IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***9th SEPTEMBER 2016*** Signature: _____

9/9/2016.

CASE NO: 2014/15210

In the matter between:

NDLOVU: LINDIWE Plaintiff

and

MINISTER OF POLICE Defendant

JUDGMENT

ADAMS AJ:

[1]. In this action the plaintiff, who is a Zimbabwean citizen, claims delictual damages from the defendant in his nominal capacity as Head of the South African Police Services *('SAPS')*. In the early hours of the morning (shortly after midnight) on Monday, the 22nd October 2012, the plaintiff was arrested and taken into custody by members of the SAPS on the strength of a warrant issued by the Khutsong Magistrate's Court on the 19th July 2011 for the arrest of one *'Lindiwe Ndlovu'*. It was a case of mistaken identity in that by sheer coincidence the plaintiff shared her name, being Lindiwe Ndlovu, as well as a date of birth with the person against whom the warrant was issued. However, the plaintiff was not the person for whom the writ was intended.

[2]. Plaintiff's claim for damages is in the nature of a *solatium,* and her cause of action, being in respect of unlawful arrest and detention, is the *actio iniuriarum*.

[3]. It is common cause between the parties that the warrant on which the plaintiff was arrested was not bad in law on account of a defect in its substance or form. There were therefore no issues relating to the regularity and/or the validity of the warrant of arrest.

[4]. The plaintiff was arrested and taken into police custody at the Beit Bridge Border Post shortly after midnight on Monday, the 22nd October 2012, and transported to the Musina Police Station, where she was detained in the Police holding cells until her appearance in the local Magistrates Court on the same day at about 12H00. When she was arrested she protested her innocence and explained to the arresting officer that, with reference to the warrant which indicated that the suspect was resident at an address in

Khutsong, she had never been to that place. In fact, so she informed the police officer, she did not even know where Khutsong was as she was ordinarily resident in Rosettenville in Johannesburg. The police were not vaguely interested in *'her stories'* as they had formed the view that she is the suspect mentioned in the writ. During the course of the day on which she was arrested, that is Monday, the 22nd October 2012, she briefly appeared in the Musina Magistrate's Court. All that this court did was to order, pursuant to the warrant for her arrest, that the plaintiff be transferred *'in custody'* to Khutsong to appear in the Khutsong Magistrates Court on the 29th October 2012.

[5]. On the morning of Friday, the 26th October 2012, the plaintiff was driven as a passenger in the back seat of a Sedan Police vehicle to Khutsong. They arrived in Khutsong at about 10H00 on Saturday, the 27th October 2012, and she was detained in the Khutsong police cells from then until her appearance in the local Magistrate's Court on the Monday, the 29th October 2012. No charges were put to her because by then it had become clear that she was not the suspect in the criminal matter in question. At about midday on that day she was officially released from custody, and arrangements were made for her to be returned by car to Musina to collect her personal belongings. She arrived back in Musina at about midnight on the same day. This means that the plaintiff was detained for a period of 8 (eight) days.

THE DEFENDANT'S DEFENCES

[6]. An arrest or detention is *prima facie* wrongful, and it is not necessary to allege and prove wrongfulness. It is for the defendant to allege and prove the lawfulness of the arrest and detention. Thus, when police have arrested and detained a person, once the arrest and detention are admitted the onus of proving the lawfulness rests on the State.

[7]. In *Zealand v Minister of Justice & Constitutional Development & Another,* 2008(4) SA 458 (SCA), the court comments as follows at par [25]:

> *'This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is* prima facie *unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In* Minister van Wet en Orde v Matshoba, *the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the* rei vindicatio *a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.'*

[8]. In his plea the defendant alleges that the arrest was justified in that the arresting officer acted under a valid and regular warrant for the arrest of *'Lindiwe Ndlovu',* and when arresting the plaintiff he reasonably believed that the person mentioned in the writ was being arrested.

[9]. In that regard, the defendant placed reliance on the provisions of section 46(1) of the Criminal Procedure Act 51 of 1977 (as amended) *['the CPA'],* which provides as follows:

> *'Any person who is authorised to arrest another under a warrant of arrest or a communication under section 45 and who in the reasonable belief that he is arresting such person arrests another, shall be exempt from liability in respect of such wrongful arrest'.*

[10]. It was submitted by Mr Kruger, who appeared on behalf of the plaintiff, that section 46(1) of the CPA, whilst exempting the arresting officer from personal liability, does not justify the arrest in that is does not render the arrest lawful. In support of his submission he relies on the case of: *Minister of Safety & Security v Kruger,* (183/10) [2011] ZASCA 7; 2011 (1) SACR 529 (SCA) (8 March 2011). This case related to section 55(1) of the South African Police Services Act no 68 of 1995, which contains an indemnity provision similar to the one contained in the above quoted section 46(1) of the CPA.

[11]. At paras [16] to [19] Nugent JA comments as follows, relative to the reliance on the exemption provision:

> *'[16] The terms in which the submission on behalf of the Minister was framed in the heads of argument points immediately to its fallacy. It is not disputed that neither of the police officers was aware that the warrant was bad in law and that they were thus exempted from liability under that section. Reminding us that vicarious liability is a secondary liability counsel for the Minister submitted that the effect of the exemption was that the police officers* 'committed no delict' *and there is thus no room for vicarious liability.*

[17] That construction of the section is not correct. A police officer – or anyone else for that matter – who deprives a person of his or her liberty without legal justification commits a delict, and is ordinary liable for the damage that is caused by the delictual act. The section does not purport to render the act lawful. In its terms it does no more than to relieve the police officer of the consequences of the delictual act. The act remains unlawful and, in accordance with ordinary principles, the employer is vicariously liable for its consequences.

[18] The same argument was advanced and rejected in Goldschagg v Minister van Polisie. *In that case the question arose under s 31(1) of the Police Act 7 of 1958, which is in material respects the same as the provision that is before us. Botha J summarily rejected an argument that the effect of the section was that a police officer who executes a defective warrant does not commit an unlawful act. The learned judge also found that while the section exempted the police officer from the consequences of the unlawful act it did not similarly exempt the state. (The decision was reversed on appeal but the issue that is now before us was not considered.)*

[19] Thirion J reached the same conclusion in De Welzim v Regering van KwaZulu *in relation to s 34(2) of the KwaZulu Police Act 14 of 1980. The learned judge said the following:*

> *'By 'n beskouing van art 34(2) is dit duidelik dat dit nie die handeling van die lid van die Mag verontskuldig nie. Dit verskaf nie 'n skulduitsluitingsgrond nie en ook nie 'n regverdigingsgrond ten opsigte van die handeling nie. Dit stel slegs die lid vry van aanspreeklikheid sonder dat dit die kwaliteit of onregmatigheid van die daad self raak. Gevolglik beïnvloed dit nie die aanspreeklikheid van die KwaZulu Regering nie.'*

[12]. I have no doubt that the aforegoing principles should find application in relation to the provisions of section 46(1) of the CPA. The aforesaid section is worded and couched in terms very similar to the wording and formulation of section 55(1) of the SAPS Act 68 of 1995. The aforesaid section has as it's main, if not exclusive object the same purpose as that of section 46(1) of the CPA, which is to exempt from liability the individual police officer or person for the delict. The point therefore is that the section does not purport to render the act lawful. In its terms it does no more than to relieve the police officer of the consequences of the delictual act. The act remains unlawful and, in accordance with ordinary principles, the employer is vicariously liable for its consequences.

[13]. Accordingly, I am in agreement with the submissions on behalf of the plaintiff that the unlawful arrest has not been justified by the provisions of section 46(1) of the CPA. I also agree with the submission by Mr Kruger that, in any event, the defendant did not begin to discharge the onus on him to proof justification of the arrest in the light of the evidence that the wrong person was arrested. For example, there was no evidence placed before me in relation to a *'mini investigation'* which ought to have been conducted by the arresting officer once faced with the plaintiff's claim that she is not the person mentioned in the warrant of arrest. The police officer ought reasonably to have made at least one telephone call to the Khutsong Police Station, which probably would have revealed the true state of affairs and would have exonerated the plaintiff. This is in fact what happened one week later when the plaintiff arrived in Khutsong and, without much ado, was released without being charged.

[14]. In that regard, I was referred to the case of *Minister of Safety & Security v Van der Heever*, 1982(4) SA 16 (CPD). At page 20 Odes AJ comments as follows:

'Nieteenstaande die verandering van die bewoording in art 46 van die huidige Strafproseswet is ek van mening dat die bedoeling van die Wetgewer steeds dieselfde is, naamlik om iemand van die gevolge van 'n onregmatige arrestasie te onthef mits hy op redelike gronde geglo het dat die persoon wat hy gearresteer het die persoon is wat gearresteer moes word. Onder art 46 moet die persoon 'redelikerwys meen' *dat hy die regte persoon in hegtenis geneem het terwyl art 31 van die ou Wet vereis het dat hy* 'op redelike en aanneemlike gronde' *so moes optree. Die verskil in bewoording doen geen afbreuk aan die Wetgewer se oogmerk nie en die toets wat deur VIEYRA WN R in die Ingram- saak supra neergelê is, bly na my mening steeds van toepassing op die bepalings van art 46.*

Die appellant se advokaat het toegegee dat die bewyslas op die appellant rus om te bewys dat die polisie redelikerwys opgetree het en dat die appellant derhalwe op die beskerming wat volgens art 46 aan hom verleen word, geregtig is. (Ingram se saak supra te 227D - E; Mabaso v Felix 1981 (3) SA 865 (A) at 873 G - 874B; Brand v Minister of Justice and Another 1959 (4) SA 712 (A) at 714E; Newman v Prinsloo and Another 1973 (1) SA 125 (W) te 126G - 127G.)

F Die landdros het basies op hierdie grondslag die feite van die saak benader en het bevind dat die betrokke konstabels nie aan die toets wat deur VIEYRA WN R in die Ingram- saak supra voorgeskryf is, voldoen het nie. Ek kan geen fout met die landdros se beredenering in hierdie opsig vind nie. Konstabel Cleophas was bereid om bloot op 'n vae beskrywing wat talle mense sou gepas het die respondent in hegtenis te neem. Hy het geweet dat die respondent en sy vrou albei op verskeie geleenthede ontken het dat die respondent die persoon is wat in die lasbrief bedoel is. Hy moes agterdogtig geraak het toe daar by die gegewe woonadres vasgestel is dat 'John van der Heever' lanklaas daar gewoon het. Hy het geweier om die

respondent toe te laat om sy identiteitsdokumente by die huis te gaan haal. Nòg hy nòg Williams het enige poging aangewend om die identiteitsnommer wat verstrek is op die SAP69 vorm met dié van die respondent te vergelyk. Hierdie eenvoudige stap sou in die omstandighede deurslaggewend gewees het want Rudolf van der Heever het sy korrekte identiteitsnommer aan die landdros verstrek. Dit klop inderdaad met die nommer wat op sy SAP69 verskyn. Hierdie inligting was in die besit van die polisie vir amper 'n maand voor die arrestasie. Die houding en optrede van konstabel Cleophas was onverskillig; in sy eie woorde 'ek het net belanggestel in die man wat genoem was in die lasbrief'. *Williams kon die hele probleem opgelos het met 'n eenvoudige verwysing na die identiteitsnommer.*

Mnr Van Staden het aan die hand gedoen dat dit nie van die polisie verwag kan word om elke keer 'n <u>mini-ondersoek</u> te hou nie. Hierdie betoog gaan ook nie op nie. Soos EKSTEEN R dit gestel het in die saak Thompson and Another v Minister of Police and Another, *1971 (1) SA 371 (OK) te 374H:*

> 'The arrest itself is prima facie such an odious interference with the liberty of the citizen that animus injuriandi is thereby presumed in our law...'

... ...

Daar was meer as genoeg in die omringende omstandighede om die agterdog van die polisie te wek dat hulle besig was om moontlik die verkeerde persoon te arresteer. Hulle moes, myns insiens, uiters versigtig te werk gegaan het en dit het hulle nie gedoen nie. Hulle het nie redelikerwys opgetree nie.

[15]. Applying these principles to the case *in casu,* I am of the view that the arresting officer acted unreasonably, which means that the arrest and detention was unlawful.

IS THE DEFENDANT LIABLE FOR THE DETENTION AFTER THE COURT APPEARANCE?

[16]. Mr Mphahlele, Counsel for the Minister, argued that once the plaintiff was brought to Court, the defendant's control over the process ended and therefore any possible delictual liability seizes.

[17]. This submission however loses sight of the fact that the arrest triggered the subsequent events and resulted in the chain of events of which her unlawful detention for an additional 7 (seven) days was an integral part.

[18]. Also, in the SCA matter of *Minister of Safety and Security v Van der Walt*, (1037/13) [2014] ZASCA 174 (19 November 2014), deals with this issue at par [14] and [15] as follows:-

> ***'Unlawful Detention***
>
> *[14] There was no conceivable reason for the refusal by the magistrate to release the respondents on bail. They remained in custody because of the groundless charge of armed robbery inserted in Annexure 'A' and the collective negligence of Phoshoko, Zinn and the magistrate. It follows that their detention for the whole period was unlawful.*
>
> ***The claim against the Minister of Safety and Security***

[15] Phoshoko did not deny that he was present in court during the respondents' first court appearance. As an investigating officer it can be inferred that he knew the contents of the docket. It can also be inferred that, as he was present in court during that appearance, he heard the magistrate informing the respondents that there was an additional charge of armed robbery. He failed to ensure that the correct information was placed before the magistrate that there was no basis for this charge and thus failed to do what was expected of a reasonable investigating officer in his position. He could have done so through Zinn who was present in court. The fact that the magistrate ignored the respondents when they tried to reason with her did not relieve Phoshoko of his duty as an investigating officer to do so. After the adjournment on 26 May 2004 he again adopted a supine attitude. A reasonable police officer would have followed up immediately after the first appearance and thereafter done whatever was reasonably necessary to rectify the situation, including clarifying the position with Zinn, or the head prosecutor, or the magistrate. Had he made an effort after the first appearance to keep abreast of developments in the matter, he probably would have been aware that the respondents were scheduled to appear in court for a bail application on 27 and 28 May, and ensured that he was present to rectify the error. For all those reasons Phoshoko was negligent and his negligence caused the prolonged detention of the respondents after their first appearance on the 26 May to 1 June 2004. It follows that the high court's finding of liability against the Minister of Safety and Security must stand.

[19]. Accordingly, I am of the view that the defendant is liable to the plaintiff for the whole of the period during which she was in custody.

QUANTUM OF PLAINTIFF'S CLAIM

[20]. The plaintiff testified that when she was held at the Police Cells in Musina from Monday, the 22nd October 2012, to Friday, the 26th October 2012, conditions were tolerable. She was traumatised and understandably so because it was her evidence that up to that point in her life she had never been in trouble with the law and by implication had never set foot in a prison let alone be locked up in one. The cells were however clean, although the blankets they were given to sleep on were dirty. Because of the *'stress'* of being locked up, she hardly ate. Except for occasionally eating a slice of bread and drinking water daily, she did not consume anything during her stay in the police holding cells.

[21]. Her detention in the Khutsong Police cells from Saturday, the 27th October 2012, to the Monday, the 29th October 2012, when she appeared in court, was much more unpleasant. The cells were filthy and the ablution facilities were not working. Of particular concern to her was the fact the toilet was blocked, which would probably have been unbearable.

[22]. In *Minister of Safety and Security v Seymour,* 2006 (0) SA 320 (SCA) at paragraph [20] it was stated that:

> *'[20] Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.'*

[23]. In *Minister of Safety and Security v M Tyulu,* 2009 (5) SA 85 (SCA) Bosielo JA said the following at paragraph [26] of the judgment:

> *"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much – needed* solatium *for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of* injuria *with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum on such facts".*

[24]. In *Masisi v Minister of Security and Another,* 2011 (2) SACR 262 (GNP) at 267 paragraph [18] Makgoka J held as follows:

> *'The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly. In* Solomon v Visser and Another, *1972 (2) SA 327 (C), at 345C-E, it was remarked that, where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which*

result. To this I add that, where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice."

[25]. With regard to deprivation of freedom the following was said in *Takawira v Minister of Police*, (A3039/2011) [2013] ZAGPJHC 138 (11 June 2013):

> *'[29]. A delictual claim for damages may also be brought in terms of Section 12(1) (a) of the Constitution. By definition such a claim 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* Zeeland v Minister of Justice and Constitutional Development & Another, *[2008] ZACC 3; 2008 (4) SA 458 (CC), at paras 24, 25 and 35....42. It is trite that an enquiry into unlawful detention (as with arrest) seeks to determine the extent to which the various affected rights of personality were impaired and their duration. The enquiry involves both a subjective element based on the emotional effect of the wrong committed to the plaintiff (such as the humiliation or anguish of suffering the injustice, the loss of self-esteem and self- respect) and an objective impairment based on the external effects of the wrong (such as loss of reputation in the eyes of others).'*

[26]. When making an award in respect of damages for unlawful arrest and detention, the following comments in *Minister of Safety and Security v Seymour, supra*, should be kept in mind:

> *'[17]. The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The*

facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.'

[27]. Counsel on behalf of plaintiff referred me to the matter of *Buthelezi v Minister of Police*, 2015 JDR 0269 (GJ). In this matter the court awarded R400,000.00 as damages for unlawful arrest and detention. In awarding damages in that case the court took into consideration that plaintiff was detained from 7 December 2011 to 19 December 2011 and from 27 January 2012 to 5 April 2012. In all the circumstances, the court concluded that the plaintiff had been detained for a lengthy period.

[28]. In *Minister of Safety and Security v Tyulu,* 2009 (5) SA 85 (SCA), the Supreme Court of Appeal awarded R15,000.00 to a magistrate who was arrested and detained for 15 minutes. Bosielo JA at para [26] of his judgment had this to say:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an

approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts."

[29]. Bosielo JA in *Minister of Safety and Security; Jonathan Daniel v Johannes Francois Swart*, (194/11) (2012) ZASCA 16 (22 March 2012) considered that an amount of R50,000,00 was appropriate award for a respondent who was unlawfully arrested and detained for four and a half hours.

[30]. In *Nicolaas George van der Westhuizen v Minister of Safety and Security and Another*, Case No 14013/2010 SGHC (9 October 2012) the plaintiff was arrested around 07h30 on 29 November 2009 and was only released late in the afternoon of 30 November 2009, making the total period he was unlawfully deprived of his liberty and freedom 32 hours. Kgomo J awarded plaintiff damages in the sum of R400 000,00.

[31]. In *Woji v The Minister of Police*, (92/2012) [2014] ZASCA 108 (11 September 2014) the plaintiff was arrested as a result of mistaken identity and imprisoned for a period of thirteen months. He was placed in an overcrowded prison and was subjected to a gang that sodomised other prisoners. He was raped twice and as a result experienced difficulty in having sexual relations with his girlfriend. He also witnessed another prisoner being stabbed which made him fear for his life. He was allocated a single cell after eight months and as a result was isolated and lonely. He was awarded damages in the amount of R500,000.00.

[32]. In *Minister of Safety and Security v Never Ndlovu,* (788/11) 2012 ZASCA 189 delivered on 30 November 2012, Never Ndlovu, a Zimbabwean who repairs and installs programmes in software was detained from 24 October

2008 to 31 October 2008 and the court awarded him damages of R175,000.00 against the Minister of Safety and Security and the Minister of Justice and Constitutional Development and a further R55 000,00 against the Minister of Safety and Security.

[33]. The arrest and detention of the plaintiff was undoubtedly a traumatic experience for her. At the time of the incident she was a 43 year old female, returning from Zimbabwe, and the last thing she would have expected was to get incarcerated for something that she did not do. Thankfully she was not subjected to any assault or any further inhumane treatment, other than the fact that she had to endure rather unpleasant conditions whilst in custody. I do not for a moment intend detracting from the unquestionable trauma that the plaintiff would have been subjected to.

FINDINGS

[34]. In all the circumstances I have come to the conclusion that, having regard to the length of period for which the plaintiff had been detained and the prevailing conditions under which she was incarcerated, it would be appropriate to award the plaintiff the sum of R240,000,00 as damages for unlawful arrest and detention.

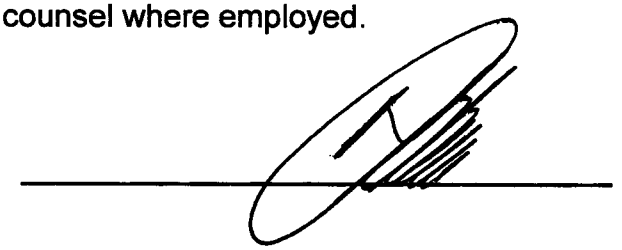
ORDER

[35]. In the result, I make the following order:

1. The ~~first~~ defendant is ordered to make payment to the plaintiff in an amount of R240,000.00.

2. The defendant is ordered to pay interest on the amount in (1) of the order at the rate of 10.25 per cent per annum from the date of service of the summons to the date of payment.

3. The defendant is ordered to pay the plaintiff's costs of suit. Such costs are to include the costs of two counsel where employed.



L ADAMS
Acting Judge of the High Court
Gauteng Division, Pretoria

HEARD ON:	6th September 2016
JUDGMENT DATE:	9th September 2016
FOR THE PLAINTIFF:	Adv T P Kruger SC, together with Adv L Badenhorst
INSTRUCTED BY:	Bares & Basson Attorneys
FOR THE DEFENDANT:	Adv M H Mpahlele
INSTRUCTED BY:	The State Attorney, Pretoria