REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

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

CASE NO: 9753/2020

In the matter between:

MOKALAPA SV	**PLAINTIFF**
AND	
MINISTER OF POLICE	**1ST DEFENDANT**
PROVINCIAL COMMISSIONER OF POLICE: GAUTENG PROVINCE	**2ND DEFENDANT**

JUDGMENT

CEYLON , AJ

[A] INTRODUCTION:

[1] This is a delictual action for damages against the Defendants by the Plaintiff stemming from the alleged (a) unlawful arrest and detention and (b) assault of the Plaintiff by the members of the Defendants, which was effected without a warrant and under section 40 (b) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] In the Plaintiff's Supplementary Heads of Argument, an amount of R1 550 000-00 is claimed for the unlawful arrest and detention, as well as for general damages for the assault (which is shooting in the leg of the Plaintiff) [para 54 on pg 036-20 of Caselines].

[3] At the hearing, the Defendants requested this Court to admit the Amended Plea. They contended that it would be in the interest of justice and that there will be no prejudice for the Plaintiff if request is granted. The Plaintiff did not object to the request. After careful consideration of the application, the Court granted the request for admission of the Amended Plea.

[4] At the hearing, the parties' representatives were *ad idem* that, although the Defendants bore the *onus* in respect of the arrest, the Plaintiff had the *onus* regarding the assault and therefore the Plaintiff had the duty to begin.

[5] The following witnesses were called to testify:

(a) for the Plaintiff:

(1) the Plaintiff

(2) Mrs Coleen Mokalapa (Plaintiff's mother)

(3) Dr PI Kumbirai (Orthopedic surgeon)

(4) Mrs Tebogo Mokalapa (Plaintiff's sister)

(b) for the Defendants:

(1) Warrant Officer A Smith

(2) Detective T Ngwenya

[6] The merits and quantum are in dispute and therefore stands to be adjudicated by this Court.

[7] The legal representatives of the parties provided written closing arguments/submissions to assist the Court, for which this Court is thankful. The Court must further express its gratitude for the courteous, collegial and professional manner in which the legal teams on both sides conducted themselves throughout the proceedings despite some technological and logistical difficulties experienced during the hearings.

[B] BACKGROUND:

[8] On an about 13 June 2019, the Plaintiff and three others were travelling in a Volkswagen Golf 4 ("Golf") motor vehicle on Baviaanspoort road from East Lynne to Mamelodi, Pretoria, Gauteng Province.

[9] The said vehicle was followed, chased and stopped by a black Toyota Fortuner, apparently unmarked. The driver of the Golf vehicle attempted to flee from the Fortuner as he feared that the occupants of the Fortuner wanted to hijack the Golf.

[10] During the chase, the Fortuner started sounding a siren and blue lights. A gunshot went off from the Fortuner and struck the Golf, resulting in the driver of the Golf loosing control of the vehicle, which veered off the road and stopped in a ditch on a nearby gravel road.

[11] At this point, the Plaintiff and other occupants alighted from the Golf. The Plaintiff with is hands clearly raised in the air, started running, fearing for his life, was shot in the foot by an occupant from the Fortuner, which occupant was subsequently identified as Warrant Officer ("W/O") Smith, from the Silverton Police ("Hawks"). The rest of the occupants of the Golf fled the scene.

[12] The Plaintiff was arrested and taken to the Kameeldrift police station by the police and was charged with, *inter alia*, reckless driving and attempted murder.

[13] The Plaintiff was later taken to the Mamelodi Hospital for treatment under police guard and handcuffed. He was discharged the next day, being 14 June 2019. He was thereafter taken back to Kameeldrift police station and detained until 18 June 2019, whereafter taken to the holding cells at Cullinan Magistrate's Court for his first court appearance.

[14] The Plaintiff was released by the police on18 June 2019 and never appeared in Court because the matter was not enrolled for hearing, as the prosecutor required further investigation into the matter.

[C] THE ISSUES TO BE DETERMINED:

[15] The issues to be determined by this Court are the following:

(a) whether the arrest and detention of the Plaintiff was lawful;

(b) whether the assault on the Plaintiff was lawful and justifiable; and

(c) the quantum of damages payable, if applicable.

[D] MERITS:

[I] THE PLAINTIFF'S CASE:

[16] The main points of the Plaintiff's case are set out herein-below:

(a) the broad background facts have been set out above.

(b) in the summons, the plaintiff claims an amount of R1 500 000-00 from the Defendants, as well as interest and costs. The amount is for the damages the Plaintiff suffered as a result of the Plaintiff's unlawful arrest, detention and shooting, his rights to freedom of the person, dignity and bodily integrity having been violated.

(c) the claim is against the Defendants, in their representative capacity of the members of the South African Police Services, who were acting within the course and scope of their employment with the Defendants when they wrongly and unlawfully arrested, detained and assaulted the Plaintiff.

(d) The Plaintiff allege that he was unlawfully arrested by the police on 13 June 2019 when he was travelling with three other occupants in a VW Golf vehicle from East Lynne to Mamelodi, Pretoria. The police followed the Golf in a Toyota Fortuner and the Golf sped off as the Plaintiff believed that his stepmother's brother, who also drive a similar colour (black) Fortuner, was going to take the Golf away from him due to a family dispute over the vehicle. The Fortuner than followed the Golf and later shot at it to force it to stop. The Golf then stopped after the driver lost control of it due to the shooting and it landed in a ditch of a gravel road in Bavaanspoort.

(e) The Plaintiff then alighted from the Golf, hand up in the air, and then, started running away fearing for his life, but got shot in his foot by W/O Smith. He was than taken by the police to the Kameeldrift police station and several hours later, to the Mamelodi Day hospital for treatment. He was discharged from said hospital the next day and taken back to the police station. Several days later he was taken to the Cullinan police holding cells and released by the police without appearing in any Court.

(f) According to the Plaintiff, the arrest, detention and assault (the shooting in the foot) was unlawful and was done without a warrant. The Plaintiff contend that the police did not introduce or announce themselves to the him except for the blue lights and siren that was sounded during a part of the chase.

(g) The Plaintiff contends further that the shooting was done without the occupants of the Golf having provoked the police and without them being a threat or danger to the police. The Plaintiff dispute the allegations made by the police (W/O Smith) that someone in the Golf showed a firearm from the driver's window, which caused the police to shoot at the Golf in self-defence.

(h) The Plaintiff further argued that the police acted without a warrant and therefore in terms of section 40 (1)(b) of the CPA. The Plaintiff submits that the police did not exercise their discretion in terms of said section properly, in that the Plaintiff did not commit any offence or attempted to commit any offence in police presence, nor that there was any reasonable suspicion that the Plaintiff or other occupants of the Golf vehicle committed an offence referred to in Schedule 1 of the said section. It is further submitted by the Plaintiff that the crime of which he was suspected (housebreaking) is not a Schedule 1 offence, but one in terms of Schedule 2.

(i) The Plaintiff further contended that his argument, that the suspicion upon which he was arrested, was not properly exercised and that he was unlawfully arrested, detained and assaulted, was vindicated when the Prosecutor at the Cullinan Court refused to prosecute him on any charges, which reasons the Prosecutor detailed in his Investigation Diary and which was provided to Detective Ngwenya.

(j) The Plaintiff also alleged that he was not brought to Court within the time provided for same in terms of the Constitution 1996, that, is within 48 hours of the arrest. The Plaintiff contended that he was unlawfully arrested and detained because the police did not arrest him for the purpose of bringing him to Court, as they arrested him and kept him detained for a period of 5 days rather than in 48 hours, without bringing him before the Courts.

(k) The Plaintiff contended that the Defendant failed to adduce evidence of objective grounds forming a basis for the suspicion of W/O Smith that the driver and the occupants of the Golf committed an offence in the East Lynne area where no objective factors to corroborate the allegation of such suspicion has been proffered as evidence to this Court.

(l) It was further contended on behalf of the Plaintiff that he was a credible and reliable witness and his testimony was consistent throughout the whole matter.

(m) The Plaintiff then argued that he is entitled to compensation in relation to the assault and the unlawful arrest and detention, relying on case authorities, the evidence of his

orthopedic surgeon, the nature of the injuries and their sequelae. The Plaintiff concluded by claiming an amount of R1 550 000-00 in total in respect of all damages in this matter.

[II] THE DEFENDANT'S CASE:

[17] The main points the Defendants raised are as follows:

(a) the Defendants pleaded that the Plaintiff's arrest and detention of 13 June 2019 was lawful.

(b) the arrest was effected without a warrant in terms of section 40 (1)(b) of the CPA on the suspicion of having committed a crime of breaking or entering any premises, whether under statute or common law, with the intent to commit an offence.

(c) the Defendants further pleaded that the Golf was pursued by the police on the 13th June 2019. The occupants were ordered to stop through a police siren and blue lights but the driver and other occupants refused and/or resisted the order to stop or pull off the road. The driver of the Golf then pointed a firearm at the police who thereafter fired shots at the Golf in self-defence and/or fired such shots as a necessary use of force to effect an arrest.

(d) the occupants of the Golf were suspected to have committed a crime in the East Lynne area.

(e) the Plaintiff was taken to the Mamelodi Hospital for medical attention and discharged on the next day (14th June 2019). On 18 June 2019 the Plaintiff was taken to Court and was released.

(f) the Defendants contended that the police officials acted on a reasonable suspicion as W/O Smith had good knowledge of the area, the housebreakings that occur therein and the observation of the Plaintiff and his accomplices on the 13th June 2019.

(g) the Plaintiff's contention that other means of securing the Plaintiff's attendance in Court, which are less invasive, should have been utilised, is disputed by the Defendants, in relying on Minister of Safety and Security v Sekhoto & Another 2011 (1) SACR 315 (SCA), Louw and Another v Minister of Safety and Security 2006 (2) SACR 178 (T), Charles v Minister of Safety and Security 2007 (2) SACR 137 (W).

(h) the Defendants further argued that the notes by the Prosecutor in the Investigations Diary should not be read or interpreted to suggest that any absence of reasonable grounds for suspicion, and, whether or not the police, when effecting the arrest, were acting on a reasonable suspicion has to be tested on the testimony of W/O Smith and not at Court when the Plaintiff was to appear for his first appearance.

(i) the Defendants conceded that the offence of housebreaking appears in Schedule 2, part iii of the CPA and not Schedule 1 thereto. However, the Defendants did plead, in their amended Plea, to another offence being committed or to be committed, which offence is different to the one of housebreaking and that the *eiusdem generis* principle should be applied.

(j) the Defendants submitted that the Plaintiff's contention that he was not brought to Court as soon as reasonably possible and/or within 48 hours, is without merit. They argued that the Plaintiff was arrested on Thursday, 13th June 2019, taken to hospital on said date and discharged on the 14th June 2019, a Friday, by which time he would have spent 24 hours in custody. The next day was a Saturday (15th June 2019) and not a court day as envisaged by section 35 (1)(d)(ii) of the Constitution 1996. The Sunday was a public holiday (16 June 2019) which meant the Monday automatically became a public holiday (17th June 2019). This meant that the 48 hours had not yet expired. The Plaintiff was taken to Court on the Tuesday, 18 June 2019, still within the 48 hours period referred to in the said section 35. The fact that the Plaintiff was not charged or appeared before Court, the Defendants argue, does not necessarily make the arrest unlawful.

(k) the Defendants further contended that the parties gave different versions in relation to the Plaintiff's arrest, and, in order to resolve such factual disputes, the Defendant referred this Court to the principles in Stellenbosch Farmer's Winery Group and Another v Martell & Others 2003 (1) SA 11 (SCA) at para 5, where the factors are listed that a Court should consider and make findings on in order to find a resolution to the irreconcilable versions.

(l) in light of the said Stellenbosch Farmer's Winery decision, *supra*, the Defendants submitted that the Plaintiff's evidence was contradictory to statements he previously made, and that he made several material contradictions, which were also evident from the Plaintiff's sister's evidence.

(m) with regards to the quantum, the Defendant's denied that the arrest, detention and assault was unlawful, therefore they denied any liability towards the Plaintiff. Accordingly, they prayed that the Plaintiff's claim be dismissed with costs.

[E] LEGAL PRINCIPLES AND EVALUATION:

[18] With regards to arrests and detention of suspects, these must be constitutionally and statutorily justified for the obvious reason that it deprives a person of their liberty and dignity [Minister of Correctional services Kwakwa (2002) 3 All SA 242 SCA; Minister of Justice v Hofmeyr (1993) 2 All SA 232 (A)]. In Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E-F it was held that:

"*An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another should bear the onus of proving that his action was justified in law*". [Lombo v ANC 2002 (5) SA 280 (A) at para 32].

(a) the arrest:

(i) In the particulars of claim, the Plaintiff alleged that he was arrested by the police on 13 June 2019. In his supplementary Heads of Argument ("HOA"), the Plaintiff submitted that the arrest was effected on 13 June 2019 between 14h25 and 15h00 and that Warrant Officer ("W/O") A Smith was the arresting officer. The Plaintiff also testified at the trial that he was arrested by the police on 13 June 2019 at Baviaanspoort, Pretoria.

(ii)In the Defendant's amended Plea it was pleaded that the Plaintiff was arrested on 13 June 2019 at around 14h25 and 15h00. The arrest and the date thereof was also confirmed during his testimony by W/O Smith.

(iii) It is therefore common cause between the parties that the arrest was effected by the police on 13 June 2019 between 14h25 and 15h00.

(b) the detention:

(i) In his particulars of claim, the Plaintiff avers that he was detained from date of arrest (13 June 2019) by the police and remained in custody until he was released on Tuesday, the 18th June 2019. This was also his testimony at the trial.

(ii) In their amended Plea, the Defendants admitted that the Plaintiff was arrested on 13 June 2019 and released on 18 June 2019.

(iii) From the above, it is clear that the detention period (13th to 18th June 2019) is common cause between the parties.

(c) the warrant of arrest:

(i) It is the Plaintiff's case that he was arrested by the police without a warrant. In his supplementary HOA the Plaintiff confirms this allegation in reference to the Defendant's reliance on section 40 (1)(b) of the CPA.

(ii) The Defendants pleaded that the arrest of the Plaintiff was effected in terms of the said section 40 (1)(b) of the CPA, which is applicable when the arrest is made without a warrant.

(iii) It is therefore not in dispute that the arrest on the Plaintiff was effected without a warrant.

(d) reasonable suspicion:

(i) In this matter, the Defendants pleaded that the arrest and detention of the Plaintiff was lawful and that they rely on section 40 (1)(b) to substantiate their conduct. Where an arrest is made without a warrant and once the arrest and detention are admitted, the onus to prove the lawfulness thereof rest on the Defendants [Brand v Minister of Justice [1959] 4 All SA 420 (A); Lawu and Another v Minister of Police (12400/17; 12401/17) [2021] ZAGPPHC 290 (24 May 2021) at para [72]); Cele & Others v Minister of Safety and Security (AR 437/07) [2008] ZAKZHC 74 (15 October 2008)].

(ii) In Mjali v Minister of Police (2223, 2226 & 2227/16) [2020] ZAECMHC 49 (29 September 2020) at para [19], it was held that, to discharge this onus mentioned above, the Defendants must show the following:

(a) the arrester must be a peace officer;

(b) the arrester must entertain a suspicion;

(c) the suspicion must be that the suspect (arrestee) committed an offence referred to in schedule 1; and

(d) the suspicion must rest on reasonable grounds

[also refer to section 40 (1)(b) of the CPA and Duncan v Minister of Law and Order 1986 (2) SA 805 (A)].

(iii) With regards to the nature of the suspicion, it was held as follows in Minister of Safety and Security v Sekhoto & Another:

"*Once the jurisdictional facts for an arrest, whether in terms of Section 40 (1) or in terms of Section 43, are present, a discretion arises. The question whether there are constraints on the exercise of discretionary powers is essentially a matter of 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 emphasised, is not obliged to effect an arrest.*" [2011 (5) SA 367 (SCA); also see Groenewald v Minister of Justice, in relation to section 43, (1973) (3) SA 877 (A) at 883G-884B].

(iv) In R v Van Heerden 1958 (3) SA 150 (T) it was held that the words contained in section 40(1)(b) "*must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have suspicion*". The same principle on the test for reasonable grounds was eloquently set out in Mabona v Minister of Law and Order & Others 1988 (2) SA 654 (E) at 685 E-H as follows:

"*Would a reasonable man in the Second Defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the Plaintiff's were guilty of conspiracy to commit robbery or possession of stolen goods knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the Section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e, something which would otherwise be an invasion of private rights and personal liberty. The reasonable man would therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The Section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion*".

(v) Police officers, who purport to act in terms of section 40 (1)(b), should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for purposes of a reasonable arrest [Louw v Minister of Safety and Security 2006 (2) SACR 178 (T) at para 40; Mabona, *supra*, at para 39].

(vi) From the Plea the Defendants filed and the testimony given by W/O Smith and Detective Ngwenya, it appears that both of them are qualified police officials in the employ of the Defendants, acting as such within the scope of their employment with the Defendants. The fact that they are both peace officers is not disputed by the Plaintiff. This issue is therefor also common cause between the parties.

(vii) In the amended Plea of the Defendants, it was pleaded that the arrest was made in terms of section 40 (1)(b) of the CPA and that the Plaintiff and the other occupants of the Golf were suspected to have committed a crime in the vicinity of East Lynne, Pretoria. At the trial W/O Smith testified that he followed the Golf from East Lynne due to the fact that the occupants looked suspicious and they were looking around, and also because many housebreakings were prevalent in the said area. Under cross-examination, W/O Smith testified that he followed the Golf because he saw two (2) suspicious looking occupants in the vehicle and he did not see anything more than this to make him think that the Plaintiff and the other occupants have committed a crime or intended to do so. No other witness, including Det Ngwenya, testified about this particular aspect.

(viii) In their amended Plea, the Defendants contended that the Plaintiff was arrested "*on a suspicion of having committed a crime of breaking and entering any premises whether under common law or statutory provision with intent to commit an offence*" [see para 7 and 8 of the submissions on behalf of the Plaintiff, submitted to this Court via email on 24 March 2022; para 3.2 of the amended Plea].

(ix) In the view of this Court, the testimony of W/O Smith did not go as far as the written submissions that were made or the contents set out in the amended Plea (para 3). W/O Smith testified nothing of what is stated in the submissions of 24 March 2022 or the amended Plea. He merely testified that the occupants looked suspicious and that is why he decided to follow them. He confirmed this very clearly under cross-examination.

(x) In the said written submissions on behalf of the Defendant, the Defendants specifically admitted that the offence of housebreaking does not fall within the offences listed in Schedule 1. However, in the said submissions, it is contended that the suspicion on the grounds set out in paragraph 3 of the amended Plea, is sufficient to comply with the provisions of section 40 (1)(b) and should be covered by Schedule 1 in terms of the *eiusdem generis* rule. The fact that the offence of housebreaking was not a Schedule 1 offence was also argued at the closing arguments before this Court. It is therefore common cause between the parties. What appears to be in dispute is the contention made in the said written submissions and that in the amended Plea.

(xi) In the view of this Court, the testimony of W/O Smith does not accord with the said paragraph 3 of the amended Plea and the written submission made. He did not testify to anything near as what was contained in the said papers. In the opinion of this Court, W/O Smith, at the time before the arrest was effected, arrested the suspects on the suspicion that they may have committed a housebreaking or was intending to do so. This is inconsistent with what has been pleaded in the amended Plea and the submissions made. This was his evidence throughout his testimony and he did not change this aspect of his version. In his evidence in chief, the issue as contained in the amended Plea was not canvassed with W/O Smith. It was, however, raised in the written submissions and in the closing arguments.

(xii) The suspicion that is being required and set out in Van Heerden, Mabona and Louw, *supra*, was, in the view of this Court, the one that W/O Smith had at the time when he saw the Golf and its occupants, they looked suspicious to him and that caused him to decide to follow them. This is the suspicion he confirmed at the trial, he had before he decided to follow the Golf and have them arrested. The ones contained in the amended Plea and the written submissions are inconsistent with the latter suspicion. This Court is of the opinion that the testimony of W/O Smith on this aspect, is totally consistent with the one he had when he saw the Golf, became suspicious of two of the occupants and decided to follow them.

(xiii) The testimony of the Plaintiff, in relation to the time of the arrest, particularly after the Golf was stopped in the ditch, was that he came out of the vehicle, his hands raised and gave himself over to the police. He testified that he was therefore taken to the Kameeldrift police station and later to the Mamelodi Day hospital. He did not testify to anything further, or that the police did or questioned him on, to enquire about the aspect of the crime he

may have committed that caused the chase after the Golf to ensue. He only stated during the trial (evidence in chief) that he was taken to the Kameeldrift police station, from around 15h00 to 20h00 when he was taken to the hospital. He was then later charged with several offences, including attempted murder, reckless driving and possession of housebreaking tools. No aspect of the crime/s of which he was suspected of committing, was ever discussed or investigated before his arrest. This particular issue was not canvassed under cross examination, the amended Plea, the written submissions or closing arguments made on behalf of the Defendants. There is no evidence before this Court to suggest that any such efforts or investigation or enquiries were made by the police officers towards the Plaintiff or anyone else prior to the arrest of the Plaintiff. This conduct on the part of the police officials are not in accordance with the requirements set in the Louw and Mabona decisions, *supra*. No means were made to investigate if any exculpatory explanations could have been proffered by the Plaintiff.

(xiv) In the view of this Court this suspicion of W/O Smith was not made on solid grounds but was arbitrary and unreasonable. That being the case, an arrest should not have been made and another manner in which to secure the Plaintiff's attendance at Court should have been considered in the circumstances.

(xv) This Court is therefore of the view that on light of the aforementioned, the lawfulness of the arrest cannot be sustained and is, accordingly unlawful.

(xvi) In addition, the fact that the crime of which W/O Smith suspected the Plaintiff and other occupants, in the view of this Court, could not have been on the broad crime that is contained in the amended Plea or the written submissions made, but on the suspicion of housebreaking, which crime is not contained in Schedule 1 (as admitted by both parties), and this made the suspicion and conduct of the police untenable in view of the section 40 (1)(b) requirements and those set in the Mjali and Duncan decisions, *supra*.

(xvii) It is this Court's view that there has not been full compliance with the said section 40 (1)(b) requirements and the Van Heerden and Mabona decisions, *supra*, as the grounds of their suspicion were not those which would induce a reasonable man to have such suspicion [Van Heerden and Mabona, *supra*]. The mere looking at persons without anything else cannot induce a reasonable suspicion, particularly where no other evidence exist to substantiate such suspicion to arrest.

(xviii) The police contended that they found several instruments (such as a pick with no handle, two screwdrivers and hand gloves) in a red and black bag in the Golf, which they regard as possible housebreaking tools. This was disputed by the Plaintiff when the testified that he was carrying these instruments for a carpentry and tiling job he had to do for his sister's boyfriend on the 13th June 2019. This evidence was confirmed and corroborated by the Plaintiff's sister (Tebogo Mokalapa) at the trial. She explained and

confirmed that her boyfriend enlisted the services of the Plaintiff to fix and/or replace the door of his mother's house. Her testimony could not be refuted in the view of this Court. It is the Courts view that her testimony was frank and reliable and she was a credible witness. In the opinion of this Court, the Plaintiff's testimony, corroborated by that of his sister, is more probable on this aspect than that of W/O Smith.

(xix) With regards to the investigation into an explanation (in forming a reasonable suspicion), the police did not bother to enquire from the Plaintiff an explanation, nor attempted to call or visit his sister or her boyfriend or the boyfriend's mother to confirm if the explanation he would have given (as he did in his testimony or HOA) about the carpentry job and the tools in the Golf vehicle could be true. Instead, the police refused him a telephone call to a family member, which could have assisted him to reach someone who could have assisted in the investigation and even provide information which could have exonerated the Plaintiff from the arrest, charges and detention. In view of this Court, not nearly sufficient means were made by the police and W/O Smith to satisfy the requirements in respect of a reasonable suspicion in light of the said decisions of Louw and Mabona, *supra*.

(xx) In the view of this Court, the police failed to properly exercise their discretion conferred on them in terms of said section 40 (1)(b), and therefore, the Plaintiff must succeed on his claim for unlawful arrest. Accordingly, their subsequent detention is equally unlawful in the circumstances.

(e) the Assault:

(i) This assault relates to the injuries sustained by the Plaintiff due to the shooting on the Plaintiff's leg when he and other occupants were driving on 13 June 2019 in the VW Golf vehicle.

(ii) With regard to the firearm that was allegedly pointed at the police by the driver of the Golf, the Plaintiff submitted that there was no evidence led that the firearm was pointed at W/O Smith and it would not have mattered that the firearm was pointed elsewhere, W/O Smith would still have shot at him despite the fact that there was no danger or imminent danger to anyone, including W/O Smith, because W/O Smith testified at the trial that in cases such as the present one, he does not wait for the suspect to shoot first but once he sees a firearm, he shoots first. This, the Plaintiff submitted, was unreasonable. The Plaintiff went on to contend that if it was not for the shooting by the police on him, none of the injuries he sustained would have occurred.

(iii) The Defendant, on this point, submitted that, since the Golf in which the Plaintiff was travelling was ordered to stop by way of the police blue lights and siren and refused and/or resisted the order, and further since the driver of the Golf pointed a firearm at the police,

W/O Smith fired firstly warning shots and then on the Golf in self defence and/or as a necessary use of force to effect an arrest.

(iv) In view of this Court, no evidence was presented by the Defendants that a firearm was present and pointed at the police or W/O Smith. The driver, who allegedly pointed the firearm apparently ran away when the Golf came to a stand still. The Plaintiff denied that he pointed a firearm at the police and that a firearm was so pointed by any of the occupants of the Golf. W/O Smith testified that he first fired a shot at the Golf, which caused it to loss control and then went into the ditch and stopped. He then fired two more shots at the vehicle and its occupants. He further testified that he first warned the suspects before he fired the last two shots. When the remaining three occupants ran off, he called for assistance and back up.

(v) As indicated before, W/O Smith testified that he shot at least three shots at the Golf vehicle. It is common cause that one of the shots injured the Plaintiff in his right leg. W/O Smith stated that he shot at the Golf in self defence after the driver thereof pointed a firearm at him and/or due to the fact that the driver disobeyed and/or resisted an order from the police to stop, and therefore he was legally entitled to force the Golf to stop by way of shooting at it.

(vi) The Plaintiff contended that there was no firearm being pointed at W/O Smith and that there was no imminent danger or threat to the police and therefore disputed the defence raised by the Defendants.

(vii) This Court is not persuaded by the contentions made by the Defendants. The Defendants could not show that a firearm was pointed or that there was any threat or danger to W/O Smith. The only other witness for the Defendants, Det Ngwenya, did not testify to anything about the shooting. No one on the side of the police could corroborate W/O Smith's version of events.

(viii) In the view of the Court, the Plaintiff has proven that he was shot by the police and sustained injuries. This was corroborated by the hospital reports, the evidence of the Plaintiff's sister, the medico-legal report and evidence of Dr Kumbirai. It was in any event not disputed by the Defendants. In the opinion of this Court, the Defendants did not succeed in refuting the evidence by the Plaintiff and could not prove that the shooting was done in self defence as there was no danger, threat or imminent harm show by the Defendants. This Court is further not persuaded by the argument of disobedience or resistance of the police order by the Plaintiff. The Plaintiff fled from the police as he was under the bona fida impression that the Golf is being hijacked or being taken away by his stepmother's brother with a similar vehicle (Fortuner) and who is also a police officer. The Defendants could, in view of this Court, not refute this explanation. This Court is inclined to accept the Plaintiff's version as a more probable one than that of the Defendants.

(f) the witnesses:

(i) The Defendants referred this Court to the Stellenbosch Farmer's Winery decision, *supra*, as they argued that this case concerns two irreconcilable, mutually destructive versions of the events.

(ii) In this decision, it was held that, in such cases of irreconcilable versions, the court described a test for resolving such disputes by making findings on the credibility and reliability of witnesses and the probabilities thereon.

(iii) This Court is not in agreement with the contention of the Defendants that there are irreconcilable, mutually destructive versions. This Court already found that the Defendants did not discharge the onus placed on them in terms of section 40 (1)(b) and the case law sited above. However, and in the event that this Court may be wrong on this particular issue, it is prepared to do the necessary in terms of the said Stellenbosch Farmer's Winery decision, *supra*.

(iv) The witnesses for the Plaintiff (excluding Dr Kumbirai) were not all particularly dynamic or on point on all aspects of their testimonies. Although they fumbled on certain issues, their over-all testimony does not alter this Court's view that, ultimately, their evidence on material aspects were reliable and forthright. The Plaintiff's evidence was largely corroborated by that of his sister, and even though his mother's testimony was not, strictly speaking, relevant to all the issues to be decided, she impressed this Court as an honest, straight forward and reliable witness. This Court found all of their evidence to be credible.

(v) The testimony of Dr Kumbirai confirmed the contents of his medico-legal report and he was consistent in his opinion on the injuries sustained by the Plaintiff, the consequences thereof, the treatment received and the treatment in future. He came across to this Court as an honest, knowledgeable and experienced professional whose evidence could be trusted and relied upon.

(vi) The witnesses for the Defendants appeared to this Court as generally honest and decent persons, but the Court found their evidence to be inconsistent, particularly that of W/O Smith. Det Ngwenya appeared to be evasive on certain aspects relating to his role in the charges proffered against the Plaintiff, the contents of the Investigations Diary and the eventual release of the Plaintiff without going to Court. It seems as if the two police officials tried to corroborate each other's version of the events on particular aspects. This alerted this Court to the fact that their testimonies could have been rehearsed and this pointed to the unreliability of their testimonies. In the opinion of this Court, the evidence of the Defendant's witnesses did not assist to take the Defendant's case much further.

(vii) The Court is, in light of the aforegoing, convinced that that the Plaintiff's version of the events are more probable than that of the Defendants.

[F] THE QUANTUM:

[19] In considering the quantum of a claim, this Court will be guided by, *inter alia*, the following principles:

(i) In Rahim and 14 Others v Minister of Home Affairs 2015 (7K6) QOD 191 (SCA) at para 27, it was held

"*[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court ex aequo et bono. Inter alia the following factors are relevant:*

27.1 circumstances under which the deprivation of liberty took place;

27.2 the conduct of the defendants; and

27.3 the nature and duration of the deprivation.

Having regard to the limited information available and taking into account the factors referred to it appears to me to be just to award globular amounts that may vary in relation to the time each of the appellants spent in detention" [also see Ngwenya v Minister of Police (924/2019) [2019] ZANWHC 3 (07 February 2019) at para 6 and Olgar v Minister of Safety and Security 2008 JDRJ 582 (E) at para 16].

(ii) In Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) [2007] 1 All SA 558 at para 17, the Court held that:

"*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 needs 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 no higher value than that*".

(iii) The Court in Minister of Safety and Security v Tyulu (2009) ZASCA 58; 2009 (5) SA 85 (SCA) held as follows:

"*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*".

(iv) In relation to the discretion a Court has regarding the award of damages, it was held in Kwenda and Others v Minister of Safety and Security (3667/09) [2010] ZAGPPHC 274 (25 June 2010) at para 18, "*that it is settled law that the trial judge has a large discretion to award what he in the circumstances considers to be fair and adequate compensation to the injured party for the sequelae of his injuries*" [also refer to Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (AD) at para 60].

(v) In Mathiso v Minister of Police (6938/2019) [2021] ZAGPJHC 768 (03 December 2021) at para 40 it was held that where a transgression occurred, the victim of the abuse is entitled to be compensated in full measure for any humiliation and indignity which resulted and where a right is of such an important nature that it has been afforded constitutional protection, any damages to be awarded should reflect that importance.

(vi) The Plaintiff contended that he was detained for a period of five (5) days. The Plaintiff further relied on the evidence of Dr P Kumbirai, his medico-legal report and case authorities to substantiate the quantum of his claim.

(vii) It was submitted on behalf of the Plaintiff that he was treated for the shooting at Mamelodi Day hospital, suffered acute pain for two weeks and is still having chronic pain in his right leg, and, is dependant on the use of analgesics for managing the pain. The Plaintiff is further unable to stand, walk or run for long periods due to this pain. Consequently, the Plaintiff is disadvantaged and is an unequal partner in the open labour market. As a result of the injury and pain the Plaintiff suffered financial depression, as he could not continue to run his transportation and carpentry business any further.

(viii) Dr Kumbirai, after considering the hospital reports and consulting with the Plaintiff, indicated that he could benefit from an operation to remove the bullet remnants in his leg to reduce the causes of the pain and chances of developing sepsis in the path of the bullet, which surgery would cost approximately R40 000-00 and would take the Plaintiff around four weeks to recuperate.

(ix) The Plaintiff relied on Msongelwa v Minister of Police 2020 (2) SACR 664 (ECM) as a precedent to show that a court awarded an amount of R5 260 000-00 for unlawful arrest and detention for a five month period. The Plaintiff conceded that the said period was way more than that in the current matter and submitted that an amount of R1 550 000-00 in this case would be fair and reasonable compensation, all inclusive.

(x) The Plaintiff also referred this Court to Jacobs v Chairman, Governing Body Rhodes High School 2011 (1) SA 160 (WCC) at para 46, where an amount of R350 000-00 was

awarded for assault and general damages arising from physical injury, emotional and psychological suffering and pain and suffering.

(xi) With regards to the unlawful arrest and detention, the Plaintiff referred this Court further to Theobald v Minister of Safety and Security 2011 (1) SACR 379 (GSF) at 389 F where it was held that:

"*It has long been settled law that the arrest and detention of a person are drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper authorisation, such arrest and detention are unlawful*".

(xii) With regard to the assault (shooting) the Court was referred to Mahale v Minister of Safety and Security 1999 (1) SA 528 (SCA) where it was held that unless there is legal justification, the shooting would be prima facie wrongful in which case a shooting at a suspect would constitute an unlawful assault. The Plaintiff therefore contended that the shooting of the Plaintiff (assault) by W/O Smith was unlawful and that the Defendants therefore liable for the compensation towards the Plaintiff.

(xiii) The Plaintiff therefore submitted that the arrest, detention and assault was unlawful and violated his rights to freedom of the person, dignity and bodily integrity, which the Defendants were unable to justify, and which resulted in the Plaintiff suffering damages in the amount of R1 550 000-00.

(xiv) The Defendants submitted that the plaintiff's claim amount of R1 550 000-00 is unreasonable and unrealistic. The Plaintiff was not in custody for five (5) days, but for four (4) days. The Defendants referred this Court to the Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA). This case sets out the principles for the assessment of damages in relation to unlawful arrest and detention and will be discussed herein-below.

(xv) The Defendant contended that, in the event that this Court found the arrest, detention and assault to be unlawful, which is denied by them, and that the Defendants are liable towards the Plaintiff, the principles in the Tyulu decision, *supra*, should be taken into consideration. The Defendants then proposed an award in the amount of R30 000-00 per day maximum for the four (4) days the Plaintiff was in custody, therefore an amount of R120 000-00, and further an amount of no more than R240 000-00 in respect of general damages be awarded. Accordingly, a maximum amount of R360 000-00 (all inclusive) would, so the Defendants submitted, be fair and reasonable compensation in the circumstances.

(xvi) The following cases authorities were also consulted by this Court in respect of the determination of the quantum:

(a) in Kwenda, *supra*, an award of R70 000-00 was granted for a detention of 22 hours under appalling conditions at the Sliverton Police Station, Pretoria.

(b) in Mothoa v Minister of Police (5056/2011) [2013] ZAGPJHC at para 38, the Court awarded an amount of R150 000-00 where the detention period was 22 hours under terrible conditions at the Johannesburg Central Police Station.

(c) in Mathiso, *supra*, an award of R350 000-00 was made where the detention period was 26 days and the Plaintiff lost his employment due to prolonged periods of absence from work.

(d) the Plaintiff in Feni v Minister of Police [EL 462/20] [2022] ZAECHC 1 (26 May 2022) was awarded an amount of R180 000-00 after being detained for a 3 day period and harshly treated at the police station, held under difficult circumstances and finally released without ever appearing in Court without any explanation.

(xvii) As indicated, the case authorities mentioned above, are valuable guidelines in determining the amount of damages. Each case must be decided on its own merits. This Court considered the facts and circumstances of the case, including the evidence led, the case law cited, the nature of the injuries sustained by the Plaintiff and the sequelae thereof, the period of detention, and the proposals made by the Defendants. The Plaintiff was refused a phone call to his family and relatives and also taken to the hospital for treatment almost five hours of the injuries in his leg. He was kept handcuffed and under police guard even on the way to hospital and after his treatment. He remained in custody for four days with a swollen and painful leg injury. All these factors were also taken into account by this Court.

[G] CONCLUSION:

[20] (1) This Court is satisfied that:

(a) the Plaintiff was arrested, detained and assaulted by the police officials in the employ of the Defendants, acting as such in the course and scope of their employment with the Defendants;

(b) the arrest, detention and assault was unlawful;

(c) the shooting by the said police officials on the Plaintiff caused the injuries to the Plaintiff's leg and the sequelae (damages) thereof;

(d) the Defendants are liable towards the Plaintiff for the payment for the damages suffered;

(e) in considering the award to be made for the damages, this Court also has to take into account the importance of the constitutional rights to individual freedom, dignity and bodily integrity.

(2) This Court is therefore prepared to award compensation to the Plaintiff as follows:

(a) R35 000-00 per day for 4 days, that is, R140 000-00;

(b) R40 000-00 in respect of the surgery required as per Dr Kumbirai's report;

(c) R250 000-00 in respect of general damages; and

(d) therefore, a total amount of R430 000-00 be granted as fair, just and adequate compensation to the Plaintiff.

(3) This Court will then make an appropriate order in light of the above and all evidence before it.

[H] COSTS:

[21] The general principle is that costs follows the result except where there are good grounds to depart from this principle [Myers v Abramson 1951 (3) SA 348 (C) at 455]. This Court finds no such grounds to deviate from the general principle in this matter.

[I] ORDER:

[22] In the result, the following order is made:

(1) that the arrest, detention and assault of the Plaintiff by the Defendants is unlawful;

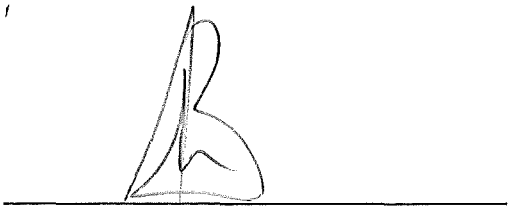
(2) judgment is granted in favour of the Plaintiff against the Defendants for:

(a) payment of the amount of R430 000-00;

(b) payment of interest on the said amount at the prescribed rate per annum, from date of service of issue of summons to date of final payment, both days included; and

(c) costs of suit.

(3) all amounts mentioned in 2(a) to (c) above to be paid within a maximum of sixty (60) days of date of delivery of this judgment.



B CEYLON

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Hearing Dates:	08, 09, 10 and 24 March 2022
Judgment Date:	07 July 2022
Appearances:	
For the Plaintiff:	Adv M Mlisana
Instructed by:	Sijako Attorneys
	Pretoria
For the Defendants:	Adv A Moja
Instructed by:	The State Attorney
	Pretoria