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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020/17691

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED.

17 October 2022

In the matter between:

GAXELA LIFA	Plaintiff
and	
THE MINISTER OF POLICE	First Defendant
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Defendant
NATIONAL PROSECUTING AUTHORITY	Third Defendant

The judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines/CourtOnline. The date and time for hand-down is deemed to be 10h00 on 17 October 2022

JUDGMENT

WANLESS AJ:

Introduction

[1] In this matter one GAXELA LIFA *("the Plaintiff"")*, an adult male, instituted an action in this Court against THE MINISTER OF POLICE *("the First Defendant")*; the MINISTER OF JUSTICE AND CORRECTIONAL SERVICES *("the Second Defendant")* and the NATIONAL PROSECUTING AUTHORITY *("the Third Defendant")*. As set out in his Combined Summons the Plaintiff, at the commencement of his action, claimed delictual damages from all three Defendants based on the same causes of action, namely, unlawful arrest and detention, together with malicious prosecution.

[2] When the trial in this matter came before this Court on the 18th of July 2022 the Plaintiff withdrew the claim for damages in respect of malicious prosecution against all three Defendants. Furthermore, the Plaintiff withdrew the entire action against the Second and Third Defendants and tendered to pay the wasted costs of those Defendants. This tender was accepted by Adv. Mzilikazi who appeared on behalf of all three of the Defendants. In the premises, this Court made an Order to that effect.

[3] In light thereof the only issues remaining for the decision of this Court were whether or not the arrest of the Plaintiff by a member of the South African Police Services and the subsequent detention thereafter was unlawful and, if so, the determination of the Plaintiff's damages as a result thereof. Only one Defendant remained potentially liable for those damages, namely the First Defendant as cited in the Plaintiff's action. For simplicity the First Defendant shall be referred to as *"the Defendant"* for the remainder of this judgment.

[4] The trial was conducted virtually *(via Microsoft Teams)* in light of the fact that there were insufficient courts available which had working recording mechanisms to record the evidence. A recording of the trial and the evidence placed before this Court is available. Neither the Plaintiff nor the Defendant raised any objections to the manner in which the proceedings were carried out

The Facts

[5] It was common cause or not disputed in this matter that:-

5.1. The Plaintiff was arrested on the 4th of March 2020, at his place of residence at [....] A [....] Street, Ramaphosa, Reiger Park by Sgt Khoza, a member of the South African Police Services stationed at Reiger Park Police Station;

5.2. When Sgt Khoza effected the said arrest he did so without a warrant;

5.3. At all material times Sgt Khoza was employed as a member of the South African Police Services and acted within the course and scope of his employment with the Defendant;

5.4. Sgt Khoza is a peace officer as defined in the Criminal Procedure Act 51 of 1977 *("the Act");*

5.5. The Plaintiff was charged with murder which is a Schedule 1 Offence in terms of the Act;

5.6. Pursuant to his arrest on the 4th of March 2020 the Plaintiff was detained in custody until his release on the 10th of June 2020;

5.7. The Defendant bore the duty to begin and the onus of proof to show, on a balance of probabilities, that the arrest of the Plaintiff was lawful in terms of subsection 40(1)(b) of the Act.

The Evidence

[6] It was noted at the commencement of the trial that on the 8th of September 2021 the Plaintiff had been granted condonation by this Court for non-compliance with section 3 of the *Institution of Legal Proceedings Against Certain Organs of State*

Act 40 of 2002 and section 2 of the *State Liability Act 20 of 1957* and that this Court had the requisite jurisdiction to hear the matter. In the premises, there were no impediments, statutory or otherwise, to prevent the matter from proceeding to trial before this Court.

[7] Insofar as the admissibility of documents was concerned (a matter the parties had neglected to deal with at the various Rule 37 Conferences held) it was agreed that the documents contained in the docket pertaining to the criminal investigation in this matter *(Exhibit "A" which appears at pages 071-6 to 076-126 on Caselines)*, could be handed in to court/referred to during the course of the evidence, without formal proof; are what they purport to be and that their contents are true and correct unless specifically challenged by either party.

The Defendant's Case

[8] The Defendant elected to rely on the oral evidence of a single witness only, namely that of Sgt Khoza the arresting officer already referred to earlier in this judgment. This witness is presently stationed at Reiger Park Police Station and has been a Policeman for the past 16 years. As at March 2020 he was stationed at the same Police Station carrying out investigations into various crimes.

[9] On the 1st of March 2020, one M [....] M [....] 1, an adult male of just 18 years of age *("the deceased")*, died tragically in the casualty unit of the Tambo Memorial Hospital. The deceased's Uncle had been awoken by a neighbour in the early hours of the morning telling him that his nephew was injured. When the deceased's Uncle found him lying in the street he called an ambulance which conveyed the deceased to the abovementioned hospital. The deceased had an injury to the side of the head. In light of the fact that Tambo Memorial Hospital falls within the jurisdiction of Boksburg, a docket was originally opened at Boksburg Police Station but the matter was very soon thereafter transferred to Reiger Park Police Station for further investigation. It was at this stage that case number A339/20 was allocated to Sgt Khoza for investigation and he became the Investigating Officer.

[10] What is of importance (as will become clear from the testimony of Sgt Khoza as set out hereunder) are the contents of that docket when Sgt Khoza was given possession of it. In that regard, when the docket was transferred from Boksburg Police Station to Reiger Police Station, it contained (at the very least) the following documents:-

10.1. the statement of the deceased's Uncle, one BAKAMELA dated 1 March 2020;

10.2. the PATIENT REPORT FORM completed by the paramedics which appears to be undated;

10.3. the statement of Professional Nurse KHUMALO dated 1 March 2020; and

10.4. the statement of a certain Constable of the South African Police Services whose name is illegible to the Court and whose name was not tendered in evidence before this Court dated 1 March 2022.

[11] Sgt Khoza told this Court that on the 3rd of August 2020 and whilst on duty at Reiger Park Police Station, he was approached by a number of persons. One of these persons was a young girl. The others consisted of two gentlemen and a lady. The identity of these other persons was never divulged to Sgt Khoza and, presumably, Sgt Khoza had no interest in ever ascertaining who they were, since his testimony was simply that these persons were unknown to him. The young girl was one B [....] E [....] B [....] 1 ("B [....] 1"). She alleged that she had witnessed the murder of the deceased in the matter which Sgt Khoza was investigating.

[12] In light of the report made to him by B [....] 1 , Sgt Khoza testified that he then proceeded to take a statement from her at Reiger Park Police Station. He remembers specifically (because he testified in this regard without being led on this aspect by Counsel for the Defendant, Adv Mzilikazi) that he asked her for her age and her identity number. She advised him she did not know her identity number but told Sgt Khoza that she was born on the 28th of January 2001. This made her

nineteen (19) years of age at the time. B [....] 1 ’s statement *(“first Statement”)* was then taken by Sgt Khoza and filed in the docket.

[13] It is not the intention of this Court to summarise the contents of that statement at this stage of the judgment. To do so would only burden the judgment unnecessarily. Rather, the salient features of that statement are as set out hereunder. Where applicable, other portions of B [....] 1 ’s first Statement will be referred to later in the judgment.

[14] For present purposes, it is salient to note that in her first Statement B [....] 1 alleged that on the 29th of February 2022 and at approximately 23h00, whilst attending a street party *(“bash”)* in Ramaphosa, she had witnessed the assault of the deceased by two males. These two males had dragged the deceased out of the tent and in the direction where she was sitting. She recognised one of the attackers to be the Plaintiff. The other alleged attacker was unknown to her. B [....] 1 allegedly saw that the Plaintiff was holding a knife and stabbed the deceased once on the head. She was afraid and tried to leave the scene but the Plaintiff grabbed her and threatened her before she could do so. B [....] 1 was also able to identify the make of the knife as a three (3) Star Okapi.

[15] The testimony of Sgt Khoza then dealt with the arrest of the Plaintiff. In this regard he testified that since the details of the Plaintiff were unknown to him they were provided by B [....] 1 and an Uncle of the deceased. Sgt Khoza’s Arrest Statement can be found as part of Exhibit A. In his Arrest Statement Sgt Khoza states that the Plaintiff’s address was provided to him by B [....] 1 and family members of the deceased. This is how he was able to trace and arrest the Plaintiff. There is nothing contentious about the arrest itself. As already stated, it is common cause that the Plaintiff was arrested at his place of residence. It is further common cause that Sgt Khoza advised the Plaintiff that he was being arrested for murder; B [....] 1 had identified him as being involved and she knew him because they went to the same school (a fact which is not included in B [....] 1 ’s statement); the Plaintiff denied both culpability and knowledge of B [....] 1 ’s identity and that the Plaintiff co-operated fully with Sgt Khoza throughout the arrest.

[16] Following the arrest of the Plaintiff on the 4th of March 2020 it was the further testimony of this witness (and it is common cause in this matter) that the Plaintiff was taken to the Reiger Park Police Station where he was detained. On the 6th of March 2020 the Plaintiff made his first appearance in the Regional Magistrates' Court for the District of Ekurhuleni North. The Plaintiff was legally represented at this appearance as he was throughout all of his appearances before the Magistrates' Court. On the 6th of March 2020 the matter was postponed to the 9th of March 2020 for the hearing of a formal Bail application.

[17] Sgt Khoza further testified before this Court that on the 9th of March 2020, at the formal hearing of the Plaintiff's Bail application, he (in his capacity as the investigating officer) requested a further postponement of the matter. This application was along the lines that he had arranged to consult with witnesses for the Bail application but that these witnesses had not honoured those consultation times. Based on those representations the presiding Magistrate postponed the Plaintiff's Bail application to the 19th of March 2020 and the Plaintiff remained in custody.

[18] The Plaintiff's Bail application took place on the 19th of March 2020 and this was also dealt with by Sgt Khoza in his testimony. When he testified, Sgt Khoza informed this Court that he did not oppose the Regional Magistrates' Court granting the Plaintiff Bail. The reasons for him not opposing Bail are clearly set out in Exhibit A and will not be set out at this stage of the judgment. The Public Prosecutor objected to the granting of Bail. Despite the lack of opposition by Sgt Khoza as the Investigating Officer the learned Magistrate, as he was entitled to do, dismissed the Plaintiff's application for Bail and postponed the matter for further investigation. In the premises, the Plaintiff remained in custody.

[19] Sgt Khoza's further testimony before this Court was that, at a later stage, B [....] 1 made a second Statement *("second Statement").* In this second Statement she avers she was lying and was forced to fabricate the whole version as set out in her first Statement in order to falsely implicate the Plaintiff. She also (in the presence of her mother) provided Sgt Khoza with a certified copy of her Birth Certificate which proved that she was only 15 when she made the first Statement and had therefore

also lied about her true age. The second Statement is dated the 5th of May 2020 and was filed in the docket by Sgt Khoza on the same date.

[20] An occurrence which Sgt Khoza did not deal with in his testimony and which also did not form part of his cross-examination, was the fact that prior thereto, according to his entry in the investigation diary on the 20th of April 2020, he had interviewed B [....] 1 in the presence of her grandmother. During the course of that interview B [....] 1 admitted to him what she would confirm in her second Statement. In the premises, Sgt Khoza was aware, as at the 20th of April 2020, that the allegations previously made by B [....] 1 implicating the Plaintiff in the death of the deceased, were false.

[21] Despite the aforegoing the Plaintiff was only released from custody on the 10th of June 2020. In this regard, it is common cause that the Plaintiff was requisitioned to court when his legal representative complained that he was being detained whilst it was a well-known fact that B [....] 1 had recanted her original (and false) version. At Court the charge of murder was withdrawn against the Plaintiff and on the 10th of June 2020 the Plaintiff was finally released from custody.

[22] Under cross-examination Sgt Khoza was asked as to why he had not taken a statement from B [....] 1 ’s friend who, according to B [....] 1 ’s first Statement, had gone to the street party with her, namely A [....] 1 . Sgt Khoza’s response thereto was that he did not interview her because she did not witness the incident. Whilst this is, according to B [....] 1 ’s first Statement, technically true, it was put to Sgt Khoza by Adv Phamba, who represented the Plaintiff, that had he interviewed this person, he could well have established, at the very outset of his investigations, that B [....] 1 had been lying. The Court then understood Sgt Khoza to change his version and state that he had in fact interviewed A [....] 1 but, since she had not witnessed the murder, he did not take a statement from her.

[23] The witness confirmed under cross-examination that prior to the arrest of the Plaintiff he did not visit the scene of the alleged street party. Neither had he interviewed any people from the area nor interviewed and taken a statement from one L [....] who had specifically been mentioned by B [....] 1 in her statement as the

person she called out to when the Plaintiff threatened her; who had comforted her and who had taken her home that particular evening.

[24] It was put by Plaintiff's Counsel to the Defendant's witness that he had rushed to arrest the Plaintiff instead of investigating the matter. In response thereto, Sgt Khoza averred that he had reasonable grounds to effect the arrest of the Plaintiff. In this regard the witness testified that he had relied on:-

24.1. the first Statement made by B [....] 1 ;

24.2. the statement of the policeman who had seen the body of the deceased and who had noticed a wound to the head of the deceased; and

24.3. the statement of the paramedics.

Sgt Khoza confirmed that he understood that he had a discretion whether or not to arrest the Plaintiff.

The Plaintiff's Case

[25] The Plaintiff's case also rested on the evidence of a single witness, namely the Plaintiff himself. He testified that he is presently 23 years of age, currently unemployed and has a grade 11 standard of education. When he was arrested on the 4th of March 2020 by Sgt Khoza he was at his home, asleep. When Sgt Khoza advised him of the charge and that he had been implicated by an eye-witness, he denied any wrongdoing and told the arresting officer that he was arresting the wrong person. As set out earlier in this judgment the circumstances surrounding the arrest and subsequent detention of the Plaintiff are largely common cause. The primary purpose of placing the Plaintiff's evidence before this Court was in respect of the quantum of any damages to be awarded to the Plaintiff. In the premises, this Court will now turn to consider his evidence pertaining to same.

[26] The Plaintiff testified that after his arrest he was taken to Boksburg Police Station where he was detained. He described the cells at Boksburg Police Station as

being “not clean”. During the time that he was detained here he slept on the floor. The blankets were dirty. Surprisingly, the Plaintiff described the food as being “not bad.” Each cell was 5 by 5 meters in size and there were 12 inmates to a cell. The Plaintiff was detained under these conditions for a period of 2 days.

[27] On the 6th of March 2020 the Plaintiff made his first appearance in the Regional Magistrates’ Court where the matter was postponed to the 9th of March 2020. Following that appearance, the Plaintiff was detained at Boksburg Prison until his release on the 10th of June 2020. He testified that when he was taken to Boksburg Prison he thought he would be placed in the juvenile section but he was not. He was 22 years of age at the time of his arrest. He was placed with what he described were the “big people”. They were given sheets but no blankets. These sheets were not clean. The toilets, which were in the cells, were not working. As a result of the toilets being in the cells and not working the Plaintiff told this Court that it took him two weeks before he went to the toilet for the first time. Unlike the food he had received in the cells at Boksburg Police Station the Plaintiff described the food in Boksburg Prison as being “very bad”. The Plaintiff was detained in Boksburg Prison for 3 months and 15 days.

[28] The Plaintiff further testified that following his release he was not regarded in a good light by members of the local community who called him names. These persons did not want to come near him and said that he “killed people”. As a result of the arrest and the subsequent detention the Plaintiff also testified that he does not trust people any more. The arrest has had a bad impact on him. He went back to school but left due to the attitude of the other pupils at the school towards him. Finally, he has not received an apology from the Police.

[29] When cross-examined by the Defendant’s Counsel the Plaintiff confirmed that he had never been arrested before the 4th of March 2020. Not surprisingly, due to the nature of the Plaintiff’s evidence, there was no other significant cross-examination of the Plaintiff before this Court.

The Law

[30] Subsection 40(1)(b) of the Act reads as follows:-

> *"A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody."*

[31] The jurisdictional facts for a subsection 40(1)(b) defence are that:-

1. The arrestor must be a peace officer;

2. The arrestor must entertain a suspicion;

3. The suspicion must be that the suspect committed an offence referred to in Schedule 1; and

4. The suspicion must rest on reasonable grounds.[1]

[32] In Heimstra's *Criminal Procedure*,[2] the learned author, with reference to the *Sekhoto* case *(supra)* summarises the law pertaining to arrest without warrant as follows:-

1. The jurisdictional prerequisites for subsection 40(1)(b) must be present;

2. The arrestor must be aware that he or she has a discretion to arrest;

3. The arrestor must exercise that discretion with reference to the facts;

4. There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

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[1] *See Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 467 (SCA).*
[2] *Page 5-8.*

[33] It is fairly trite that these grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.[3]

[34] The arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an ***initial*** suspicion, steps have to be taken to have it confirmed in order to make it a ***reasonable*** suspicion before the peace officer arrests. Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order.*[4]

[35] In the matter of *Olivier v Minister of Safety and Security and Another,*[5] the court held that:

> *"When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own facts."*

[36] Further, the court stated,[6] the following, namely:-

> *"This entails that the adjudicator of facts should look at the prevailing circumstances* ***at the time*** *when the arrest was made and ask himself the question, was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employer, and then residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation.*
>
> *The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court's view may have a bearing on the question, there should be no reason why the court should not*

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[3] R v Van Heerden 1958 (3) SA 150 (TPD); Duncan v Minister of Law and Order 1986 (2) SA 805 (AD) at 814D.
[4] 1993 (1) SACR 434 (TPD); Heimstra (supra) at 5-8.
[5] 2009 (3) SA 434 (WLD).
[6] at 445D to F.

exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort."

[37] The discretion to arrest must be properly exercised and authority for this proposition is once again found in the matter of *Duncan v Minister of Law and Order*[7] *(supra)*. The test for the legality of the exercise of discretion to arrest is objective. The exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related for the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement. The question of whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry.[8]

[38] In objectively determining when an arrestor has acted arbitrarily the court should consider whether or not he (1) applied his mind to the matter or exercised his discretion at all; and/or (2) disregarded the express provisions of the statute. The authority for this has long been held.[9]

[39] The onus rests upon the arrestor to prove that the arrest was objectively lawful.[10]

[40] If the arrest is unlawful, it follows that the subsequent detention must also be unlawful.[11]

[41] The recent decision of the Supreme Court of Appeal in the matter of *Minister of Police and Another v Erasmus*[12] is illustrative of the more recent developments in our law pertaining to unlawful arrest and detention. At paragraph [12] of the judgment the Court held:-

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[7] at 818H-I.
[8] See Pharmaceutical Manufacturers Association of SA and Another v Imray Ex Parte President of the republic of South Africa and Others 2000 (2) SA 678 (CC) paragraphs 85-86, at page 708D-F.
[9] See Shidiack v Union Government (Minister of the Interior) 1912 (AD) 642 at 651-652.
[10] See Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (AD) at 589 E-F, Mabasa v Felix 1981 (3) SA 865 (AD) and Minister of Law and Order v Matshoba 1990 (1) SA 280 (AD) at 284.
[11] Minister of Safety and Security v Tyokwana 2015 (1) SACR 597 (SCA) at 600G.
[12] (366/2021) [2022] ZASCA 57 (22 April 2022).

"When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, and (b) was the factual and legal cause of the post-hearing detention. In Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR 409 (SCA), the culpable conduct of the investigating officer consisting of giving false evidence during the bail application caused the refusal of bail and resultant deprivation of liberty. Similarly, in Minister of Safety and Security v Tyokwana [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statements implicating the respondent had been obtained under duress and were subsequently recanted and that consequently there was no credible evidence linking the respondent to the crime. In De Klerk v Minister of Police [2019] ZACC 32; 2020 (1) SACR (CC) paras 58 and 76, the decisive consideration in both the judgments that held in favour of the appellant was that the investigating officer knew that the appellant would appear in a 'reception court' where the matter would be remanded without the consideration of bail. Finally, in Mahlangu and Another v Minister of Police [2021] ZACC 10; 2021 (2) SACR 595 (CC), the investigating officer deliberately supressed the fact that a confession which constituted the only evidence against the appellants, had been extracted by torture and thus caused their continued detention."

[42] Of course the *locus classicus* in respect of the principles applicable to the delictual liability of the Minister of Police for detention is the Constitutional Court decision in the matter of *Mahlangu and Another v Minister of Police*.[13] Little purpose would be served by simply repeating those principles as set out so clearly by the Court in *Mahlangu (supra)* in this judgment. Rather, it will be far more beneficial to highlight those principles as dealt with by the Constitutional Court that are relevant to the present matter.

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[13] *Supra [2021] ZACC 10.*

[43] Firstly, the Court cited, with approval, the matter of *Relyant Trading (Pty) LTD v Shongwe*[14] where the Supreme Court of Appeal held, *inter alia*, the following:-

> *" ….to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty".*

[44] Importantly, the Constitutional Court also cited with approval the matters of *Woji (supra)* and *Zealand v Minister of Justice and Constitutional Development and Another*[15] noting that *Woji* had followed *Zealand* in holding that the Minister of Police 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. Following thereon, the Constitutional Court noted that this reasoning *"….effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor".*[16]

[45] In upholding the appeal from the SCA the Constitutional Court held, *inter alia*, that *"The obligation on the police to disclose all relevant facts to the prosecutor is to be regarded as a duty that remains for as long as the information withheld is relevant to the detention".*[17]

[46] Writing for the court in *Mahlangu (supra)*, Tshiqi J[18] was compelled to include in the judgment a fairly lengthy excerpt from the decision of *Botha v Minister of Safety and Security, January v Minister of Safety and Security*.[19] It can only be presumed, with the greatest of respect, that the learned Judge did so in light of the importance thereof. In the premises, that excerpt is repeated hereunder:-

> *"It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not*

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[14] [2007] 1 All SA 375 (SCA) at paragraph 6; at paragraph [29] of Mahlangu (supra).
[15] 2008 (2) SACR 1 (CC).
[16] At paragraph [33].
[17] At paragraph [37]; see also Woji (supra) at paragraph 28; Minister of Safety and Security v Tyokwana 2015 (1) SACR 597 (SCA) at paragraph 44.
[18] At paragraph [40].
[19] 2012 (1) SACR 305 (ECP).

deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of s 12(1) of the Constitution . . . . These provisions, therefore, place an obligation on police officials, who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish, before detaining the person, the justification and lawfulness of such arrest and detention.

This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case, and the law casts an obligation on the police official to do so. In Mvu v Minister of Safety and Security and Another Willis J held as follows:-

> *"It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all."*

It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is any legal justification for the further detention of the person.

[Footnotes omitted.]”

[47] Finally, the Constitutional Court cited,[20] once again with approval, the matter of *Tyokwana (supra)*[21] where it was held:-

> *"(T)he 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."*

Discussion

[48] It was submitted on behalf of the Defendant that the Defendant had discharged the onus of proving, on a balance of probabilities, that the arrest of the Plaintiff was lawful in terms of subsection 40(1)(b) of the Act. More particularly, it was submitted by the Defendant's Counsel that the arrest of the Plaintiff by Sgt Khoza, viewed objectively, was justified and that he had correctly exercised his discretion when deciding to arrest the Plaintiff. This was because of the evidence he had been provided with in the docket and which was then corroborated by the evidence provided by B [....] 1 in her first Statement. This gave rise, it was submitted, to Sgt Khoza forming a reasonable suspicion that the Plaintiff had murdered the deceased. In addition thereto, it was argued that the arrest was justified due to the serious nature of the offence, namely murder.

[49] Defendant's Counsel further submitted, relying on the decisions of *Biyela v Minister of Police*[22] and *Malatjie and Others v The Minister of Police*[23] that it is not a requirement of our law that prior to an arrest without a warrant the police must first conduct a thorough investigation before a suspect may be arrested. These submissions undoubtedly arose as a result of the line of cross-examination pursued by Plaintiff's Counsel when Sgt Khoza testified.

[50] In the event that this Court found that the arrest of the Plaintiff was unlawful, Adv Mzilikazi submitted that the Defendant could only be liable to the Plaintiff for

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[20] *At paragraph 41.*
[21] *At paragraph 40.*
[22] *(1017/2020) [2022] ZASCA 36 (1 April 2022) at paragraphs [33] and [34].*
[23] *(16853/2020) [2022] ZAGPPHC 380 at paragraph 36 (6 June 2022).*

damages in respect of the unlawful detention which flowed from that unlawful arrest for the period following his arrest until his first appearance in court. This, it was submitted, is because once a suspect has been brought to court the authority of the police to detain that suspect, which is inherent in the power to arrest and as provided for in the Act, is exhausted. The authority to detain the suspect further is then within the discretion of the court. In support of these submissions, Defendant's Counsel relied on the decision of *De Klerk v Minister of Police*.[24]

[51] Adv Phamba, on behalf of the Plaintiff, submitted that the Defendant had failed to prove, on a balance of probabilities, that the Defendant had satisfied the necessary jurisdictional requirements to bring the arrest of the Plaintiff without a warrant within the ambits of subsection 40(1)(b) of the Act which would make that arrest lawful. In particular, he argued that Sgt Khoza had failed to investigate the matter and then, without exercising his discretion, had arrested the plaintiff. With regard to the liability of the Defendant to compensate the Plaintiff in respect of his unlawful arrest and subsequent detention, it was submitted that, on the strength of, *inter alia*, the decision of *Mahlangu (supra)* the Defendant should be held liable by this Court for the entire period during which the Plaintiff was detained.

Was the arrest of the Plaintiff lawful in terms of subsection 40(1)(b) of the Act?

[52] When B [....] 1 approached Sgt Khoza at Reiger Park Police Station to proffer her eye-witness account of the murder, it was 3 days after the murder had occurred. The fact that B [....] 1 had waited this amount of time before reporting such an horrendous crime which she had witnessed first-hand and had not gone straight to the police after the incident had occurred, or during the course of the next several days, should have been a matter of some concern for Sgt Khoza. This obvious concern should have been aggravated by various other factors the first of which was the obvious fact that B [....] 1 was of tender years. In his testimony before this Court, Sgt Khoza made specific mention of the fact that he asked B [....] 1 how old she was and for her identity number. It is thus highly probable and this was the distinct impression gained by this Court when listening and observing this witness give

[24] *2016 JDR 1672 (GP).*

evidence, that the primary purpose of Sgt Khoza wishing to establish B [....] 1 ’s age was due to the caution which one should consider the evidence of young children. Of course, the fact that B [....] 1 was in fact 15 and not 19 at the time when she made her first Statement can only lead this Court to conclude that her physical appearance must have given Sgt Khoza the distinct impression that she could well be a minor, hence leading him to seek confirmation of her age (which he did not get as B [....] 1 advised him she did not know her identity number and lied about her real age). In addition, Sgt Khoza’s suspicions should have been further raised when B [....] 1 told him she was 19 years of age yet did not know her own identity number.

[53] Another factor which should have been of some concern to Sgt Khoza was the fact that B [....] 1 did not come to the Police Station alone to make the report but was accompanied by no less than three other persons (two men and a women). Rather strangely, as noted earlier in this judgment, Sgt Khoza testified that these adults who accompanied B [....] 1 were unknown to him and he clearly made no attempt to enquire who they were. If they had been family members of B [....] 1 ’s, this would clearly have become apparent to Sgt Khoza during the time that these persons spent with B [....] 1 and Sgt Khoza at the Police Station. Of course, if they had been relatives of the child then Sgt Khoza would also have been able, as he clearly wished to do, to seek verification of her age from either one or all of them. In the premises, it can safely be accepted that the three adults who accompanied B [....] 1 to the Reiger Park Police Station for the specific purpose of reporting the Plaintiff to be the perpetrator of the murder of the deceased, were not family members of B [....] 1 and that Sgt Khoza was aware of this fact.

[54] It is correct that the statement of the Constable who had seen the body of the deceased refers to a stab wound to the side of the deceased’s head. The statement by the Paramedics is less clear but the side of the head in a diagram has been circled. Sgt Khoza testified that he relied upon these documents to form a reasonable suspicion that the Plaintiff had murdered the deceased and so to arrest the Plaintiff without a warrant. What is important to remember however is that, as set out earlier in this judgment, an Uncle of the deceased had found the body of the deceased shortly after the deceased had been murdered. This Uncle had observed (as confirmed in his statement made on 1 March 2020) that the deceased had a

wound to the head. It is highly probable that when members of the local community came to learn of the tragic news of the deceased's death, they also became aware of the injuries he suffered with particular reference to the wound to the side of his head. Indeed, B [....] 1 had, one way or another, come to know of this fact before she made her first Statement, which had enabled her to seemingly corroborate the injuries sustained by the deceased despite the entire contents of the first Statement being a complete fabrication.

[55] As already dealt with in this judgment, Sgt Khoza either declined to interview A [....] 1 or did interview her but then declined to take a statement from her on the basis that she did not witness the murder. In this regard, it is noted that if Sgt Khoza did indeed interview A [....] 1 , no note thereof was ever made by Sgt Khoza in the Investigation Diary which forms part of Exhibit A in this matter. It has also been noted that prior to arresting the Plaintiff, Sgt Khoza did not take a statement from L [....] ; interview any persons who may have attended the street party or carry out an *inspection-in-loco* at the alleged scene of the murder.

[56] These then are the objective facts which this Court must consider when deciding whether or not Sgt Khoza, in the exercise of his discretion, had a reasonable suspicion to arrest the Plaintiff without a warrant. In *Biyela*, relied upon by the Defendant, the Supreme Court Of Appeal, dealing with a matter where the police formed a suspicion based on hearsay evidence, after confirming that whether or not the suspicion was reasonable, under the prevailing circumstances, is determined objectively,[25] held, at paragraph [38] of the judgment the following:-

> *"I, therefore, agree with the majority's characterisation of the issues and its conclusions that a reasonable suspicion can,* ***depending on the circumstances,*** *be formed based on hearsay evidence, regardless of whether that evidence is later found to be admissible or not."*[26]

[57] Further, the Defendant placed considerable weight upon the recent decision of Van der Schyff J in the Gauteng Division (Pretoria) in the matter of *Malatjie*

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[25] *At paragraph [34].*
[26] *Emphasis added.*

(supra). In this matter the three Plaintiffs were arrested on a charge of rape. The complainant made a statement at a Police Station that three men had kidnapped and raped her. Thereafter the Plaintiffs sought the assistance of the police in that the complainant's boyfriend was allegedly, either (on the Plaintiffs' version) spreading rumours they had kidnapped and raped the complainant or (on the Defendant's version) threatening the Plaintiffs with violence. The Court rejected the version of the Plaintiffs. As the matter unfolded the complainant identified the Plaintiffs to the arresting officer as the persons who had raped her and at the same time showed him the case number relating to when she had reported the rape at the police station. On that basis the policeman arrested all three Plaintiffs. Whilst the Plaintiffs were in custody the complainant made a further statement admitting that she had laid false charges against the Plaintiffs. The Investigating Officer advised the Public Prosecutor of same and when the Plaintiffs appeared in court on the next occasion for a Bail application the charges against them were withdrawn.

[58] Van der Schyff J held, on the basis of what the learned Judge described as an explanation by the SCA in *Biyela (supra),* that it is not required that the police must first conduct a *thorough* investigation before a suspect may be arrested[27] that it is not a requirement that the police carry out a thorough investigation before arresting a suspect. Nowhere in the *Biyela* judgment did the SCA hold this. Whilst not specifically stating so in the judgment, it is reasonable to assume that Van der Schyff J came to this finding on the basis that the SCA *did* hold that the standard of a reasonable suspicion is very low.[28] The learned Judge went on to hold that the jurisdictional requirement is that a reasonable suspicion must exist and, on the particular facts of that matter, found that the Defendant had proved, on a balance of probabilities, that the arrest was lawful and in accordance with the requirements of subsection 40(1)(b) of the Act.[29]

[59] The comments by the SCA in *Biyela* in relation to the standard of a reasonable suspicion to be applied when a court is called upon to decide whether or not the defendant has discharged the onus of proving a lawful arrest in terms of

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[27] *Malatjie at paragraph [36].*
[28] *Biyela at paragraph 34; Malatjie at paragraph [29].*
[29] *Malatjie at paragraph [29].*

subsection 40(1)(b) of the Act, requires further attention, particularly in light of the recent interpretation placed upon it by Van der Schyff J in *Malatjie (supra).*

[60] The relevant paragraph of that judgment[30] reads as follows:-

> *"The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively."*

[61] It is the respectful opinion of this Court that the above should not be interpreted or applied to the detriment of the prevailing jurisprudence and entrenched Constitutional principles applicable to the standard of a reasonable suspicion when considering the lawfulness of an arrest in terms of subsection 40(1)(b) of the Act. Indeed, it is clear, with respect, that despite holding that the standard of a reasonable suspicion is *"very low"* the SCA immediately qualifies this by what is stated thereafter. In particular, that the suspicion must be based on *"specific and articulable facts or information."* Of course, the ultimate *caveat* is that whether the suspicion was reasonable is determined objectively *"under the prevailing circumstances."* In other words, as is trite, each case must be determined on its own facts. Finally, this paragraph of the judgment of the SCA in *Biyela* should be read in the context of the *entire* judgment which also contains reference to, *inter alia*, the importance of the liberty of an individual.[31]

[62] In this manner, any danger whatsoever of lowering or potentially creating the incorrect perception of our courts lowering, the standard of reasonable suspicion, can and should be avoided. Furthermore, the fundamental principles of individual liberty as entrenched in our Constitution, together with the important responsibility that the police have in protecting that liberty, particularly having regard to the unfortunate history of our country, can continue to receive protection from our courts. At the same time, it is imperative that the police be able to effectively carry out their

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[30] *Biyela at [34].*
[31] *Biyela at paragraph [36].*

duties and in this regard the proper interpretation of the standard to be applied when considering a lawful arrest in terms of subsection 40(1)(b) of the Act, particularly in that each case should be decided on its own facts, provides a proper balance between the competing interests of individual liberty and the need for the police to effect often speedy arrests in relation to serious crimes.

[63] The fact that the first Statement made by B [....] 1 transpired to be false and that B [....] 1 had been forced to falsely implicate the Plaintiff, is not, when viewed in isolation, sufficient to make a finding that the suspicion formed by Sgt Khoza was unreasonable. One must consider all of the relevant facts objectively that existed at the time when Sgt Khoza elected to arrest the Plaintiff.

[64] In the opinion of this Court there were various factors present when B [....] 1 made her first Statement which, when viewed objectively, should have raised concern in the mind of Sgt Khoza; caused him to investigate the matter further and, ultimately, in the exercise of his discretion, have militated against him electing to arrest the Plaintiff without a warrant.

[65] Firstly, it is clear from the evidence that Sgt Khoza was concerned, from the outset and from her physical appearance, in respect of B [....] 1 ’s tender age. Whilst age is not in itself an absolute bar to credibility or the ability to accept the evidence of young children, it must always be approached with caution. Despite accepting this fact and attempting to seek verification of B [....] 1 ’s age from her before she made the first Statement, Sgt Khoza failed to carry out any investigations into this issue whatsoever prior to arresting the Plaintiff. Not only did he fail to question the adults in whose company B [....] 1 was when she attended at the Police Station to make the first Statement but he did not make any attempts thereafter to verify her age from a family member or from any other reliable source. At the same time, Sgt Khoza must have been aware that the adults accompanying B [....] 1 to the Police Station were not her family members. This fact, coupled with the fact that B [....] 1 had only elected to report a murder to which she had been an eye-witness some three days after the event had allegedly taken place, together with the fact that it must have been common knowledge amongst the community at large that when the deceased had been murdered he had sustained an injury to the side of the head, should have

raised some serious concerns in the mind of any Policeman. This is particularly so in the case of Sgt Khoza who had already had a lengthy career as an employee of the Defendant. At the very least, it should have caused him to carry out further investigations before arresting the Plaintiff to seek some corroboration of the facts as set out in B [....] 1 ’s first Statement.

[66] With regard to the nature of these investigations, it has already been accepted by this Court, on the basis of *Malatjie* and *Biyela* that, as a general principle, it can be accepted that there is no onus upon the police to carry out a *thorough* investigation in each and every case before an arresting officer exercises his or her discretion whether or not to effect an arrest without a warrant in terms of subsection 40(1)(b) of the Act. However, the necessity or otherwise for the police to carry out further investigations before exercising this discretion (just one of the objective facts to consider) must depend on the facts of each particular case.[32] In this case it is clear that further investigations were necessary. On the one hand Sgt Khoza was faced with the concerns he had, or reasonably should have had, pertaining to the circumstances surrounding the first Statement made by B [....] 1 . On the other hand, he did have some corroboration between the contents of that statement and the statements in the docket pertaining to the injuries sustained by the deceased to the side of his head. There was a duty upon Sgt Khoza to take steps to have his initial suspicion confirmed in order to make it a reasonable suspicion before he arrested the Plaintiff.[33] In accordance with the established principles, these steps were not onerous and could never be described as “thorough investigations”.

[67] In addition to the simple steps Sgt Khoza could have taken to verify B [....] 1 ’s age as dealt with earlier in this judgment (which could very well have resolved the entire matter by for example a family member divulging that B [....] 1 had never attended a street party on that particular evening) there were a number of relatively simple and straightforward steps Sgt Khoza could have carried out to verify the correctness of B [....] 1 ’s first Statement before he elected to arrest the Plaintiff on the strength thereof. Firstly, as dealt with above, he could have taken statements from A [....] 1 and L [....] . Secondly, he could have attended the scene of the alleged

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[32] *Olivier (supra).*
[33] *Nkambule (supra).*

murder and interviewed members of the community who lived in the area where the street party was alleged by B [....] 1 to have taken place. He failed to do so. In this regard, Sgt Khoza was roundly criticised for his failure to carry out these cursory investigations (as well as his investigations of the matter generally) by both the Public Prosecutor and his Station Commander.[34] Eventually, when he did carry out these investigations, it transpired that no street party had in fact taken place on that particular evening.[35] Had Sgt Khoza taken any of these simple steps following receipt of B [....] 1 's first Statement, it would have been abundantly clear to him (and if he had any doubt to his superiors) that the contents of the first Statement were false and, if not false, did not contain sufficient facts when weighed against the other facts, to provide Sgt Khoza with reasonable grounds to arrest the Plaintiff. As held in the matter of *Mabona and Another v Minister of Law and Order*[36] the suspicion must be based on solid grounds.

[68] Of course, it is trite that the fact that it is common cause that the Plaintiff denied culpability to Sgt Khoza at his arrest and co-operated fully during his arrest are also factors which militate against an arrestor electing to arrest. In addition thereto, it was never the evidence of Sgt Khoza that he regarded the Plaintiff as a flight risk. In fact, as already dealt with earlier in this judgment, Sgt Khoza did not oppose the Plaintiff's application for Bail when it was made on the 19th of March 2022.

[69] In light of the aforegoing, this Court finds that the Defendant has failed to discharge the onus incumbent upon the Defendant to prove, on a balance of probabilities, that the arrest of the Plaintiff was lawful in terms of subsection 40(1)(b) of the Act.

For what period of the Plaintiff's detention is the Defendant liable to compensate the Plaintiff?

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[34] Exhibit A; Investigation Diary.
[35] Exhibit A contains two statements from residents living in the street where Bennet said in her first Statement that the street party had taken place stating no street party took place on the night in question. These statements are dated the 21st of April 2020.
[36] 1988 (2) SA 654 (SE) at 658 E-H.

[70] As set out earlier in this judgment it was submitted on behalf of the Defendant that the Defendant could only be liable to compensate the Plaintiff for damages in respect of his unlawful detention arising from his unlawful arrest for the period of the date of his arrest to the date of his first court appearance. On behalf of the Plaintiff, it was submitted that the Defendant should be liable to compensate the Plaintiff for those damages in respect of the entire period of his detention.

[71] The principles in respect of deciding liability of a party for the detention of a Plaintiff unlawfully arrested have already been dealt with earlier in this judgment. Likewise, the history of that detention and the facts surrounding it have also been set out above. When the said principles are applied to those facts, it is clear that the Defendant must be liable to compensate the Defendant for damages in respect of the entire period of his detention, namely from the 4th of March 2020 (the date of his arrest) until the 10th of June 2020 (when the charge of murder was withdrawn against the Plaintiff and he was released from custody).Put simply, this is so because the cause of the detention remained at all times the unlawful arrest and the information which had formed the basis for that arrest (the first Statement of B [....] 1) which Sgt Khoza had provided to the Public Prosecutor.

[72] When Sgt Khoza arrested the Plaintiff on a charge of murder and provided the first Statement of B [....] 1 which was included in the docket to the Public Prosecutor he must have foreseen the reasonable possibility that in light thereof and in light of the fact that the Plaintiff had been charged with murder the Plaintiff would not receive Bail and would be remanded into custody. On the 9th of March 2020, at the first opportunity for the Plaintiff to apply for Bail, it is common cause that Sgt Khoza applied for and was granted a postponement of the Bail application to the 19th of March 2020. Hence the Defendant was clearly liable for the continued detention of the Plaintiff. On the 19th of March 2020, it is true that Sgt Khoza, as the investigating officer, did not oppose the granting of Bail. This is clear from both the testimony of Sgt Khoza before this Court and the transcript of the said Bail application which forms part of Exhibit A in this matter.

[73] Sgt Khoza gave *viva voce* evidence on behalf of the State at the said Bail application. The State opposed the Plaintiffs application for Bail. This opposition was

squarely based upon the contents of B [....] 1 's first Statement. From a perusal of the transcript thereof and the judgment of the Magistrate when dismissing the Plaintiff's application thereby resulting in the Plaintiff remaining in custody, it can be ascertained that the reasons therefore were, *inter alia*, that the Plaintiff had allegedly threatened the witness at the scene of the murder; the Plaintiff and the witness attended the same school; the safety of the witness was a major concern and there was a strong case against the Plaintiff. In the premises, the continued detention of the Plaintiff can be solely attributed to the unlawful arrest; the information upon which that arrest was based and the first Statement of B [....] 1 provided by the police to the Public Prosecutor and the Magistrate without any investigation in respect thereof having been carried out by the police.

[74] Thereafter, as noted earlier in this judgment, Sgt Khoza was told by B [....] 1 on the 20th of April 2020 that she had been forced to fabricate the evidence against the Plaintiff. Despite his duty to ensure that the Public Prosecutor was immediately made aware of this fact, he elected not to do so.[37] On the 5th of May 2020, Sgt Khoza obtained and filed in the docket the second Statement of B [....] 1 whereby she withdrew all of her previous allegations pertaining to the Plaintiff. The Plaintiff continued to be detained until the 10th of June 2020 when his legal representative insisted he be requisitioned to court and that the charges be withdrawn. The Defendant placed no evidence before this Court at the trial as to why the Defendant should not be held liable for the continued detention of the Plaintiff from the time that the Plaintiff was refused Bail until he was finally released from custody. This was despite Sgt Khoza having had ample opportunity to do so. As set out above the Defendant relied on De Klerk (supra) as support for the submission that the Defendant should only be liable for damages from the date of the Plaintiff's arrest until his first appearance in court. The facts in De Klerk and the present matter are vastly different and do not assist the Defendant. In De Klerk the arresting officer recommended that the Plaintiff be granted Bail at his first appearance. In that matter De Klerk was not provided with an opportunity to apply for Bail. In the present matter not only was evidence never placed before this court that Sgt Khoza recommended that the Plaintiff should be granted Bail but no evidence was placed before this Court

[37] *Botha (supra); Tyokwana (supra).*

that he expected the Plaintiff to be granted Bail since he had arrested him on a charge of murder. Also, it is clear he would have opposed the Plaintiff being granted Bail at that early stage as is confirmed by his actions when he requested (and was granted) the postponement of the Plaintiff's Bail application on the 9th of March 2020. Of course, the underlying causa remained throughout the false statement which had not been investigated.

[75] In the premises, the Defendant is liable to compensate the Plaintiff in respect of damages for unlawful detention for the period 4 March 2020 to 10 June 2020 (a period of 3 months and 6 days).

Quantum of General Damages for Unlawful Arrest and Detention

[76] In the matter of *Mahlangu (supra)* the Constitutional Court noted[38] that it is trite that damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place. The court then cited, with approval, the decision of the SCA in the matter of *Seymour*[39] where it was held:-

> *"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."*

[77] Also, in the matter of *Tyulu*[40] the SCA held the following:-

> *"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*

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[38] *At paragraph [50].*
[39] *2006 (6) SA 320 (SCA) at paragraph 20.*
[40] *Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at paragraph 26.*

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) at 325 para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 – 29).”

[78] In paragraph [53] of *Mahlangu* the Court held:-

“In Woji, the SCA took into account the following: the cells where Mr Woji had been kept were overcrowded, dirty and there were insufficient beds to sleep on; he was subjected to the control of a gang who raped other prisoners; he suffered the appalling, humiliating and traumatic indignity of being raped on two occasions, which he did not report to the prison authorities because he feared retaliation from gang members; and the fact that he endured these humiliating and degrading experiences for 13 months. The court found that an award in the sum of R500 000 was appropriate.”

[79] And in paragraph [54] of *Mahlangu* it was held:-

“In De Klerk this court took into account the fact that the applicant was detained from 20 December 2012 to 28 December 2012. It also took into account the fact that the applicant had provided precedent for the quantum of the general damages he sought, and the fact that the respondent did not put up a serious fight in that respect. It awarded damages in the amount of R300 000 for the eight days' deprivation of freedom.”

[80] The relevant factors in the present matter have already been set out in this judgment when dealing with the Plaintiff's evidence. Nevertheless, those factors which are relevant to the assessment of the Plaintiff's damages will be highlighted in the discussion below. It was submitted on behalf of the Plaintiff that the Defendant should be ordered to pay to the Plaintiff the sum of R2 910 000.00 calculated on the basis of R30 000.00 for each day that he spent in custody in respect of the Plaintiff's general damages for unlawful arrest and detention. It should be noted that in his Particulars of Claim the Plaintiff claimed an amount of R5 000 000.00. On behalf of the Defendant, it was submitted that an amount of R350 000.00 would be a suitable amount to compensate the Plaintiff for his damages. Regrettably, very few authorities were provided to this Court by both parties as guidance to assist in determining the Plaintiff's damages and in respect of those that were the amounts awarded had not been escalated to reflect the same award at present day values.

[81] On the one hand the circumstances surrounding the arrest were (putting aside that the very fact of being arrested must, in itself, be a traumatic event) not as traumatic or appeared to have had such a humiliating effect upon the Plaintiff as has unfortunately been the case in so many similar matters dealt with by our courts. For example, the Plaintiff was not subjected to any torture. Nor does it appear that he was arrested in front of his peers or any other members of the community. That said, he did testify that he had never been arrested before and that he thought (rather naively it must be noted) that, despite his age, he would be detained with juveniles and not with other adults.

[82] The circumstances of his detention (upon which our courts have placed much emphasis) were nothing less than horrendous. In this regard the cells were badly overcrowded resulting in the Plaintiff having to sleep on the floor and the food was disgusting. Probably the worst of all was the Plaintiff's description of the so-called toilet facilities which resulted in him being unable to relieve himself for a period of two weeks. These "facilities" can only be described as "sub-human" and utterly degrading.

[83] As is to be expected in the majority of such cases the real damage suffered by the Plaintiffs only really manifests itself after their release from custody. In this

regard, the Plaintiff testified that the rest of the community no longer regards him in the same light as they did before, to the extent that he even dropped out of school (where he was in the process of repeating Matric). He further testified that he no longer trusts his fellow human beings. This comes as no surprise since he was unlawfully arrested by the police on the strength of fabricated evidence. In addition thereto, once the perpetrator decided to come clean and confess to the police that she had been forced to fabricate the evidence which gave rise to his arrest and subsequent detention, the police, being the very officials to whom the Plaintiff should be entitled to look to protect him, elected to sit on this information and allow him to languish in prison for a further period of just short of two months. It is important to note at this juncture that this deplorable behaviour on the part of the Defendant's employees has also been taken into account as a relevant factor when assessing the Plaintiff's damages.

[84] It is therefore not surprising that the Plaintiff has suffered the "fallout" he testified to in this Court pursuant to his unlawful arrest and detention. What is always surprising to this Court in matters of this nature (and sadly there are simply too many in number) is the general failure, on the part of Plaintiffs, to place before the courts which are tasked to assess their damages, expert medical evidence pertaining to same. In this regard, this Court obviously refers to evidence of a medico-legal nature by relevant experts in support of various heads of delictual damages.

[85] Having taken all of the aforegoing factors into account, it is the opinion of this Court that a suitable amount of general damages to be paid by the Defendant to the Plaintiff is the sum of R 600 000.00 (Six Hundred Thousand Rands).

Order

[86] The Court makes the following order, namely:-

1. The First Defendant (The Minister of Police) is to pay to the Plaintiff the sum of R 600 000.00 (Six Hundred Thousand Rands);

2. Interest thereon at the prescribed rate of interest from the date of judgment to date of final payment;

3. Costs of suit.

BC WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of Hearing: 19 July 2022

Date of Judgment: 17 October 2022

Appearances:

For Plaintiff: Adv FP Phamba
(Advocate with Fidelity Fund Certificate)

For Defendants: Adv F Mzilikazi

Instructed by: State Attorney (Johannesburg)