

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

**REPORTABLE
CASE NO: 9132/2016**

In the matter between:

GEOPHONSE MABIALA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Defendant

Bench: P.A.L. Gamble, J

Heard: 16, 17 & 18 October 2017; 9 & 10 December 2019; 25 & 26 July 2022

Delivered: 26 January 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 26 January 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. The plaintiff, Mr. Geophonse Mabiala, is a national of Congo – Brazzaville (“the Congo”) who arrived in South Africa in 2004. He claims that his presence in the Republic since then has been lawful pursuant a series of valid asylum seeker permits issued to him from time to time by the Department of Home Affairs (“DHA”).

2. At about 15h30 on Tuesday 11 June 2013, the plaintiff went to a public service kiosk at the Cape Town Station (“the kiosk”) manned by members of the South African Police Services (“SAPS”) for purposes of deposing to an affidavit before a commissioner of oaths in order that he could perform an exchange of SIM cards on his cell phone – a so-called “SIM swop”. In the process of deposing to the affidavit, it came to the attention of the SAPS officer on duty that the plaintiff was a foreign national. The circumstances as to how this occurred are in dispute and will be discussed when the evidence is analyzed.

3. Believing that the plaintiff might be an illegal immigrant and had fraudulently used a document to verify his identity, the SAPS officer ordered him to remain present behind the counter at the booth while the status of the document was verified with the DHA. As a consequence of discussions with an official of the DHA, the plaintiff was arrested and taken by police van to the Cape Town Central Police Station (“Cape Town Central”) where he was held in custody.

4. On Thursday 13 June 2013 the plaintiff was taken from the police cells to the Cape Town Magistrates Court across the road where he appeared before Magistrate Oakes on a charge relating to the alleged illegality of his presence in South Africa. The plaintiff was not released from custody immediately but was held for a further 7 days in the police cells at Cape Town Central. On his second appearance on Tuesday 18 June 2013, also before Magistrate Oakes, the plaintiff was granted bail in the amount of R500 and he was subsequently released from custody. At a later appearance on 29 August 2013, the charges against the plaintiff were withdrawn.

5. On 20 May 2014, the plaintiff issued summons under case number 8902/2014 against the Minister of Police claiming damages in the sum of R460 000 as a consequence of his alleged unlawful arrest at the kiosk by members of the SAPS on 11 June 2013. That claim was defended by the Minister of Police who filed a special plea and a plea on the merits during November 2014.

6. On 27 May 2016, the plaintiff issued a further summons out of this court under case number 9132/2016 for damages in the sum of R460 000 arising out of his alleged unlawful detention pursuant to his alleged unlawful arrest as aforesaid. In that matter, the first defendant was cited as the Minister of Justice and Correctional Services and Magistrate Oakes was cited in her personal capacity as the second defendant.

7. The matters were later consolidated and came before this Court on trial on 16 October 2017. The plaintiff was represented by Mr. S. Botha on instructions of Sohn and Wood Attorneys, the Minister of Police was represented by Ms. P. Magona, while the Minister of Justice and Magistrate Oakes were represented by Ms. B. Mthamzeli. Both counsel were instructed by the State Attorney, Cape Town. Initially, the matter ran for 3 days during which time the Court heard the evidence of the plaintiff and his witness as well as the evidence of Ms. Oakes. Thereafter the matter was postponed *sine die*.

8. When the hearing resumed on 9 December 2019, Mr. Botha informed the Court that the plaintiff had abandoned his claim against the Minister of Justice and Constitutional Development and Ms. Oakes and that, by agreement, each party would bear its own costs. Ms. Mthamzeli was accordingly excused from further attendance. The matter then continued against the Minister of Police (hereinafter conveniently referred to as “the defendant”) and Ms. Magona presented the evidence on his behalf.

9. At the conclusion of the defendant’s case, the special plea relating to the non-joinder of the Director of Public Prosecutions was abandoned by the

defendant and matter was postponed until 4 February 2020 for argument. And then came Covid-19 and its consequences: the matter eventually came on again on 25 July 2022 when argument was delivered over 2 days.

THE RELEVANT PLEADINGS

10. The defendant accepted that it bore the onus of establishing the lawfulness of the arrest of the plaintiff. The case was set forth as follows in the defendant's plea dated 20 November 2014.

"3.1 The Defendant admits that on 11 June 2013 at approximately 15h30 and at the South African Police Station at the Cape Town Train Station, Adderley Street, Cape Town members of the Defendant arrested the Plaintiff without a warrant of arrest. It is further admitted that at all material times hereto the Defendant's members were acting in the course and scope of their employment with the Defendant. The Plaintiff was transported and detained Plaintiff to (sic) the Cape Town South African Police Station, Caledon Square in Buitenkant Street, Cape Town. It is admitted that Plaintiff was then detained in a communal cell with other detainees;

3.2 Save as aforesaid, the other allegations made in this paragraph, in particular that the Plaintiff's arrest and detention was wrongful is (sic) denied;

3.3 In amplification of the above denial, the Defendant pleads as follows:

3.3.1 The Plaintiff was arrested by one Warrant Officer Geswindt, who is a peace officer;

3.3.2 Warrant Officer Geswindt entertained a suspicion on reasonable grounds that the Plaintiff had committed an offence of fraud;

3.3.3 Warrant Officer Geswindt then arrested the plaintiff.

3.4 In the circumstances, the Plaintiff's arrest was lawful in terms of section 40 (1) (b) of the [Criminal Procedure] Act [51 of 1977]¹."

11. There are no allegations of fact in the defendant's pleadings which support the purported suspicion of the commission of the crime of fraud on the part of Geswindt, nor was the issue dealt with by way of a request for trial particulars or in terms of the pre-trial procedures under Rule 37. The Court is thus required to consider the evidence adduced by the defendant and the cross-examination of the plaintiff to understand just what the alleged fraud was.

THE MATERIAL EVIDENCE

12. Given the state of the pleadings and the issues as refined, the evidence relative to the adjudication of this dispute falls within a fairly narrow compass. It turns largely on what transpired at the kiosk on the afternoon of Tuesday 11 June 2013.

The Plaintiff

13. The plaintiff testified that at the time he was employed by a firm called First Watch Fire Services in the Port of Cape Town performing work as a fire marshal and earning approximately R9000 per month. He said he was in possession of a valid asylum seeker temporary permit ("the permit") which expired on 12 September 2013. The permit reflected that it had been extended on at least 4 previous occasions. At the end of the day, it was common cause that the plaintiff was lawfully in South Africa at the time and was entitled to work and study here.

14. The plaintiff testified that he wished to swop the SIM card from his cell phone and was required by the relevant service provider to produce an affidavit to that end. The plaintiff said that he went to the kiosk to depose to such affidavit. When he asked the officer on duty (later identified as W/O Geswindt) to commission the affidavit, the plaintiff said that he was asked to produce some form of identification.

¹ Hereinafter referred to as "the CPA".

The plaintiff said it was his custom to carry his permit in his wallet but when he opened it that afternoon to take out his permit in order to verify his identity, he discovered that he had left it at home.

15. The plaintiff went on to explain that he also had in his wallet a small, credit-card sized document issued to him by the DHA in KwaSani in KwaZulu Natal. For the sake of convenience, I shall call this “the DHA card”. The plaintiff said that as he opened his wallet, Geswindt spotted the DHA card, grabbed it and accused him of being a Nigerian fraudster. He protested his innocence, pointing out that he was from the Congo, had no criminal record and that he had a permit to be in the Republic. The plaintiff further said that he told Geswindt that the card had been lawfully issued to him by the DHA at KwaSani but Geswindt would have nothing of it and continued to hold the view that the DHA card was fraudulently procured by the plaintiff. Geswindt’s attitude, as it later transpired, was that the plaintiff had attempted to use the DHA card as proof of his identity, that the latter was unlawfully obtained and that the plaintiff had thus committed the offence of fraud.

16. The plaintiff said he was then detained in a make-shift holding facility in a room at the back of the kiosk along with two others. He was told that he was under arrest and that he had the right to contact a family member to inform them of his arrest. The plaintiff said that he was later bundled into a police van and driven the short distance from the railway station to Cape Town Central.

17. The plaintiff said that on the way there he told the police that he had family (a “cousin-brother”) who worked nearby and that the police should stop there so that the plaintiff could ask his “cousin-brother” to arrange for his permit to be collected at his home in Brooklyn and brought to the police station so as to secure his release. As luck would have it, his “cousin-brother” was not at work but the plaintiff left a message with someone else who was asked to forward it on. The message achieved the desired result as the plaintiff’s valid permit was delivered to Cape Town Central the following day. The plaintiff said that at Cape Town Central he saw that he had been booked in on a charge of fraud.

18. The plaintiff was thereafter detained in the cells at Cape Town Central in conditions which might fairly be described as deplorable. On the morning of 13 June 2013 the plaintiff said he was taken by foot across to the Cape Town Magistrates Court where he appeared before Magistrate Oakes. He informed that court that he was in possession of a lawful permit which had been taken to Cape Town Central and also claimed that the DHA card had been lawfully issued to him.

19. The plaintiff's permit, it seems, was in the court file and Ms. Oakes was satisfied as to its authenticity, but, the plaintiff explained, she was evidently not satisfied with the authenticity of the DHA card. It appears from the record in that court that the State contended that the charge against the plaintiff was that he had used the card to assert that he was a DHA official and that this required investigation. This, however, was never the police's case against him.

20. For reasons which he could not fully comprehend, the plaintiff said that the matter was postponed and he traipsed back across the road to Cape Town Central where he was held overnight again until 14 June 2013 when he was taken back to the Magistrates Court. Ms. Oakes' recordal on the charge sheet reflects that on that day the State indicated that it did not oppose bail but the Magistrate was not satisfied as to the integrity of the DHA card and required the State to investigate the matter further. The person that the State needed to speak to in that regard was a Mr. Plaitjies at the local DHA office, who was apparently on leave at the time.

21. Accordingly, the magistrate postponed the matter until 18 June 2013 and the plaintiff was remanded without bail to be further detained at the Cape Town Central cells. When he appeared again on that day, the prosecutor told the court that Mr. Plaitjies was still on leave and that his return date was unknown. In the result Ms. Oakes postponed the matter to 29 August 2013 and the plaintiff was released on bail of R500. Eventually the charges against him were withdrawn on 29 August 2013 and his bail deposit was refunded.

The DHA Card

22. The plaintiff explained how he came to obtain the DHA card. He said that word was going around in Cape Town at the time that the DHA was issuing identification cards to foreign nationals in KZN. Together with others he decided to travel to Underberg to try his luck. The plaintiff said that he proceeded with caution because he did not want to be lured into a trap and land up in conflict with the law. However, when he arrived in KwaSani (evidently a township outside Underberg) he saw police and marked DHA vehicles in attendance and was assured that all was above board.

23. The plaintiff explained that there were various foreign nationals at KwaSani, including from Africa and Asia. After waiting for more than a day, he was processed on the DHA computer system and issued with a small credit card sized document which bore the coat of arms of the Republic, his name and date of birth, his country of origin ("Congo"), the place of issue of the card ("KwaSani") and an entry designated "Area Name", which was recorded as "Cape Town". I should mention that even a perfunctory perusal of the DHA card makes it clear that there is no suggestion therein that the bearer thereof is an official of the DHA.

24. The card also contained a passport-size photo of the plaintiff and was endorsed with a bar code. The plaintiff explained that because the card was only made of paper and became scuffed, he decided to have it laminated to protect it. Lastly, on this score, the plaintiff explained that he was told that the DHA card was a temporary document and that a permanent document would be made available to him in due course.

25. In view of the fact that it was common cause at the trial that the DHA card had been lawfully issued to the plaintiff at KwaSani, the only aspect of the cross-examination of the plaintiff that is material to this judgment relates to his interaction with Mr. Geswindt at the kiosk. In this regard, it was put to the plaintiff that he had attempted to use the DHA card as proof of his identity, that Geswindt formed the opinion that the card was not validly issued and hence the charge of fraud which

was preferred against him. The plaintiff disputed that version of events, saying that he ordinarily used his permit as proof of identity and that he usually carried a certified copy thereof with him in his wallet: he preferred to retain the original permit for safe-keeping at home.

26. The plaintiff stuck to his version that he had delved around in his wallet looking for the permit and that the DHA card had been exposed in the process. Upon seeing this, he said, Geswindt had opportunistically seized upon the card as a fake, while claiming, in a bigoted manner, that the plaintiff was of Nigerian descent and hence a potential fraudster. The plaintiff expressly denied that he presented the DHA card as proof of identity.

Ms. Mackita

27. The plaintiff adduced the evidence of a fellow Congolese national, Marie Mackita, who had also undertaken the journey to KwaSani, where she met the plaintiff, whom she did not know. Ms. Mackita confirmed the plaintiff's evidence that DHA cards were issued at KwaSani and that she similarly received one.

Cross examination of the plaintiff

28. The cross examination of the plaintiff was an endeavour to demonstrate that Geswindt had held a reasonable suspicion that the plaintiff had committed an offence and thereby to discharge the onus of establishing that his arrest without a warrant was justified. The plaintiff remained resolute throughout that he did not use the DHA card to attempt to identify himself. For instance, he said he told the police officers at the kiosk that he was lawfully employed and invited them to call his employer, First Watch, to verify this allegation. They bluntly refused to do so. He also explained that he was in possession of a permit lawfully issued by Transnet to enable him to enter and exit the harbour for work purposes. They also refused to accept the veracity of this allegation nor to follow up thereon.

29. Throughout, the defendant's officials at the kiosk wanted to make contact with an official of the DHA - not to verify the lawfulness of the plaintiff's

presence per se, but to establish whether the DHA card had been validly issued to him. It transpired that it was the defendant's case that it was the suspicious nature of the DHA card itself which led Geswindt to believe that the plaintiff had committed the offence of fraud.

THE DEFENDANT'S ONUS

30. In evaluating the evidence, and in particular whether the defendant has discharged the onus it attracted on the pleadings, the Court must consider the evidence of Geswindt and be satisfied that the defendant has advanced a case that he (Geswindt), objectively speaking, was misled by a false representation intentionally made to him by the plaintiff and that such misrepresentation occasioned actual or potential prejudice to the defendant.²

31. In light of the fact that the defendant relies on an offence committed in the presence of the arresting officer, it must be shown that Geswindt harboured a reasonable suspicion that the plaintiff had committed the offence of fraud and, further, that it was reasonable to deprive him of his liberty as a consequence of the alleged misrepresentation.

32. In Mabona³ the Court suggested the following approach in respect of an arrest under s40 (1) (b) of the CPA.

"There can be no doubt that [the arresting officer] was given information which caused him subjectively to suspect the plaintiffs of involvement in the robbery. The question is whether his suspicion was reasonable. The test of whether a suspicion is reasonably entertained within the meaning of s40 (1) (b) is objective (*S v Nel and Another* 1980(4) SA 28 (E) at 33H). Would a reasonable man in the [arresting officer's] position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of

² See, generally, Burchell, Principles of Criminal Law, 3rd ed. At 833 *et seq.*; Duncan v Minister of Law and Order 1986 (2) SA 805 (AD) at 814D

³ Mabona and another v Minister of Law and Order and others 1988 (2) SA 654 (SE) at 658F-H

conspiracy to commit robbery or possession of stolen property 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 authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant; i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyze 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. It is only after an examination of this kind that he will allow himself to entertain a suspicion which would justify an arrest. 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."

CONFLICTING VERSIONS – THE TEST

33. This case is not about whether Geswindt harboured a belief that the plaintiff was an illegal immigrant. Although documents in the police docket show that he was later charged with such an offence in addition to the fraud charge, the case as pleaded by the defendant, and the evidence led in support of that allegation, is that the plaintiff made a misrepresentation to Geswindt that the DHA card was a valid form of identification.

34. The plaintiff's case is that he made no such representation to Geswindt, who, he claimed, simply plucked the document out of his wallet when he fossicked around looking for his permit. When the accuracy of attempting to assert his identity on the strength of the DHA card was questioned by Geswindt, the plaintiff protested that he had more than enough documentation at home to establish the veracity of his allegations but that the police were not interested therein. There are thus mutually destructive versions as to what, if anything, the plaintiff said about the DHA card to Geswindt.

35. Where a court is confronted with conflicting versions under oath, the test to be applied is that set forth in Stellenbosch Farmers' Winery⁴.

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

⁴ Stellenbosch Farmers' Winery Group Limited and another v Martell et Cie and others 2003 (1) SA 11 (SCA) at [5]

36. In my view the plaintiff was a good witness who answered all questions put to him forthrightly. He was adamant that, although he had travelled to KwaSani to procure what he had heard might provide him with means of easily identifying himself in circumstances where this was legitimately required of him, he did not use the card to identify himself at the kiosk. The question that follows is, if the DHA card was in fact just a receipt issued at KwaSani by the DHA (as the plaintiff alleged), what became of the card proper that was to be sent to him later, and with which he would then be able to identify himself? Further, why did he retain that card (in truth just a receipt as he alleged) and laminate it when it became dog-eared, presumably through being handled regularly? These questions certainly reflect on the probabilities of the plaintiff's version but they are not sufficient, in my view, to disturb the crux of his evidence.

37. Geswindt, on the other hand was not a satisfactory witness. He was argumentative with counsel under cross examination and contradicted the evidence given by Mr. Plaaityies. He jumped to conclusions and this was to be seen, also, in the basis for the suspicion which he harboured that the plaintiff had committed the crime of fraud by presenting the DHA card as proof of his identity. He was unable to explain convincingly why he thought the DHA card was fraudulent and offered various reasons for his assessment of it. But, what is clear is that Geswindt did not carefully examine the card before concluding that it was a fraud. Rather, he said that in all his years of experience he had never encountered such a card; *ergo*, he concluded, it was fraudulent. The proposition has only to be stated for its illogicality to be demonstrated.

38. Geswindt testified that he nevertheless harboured some uncertainty as to the validity of the DHA card and went to consult Mr. Plaaityies at the DHA offices. He said that Mr. Plaaityies told him that the card was a fraud and so on the strength of that information he went ahead and formally arrested the plaintiff, who, at that stage was already effectively detained at the kiosk. In his statement made in the

police docket, Geswindt said that he had arrested the plaintiff on a charge of fraud and for “being an illegal foreigner.”

39. But the testimony of Mr. Plaaitjies was different. He told the Court that he said to Geswindt that he found the card suspicious and commented on its provenance but he said that he told Geswindt that he should conduct further enquiries with the DHA authorities in KwaZulu Natal before arresting the person. This we know was not done.

40. At that time the plaintiff was in possession of a valid permit to be in the Republic which he told the police he had forgotten at home. He urged Geswindt to enable him to retrieve same so as to satisfy the query regarding his residency status. The plaintiff says that Geswindt was not interested in assisting him, while Geswindt, on the other hand, says that the plaintiff made no mention of any such document. This is highly improbable in the circumstances.

41. When the plaintiff was handed over to the staff at Cape Town Central, Geswindt filled in a form known as a “BI 1710”, bearing the name of the plaintiff. It is headed “*Warrant of Detention of Person Suspected of Being Illegal Foreigner*” and records that having been suspected of being an illegal foreigner, the plaintiff had failed to satisfy Geswindt that he was lawfully entitled to be present in the Republic. The document further commands the Head of Cape Town Central “*to detain the said person pending an investigation into his or her prima facie status or citizenship.*”

42. In addition, when the case docket was opened at Cape Town Central the nature of the alleged offence is described on the front thereof as “*Fraud and Illegal Immigrant at Platform 1, Cape Town Station.*” And yet the plea filed on behalf of the defendant makes no mention of an arrest on immigration charges, only fraud.

43. Given that the police were expressly interested in the plaintiff’s residency status and had charged him with an offence in relation thereto, I find Geswindt’s evidence that the plaintiff made no mention of his entitlement to be in the

Republic during the interrogation at the kiosk highly improbable. Production of the permit would undoubtedly have addressed Geswindt's concerns there and then and most likely not have required the plaintiff's arrest on immigration charges. Similarly, sight of a valid permit would certainly have gone a long way to satisfying the police that the DHA card was not fraudulent.

44. In the circumstances, I conclude that the plaintiff's version is more probable than Geswindt's. That being so, there is no evidential basis to conclude that the plaintiff made a fraudulent misrepresentation to Geswindt and it follows that there was thus no lawful basis for his arrest.

45. But even if Geswindt's version is to be preferred, I am of the view that the defendant has not discharged the onus of justifying the arrest. Central to any charge of fraud is the making of a misrepresentation. Burchell puts it thus at p836 – "The essence of fraud is the deceiving or misleading of the victim of the crime. This is done by way of a misrepresentation, i.e. an incorrect statement of fact or law made by one person to another.

It may be made, and is often made, by conduct alone or by words and conduct."

46. The evidence of Geswindt does not sustain an allegation that the plaintiff made an incorrect statement of fact to him. Rather, it is common cause that at all material times the DHA card had been lawfully issued by DHA officials at KwaSani. And so, when the plaintiff allegedly responded to Geswindt's instruction to furnish proof of his identity by handing over the DHA card, his conduct alone did not constitute a misrepresentation. Nor, when (on either version) he protested to Geswindt that the card had been lawfully issued to him at KwaSani, did he make any verbal misrepresentation.

47. I am accordingly bound to conclude that the defendant has failed to discharge the onus of proof and that the plaintiff's arrest was thus unlawful.

DAMAGES

48. Mr. Botha referred the Court to various cases in support of the claim that the plaintiff is entitled to be substantially compensated for being detained without bail for a week at Cape Town Central. While each case must, of course, be decided on its merits, I am of the respectful view that this Court can be guided by the judgment of the majority of the Constitutional Court (per Theron, J) in De Klerk⁵.

49. The case involved incarceration of a man for a week subsequent to an alleged wrongful arrest. The High Court dismissed the claim in its entirety, whereafter the matter served before the Supreme Court of Appeal ("the SCA). The SCA unanimously agreed that the arrest was unlawful but it split on the duration of the unlawful incarceration. The majority in the SCA (per Shongwe ADP) held that the incarceration following the arrest was interrupted by the intervention of the magistrate refusing to entertain a bail application, which was considered unlawful in the circumstances, and awarded damages in the sum of R30 000 for incarceration for a couple of hours. The minority in the SCA (per Rogers AJA) found that the police minister was liable for damages for the entire duration of the incarceration following the unlawful arrest by his officers. After a detailed discussion of the law, the learned Acting Judge of Appeal held that damages in the amount of R300 000 was fair and reasonable in the circumstances,

50. I consider that the judgment of Theron J in De Klerk finds application in this matter on two grounds. Firstly, there is the issue of magisterial intervention. The facts here show that at the plaintiff's first appearance before the magistrate, the State did not oppose the granting of bail. While the plaintiff's attorney rightfully pressed for his client's release on bail, the magistrate refused to grant bail until the issue of the validity of the DHA card had been cleared up to her satisfaction. The magistrate's notes show that she had been led to believe by the State (wrongfully it must be added) that the plaintiff had used the DHA card to assert that he was employed by the DHA. In any event, in this matter the claim against the magistrate

⁵ De Klerk v Minister of Police 2021 (4) SA 585 (CC)

was abandoned part way through the trial and the presence of any unlawful conduct on her part does not fall for consideration.

51. The judgment of Theron J in De Klerk is thus authority for the proposition that in such circumstances the intervention of the magistrate in prolonging the consequences of an already unlawful arrest does not constitute a *novus actus interveniens* as recognized in our law of delict. The defendant is thus liable for the entire duration of the plaintiff's unlawful detention flowing from his unlawful arrest by Geswindt.

52. Secondly, the judgment of Theron J in De Klerk is authority for the assessment of the quantum of damages in a case such as this. In that matter too the plaintiff was detained for a week albeit not in a police cell but in Johannesburg's notorious Diepkloof Prison, euphemistically referred to as "Sun City". He was awarded R300 000 by the majority of the Constitutional Court ("CC") for the delict committed against him, throughout the period of his incarceration i.e. both before and after his first appearance before the magistrates' court. In fixing the appellant's damages in that amount, the CC adopted the reasoning of the minority judgment of Rogers AJA in the SCA.

53. While the minority in the CC in De Klerk did not deal with the issue of quantum because it considered that the appellant had not established the unlawfulness of his arrest beyond his first appearance in the magistrates' court, it certainly did not express any misgivings about the appropriateness of the award made by the majority.

54. The facts in this matter relating to the plaintiff's incarceration at Cape Town Central show that this was his first ever arrest and detention. During that time he was kept in a filthy cell for a week, alongside a communal toilet with little more than spare rations for nourishment. The plaintiff said he was subjected to threats from members of Cape Town's notorious "Numbers' Gangs", was involved in a physical altercation and described his experience generally as harrowing. I can find

no basis to distinguish this matter from De Klerk and in the circumstances I consider the amount of R300 000 to be fair and reasonable compensation in the circumstances.

ORDER OF COURT

Accordingly, it is ordered that:

A. The first defendant is liable to the plaintiff for the payment of damages in the sum of R300 000,00;

B. The first defendant shall pay interest on the aforesaid sum of R300 000,00 at the prevailing rate under the Prescribed Rate of Interest Act, 55 of 1975 from date of judgment to date of payment;

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

GAMBLE, J

APPEARANCES

For the plaintiff:

Adv. S Botha

Instructed by Sohn and wood Attorneys

Cape Town

For the First Defendant:

Adv. P. Magona

Instructed by The State Attorney

Cape Town