



THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

17/5/2016

APPEAL CASE NO: A68/2012

CASE NUMBER 33714/2006

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>..... DATE</p> <p>..... SIGNATURE</p>	

O MAGAGULA

APPELLANT/ PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

RESPONDENT/ DEFENDANT

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JUDGMENT

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MODIBA AJ (Msimeki J and Olivier AJ concurring)

INTRODUCTION

- [1] This is an appeal against an order granted by this court per Zondo J, awarding the appellant damages in the amount of R150, 720 for loss of income and general damages arising from unlawful arrest and unlawful detention. He appeals with leave of the court *a quo*. For convenience I refer to the parties as they were cited in the court *a quo*.

- [2] The plaintiff was partially successful in the court *a quo*. The court *a quo* declared his arrest as well as his detention from 25 to 30 August 2004 unlawful<sup>1</sup> and awarded him damages in the amount of R720<sup>2</sup> in respect of loss of earnings and R150, 000 in respect of general damages.<sup>3</sup> The court *a quo* found that his detention ceased to be unlawful when he was remanded in custody at his first court appearance. It is for that reason that the court *a quo* declared his detention period from the date he was first remanded in custody, being 30 August 2004 to the date he was released on 18 October 2005 lawful. Despite the plaintiff's partial success, the court *a quo* ordered him to pay the defendant's legal costs.
- [3] The plaintiff appeals the part of the order of the court *a quo* in respect of which he was unsuccessful. He seeks an order declaring his whole detention period unlawful. He also seeks his award for damages adjusted to accord with such a finding. Not only does the defendant oppose the appeal, he also cross appeals part of the order of the court *a quo* that declared the plaintiff's arrest and detention unlawful as well as the damages awarded to the plaintiff. The cross appeal is also with leave of the court *a quo*.

#### **LEGAL QUESTIONS TO BE DETERMINED IN THE APPEAL AND IN THE CROSS APPEAL**

- [4] The following issues are to be decided on appeal:
- 4.1 whether the plaintiff's detention ceased to be unlawful when the Krugersdorp Magistrate's Court remanded him in custody at his first court appearance on 30 August 2015. The plaintiff's case is that his detention did not cease to be unlawful.
  - 4.2 in the event that I find the plaintiff's whole detention period is unlawful, the quantum of general damages and loss of income to be awarded to the plaintiff from 25 August 2004 to 18 October 2005. The plaintiff seeks an award for general damages and for loss of income in respect of the 428 days spent in unlawful detention.
  - 4.3 whether the defendant was entitled to costs of suit in the court *a quo* even though the plaintiff was partially successful in that court. The plaintiff contends that the defendant was not entitled to costs of suit in the court *a quo*.

<sup>1</sup> The court *a quo* handed down judgment in respect of the Defendant's liability on 21 June 2011.

<sup>2</sup> This is what the Plaintiff would have earned for 6 days' wages working at a building construction site. He was earning R120 per day.

<sup>3</sup> The court *a quo* handed down judgment in respect of quantum on 30 September 2011.

- [5] The issue to be decided in the cross appeal is whether Detective Sergeant Nel harboured a reasonable suspicion that the plaintiff committed a schedule 1 offence as envisaged by section 40 (1) (c) of the Criminal Procedure Act 51 of 1977 (the CPA) when he arrested him on 25 August 2004. The defendant's case is that he harboured such a suspicion, therefore the plaintiff's arrest and detention was lawful.

## **BACKGROUND FACTS**

- [6] The above issues will be understood better against the background facts set out below. These facts are common cause between the parties.
- [7] The plaintiff's action arises out of the events that took place on 25 August 2004 in Krugersdorp. On that day, a certain Jeffrey Thabiso Ndimande (Mr Ndimande) and a male person only identified in the trial record as Obakeng were arrested on charges of housebreaking and theft and taken to the Krugersdorp Police Station. Shortly thereafter and at approximately 14h30, Inspector Gordon, the investigation officer in the murder of Ms Alberts, was given certain information regarding Mr Ndimande and Obakeng. Ms Alberts, a prominent Krugersdorp business woman, was murdered at her home two weeks prior. Inspector Gordon did not spell out details of this information in his evidence. Inspector Gordon immediately made his way to the Krugersdorp Police Station where he found Mr Ndimande and Obakeng. He booked them out to his office in Roodepoort where he questioned them individually in connection with Ms Alberts's murder. He then arrested Mr Ndimande for Ms Alberts's murder. At approximately 16h00 that same afternoon, the plaintiff was arrested as an accomplice to Mr Ndimande in Ms Alberts's murder. Inspector Gordon decided not to arrest Obakeng for this offence.
- [8] It is common cause that the plaintiff's arrest was not authorised by a warrant. Murder is one of the offences listed in Schedule 1 of the CPA. It is also common cause that when he arrested the plaintiff, the arresting officer acted within the scope and duty of his employment with the defendant.
- [9] On the day he was arrested, Mr Ndimande pointed out several scenes, namely, 777 tavern in Krugersdorp where he spent time with the plaintiff on the evening of 15 August 2015 (the night when Ms Alberts was murdered), the plaintiff's work place where he pointed the plaintiff out to Detective Sergeant Nel - leading to his arrest, as

well as the scene of Ms Alberts's murder. These pointings out were conducted by Superintendent Eksteen. A few days after his arrest, Mr Ndimande was taken to Magistrate Visagie to make a confession. Magistrate Visagie refused to note the confession after Mr Ndimande informed her that he was tortured to make it.

- [10] Mr Ndimande and the plaintiff were later detained at the Krugersdorp Police cells until their first court appearance on 30 August 2004. They were remanded in custody. Thereafter, they continued to appear in court several times. After each court appearance, they were remanded in custody at the Krugersdorp Police cells and later at the Krugersdorp Prison. After several court appearances and about two months after his arrest, the plaintiff raised the question of bail. He was unsuccessful in a bail application opposed by Inspector Gordon. Both Mr Ndimande and the plaintiff were kept in custody until the plaintiff was released on 18 October 2005 without any charges being put to the plaintiff.

## APPLICABLE LEGAL PRINCIPLES

- [11] Below I have summarised an ensemble of legal principles from several reported cases dealing with unlawful arrest and detention commonly referred to by our courts. In determining the issues articulated above, I am guided by these legal principles.

### *Onus*

- [12] The defendant bears the onus to prove that the plaintiff's arrest and detention is lawful. See ***Minister of Law and Order v Hurley and another***<sup>4</sup> and ***Zealand v Minister of Justice and Constitutional Development and another***.<sup>5</sup> If the defendant fails to discharge this onus, the appeal stands to succeed and the cross appeal stands to be dismissed.

### *Unlawful arrest*

- [13] For an arresting officer to effect a lawful arrest without a warrant, the following jurisdictional facts must be present:
- 13.1 the arresting officer must be a peace officer;
  - 13.2 he must arrest a suspect based on a reasonable suspicion that the suspect committed an offence set out in Schedule 1 of the CPA;

<sup>4</sup> 1986 (3) SA 568 (A) at 589 E-F, referred to with approval in ***Minister of Safety and Security v Ndlovu*** 2013 (1) SACR 339 (SCA) at 10.

<sup>5</sup> 2008 (6) BCLR 601 (CC) at 25, also referred to with approval in ***Minister of Safety and Security v Ndlovu*** (citation at footnote 4) at 10.

13.3 he must arrest the suspect without a warrant authorising such arrest.<sup>6</sup>

[14] An enquiry into whether an arresting officer arrested a suspect on a reasonable suspicion that he committed a Schedule 1 offence is objectively justiciable. The test is not whether the arresting officer had reason to suspect, but whether his suspicion is founded on reasonable grounds. See **Duncan v Minister of Law and Order**.<sup>7</sup> Any additional information available to the arresting officer when he arrests a suspect must also be considered to determine whether he acted on a reasonable suspicion. See **Woji v Minister of Police**.<sup>8</sup>

[15] In **Powell NO v Van der Merwe NO and others**<sup>9</sup> the SCA adopted the following definition of suspicion:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of a *prima facie* proof is the end."<sup>10</sup>

[16] Information by a suspect which implicates another person in the commission of an offence, although inadmissible as evidence against a co-accused may be used to determine whether the suspicion harboured by an arresting officer was reasonable. See **Woji**<sup>11</sup> *supra*.

#### *Unlawful detention*

[17] The authority of the police to detain a person is inherent in their discretionary power to arrest. See **Minister of Safety and Security v Tyokwana**.<sup>12</sup> Once a detainee is brought before court, that authority is exhausted. Further detention of a suspect is within the discretion of the court and requires a judicial evaluation to determine whether it is in the interest of justice to release the suspect on bail. See **Minister of Safety and Security v Sekhoto**.<sup>13</sup> It is the duty of a judicial officer to guard against the accused being detained on insubstantial or improper grounds and to ensure that his detention is not unduly extended. See **Minister of Law and Order v Kader**.<sup>14</sup>

<sup>6</sup> Section 40(1) (b) of the CPA.

<sup>7</sup> [1986] 2 All SA 241 (A) at 8.

<sup>8</sup> 2015 (1) SACR 409 (SCA) at 18.

<sup>9</sup> 2005 (5) SA 62 (SCA) at 36.

<sup>10</sup> The SCA borrowed this definition from **Devlin Shabaan Bin Hussein and others v Chong Fook Kan and another** [1969] 3 All ER 1627 (PC) at 1630, referred to with approval in **Woji v Minister of Police** (see citation at foot note 8) at 17.

<sup>11</sup> See citation at footnote 8.

<sup>12</sup> 2015 (1) SACR 597 (SCA).

<sup>13</sup> 2011 (5) SA 367 (SCA) at 42-44.

<sup>14</sup> 1991 (1) SA 41 (A) at 51 A-C. See also the *Zealand* judgment as well as **Minister of Safety and Security and another v Ndlovu** (citation at footnote 4) at 16 were referred to with approval by Petse JA, writing for the court).

However an order by the reception court (being a court tasked with remanding cases when accused persons first appear in court), without a proper enquiry into whether or not an accused person ought to be detained pending trial, does not end the unlawfulness of the detention of an accused person (*Ndlovu supra*).<sup>15</sup> Whether the unlawfulness of a detention ceases upon a remand order by a Magistrate has to be answered with regard to the peculiar facts of each case (*Tyokwana supra*).<sup>16</sup>

*The right to freedom and security of the person and the State's duty to respect individual rights*

- [18] The Constitution of Republic of South Africa, 1996 (the Constitution) imposes a positive duty on the state and on all its organs not to perform any act that infringes entrenched rights including the right to human dignity and freedom and security of the person. (*Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)*).<sup>17</sup>
- [19] Section 12(1) (a) of the Constitution protects the right of a suspect or an accused person not to be deprived of freedom arbitrarily or without just cause. This right requires that every encroachment on a person's physical freedom be carried out in a procedurally fair manner but also be substantively justified by acceptable reasons (*S v Coetzee and Others*).<sup>18</sup> Therefore a series of Magistrate's Court issued orders remanding the appellant in detention is not sufficient to establish that the detention was not arbitrary or without just cause. Breach of section 12(1) (a) of the Constitution is sufficient to render the appellant's detention unlawful for the purpose of a delictual claim for damages. See *Zealand supra*.<sup>19</sup>

*Damages for the infringement of personal rights*

<sup>15</sup> *Minister of Safety and Security and another v Ndlovu* (see citation at footnote 4 *supra*) at 16. This reasoning accords with that applied in *Zealand* where the court defined the content of the right of a suspect or an accused person not to be deprived of freedom arbitrarily or without just cause. See paragraph 21 of this judgment.

<sup>16</sup> *Minister of Safety and Security v Tyokwana* (citation at footnote 12 *supra*) at 39.

<sup>17</sup> 2001 (4) SA 938 (CC) para 44 referred to with approval in *Woji v Minister of Police* (footnote 8 at 20.)

<sup>18</sup> 1997 (3) SA 527 (CC). In this case O'Regan J defined the content of this right as follows:

"They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom...

Our Constitution recognizes that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, to do so in a manner which is procedurally unfair."

<sup>19</sup> Footnote 5 at 53.

[20] The following principles governing the award of money in cases of an infringement of personality rights are set out in the seminal ***Minister of Safety and Security v Seymour*** judgment<sup>20</sup>:

- 20.1 Money can never be more than a crude *solatium* for the deprivation of what in truth can never be restored. There is no empirical measure for the loss.<sup>21</sup>
- 20.2 The trial judge has a wide discretion to award what the judge considers to be fair and adequate compensation to the injured party.<sup>22</sup> A court will not interfere with damages awarded by the court *a quo* on appeal unless there is a substantial variation or striking disparity between what the trial court awarded and what an appeal court believes ought to have been awarded.
- 20.3 the assessment of damages with reference to earlier cases is fraught with difficulty. The facts of a particular case need to be considered as a whole and few cases are directly comparable. They are, however, a useful guide to what other courts have considered to be appropriate but they have no higher value than that.<sup>23</sup>

## ANALYSIS

[21] The evidence of the parties' witnesses is mutually destructive regarding the identity of the arresting officer and the circumstances that led to the plaintiff's arrest. In order to determine the unlawfulness of the plaintiff's arrest and detention, it is important to first reconcile the parties' mutually destructive versions. It is trite that to reconcile mutually destructive versions of the parties, the approach adopted in the ***Stellenbosch Farmers Winery***<sup>24</sup> has to be followed. The approach requires the court to make a finding on the probabilities, having regard to the credibility and reliability of the parties' witnesses.

[22] According to Inspector Gordon and Detective Sergeant Nel, the latter arrested the plaintiff after Inspector Gordon requested him to assist with the plaintiff's arrest. Inspector Gordon informed Detective Sergeant Nel that he sought the plaintiff's arrest because after Inspector Gordon arrested Mr Ndimande, Mr Ndimande made certain admissions to him regarding Ms Alberts's murder and implicated the plaintiff. Prior to proceeding to arrest the plaintiff, Detective Sergeant Nel interviewed Mr Ndimande in Inspector Gordon's presence to

<sup>20</sup> 2006 (6) SA 320 (SCA).

<sup>21</sup> ***Seymour*** at para 20.

<sup>22</sup> ***Seymour*** at para 11.

<sup>23</sup> ***Seymour*** at para 17.

<sup>24</sup> ***Stellenbosch Farmers Winery Group Ltd and Another v Martel Et CIE and Others*** 2003 (1) SA 11 (SCA) at para 5.

confirm the admissions that Mr Ndimande made to Inspector Gordon. Mr Ndimande continued to implicate the plaintiff. He informed Detective Sergeant Nel that he was with the plaintiff when the plaintiff shot Ms Alberts at her home and that the murder weapon will be found where the plaintiff resides. Mr Ndimande also offered to point out the plaintiff. It was on the basis of the information he received from Inspector Gordon, confirmed by Mr Ndimande, as well as a pointing out of the plaintiff by Mr Ndimande that Detective Sergeant Nel arrested the plaintiff. The evidence of Detective Sergeant Nel regarding the plaintiff's arrest is supported by the arresting statement that he prepared after he arrested the plaintiff. Inspector Gordon corroborated Detective Sergeant Nel's evidence in this regard.

[23] According to the plaintiff and Mr Ndimande, the plaintiff was arrested by Inspector Gordon. They both testified that they will be able to identify Inspector Gordon when they see him. However, when called upon to identify him in court, they could not do so.

[24] It seems to me that both Mr Ndimande and the plaintiff made a mistake regarding the name and identity of the officer who arrested the plaintiff. From the record it appears that Mr Ndimande and the plaintiff's interaction with Detective Sergeant Nel was very limited. He arrived at the SAPS Roodepoort Detectives branch office he shares with Inspector Gordon around 3pm on the day of their arrest. This was before the plaintiff was arrested. The plaintiff was arrested at approximately 4pm on 25 August 2004. Not only did Inspector Gordon accompany Detective Sergeant Nel when he went to arrest the plaintiff, he arrested him on Inspector Gordon's request. Mr Ndimande was present when Inspector Gordon requested Detective Sergeant Nel to assist him with arresting the plaintiff. After he arrested the plaintiff, Detective Sergeant Nel left Mr Ndimande and the plaintiff with Inspector Gordon at approximately 7pm that evening. It does not appear that Detective Sergeant Nel had another encounter with Mr Ndimande and the plaintiff in the 428 days of their detention. During this period, particularly in the first two months of their arrest, it appears that Mr Ndimande and the plaintiff had numerous interactions with Inspector Gordon when he was investigating Ms Alberts's murder. When the plaintiff applied for bail some two months after he was arrested, it was Inspector Gordon who opposed it.

[25] Despite their long interaction with Inspector Gordon during their detention, during the trial in the court *a quo* which took place approximately 7 years after these events, the plaintiff and Mr Ndimande could not identify him. From these facts, it appears that both the plaintiff and Mr Ndimande probably knew that the person who wanted the plaintiff arrested is Inspector Gordon. From the evidence, it appears that even though both the plaintiff and Mr Ndimande did not clearly remember the name of this officer, the name 'Gordon' remained



engraved in their minds. In his evidence, the plaintiff conceded that he may be mistaken regarding the name and identity of the person who arrested him due to the lapse of time between his arrest and the civil trial. The plaintiff and Mr Ndimande lack a motive to be dishonest regarding the identity of the police officer who arrested the plaintiff.

[26] Given that it was Inspector Gordon who wanted the plaintiff arrested, that when Detective Sergeant Nel went to arrest the plaintiff Inspector Gordon accompanied him, as well as the fact that Inspector Gordon interacted with Mr Ndimande and the plaintiff several times during their detention, it is probable that both Mr Ndimande and the plaintiff made a *bona fide* error regarding the name and identity of the person who arrested the plaintiff. The probabilities support a finding that Detective Sergeant Nel and not Inspector Gordon arrested the plaintiff.

[27] It is apposite at this point to reconcile the parties' versions regarding the circumstances that led to the plaintiff's arrest.

[28] As already stated, the plaintiff's arrest was prompted by an admission statement made by Mr Ndimande to Inspector Gordon implicating the plaintiff. According to Inspector Gordon, he interviewed Mr Ndimande for approximately 30 minutes. During this time they developed a rapport and Mr Ndimande of his own volition admitted to being with the plaintiff when the plaintiff shot Ms Alberts. Inspector Gordon arrested Mr Ndimande without a warrant. He denied inducing an admission statement from the plaintiff by torture. It was because of the admission made by Mr Ndimande that Inspector Gordon requested Detective Sergeant Nel to assist him to arrest the plaintiff.

[29] Before proceeding to arrest the plaintiff, Detective Sergeant Nel independently questioned Mr Ndimande to confirm his admission statement and to assess the plaintiff's risk profile. According to Detective Sergeant Nel, during the interview, Mr Ndimande laid all the blame for Ms Alberts's murder on the plaintiff. Mr Ndimande was relaxed and did not appear to be under pressure to speak. He had no evidence of being assaulted on his face and wrists. He even started talking about the murder incident whereupon Detective Sergeant Nel warned him to be careful because his admission statement was bordering on a confession. At that point Inspector Gordon read him his constitutional rights in Detective Sergeant Nel's presence. Mr Ndimande then offered to make a confession and to point out certain scenes. Detective Sergeant Nel then decided that this information warrants the plaintiff's arrest. At that point, Detective Sergeant Nel started making preparations to arrest the plaintiff.

Inspector Gordon started making arrangements for Mr Ndimande to make the confession and the pointing out.

[30] According to Mr Ndimande, when Inspector Gordon took him to his office on the day he was arrested, he questioned him about Ms Alberts's murder. Mr Ndimande denied any knowledge of this crime. Inspector Gordon insisted that he knew and started assaulting him. He made him lie on his back with his hands handcuffed to the back, sat on his chest and suffocated him repeatedly with a clear plastic bag bearing an SAPS logo, uttering the words "*wil jy die waarheid praat?*" repeatedly. While Inspector Gordon was suffocating him, three other men walked into his office and assaulted him by kicking him. While being assaulted like that, a white lady also walked in. He screamed to her for help. The white lady walked away without assisting him. Inspector Gordon then put him on a chair and told him that he will see what he will do with him if he does not tell the truth. Then he asked him where he was on the day Ms Alberts was killed. He told him that he was at 777 tavern with a friend watching football. The friend in question is Owen Magagula, the plaintiff. He then took him into the car and told him to show him where the friend lives. They then drove with another person who was with Inspector Gordon to the plaintiff's place where he pointed out the plaintiff. From the trial record it appears that this person is Detective Sergeant Nel. The plaintiff was arrested. They drove back to Inspector Gordon's office where Mr Ndimande was locked in a place resembling a court yard. Inspector Gordon and his colleague took the plaintiff into Inspector Gordon's office. Later the plaintiff told Mr Ndimande that Inspector Gordon assaulted and suffocated him with a clear plastic bag bearing an SAPS logo. After a while Mr Ndimande was brought back to Inspector Gordon's office where the plaintiff was asked where the fire arm was. Inspector Gordon's friend then told them to tell the truth otherwise they were going to shit. They were beaten up again and after a while taken to the police cells where they were locked up.

[31] According to the plaintiff, after he was arrested, he was also assaulted and tortured by Inspector Gordon and a person he referred to as his (Inspector Gordon's) colleague using the same method described by Mr Ndimande. The plaintiff also corroborated Mr Ndimande's evidence in material respects regarding the plaintiff's arrest. He contradicted Mr Ndimande's evidence regarding the place where he was arrested and the sequence of events immediately after the plaintiff's arrest. According to Mr Ndimande, the plaintiff was arrested at his place of residence. From there they were taken to Inspector Gordon's office. According to the plaintiff, he was arrested at his place of work and taken to his house where it was searched to no avail initially by police officers and subsequently by sniffer dogs. From his house the plaintiff was taken to Inspector Gordon's office where he was interrogated and

tortured to produce a fire arm. He was then locked up separately from Mr Ndimande in the cells at the Roodepoort police station. It was at this point that he was assaulted and tortured by Inspector Gordon and his colleague. At midnight on the 26 August 2004, Inspector Gordon booked him out and took him to the compound where he stays again. His place of residence was searched again and nothing was found. He was taken to the police cells where he was locked up until he was taken to court several days later.

[32] Mr Ndimande further testified that on the evening of his arrest Inspector Gordon fetched him from the police cells and took him into an office where there was a white lady. Again he was asked if he knew a place where a lady was killed. The white lady was busy writing. Thereafter Inspector Gordon gave him a paper and told him to sign it. When he asked what that paper was for Inspector Gordon told him not to ask shit and told him to sign. He was not given an opportunity to read the paper prior to signing it. When he tried to read it he was told to "sign otherwise he will 'shit himself'". He refused to sign but was told that if he does not sign he will be beaten up. He was in pain and did not want to be beaten up again. It is for that reason that he signed it. Inspector Gordon and this white lady then took him into a car. They told him that they are going to where he was drinking with the plaintiff. On arrival he was told to point with a finger to show that that is where they were drinking. Then someone took a picture of him pointing out. From there he was taken to the plaintiff's place of work where he was told to point out and when he was pointing out another picture was taken. From there they drove to Ms Alberts's house where again he was instructed to point out and a picture of him was taken in the process.

[33] It is common cause that the person Mr Ndimande referred to as the white lady is Superintendent Eksteen. She conducted the pointing out by Mr Ndimande at Inspector Gordon's request. When asked under cross examination what he was pointing at, Mr Ndimande's answer was that he was pointing at a wall. He does not know why he was being told to point out. After the pointing out, he was taken back to the cells at the Randfontein Police Station and the following morning taken to Roodepoort. He requested to be taken to his house to collect toiletries and changing clothes. On arrival there his house was ransacked. Nothing was found. He was taken to the police station where Inspector Gordon told him to make a statement implicating the plaintiff and he will be made a state witness. When he refused to make it, he was again assaulted. He was thereafter locked in a separate cell from the plaintiff. The following day he was taken out and again questioned about Ms Alberts's murder and specifically about the firearm. He was taken to his place of residence where his house was searched again to no avail.

[34] He was made to appear in court several days later. On the day of his first court appearance he was taken to a Magistrate's office. On their way to the Magistrate's office Inspector Gordon again promised to make him a state witness if he made a statement to the Magistrate to the effect that the plaintiff killed Ms Alberts. It is common cause that the Magistrate in question was Magistrate Visagie. Inspector Gordon remained outside the Magistrate's office. Mr Ndimande refused to make the statement. He informed the Magistrate what Inspector Gordon promised him. He also informed the Magistrate that Inspector Gordon and his colleagues assaulted and tortured him to make the statement.

[35] At their first court appearance, when the presiding Magistrate remanded them in custody at the police cells in Krugersdorp, according to both Mr Ndimande and the plaintiff, they raised their hands and complained to the presiding Magistrate not to let them go with Inspector Gordon because he ill-treats them. The presiding Magistrate ignored their complaint and told them to go with Inspector Gordon because he was still investigating the case. When they left the court, Inspector Gordon assaulted them further by handcuffing their one hand together, tightening the hand cuffs and putting his hand in them to press their hands further against the handcuffs, causing them pain. He told them that they are talking nonsense and took them to the Krugersdorp Police cells.

[36] The allegations of assault and torture made against Inspector Gordon and Detective Sergeant Nel were met by a bare denial by these two officials.

[37] According to Superintendent Eksteen, Inspector Gordon was not involved in the pointing out at all. Mr Ndimande pointed out the 777 tavern, the construction site where the plaintiff works and the scene of Ms Alberts's murder voluntarily. He was easy to work with. He showed no sign of distress. She did not observe any injuries on Mr Ndimande. Pictures of Mr Ndimande taken prior to the pointing out also do not indicate injuries on Mr Ndimande. He never complained to her about being assaulted by anyone.

[38] I find it astonishing that of the chain of people who were invited by Inspector Gordon to assist with various aspects of his investigation of Mr Ndimande's involvement in Ms Alberts's murder, Magistrate Visagie was not called. On 30 August 2004 Mr Ndimande was taken to Magistrate Visagie to make a confession. He refused to make a confession before Magistrate Visagie and informed her that he was coerced to make it. In the aborted confession statement which was admitted by the court *a quo*, Magistrate Visagie reports that she observed and was informed by Mr Ndimande of the following injuries: slight laceration on the left eye brow, scratches on the left and right elbows; a slight cut in the right forearm

caused by hand cuffs; both forearms swollen; chest still painful from being sat on; back of head swollen; neck still painful from the pressure caused by the plastic bag; slight scratch on ankle sustained when his ankle was pressed against the floor.

[39] Mr Ndimande also informed Magistrate Visagie that Inspector Gordon comes at any time into the cell where he is kept, books him out and goes and assaults him. He put him under extreme pressure. Magistrate Visagie also noted that Mr Ndimande informed her that Inspector Gordon forced him to make a statement to Superintendent Eksteen on the day of his arrest but did not want to repeat it because he made the statement under duress.

[40] A cursory examination of the evidence of the parties' witnesses and in particular, the evidence of Detective Sergeant Nel regarding the plaintiff's arrest, as well as that of Mr Ndimande and Superintendent Eksteen, regarding the events that transpired during the pointing out, may sway anyone reading the trial record towards a finding that the plaintiff and Mr Ndimande are not reliable and that Mr Ndimande lacks credibility. I say so for the following reasons:

40.1 the plaintiff and Mr Ndimande have a poor recollection of the identity of the plaintiff's arresting officer;

40.2 the evidence of the plaintiff and Mr Ndimande regarding the plaintiff's place of arrest and sequence of events after the plaintiff's arrest is contradictory;

40.3 Mr Ndimande's evidence regarding Inspector Gordon's participation in the pointing out, when weighed against the evidence of the defendant's witnesses in respect of the pointing out seems improbable because:

40.3.1 he fails to elaborate on how Superintendent Eksteen's party knew how to get to the scenes that he pointed out. It is not clear in particular how Superintendent Eksteen's party would have known the directions to the 777 tavern because of the 3 scenes that Mr Ndimande pointed out, it is the only scene that Inspector Gordon has not been to prior to the pointing out. Given that on Mr Ndimande's version, Inspector Gordon instigated the pointing out and was present during the pointing out, one would have expected him to have testified that Inspector Gordon directed Superintendent Eksteen's party to the scenes that he pointed out. This crucial aspect of a pointing out process is missing from his evidence.

40.3.2 his response to a question under-cross examination regarding what he was pointing at – his answer was that he was pointing at a wall – seems unfounded;

[41] Mr Ndimande's evidence is also contradictory in several other respects. He testified in chief that the police men who came in when he was being suffocated by Inspector Gordon sat on his legs. Later he changed this version to say they pressed his legs against the floor. He also testified that when he was torturing him, Inspector Gordon uttered the words: "*will jy die waarheid praat*" repeatedly. When questioned under cross-examination he said Inspector Gordon swore at him saying "*Kaffer praat, Kaffer praat, jy moet die waarheid praat*". Furthermore, when questioned about why he refused to make a confession before Magistrate Visagie, he testified that he informed Magistrate Visagie that Inspector Gordon threatened to kill him when he was torturing him. However, in his evidence in chief he never mentioned that Inspector Gordon threatened to kill him. His evidence was that Inspector Gordon used the words: 'you will see what I will do to you.'

[42] The plaintiff failed to identify the official who together with Inspector Gordon assaulted him in Inspector Gordon's office after he was arrested. Although I found that Detective Sergeant Nel arrested the plaintiff in Inspector Gordon's company, there is no basis from the plaintiff's evidence to find that Detective Sergeant Nel was present in Inspector Gordon's office when the plaintiff was assaulted as claimed. The plaintiff failed to establish prima facie that Detective Sergeant Nel assaulted him. For that reason, I do not find fault with Detective Sergeant Nel's bare denial of the torture.

[43] The contradictions in Mr Ndimande's evidence as well as between the evidence of Mr Ndimande and the plaintiff relates to details of events testified about and do not in my view affect the veracity of their evidence. Mr Ndimande and the plaintiff also lack a good recall of some details of this incident. In view of the long time lapse between their arrest and the proceedings in the court *a quo*, poor recall of the incident and contradictions on such details are not out of the norm.

[44] Despite finding that the evidence of the plaintiff and Mr Ndimande is poor in the respects detailed in paragraphs 42 to 44 above, I find their evidence of the torture in respect of Inspector Gordon too detailed to dismiss as a fabrication. I find it disconcerting that Inspector Gordon did not deal with the torture claims in his evidence, save to barely deny them. The court *a quo* also had difficulty with the cursory manner in which Inspector Gordon dealt with the allegations of torture by these witnesses. When one examines Inspector Gordon's evidence against the totality of the evidence of the parties, a completely different picture emerges.

[45] I have several difficulties with Inspector Gordon's evidence. Firstly, he failed to take the court into his confidence regarding the information that he received telephonically from an undisclosed informant that led him to interrogate Mr Ndimande and Obakeng and to arrest Mr Ndimande. It concerns me that his evidence on the crucial question of what exactly led him to question Mr Ndimande and Obakeng; and on what basis, apart from the controversial admission statement by Mr Ndimande, he moved from Obakeng to suspect that the plaintiff was involved in Ms Alberts's murder. His evidence on this crucial aspect is nebulous. This connection is important because at that point, Inspector Gordon had been investigating Ms Alberts's murder for two weeks and had not secured evidence linking any suspect to this callous deed.

[46] Secondly, his evidence regarding Mr Ndimande's verbal admission statement contradicts what he recorded in his arresting statement in respect of Mr Ndimande. He testified that Mr Ndimande told him that the plaintiff shot Ms Alberts. In the arresting statement, Inspector Gordon stated that Mr Ndimande told him that he (Mr Ndimande) shot the plaintiff. When cross examined on this aspect, Inspector Gordon's response was that his use of 'hy' in the relevant paragraph in the arresting statement was in reference to the plaintiff. The court *a quo* found and in my view correctly so, that his use of 'hy' in that paragraph was clearly in reference to Mr Ndimande. The only inference to draw from Inspector Gordon's evidence in this regard is that he deliberately changed his version to give gravitas to his reasons for wanting the plaintiff arrested.

[47] Thirdly, when Detective Sergeant Nel interviewed Mr Ndimande in Inspector Gordon's presence, according to Detective Sergeant Nel, Mr Ndimande informed him that the plaintiff shot Ms Alberts. At this point, Inspector Gordon became aware that Mr Ndimande's admission statement is contradictory. However he did not question Mr Ndimande further to clarify this important contradiction. I find this disturbing. From the record, it also does not seem that he brought the contradiction in Mr Ndimande's admission to Detective Sergeant Nel. He instead accompanied Detective Sergeant Nel when he went to arrest the plaintiff.

[48] These concerns raise a serious question about Inspector Gordon's credibility. From the record, I find that Inspector Gordon was not a credible witness.

[49] The veracity of Inspector Gordon's evidence is further weakened by the following:

49.1 From the evidence that I have detailed in paragraphs 36-40 above, we see that things took an interesting turn when Mr Ndimande and the plaintiff interacted

with officials outside the SAPS for the first time since they were arrested. When he was taken to Magistrate Visagie and when he appeared in court for the first time, Mr Ndimande complained to these officials of being tortured and ill-treated by Inspector Gordon. This supports the probability that until then, they only came into contact with SAPS officials who they perceived to be one company who could not be trusted.

49.2 Magistrate Visagie's observed injuries on Mr Ndimande a few days after his arrest: I find it inexplicable that Superintendent Eksteen did not observe any injuries on Mr Ndimande when he was brought to her on the day of his arrest. Magistrate Visagie's evidence ought to be given more weight than that of Superintendent Eksteen for the following reasons:

49.2.1 She is independent of the SAPS. For that reason, Mr Ndimande is likely to be comfortable to complain to her about Inspector Gordon's ill-treatment;

49.2.2 As a judicial officer one expects her to be more arduous in her assessment of Inspector Gordon's conduct and more eager not only to respect Mr Ndimande's rights as a person suspected to have committed an offence, but to also be more prudent in exercising her duty to protect Mr Ndimande's rights;

49.2.3 Injuries are also not visible on photographs of Mr Ndimande taken when he was in Superintendent Eksteen's office, yet when he attended Magistrate Visagie's office a few days later, Magistrate Visagie observed injuries on Mr Ndimande.

[50] Magistrate Visagie's evidence raises the following probabilities:

50.1 Mr Ndimande did not have injuries because Inspector Gordon deliberately used a plastic bag to torture him so that he does not leave any trace of the torture.

50.2 Superintendent Eksteen either did not take care to observe injuries on Mr Ndimande prior to the pointing out; or

50.3 at the very worst, Superintendent Eksteen ignored the injuries to protect her colleague.

[51] The first conjecture does not explain why Mr Ndimande was bruised from being kicked by Inspector Gordon's colleagues. For that reason, I find this conjecture improbable.

[52] When Superintendent Eksteen was preparing Mr Ndimande for the pointing out, photographs of Mr Ndimande were taken. Injuries cannot be seen on photographs taken by Sergeant Viljoen prior to pointing out. There is no evidence on record that photographs of



Mr Ndimande were taken at close range. If they were taken, the trial record does not reflect that such photographs were admitted during the trial. They were also not part of the appeal record. Only two photographs of the plaintiff taken during the pointing out were taken of him only wearing underpants. From these pictures, a conclusion cannot be drawn that he did not have injuries when he attended Superintendent Eksteen's office. This supports the second conjecture that I deal with in paragraph 51.2 above.

[53] From the record, Superintendent Eksteen's evidence seems to be straight forward. I have no reason to doubt her credibility as a witness. There is also no evidence of collusion between her and Inspector Gordon. Apart from the uneven evidence of Superintendent Eksteen and Magistrate Visagie in respect of Mr Ndimande's injuries, the trial record does not provide any basis for second guessing Superintendent Eksteen's evidence.

[54] This leaves me, particularly in light of the unreliable nature of the pictures of Mr Ndimande taken prior to the pointing out, with the second conjecture being more probable. I therefore find Superintendent Eksteen's evidence on this aspect unreliable. I am not satisfied that she properly observed injuries on Mr Ndimande before the pointing out.

[55] I am of the view that the report of assault and torture given by Mr Ndimande to Magistrate Visagie; and that given by the plaintiff and Mr Ndimande to the presiding Magistrate when they first appeared in court is the straw that breaks the camel's back. These are the first officials outside the safety and security service to whom they reported their assault and torture. They probably felt safe to report to them because they are not part of the safety and security service. Until then, apart from the people they interacted with at their respective residences when their places of abode were searched, they only came into contact with SAPS officers. A few of these SAPS officers either joined in the assault or ignored their requests for help; for example, the three officers and a white lady who walked into Inspector Gordon's office during Mr Ndimande's interrogation.

[56] Given that Magistrate Visagie observed injuries on Mr Ndimande a few days after he was allegedly tortured, and in the light of my finding that Superintendent Eksteen failed to properly observe injuries on Mr Ndimande, it is probable that Mr Ndimande had these injuries when he attended Superintendent Eksteen's office.

[57] Interestingly, Magistrate Visagie was not called to testify in the court *a quo*. Given the contents of the aborted confession statement she took from Mr Ndimande, it is not far-fetched to draw a negative inference that she was not called to testify because her evidence

would not have supported the defendant's version. I therefore draw a negative inference from the defendant's failure to call Magistrate Visagie to testify at the trial.

[58] Given that Inspector Gordon did not have any evidence linking any suspect to Ms Alberts's murder, coupled with lack of clarity regarding what led him to suspect Mr Ndimande to be party to Ms Alberts's murder in the first place, gives rise to the probability that his only prospect of securing a conviction against the plaintiff and Mr Ndimande is their confession to murdering Ms Alberts. This would probably give him sufficient reason to torture and assault Mr Ndimande.

[59] The concerns that I have regarding Inspector Gordon's evidence (see paragraphs 45 to 49), as well as the totality of the evidence strongly support a probability finding that Inspector Gordon tortured and ill-treated the plaintiff and Mr Ndimande as alleged. His version is improbable. I therefore agree with the court *a quo*'s rejection of Inspector Gordon's evidence.

[60] Next I determine whether the plaintiff's arrest was based on reasonable grounds.

#### *Unlawful arrest*

[61] The defendant's case on appeal rests solely on whether Detective Sergeant Nel as the official who arrested the plaintiff, harboured a reasonable suspicion as required by section 40 (1) (c) of the CPA, that the plaintiff was involved in Ms Alberts's murder.

[62] When he arrested the plaintiff, Detective Sergeant Nel relied on two nebulous reports on the plaintiff's participation in Ms Alberts's murder, namely the vague information received from Inspector Gordon regarding Obakeng and Mr Ndimande and an admission statement by Ndimande implicating the plaintiff. He ought to have enquired deeper into the reasons why Inspector Gordon wanted the plaintiff arrested. Detective Sergeant Nel executed Inspector Gordon's request to arrest the plaintiff without properly enquiring into the reasons for this request. Bearing in mind the judgment in **Powell NO**, that suspicion is established on a continuum, the beginning of which is when a suspicion rises without proof and is completed when *prima facie* proof is obtained; at the very least Detective Sergeant Nel should have established whether there is evidence that links the plaintiff to Ms Alberts's murder. The implication of the plaintiff by Mr Ndimande only served to prompt a suspicion. It was insufficient to establish it. Detective Sergeant Nel failed to independently formulate a suspicion regarding the plaintiff's involvement in Ms Alberts's murder. The probabilities

suggest that his decision to arrest the plaintiff was swayed by Inspector Gordon's request to assist him to arrest the plaintiff.

[63] The cursory manner in which Detective Sergeant Nel dealt with Inspector Gordon's request relegates his role to that of a person who executed an instruction to arrest the plaintiff without independently formulating a suspicion as required by section 40 (1) (c) of the CPA. His conduct was nothing short of that of a messenger who accepted information given to him without questioning it.

[64] There is a pivotal interplay between section 40 (1) (c) of the CPA and section 12 (1) (a) of the Constitution. In **Coetzee, O' Regan's J** defined the content of the right of a suspect or an accused person not to be deprived of freedom arbitrarily or without just cause to include not only the procedure followed in arresting a suspect, but also the substantial reasons therefore. To accept Detective Sergeant Nel's evidence that he arrested the plaintiff on reasonable suspicion will pay lip service to this important constitutional right - having regard to its definition by O'Regan J. In the absence of evidence linking the plaintiff to Mrs Alberts's murder, his reliance on Ndimande's so-called admission also falls short of the requirement for substantial reasons for an arrest as required by section 12 (1) (a) of the Constitution.

[65] I find that when he arrested the plaintiff, Detective Sergeant Nel did not have a reasonable suspicion that the plaintiff was involved in Mrs Alberts's murder as required by section 40 (1) (c) of the CPA. I also find that he lacked substantive reasons to arrest the plaintiff as required by section 12 (1) (a) and (c) of the Constitution. Therefore I find that the Plaintiff's arrest was unlawful.

#### *Unlawful detention*

[66] In light of the unlawfulness of the plaintiff's arrest, his detention from 25 August 2004 to 30 August when he first appeared in court is inherently unlawful. This is in line with the decision in **Tyokwana**. It is common cause that Inspector Gordon was responsible for the plaintiff's detention. His detention of the plaintiff under the circumstances mapped out above (knowing that Mr Ndimande's purported admission statement was induced by torture, that it was contradictory and that in the absence of this precarious information, he lacked evidence that links the plaintiff to Ms Alberts's murder) amounts to an arbitrary deprivation of his freedom without just cause. There was no substantial reason for the detention. Therefore,

the plaintiff was also detained in violation of section 12 (1) (a) and (c) of the Constitution. I confirm the court *a quo*'s finding that his detention was unlawful.

[67] When Mr Ndimande and the plaintiff appeared in court on 30 August 2004 and on subsequent occasions until the plaintiff raised the question of bail in October 2004, it appears that they were not informed of their right to apply for bail as contemplated in section 50 (1) (b) read with section 50 (6) (c) of the CPA.<sup>25</sup> When he was remanded in custody by the presiding Magistrate, it does not appear that the plaintiff was informed of the reason for his detention. From the first day of the plaintiff's appearance in court, there appears no reason why he was detained further because Inspector Gordon knew that he did not have any evidence that linked him to Ms Alberts's murder. He did not inform the Public Prosecutor and as a result this information was not placed before the presiding Magistrate. It does not seem that an enquiry into the reasons for the plaintiff's further detention was conducted when the plaintiff appeared in court on 25 August 2004. Therefore, in line with the decision in **Zealand** and in **Ndlovu**, the presiding Magistrate's order remanding the plaintiff in custody did not sanitize the unlawfulness of his detention.

[68] When the Plaintiff applied for bail some two months after he first appeared in court, from the appeal record it also does not appear that Inspector Gordon played open cards with the court regarding the absence of evidence linking the plaintiff to Ms Alberts's murder. Again, from the trial record, it does not appear that the presiding Magistrate enquired into the reasons for the plaintiff's continued detention during the bail application. Inspector Gordon's evidence is silent on this aspect. He opposed bail on the basis that he needed to take blood samples from the plaintiff and Mr Ndimande for DNA analysis purposes. The presiding Magistrate refused to grant the plaintiff bail because Inspector Gordon informed him that the plaintiff does not have a fixed address. There is no evidence why Inspector Gordon did not accept the address of the plaintiff's abode in Chanclyf where he conducted a search for the murder weapon.

[69] After Mr Ndimande and the Plaintiff were denied bail, they were further remanded in custody for three months. Inspector Gordon only arranged for the collection of Mr Ndimande

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<sup>25</sup> Section 50 (1)(b) reads:

A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings', and

Section 50 (6)(c) reads:

The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.

and the plaintiff's blood samples close to their next date of appearance in court, further unjustifiably prolonging their stay in detention.

[70] The plaintiff and Mr Ndimande appeared in court several times thereafter. On every occasion of their appearance they were remanded in custody on the basis that the DNA results were pending. After spending approximately 428 days in detention, charges against them were withdrawn and the plaintiff was released due to lack of evidence. No charges were put to them.

[71] The plaintiff was detained without a just cause from the first day for the following reasons:

- 71.1 his detention was predicated on an unlawful arrest;
- 71.2 there was no evidence linking him to Ms Alberts's murder. Therefore there was no substantive reason for his detention on each occasion he was remanded in custody;
- 71.3 he was not informed of his right to apply for bail forthwith after his arrest and when he first appeared in court;
- 71.4 when he eventually applied for bail his application was unreasonably opposed by Inspector Gordon who failed to disclose information that would have counted in the plaintiff's favour;
- 71.5 the presiding Magistrate does not seem to have conducted an enquiry into the reasons for the plaintiff's further detention at any stage during the plaintiff's detention.

[72] In light of the foregoing, I find that the plaintiff's detention from 30 August 2004 to 18 October 2005 was unlawful.

### *Damages*

[73] The amount to be awarded for damages falls within the discretion of the trial court.<sup>26</sup> It may only be set aside by the appeal court in the event of a misdirection. The award made by the court *a quo* in respect of both the unlawful arrest and unlawful detention and the loss of earnings was limited to the period of detention found to be unlawful. Having found that the whole period of the plaintiff's detention was unlawful, sufficient cause exists to set aside the amount awarded by the court *a quo* in respect of both heads of damages and to replace it

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<sup>26</sup> The court exercises a judicial discretion. See **Merber v Merber** 1948 (1) SA 446 (A) at 452-453.

with an award that accords with the whole period that the plaintiff spent in unlawful detention.<sup>27</sup>

*Quantum for loss of income*

[74] When he was arrested, the plaintiff worked on a construction site 7 days a week. He earned R120 per day, paid fortnightly. Counsel for the defendant argued that he was employed on a temporary capacity therefore the amount of R720 awarded by the court *a quo* in respect of loss of earnings was appropriate. The award made by the court *a quo* was based on 6 days detention from the day the plaintiff was arrested to the day of his first appearance in court. No evidence was placed before the court *a quo* that his contract would have expired on 5 September 2004 or at any time during the period of his detention. There is therefore no basis for limiting his loss of earnings as argued by Counsel for the defendant. The concern raised by Counsel for the defendant is best dealt with by allowing a contingency deduction. In my view, it is appropriate in the circumstances of this case to allow the plaintiff the proverbial 5% contingency deduction<sup>28</sup> to his proven past loss of income.

[75] The plaintiff spent 428 days in unlawful detention. He ought to have worked a 45 hour week by law.<sup>29</sup> No evidence was placed before the court *a quo* regarding his conditions of employment in respect of the additional 2 days that he worked weekly, particularly whether he was paid overtime for any work done in excess of 45 hours per week. However, given the length of the plaintiff's detention, it is unconscionable that he would have worked for 428 days flat out. This would have amounted to a 63 hour week, which would have been unlawful. This issue was not raised in the court *a quo*, probably because the award made by the court *a quo* in respect of loss of earnings was only for 6 days. This issue was also not argued on appeal. However, the interests of justice require that I take it into account in determining the plaintiff's loss of income.

[76] In the absence of evidence regarding overtime and compensation for it, the plaintiff has only proved his entitlement to loss of earnings for a 45 hour week of work from 30 August 2004 to 18 October 2005. This translates to 296 working days. He would have therefore earned R35, 520 during the period of his unlawful detention. The value of this

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<sup>27</sup> *Minister for Safety and Security v Scott* 2014 (6) SA 1 (SCA) at para 42 and *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at para 23.

<sup>28</sup> R Koch, *The Quantum Yearbook* 2015 at pg. 120.

<sup>29</sup> Section 9 of the Basic Conditions of Employment Act 75 of 1997.

amount on 31 March 2016 is R62, 705.23 after allowing a 5% contingency deduction.<sup>30</sup> In the premises, the plaintiff is entitled to damages for loss of earnings in the latter amount.

*Quantum for unlawful arrest and detention*

[77] Two of the rights of the plaintiff that were infringed are embodied in the Constitution; namely, the right to dignity and the right not to be deprived of one's freedom without just cause. The Constitutional Court has recognised a delictual claim for damages brought under section 12(1) (a) of the Constitution which is based on the unreasonable and unjustifiable infringement of an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause. See **Zealand**.<sup>31</sup>

[78] A determination of the plaintiff's damages for unlawful arrest and detention, involves an assessment of the extent of violation of affected personal rights and the duration of the infringement. It necessitates an enquiry into the following objective and subjective factors: (a) loss of reputation in the eyes of others, (b) the emotional effect of the infringement on the plaintiff, (c) the manner of arrest and (d) the conditions under which he was detained.<sup>32</sup>

[79] It is incumbent upon the plaintiff to lead detailed evidence regarding his personal circumstances, the events surrounding the arrest as well as all relevant details concerning the detention including its nature, duration and incidents that may have occurred.<sup>33</sup> The plaintiff was arrested at work in the presence of his superior and colleagues. No evidence was led regarding the size of the police contingent when he was arrested and on the manner in which the arrest was executed. From the evidence the following people accompanied Detective Sergeant Nel when he attended the plaintiff's place of work to arrest him: Inspector Gordon, Mr Ndimande and an undisclosed number of members of the tracing unit. Also no evidence was led regarding the number of people who witnessed the unauthorised search of his abode, the emotional and psychological trauma of the arrest, the conditions in which the plaintiff was detained while awaiting trial as well as the plaintiff's pre- and post- detention quality of life and state of health.

<sup>30</sup> Calculated from [www.inflationcalc.co.za](http://www.inflationcalc.co.za) based on an annual inflation increase of 6.8% from 18 October 2005 to 31 March 2016.

<sup>31</sup> At 24, 25 and 35.

<sup>32</sup> **Takawira v Minister of Police** 2013 JOL 30554 at 42 and 43.

<sup>33</sup> **Sithebe v Minister of Police** (31236/2012) [2014] ZAGPJHC 201 (4 August 2014).

[80] In ***Mokoena v Minister of Safety and Security***<sup>34</sup> the court per Spilg J (Modiba AJ concurring) stated as follows regarding failure by a plaintiff to lead evidence that allows the court to take all relevant factors into account when determining the amount of damages for unlawful arrest and detention:

"It would therefore be incorrect to conclude that a party will only be entitled to a nominal award if he or she does not eloquently and vividly describe the effects of the arrest and detention. Moreover the court is entitled to assume that, barring any evidence to the contrary, a plaintiff will suffer a loss of self-worth, will perceive that others have a lower estimation of him, that he will suffer embarrassment, is likely to lose a degree self-confidence and will experience vulnerability, humiliation and a feeling of being impotent as a consequence of a wrongful arrest and detention."

[81] From the trial record, there is cause to find that the plaintiff was humiliated before his colleagues and superior when he was arrested. Given the chain of events after his arrest, including a prolonged unexplained detention period as well as refusal of bail without justification as dealt with in the preceding paragraphs, I am satisfied that the plaintiff suffered emotional trauma as a result of the unlawful arrest and unlawful detention. On the strength of the judgment in ***Mokoena***, despite the shortcomings in the plaintiff's evidence regarding how the unlawful arrest and unlawful detention has affected him and in the absence of contrary evidence, I find that as a result of the trauma endured during his arrest and detention, the plaintiff has suffered loss of self-worth, self-confidence, low estimation of his perception by others, humiliation and impotence.

[82] In reaching a conclusion regarding the amount to be awarded to the plaintiff in respect of general damages for unlawful arrest and detention I have considered the following cases:

82.1 ***Seymour***: R90 000 in 2006 - 5 days detention but only one night in a cell;

82.2 ***Makgae v Minister of Safety and Security***:<sup>35</sup> R75 000.00 in 2014 – 2 nights detention.

82.3 ***Sobopha v Minister of Police***:<sup>36</sup> R60 000.00 in 2013 – 20 hours detention;

82.4 ***Baasden v Minister of Safety And Security***:<sup>37</sup> R120, 000.00 in 2014 – 24 hours detention;

82.5 ***Khanyile v Minister of Police***:<sup>38</sup> R110 000.00 in 2013 – 56 hours detention;

82.6 ***Lamula and Others v Minister of Police***:<sup>39</sup> R100 000 in 2013 – 5 days detention;

<sup>34</sup> Unreported judgment, Gauteng Local Division case number 2014/ A3084, delivered on 17 February 2015.

<sup>35</sup> [2014] ZAGPPHC 937

<sup>36</sup> [2014] ZAGPJHC 189

<sup>37</sup> 2014 (2) SACR 163 (GP)

<sup>38</sup> [2013] ZAGPJHC 234

<sup>39</sup> [2013] ZAGPJHC 130.



82.7 **Duarte v Minister of Police:**<sup>40</sup> R75 000 in 2013 for arrest and 4 hours detention only- separate award for assault)

82.8 **Phasha v Minister of Police:**<sup>41</sup> R80 000 in 2012 – 9 hours detention;

82.9 **Sithebe v Minister of Police:**<sup>42</sup> R140, 000 in 2014 – 3 days detention;

82.10 **Wojii** (supra): R500, 000 from 12 December 2007 to 13 January 2009 (397 days).

[83] No amount of money can compensate the plaintiff for the infringement of his freedom, human dignity and security of the person that he endured at the hands of Detective Sergeant Nel and Inspector Gordon during the events that gave rise to this claim.

[84] In the premises, I am satisfied that an award of R750, 000 for general damages for the 428 days the plaintiff spent in detention is appropriate.

[85] The defendant's cross appeal fails.

## LEGAL COSTS

[86] With the plaintiff having completely succeeded on appeal, it is appropriate that costs follow the course. No evidence was led regarding why a different order in respect of costs should be made in the circumstances. Given the plaintiff's entitlement to costs of suit, it is superfluous to determine the appropriateness of an adverse cost order against him where he succeeds in respect of the cause of action but only proves a nominal proportion of the amount set out in his particulars of claim. This is one of the questions the plaintiff sought to be determined on appeal.

### *Costs of two counsel*

[87] The plaintiff was represented by Advocate Geach SC assisted by Advocate Seeima, a junior. Counsel for the state argued that this matter did not warrant briefing two counsel; therefore, in the event that the plaintiff is successful, he is only entitled to the costs of 1 counsel. I disagree. This was not a simple unlawful arrest and detention case. Relative to other similar cases, the appeal record was long. It approximates over 1,000 pages. The evidence is intricate and required careful consideration. The jurisprudence on the issues to be decided is vast.

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<sup>40</sup> [2013] ZAGPJHC 51.

<sup>41</sup> [2012] ZAGPJHC 261.

<sup>42</sup> [2014] ZAGPJHC 201.

[88] In the premises, I find that briefing two counsel was warranted. I therefore allow the Plaintiff the costs of two counsel.

## ORDER

I therefore make the following order:

1. The appeal succeeds.
2. The defendant's cross appeal is dismissed.
3. Paragraph 1 of the order granted by the court *a quo* on 17 June 2011 is confirmed.
4. Paragraphs 2, 3, and 4 of order granted by the court *a quo* on 17 June 2011 are set aside and replaced with the following:
  - 4.1 The plaintiff's detention from 30 August 2004 to 18 October 2005 is declared unlawful;
5. Paragraphs 1 and 2 of order granted by the court *a quo* on 30<sup>th</sup> September 2011 are set aside and replaced with the following:
  - 5.1 Judgement in the amount of R812,705.23, is awarded in favour of the plaintiff;
  - 5.2 The defendant shall pay the plaintiff's costs of suit in both the court *a quo* and in this court including the costs of two counsel.

OLIVIER AJ

I agree

MSIMEKI J

It is so ordered

MSIMEKI J

MODIBA, AJ

OLIVIER AJ

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LEGAL REPRESENTATIVES:

Counsel for the Appellant/ Plaintiff:

Mr Geach SC assisted by Mr Seeima

Instructed by:

A. P. Phefadu Inc.

Counsel for the Respondent/ Defendant:

Mr Mokotedi

Instructed by:

The State Attorney