REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 10505/18
REPORTABLE:
OF INTEREST TO OTHER JUDGES:
REVISED
26/07/2022

In the matter between:

ELPACINO VICTOR MAPHOSA	Plaintiff
And	
MINISTER OF POLICE	Defendant

J U DG M E N T

MAHALELO J:

Introduction

[1] This is a claim by the plaintiff against the Minister of Police for damages based on the alleged unlawful arrest and detention of the plaintiff. The plaintiff was arrested by members of the defendant on a warrant of arrest on 25 January 2017. He was detained for 26 days before he was released on bail of R2000 on 20 February 2017. The case was postponed several times and on 20 August 2017, the case was withdrawn against him by the state.

[2] This judgment concerns the issue of whether or not the plaintiff's arrest and detention were unlawful and the quantum of damages to which he is entitled, if any.

[3] The plaintiff alleges that the warrant of arrest against him was wrongfully and unlawfully obtained as the investigating officer Warrant Officer Conradie who applied for it did not properly investigate the allegations against him and neither did he have sufficient information to form a reasonable suspicion that the plaintiff committed the offence of armed robbery but nonetheless deposed to an affidavit to that effect. Further, the commissioned officer Colonel Wentzel who applied for the warrant of arrest, based on Conradie's affidavit, had no reasonable grounds to suspect that the plaintiff had committed the alleged offence. Furthermore, both Wentzel and Conradie, failed to properly apply their minds to the evidence in the docket before the warrant was applied for and issued. The plaintiff also alleges that the police failed to take him before a court not later than 48 hours after his arrest.

[4] The defendant pleaded that save for admitting the arrest, it is denied that the plaintiff's arrest was wrongful and unlawful, it being pleaded that such arrest was effected pursuant to a warrant of arrest for armed robbery having been authorised by the Magistrate in terms of Section 43 of the Criminal Procedure Act 51 of 1977. The defendant further contended that the plaintiff's subsequent detention was ordered by the court and therefore lawful.

[5] In this case, it was not disputed that:

(a). The plaintiff was arrested with a warrant of arrest on 25 January 2017.

(b). He was detained.

(c). He was taken to court on 26 January 2017 at the Randfontein Magistrate court where he did not appear.

(d). He was again taken to the same court on 27 January 2017 and still did not appear before court.

(e).On 31 January 2017, he appeared before the Magistrate at Germiston and the case was postponed for legal representation and a formal bail application.

(f). On 20 February 2017, he was granted bail of R2000.

(g). The case was postponed several times until it was withdrawn against him by the state on 20 August 2017.

Background facts

[6] At the time of his arrest, the plaintiff was on parole and reporting at Toekomsrus police station as a condition of his parole. The plaintiff testified that he was approached by a male and a female police officers who informed him that they were in possession of a warrant for his arrest and proceeded to arrest him. The defendant alleges that at the time of the plaintiff's reporting, another case of hijacking was opened against him in respect of which the warrant in question was issued and circulated within the defendant's system. The warrant was applied for by Leutenant Colonel Wentzel, based on the affidavit deposed to by Warrant Officer Conradie (Conradie) and it was issued by Lieutenant Colonel Du Plessis, who was the Station Commander of the SAPS Germiston. The defendant pleaded that in 2010, a case of truck hijacking using a firearm was opened and during investigations, the plaintiff was identified by the complainant as the perpetrator and his fingerprints were found all over the truck that was hijacked. The defendant further pleaded that members of the defendant tried to locate the plaintiff at his address but was found to be unknown at that address.

[7] The validity of the said warrant is in issue in this case. It is to be decided whether Conradie and Wentzel applied their minds properly in respect of the application for the warrant. Further, once the warrant was issued, whether the arresting officers, when armed with the warrant, exercised their discretion to arrest properly. In order to try and answer the questions raised, it is important to set out, in summary, the evidence tendered.

Evidence of the defendant

[8] The defendant called three members of the SAPS to testify. None of them are the arresting officers. Mr Phokwane testified that he is now a retired police officer. He was an investigating officer and a station commander of the Germiston Police Station whilst on active service. His evidence was mainly of a general nature and it dealt with the procedure in issuing a warrant of arrest and the circulation of a wanted person. During cross examination, he confirmed that he played no role in the investigation of the case against the plaintiff as well as the application for the warrant of arrest against him and that he was not involved in the arrest of the plaintiff. He was not aware of the evidence that was used in support of the application for the J50 warrant against the plaintiff and neither was he aware of the reasons for the circulation of the plaintiff as a wanted person.

[9] Conradie testified that he was employed at the Germiston SAPS and worked as a police officer for more than 40 years. He is presently retired. He was a warrant officer in the detective branch dealing with investigation of dockets and tracing of suspects. He received the docket for an armed robbery case for investigation sometime in 2015/2016 before he deposed to an affidavit applying for a J50 warrant of arrest against the plaintiff. When he received the docket, it contained the A1 statement of the complainant who was the driver of the alleged hijacked truck, the 212 statements of the fingerprint experts (Constables Sithole and Tivane) and a witness statement. At the time, he was an investigating officer in the Tracing Unit with two other police officers assisting him. He stated that the suspect in that docket could not be traced. He explained the procedure of tracing a suspect who is linked to the crime through fingerprints. He referred the court to the 212 statement of Sithole, who took the fingerprints at the crime scene of a truck hijacking, and that of Tivane, who compared the prints found at the scene of the crime and those of the plaintiff. Conradie testified that it was on the basis of the statements that the suspect's name and address were identified. The name was that of the plaintiff and his address was said to be [....] M [....] 1 S [....] 1, T [....] .

[10] According to Conradie, the plaintiff was untraceable at the said address. He then deposed to an affidavit which he used to apply for a warrant of arrest/J50 so that the plaintiff could be circulated.

[11] During cross examination, it was pointed out to Conradie that after the entry on 10 July 2010 in the investigation diary of the docket in question, the next entry which appears is only on 31 January 2017. He could not explain why the pages were missing from the investigation diary and he found this to be strange.

[12] Conradie confirmed during cross examination that it was expected of him to read the statements in the docket before he applied for a warrant of arrest. He confirmed the following evidence in the docket: in terms of the A1 statement, the driver of a truck and his assistant (witness) were robbed of the truck at the Golden Walk Shopping Mall parking on 5 May 2010. The truck was not recovered and it was circulated in the SAPS Circulation System as a stolen vehicle. The vehicle was eventually found on 4 February 2011 and handed over to the owner on 8 February 2011.

[13] Conradie was referred to the 212 statements of Sithole and Tivane. At paragraph 2 of his statement, Sithole stated the following: "*On 2010-05-05 i went to [....] M [....] 1 S [....] 2, K [....] for investigation for finger and palm prints. I lifted identifiable prints by means of scotch tape: - TOYOTA DYAN WHITE REG NO [....] . S/tape 1: P/prints lifted vertically from the passenger's door next to the mirror and window +/-1.2m from the ground. I have marked the scotch tape Germiston LCRC number 100/05/2010 and had it put away in the safe for safe keeping back at the office.*" Sithole's 212 statement was commissioned on 23 July 2012.

[14] Tivane stated in his statement that *"I compared the left palm print on the photographic reproduction of the exhibit (S/tape 1) with Germiston LCRC 100/05/2010 to the prints of Elpacino Maphosa and found it to correspond with the left palm print"*.

[15] Conradie was asked whether the contents of paragraph 2 of Sithole's statement was factually possible. He confirmed that according to the date when the

print was uplifted, it was not factually possible as Sithole could never have uplifted the print on the date that the vehicle was stolen. He stated that it was possible that the date on the affidavit was not right. When asked if he saw the discrepancy on Sithole's statement, he stated that unfortunately he did not and he could not remember that he did. He was asked how he applied for a J50 warrant based on a statement that he did not read and if that was how he did his job. His response was *"Ya*". He stated that he could not comment on the statement as it was not made by him but confirmed that it was his job to read the statement. Conradie confirmed that the content of the statement of Sithole was an impossibility and that the uplifting of the fingerprints could not have happened on the date of the robbery as the truck was recovered on a later date.

[16] With regards to the 212 statement of Tivane, Conradie was asked about the copy of the prints allegedly lifted from the stolen vehicle. He initially referred to the prints that were obtained from the Criminal Record Centre for comparison. These prints, he confirmed, were registered on 17 November 2003 and it appeared to him that they were taken from the suspect in 1997. Conradie could not confirm if any of the prints in the docket were the prints that were allegedly lifted from the stolen vehicle. He confirmed that it was expected that a copy of the prints uplifted from the stolen vehicle should have been in the docket. He further confirmed that there was no statement in the docket relating to the fingerprints which were uplifted from the stolen vehicle after it was recovered. He agreed that it was improbable that prints could be uplifted from the outside of a vehicle after a period of a year due to the prints being affected by rain, dust and other elements of the weather. He was not sure if prints could be recovered from the outside of the vehicle if it was under cover for that period.

[17] Conradie was again referred to the address of the alleged crime scene where the fingerprints were uplifted from the vehicle being [....] M [....] 1 S [....] 1, K [....] . He was referred to the statement by the driver's assistant, Elia Themba Mzafani, which statement indicated that his address is [....] M [....] 1 S [....] 1 K [....] South. He was also referred to the subpoena where the address of the witness was reflected as [....] M [....] 1 S [....] 1, K [....] . He could not explain how the fingerprints could have been uplifted from the stolen vehicle at the witness' address. Further, he indicated

that there is no statement in the docket explaining how this could have happened. Furthermore, it was pointed out to Conradie that the witness, Mr Mzafani, made a statement on 26 March 2017, in which he does not mention that the vehicle was recovered at his address and that fingerprints were uplifted from the vehicle.

[18] Conradie was further referred to the CRC report where the address of Elpacino Maphosa is indicated as [....] M [....] 2 S [....] 2, T [....] K [....] 1 . He confirmed that he did not look for the address in K [....] 1 but in T [....] . He explained that he had used a Garmin and could not find the address. He stated that the people who worked with him could have gone to the address. It was put to him that he would not have found the address in T [....] as it did not exist in T [....] . He confirmed that it was possible. Conradie could not remember if he personally traced the plaintiff. He stated that he did not have other addresses and could not explain why he omitted "K [....] 1 " when he referred to the plaintiff's address. He could not explain what information he relied upon when he stated that the plaintiff could not be traced. He stated that it could have been written in the investigation diary in the pages that were missing from the docket how and when the plaintiff was traced. It was pointed out to him that there was another address in the docket, namely, [....] M [....] 2 S [....] 1, E [....] P [....] K [....] 1 . He confirmed this but stated "*Unfortunately I cannot say that I noticed it."*

[19] It was also pointed to him that the information in the docket stated that Elpacino Maphosa was previously in custody under Dawn Park CAS No. 25/03/2010. He was asked whether he followed up on that CAS number. He confirmed. He was asked if he followed up on the address given. His response was "Most likely yes". However, he stated that it is a false address because Constable Lethule went there and was told that the plaintiff is unknown. It was put to him that it was unknown if Constable Lethule actually went to the address as the said address did not exist in T [....] . He could not respond to this.

[20] Mr Conradie was referred to the charge sheet under Vosloorus Court Case Number VSH 133/10, which is Exhibit "B". The plaintiff's address was pointed out on the charge sheet to be [....] M [....] 2 S [....] 1, K [....] 1 . It was put to him that if he had investigated the case properly, he would have seen all the details on the charge

sheet, which he could have obtained from the Vosloorus Court and he could have attempted to trace the plaintiff at the address stated on the charge sheet. He stated that he did not go to the address but it does not mean that the other police officers did not go there. It was put to him that there was nothing in the case docket which showed that there was any attempt to trace the plaintiff in K [....] 1 . His response was that half the investigation diary is gone and he cannot remember the case. He did not go to the address in K [....] 1 but somebody could have gone there.

[21] Conradie was referred to the J50 warrant of arrest. He stated that the warrant was applied for by Lieutenant Colonel Wentzel based on his affidavit and the contents of the docket. He confirmed that anyone who applied for a warrant must apply their minds to the evidence that they have before they rely on it to make the application. It was pointed out to him that in the application part of the warrant, it is stated *"The said suspect is at present known or suspected on reasonable grounds to be within the District of Germiston"*. He was requested to explain this as according to his statement, the suspect could not be traced. His response was that the offence was committed in Germiston.

[22] He was then referred to the wanted person circulation document. He confirmed that he completed the application on 10 August 2016 and at the bottom of the document, he ticked yes to the question: warrant issued? It was pointed out to him that the warrant was only issued on 15 August 2016. He explained that the document was completed in anticipation that the warrant would be issued, if the warrant was not issued, he would not have sent the form for circulation. He was asked why he did not take the docket to a prosecutor to apply to a magistrate for the warrant. He responded that he did not do so because a policeman with the rank of Captain could apply for the J50 warrant and the Colonel could issue the warrant. It was pointed out to him that because he had flimsy evidence, he ought to have approached the prosecutor so that he could be assisted in applying for the warrant of arrest. He stated that it was not up to him as any other police officer working on the case could have gone to the prosecutor. He stated that he was working with 50 other dockets wherein J50s had to be applied for and the easiest for him was to take it to the officers who are allowed to do it.

[23] Conradie was referred to the printouts from the SAPS Vehicle Circulation System. In these printouts, where there is a provision for description of place where the vehicle was found, it was left blank. After pointing this out to him, he confirmed that he did not know where the vehicle was found. He confirmed that when he mentioned in his statement that fingerprints were found on the truck at the crime scene at [....] M [....] 1 S [....] 2, K [....] , this was based on the 212 statement of Sithole.

[24] Sergeant Leshaba testified that he was the current investigating officer of the case. He received the docket on 6 February 2017 after the plaintiff had already appeared in court. His investigations comprised mainly of profiling the accused, verifying his address and preparing the docket for court. He also subpoenaed witnesses for court. He had no personal knowledge of the contents of the statements in the docket as he did not obtain the statements from the witnesses and neither did he interview them at any stage. However, in the course of his investigations, he had to read all the statements and evidence in the docket. He confirmed that he was not present when fingerprints were allegedly uplifted from the stolen vehicle. He had no knowledge as to where the vehicle was when the fingerprints were uplifted. He initially testified that the vehicle was found on the same day that it was stolen hence the statement by Sithole that fingerprints were obtained from the vehicle on the same date in K [....] . He was aware that the address at which the fingerprints were obtained was that of the witness Mr Mzafani. He could not explain how the stolen vehicle could have been located at the address of the witness on the very same day that it was stolen.

[25] During cross examination, Leshaba was referred to the entry of 10 July 2010 in the docket where it is stated that the truck was not recovered in this case. He was also referred to the vehicle circulation documents, in particular where the circulation status was *"Vehicle sought*" as at 1 June 2010. He was also referred to the vehicle recovery and cancellation documents from the SAPS Circulation System which showed that the vehicle was found on 4 February 2011 and released to the owner on 8 February 2011. He initially attempted to disagree with these dates in view of the statement of Sithole which indicated that the prints were uplifted on 5 May 2010. However, he could not explain how it came about that the vehicle Circulation System

recorded the date on which the truck was found as 4 February 2011. He conceded that he had no knowledge as to when the vehicle was found. He played no part in the recordal of the information in the SAPS Vehicle Circulation System and his evidence on what could have possibly happened would be mere speculation.

[26] During cross examination, Leshaba was asked whether it was possible that the fingerprints expert could have uplifted fingerprints from the stolen vehicle if it was not recovered on the same date. He conceded that it would be impossible. When he was asked whether he paid any heed to this material discrepancy between the statement of the fingerprints expert and the evidence in the docket as to the date of recovery of the vehicle, he said that he did not and could not explain the reasons for not considering this major and material discrepancy.

The evidence for the plaintiff

[27] The plaintiff testified that after his arrest on 25 January 2017, he was taken to court on 26 January 2017 at Randfontein Court. The matter was not dealt with at the Randfontein Court as he did not appear before the magistrate. He was taken back to Randfontein Police Station where he was detained overnight and taken back to Randfontein Magistrate's Court on 27 January 2017. The matter was again not dealt with and he was taken back to the Randfontein Police Station where he was detained in the police cells. He was subsequently taken to the Germiston Police Station on 29 January 2017 and detained in the police cells. On the morning of 31 January 2017, he was charged and taken to Germiston Court. The matter was postponed for bail application and legal representation. On 9 February 2017, the matter was postponed to 20 February 2017 for a formal bail application. On that date, he was granted bail of R2 000.00, which he paid and was released from custody.

[28] The plaintiff testified that he was on parole in a case for which he was arrested in 2010 for possession of stolen property for which he had pleaded guilty and was sentenced to six years' imprisonment which was suspended on conditions. In 2012, he pleaded guilty in another matter and the suspended sentence for the 2010 case was put into operation. He served three years' imprisonment from 2012 to

2015 and was released on parole towards the end of 2015. After the charges for the current matter were explained to him when he was charged at Germiston SAPS, that the matter involved the robbery of a truck in 2010, he believed that he had been rearrested for the same case for which he had already pleaded guilty and was sentenced in 2010.

[29] With regards to the conditions of his detention, he testified that the conditions at the Randfontein Police cells were very bad as the cell was overcrowded with about 20 to 25 suspects. The cell was always dirty and smelt badly because of the number of inmates. There was no shower in the cell and he had not taken a bath for the 4 days. There were blankets and sponges in the cell which they shared but there were bugs on the sponges and the blankets, and they were dirty. There was only one toilet in the cell and a wash basin but they were not provided with soap. The toilet was always dirty and whenever he wanted to use it, he had to clean it himself. He was given food but the food was not good. When he was taken to Germiston Police cells, the conditions were a little better. The cell was not crowded and it had a shower. He was also given soap to take a shower. He was given a sponge and a blanket to sleep on which was not as dirty as the one in Randfontein but it also had bugs and he was bitten. He was given food but the food was also not good. The only part of the food that he could say was good was the bread.

[30] After he appeared at the Germiston Magistrate's Court, he was remanded in custody to the Boksburg Prison. There, the conditions were much better than the police cells. They had clean sponges and blankets. There was a shower in the cell. He was given soap to shower and the cell was not overcrowded. He was also provided with meals which was the usual prison food which was not really good. It was however better than the food at the police cells.

[31] At the time of his arrest, he was 43 years old and he was married by customary union. He had three children who were aged 16, 15 and 6 years at the time. The 6-yearold was still at crèche. He used to assist his relative with certain chores for which he received some income. He also transported his 6-year-old child to crèche and his teacher wife to school in the morning and he fetched them in the afternoons. He had to be home by 4pm in terms of his parole conditions. The police

checked on him every day whilst he was on parole but he had to report at the Toekomsrus Police Station once a month. In 2010, when he was arrested for possession of stolen property, he was residing at [....] M [....] 2 S [....] 1 K [....] 1 . He was requested to explain why T [....] appeared in one of the addresses in the case docket. He explained that the area in which he lived in K [....] 1 was called T [....] because the people that lived there were Shangaan or Venda speaking. He explained that the other address in the docket of [....] M [....] 2 S [....] 3 E [....] P [....] , K [....] 1 was his uncle's address. It was called E [....] P [....] because it was a new section in K [....] 1 but also near T [....] which was the old section. He stayed at his uncle's house when his uncle was away for three or four days. He was very angry and upset about being arrested for something that he knew nothing of and because he had recently been released on parole and part of the conditions of his parole was that he not be arrested for another offence whilst on parole. His arrest had caused him a problem because he had to go and explain himself to the parole officers. However, he was not made to serve the remainder of his sentence.

[32] During cross examination, he confirmed that the correct spelling of the street was "Mhlabunzima". The plaintiff confirmed from the court's questions that he was shown the warrant of arrest which was explained to him when he was arrested. However, it was not explained to him how he was identified as the suspect in the case.

Arrest on a Warrant: The Law

[33] Section 38 of the Criminal Procedure Act provides for four methods of securing the attendance of an adult in court for purposes of his or her trial. They are arrest, summons, written notice and indictment. Section 39(1) provides that arrests may be made with or without a warrant and section 39(3) states that the effect of an arrest is that '*the person arrested shall be in lawful custody' and he or she 'shall be detained in custody until he [or she] is lawfully discharged or released from custody'*.

[34] Section 43 deals with warrants of arrest. It provides:

"(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed."

[35] Section 44 concerns the execution of warrants of arrest. It states that a warrant issued in terms of section 43 *"may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof."*

[36] Section 50 deals with the procedure to follow after a person has been arrested. It provides as follows:

> *"50(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.*
>
> *(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.*
>
> *(c) Subject to paragraph (d), if such an arrested person is not released by reason that- (i) no charge is to be brought against him or her; or (ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest."*

[37] It is trite law that even where the warrant for the arrest of a suspect has been lawfully obtained, this in itself does not necessarily justify an arrest to secure the attendance of the suspect in court. In *Brown and Another v Director of Public Prosecutions & Others,*[1] Fourie J reaffirmed that an arrest constituted such a drastic invasion of personal liberty that it still had to be justifiable according to the demands of the Bill of Rights. A change in the flight risk of a suspect might however justify his arrest to secure attendance in court.

[38] An arrest in terms of a J50 warrant is unlawful if the warrant of arrest is improperly sought and obtained.[2]

[39] In *Mphaleni v Minister of Safety & Security*,[3] the plaintiff attacked the validity of a warrant of arrest on the basis that : (a) it was improper because the police officer

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[1] 2009 (1) SACR 218 (C).
[2] See *Mahlangu v Minister of Safety and Security and Others* [2012] ZAGPPHC 12 (9 February 2012).

applied for and obtained it without properly investigating the allegation against the plaintiff and without having sufficient or any information to form a reasonable suspicion that the plaintiff committed an offence of fraud but nonetheless deposed to an affidavit to that effect; (b) the police officer had no reasonable grounds to suspect that the plaintiff had committed the offence he alleged that the plaintiff was suspected of having committed. Dawood J, with reference to *Minister of Safety & Security v Sekhoto and Another*[4] stated at paragraph 28 (x- and xi): *"…the court reaffirmed that an arrest is in fraudem legis when the arrestor has used a power for an ulterior purpose, but a distinction must be made between the object of the arrest and the arrestor's motive - "object relevant while motive is not. Courts do sometimes interfere to protect an injured party against abuse of power, example, in those well recognized cases in which powers, given to public bodies to be used for certain purposes, are wrongly used by them to achieve other purposes. See Sinovichv Hercules Municipal Council 1946 AD 783. To profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act in fraudem legis, see Van Eck and Van Rensburg v Etna Stores 1947 (2) SA 984 (A) 998. Thus, where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorized purpose such person acts mala fide and in fraudem legis. See Minister van die SA Polisie v Kraatz 1973 3 SA 490 (A) 508."*

[40] Even when a warrant of arrest has been issued, a peace officer has a discretion as to whether or not to execute it. In *Minister of Safety and Security v Sekhoto & Another,*[5] Harms DP held that: '[o]*nce the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises'* and that the peace officer *'is not obliged to effect an arrest'.* Further, in *Domingo v Minister of Safety and Security,*[6] Chetty J held that: ' *The trial court's finding that, once armed with a warrant, the arrestor . . . was duty bound to*

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[3] (1495/2007) [2013] ZAECMHC 28 (4 October 2013).
[4] 2011 (5) SA 367 (SCA).
[5] 2011(1) SACR 315(SCA) para 28.
[6] (CA 429/2012) [2013] ZAECGGHC 54 (5 June 2013) para 3.

arrest the plaintiff without further ado, was wrong and amounts to a clear misdirection'. The discretion to arrest or not obviously must be exercised properly.[7]

[41] In *Weitz v Minister of Safety & Security and Others,*[8] Plasket J stated: *"Even when a warrant of arrest has been issued a peace officer has a discretion as to whether or not to execute it..."*

[42] In *Khanyile v Minister of Safety & Security and Another,*[9] the plaintiff instituted an action for damages for unlawful arrest and detention alleging that the warrant for his arrest, authorised in terms of section 8(1)(a) of the Domestic Violence Act No. 116 of 1998, issued for violation of an interim protection order, was invalid because the complainant had not yet made a statement; and that consequently, there was "no basis" for his arrest by the arresting officer. It was contended for the plaintiff that there were insufficient grounds for the arrest as the arresting officer arrested the plaintiff before the complainant had made a statement and the warrant was not presented with the annexures. Even after the statement was taken from the complainant, Gumede failed to exercise his discretion despite there being no indication in that statement that the plaintiff had contravened the terms of the interdict. Further, he had not investigated the matter. Consequently, he had not acted as a prudent and reasonable police officer in arresting the plaintiff. The arrest was therefore unlawful and wrongful. It was contended for the defendant that Gumede, as the arresting officer, was satisfied that he could arrest the plaintiff as he had been furnished with a warrant which was authorised by a magistrate, he was advised by the complainant that she was abused in contravention of the protection order and he could not question or interfere with the warrant. In arresting the plaintiff, he had therefore acted on a reasonable suspicion that the plaintiff had contravened the order, and the arrest and detention of the plaintiff was consequently not unlawful. In his judgment, Murugasen J stated at paragraph 33 and 34 that:

> "*as an experienced member of the South African Police Services, Gumede ought to have known that the arrest of an individual is a drastic infringement*

[7] See *National Commissioner of Police & another v Coetzee* 2013 (1) SACR 358 (SCA) para 14.
[8] (487/11) [2014] ZAECGHC 33 (22 May 2014) para 12.
[9] 2012 (2) SACR 238 (KZD).

of the arrestee's Constitutional rights to freedom and security of a person (section 12 of the Constitution of South Africa No. 108 of 1996) and a warrant should therefore not be executed in haste and without due consideration of all the pertinent facts, particularly as there was only an allegation, not conclusive proof, that the order had been breached. Further when the complainant returned with the protection order, and deposed to a statement, it ought to have been apparent to Gumede from her statement that the alleged breach and verbal and /or emotional abuse by the plaintiff did not constitute a breach of the order, nor did plaintiff's comment expose her to imminent harm. Consequently, Gumede ought to have realized that not only the arrest but the continued detention of the plaintiff was not justified. However, he failed to release the plaintiff. In the premises I am persuaded that the arrest and detention of the plaintiff was unlawful".

[43] In *Mofokeng v Minister of Police & Another*,[10] the court stated the following:

"[64] In casu section 44 of the Criminal Procedure Act, 51 of 1977 prescribes the procedure applicable to an arrest on a warrant of arrest. The section reads as follows: 'A warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof. [65] The section clearly confers a discretion on an arresting officer in possession of a warrant of arrest to arrest. [See: Brown & Another v Director of Public Prosecutions & Others 2009 (1) SACR 218 C and Theobald v Minister of Safety and Security 2011 (1) SACR 379 GSJ.]. In order to exercise this discretion, the arresting officer must have sufficient knowledge of the evidence against the accused. In casu Motlogi confirmed during cross examination that he had no knowledge of the contents of the docket and could not form an independent opinion to arrest or not. He merely executed the J50 warrant of arrest and in so doing acted in contravention of the provisions of section 44 of the Act. It furthermore appeared during cross-examination that Motlogi was not even aware that he had a discretion to arrest. In this regard, Mr Kerr-Philips

[10] (29678/2014) [2019] ZAGPPHC 566 (21 November 2019) para 64.

referred to the matter of Domingo v Minister of Safety and Security (CA 429/202) [2013] ZAECGHC 54 (5 June 2013), in which it was held that an arrest by a police officer who is not aware that he/she has a discretion to arrest, renders the arrest automatically unlawful. In these circumstances, I find that the arrest of the plaintiff was unlawful and that the police is liable for the damages suffered by the plaintiff due to his unlawful arrest."

[44] Having set out the legal principles that apply to the issues I am called upon to decide, I now turn to whether the defendant has discharged the onus in justifying the plaintiff's arrest and detention by showing that the warrant of arrest against the plaintiff was properly obtained, and whether the arresting officers exercised their discretion to arrest the plaintiff properly or improperly.

Was the warrant properly applied for?

[45] It is apparent from the evidence that Warrant Officer Conradie, who deposed to a statement which was used to apply for the warrant, did not apply his mind to the contents of the docket. It would appear that he did not even read the statement of the fingerprints expert, Sithole. Conradie failed to notice that according to the statement, a palm print was obtained from the stolen vehicle on the date of the armed robbery but the entry in the investigation diary on 10 July 2010 showed that the truck was not yet recovered then. The SAPS Vehicle Circulation System also showed that the vehicle was circulated and it was still sought as at 1 June 2010. It was only recovered on 4 February 2011 and released to the owner on 8 February 2011. Conradie did not interview Sithole and Tivane regarding their 212 statements, especially about where and how the fingerprints were uplifted from the hijacked truck. He was not aware as to when the vehicle was recovered or where it was recovered. He made no effort to confirm that a copy of the fingerprints that were uplifted from the truck was in the docket. He paid no regard to the fact that there was no recovery statement regarding the recovery of the stolen truck. He stated that he deposed to an affidavit on the strength of the statements of Sithole and Tivane to the extent that he even referred to the address where the fingerprints were allegedly uplifted, as the crime scene. He could not explain how it could have been the crime scene if it was also the address of the witness, Mr Mzafani. He did not bother to

follow up on this aspect. It is important to note that Constable Sithole and Tibane were not called to testify.

[46] Conradie testified that there was only one address for the plaintiff in the docket in T [....] in the East Rand, which could not be located. He therefore stated in his affidavit that the suspect could not be traced. He seemed to have overlooked that the addresses in the docket pointed to the plaintiff residing in K [....] 1 . He could not explain this oversight. He was requested to use his phone to locate the address as it appeared in the case docket in K [....] 1 and he stated that it does show a location, however, when he tried to locate the address in 2016, he used a Garmin that did not show the address. It must be noted that Conradie was looking for the address in T [....] and not K [....] 1 . He could not explain why there was no statement in the docket relating to any attempt to trace the suspect at his correct address prior to the application for the warrant of arrest being made. He could also not explain why there was a statement in the docket, the statement of Lethule, that showed an attempt to trace the suspect after the warrant was issued. Conradie stated that he was under the impression that if the offence occurred in Germiston and the matter was being investigated in Germiston, a police officer with rank of Captain was entitled to apply for the warrant to a policeman of the rank of Lieutenant Colonel, in Germiston. It was pointed out to him that Section 43 of the CPA does not permit this and in such instances, the application has to be made within the magisterial jurisdiction where the suspect resides. He did not take the docket to a prosecutor for application for a warrant to a magistrate because it was easier to obtain it from the police at the police station. He stated that if he took it to a prosecutor, he would have to wait five or six months for a response. Quite clearly, he preferred the easier option. Having regard to the legal principles stated herein above, it is apparent that not only was the warrant of arrest improperly sought and issued, it was also defective for the reasons set out herein above.

[47] The J50 warrant was applied for on the basis of there being a reasonable suspicion that the plaintiff committed the alleged offence on or about the 5th May 2010 in the district of Germiston. Conradie conceded that when applying for a J50 warrant, the police officer must entertain a suspicion on reasonable grounds that the suspect had committed the offence in respect of which the J50 warrant is applied for.

Having regard to the evidence on record, it is evident that Conradie did not properly investigate the information in the docket and properly applied his mind to it and his decision to apply for a warrant was therefore irrational. Further, the fact that the warrant was applied for in the district of Germiston without reasonable grounds for suspecting that the suspect was in Germiston, must render the warrant defective.

Was the discretion to arrest exercised properly?

[48] The onus was on the defendant to show that the arrest of the plaintiff was lawful. The defendant did not call any witnesses to prove that the arrest was lawful. During the trial, counsel for the defendant stated that Sergeant Ngwenya, who arrested the plaintiff, was deceased. The plaintiff testified that he was approached by two police officers who informed him of the warrant of arrest against him. It seems that the defendant made no effort to at least attempt to prove that the arrest was lawful.

[49] The plaintiff testified that the warrant of arrest was read to him and he was thereafter arrested. It is trite that the arresting officer has the discretion to arrest and this discretion must be exercised having regard to the evidence at hand. There is no evidence before the court that the arresting officers had anything else to rely upon to entertain a suspicion that the plaintiff had committed the offence for which he was being arrested in terms of the warrant. From the evidence, it is not known if the arresting officers exercised their discretion rationally in arresting the plaintiff.

[50] The plaintiff testified that when the warrant of arrest was read out to him, he denied any involvement in the crime. In my view, had the arresting officers been able to explain to the plaintiff the charges and the evidence at hand, the plaintiff would have been afforded an opportunity to offer a response which the arresting officers could have investigated before effecting an arrest on the plaintiff. In conclusion, I find that the arrest of the plaintiff was unlawful, not only because the warrant was improperly sought and obtained, but also because the defendant failed to discharge the onus to show that the arresting officers exercised their discretion at all when arresting the plaintiff.

Is the defendant liable for the plaintiff's further detention?

[51] The plaintiff was arrested on 25 January 2017. He was detained before he was taken to the Randfontein Magistrate's court on 26 and 27 January 2017, where he did not appear before the magistrate. He was charged on the morning of 31 January 2017 and taken to the Germiston Magistrate's Court. He was remanded in custody for legal representation until 8 February 2017. The State opposed bail on that date. As a result of the State's opposition to bail, a formal bail application had to be held and the plaintiff was eventually released from custody when the court granted bail on 20 February 2017.

[52] The defendant contended that the plaintiff's subsequent detention was ordered by the magistrate and therefore lawful. Counsel for the defendant argued that once the plaintiff was brought to court, the defendant's control over the process ended and therefore, any possible delictual liability seized. The defendant relied on *Minister of Safety and Security v Tshei Jonas Sekhoto and Another,*[11] where it was held that: "…*Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.*"

[53] Both parties referred me to *De Klerk v Minister of Police*,[12] where the Constitutional Court stated as follows:

> *"Second, even if Isaacs says that a remand after an unlawful arrest is always lawful, does that necessarily render the harm arising from the subsequent detention too remote from the wrongful arrest? In other words, for the purposes of determining the liability of the Minister of Police, what is the relationship between the legal causation element in relation to the wrongful arrest and the lawfulness of the detention after the first appearance of an arrested person?..."*

[11] 2011 (1) SACR 315 (SCA) para 42.
[12] 2020 (1) SACR 1 (CC) para 35.

[54] In *Mahlangu and Another v Minister of Police,*[13] it was held that it is only when a causal link is established between the arresting officer's conduct and the subsequent harm suffered by the plaintiff that the defendant is said to be liable for detention after first appearance.

[55] *In casu*, the police failed to inform the magistrate, through the prosecution, of the problems that were there in their case. They failed to inform the magistrate how the warrant of arrest against the plaintiff was applied for and the material discrepancies that were there in Sithole's 212 statement regarding where and when he allegedly uplifted the plaintiff's fingerprints on the hijacked truck. They also failed to point out what was contained in the vehicle circulation system as well as when the vehicle was recovered and released to the owner.

[56] The duty of a policeman who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not (*Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA)). This duty applies to the investigating officer. The investigating officer breached this duty by failing to disclose the said crucial information to the prosecutor which was relevant to the further detention of the plaintiff. In *Woji v Minister of Police,*[14] it was held that the Minister was liable for post appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question, in custody. In *Mahlangu*[15]*,* the Constitutional Court said that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor. I am of the view that the police should have foreseen that their unlawful conduct of arresting the plaintiff with an invalid warrant, would result in his continued detention and liability for their lack of foresight in those circumstances cannot be avoided. I conclude that the defendant is liable for the whole period of detention of the plaintiff.

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[13] 2021 (7) BCLR 698 (CC).
[14] 2015 (1) SACR 409 (SCA).
[15] Supra.

Quantum

[57] Turning to the issue of quantum, I bear in mind what was held in *Minister of Safety and Security v Tyulu*[16]:

> *"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 of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29)."*

[58] In evaluating what damages to award to the plaintiff, Visser en Potgieter – Law of Damages, Third Edition, at 15.3.9 at page 505 to 548, states the following factors that generally play a role in the assessment of damages in similar cases, an assessment to determine what is fundamentally fair and equitable, as follows:

> *"… The circumstances under which the depravation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature of*

[16] 2009 (2) SACR 282 (SCA) para 26.

the depravation of liberty; the status, standing, age and health and disability of the plaintiff; the extent of the publicity given to the depravation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; award in previous comparable cases; the fact that in addition to physical freedom, other personality interest such as honour and good name as well as constitutionality protected fundamental rights have been infringed constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effect of inflation; the fact that the plaintiff contributed to his or her misfortune;the effect an award may have on the public purse; and according to some, the view that actio injuriarum also have a punitive function."

[59] The plaintiff testified that at the time of his arrest, he was 43 years old and he was married by customary union. He had three children who were ages 16, 15 and 6 years old at the time. The 6-yearold was still at crèche. He was not employed but he used to assist his relative with certain chores for which he received some income. He also transported his 6-year-old child to crèche and his wife who is a teacher to school in the morning and he fetched them in the afternoons. He testified that was made to endure unbearable conditions in the cells and endured filthy and unhygienic conditions in the cells.

[60] The experience was hurtful and most humiliating and no attempt was made by the defendant to provide any form of justification.

[61] The plaintiff justified the amount claimed by referring to a number of similar judgments. I have had regard to them and am mindful that they only serve as a guide without losing sight of the facts of this matter. The ultimate purpose of this award is to compensate the plaintiff for his injured feelings and not to enrich him. I have to balance such interests when compensating him. I am of the view that an amount that would be commensurate with the damages he sustained is an amount of R500 000.00 (*Five Hundred Thousand Rand only).*

[62] With regards to when interest is payable, the plaintiff sought to amend prayer 2 of its Particulars of Claim which reads *"interest thereon at the rate of 10.5% per*

annum from date of judgment to date of payment" by deletion of the words *"from date of judgment to date of payment"* and substituting it therefore with the words *"a tempore mora from date of delivery of demand being 11 April 2017 to date of payment"*. The defendant objected to the plaintiff's amendment and contended that the facts upon which the plaintiff bases his claim in the letter of demand are different from the facts in the Particulars of Claim. Therefore, the plaintiff should not be entitled to interest from the date of service of the demand.

[63] In deciding whether to grant or refuse an application for an amendment, the court exercises a discretion and in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them.[17] An amendment will normally not be granted if there will be real prejudice to the other party which cannot be cured by an order for costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject matter of the litigation. There will not be prejudice if the parties can be put back, for the purpose of justice, in the same position as they were when the pleading, which is sought to be amended, was originally filed.

[64] In my view, the defendant was aware that the plaintiff was stating its intention to claim damages on the grounds stated in the letter of demand but more importantly, on the grounds that his arrest and detention were unlawful. The fact that the plaintiff, at the time believed that he was rearrested for a case for which he had already pleaded guilty and was sentenced, is not relevant in the consideration relating to the date on which interest should be ordered to run. In terms of section 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975, interest shall run from the date on which payment was claimed by service of the demand or summons, whichever is the earlier.

[65] In *Minister of Safety and Security and others v Janse van der Walt and Another*,[18] the Supreme Court of Appeal ordered the first defendant to pay the interest on the amount of damages awarded at the rate of 15.5% per annum from the

[17] See *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565.
[18] [2015] JOL 32548 (SCA).

date of demand to the date of payment. In *Woji v The Minister of Police*,[19] the Supreme Court of Appeal ordered the defendant to pay interest on the sum of R500 000.00 at the rate of 15.5 % per annum a tempore morae from date of demand to date of payment. Also in *Van Rooyen v Minister of Police,*[20] Pretorius J referred *to West Rand Estates v New Zealand Insurance Co Ltd* 1926 AD 173 at 183 where Solomon JA found: *"There is no satisfactory reason for following any other practice, and we think that we should now definitely lay down the rule that mora begins to run from the date of receipt of the letter of demand".* Also in *Van Rensburg v City of Johannesburg,*[21] interest was payable on the awarded amount at the rate of 15.5 % per annum from date of delivery of demand to date of payment.

[66] Having regard to the above-mentioned case law and the reasoning therein concluding that interest in illiquid claims for damages may be awarded interest *a tempore morae* from the date of demand or summons, whichever is earlier, in terms of section 2A (2)(a) of Act 55 of 1975, it is my view that the amendment should be granted.

Costs

[67] The plaintiff seeks costs on attorney and client scale based on the manner in which the defendant conducted its defence to this action. The plaintiff is successful on both liability and quantum. I find no reason why costs should not follow the result. However, taking into consideration the nature of this matter, I am not inclined to grant punitive costs against the defendant.

Order

[68] In the result I make the following order:

1. It is declared that the plaintiff's arrest and detention from 25 January 2017 to 20 February 2017 were unlawful.

[19] Supra.
[20] 2013 JDR 1149 (GNP) para 41.
[21] 2009 (11) SACR 32 (W).

2. The defendant shall pay the plaintiff an amount of R500 000 (*Five hundred thousand rand only)* for damages suffered as a result of unlawful arrest and detention;

3. Interest on the above amount at the rate of 10.5% per annum from date of service of demand, being 17 April 2017, to date of final payment.

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include the costs reserved on 1 July 2020.

M B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was delivered electronically by circulation to the parties legal representatives by e-mail and uploading onto caselines. The date and time of hand down is 10h00 on the 26 July 2022.

Delivered on:	26 July 2022
APPEARANCES	
For the Plaintiff:	Mr Logan Naidoo
Instructed by:	Logan Naidoo Attorneys
For the Defendant:	Adv Ntoane
Instructed by:	State Attorney Johannesburg