




**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
21 November 2022	
.....	
DATE	SIGNATURE

Case no: 67836/2016

In the matter between:

**MATLOU MAKWENA JOSIAS**

**Plaintiff**

**and**

**MINISTER OF POLICE**

**1<sup>st</sup> Defendant**

**NATIONAL COMMISSIONER OF THE SOUTH  
AFRICAN POLICE SERVICES**

**2<sup>nd</sup> Defendant**

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**JUDGMENT**

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Mazibuko AJ

Introduction

1. The plaintiff claims damages arising from his arrest without a warrant and detention on 11 November 2015 on charges of armed robbery by the members of the South African Police Services, hereinafter referred to as 'SAPS'.

2. The first defendant is the head of the SAPS, cited in his official capacity in terms of Section 34 of the General Amendment Act 62 of 1955, read with Section 2 of the State Liability Act.
3. The Second Defendant is responsible for the management and control of the members of the SAPS.
4. The plaintiff's particulars of claim state that the plaintiff was arrested and detained for seventeen (17) days, from 11 November 2015 until 27 November 2015, when he was released on bail. The plaintiff pleaded not guilty to the charge on 13 April 2016 and was subsequently acquitted of the charge on 28 April 2016.
5. As a result of the arrest and detention aforesaid, the plaintiff alleges that he suffered deprivation of liberty, discomfort and inconvenience; and contumelia, privacy, dignity and bodily integrity. He avers that he suffered damages in the amount of R600 000.
6. The defendants denied that the arrest was unlawful as alleged and pleaded that the plaintiff was arrested by Sergeant Mhloti Benjamin Nkatingi, herein referred to as "Sergeant, Nkatingi", on reasonable suspicion that the plaintiff and one Letlalo had committed armed robbery. The defendants also denied that they are vicariously liable for the damages suffered by the plaintiff.
7. The defendants denied that the plaintiff was unlawfully detained from 11 November 2015 to 27 November 2015. They pleaded that on the day of the plaintiff's arrest, SAPS recommended that the plaintiff be granted bail of R1000. The plaintiff made his first appearance in court on 12 November 2015 and was remanded in custody by the court, notwithstanding SAPS's recommendation for bail.
8. The defendants denied that the plaintiff suffered damages as alleged.

9. Counsel, on behalf of the defendants, submitted that the plaintiff's arrest was lawful. To justify the plaintiff's arrest, the defendant called two police officers as witnesses, Sergeant Nkatingi and Sergeant Nell Mateta, hereinafter called "Sergeant Mateta", who led evidence on the plaintiff's arrest

#### Defendant's case

##### Nkatingi

10. Nkatingi testified that on 11 November 2015, at the Midrand police station service centre, Rethabile Mantsoe, herein referred to as "Rethabile", came to him. She reported that she was walking to her workplace when two men on Le Roux Street in Midrand robbed her of her belongings at knifepoint. Rethabile told him that one of her assailants was dark and tall, wearing a red t-shirt and blue worksuit pants, and the other was light in complexion and shorter than the other. He was wearing a two-piece blue worksuit. One of them had a knife. She had no shoes on and was visibly upset. He advised Rethabile to go inside the police station and lay an armed robbery charge.
11. Sergeant Nkatingi drove towards the vicinity of the robbery. Whilst driving around, he saw two men walking in the bush towards Halfway House, matching the description of Rethabile's assailants. The one on a red t-shirt had a blue Nike cap. Whilst the other had a white sports hat. He parked the patrol car in the underground parking. Later, he saw them entering the Salvage Pawnshop. He called for backup and entered the pawn shop.
12. Inside the pawn shop, he introduced himself to the two men and informed them about Rethabile's complaint. He searched them and did not find any items matching those mentioned by Rethabile. They had nothing in their pockets. He then demanded an explanation for their visit to the pawnshop. They looked frightened and did not proffer a satisfactory reason. He did not speak to the shop owner. Further, in his experience, pawnshops sell stolen goods. He arrested them for the reported robbery. The arrested persons were the plaintiff and his cousin, Letlalo.

13. Constables Ledwaba and Mbhenyana arrived, responding to Sergeant Nkatingi's request for backup. They transported the plaintiff and Letlalo to the police station. On arrival at the station, Sergeant Nkatingi took them to the cells. Whilst passing the service centre with them, Rethabile identified them as the people who robbed her.

#### Mateta

14. Sergeant Mateta testified that at around 14H00, the plaintiff and Letlalo were charged with armed robbery. That very same day, one of the detectives who charged them made an affidavit recommending they should be granted bail of R1 000 each. SAPS did not oppose bail. The matter went on trial. They pleaded not guilty and were acquitted of all charges on 28 April 2016.

#### Plaintiff's case

##### Matlou

15. The plaintiff testified that he and Letlalo left their home to seek temporary employment at a butchery in Waterfall Park. They could not secure employment and left to collect his laptop at the Salvage pawnshop. Before collecting the laptop, they bought a lottery ticket from Shoprite across the pawnshop street.
16. After they entered the shop, they were accosted by two police officers who told them that they matched the description of two men who had just committed armed robbery. One of the police officers pointed a firearm at them. The shopkeeper intervened on their behalf and told the police he and his cousin were there to collect a laptop. He had a receipt to prove that he had taken his laptop in for repairs. The document referred to as the receipt formed part of the discovery.
17. The Police ignored the shopowner's explanation. They searched them and only found a few of their personal possession. None of the items stolen from Rethabile was found on them, including the knife. They were then arrested without being informed of their rights. They were taken to Boulders taxi rank, where Rethabile identified them by simply looking at the back of their heads

through the police van's window. After that, they were detained for one night, at the station, in atrocious conditions.

18. He also testified concerning prison conditions. In that, blankets were not always available. If one arrives late, there will be no blankets for them. There was no privacy whilst using the toilet. It was stinking. Food was not normal and made him vomit.
19. The following day, they appeared in Midrand Magistrates' Court. The court refused to hear their case. It was said they were in the wrong court and should be taken to Alexander Magistrates' Court. Their matter was postponed to 19 November 2015. Thereafter they were detained at the Sun City prison facility.
20. On their second court appearance, they were asked about legal representation and told the court they did not have it. No mention was made of bail. The matter was postponed. On the third court appearance, their attorney tried to apply for bail; however, he did not have all the necessary documents. The magistrate allowed their attorney to get all the documents, and they applied for bail the following day. They were released on bail on 27 November 2015. They were subsequently acquitted of all charges on 28 April 2015.
21. During cross-examination, the plaintiff's counsel referred to the contents of the statement by the Salvage pawnshop keeper. In that, Sergeant Nkatingi spoke to the pawnshop keeper on the day of the plaintiff's arrest. He also put statements to Sergeant Nkatingi and Mateta from the said statement. The defendant objected and submitted that admission in terms of rule 35(9) is simply an admission that the document is what it purports to be and was executed correctly and nothing more. Therefore, the content of the said statement was hearsay evidence. The court allowed the cross-examination in this regard. Such evidence was provisionally accepted, provided the shopkeeper was called to testify. The shopkeeper was not called.

#### Common cause

22. The Plaintiff was arrested without a warrant and charged with armed robbery

on 11 November 2015 by a member of SAPS. He was detained at Midrand police station and thereafter transferred to Sun City Prison. He was released on bail on 27 November 2015. The SAPS member who arrested the plaintiff acted within their course and scope of employment with the defendants.

#### Issue

23. The issues in dispute which the court should decide on are:
- (a) Whether the plaintiff's arrest and detention were unlawful.
  - (b) Whether the defendant should be liable for further detention of the plaintiff from 12 November 2015 to 27 November 2015.
  - (c) If the plaintiff has satisfactorily proved the above, what is the appropriate amount of damages the plaintiff should be awarded as compensation?

#### The law

24. Section 40(1)(b)<sup>1</sup> reads as follows: *"A peace officer, may without a warrant arrest any person – (b) whom he reasonably suspects to have committed a schedule 1 offence other than the offence of escaping from lawful custody"*.
25. In the matter of Minister of Safety and Security v Sekhoto and Another<sup>2</sup>, Harms DP stated: Para [6], *"As was held in Duncan v Minister of Law and Order,<sup>3</sup> the jurisdictional facts for a section 40 (1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds."*
26. Para [28], *"Once the required jurisdictional facts for an arrest, whether in terms of any paragraph of s40(1) or in terms of s43 are present, a discretion arises. The question whether there are any constraints on the exercise of*

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<sup>1</sup> of the Criminal Procedure Act, 51 of 1977

<sup>2</sup> (2011 (1) SARC 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; 131/10 (19 November 2010) (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021)

<sup>3</sup> Duncan v Minister of Law and Order 1986 (2) SA 805 AD at 818G-I.

*discretionary powers is essentially a matter construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to effect an arrest.” This was made clear by this court in relation to section 43 in Groenewald v Minister of Justice<sup>4</sup>.*

27. Section 35 of the Constitution<sup>5</sup> provides in relevant part:

*“(1) Everyone who is arrested for allegedly committing an offence has the right-*  
*(d) to be brought before a court as soon as reasonably possible, but not later than-*  
*(i) 48 hours after the arrest; or*  
*(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;*  
*(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and*  
*(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”*

## Discussion

### *Unlawful arrest*

28. It is common cause that in his pleadings, the plaintiff did not plead that the police officers were acting within the course and scope of their employment with the defendants.
29. It is only in paragraph 4<sup>6</sup> that the plaintiff mentioned that the arresting officer acted within the course and scope of their employment with the defendants when they arrested the plaintiff.

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<sup>4</sup> (1973 (3) SA 877 at 883G-884B).

<sup>5</sup> Constitution of the Republic of South Africa, 1996

<sup>6</sup> of the plaintiff's notice of its intention to sue, dated 9 May 2016

30. During the trial, the defendant had a duty to begin as they had to justify that the arrest was lawful. Sergeant Nkatingi confirmed that he was a police officer on duty on the day of the plaintiff's arrest. Also, on the day in question, he acted within the course and scope of his employment with the defendants. Same was also canvassed and confirmed during cross-examination.
31. In my view, there was nothing more the plaintiff needed to do in this regard, the defendants had already led evidence to that effect, and same was not contested. I am therefore satisfied that evidence shows that Nkatingi and other police acted within the course and scope of their employment with the defendants when the plaintiff was arrested.
32. During cross-examination, the plaintiff's counsel referred to the contents of the statement by the Salvage pawn shopkeeper and intended to read the contents thereof into the record. Sergeant Nkatingi spoke to the pawn shopkeeper on the day in question. This evidence was provisionally accepted, provided the shopkeeper was called to testify. He was not called to testify, and no reasons were advanced why he was no more called to testify.
33. Section 3<sup>7</sup> reads as follows:
- “(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—*
- (a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
  - (b) The person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
  - (c) The court, having regard to—*
    - (i) the nature of the proceedings;*
    - (ii) the nature of the evidence;*
    - (iii) the purpose for which the evidence is tendered;*
    - (iv) the probative value of the evidence;*

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<sup>7</sup> of the Law of Evidence Amendment Act 45 of 1988.



(v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*  
(vi) *any prejudice to a party which the admission of such evidence might entail; and*  
(vii) *any other factor which should, in the opinion of the court, be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.*

(2) *The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.*

(3) *Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.*

(4) *For the purposes of this section—*

*“Hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.”*

34. In the matter of *Rautini v Passenger Rail Agency of South Africa*,<sup>8</sup> the Supreme Court of Appeal addressed the issue of reliance on the contents of discovered documents. The finding was that *“the inclusion of all discovered documents are what they purport to be” is not unlawful. In fact, it serves a legitimate purpose: it allows the documents to be discovered as real evidence. However, parties should be vigilant and lead the evidence of the authors of those documents if they intend to rely on the contents of the documents.”*

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<sup>8</sup> (853/2020)(2021) ZASCA 158

35. In *casu*, the plaintiff bears the onus to, on a balance of probabilities, prove that there was a conversation between the pawn shopkeeper and the police. The content of the shopkeeper's statement is thus primary evidence. If its veracity cannot be tested or guaranteed, then the court is not permitted to use same to adjudicate the matter. The pawn shopkeeper did not testify.
36. The content of the pawn shopkeeper's statement amounted to hearsay evidence and remained as such. The said evidence can not be considered as it was provisionally accepted on condition that the shopkeeper is called to testify and be cross-examined. Based on the nature of the proceedings in this instance, the evidence is inadmissible.
37. To justify the plaintiff's arrest, the defendant is required to prove that Nkatingi entertained a suspicion, based on reasonable grounds, that the plaintiff committed the offence of armed robbery as reported by Rethabile. The test is whether a reasonable person in the position of Sergeant Nkatingi and possessing the same information would have considered that there were suitable and sufficient grounds for suspecting that the plaintiff committed the offence of armed robbery.
38. At the time of the plaintiff's arrest, Nkatingi had information at his disposal which he obtained from Rethabile. In that, she was robbed at knifepoint by a tall, dark man wearing a red t-shirt with blue worksuit pants, and the other was light and shorter than the other and wore a blue two-piece worksuit.
39. Unlike the pants, the red T-shirt was not specified. So the range was wide. Any tall dark man wearing a red t-shirt with blue work pants fitted the description. The description of the second man was as wide as the first one. Under such circumstances, Sergeant Nkatingi needed to be cautious as it was morning, and Le Roux street was said to be busy.
40. According to Sergeant Nkatingi, he arrested the plaintiff and his cousin as they fit the description in relation to the clothing and height given by Rethabile. It was

unclear why he found them matching the description, as Rethabile did not report that her assailants had hats or caps on.

41. According to Sergeant Nkatingi, when he searched them, he found nothing. None of them had a knife, Rethabile's bag or any items from her bag. No basis was set out for the suspicion on reasonable grounds that the plaintiff was part of the armed robbery of Rethabile. The arrest was, it seems, clearly premised on the fact that they were wearing clothes to a certain extent fitting the description given by Rethabile. It can be accepted that many people would fit that clothing description and height on that busy Le Roux street.
42. The fact that Sergeant Nkatingi could not find anything in the plaintiff's possession, including the knife used during the commission of the crime, that linked the plaintiff to the armed robbery should have caused him to realize that his suspicion was unreasonable. A reasonable man, under the circumstances, would have exercised his discretion of not arresting as he had nothing assisting him to continue reasonably suspecting the plaintiff and Letlalo except for the clothing. The arrest was, therefore, unreasonable.
43. There was also evidence that Rethabile identified her assailants. According to Sergeant Nkatingi, Rethabile identified the plaintiff and Letlalo while taking them to the holding cells. The evidence of the plaintiff and Sergeant Nkatingi differs in this regard. According to the plaintiff, they were taken to Boulders taxi rank, and Rethabile saw their backs while they were seated inside the police van. According to Sergeant Nkatingi, they were on the way to the police cells when Rethabile identified them.
44. When the identification by Rethabile, whether at the police station or Boulders taxi rank, occurred, the plaintiff and [Letlalo](#) were already under arrest. Sergeant Nkatingi had already exercised his discretion to arrest them. So it can be safely accepted that Sergeant Nkatingi based the plaintiff's arrest on the clothing and that they did not give him a satisfactory explanation of why they were at the pawn shop. It was not necessarily because Rethabile identified them.

45. Sergeant Nkatingi stated that he was not satisfied with the explanation by the plaintiff as to why they were at the pawn shop. The evidence is that the plaintiff told him he was collecting his laptop. He was specific. He did not say he was coming to buy or window shop. The incident occurred inside and/or in the vicinity of the pawnshop. In his testimony, Sergeant Nkatingi denied having spoken to the shopkeeper. There is no evidence suggesting that something prevented him and the other police from talking to the shopkeeper to verify the plaintiff's explanation.
46. By not verifying the plaintiff's explanation at his disposal, Sergeant Nkatingi robbed himself of the opportunity to have more information to properly analyze and assess the quality and veracity of the plaintiff's explanation. Such analysis would have put him in a better position to determine whether his suspicion was still reasonable and exercise his discretion on whether to arrest. Had he exercised his discretion reasonably and appropriately, he would have concluded that his suspicion was unreasonable and was not obliged to effect an arrest as there was no basis that the plaintiff was part of the armed robbery of Rethabile.
47. The arrest was, therefore, unwarranted, unjustified and unlawful. Sergeant Nkatingi failed to critically analyze and assess the quality of the information at his disposal. A reasonable man doing so would not have considered that there were reasonable and sufficient grounds for suspecting that the plaintiff was guilty of armed robbery. A reasonable person acting on the above information would not have suspected that the plaintiff committed the armed robbery. Therefore, Sergeant Nkatingi's suspicion that the plaintiff was part of the armed robbery of Rethabile was unreasonable. The plaintiff's arrest by Sergeant Nkatingi was, therefore, unlawful.

#### *Detention*

48. It was submitted that the detention following the plaintiff's arrest was unlawful. It has been found that the plaintiff's arrest was unlawful. It follows then that his detention until his first court appearance was also unlawful.

49. Regarding detention, the plaintiff's particulars of claim<sup>9</sup> are succinct. In my respectful view, they could have been more specific and detailed.
50. The plaintiff alleged that he was transferred to Sun City prison for further detention. It is unclear from the particulars of claim why he was further detained after his first court appearance or what contribution, directly or indirectly, made or not made by the defendants caused him to be further detained.
51. The plaintiff testified that on his first court appearance, they were told they were in the wrong court. This was not pleaded by the plaintiff nor put to the defendants' witnesses during cross-examination. The defendants' witnesses were not given an opportunity to react thereto. On behalf of the defendants, it was submitted that this testimony must be rejected as it did not form part of the disputes between the parties.
52. The copy of the first page of the charge sheet formed part of the discovered documents. It depicted the place of trial as Alexander magistrates' court and the date of the first appearance as 12 November 2015. The evidence shows that on the plaintiff's first court appearance, the matter was postponed for about seven days. On his second court appearance, they were asked about legal representation. They were not told anything about bail.
53. Mogoeng CJ, as he then was, had the following to say in the matter of *De Klerk vs Minister of Police*<sup>10</sup>:

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<sup>9</sup> "8. On 12 November 2015, the plaintiff was transferred from Midrand Police Station to the Johannesburg Correctional Services prison facility, known as Sun City, for further detention

10. The Plaintiff was released on bail on 27 November 2016

11. Thus, the plaintiff was unlawfully and wrongfully arrested and detained from 11 November 2015 to 27 November 2016, which is an uninterrupted period of seventeen (17) calendar days."

<sup>10</sup> CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC)(22 August 2019), at paragraph 168.

*“[168] Once arrested, an accused person, like Mr de Klerk, has a fundamental right which translates into a constitutional obligation on the Executive, to be brought before a court of law within 48 hours or as close thereto as is reasonably possible. Why? It bears repetition that we have an ugly and painful past of arbitrary and long detentions without trial. To give practical and more authoritative expression to the fundamental right “not to be deprived of freedom arbitrarily or without just cause”, the right to be brought to court within 48 hours had to be entrenched in the supreme law of the Republic so that it is insistently treated with the seriousness it deserves. The drafters of our Constitution, alive to a similar provision in the Criminal Procedure Act, presumably knew just too well how inadequate the latter’s protection had been over the years. Now that the right to be brought before an independent arm of the State is a constitutional imperative, its implications or significance may not be treated as flippantly as it often was during the apartheid era.*

54. *[173] It must be emphasized that on the accused person’s first appearance, the Judiciary or courts are under a weighty obligation to understand and satisfy itself that there is justification for the past and continued detention of a suspect or else release her if the interests of justice so dictate. This personal liberty-inclined obligation cannot be passed on to another arm of the State - it remains under the exclusive domain of the Judiciary. It is a constitutionally-imposed new intervening act that must always break the chain of possible abuse, arbitrariness, illegality or error in the arrest or detention of an accused person, and by extension of legal causation. The duty to fulfil that obligation cannot be sharedPolice the police just because they would have initiated the chain of events that culminated in the suspect being brought to court, which then ordered a further detention in flagrant disregard for its obligations in terms of section 35(1)(e) and (f) of the Constitution.”*
55. It was upon the court before which the plaintiff appeared for the first time to ensure that he was not further detained unnecessarily. Before granting a remand in custody, the court needed to satisfy itself that the plaintiff was to be kept in custody for a just cause, besides the point that he was charged with a serious offence, where the accused is usually released from custody after the

bail application hearing. Nothing stopped the court from inquiring from the prosecutor and/or police about the circumstances of the accused regarding the police's attitude towards bail and informing the plaintiff of his rights, including that of legal representation. Even though I have found that the arrest was unlawful, the defendants cannot be held liable for the further detention ordered by the court. Which court appears to have had no proper regard for the plaintiff's Constitutional rights, as it explained none during his first court appearance.

56. There is evidence, and the plaintiff was emphatic, that his first court appearance was at Midrand magistrates' court, then the Alexander magistrates' court. The defendants, through their counsel, argued that such evidence must be rejected as they became aware of it for the first time when the plaintiff testified.
57. In the matter of *Robinson v Randfontein Estates GM Co Ltd*<sup>11</sup>, it was said:  
*"The object of pleading is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits, the court has a wide discretion. For pleadings are made for the court not the court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."*
58. The evidence about the plaintiff appearing before the Midrand magistrates' court remained untested. The defendants could not plead to it as it did not form part of the plaintiff's particulars of claim. Also, the plaintiff, through his counsel, did not attempt to cross-examine the defendants' witnesses on this aspect for them to respond.

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<sup>11</sup> *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at paragraph 198. It was confirmed in *Shill v Milner* 1937 AD 101 at 105 and *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26(A) at 44D - 45E, and *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 108D-E.

59. In my view, this issue is not material as it is common cause that the plaintiff was arrested, detained and brought before a court on the following day. Whether it was Midrand or Alexander magistrates' court, the police brought him before a court. That court took over where the police left off in relation to the further detention of the plaintiff. Unless there was wrongful and culpable conduct by Sergeant Nkatingi that materially influenced the decision of the court to remand the plaintiff in custody.<sup>12</sup>
60. There is uncontested evidence that the police had already recommended bail of R1000 before the plaintiff's first court appearance. The court failed to ensure that the plaintiff's rights were explained. Also, to inform him why he could not be released from custody or under what circumstances he could be released as soon as it was practical. It was imperative for the court to go through this exercise as it is part of its Constitutional obligation to prevent any possible abuse, arbitrariness, illegality or error in the arrest or further unjustified detention of the plaintiff. There is no justification to hold the defendants liable for such failure by the court in this regard.
61. During cross-examination, Sergeant Nkatingi confirmed that he foresaw that the plaintiff would be released after a formal bail application as he was charged with armed robbery. He knew the plaintiff would be further detained after his first court appearance.
62. The plaintiff's arrest resulted in his detention until his first court appearance. There is no evidence that there is more that Sergeant Nkatingi or his colleagues did or did not do to cause or contribute to the plaintiff's further detention. There

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<sup>12</sup> In *Woji v The Minister of Police* (92/2012) [2014] ZASCA108 (20 August 2014), the Supreme Court of Appeal followed *Zealand v Minister of Justice and Constitutional Development and Another* (CCT 54 of 2007) [2008] ZACC 3 (11 March 2008). It held: "the Minister of Police was liable for post-appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody. The reasoning is that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor."



is, therefore, no justification to find the defendants liable for the plaintiff's further detention.

63. The right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial is guaranteed.<sup>13</sup> The court had a Constitutional obligation to ensure that the plaintiff, at the court's first opportunity, is informed of his rights, including reasons for his further detention, as the arrested and detainee appearing before the court for the first time after the arrest.
64. It is never in the interest of justice to keep any person in detention where it is not permissible to do so. Anyone arrested for allegedly committing an offence is brought to court within 48 hours so that they are not detained any longer than they should without just cause.
65. The plaintiff's first court appearance and the remand order issued by the court amounted to a new causative event breaking the causal chain initiated by Sergeant Nkatingi when he unlawfully arrested and detained the plaintiff. It would not be reasonable, fair, and just to hold the defendants liable for the harm suffered by the plaintiff that was factually caused by his wrongful arrest, as the police fulfilled their Constitutional obligations in relation to the plaintiff's arrest and did everything within their power. They cannot be held liable for the further detention ordered by the court, which seems to have had not much concern for the plaintiff's Constitutional rights.
66. In my respectful view, absent the evidence that the police directly or indirectly caused or contributed to the further detention of the plaintiff, either by commission or omission, in presenting or withholding evidence before the court in relation to the release of the plaintiff, the claim of vicarious liability against the defendants is not justified for the period after the plaintiff's first court appearance. The plaintiff's detention after his first court appearance had,

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<sup>13</sup> Section 12(1)(a) and (b) of the Constitution

everything to do with the court's dereliction of its Constitutional obligations. Therefore, the plaintiff's claim for further incarceration after his first court appearance against the defendants stands to fail.

### *Quantum*

67. Now that the plaintiff has satisfactorily proved the defendant's liability in relation to the unlawful arrest and detention until his first court appearance, I turn to quantum. In assessing damages for unlawful detention, it is crucial to appreciate that the primary purpose is not to enrich but to offer the aggrieved party some much-needed solatium for their injured feelings.
68. Therefore, *"damages awarded need to be commensurate with the injury inflicted. The awards need to reflect the importance of the right to personal liberty and the seriousness with which the arbitrary deprivation of same is viewed. It is impossible to determine an award of damages for this kind of injuria with any mathematical accuracy. Though previous cases are followed as a guide, slavishly following them can prove treacherous. The correct approach has been adopted as having regard to all the facts of the particular case and determining the quantum of damages on such facts. See Minister of Safety and Security v Seymour".*<sup>14</sup>
69. Taking all the relevant factors into account, including the arrest in front of people waiting to be served at the pawnshop, having been pointed with the firearm and searched in front of people. He was traumatized and humiliated, and his integrity was diminished. His privacy was invaded. The evidence is that the living conditions in custody were deplorable. It was stinking. There was a lack of bedding, and the food caused him to vomit. He had to relieve himself in the presence of other inmates. His right to liberty, privacy and bodily integrity was infringed. In the circumstances, it is fair, reasonable, and just to award damages in the sum of R90 000 (ninety thousand rand).

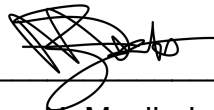
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<sup>14</sup> 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and others v Minister of Safety and Security and Another* 2009(5) SA 94 (SCA)(2009) ZASCA at 39 paras 26-29.

70. For these reasons, the following order is made:

Order

1. The plaintiff's claim against the defendants succeed.
2. The arrest and detention of the plaintiff from 11 November 2015 to 12 November 2015 are declared unlawful.
3. The plaintiff is awarded damages in the sum of R90 000 (ninety thousand rand).
4. The defendants shall pay the costs of suit.



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N. Mazibuko

Acting Judge of the High Court of South Africa  
Gauteng, Pretoria

*This Judgment is digitally submitted by uploading it onto Caselines and emailing it to the parties.*

Representation

Counsel for the Plaintiff:

Mr D. Moodliyar

Instructed by:

Majang Attorneys

Counsel for the Defendant:

Mr P. Nonyane

Instructed by:

The State Attorney, Pretoria

Date of hearing:

29 to 30 August 2022

Judgment delivered on:

21 November 2022