IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 5546/2016
REPORTABLE

In the matter between:

NCEBA SANDLANA	Plaintiff
and	
MINISTER OF POLICE	First Defendant
DIRECTOR OF PUBLIC PROSECUTIONS	Second Defendant

Bench: P.A.L Gamble, J

Heard: 28, 29 & 30 November 2022; 25 January 2023

Delivered: 11 May 2023

Judgment

GAMBLE, J:

INTRODUCTION

1. On Tuesday 19 August 2014, Mr. Nceba Sandlana ("the plaintiff"), a 48-year-old family man from Gugulethu, was arrested on the steps of the High Court, Cape Town by Sgt. Lwandile Msindo, a detective with the South African Police Service ("SAPS") stationed at the Cape Town Central Police Station ("Cape Town Central"). At the time

the plaintiff was attending the criminal trial of his brother, who was arraigned on a murder charge in the High Court.

2. The plaintiff was thereafter detained by Msindo at Cape Town Central before he appeared before the magistrate, Cape Town, purportedly on a charge under the Intimidation Act, 72 of 1982 ("the Act") the following day, Wednesday 20 August 2014. The plaintiff's case was then remanded for a week while his personal circumstances were investigated by the State with a view to bail being set. In the interim the plaintiff was detained at Pollsmoor Prison until 26 August 2014, when he appeared again and was granted bail in the sum of R500 which was paid there and then. The case was postponed to 23 October 2014 and the plaintiff was released.

3. The matter was struck off the roll by the presiding magistrate on 23 October 2014 because the docket was not at court. No further prosecution ensued and in 2016 the plaintiff issued summons out of this court for wrongful arrest and detention as also malicious prosecution, all arising out of his arrest as aforesaid. The Minister of Police is cited as the first defendant and the Director of Public Prosecutions ("DPP") as the second defendant.

4. Upon commencement of the trial on 28 November 2023 the Court was asked to determine liability and quantum in respect of both claims. However, when the matter was argued on 25 January 2023, counsel for the plaintiff, Mr. Papier, informed the Court that the plaintiff had abandoned the claim against the DPP for malicious prosecution and that it had been agreed in the interim that each party would bear its own costs in that regard. Thus it is only the wrongfulness of the plaintiff's arrest and the damages flowing therefrom, if any, that fall for determination. For the sake of convenience, the first defendant will hereinafter be referred to as "the defendant".

THE DEFENCE TO THE CLAIM FOR WRONGFUL ARREST

5. It is common cause that that defendant has attracted the onus of establishing the lawfulness of the plaintiff's arrest[1]. To that end the defendant relies on the provisions of s40(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the CPA") which is to the following effect.

> "**40. Arrest by peace officer without warrant –**
>
> (1) A peace officer may without a warrant arrest any person –
>
> (a)…
>
> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

It is clear therefore that a lawful arrest without a warrant requires a reasonably suspected contravention of a Schedule 1 offence.

6. Schedule 1 to the CPA contains a long list of serious offences and includes a so-called "catch-all" provision incorporating –

> "Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine."

7. In support of the grounds justifying the arrest, the defendant makes the following allegations in para 2 of his plea.[2]

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[1] Minister of Law and Order and another v Dempsey 1988 (3) SA 19 (A) at 38 B-C; Minister of safety and Security v Sekhoto 2011 (5) SA 367 (SCA) at [53]; Minister of Safety and Security and another v Swart 2012 (2) SA 226 (SCA) at [19].

[2] The pleading is reproduced as in its original grammatical and syntactical form.

"First Defendant only admits that on or about Tuesday, 19 August 2014, at High Court in Cape Town, Plaintiff was arrested and detained on an allegation of contravening section 1(1)(b) read with section 2 and 3 of the Intimidation Act 72 of 1982, referred to as Intimidation, by Constable Msindo. First Defendant denies that the arrest of Plaintiff was unlawful and plead that the arrest of Plaintiff was lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977, in that:

2.1 arresting officer was a peace officer;

2.2 arresting officer entertained a suspicion since Plaintiff was pointed out to him by complainant;

2.3 offence was a Schedule 1 offence; and

2.4 there were reasonable grounds in that a criminal case was already registered against Plaintiff under Cape Town CAS 2083/04/2014."

The defendant thus attracted the onus of establishing the suspected commission of a Schedule 1 offence by the plaintiff. I turn, first, to examine the relevant evidence.

EVIDENCE ADDUCED BY SAPS

8. Msindo explained that in 2014 he was stationed at Cape Town Central as a detective handling general criminal complaints such as aggravated assault and intimidation. At that time he held the rank of constable, while he has since been promoted to sergeant. He explained that on 2 May 2014 he was allocated a docket under reference number Cape Town CAS 2083/04/2014 for further investigation. That is the docket relevant to this matter.

9. On going through the docket Msindo said he noted that the complainant was a certain Ms. Zimkita Ndayi, the sister of the deceased in a murder case in which the plaintiff's brother, Siyabulela Sandlana, was the accused. I shall refer to this as "the murder case". The docket recorded that Ms. Ndayi was assisting the investigating officer (W/O John van Staden) in the murder case. That assistance, it seems, encompassed the marshalling and transport of witnesses to court and the like. Ms. Ndayi was not a State witness in the murder case.

10. Like Ms. Ndayi, the plaintiff resided in the Cape Town suburb of Gugulethu. He was also regularly in attendance at the High Court trial of the murder case, offering support to his brother. In the result, Ms. Ndayi and the plaintiff were acquainted by sight but they were not well disposed to each other: Ms. Ndayi had complained to van Staden that she felt threatened by the plaintiff and that she feared for her safety. The plaintiff's evidence also suggests that he and Ms. Ndayi were active in local politics in Gugulethu, were aligned to different political parties and had a history of disagreement in that regard.

11. Ms. Ndayi told the police that a friend had informed her of a video circulating on the WhatsApp social media platform which showed her sitting at court during the trial of the murder case. The plaintiff was evidently the author of this video, which was the second such image to be circulated on social media, an earlier iteration having done the rounds in 2013. Ms. Ndayi told the police that she found the circulation of these video's threatening.

12. Ms. Ndayi told the police that while attending the High Court trial in 2014 she was informed by van Staden that the plaintiff was again making a video recording of her. When van Staden asked the plaintiff what he was up to, said Ms. Ndayi, he was apparently told by the plaintiff that he was a journalist, implying that he thus served a public interest in covering the murder case.

13. Upon enquiry as to her welfare, Ms. Ndayi told van Staden that she was “ok”, but he nevertheless decided to accompany her after the court adjourned. Her car was parked in the street in the High Court precinct and while she and van Staden walked to her car, Ms. Ndayi said the plaintiff continued to walk behind her and film her on his cellphone camera. Given that they were acquainted with each other on the basis set forth above, and in light of the fact that he sometimes drove past her house in the company of male friends, Ms. Ndayi said she was scared of the plaintiff and experienced his conduct overall as threatening and intimidatory.

14. Ms. Ndayi laid a charge against the plaintiff at Cape Town Central on 30 April 2014, which was registered under the aforesaid CAS number. The front cover of the docket records the charges as “*1. Intimidation; 2. Incitement”.* These entries were not made by Msindo who only received the docket for investigation on 14 May 2014. Common sense tells one that the entries probably originated from an official in the charge office who opened the docket for investigation. Just what that unnamed official considered the crime of “incitement” to have been in the circumstances, is beyond comprehension.

15. Be that as it may, Msindo said that when he received the docket it contained only the statement of Ms. Ndayi and so he asked her to come in for an interview. She gave him further details which confirmed her fear of the plaintiff. Msindo said that he asked Ms. Ndayi to furnish him with the contact details of any persons to whom the video had been circulated on WhatsApp. She undertook to do so but never reverted with any further information. When he pressed her to procure such evidence, Msindo said that Ms. Ndayi told him that her friends were reluctant to get involved as they were scared of the plaintiff.

16. It seems that Msindo was not particularly hasty to complete his investigation but, perhaps in fairness to him, he did tell the court that his workload was excessive – he said he never investigated less than 100 dockets at any given time. In the event, Msindo procured a statement from van Staden on 10 July 2014, in which the warrant officer

confirmed Ms. Ndayi's statement regarding events at the High Court. Msindo said that he was then satisfied that Ms. Ndayi had felt intimidated and that the plaintiff had behaved as described by both her and van Staden.

17. Msindo said that in the course of his investigation he had attempted to confront the plaintiff on various occasions with the allegations made by Ms. Ndayi but was unable to gain access to his residence which he claimed was surrounded by a high wall. He said he did not know what the plaintiff looked like and that he had no number at which he could contact him telephonically. Msindo also testified that he had handed Ms. Ndayi a "pointing out note" in May 2014. This would have permitted her to call upon the police to arrest the plaintiff in the event that she encountered him.

18. In the result, Msindo said he decided to arrest the plaintiff at the High Court while he was attending the murder trial. He said that he believed that Ms. Ndayi was scared of the plaintiff and that he thus had reasonable grounds to believe that he had committed the offence of "intimidation". Msindo said he wished to bring the plaintiff before the court so that the prosecutor could decide what to do with him. Because he believed that the crime of "intimidation" resorted under Schedule 1 to the CPA in that it carries a sentence in which 6 months' direct imprisonment (or more) may be imposed upon conviction, Msindo said he considered that the arrest of the plaintiff without a warrant was justified under that schedule.

19. Having confronted the plaintiff at the High Court, and having satisfied himself as to his identity, Msindo said he then effected the arrest described above. After informing the plaintiff of his rights, Msindo cuffed him and took him off to Cape Town Central where he was charged. During his post-arrest interview, said Msindo, the plaintiff confirmed that he had made a video recording of the plaintiff and alleged (in a rather garbled version) that he had done so because he knew that Ms. Ndayi was on parole at the time following her conviction on a charge of fraud and he considered that her attendance at the High Court constituted a breach of her parole conditions. He told

Msindo that he wished to provide Ms. Ndayi's parole officer with proof of these alleged transgressions.

20. Msindo said he was skeptical of this explanation as he had already heard from van Staden about the plaintiff's earlier claim that he had made the video recording in the discharge of his functions as a journalist. In any event, the plaintiff was detained overnight in the cells at Cape Town Central on Tuesday 19 August 2014 before being taken across to the magistrates' court for his first appearance the following day.

21. At the time of his first appearance the plaintiff's details regarding previous convictions and/or pending cases were incomplete and according to Msindo the control prosecutor in the office of the Senior Public Prosecutor, Ms. Warda Steyn, required some follow up before bail could be considered, this notwithstanding Msindo's recommendation at that stage that bail not be opposed.

22. Accordingly, when the matter came before the magistrate in court 16, which is evidently the feeder court for criminal cases to be tried in the regional court, the matter was postponed for a week for verification of the plaintiff's personal details. On 26 August 2014 the plaintiff appeared in court 16 again and bail was fixed in the sum of R500, which, as I have said, was paid. The plaintiff was warned to appear again on 23 October 2014 and was released from custody.

23. At his next appearance on 23 October 2014, the police docket was not at court – due to Msindo's slackness – and the matter was thus struck from the roll. Msindo said that the matter was never re-enrolled as he was unable to procure the further statements which Ms. Steyn required from the witnesses to whom the video's had been circulated. That was the end of the abortive criminal prosecution of the plaintiff.

24. The defendant also adduced the evidence of van Staden which corroborated the plaintiff in all material respects and which need not be addressed further. Further, the defendant called Ms. Steyn, seemingly to rebut the allegations of a malicious

prosecution. No doubt as a consequence of the veracity and materiality of her evidence, the plaintiff subsequently abandoned the claim against the DPP.

25. Ms. Steyn's evidence did nevertheless deal with a relevant aspect of the claim against the defendant. This related to the formulation of the charge sheet in the intended prosecution against him. Ms. Steyn explained that as part of her duties she screened all new dockets before they were handed to the court prosecutor at an accused's first appearance. The purpose was so that she could satisfy herself, inter alia, as to the status of a matter, whether a prima facie case existed, what charge(s) should be preferred, what further investigation needed to be done and to which court the matter should be referred.

26. In that regard, Ms. Steyn testified that she held the view that the statements in the docket made out a prima facie case for a contravention of s1(1)(b) of the Act. She regarded that contravention as a Schedule I offence under the CPA because of the penalty provisions in s1 of the Act which provided for the imposition of a fine not exceeding R40 000 or imprisonment not exceeding 10 years, or to both such a fine and such imprisonment.

27. Ms. Steyn explained further that when a docket was sent to court the annexure to the charge sheet ("the J15"), in which the details of the offence with which an accused was charged were set forth, was customarily filled in by the court prosecutor. There was a collection of pro forma annexures in a series of pigeon-holes in the court room which the court prosecutor procured and filled in. In this matter the annexure to the J15 was not so filled in and remains blank. However, it is clear that the court prosecutor selected the pro forma annexure relating to a contravention of s1(1)(a) of the Act.

EVIDENCE OF THE PLAINTIFF

28. Upon consideration of the plaintiff's evidence it appears that there is not much in dispute between the parties regarding what the plaintiff said and did during the murder

trial in relation to Ms. Ndayi. He admitted having taken a video of her using his cellphone, suggesting that he wanted to report her conduct to her probation officer to demonstrate that she was in breach of the aforesaid parole conditions. He denied ever having told van Staden that he was a journalist.

29. The plaintiff's explanation in regard to the filming of Ms. Ndayi was palpably false. He was no goody two-shoes purporting to discharge a civic duty but clearly intent on harassing the sister of the victim whom his brother had allegedly murdered. His conduct is thus to be considered in the emotionally charged atmosphere of a murder trial and against the background of his political differences with Ms. Ndayi. However, the dubious "journalist" explanation is not relevant for the determination of this matter: it might have been if the criminal charge against him was pursued to finality. The question to be addressed here is whether the defendant has discharged the onus of establishing that the arrest of the plaintiff was lawful.

A SCHEDULED OFFENCE?

30. The respondent argues that a contravention of s1 of the Act is an offence classified under Schedule 1 to the CPA in light of the penalty provisions therein. As I have already said, this is consistent with the approach adopted by Ms. Steyn already referred to. The plaintiff argues that because the Act is specifically mentioned in Schedule 2 Part III of the Act, it does not resort under Schedule 1 and that an arrest without a warrant is not sanctioned.

31. I do not agree. Part III of Schedule 2 specifically refers, in parentheses under the heading, to its application in respect of ss 59, 72, 185 and 189 of the CPA. The first two sections relate to the circumstances in respect whereof bail for a listed offence may be considered while s185 deals with witness protection and s189 with recalcitrant witnesses. There is nothing in the said Part III which links it to the powers of arrest.

32. I am consequently of the view that an arrest for a contravention of s1 of the Act may be effected without a warrant provided there has been compliance with the criteria contemplated in s40(1)(b) of the CPA. I turn now to consideration of the applicable provisions of the Act.

THE INTIMIDATION ACT, 1982

33. At common law a threat made to a person might, in appropriate circumstances, constitute common assault[3]. Central to a conviction in such circumstances is the fact that, in the absence of any physical impact by the perpetrator on the victim, the perpetrator was required to have to inspired in the victim the reasonable belief that force was imminently to be applied to her.[4]

34. The Intimidation Act was promulgated in 1982, replacing the relevant provisions of the Riotous Assemblies Act, 17 of 1956. It is a piece of apartheid order legislation introduced at a time of increasingly repressive internal security legislation designed to criminalise conduct, largely, in the field of the resistance politics.[5] Its application was often to be found in the attempts by members of a particular political philosophy to induce others to take up the same view (or not to take up a differing view)[6] while in the field of labour relations, for example, it was used against striking workers who purported to dissuade non-striking workers from going to work on pain of violence being dealt out towards them[7].

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[3] See, for example, R v Jolly and others 1923 AD 176 at 179; R v Sibanyone 1940 (1) PH H67 (T); S v Miya 1966 (4) SA 274 (N) at 277

[4] South African Criminal Law and Procedure Vol II (3rd Ed. by JRL Milton) at 427

[5] It is not insignificant that the Act was passed at the same time as the notorious and now defunct Internal Security Act, 74 of 1982.

[6] S v Mohapi en andere 1984 (1) SA 270 (O) at 274E – 275A

[7] South African Criminal Law and Procedure Vol III, Part 2 (2nd Ed. by JRL Milton) at M1

35. In Holbrook[8] a Full Bench in the Eastern Cape remarked that the wording of the section was "tortuously framed" and went on to add in an *obiter dictum* that the section was an unnecessary burden on the statute book whose objectives might rather be achieved through the enforcement of common law sanctions. The Court's suggestion to the Law Commission that it consider the constitutionality of the Act seems to have fallen on deaf ears. Underlying the decision in Holbrook was the concern whether, when viewed reasonably, the offending conduct could truly have been taken as a threat to the personal safety of the complainant.

36. In any event, the Act has two distinct provisions – s1 thereof prohibits "*certain forms of intimidation"* while s1A targets the intimidation of the "*general public, [a] particular section of the population or the inhabitants of a particular area."* The latter section was an amendment effected to the Act shortly after its promulgation and was intended to focus on more generalized threats to the disturbance of public order. This matter, however, involves only the application of s1.

37. At the time of the plaintiff's arrest s1 comprised two distinct contraventions.

"**S1.Prohibition of and penalties for certain forms of intimidation.**

(1) Any person who –

(a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind of persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint –

(i) assaults, injures or causes damage to any person; or

[8] S v Holbrook [1998] 3 All SA 597 (E) at 603a-d

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind, or

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, occurrence or publication –

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other persons; and

(ii)…[9]

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

38. S1(2) of the Act contained a provision relating to the onus in criminal proceedings:

"1(2) In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution."

39. In October 2019, the Constitutional Court considered the constitutionality of s1(1)(b) and 1(2) of the Act in Moyo[10] and concluded that neither subsection passed

[9] This subsection was deleted when the aforesaid amendment introducing s1A was promulgated later in 1992.

constitutional muster. S1(2), which effectively made provision for a reverse onus of proof, is of no relevance in this matter and will not be considered further.

40. In regard to the finding of unconstitutionality of s1(1)(b), the Constitutional Court directed that its finding of invalidity should operate retrospectively in regard to pending criminal trials and appeals. That order does not affect the determination of this matter which must be decided on the assumption that s1(1)(b) was constitutional and fully operative in 2014. This Court must therefore look at s1(1)(b) and consider it as it might reasonably have been interpreted by police officers, prosecutors and courts at that time.

41. I should add that in finding s1(1)(b) unconstitutional, the Constitutional Court considered that the sub-section was overly broad when applied in the context of, inter alia, the free speech provisions of the Constitution.

> "[44] Our courts have rightfully referred to the framing of s1(1)(b) as 'tortuous'. But that alone is not enough to render the section unconstitutional. On a plain reading, the section criminalises any person who acts in a manner that has the effect of causing another to fear for their own safety, or the safety of their property or livelihood. This, in my view, casts the net of liability too wide, as it depends simply on the experience of fear by another. For example, the act of handing out flyers advocating expropriation of land without compensation in a known libertarian suburb could, all things considered, lead to a charge of intimidation. This is because such an activity would, in all likelihood, be fear-causing. It is unlikely that such an infringement on freedom of expression and the adjacent political rights could ever be justified under a s36 analysis…
>
> [65]… If the section merely criminalizes conduct that creates objectively reasonable fear of imminent violent injury to person, property or security of livelihood, it becomes easier to argue that it does not infringe on the constitutional guarantees of freedom of expression or peaceful protest.

[10] Moyo and another v Minister of Police and others 2020 (1) SACR 373 (CC)

Incitement of imminent violence is not protected as free expression and it would be difficult to argue that conduct creating objectively reasonable fear of imminent violence to person, property or security of livelihood would qualify as peaceful protest. If, however, intimidation does not carry this broad meaning under the section, and it is held that any intentional conduct that creates objectively reasonable fear of harm to person, property or security of livelihood is covered, then it is overbroad because it would criminalize protected free speech that does not incite imminent violence and probably also peaceful forms of protest."

42. There is a dearth of reported judgments dealing with the applicability of s1(1)(b) prior to Moyo. A comprehensive study of the sub-section was conducted by a Full Court in the Northern Cape in Motshari[11], an analysis with which I fully associate myself. At para 10 of this judgment, the learned judges refer to a critique of the Act in the Industrial Law Journal[12] in which the authors pointed out the contextual setting of the Act in the milieu of repressive security legislation passed at the time and the attempt to broaden the ambit of legislation intended to crack down on conduct properly classified as intimidatory.

43. The facts in Motshari were based on domestic strife of some duration between what were described as "live-in lovers". The Full Court[13] distinguished that situation from the customary application of the Act –

"B.1…The case did not involve any riotous behavior pertaining to an assembly of people or a security situation or some industrial action."

The Full Court went on to hold that it considered that the Act was not applicable in those circumstances and that the common law or even the Domestic Violence Act, 116 of 1998, should have been resorted to.

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[11] S v Motshari [2001] 2 All SA 207 (NC)

[12] Clive Plasket and Richard Spoor "The New Offence of Intimidation" (1991) 12 ILJ 747

[13] At 209f

44. Upon consideration it seems to me that in 2014 the ambit of the Act would have similarly been strictly interpreted. I therefore consider that s1(1)(a) then contemplated either an actual act of violence (such as an assault) or an imminent threat of such violence, intended to induce the victim to do a particular act or to refrain from doing something.

45. S1(1)(b) on the other hand contemplated an act or conduct of sorts which induced in the victim an imminent sense of fear for her personal safety (or property) or the safety (or property) of another. It is the latter interpretation that occasioned the striking down of the section by the Constitutional Court as being overly broad.

HAS THE DEFENDFANT ESTABLISHED THE ALLEGED ACT OF INTIMIDATION ON THE PART OF THE PLAINTIFF?

46. As I have already said, the defendant justifies the arrest of the plaintiff under s 40(1)(b) of the CPA on the basis of an alleged contravention of s(1)(b) of the Act, as it then was on the statute book. It is thus required to prove on a balance of probabilities that the plaintiff conducted himself in such a manner that Ms. Ndayi feared for her personal safety or for that of another. Importantly, that fear had to be of an imminent nature. In the context of the facts at hand, the focus must be on the fact that the taking of Ms. Ndayi's photograph by the plaintiff on his cellphone and the subsequent distribution thereof on a social media platform had the consequence that she felt imminently threatened by him and that she bore an imminent fear for her safety.

47. As pointed out above, the entry on the cover of the police docket made by Msindo does not disclose what particular act of "intimidation" was relied on by the investigating officer. Similarly, in the interview with the plaintiff which Msindo conducted shortly after his arrest, the offence with which he was charged is simply described as "Intimidation". Indeed, that is the description given throughout the docket where any description of the plaintiff's alleged criminal conduct is recorded.

48. It is not difficult to conclude that Msindo had no inkling whatsoever of the fact that the plaintiff was required to have breached a particular statutory provision before he could be charged in respect of any conduct vis-à-vis Ms. Ndayi. Indeed, he conceded under cross-examination that he did not know of the existence of the Act. This presents problems for the defendant: there is no common law offence known as “intimidation” and the evidence before this Court establishes conclusively that Msindo arrested the plaintiff without knowledge of the criminal contravention he was alleged to have committed.

49. When Msindo took the docket to court on the plaintiff’s first appearance, it was perused by Ms. Steyn who testified that she formed the view that a prima facie case had been made out for a prosecution of the plaintiff under s1(1)(b) of the Act. She said that the murder case comprised a number of serious crimes and given Ms. Ndayi’s involvement in assisting the investigating team during the trial, Ms. Steyn testified that she thought that the statement in the docket justified the inference that her safety “was at risk”.

50. Ms. Steyn explained that the docket was sent to court 16 with the intention that the charge to be preferred against the plaintiff was a contravention of s1(1)(b) of the Act. The duty prosecutor in that court, a certain Mr. Hugh, was responsible for attaching the appropriate pro forma annexure to the J15 and for filling in the relevant details therein. In the result, the annexure actually attached to the J15 was a pro forma document relating to a contravention of s1(1)(a) which to this day is bereft of any detail – nothing was filled in by either the duty prosecutor at the first appearance or subsequent thereto – and so this Court, upon a reading of the J15, has no idea of where, when, how or why the contravention of s1(1)(a) is alleged to have been committed by the plaintiff.

51. To be sure, the opinion of Ms. Steyn that there was a prima facie case to prosecute the plaintiff under s1(1)(b) does not mean that there was a case made out

under s1(1)(a). It could be that the prosecutor in court simply plucked the wrong annexure out of the pigeon-hole in his haste to place the matter before the magistrate, or perhaps he was of the view that the allegations in the docket indeed warranted a prosecution under s1(1)(a). The Court is left in the dark regarding this anomaly.

52. But the fact that the prosecution authorities believed that a charge under the Act should be preferred against the plaintiff does not assist the defendant in this matter. It must show that Msindo reasonably held the belief that the section of the Act upon which the justification for the arrest in the plea is predicated had been contravened. The defendant was unable to do so because the cross-examination established that Msindo had never read the Act before the arrest of the plaintiff. This notwithstanding, Msindo testified that he had learned of the existence of the offence during training at the police college and confidently proclaimed the successful arrest and prosecution of several offenders on charges of 'intimidation" during his time as a detective.

53. In my view, the fact that Msindo did not know what statutory provision the plaintiff might have contravened was, on the facts of this case, fatal to the reasonable suspicion which he is alleged to have harboured before he was entitled to consider arresting the plaintiff. After all, as demonstrated above, the Act criminalises various forms of intimidatory conduct, and it would have been necessary for the arresting officer to fully appreciate what conduct on the part of the plaintiff was proscribed before he was permitted to arrest him.

54. Had Msindo correctly understood the provisions of s1(1)(b) he would have appreciated at the time that the Act required that the threat to Ms. Ndayi's safety had to have been serious and imminent to warrant the prosecution of the plaintiff. Yet, there are facts that militate against such a conclusion having been reasonably arrived at. Firstly, the evidence of van Staden demonstrated that Ms. Ndayi did not feel sufficiently threatened when being filmed at Court during April 2014. After all, she told van Staden that he need not be concerned as she was "ok". Secondly, she was not scared to walk off to her car after this happened, notwithstanding the fact that the plaintiff continued to

film her as she walked down the steps of the court. Thirdly, she did not complain to van Staden that she feared for her safety as he escourted her to her car.

55. When Msindo received the docket on 2 May 2014, the most recent act of intimidation was alleged to have taken place almost three weeks earlier, on 14 April 2014. Prior to that, the docket reflected an incident in November 2013 when earlier video footage of Ms. Ndayi was allegedly circulated on social media. But Msindo waited until 22 May 2014 before he interviewed Ms. Ndayi and issued her with the "pointing-out note". In addition, the delay in the arrest of the plaintiff some 3 months later is not explained. Importantly, there were no further acts of intimidation alleged in the interim and there was consequently no "imminent threat" towards Ms. Ndayi at the time of the plaintiff's arrest.

56. Msindo said that he arrested the plaintiff because he was concerned about the safety of Ms. Ndayi "at the time", this notwithstanding the aforesaid absence of any further threatening behaviour by the plaintiff towards her in the interim. Furthermore, at that stage the police investigation was incomplete since Msindo had not followed up on the instructions of his superiors (who reviewed the docket from time to time) to procure additional evidence from, inter alia, the persons to whom the video footage of Ms. Ndayi had allegedly been sent by the plaintiff. This evidence was critical because the say-so of Ms. Ndayi needed to be corroborated. Further, there had been no interview conducted with the plaintiff.

57. Yet, with the investigation far from complete, Msindo said he decided to arrest the plaintiff anyway and bring him before court in order that the prosecutor could decide what to do. It was manifestly not necessary nor prudent to effect an arrest of the plaintiff in such circumstances. A reasonable investigating officer would rather first have sought directions from the prosecutor as to what was further required to bring the investigation to completion before taking the drastic step of arresting the suspect and depriving him of his liberty and dignity.

58. When the docket was reviewed by Ms. Steyn on 20 August 2014, she immediately noted the gaping holes in the investigation which need to be filled before she was prepared to permit the prosecution to go ahead and told Msindo what needed to be done in that regard. And, when the charges were eventually withdrawn against the plaintiff, it was precisely because these statements were still outstanding in the docket that the State refused to prosecute.

59. Msindo did not have personal knowledge of the commission of the alleged offence – he had to rely on the docket contents when deciding whether to arrest or not. And, when he arrested the plaintiff, those contents were incomplete. The arrest of the plaintiff was therefore effected by a police officer who did not properly comprehend the legal basis for the offence which the plaintiff had allegedly committed and whose knowledge of the factual basis for the arrest was sorely lacking.

60. While it appears that Msindo may have failed to properly exercise his discretion when arresting the plaintiff[14], this was not expressly pleaded by the plaintiff nor traversed in evidence or argument. It would therefore not be proper to make a definitive finding in that regard.

61. In the circumstances, I conclude that the defendant has not established that Msindo reasonably held the suspicion that the plaintiff had contravened s1(1)(b) of the Act and has failed to establish that the arrest was accordingly justified under s40(1)(b) of the CPA. It follows that the plaintiff has established that his arrest was unlawful.

DAMAGES

62. In assessing the plaintiff's damages, the Court has regard to what the SCA said in Rahim[15]

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[14] See, for example, Sekhoto at [28] *et seq* and the cases cited therein; De Klerk v Minister of Police 2018 (2) SA 28 (SCA) ("De Klerk SCA") at [11]

[15] Rahim and others v Minister of Home Affairs 2015 (4) SA 433 (SCA)

"[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 from introducing 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:

(i) the circumstances under which the deprivation of liberty took place;

(ii) the conduct of the defendant; and

(iii) the nature and duration of the deprivation."

63. In granting such damages, the Court enjoys a wide discretion in which fairness predominates, subject only to equanimity. In Pitt[16] Holmes J eloquently reminded trial courts that –

"I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."

64. In Seria [17], Meer J summed up the approach as follows –

"Courts, I believe are tasked with the duty of upholding the rights to liberty, safety and dignity of the individual and in so doing have a responsibility to record an

[16] Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) at 287E-F

[17] Seria v Minister of Safety and Security and others 2005 (5) SA 130 (C) at 151B

appropriate and proper value thereto, especially in the light of the extent to which these rights were devalued, indeed negated, in the brutal past of this country."

65. The plaintiff testified in detail about his experience after his arrest. He said he was kept in a filthy cell at Cape Town Central where he was in the company of a dozen drunks and a handful of hardened criminals. But his experience in the cells pales into insignificance when compared to his detention in the awaiting trial section of Pollsmoor Prison. His graphic evidence in that regard constitutes a shocking indictment of the appalling state of South African prison conditions.

66. The plaintiff testified that he was transported from the magistrates' court to Pollsmoor in a large truck along with a number of other arrestees. En route he was confronted by a hardened gangster belonging to one of the notorious "Numbers Gangs" who operate with unbridled impunity in our prisons[18]. That confrontation led to the plaintiff being deprived of his track shoes and belt even before he arrived at Pollsmoor.

67. Upon arrival at Pollsmoor, said the plaintiff, he and a large group of other men were kept in a crowded holding cell overnight, awaiting medical evaluation the following morning. He was able to share a blanket with others and had to sleep on a cold cement floor in mid-winter. The following morning the plaintiff was taken to the hospital section for a check-up where he was fortunate to receive medication for treatment of his chronic asthmatic condition. Thereafter he was taken to a euphemistically termed "sleeping cell" where he would spend the next 7 days.

68. The plaintiff said that upon entering this cell he was confronted by yet another numbers gangster, who enquired as to his gang affiliation. Evidently the members of the 26 Gang were sent by this self-appointed orderly to one part of the cell while members of the 28 Gang were sent to another part of the cell. When the plaintiff disavowed any gang affiliation he was directed to a different part of the cell where, he said, he once

[18] See, in this regard, Johnny Steinberg The Number: One Man's Search for Identity in the Cape Underworld and Prison Gangs (Jonathan Ball, 2010)

again shared a blanket and slept on the floor with other suspects who did not have gang affiliations either. The cell was grossly overcrowded with 76 persons kept in a cell with only 20 beds. During the time he was incarcerated at Pollsmoor the plaintiff said he received 2 meals a day – one at 07h00 and another at 14h00. He was not permitted to exercise outside and was only briefly let out to make a phone call to friends. For a week therefore the plaintiff was crammed into a grossly over-crowded cell with no opportunity for exercise or proper sleep.

69. The plaintiff is no shrinking violet. He is a self-confident man who is actively involved in local politics in Gugulethu where he is well-known as a volunteer and liaison officer in community organizations and he struck the Court as someone who was both astute and street-smart. He readily acknowledged that he had been arrested before on criminal charges and had spent trial as an awaiting-trial prisoner, all on charges which had ultimately been withdrawn. This was thus not the plaintiff's first experience of incarceration.

70. Yet when he testified about the events in the prison truck and later at Pollsmoor he was overcome with enormous shame and grief. He was so upset by relating his experience that the Court was required to adjourn for about 20 minutes to enable the plaintiff to compose himself. In argument, counsel for the defendant, Mr. van Wyk, readily accepted the gravity of the situation and correctly did not suggest that the plaintiff had disingenuously hammed it up in the witness box. It is clear that so many years after the event, the emotional scars of the plaintiff's experience of this unlawful arrest still run deep.

71. In argument, Mr. Papier referred the Court to the judgment of the Constitutional Court in De Klerk[19] in which an award of damages in the amount of R300 000 was confirmed in circumstances where the arrestee was held in custody for a week. In so doing, the majority of the apex court upheld the minority judgment of Rogers AJA in De Klerk SCA.

[19] De Klerk v Minister of Police 2021 (4) SA 585 (CC)("De Klerk CC")

72. I must add in passing that, following the *dictum* in De Klerk CC, it was common cause that any damages that the Court might award, should include the entire period of the plaintiff's detention and that the first appearance before the magistrate (at which bail was not considered and whereafter he was detained by order of the court) did not constitute a *novus actus interveniens* which interrupted the causal chain following upon the initial unlawful arrest.

73. Mr. van Wyk did not quibble with quantum of damages suggested by Mr. Papier and rightfully so. The facts in this case are similar to those set forth in De Klerk SCA, if not more serious, and I can only but echo the words of Rogers AJA.

> "[50] …On the appellant's evidence, what happened was a shocking violation by the prosecutor, the magistrate and indeed the investigating officer of their duties to ensure that the question of bail was properly considered at the appellant's first appearance. Detention in prison for a week is no small matter. Had the question of bail been considered by any of the officials concerned, it would immediately have been apparent that there was no justification not to grant the appellant bail in a modest amount. This was not a case where remand in custody pending further investigation could ever have been warranted.
>
> [51] I thus consider that the appellant's damages should be assessed with reference to the full period of his detention. The period of detention was seven nights, extending into an eighth day. The appellant found the experience very distressing. At the holding cells in Randburg his cellphone was confiscated and he never saw it again. After he was remanded in custody, he was handcuffed and taken to prison in a bus. He found jail a very intimidating experience. He testified that he cried almost the whole time. His period of incarceration included Christmas and Boxing Day. This was the period during which his son was meant to have been with him. He paid R450 as protection money to a fellow prisoner who could make prison life more bearable."

74. In the result, I am satisfied that a damages award in the amount of R300 000 would be fair and reasonable to both parties.

ORDER OF COURT

Accordingly, it is ordered that:

A. The first respondent is liable to pay damages to the plaintiff in the amount of R300 000;

B. Interest will run on the aforesaid amount at the prescribed rate from date of this judgment until date of payment;

C. The first respondent shall pay the plaintiff's costs of suit.

GAMBLE, J

APPEARANCES

For the plaintiff:	Mr. G.R. Papier
Instructed by	Venfolo Attorneys
	Cape Town.

For the defendants:	Mr. P van Wyk
Instructed by	The State Attorney
	Cape Town.