in support of their cases. The evidence led during the trial indicate that the facts in the matter are by and large common cause mainly because the material aspects of the evidence by the plaintiffs are uncontested and unchallenged. In those instances, where there is a factual dispute between the version of the Minister and that of the plaintiffs, I accept the version of the plaintiffs and I do so for the reasons mentioned later on in this judgment and on the basis of the *ratio decidendi* in cases such as *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*[1], *National Employers' General Insurance Co Ltd v Jager*[2] and *Govan v Skidmore*[3]. All of these cases settled the law and the approach to be adopted when a court is faced with factual disputes and, in particular, mutually destructive versions relating to the same event.

[6]. So, for example, the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group*[4], explained the approach to be adopted as follows:

'To come to a conclusion on the disputed issues a court must make findings on:

(a) the credibility of the various factual witnesses;

(b) their reliability; and

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[1] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others* 2003 (1) SA 11 (SCA).

[2] *National Employers' General Insurance Co Ltd v Jager* 1984 (4) SA 437 (ECD).

[3] *Govan v Skidmore* 1952 (1) SA 732 (N).

[4] At para 5.

(c) the probability or improbability of each party's version on each of the disputed issues.

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail.'

[7]. In *Govan v Skidmore*, it was held that a court, in making factual findings in a civil action, should, by balancing probabilities, select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.

[8]. A summary of the events which gave rise to the arrests is as set out above. Additionally, the evidence also indicated that the complainant noticed the plaintiffs for the first time at Park Station, whilst they were all waiting to board the bus to the Eastern Cape, and, as luck would have it, she saw them in each other's company. She assumed that they were travelling together and, as I indicated above, they, presumably as a pair, looked, to the complainant, like the two ladies who robbed her in January 2014. She alerted police officers at the bus terminus to this fact. The police officers thereupon confronted the plaintiffs with the fact that the complainant accused them of having robbed her during January 2014. Needless to say, the plaintiffs were astounded by this accusation and drew to the attention of the police officers at the bus terminus the fact that they did not even know each other. How then, so they protested, could they have robbed the complainant. The police officers at Park Station conducted a mini enquiry by requesting one of the plaintiffs to call the other's cell number, which, for the police, confirmed that they did not know each other. The one's cell number did not register as a contact on the other's cell phone.

[9]. The plaintiffs were thereupon allowed to board the bus, but was warned not to talk to the complainant, who also boarded the same bus. The complainant, still convinced that these two ladies were her robbers in January 2014, was not satisfied with the outcome of the 'proceedings' at the bus terminus and contacted

her husband, who, in turn, communicated with the Wierdabrug Police Station, where the charge of robbery had initially been laid. This then set in motion the processes which resulted in the arrests of the plaintiffs.

[10]. Warrant Officer Henning of the SAPS Flying Squad, who had been contacted by the Wierdabrug Police Station, intercepted the bus in Vanderbijlpark, spoke to the complainant, who again pointed out one of the plaintiffs, who in turn was required to point out the other. They were thereupon requested to disembark. Once outside the bus, both plaintiffs were advised that they were being arrested for robbery of the complainant, who, upon being asked by Warrant Officer on at least two occasions as to whether she was sure that the plaintiffs were the robbers, confirmed so. She was adamant, despite a plea by the second plaintiff that she needed to have a closer look, because, so the second plaintiff told her, she was mistaken. The complainant would have none of that and remained adamant that the first and second plaintiffs were the ones who robbed her. The plaintiffs were shocked, dismayed and dumbfounded all at once – not to speak of the embarrassment of having been yanked off the bus in front of a busload of passengers, who no doubt saw them as trouble makers and the ones responsible for disrupting what should have been a leisurely and carefree bus trip to the Eastern Cape.

[11]. The plaintiffs soon realised that despite their protestations to the contrary, the police were not going to listen to their explanations as they had clearly accepted the claim by the complainant that they had robbed her. It bears emphasising that the complainant evidently was adamant that the plaintiffs were the culprits and she made no provision for the possibility that she may have been mistaken.

[12]. In the end, Warrant Officer Henning was satisfied that the plaintiffs should be arrested and he thereupon effected the arrests. He asked the bus driver to off load the luggage of the two plaintiffs and he booked them into the police cells at the Vanderbijlpark Police Station. The next day, Saturday, 4 October 2014, at about 11:00, they were collected from the Vanderbijlpark Police Station and transferred to the Wierdabrug Police Station by Constable Sithole from the latter

Police Station. They were detained on the Saturday and Sunday nights and taken to court on Monday, where bail for each of them were set at R2000 each. The case was postponed and later the charges against the plaintiffs were withdrawn ostensibly because the complainant was not giving her co-operation and was not coming to court to give evidence.

[13]. As already indicated, the issues requiring adjudication in this action is: (1) Whether the members of the SAPS reasonably suspected that the plaintiffs had committed the robbery of the complainant during January 2014 in Centurion; and (2) Whether the plaintiffs were wrongfully and unlawfully arrested and detained by members of the SAPS.

[14]. The Minister admitted the arrests, and subsequent detention, and contended that the arrests were justified and therefore lawful, in terms of s 40(1)(b) of the Criminal Procedure Act (the CPA). Section 40(1)(b) provides:

'(1) A peace officer may without warrant arrest any person-

. . .

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

[15]. Robbery is an offence listed in Schedule 1 of the CPA. And it is accepted by the parties that Warrant Officer Henning, who effected the arrests of the plaintiffs, was a peace officer at the time of the arrest.

[16]. The Minister's plea is a confession and avoidance, which attracts the onus to prove the justification pleaded, that is, the lawfulness of the arrests in terms s 40(1)(b), on a balance of probabilities. In order to discharge this onus, the Minister was required to establish that Warrant Officer Henning in fact entertained a suspicion that the plaintiffs had committed the offence of robbery of the complainant on 27 January 2014 and that the suspicion rested upon reasonable grounds. Once these jurisdictional facts have been established the arrestor has a discretion whether or not to carry out an arrest.

[17]. As I have indicated, a charge of robbery had been laid by the complainant and she informed the Warrant Officer – some eight months after the fact – that the perpetrators were the two persons whom she had by chance stumbled onto

at a bus terminus. Having been briefed by the Investigating Officer and having required confirmation from the complainant personally that the two plaintiffs were the persons who robbed her, there can be little doubt that Warrant Officer Henning would have held a suspicion that the plaintiffs had perpetrated the robbery of the complainant. However, s 40(1)(b) of the CPA requires more. The question is whether, all things considered, this suspicion was reasonably held. 'Suspicion' implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.

[18]. The plaintiffs' contention is that the evidence did not establish that Warrant Officer Henning had reasonable grounds to suspect that they (the plaintiffs) were the ones who perpetrated the robbery of the complainant. He relied solely and exclusively on the fact that the complainant had fingered them as the culprits and the complainant did so rather convincingly and adamantly. He had no regard, so the plaintiffs contend, to their explanations that they could not possibly have been the pair who robbed the complainant as they did not even know each other before they met at the bus terminus on that particular day, which is a fact which could easily have been verified by the police officer. In fact, this is exactly what the police officers at Park Station did.

[19]. Moreover, the police officer failed to have regard to the fact that the robbery occurred months prior to the identification, which increased – quite dramatically – the possibility that the complainant may have been mistaken. I find myself in agreement with these submissions on behalf of the plaintiffs. The point is that the arresting officer was required to have regard to all of the facts and circumstances at his disposal, including the fact that the plaintiffs flatly denied their involvement in the robbery, as well as their contention that they only met at the bus terminus. Where reasonably possible, the Warrant Officer was also required to satisfy himself of the merit of the contention by the plaintiffs, which he clearly failed to do.

[20]. It is trite that police officials who purport to act in terms of s 40(1)(b) of the CPA should investigate an exculpatory explanation offered by a suspect before

they can form a reasonable suspicion for the purposes of a lawful arrest. (*Louw & Another v Minister of Safety and Security & Others*[5]). A peace officer who suspects that a crime has been committed must first, if he has the opportunity, take the trouble to either confirm his suspicion or allow it to dissipate. This must be done especially where the suspicion is somewhat unfounded. A peace officer who fails to substantiate his suspicion even though he has the opportunity to do so, does not act reasonably if he acts on that suspicion. See *State v Purcell-Gilpin*[6].

[21]. I interpose here to deal briefly with a factual dispute between the plaintiffs and the Minister relating to what was said by the plaintiffs to Warrant Officer Henning after the plaintiffs had alighted from the bus at his request. His evidence was that the plaintiffs, on being confronted with the accusation that they had robbed the complainant during January 2014, simply told him that they knew nothing about that case and then – bizarrely – just left it at that. Their attitude, so he testified, was rather blasé, which he found rather peculiar – as do I, but I shall revert to this aspect shortly. The plaintiffs did not tell him anything about what had transpired at Park Station and they elected not to elaborate on why they denied any involvement in the incident in January 2014. His story stands in direct contrast to that of the plaintiffs, whose version was that they had told the two police officers who hauled them off the bus that they had been confronted by police at Park Station, at the instance of the complainant, with the very same unfounded accusations and that the police there were convinced of their innocence and let them go. They also explained to the police officers – two of them, according to the plaintiffs – that they did not know each other and only met at the bus terminus at Park Station.

[22]. I do not accept the version of Warrant Officer Henning. He himself admits, rather unwittingly, that his story is improbable. He said that in all his years as a police officer he has never seen anything like this – arrestees refusing to explain why they deny any involvement in the crime. This, to me, sounds like the very

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[5] *Louw & Another v Minister of Safety and Security & Others* 2006 (2) SACR 178 (T).

[6] *State v Purcell-Gilpin* 1971 (3) SA 548.

definition of inherent improbably. He also got the distinct impression that they did not care about the case. On the other hand, the second plaintiff, in particular, testified that she told the police about the incident at Park Station and that they were let off the hook by the police officers there. She also confronted the complainant in the presence of the police in Vanderbijlpark and begged of her to take a closer look at her, because, so she explained, it could not possibly have been her that robbed her.

[23]. I reiterate that the version of Warrant Officer Henning, if regard is had to all of the evidence on that point, is an improbable one. The simple fact of the matter is that it seems so very unlikely and unnatural and even more implausible that the plaintiffs would not mention to the police in Vanderbijlpark the incident at Park Station, which, in all likelihood, was their ticket out of being arrested. Moreover, the complainant's evidence corroborates the version of the plaintiff and contradicts that of the Warrant Officer. The Complainant confirmed that in Vanderbijlpark, the second plaintiff protested her innocence rather vociferously. It is for these reasons that I reject the Minister's version on this aspect of the case and accept that of the plaintiffs.

[24]. In any event, the Minister bears the onus to prove that the arresting officer acted reasonably. The version of the plaintiffs cannot possibly be said to be less probable than that of the Minister. At best for the Minister, the two versions are equally probable. So, even if my rejection of the Minister's version is incorrect, the matter should still be adjudicated on the basis of the plaintiffs' version – the Minister would not have proved his version if the probabilities are equally balanced.

[25]. In my judgment, the reasonable thing for Warrant Officer Henning to have done would have been to accept the explanation by the plaintiffs that they could not have been responsible – as partners in crime – for the robbery of the complainant, as they did not know each other. All that he needed to do was to obtain their full details and particulars, including their full names, addresses (home and work) and identity numbers, which would have enabled the investigating officer to verify their story. Even at 19:30 on a Friday night, he

probably could have called the principal at the school at which the second plaintiff worked as a teacher to verify her story. This should have been done without arresting the plaintiffs.

[26]. The question, whether the suspicion of the person affecting the arrest is reasonable, must be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first schedule offence. As I have indicated above, the way I see things, all of the information before Warrant Officer Henning, when he effected the arrest, did not demonstrate that the actual suspicion held by him was founded upon reasonable grounds. I am therefore of the view that the Minister did not establish that there were reasonable grounds to suspect that the plaintiffs committed the robbery. The arrests and subsequent detention were therefore unlawful.

[27]. It bears emphasising that the arresting police officer, once faced with the plaintiffs' claim that they could not possibly be the persons who robbed the complainant, was required, before arresting the plaintiffs, to conduct a 'mini investigation'. At the very least, he ought reasonably to have made a telephone call to a colleague of the second plaintiff, which probably would have revealed the true state of affairs and would have exonerated the plaintiffs. Alternatively, he should have done a little test as was done by the police officers at Park Station.

[28]. In sum, I am of the view that the arresting officer acted unreasonably, which means that the arrest and detention was unlawful.

[29]. As regards, the quantum of the damages to be awarded to the plaintiffs, they testified that when they were held overnight at the Police Cells in Vanderbijlpark on the Friday night, conditions were intolerable. They were traumatised, understandably so. The cell was dirty and the ablution facility was disgusting. Although, they were offered something to eat at about 20:00 on the Friday night, both of them were not able to eat due to the stress.

[30]. Their detention in the Wierdabrug Police cells from Saturday, the 4th of October 2014, to the Monday, the 6th October 2014, when they appeared in court, was just as unpleasant. The first plaintiff, it should not be forgotten, was eight

months pregnant and for her the situation would have been worse. She also spent one additional night in custody at the Kgosi Mampura Correctional Facility. They felt particularly hurt and their feelings injured by the fact that they were looking forward to a pleasant trip to the hometown, only to be unceremoniously pulled off a bus and arrested. The embarrassment they would have suffered as a result is unimaginable.

[31]. As was said in *Minister of Safety and Security v Seymour*[7]:

'[20] 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 discernible 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.'

[32]. In *Minister of Safety and Security v Tyulu*[8], Bosielo JA said the following at para 26 of the 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 an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum on such facts.'

[33]. Because it is always helpful to use as a guide awards made in previous cases, I shall refer briefly to previous judgments relating to the appropriate quantum to be awarded as damages.

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[7] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA)

[8] *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA)

[34]. In *Minister of Safety and Security and Another v Johannes Francois Swart*[9], an amount of R50 000 was considered appropriate for a claimant, who was unlawfully arrested and detained for four and a half hours. In *Van der Westhuizen v Minister of Safety and Security and Another*[10], the arrestee was awarded R400 000 by Kgomo J for an arrest and detention for a period of thirty two hours.

[35]. In *Woji v The Minister of Police*[11] the plaintiff was arrested as a result of mistaken identity and imprisoned for a period of thirteen months. He was placed in an overcrowded prison and was subjected to a gang that sodomised other prisoners. He was raped twice and as a result experienced difficulty in having sexual relations with his girlfriend. He also witnessed another prisoner being stabbed which made him fear for his life. He was allocated a single cell after eight months and as a result was isolated and lonely. He was awarded damages by the Supreme Court of Appeal of the amount of R500 000.

[36]. The arrest and detention of the plaintiffs were undoubtedly a traumatic experience for both of them. They were on the way to their hometowns, and the last thing they would have expected was to get incarcerated for something that they did not do. The first night they spent in the Police Cells in Vanderbijlpark, they cried the whole night. Even after their release, they were probably still subjected to emotional trauma as there was always that suspicion by others that they were likely involved in the robbery.

[37]. In all the circumstances, and having regard to previous awards for unlawful arrest and detention, I have come to the conclusion that, considering the length of period for which the plaintiffs were detained and the prevailing conditions under which they were incarcerated, it would be appropriate to award the first plaintiff the sum of R250 000 and the second plaintiff an amount R290 000 as damages for unlawful arrest and detention.

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[9] *Minister of Safety and Security and Another v Johannes Francois Swart* (194/11) [2012] ZASCA 16 (22 March 2012).

[10] *Van der Westhuizen v Minister of Safety and Security and Another* Case No 14013/2010 SGHC (9 October 2012).

[11] *Woji v The Minister of Police* (92/2012) [2014] ZASCA 108 (11 September 2014).

Order

[38]. Accordingly, I make the following order: -

(1) Judgment is granted in favour of the first plaintiff against the defendant for: -

(a) Payment of the sum of R250 000;

(b) Payment of interest on R250 000 at the applicable legal rate of interest of 9% per annum from date of service of the summons, namely 21 September 2015, to date of final payment;

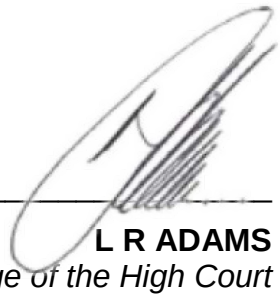
(c) Costs of suit.

(2) Judgment is granted in favour of the second plaintiff against the defendant for: -

(a) Payment of the sum of R290 000;

(b) Payment of interest on R290 000 at the applicable legal rate interest of 9% per annum from date of service of the summons, namely 22 September 2015, to date of final payment;

(c) Costs of suit.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	30th and 31st August, 1st, 2nd and 3rd September 2021.
JUDGMENT DATE:	5th October 2021 – judgment handed down electronically
FOR THE PLAINTIFFS:	Advocate Mancha Manaka
INSTRUCTED BY:	M N Mkanzi, Roodepoort
FOR THE DEFENDANT:	Advocate S Kunene
INSTRUCTED BY:	The State Attorney, Johannesburg