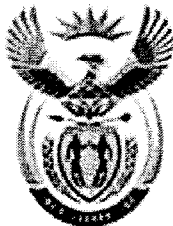


IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]



7/4/2016

CASE NUMBER: 27012/2013

(1)	REPORTABLE: <i>YES</i> / NO
(2)	OF INTEREST TO OTHER JUDGES: <i>YES</i> / NO
(3)	REVISED:
<i>7/4/2016</i> DATE	
<i>[Signature]</i> SIGNATURE	

In the matter between :

CT ENDESHAN

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

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JUDGMENT

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A.J. LOUW AJ

- [1] On the 11<sup>th</sup> May 2012 and in the district of Witbank the Plaintiff, who is an Ethiopian refugee, was arrested without a warrant of arrest in terms of

Section 40 of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") by Sergeant Combrink, a member of the South African Police Service who acted in the course and scope of his employment as an employee of the Defendant. Sergeant Combrink testified that the charge was that the Plaintiff was unlawfully in South Africa.

- [2] The facts of the matter are upsetting because the Plaintiff was a refugee and asylum seeker. As a foreigner and asylum seeker the Plaintiff was a vulnerable person. Our Constitution is committed to protect freedom, equality and dignity and is concerned to protect the vulnerable, exploited and powerless. See: **Kylie v CCMA 2010 (4) SA 383 LAC, par 46 and 50; SATAWU v Garvas 2013 (1) SA 83 CC, par 61 and 63.)**

It turned out, in the end, that he indeed was not an undocumented person or an illegal immigrant and his arrest and detention between the 11<sup>th</sup> and the 18<sup>th</sup> May 2012 were unnecessary, certainly very uncomfortable and avoidable if the employees of the Defendant acted with deference to the liberty of the Plaintiff. The question to be answered is whether the arrest and detention were unlawful.

The Supreme Court of appeal in the **Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)** found in the context of where Section 40(1)(b) of the Criminal Procedure Act applied that there is no "fifth jurisdictional fact" for a lawful arrest of a person. The "fifth jurisdictional fact" being that there must have been no less invasive option available in order to bring the suspect before a court. In

paragraphs 28 and 39 of the **Sekhoto**-judgment the Supreme Court of Appeal found that no such fifth jurisdictional fact can be read into the provisions of Section 40(1)(b) of the Criminal Procedure Act.

This matter concerns Section 40(1)(a) or Section 40(1)(l) of the Criminal Procedure Act and not Section 40(1)(b) thereof. I am however bound by the **Sekhoto**-judgment insofar as it found that there is no requirement that the Police must consider, before making an arrest, whether there are less invasive options to bring the suspect before the court than an immediate detention of the person concerned.

The unfortunate circumstances of the arrest and detainment of the Plaintiff in this matter highlight the plight of persons that might be lawfully arrested in terms of the provisions of the Criminal Procedure Act on the application of the principles regarding arrest laid down in **Sekhoto**, but where such arrest and detention were unnecessary in the broader circumstances of the particular matter. The purpose of arrest is to secure the attendance of an accused in court. See **Sekhoto** par 19. There are indeed other less invasive of the constitutional right to freedom ways to secure attendance at court of an accused person.

- [3] On the other hand I am acutely aware of the fact that the members of the South African Police Service must be allowed to do their work. One is obliged to consider the practicalities of their work where they have to take decisions without necessarily having the luxury of long reflection before deciding on a suitable course of conduct.

[4] Arising from the above concerns, I overly long delayed in finalising the judgment. I extend my profound apologies to both parties for the delay in finalising the judgment.

[5] On the pleadings the Plaintiff's case is simple. He was arrested on the 11<sup>th</sup> May 2012 in the district of Witbank and was held in custody from the 11<sup>th</sup> May 2012 to the 18<sup>th</sup> May 2012 when the Public Prosecutor issued a certificate of *nolle prosequi*. As a result of the alleged unlawful arrest and detention, the Plaintiff claims R250 000.00 in general damages for loss of his freedom.

In the particulars of claim it is alleged that proper notice of the proceedings was given in terms of Act 40 of 2002. This however, actually was incorrect. A successful application for condonation was brought and the non-compliance with Section 3(2)(a) and (b) of Act 40 of 2002 was condoned by Jordaan, J on the 18<sup>th</sup> November 2013.

[6] The Defendant's amended plea says that Sergeant Combrink arrested the Plaintiff on the 11<sup>th</sup> May 2012 without a warrant of arrest. It is alleged that the arrest was lawful in that the Plaintiff was arrested pursuant to the provisions of Section 40(1)(a) of the Criminal Procedure Act for contravening the provisions of Section 37(b) of the Refugees Act 130 of 1998 by failing to comply with the conditions subject to which his asylum seeker temporary permit had been issued to him. It is further alleged that

the Plaintiff was detained at the instance of the members of the South African Police Service at the Vosman Police Station until the morning of the 14<sup>th</sup> May 2012 when he appeared in the Magistrates Court, Witbank. It is then further pleaded that the Plaintiff's further detention was pursuant to an order of the Magistrate, Witbank denying bail and remanding his case to the 18<sup>th</sup> May 2012. On the 18<sup>th</sup> May 2012 the Public Prosecutor withdrew the charges against the Plaintiff. It is further alleged that the Plaintiff is to blame for the loss of his freedom because the Plaintiff deliberately refrained from producing a valid asylum seeker temporary permit which he apparently had, either to the Police during his incarceration over the weekend of the 11<sup>th</sup> May 2012 or to the court when he made his first appearance.

- [7] The parties handed in a bundle of documents that I marked Exhibit "A". The documents are all common cause between the Plaintiff and the Defendant. Amongst these documents are at page 11 of Exhibit "A" an expired asylum seeker temporary permit that indeed expired on the 5<sup>th</sup> May 2012. Also included in Exhibit "A" at page 8 of Exhibit A is a valid (as at date of the arrest of the Plaintiff) asylum seeker temporary permit dated the 9<sup>th</sup> May 2012 and that was valid until the 13<sup>th</sup> June 2012.
- [8] From this document it is accordingly clear that the Plaintiff was, at the time of his arrest and for the full period of his detention the holder of a valid asylum seeker temporary permit. For purposes of distinction I will

refer to the said Exhibit "A" page 8 as the "valid asylum seeker temporary permit" and to the expired permit (page 11 of Exhibit "A") as "the expired temporary permit".

[9] Although the Plaintiff did not take on any onus, the Plaintiff presented evidence first and the Plaintiff himself, a cousin of the Plaintiff, Mr DA Bjigo testified. Thereafter the Plaintiff's case was closed. The only witness that testified on behalf of the Defendant is Sergeant Combrink.

[10] The Plaintiff testified that he is a citizen of Ethiopia and that he was arrested in Witbank/Emalahleni at the Kwa-Guqa Township on the 11<sup>th</sup> May 2012. At the time of his arrest he was in his shop. According to his evidence he earns more than R3 000.00 per day from his business. Sergeant Combrink approached him and requested his documents. He produced the expired temporary permit. Sergeant Combrink informed him that the validity period of the expired temporary permit had already expired. He explained to Combrink that he has valid papers at his home. As a fact this is correct as the valid asylum seeker temporary permit was already in existence and it is not in dispute that this document was at the Plaintiff's home on the 11<sup>th</sup> May 2012.

[11] The Plaintiff testified that the valid asylum seeker temporary permit was issued on the 9<sup>th</sup> May 2012, i.e. some days after expiry of the expired temporary permit because Ethiopian applications for asylum are only

dealt with at the Marabastad Office of the Department of Interior in Pretoria on Wednesdays.

[12] The Plaintiff explained that he asked his brothers (it appears to be cousins) by telephone to bring the valid asylum seeker temporary permit to the shop. Combrink waited for a few minutes. The Plaintiff testified that his place of residence was not far from the shop.

[13] After a short period of time, it appears not to have been longer than 15 minutes, Sergeant Combrink decided to arrest the Plaintiff. The Plaintiff testified that his family turned up with the valid asylum seeker temporary permit whilst he and Sergeant Combrink were outside the shop and he was informed that he will be kept in custody until the said document will have been investigated. It is necessary to say that Combrink denies knowledge of the existence of the valid asylum seeker temporary permit and disputes the evidence that the papers were brought to the shop. The Plaintiff's witness also does not support him on this evidence and this evidence is also contrary to the Plaintiff's own evidence under cross-examination.

[14] The Plaintiff was taken into custody, his fingerprints were taken at the Vosman Police Station and he was placed in a filthy cell with no toilet facilities. Again this part of his evidence was disputed by Combrink but I have no reason to doubt the correctness of the Plaintiff's evidence in this

regard. Not alone were proper toilet facilities lacking, no blankets and bedding were provided and no food was provided over the weekend. His family brought him food. After his court appearance on Monday the 14<sup>th</sup> May 2012 he remained in custody and was taken to a different police station. Again toilet facilities were lacking. He did receive food once a day being a meal of porridge and salad. Again his family brought additional food to feed him. The Plaintiff and his fellow detainees were not allowed to make use of the toilet facilities outside the cells and had to relieve themselves in the cells. Again I have no reason to doubt the veracity of the Plaintiff on these aspects.

[15] In cross-examination the Plaintiff was questioned on why he did not have the valid asylum seeker temporary permit with him. He explained that when Combrink confronted him with the fact that the document in his possession had expired, the Plaintiff explained that he had not noticed that it was the expired document. In cross-examination he said that he was taken into custody to Vosman Police Station before his family brought the valid asylum seeker temporary permit. From Exhibit "A" it appears that at the latest on the 18<sup>th</sup> May 2012 a legal representative, one Mr Venter, appeared on behalf of the Plaintiff. The Plaintiff was cross-examined on the question of whether he had a legal representative representing him on the 14<sup>th</sup> May 2012. The Plaintiff denied that Mr Venter appeared for him on that particular day. In further cross-examination he said he could not remember whether he had a legal



representative. What is clear is that the Plaintiff is somewhat confused as to the court procedure and he conceded that he did not tell the court on the 14<sup>th</sup> May 2012 that he was in possession of a valid asylum seeker temporary permit.

[16] In cross-examination the Plaintiff indeed said that his family (he called them his brothers) brought him food and they also brought the valid asylum seeker temporary permit to the Police Station over the weekend of 11 May 2012. This was done by one Habitjo according to the Plaintiff's evidence.

[17] On the evidence of the Plaintiff it must be said that he is not certain as to when precisely the valid asylum seeker temporary permit was indeed brought to the Police except that it is clear that it was available on the 18<sup>th</sup> May 2015 when he was released at his second court appearance. I refer in this regard to Exhibit "A" page 5. I also conclude that he did not properly understand the court process on the 14<sup>th</sup> May 2012.

[18] The second witness on behalf of the Plaintiff was Mr Bejigo. He explained that he was not at the Plaintiff's shop when the Plaintiff was arrested. He was indeed aware of the arrest on the very day, namely the 11<sup>th</sup> May 2012. He knew of the arrest because he received the Plaintiff's call to bring the valid asylum seeker temporary permit. He specifically testified that the Plaintiff said that he had been arrested by the Police and

that the witness should bring the Plaintiff's valid asylum seeker temporary permit. He then explained that he drove the vehicle going to the Vosman Police Station and that he and the rest of the family followed the South African Police vehicle and tried to speak to the officers. He says he pleaded that he (that is the witness) is in possession of the documents. He explained that the Plaintiff was driven to the Police Station by two South African Police Service personnel members who were both black officials. On this evidence the discussions were with Police officials different.to Sergeant Combrink and not in Combrink's presence.

- [19] The witness testified that he showed the Police officials the valid documents. The witness was told to follow the Police to the Police Station where the documentation could be investigated. He says that the Plaintiff was put into the cells and that the witness was called by the South African Police officials whereupon he explained the existence of the valid asylum seeker temporary permit. The answer was that a different section would verify these documents. He said in his evidence that he gave the document in Exhibit "A", page 8 with the date stamp 9 May 2012, which is the valid asylum seeker temporary permit, to these Police officials. The Police officials remained in possession thereof. He further testified that on the following day (that is the 12<sup>th</sup> May 2012) he enquired about the verification process but was told that that had not occurred yet.

[20] During cross-examination Mr Bejigo confirmed that the Plaintiff had already left the shop in the custody of the Police when the witness arrived at the shop. He then drove behind the Police vehicle and flickered his lights. It is not altogether clear but it appears as if the personnel transporting the Plaintiff only went into discussion with the witness when they arrived at the Vosman Police Station. He explained that he and the family members tried to obtain the release of the Plaintiff over the weekend of the 11<sup>th</sup> May 2012 without any success. The legal representative, Mr Venter, only became involved after the refusal to release the Plaintiff over the weekend of the 11<sup>th</sup> May 2012. The witness testified that the original of the valid asylum seeker temporary permit was in possession of the Police already on Friday the 11<sup>th</sup> May 2012.

[21] In cross-examination by Mr Jozana Mr Bejigo was cross-examined on the events at court on Monday the 14<sup>th</sup> May 2012. He explained that him and his brothers were outside court and the legal representative (I assume Mr Venter) explained that the valid asylum seeker temporary permit was not brought to court by the investigating officer and it was also explained to them that the Plaintiff would be held at a different Police station. The legal representative also explained that arrangements will be made for an interpreter to interpret for the Plaintiff. He was adamant that the valid asylum seeker temporary permit was given to the Police on the 11<sup>th</sup> May 2012.

[22] In evidence in chief Sergeant Combrink testified that he was a member of the South African Police Service and was stationed at Vosman Police Station. He testified that he arrested the Plaintiff at the Plaintiff's tuckshop in the Vosman area. Upon request the Plaintiff produced the expired temporary permit, Exhibit "A11". Sergeant Combrink told the Plaintiff that the Plaintiff was unlawfully in the Republic of South Africa. The Plaintiff answered that his valid asylum seeker temporary permit was where he sleeps and that that is not further than 500 metres away and asked to fetch the document. He could not recall that the Plaintiff made a phone call but he waited outside the Plaintiff's shop and after approximately 15 minutes decided to arrest the Plaintiff for being unlawfully in the Republic of South Africa.

[23] Sergeant Combrink testified that the Plaintiff was in the back of his vehicle, not handcuffed and that nobody stopped them on their way to the Vosman Police Station. The said Police Station was not longer than 10 minutes away from where the arrest took place. He testified that the Plaintiff was placed in the holding cells and he confirmed that a relative (without specifying who the person was) of the Plaintiff arrived after the Plaintiff had already been put into the holding cells. He denied the absence of ablution facilities and blankets. He then testified that he wrote out his arrest statement. The statement appears at pages 13 and 14 of Exhibit "A". The statement says that the Plaintiff produced the expired temporary permit and that the Plaintiff said that he has a new document

at home. The statement then further confirms that they waited for someone to bring the document and when no one arrived he decided to arrest the Plaintiff on grounds thereof that the Plaintiff was an undocumented person/an illegal immigrant.

[24] Sergeant Combrink further explained that the Plaintiff went to court on the Monday (that is 14 May 2012) but Combrink himself did not attend at court. He only became aware of the valid asylum seeker temporary permit (as it appears at page 8 of Exhibit "A") shortly before the trial of this matter when he was asked to come and testify. He denied that the document was given to him by the witness Bejigo. He further testified that he arrested the Plaintiff because the Plaintiff was not in possession of a valid permit.

[25] In cross-examination by Mr Pienaar, Sergeant Combrink confirmed that he waited approximately 15 minutes before he decided to arrest the Plaintiff. He testified that he would in any event have arrested the Plaintiff because of the fact that the valid asylum seeker temporary permit was only issued some days after the expiry of the expired temporary permit, thus because the Plaintiff would have been illegally in South Africa for four days prior to the issue of the valid asylum seeker temporary permit. His explanation was that he would have had the suspicion that the valid asylum seeker temporary permit was fraudulent. He further testified that the investigating officer on the case, Warrant

Officer Lombaard, did not contact Sergeant Combrink. He could not explain whether the information was followed up, nor the fact that there was less than perfect compliance with the further investigations after the arrest of the Plaintiff as for instance the Plaintiff's warning statement clearly was not signed by the Plaintiff. (See Exhibit "A" page 10). There is also no indication of the residential or work address of the Plaintiff. Combrink testified that after the arrest of the Plaintiff and after arrival of the Plaintiff at the Vosman Police Station, he did not follow up with Home Affairs as to the illegality or not of the Plaintiff's presence in the South Africa as he had other duties and handed the Plaintiff over to the detectives who were to investigate the matter.

[26] Sergeant Combrink was questioned on why he did not collect the Plaintiff's valid asylum seeker temporary permit from the Plaintiff's home. His explanation was that foreigners tended to have unlawful documents; the Plaintiff was in possession of an expired document and that he could not drive the Plaintiff around in a Police vehicle as a civilian. None of these excuses seem to me to be acceptable, although I cannot say that he was obliged to assist with the collection of the document at the Plaintiff's home.

[27] He was examined regarding the inscription in the investigation diary at inscription C1 where, apparently one Colonel De La Hunt made an entry in red pen on the 12<sup>th</sup> May 2012 at 14h00. The entry reads "arranged

with home affairs to check the document". Finally Sergeant Combrink confirmed in cross-examination that after having arrested the Plaintiff he had nothing further to do with the matter.

[28] The above concluded the evidence that was led.

[29] In argument Mr Jozana criticised the Plaintiff and his witness on grounds of the contradictions in their evidence and made a submission that these contradictions served to reduce the weight to be attached to their evidence. His submission was that the Defendant's version remained consistent and that the Defendant's version of the facts must be accepted. He submitted that it must be the inescapable conclusion that no valid document was produced over the weekend of the 11<sup>th</sup> May 2012. He further submitted that it must be found that the Defendant's employees were not presented with the valid asylum seeker temporary permit prior to the 18<sup>th</sup> May 2012 when the Plaintiff was released. He submitted that Sergeant Combrink acted within his powers and made a lawful arrest. Therefore, he argued, also follows that the detention was lawful and when the Magistrate's Court intervened on Monday 14 May 2012 the further detention of the Plaintiff was also lawful. Thus, if anything, the Defendant could only be held liable for two days of detention (that is if it is found that the Defendant is liable for unlawful arrest and detention). He further submitted that the claim must be

dismissed with costs. If there is liability on the part of the Plaintiff this must be limited to approximately R30 000.00 per day of detention.

- [30] Mr Pienaar argued that the Plaintiff was not arrested in terms of Section 40(1)(a) of the Criminal Procedure Act but indeed in terms of Section 40(1)(l) namely on grounds thereof that there was a reasonable suspicion that the Plaintiff was an illegal immigrant. He submitted that the Plaintiff told Combrink that he has valid papers approximately 500 metres away from where the arrest took place and that the invasion of the Plaintiff's liberty should have been an action of last resort. He argued that there was nothing that prevented the collection of the valid asylum seeker temporary permit. He argued that only Sergeant Combrink was called and that the investigating officer, Warrant Officer Lombaard, was not called to testify. The in red pen inscription referred to above should have been explained by the Defendant. He submitted further that it is common cause that after the arrest nothing further was done with regard to investigating the matter and that there was a legal duty upon the Defendant's personnel to inform the Public Prosecutor that there was no further reason for the incarceration of the Plaintiff. He submitted that the valid asylum seeker temporary permit was with the South African Police Service all along since Friday the 11<sup>th</sup> May 2012. He argued that a negative inference must be made against the Defendant in view of the absence of any evidence from the investigating officer.



[31] Mr Pienaar further submitted, with reference to case law, that R250 000.00 as general damages would not be exorbitant depending on which scenario applies, namely unlawful detention up to the 14<sup>th</sup> May 2012 or unlawful detention for the whole period up to the 18<sup>th</sup> May 2012.

[32] The contradictions between the evidence of the Plaintiff and his witness are an unsatisfactory feature of their evidence. The question, however, is whether they are not to be believed with regard to specifically the question whether the valid asylum seeker temporary permit was produced to the Police officials on Friday the 11<sup>th</sup> May 2012 or Saturday the 12<sup>th</sup> May 2012. There could not be any contradictions between witnesses on the part of the Defendant as only Sergeant Combrink was called to testify. In this regard it must be kept in mind that Sergeant Combrink can only testify with regard to the facts of the matter up to the time when he left the Plaintiff in the holding cells on the 11<sup>th</sup> May 2012. After that he cannot make any contribution whatsoever to what occurred thereafter.

[33] It is common cause on the evidence that the Plaintiff was arrested on the 11<sup>th</sup> May 2012 whilst he was in possession of the expired temporary permit. It is further common cause that the valid asylum seeker temporary permit was in existence and that the Plaintiff was not an illegal immigrant at the time of his arrest by Sergeant Combrink. It is common cause that the Plaintiff was transported to the Vosman Police Station and

taken into custody in the holding cells until Monday the 14<sup>th</sup> May 2012 when he appeared in court and was thereafter held in further custody until the 18<sup>th</sup> May 2012. On the 18<sup>th</sup> May 2012 there was a refusal to prosecute because of the existence of the valid asylum seeker temporary permit.

[34] As regards the impression that the witnesses made, I make the following observations: There are contradictions in the evidence of the Plaintiff and his witness. However, neither of them gave me the impression that they are anything but honest witnesses attempting to give honest evidence. In this respect I take into consideration that they find themselves in a situation where they have to present their evidence in English where English is not their first language. In any event the general picture of the evidence presented by the Plaintiff and his witness is not at variance with the evidence of Sergeant Combrink who was the only witness on behalf of the Defendant. On his part I also find Sergeant Combrink an honest witness.

[35] The Defendant carries the onus of proof to prove the lawfulness of the arrest as well as the lawfulness of the full period of the detention in custody of the Plaintiff. In this respect it must immediately be stated that the Defendant failed to produce any evidence other than that of Sergeant Combrink. In that regard it is already clear from the previous exposition that Sergeant Combrink can only provide evidence up to the initial

incarceration of the Plaintiff on Friday the 11<sup>th</sup> May 2012. On his own version he thereafter had nothing further to do with the matter. His only further involvement came when he was called upon to come and testify at the trial of this matter.

[36] The confusing evidence of the Plaintiff and his witness as to precisely when the valid asylum seeker temporary permit was produced to the South African Police Service is a factor that I have to take into consideration. As referred to earlier, Mr Jozana argued that the valid asylum seeker temporary permit was only produced on the 18<sup>th</sup> May 2012 when the release of the Plaintiff occurred. I however cannot accept this submission. I find so for the following reasons. Although the Plaintiff himself cannot assist me with precisely when the valid asylum seeker temporary permit was produced to the Police, this clearly must have occurred by no later than 14h00 on the 12<sup>th</sup> May 2012. It is namely common cause that at the time of the Plaintiff's arrest, he was not in possession of the valid asylum seeker temporary permit. It is common cause that the Plaintiff said to Sergeant Combrink that he indeed has a valid asylum seeker temporary permit and that he requested time, prior to his arrest, to produce this document. Sergeant Combrink could not testify on whether the Plaintiff made a phone call in order to request his cousins to bring the valid document to the Plaintiff's shop in order to avoid his arrest. However, leaving aside both the Plaintiff's evidence in this regard as well as the evidence of his witness, it is indeed on Sergeant

Combrink's evidence clear that the family members, i.e. the cousins of the Plaintiff, did indeed turn up at the Vosman Police station. The evidence of Sergeant Combrink was that the relative arrived at a time after the Plaintiff had already been put into the holding cells. What remains unexplained is the inscription in the investigation diary by the officer. That inscription was made, according to the investigation diary, on the 12<sup>th</sup> May 2012 at 14h00. That entry, in red pen says: "Arranged with home affairs to check the document." I was not referred through the evidence of any of the witnesses of any follow up on this entry in the investigation diary and there is a dearth of evidence on what occurred at court on both the 14<sup>th</sup> of May 2012 and the 18<sup>th</sup> May 2012. On the 18<sup>th</sup> May 2012 the public prosecutor refused to prosecute in view of the existence of a valid asylum seeker temporary permit. Mr Jozana has no basis in any evidence for his submission that the Plaintiff on purpose failed to produce this document nor for the submission that it was only produced on the 18<sup>th</sup> May 2012. Indeed these submissions are against the probabilities in this matter. The Plaintiff is arrested. He calls in the assistance of his family members to indeed produce the valid asylum seeker temporary permit that indeed existed at the time of his arrest and that unfortunately was not in his possession at that time. To expect that the Plaintiff and his family would delay for some purpose not explained in any evidence or in cross-examination to produce this document and then only produce it on the 18<sup>th</sup> May 2012 is contrary to what one would normally expect in circumstances where a person is unnecessarily

incarcerated whilst he indeed is in possession of a valid asylum seeker temporary permit. The inscription in the investigation diary discussed above, which remains unexplained by the Defendant, indeed strongly supports the possession of the valid asylum seeker temporary permit by the South African Police by no later than 14h00 on 12 May 2012.

[37] I accordingly find that the valid asylum seeker temporary permit was produced and in possession of the Defendants Police Officers by no later than 14h00 on the 12<sup>th</sup> May 2012.

[38] The question now is whether the Plaintiff was unlawfully arrested by Sergeant Combrink and unlawfully incarcerated until the 14<sup>th</sup> May 2012. The further questions are whether the remanding of the Plaintiff in custody on the 14<sup>th</sup> May 2012 for the period between the 14<sup>th</sup> May 2012 and the 18<sup>th</sup> May 2012 occurred unlawfully.

[39] On the pleadings the Defendant's case is that the Plaintiff was arrested lawfully pursuant to the provisions of Section 40(1)(a) of the Criminal Procedure Act for contravening the provisions of the Refugees Act 130 of 1998 by failing to comply with the conditions subject to which his asylum seeker temporary permit had been issued to him and on grounds thereof that the Plaintiff deliberately refrained from producing the valid asylum seeker temporary permit either to the Police over the weekend (of the 11<sup>th</sup> May 2012) or to the court when he made his first appearance on 14

May 2012. On the evidence of Sergeant Combrink he arrested the Plaintiff for being unlawfully in South Africa after he saw that the Plaintiff was in possession of the expired temporary permit. It appears to me as if this basis of the arrest can be housed under either Section 40(1)(a) or Section 40(1)(l) of the Criminal Procedure Act. From Combrink's evidence it is clear that he was not aware of the other legislation referred to in the plea.

[40] There is no so-called "fifth jurisdictional fact", namely the consideration of whether there are less invasive options to bring the suspect before the court other than an immediate detention of the arrestee. See: **Sekhoto** para 10, 11 and 13.

[41] Whether Section 40(1)(a) or on Section 40(1)(l) applies the Plaintiff was in remiss in not being in possession of his valid asylum seeker temporary permit. Despite a short period of waiting for the document to turn up, it did not turn up and the arrest was effected. On the approach set forth in the **Sekhoto** matter, the conduct of Sergeant Combrink cannot be faulted, although it certainly was not an optimal exercise of his discretion. I thus conclude that Sergeant Combrink lawfully arrested the Plaintiff on the 11<sup>th</sup> May 2012.

[42] In due course it appeared that the Plaintiff indeed was in possession of a valid asylum seeker temporary permit and accordingly he was arrested

whilst in fact he was not unlawfully in the Republic of South Africa. These facts do not make his arrest per se unlawful. The assessment of the legality of an arrest in terms of Section 40(1)(a) (or 40(1)(l)) of the Criminal Procedure Act requires a determination whether the facts observed by the arresting officer as a matter of law *prima facie* established the commission of the offence in question. Indeed the Plaintiff did *prima facie* commit an offence as result of the absence of the valid asylum seeker temporary permit at the time of his arrest. See: **R v Moloy 1953 (3) SA 659 (T) at 662; S v Loubser 1977 (4) SA 546 (T) at 548; Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG) at para 20 – 21.**

[43] The next question to determine is whether the Plaintiff was lawfully detained and if so until when.

[44] The witness Bejigo was adamant that he gave the valid asylum seeker temporary permit to the arresting officers already on the 11<sup>th</sup> May 2012. On the totality of Bejigo's evidence it appears that the persons to whom he gave the valid asylum seeker temporary permit were not Sergeant Combrink but other officers who indicated that they do not do the investigations as to the validity of the documentation. I already found that on the probabilities the members of the South African Police Service were already in possession of the valid asylum seeker temporary permit by no later than 14h00 on Saturday 12 May 2012. It is only as a result of

the unclarities and contradictions in the evidence of the Plaintiff and his witness that I do not conclude that the valid asylum seeker temporary permit was already in the possession of the Police officials on Friday 11 May 2012.

- [45] The Defendant carries the onus of proof to prove the lawfulness of the arrest and the lawfulness of the full period of detention. Insofar there are more than one possible inference to be made from the facts in the absence of evidence from the Defendant for the period after the involvement of Sergeant Combrink, I am entitled to make the inference that favours the Plaintiff. See for instance: **Galante v Dickinson** 1950 (2) SA 460 (A) at 465. The inference I make on the evidence is also the most readily apparent and acceptable inference. See: **AA Onderlinge Assuransie Assosiasie Bpk v De Beer** 1982 (2) SA 603 (A) and **Goliath v MEC for Health, Eastern Cape** 2015 (2) SA 97 (SCA) at par 19. However, the **Galante**-principle is probably not applicable as on the probabilities the obvious answer to the question of the delivery of the valid asylum seeker temporary permit to the South African Police officials is, as found above, that the Plaintiff's family would have ensured that the valid asylum seeker temporary permit be in possession of the South African Police officials as soon as possible so as to obtain the speedy release from custody of the Plaintiff. See: **De Maayer v Serebro and Another, Serebro v Road Accident Fund and Another** [2005] 2 All SA 553 (SCA) at para 19.



[46] The question then is whether the Plaintiff should have been released by 14h00 on the 12<sup>th</sup> May 2012.

[47] In terms of Section 50(1) of the Criminal Procedure Act a person who is arrested without a warrant is brought to a police station as soon as possible and is held in custody for no longer than 48 hours if he is not released because no charge is preferred against him. Release on payment of bail or warning or release or service of a notice in terms of Section 56(2) of the Criminal Procedure Act are also possible.

[48] A lawful arrest is not a prerequisite for the provisions of Section 50(1) of the Criminal Procedure Act coming into effect. Also, an unlawful arrest does not preclude that the arrestee may be lawfully remanded in custody in terms of Section 50. On the other hand also a lawful arrest and period of lawful detention of an arrestee does not prevent the detention from becoming unlawful. In view of the provisions of Sections 7, 8, 10 and 12 of the Constitution it is obligatory for the South African Police Service officials to first establish whether there is any legal justification for the detention of an arrested person. This requirement also applied to the Plaintiff. In addition, further, the South African Police officials were obliged to relay to the public prosecutor the fact of the existence of the valid asylum seeker temporary permit at the time of the first appearance of the Plaintiff on the 14<sup>th</sup> May 2012. However, the first time the court

and public prosecutor became aware of this document, according to Exhibit "A", was on the 18<sup>th</sup> May 2012. See: **Isaacs v Minister van Wet en Orde** [1996] 1 All SA 343 (A); **Woji v Minister of Police** [2015] 1 All SA 68 (SCA); **Botha v Minister of Safety and Security** 2012 (1) SACR 305 ECP (this is the same case in unreported form that Mr Pienaar referred to in argument); **Minister of Safety and Security and Another v Ndlovu** 2013 (1) SACR 339 SCA; **Minister of Safety and Security v Tyokwana** 2015 (1) SACR 597 (SCA);

[49] In view of the existence of the valid asylum seeker temporary permit, the Plaintiff should have been released by no later than 14h00 on 12 May 2012. Having regard to the authorities referred to above the Plaintiff was in unlawful detention since 14h00 on the 12<sup>th</sup> May 2012. Although I have no doubt with regard to the correctness of my finding in this regard I need to say, should it become relevant, that if I am incorrect with the finding as regards the 12<sup>th</sup> May 2012 then the further detention of the Plaintiff became unlawful as from his court appearance on the 14<sup>th</sup> May 2012 because of the fact that the prosecutor and court were not informed by the police officials of the existence of the valid asylum seeker temporary permit on the 14<sup>th</sup> May 2012.

[50] In the circumstances the Defendant is liable for the unlawful detainment of the Plaintiff in custody for the period from 14h00 on the 12<sup>th</sup> May 2012 to his release at court on the 18<sup>th</sup> May 2012. This is a period of 6 days.

[51] Mr Jozana argued for the dismissal of the claim but argued further that if anything, the Defendant is only liable for 48 hours of detention, namely for the period from Friday 11 May 2012 to the first court appearance on 14 May 2012. His submission was that an amount of approximately R30 000.00 per day would be sufficient compensation. Mr Pienaar argued for an amount of R250 000.00 depending on the finding I make with regard to the period of detention, either, on his submission, to the 14<sup>th</sup> May 2012 or to the 18<sup>th</sup> May 2012.

[52] In the matter of **Woji v Minister of Police [2015] 1 All SA 68 (SCA)** the Supreme Court of Appeal in paragraph 38 pointed out that there was no discernible pattern in awards for unlawful detention other than that the courts are not extravagant in compensating the loss. In addition the award of general damages with reference to awards made in previous cases was fraught with difficulty. The facts of the particular case must be looked at as a whole and few cases are directly comparable.

See: paragraph 38 of the **Woji**-judgment.

[53] The Plaintiff explained that he is a refugee, that he ran a shop and made more than R3 000.00 per day. He described appalling circumstances under which he was held for the whole of the period of his unlawful detention.

[54] When one has regard to the facts in the Woji matter, I conclude that the Plaintiff's circumstances were less dramatic and appalling than those of Mr Wojj who was awarded R500 000.00 after being detained for 13 months and suffered humiliating and degrading experiences of a worse nature than those that the Plaintiff suffered.

[55] In Phasha v Minister of Police [2014] JOL 31731 (GSJ) the plaintiff in that matter was awarded R80 000.00 for some 9 hours of unlawful detention. In Takawira v Minister of Police [2013] JOL 30554 (GSJ) the appellant was awarded R75 000.00.

[56] The basic inquiry is to determine the extent of the Plaintiff's suffering indignity, unjustified humiliation or loss of self-worth as a result of the unlawful detention and to give that loss a monetary value.

[57] I do consider it an important factor that the Plaintiff was held in unlawful custody for a period of 6 days in circumstances where he indeed was lawfully in the Republic and where his only mistake that he did not have the valid asylum seeker temporary permit in his possession at the time of his arrest. On production of that document, it did not persuade the officials of the South African Police Service to release him from custody or to ensure that a court release him from custody before the 18<sup>th</sup> May 2012.

[58] Mr Jozana himself suggested that the amount of R30 000.00 per day would not be unreasonable (albeit in circumstances where he was of the view that any unlawful detention could not be for longer than 48 hours). Mr Pienaar's submission comes down to a daily amount of approximately R35 000.00 per day if calculated as from the moment of arrest.

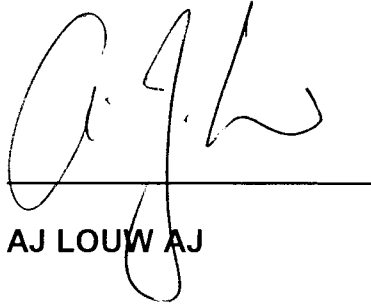
[59] After having considered the facts of the matter and the authorities referred to above I am of the view that R150 000.00 is just compensation for the Plaintiff's unlawful detention.

[60] In paragraph (b) of the Plaintiff's particulars of claim interest is claimed at the prescribed rate 14 days after judgment. Accordingly interest will run from a date 14 days after date of this judgment. The *mora* interest rate applicable is 9.5% per annum as the interest rate promulgated in Government Gazette No 397895 of 4 March 2016 will only become operative as from 1 May 2016.

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

1. The Defendant is ordered to pay the Plaintiff the amount of R150 000.00;
2. The Defendant is ordered to pay the Plaintiff interest on the sum of R150 000.00 at the rate of 9.75% per annum calculated from 21 April 2016 to date of payment;

3. The Defendant is ordered to pay the Plaintiff's costs of suit.



AJ LOUW AJ