

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25597/2012

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE	SIGNATURE

In the matter between:

LEVERED RICHARDS

Plaintiff

And

MINISTER OF POLICE

First Defendant

M MUNYAI

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

LIESEL VAN JAARSVELD

Fourth Defendant

MINISTER OF JUSTICE

Fifth Defendant

J U D G M E N T

MASHILE, J:

[1] The Plaintiff, a twenty-three year-old male person, sues herein in his personal capacity for unlawful detention stemming from the Second and Fourth Respondents' deliberate presentation of false information to a magistrate who was considering whether or not to grant bail to him subsequent to a charge of robbery with aggravating circumstances as envisaged in Section 51 of the Criminal Law Amendment Act No. 105 of 1997.

[2] On 27 March 2010 at approximately 21h12, Members of the police acting in the course and scope of the discharge of their duties with the First Defendant arrested the Plaintiff at Eldorado Park, Milnerton Street without a warrant.

[3] The Plaintiff was arrested by a student Constable Tinowanga Mukwevo (Mukwevho), Constable Mathe (Mathe) and another constable whose name was not provided to this court. His arrest was pursuant to being pointed out by the complainant, Mr Jason Johnson (Johnson).

[4] Following his arrest, he was detained at the Johannesburg Prison, colloquially known as Sun City Prison. His application for bail was postponed

at least twice at the instance of the State before it was finally heard and refused on 7 May 2010. The bail application came before court on 14 April 2010 and was postponed to 29 April 2010 with the court's specific remarks that the State should come back prepared to argue the matter if it intended to oppose.

[5] The bail application came to court again on 29 April 2010 and the State was still ill-equipped to proceed as it had not obtained a sworn statement from the Second Defendant. The hearing was postponed to the 7th of May 2010 for a further hearing on which date it was heard and refused.

[6] In support of his bail application, the Plaintiff presented his affidavit to court on 7 May 2010 wherein he delineated his personal particulars such as his physical address, his age, lack of pending cases against him, his date of birth, time and place of his arrest.

[7] In response to the bail application of the Plaintiff, the Second Defendant on behalf of the State prepared an affidavit in opposition and gave it to the Fourth Defendant for presentation to court. To the extent that the magistrate's judgment places weight on the allegations contained in the affidavit of the Second Defendant, the following are noteworthy:

7.1 The Plaintiff was arrested on 27 March 2010 at 12h15 in the afternoon;

- 7.2 The Plaintiff pointed a firearm at Johnson;
- 7.3 Johnson seized the firearm from the Plaintiff and held him around the neck;
- 7.4 Implicit in the statement is that the Plaintiff was arrested at the scene of crime whilst Johnson was holding him by his neck;
- 7.5 The Plaintiff committed the offence during broad day light.

[8] Relying mainly on the contents of the affidavit of the Second Defendant, which is explicit that the State's case was strong, the offence was serious and prevalent in his area of jurisdiction, the magistrate found that there were no exceptional circumstances justifying the Plaintiff's release on bail. Accordingly, he ordered that the Plaintiff be kept in custody until commencement of his trial. He was therefore kept in custody for a further 115 days.

[9] The Plaintiff stayed in custody from 7 May 2010 to 31 August 2010 on which date he launched a fresh bail application based on new facts. Those facts were, in the main, a correction of the false allegations prepared by the Second Defendant and presented to court on 7 May 2010 by the Fourth Defendant. The new facts persuaded the magistrate consequently he ordered his release on bail. The Plaintiff was subsequently tried and ultimately on 25 November 2010 discharged in terms of Section 174 of the Criminal Procedure Act No. 51 of 1977, as amended.

[10] The Plaintiff's claim is in essence that the Second Defendant while acting in the course and scope of discharging his duties with the First Defendant intentionally gave false evidence in the form of a sworn statement in opposition to the Plaintiff's application for bail. The Fourth Defendant, also acting in the course and scope of discharging his duties with the Third Defendant, failed to verify the contents of the affidavit prior to presenting it to the court resulting in the magistrate refusing bail to the Plaintiff. In consequence of this, the Plaintiff was detained for a further period of 115 days when he should have been released on bail.

[11] The Defendants have raised lack of compliance with Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act No. 40 of 2002 as a special plea against the Plaintiff's claim. In terms of Section 3 of the aforesaid Act, the Plaintiff was under obligation to notify the Organs of the State, the First, Third and Fifth Defendants, within six months of the occurrence of the event, that he intends to institute a civil claim.

[12] The Plaintiff's further detention having happened between 7 May and 31 August 2010, he should have prior to 7 November 2010 have advised the aforesaid Defendants of his intention to institute the action against them. The Defendants argue that even if the Plaintiff were to contend that he could not give the notice as he was incarcerated such that one commences the calculation of the six month period from the date of his discharge, 25

November 2010, he remains hopelessly outside of the period as the last day on which he could have done so was 25 May 2011.

[13] The Defendants also argue that the First, Third and Fifth Defendants did not consent to the action being instituted against them. They assert that they will suffer prejudice and accordingly are opposing. The Plaintiff has also failed to formally launch an application for condonation of his failure to notify the organs of State.

[14] The Plaintiff only wrote his notice of intention to institute this civil claim on 14 June 2012. He dispatched four notices to wrong addresses in respect of the organs of state. The notices were also sent to third parties. There was no explanation why the incorrect procedure was followed. Summons was ultimately issued in July 2012.

[15] In the event that the court condones the Plaintiff's non-compliance with the Act, the Defendants contend that the Second and Fourth Defendants did not intentionally mislead the Court and in any event, the court is always at liberty to grant or refuse bail. In addition, the Defendants allege that the Plaintiff's detention was lawful.

[16] It is convenient at this stage to turn to the evidence that was presented by both parties in support of their case. The Plaintiff testified on his own behalf and thereafter closed his case. The Defendants, on the other hand, led evidence of five witnesses before closing their case. The Plaintiff testified that:

- 16.1 He was born in September 1990 and is currently 23 years old. He is not married and has no children.
- 16.2 He was in matric when he was arrested on 27 March 2010. He was detained for 115 days and was finally discharged in terms of Section 174 of the Criminal Procedure Act No. 51 of 1977 on 25 November 2010. He found employment with a panel-beating company and earned R450.00 per week.
- 16.3 He grew up with his great grand mother who has no qualification whatsoever. She worked as a domestic servant during her working days.
- 16.4 He grew up not knowing his father. He only came to know him when he was 13 years old.
- 16.5 His mother lived and still lives in Boksburg. Both his parents have had no share in his up-bringing.
- 16.6 He was arrested on 27 March 2010 at Extension 4, Eldorado Park. He protested arrest and made it clear to the police officers and the complainant that he was not part of the robbery. He claims that he even took off his cap and told the complainant to

look at him and tell the police that he was not the one who robbed him.

16.7 The complainant was confused at the time when the Plaintiff was arrested. He kept on saying it is him and no, it is not him. He was however under pressure from the police to confirm or not to confirm. He eventually confirmed that the Plaintiff was the one. The police went ahead and arrested his hesitation and uncertainty notwithstanding.

16.8 He was subsequently locked up at the Eldorado Park Police Station and later transferred to Johannesburg Prison.

16.9 The Plaintiff was held and kept in the company of other prisoners. He injured his back during a fight with another prisoner.

16.10 Immediately after his release on bail he went back to his school but was refused readmission because it was too late. He then went back in 2011, wrote and passed matric at the end of that year.

16.11 Both his legal representation and bail were paid by his aunt.

16.12 He looked for work after passing matric. He then worked for the Johannesburg Metropolitan Police Department for two months.

He was told that he could not be employed because he had a criminal record.

16.13 He now works for Hydraark earning R1 560.00. Does not know that he should have notified the police that he intended to bring an action against them. He did not know hence the letter of demand was not sent.

16.14 The Section 3 letter of demand was only sent to the defendants on 14 June 2012. This letter was sent to all the relevant parties including the Minister of Justice.

16.15 According to the judgment of the magistrate, bail was refused on the strength of the contents of the statement of the investigating officer, warrant officer Munyai. Firstly, it states that:

16.15.1 The Plaintiff was arrested at 12h15;

16.15.2 It was in the afternoon;

16.15.3 During broad daylight;

16.15.4 The community was outraged as this robbery took place during the day;

16.15.5 The police did not lose sight of the Plaintiff when they ran after him;

16.15.6 The Plaintiff was arrested at the scene of the crime;

16.15.7 The complainant had held him by the neck until the arresting officer arrived.

16.16 In cross-examination, the Plaintiff stated that he wanted to sue the police almost immediately after his discharge. He felt like suing the Defendants in 2011.

16.17 To this end, In February-March 2011 he gave his attorneys instructions to proceed with the claim. Surprisingly, the attorneys, in violation of Section 3 of the Institution of Legal Proceedings against certain organs of the State Act No. 40 of 2002, only instituted proceedings against the Defendants approximately 19 months later.

16.18 The Plaintiff conceded that his attorneys were negligent by not prosecuting his claim promptly. The Section 3 letters were all sent to each defendant care of the State Attorney.

16.19 His attorneys and the State entered into plea bargaining negotiations. The Plaintiff steadfastly refused to plead guilty because he believed that he did not do anything wrong. He accordingly rejected it.

16.20 Mr Skhosana who was the prosecutor in charge of plea bargaining matters at the time confirmed when he took the stand that indeed the attorneys came back to him and said that the Plaintiff was not interested in plea bargaining as he believe that he was not guilty.

16.21 Counsel for the Defendants argued that the Plaintiff heard when the statement of the investigating officer was read in court during the first bail hearing that it was completely incorrect. In response to this rather strange behaviour by the plaintiff and his attorney, the Plaintiff said that he did not speak to his attorney immediately after the refusal of the bail other than their parting pleasantries.

16.22 It was put to the Plaintiff that the first bail application failed because he could not furnish sufficient and satisfactory exceptional circumstances that could persuade the court to feel justified to grant him bail.

16.23 The second bail hearing however was well supported with reasons that gave exceptional circumstances hence the court allowed bail.

16.24 The plaintiff testified that he relied on his attorney for most of what was taking place in court.

16.25 This concluded the case of the Plaintiff.

[17] The Defendants called JOHNSON as their first witness who took the stand and gave the following evidence:

17.1 He was the complainant in the criminal case against the Plaintiff. He claims that the Plaintiff robbed him using a firearm.

17.2 The Plaintiff and his co-perpetrator ran away after the robbery. The complainant and the police then drove around the block and saw him walking along side the street. The complainant immediately saw him and told the police that he was the one who had just robbed him.

17.3 The Plaintiff's reaction after he had been pointed out was one of anger and shock. The Plaintiff tried to run away when the police stopped in front of him. The Plaintiff protested that it was him.

17.4 Johnson first stated that the Plaintiff did not run away and then changed and said that he did. Eventually he told the court that the Plaintiff stopped when the police vehicle pulled over next to him. Had three versions on whether or not he was running away.

17.5 Johnson admitted that the Plaintiff was arrested at night and not during broad daylight. He denied nonetheless that he hesitated that the Plaintiff was not the one at any time when the police asked him. He said that he identified him immediately. He denied that the Plaintiff was wearing a cap yet the arresting officer confirmed that the Plaintiff wore a jacket with a cap.

17.6 Mr Johnson was not a good witness. He left the court with the impression that he was genuinely mistaken in that he just did not have one version on simple matters, such as, did he run or not.

[18] Constable MUKWEVHO was the Defendants' second witness and his evidence was that:

18.1 He knew the Plaintiff. He is the one who arrested him on 27 March 2010.

18.2 He was busy in the vicinity of the scene of crime when he heard someone screaming. Johnson said that someone was trying to

rob him. He then approached the scene and that is when he noticed two coloured men running away from the scene. They got into their vehicle with Johnson. When they turned around the block they saw a man walking along side the street.

18.3 Johnson then identified him as the person who robbed him earlier. The Plaintiff protested but he was nonetheless arrested. Mukwevho said that it took them approximately 3 minutes from the time they left the scene of the crime to the time they arrested the Plaintiff.

18.4 Mukwevho confirmed that Johnson was very certain that the Plaintiff was the one who robbed him.

18.5 In cross-examination. Mukwevho confirmed that he was the arresting officer. He arrested the Plaintiff at night. He said that it must have been at about 21h30. He made a sworn statement, which he filed inside the docket on the evening of the arrest, 27 March 2010.

18.6 He denied that the Plaintiff was arrested by Johnson. The Plaintiff was walking along side the street when the police approached him. The Plaintiff was wearing a jacket with a cap.

18.7 The police stopped the car and went to him. He resisted arrest claiming that he was not the culprit.

18.8 He denied that the Plaintiff took off his cap and confronted Johnson to tell the police that he was not the one who robbed him of his property earlier.

[19] The fourth witness was Ms LIZEL VAN JAARSVELDT, the prosecutor at the time when the Plaintiff was tried and she testified that:

19.1 She is the regional court senior public prosecutor. She was the prosecutor during the hearing of both bail applications of the Plaintiff.

19.2 She stated that the Plaintiff was in fact arrested at 21h00 and not at 12h15 as alleged on the statement of the investigating officer, Warrant officer Munyai. She admitted that she made a mistake. She meant to type in 21h00 but typed instead 12h00.

19.3 She typed the statement and gave it to Munyai to sign before a commissioner of oaths. She apparently has no interest in the matter in that she knows no one involved in it.

19.4 She is aware that plea bargaining negotiations were held between the defence attorneys and the State but does not know

who initiated them. Normally the defence would make the approach.

19.5 The Plaintiff heard that the statement of the investigating officer was incorrect as it was read onto the record in court yet he kept quiet. She holds the view that the Plaintiff could have advised his attorney of the mistake alternatively, could have noted an appeal against the judgment of the magistrate to refuse bail.

19.6 She maintains that had the Plaintiff notified her of the mistake then and there, as the statement of Munyai was being read in court, she would have stopped the proceedings and corrected the mistake of 12h00 instead of 21h00.

19.7 In cross-examination, it was put to her that Mukwevho prepared and signed a statement on 27 March 2010, which he then filed in the docket. Surprisingly, his statement just happened not to be in the docket on 29 March and 7 May 2010. She could not account for the convenient disappearance of the statement.

19.8 Plaintiff was in custody for 41 days before a formal bail application could come before court. No bail was prepared by the state on 29 April 2010 consequently the bail application had to be postponed to the 7th of May 2010.

19.9 She prepared the statement in the presence of the investigating officer. She then sat alone to type it whereafter she gave to Munyai to read before deposing to it. She conceded that the fact that the statement was corrected means that Munyai perused it and saw the mistake which he corrected.

19.9 It was put to her that the reference to broad daylight, arrested at the scene of the crime and afternoon and that the community was outraged as a result of this occurrence was in the statement to persuade the magistrate to refuse bail.

19.10 It was also put to her that on 24 August 2010, five months from the date of arrest, the State remained unprepared to proceed with the formal bail application. She agreed that indeed the State was not.

19.11 She felt that there was a need to oppose the second bail application despite that she realised her mistakes because for every Schedule 6 offence prosecutors are required to furnish reasons. Moreover, Johnson remained resolute that the Plaintiff was the person who robbed him.

19.12 She conceded that the statements were badly drafted and confusing such that she had to interpret them to have meaning.

She was tongue-tight when asked why she attached a negative meaning against the Plaintiff when interpreting them.

19.13 She conceded that the Second Defendant acted in the course and scope of his employment when he approached her for the typing of the statement.

[20] WARRANT OFFICER MUNYAI testified that:

20.1 He is the investigating officer in this matter and did not know the Plaintiff prior to his assignment to the case.

20.2 He and Van Jaarsveldt prepared an affidavit. They did so by making reference to the statement of the arresting officer, Mathe, and Johnson. Thereafter Van Jaarsveldt took the statement to type it.

20.3 Van Jaarsveldt then gave the typed statement back to him to peruse and thereafter to sign before a commissioner of oaths. He admitted that he made certain corrections on the statement. These corrections were made after he had read it.

20.4 He came to know that the crime occurred at night only after reading the statement of Johnson. He was not in court when the statement was read to the court hearing the bail application.

- 20.5 He could not remember whether or not he was present when Van Jaarsveldt was typing the statement.
- 20.6 In cross-examination, he stated that he has been a police officer for 22 years, 15 years as crime investigating officer and a Warrant Officer for 7 years.
- 20.7 He confirmed that he and Van Jaarsveldt compared the statements of the arresting officer, Mathe, and Johnson to his own as they were drafting it. The statement of Mukwevho was not inside the docket at the time. Van Jaarsveldt subsequently typed the statement in his absence.
- 20.8 He and Van Jaarsveldt discussed the bail application shortly before the start of the case on 7 May 2010. He claims to have read his statement prior to appending his signature.
- 20.9 According to his statement, the crime occurred at 12h15. He said that the typist made an error by swapping the numbers resulting in 21 becoming 12. He said that he could not remember whether or not he read the statement.
- 20.10 When he was shown another mistake, which had been corrected, he stated that he did not rectify it but his was just to

initial next to it. He confirmed his knowledge of the statement but not of the errors.

20.11 He did not read the statement because he had seen the manually prepared one and it had no mistakes and besides, he trusted Van Jaarsveldt. He could not explain the reference to broad daylight and afternoon. He could not answer whether or not the mistakes were made by him and typed by Van Jaarsveldt.

20.12 He received the docket to conduct investigations on 29 March 2010. Mukwevho's statement was signed and filed in the docket on 27 March 2010. It was put to him that it was rather strange that he and Van Jaarsveldt could not find it in the docket. He was nonetheless adamant that Mukwevho's statement was not in the docket.

20.13 On 10 April 2010 the case was postponed for further investigations. He knew that he had to obtain the statement of Mukwevho prior to the next bail hearing, 29 April 2010. He conceded that he was still not ready to proceed on 29 April 2010.

20.14 He stated in his sworn statement that Johnson held the Plaintiff by the neck until the police came to arrest him. According to

Munyai, the plaintiff was arrested at the scene. If not, this is by reasonable inference. This was reiterated by the magistrate when he said: “..... the accused was arrested then and there....”

[21] Petrus Skhosana was the last witness for the Defendants and he said:

21.1 He is a Public Prosecutor stationed at the Randburg Magistrate Court.

21.2 Has been a prosecutor since 1997. In 2010 he was about 13 years in the field.

21.3 When this matter was considered in 2010, he was the prosecutor in charge of plea bargaining.

21.4 He dealt with the plea bargaining of the plaintiff. He thinks the defence made the approach and not the State.

21.5 The attorneys of the Plaintiff eventually withdrew from the plea bargaining process because the Plaintiff refused to plead guilty.

[22] It is on the basis of the above facts that I am required to decide whether or not:

22.1 The Plaintiff's further detention was unlawful; and

22.2 If his detention was unlawful, how much should be awarded to the Plaintiff by way of damages?

[23] It is common cause that the Plaintiff's failure to send the Notice to the First, Third and Fifth Defendants punctually constitutes non-compliance with the Act. It is this acknowledgment that prompted the Plaintiff to launch an application seeking condonation of his non-compliance with Section 3. His application for condonation is in terms of Section 4(a) of the Act, which reads:

"If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that —

- (i) the debt has not been extinguished by prescription;*
- (ii) good cause exists for the failure by the creditor; and*
- (iii) the organ of state was not unreasonably prejudiced by the failure.*

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[24] There are therefore three requirements with which the creditor must comply in order to qualify for condonation. The court may grant such condonation if it is satisfied that:

- 24.1 The debt has not been quenched by prescription;
- 24.2 The creditor has shown good cause for his failure to adhere to compliance; and
- 24.3 The organ of state has not been unreasonably prejudiced by the Plaintiff's failure.

[25] Counsel for the Plaintiff referred this court to several cases that considered the three requirements above and it is useful to have regard to them. The court dealt with the three requisites of the Section of the Act in *De Wet N.O v Minister van Veligheid en Sekuriteit*, 2008 (5) SA 418 (CPD). The Applicant who was a *Curator ad Litem* for a minor child brought an application for condonation under the following circumstances:

- 25.1 The minor child was approximately 16 years-old. His parents were farm workers who had abandoned him and were inebriated for most of the time. A lady who worked for the Cape Town Society for the Blind took care of him.
- 25.2 He was injured when the South African Police Services sprayed tear gas directly into his eyes resulting in his blindness. The notice in terms of the Act was given two years from the date on which he went blind.

- 25.3 The Minister of Safety and Security objected to the notice on the basis that it was out of time. The Minister was requested to condone the late service of the notice, but refused. The Applicant was appointed as *Curator ad Litem*, who then brought the application.
- 25.4 The Court found that the claim had not prescribed. The similarities of this case with the present case are striking. If one has regard to the fact that the notices were sent on 14 June 2012 then the Plaintiff dispatched the notices after nineteen months compared to eighteen months. The claim in this case has also not prescribed.
- 25.5 In concluding that the applicant had demonstrated the existence of good cause for his failure to give notice timeously, the court had regard to his personal circumstances such as the minor child's age, his abandonment by his parents, his difficult childhood and his blindness since November 2004.
- 25.6 The fact that the Plaintiff *in casu* too only came to know his father when he was thirteen, did not grow up with his mother, was brought up by his illiterate grandmother and was only nineteen when he was detained are therefore pertinent personal factors to be taken into account when determining whether or not good cause has been shown. Moreover, the failure of his attorneys to whom he gave instructions to proceed against the

Defendants in February/March 2011 cannot be attributed to him. See *Mugwena & Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) and *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (CKHC).

- 25.7 With regard to the third requirement dealing with unreasonable prejudice, the Court found that the mere fact that the notice was given late did not prejudice the Minister. The Court also found that giving notice 18 months late cannot necessarily be taken as an unreasonable delay.
- 25.8 If giving the notice 18 months late was not considered prejudicial this court cannot decide otherwise but to follow in the footsteps of these cases. In arriving at this decision I have taken into account that the Defendants did not lay any basis of the prejudice that they will suffer in their papers or in their cross examination of the Plaintiff should the court grant condonation.
- 25.9 The prospects of success of this claim are good. There are no disputes of fact which might result in the Plaintiff's case being dismissed. Most of the facts on which his claim is founded are common cause. The significance of this claim to the Plaintiff is no doubt that an award of damages will compensate him for the loss of the one year, which he spent without attending school.

[26] Having considered the facts in the various cases and the circumstances under which condonation was granted, I have come to the conclusion that it will be fair and just that the Plaintiff's failure to comply with Section 3 in this case be condoned. See also *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA).

[27] I turn now to examine the fault of the Second and Fourth Defendants, which can either be in the form of intention or negligence. The Defendants have argued that the Second Defendant did not intentionally mislead the court by giving false evidence in his affidavit as he was absent in court when the affidavit was read into the record. In any event, so the argument goes, granting bail is in the discretion of the court.

[28] The determination of the Defendants' fault requires a closer examination of the Second Defendant's sworn statement that was utilised for the purposes of opposing bail and the reasons that the magistrate furnished when he ordered the Plaintiff to remain in custody on 7 May 2010. According to the judgment of the magistrate, bail was refused on the strength of the contents of the sworn statement of the Second Defendant. It states that:

28.1 The Plaintiff was arrested at 12h15;

28.2 It was in the afternoon;

28.3 It was during broad daylight;

28.4 The community was outraged as this robbery took place during the day;

28.5 The police did not lose sight of the Plaintiff when they ran after him;

28.6 The Plaintiff was arrested at the scene of the crime;

28.7 The complainant had held him by the neck until the arresting officer arrived.

[29] All the above are evident or implied in the statement of the Second Defendant. It is also inexorable to conclude that they form the foundation of the magistrate's ratio in ordering the Plaintiff back into detention on 7 May 2010. The question that needs investigation is why did the Second Defendant give this evidence when he knew or ought to have known that it was incorrect?

[30] The Second Defendant's evidence is that he would have made reference to the affidavit of Constable Mukwevho had it been in the docket prior to compiling his own. His evidence that Mukwevho's statement was not in the court file must be rejected as there is no explanation how it momentarily disappeared and then conveniently resurfaced after the Plaintiff had been ordered back into custody. Had he wanted the Plaintiff to be released on bail, he would have presented the correct evidence before court to enable it to exercise its discretion whether to grant bail or not.

[31] Even if this court were to accept that the statement of Mukwevho had temporarily vanished at the time when the Second Defendant made his own statement in preparation for the bail application, there is no justification for missing the statements of Johnson and Mathe, which were apparently in the docket and were clear on how and when the Plaintiff was arrested. Had he taken the trouble of reading them, he would have noted that the Plaintiff was not arrested at 12h15, that it was not during broad day light and that he was not arrested at the scene of crime. The Second Defendant gave various inconsistent evidence on whether or not he read his statement prior to signing it. He was also not clear why he noted certain mistakes and left others out when perusing his statement. He gave the impression that he did not care, which led this court to conclude that he was negligent.

[32] The Fourth Defendant, an officer of the court, took the sworn statement from the Second Defendant and merely presented it to court as is without verifying the veracity of its contents. She was completely incoherent during her evidence in cross examination why she allowed this to happen. Her incoherence leads this court to the inescapable conclusion that she was negligent and that her primary concern was to ensure that the Plaintiff remained in detention regardless of the circumstances surrounding his detention.

[33] It would not have taken her more than the reading of the sworn statements of Johnson and Mathe to establish that the Second Defendant's

affidavit had irreconcilable and fundamental differences with those of the former. She attributed the reference to the time of arrest, 12h00, as a cosmetic typing error. However, her argument could not be sustained when she could not justify the mentioning of 'afternoon', 'during broad day light' and 'the community was indignant' as those were associated with 12h00, the time at which the offence is alleged to have occurred.

[34] She also was tongue-tight when she had to explain why the opposing affidavit of the Second Defendant, contrary to Johnson's statement, states that the Plaintiff was arrested whilst Johnson held him by the neck. Furthermore, she also could not clarify the discrepancy between her evidence and Constable Mathe's statement that the suspects ran away when they saw them. Mathe's statement makes it clear that the Plaintiff could not have been arrested at the scene while held by Johnson.

[35] Counsel for the Plaintiff in cross-examination demanded to know what she would have done had she been aware of the mistakes. Her response was that she would have alerted the court. If this answer was genuine and true, one would have expected her not to have opposed the second bail application brought on new facts on 31 August 2010.

[36] It is disquieting that what the Second and Fourth Defendants want this court to believe were inadvertent inaccuracies are in fact allegations that were inserted for purposes of persuading the court not to grant bail. It is indubitable from the contents of the judgment of the magistrate that in ordering the

Plaintiff back into custody, he relied on the evidence of the Second Defendant, which was jointly prepared with the Fourth Defendant.

[37] The above became palpable on 31 August 2010 when the magistrate granted bail. The exceptional circumstances were in the main, the rectification of the false evidence of the Second Defendant that was presented to court by the Fourth Defendant on 7 May 2010.

[38] I am satisfied that the Second and the Fourth Defendants were negligent in their handling of the bail application. It was on the strength of their testimony that the magistrate exercised his discretion in favour of denying bail. The Plaintiff's continued detention could not have been lawful especially from 7 May 2010 as it is apparent that he would have been released had it not been for the magistrate's exposure to the distorted facts by the Second Defendant and presented to court by the Fourth Respondent.

[39] The Defendants have argued that both the Plaintiff and his attorney were present in court when the false evidence was tendered to court intimating that the Plaintiff and his own attorney were the authors of his misfortunes. The uncontested evidence is that it was the Plaintiff's first experience to appear in court. This court need not emphasise how overwhelming and daunting court procedures can be to older and experienced people let alone a 19 year-old appearing for the first time.

[40] The Plaintiff does acknowledge though that he heard that the evidence was incorrect but he did not have an opportunity to advise his attorney. When the magistrate refused bail, the only chance he had was wishing his attorney well by signalling him prior to instruction to descend to the court cells.

[41] A further contention advanced by the Defendants is that the Plaintiff delayed in bringing back the matter to court for a bail hearing. This assertion presumes that the Plaintiff could have mitigated his damages but he deliberately prolonged his incarceration thereby exacerbating the amount for damages. This approach can never find favour with this court principally because this court is acutely mindful of the poor social circumstances under which the Plaintiff grew. Even assuming that he grew up with his parents, it probably would have taken them that long to secure legal services as a result of their penury.

[42] I agree with the approach of the Plaintiff's Counsel that the evidence of Johnson, the prosecutor, Mr Skhosana, Mathe and Mukwevho have limited value. The evidence of Johnson, Mathe and Mukwevho is only relevant and useful insofar as it confirms the manner and time of arrest. Other than the unreliability of their testimony, it has no weight on the unlawful detention from 7 May to 31 May 2010 and can safely be excluded as being neither here nor there. Equally, the evidence of Skhosana pertaining to the plea bargaining has no bearing on the unlawful detention of the Plaintiff and it is accordingly discarded as being of no consequence.

[43] In the circumstances I find that:

43.1 The Plaintiff has on a balance of probabilities successfully proved that he was unlawfully detained from 7 May 2010 to 31 August 2010;

43.2 In denying the Plaintiff bail on 7 May 2010, the magistrate placed weight on the false evidence of the Second Defendant, which was presented to the court by the Fourth Defendant;

43.3 The Second and Fourth Defendants acted in the course and scope of discharging their respective duties with the First and the Third Defendants;

43.4 The Plaintiff was ordered to remain in custody for 115 days as a result of the false evidence of the Second Defendant, which was presented to court by the Fourth Defendant;

43.5 In consequence of the Plaintiff's detention, he lost one year of schooling;

43.6 The actions of the Second and Third Defendants were unlawful;

43.7 The First and Third Defendants are vicariously liable for the actions of the Second and Forth Defendants to the Plaintiff;

43.8 There is no basis to hold the Fifth Defendant liable and accordingly no order will be made against it.

[44] Having established that the Defendants are liable for the compensation of the Plaintiff's unlawful detention, I turn to consider the amount that should be awarded as damages. Section 12(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996 Provides that everyone has the right to freedom and security of the person, which includes the right -:

- “(a) *not to be deprived of freedom arbitrarily or without just cause;*
- (b) *not to be detained without trial;*
- (c) *to be free from all forms of violence from either public or private sources;*
- (d) *not to be tortured in any way;*
- (e) *not to be treated or punished in a cruel inhumane or degrading way.”*

[45] The Second and Fourth Defendants wield a lot of power upon which courts rely when exercising their discretion to deprive a person of his freedom or to liberate him. They should have known that the court would place emphasis on what they gave as evidence in deciding whether the Plaintiff was to be freed pending his trial.

[46] Counsel for the Plaintiff has referred me to a number of comparable cases to assist with the assessment of damages to be awarded. It is trite that it is useful to have regard to previous awards that are similar or closely associated. It is also settled that no case is exactly similar to the other and

that one cannot follow previous cases mechanically without the application of one's mind. It follows that each case must of necessity be decided on the strength of its own peculiar set of facts.

[47] The facts against which the damages of the Plaintiff are to be assessed are that he was 19 years old at the time of detention. It was his first time to have been exposed to jail where he mixed with older and hardened criminals with whom he fought and even injured his back in the process. It must have been traumatic to a 19 year old young man who was looking forward to completing his matriculation certificate. He lost a year of schooling and therefore started his working life later than he could have.

[48] When assessing how much to award as damages, the personal circumstances of the Plaintiff cannot be viewed in isolation from the actions of the Second and Fourth Defendants. Considering how the Plaintiff came to be detained for a further period of 115 days in jail, courts should be fretful and be on their guards as they cannot necessarily trust even the most experienced employees in the employ of both the First and Third Defendants. Under normal circumstances one would regard individuals who have been employed for twenty-two and eleven years in the case of the Second and Fourth Defendants respectively to be the most consummate in their respective fields. Their actions are the aftermath of the society being apprehensive to place trust and respect on those organs of State that are suppose to serve and protect them.

[49] Having said that, it does not mean that the court must award an amount that is dreadfully out of line. While I am appreciative of the cases to which the Plaintiff's Counsel referred me, I think they are completely out of sink with the facts of the case *in casu*. Firstly, in the case of *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W), the award that was made by Willis J, as he then was, was reduced from R500 000.00 to R90 000.00 on appeal.

[50] Equally, in the case of *Van Rensburg v City of Johannesburg* 2009 (2) SA 101, the sixty-six year old accountant who was awarded an amount of R75 000.00 for being in custody for 6 hours is not by any stretch of imagination analogous with this case. The factors that the court took into account in awarding that amount are totally different and inimitable. Thus the award of R75 000.00 in that situation did not come as a surprise.

[51] In *Rudolph & Others v Minister of Safety & Security* 2009 (5) SA 94 the court allowed damages in the amount of R100 000.00 to each Plaintiff. The award was pursuant to the deprivation of freedom of the Plaintiffs for four days. From the facts of this case Counsel for the Plaintiff concludes that since each of them was awarded R100 000.00 it follows that each of them was paid R25 000.00 for each day in custody. I would be careful to apply a mathematical solution to matters of this kind otherwise the amount of the award would, as I have stated above, be outrageously and farcically high.

[52] In *Mvu v Minister of Safety & Security* 2009 (6) SA (GSJ) Willis J, as he then was, allowed damages in the amount of R30 000.00 to a plaintiff who was kept in custody for overnight. Counsel for the Plaintiff concludes from the facts of this case and all the others to which he has referred this court that generally courts allow between R25 000.00 and R30 000.00 per day in custody. I disagree that his assertion is correct. Each case is assessed on its own merits, the situation under which it occurred, whether the plaintiff was employed or not, how skilled or educated the plaintiff was and his age, the plaintiff's sex, the list is not exhaustive.

[53] I have considered all these cases and the personal position of the Plaintiff in this case and have come to the decision that the appropriate amount to be awarded is R500 000.00. Against that background, the claim of the Plaintiff succeeds and I make the following order against the First, Second, Third and Fourth Defendants jointly and severally the one paying the other to be absolved:

1. Payment of an amount of R500 000.00.
2. Interest at the rate of 9% per annum from the date of judgment to the date of payment tempore morae.
3. Cost of Suit.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR PLAINTIFF: Adv. J P Du Plessis

INSTRUCTED BY: Gani & Koor Attorneys

COUNSEL FOR DEFENDANTS: Adv. Tshepo Lebeko

INSTRUCTED BY: The State Attorney

DATE OF HEARING: 18 February 2014

DATE OF JUDGMENT: 23 October 2014