



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no. 2101/2020

In the matter between:

KARIN SWANEPOEL

Plaintiff

and

MINISTER OF POLICE

First Defendant

ANDREW MKETHI MHLAFU

Second Defendant

CORAM: VAN RHYN J

**HEARD ON: 8, 9 and 11 NOVEMBER 2022, 5 and 6 DECEMBER
2022 AND 20 FEBRUARY 2023**

DELIVERED: 20 APRIL 2023

Introduction.

- [1] The plaintiff, Karin Swanepoel, an adult female born on the 5 October 1984, instituted action against the first defendant in his capacity as representative and head of the South African Police Service ("SAPS") claiming damages in

the amount of R500 000.00 suffered due to the alleged wrongful, illegal and unlawful arrest executed by the second defendant, Andrew Mkethi Mhlafu.

- [2] The plaintiff, a resident of Odendaalsrus, Free State Province, was arrested on 7 March 2019. The arrest was effected without a warrant by the arresting officer, Warrant Officer Mhlafu (“WO Mhlafu”) on a charge of Crimen Injuria. WO Mhlafu effected the arrest while acting within the course and scope of his employment with the first defendant. The circumstances leading to the arrest are however in dispute.
- [3] Neither the plaintiff nor the defendants referred to any specific section of the Criminal Procedure Act¹ (the “CPA”) in the pleadings regarding the lawfulness of the arrest of the plaintiff. The defendants denied in their Plea that the arrest was wrongful, illegal and unlawful and pleaded that the plaintiff committed a crime in the presence of WO Mhlafu. The merits and quantum of the plaintiff’s claim were separated and the trial proceeded on the merits only. The Defendant bore the duty to begin and the onus of proof to show, on a balance of probabilities, that the arrest of the Plaintiff was lawful in terms of subsection 40(1) of the CPA.

The Defendant’s Case

- [4] The defendants presented the testimony of four witnesses. The first witness was that of WO Mhlafu, the arresting officer. WO Mhlafu is presently still stationed at Odendaalsrus Police Station and has been a member of SAPS for the past 29 years. During March 2019 he was the Charge Office Commander.
- [5] WO Mhlafu testified that on 7 March 2019 between 07h00 and 08h00, the plaintiff and her husband (“Mr Swanepoel”) came to the charge office to lay a complaint regarding a taxi that nearly “ran them over”. WO Mhlafu asked them what the complaint was about and after they explained that they did not have the registration number of the taxi but that they would be able to identify the

¹ Act 51 of 1977.

taxi, he requested them to be seated in the charge office. He offered to call a police vehicle to take them to the taxi rank to go and search for the particular taxi.

- [6] WO Mhlafu testified that he contacted a colleague who was in possession of the only available police vehicle, to assist. The colleague, Constable Makatu reported that as soon as the complaints he was busy attending to were dealt with, he would return to the police station to attend to the plaintiff's complaint. After about 20 minutes the plaintiff became aggressive and complained that she had been waiting for a considerable period of time and if she was "black", she would not have been requested to wait. After having explained to the plaintiff that the police are attending to complaints which had been lodged before her matter, she insulted the witness by saying that she: "... is going to show me my ass".
- [7] WO Mhlafu reprimanded her not to use vulgar language and not to insult him. While reprimanding her, the plaintiff exited the charge office and entered the corridor into the court yard of the police station. She then said to WO Mhlafu that he is a "swart kaffir polisieman". After she had uttered these word, he stood up from the desk where he had been sitting and followed her, grabbed her and said that he is arresting her for calling him a "kaffir". Mr Swanepoel then tried to intervene and attempted to separate them. Constable Mafabato came to assist with the arrest of the plaintiff.
- [8] The plaintiff was escorted back to the charge office and requested to sit while WO Mhlafu opened a docket on a charge of *crimen injuria*. The plaintiff, in the meantime explained that she has cancer to which WO Mhlafu responded that the plaintiff does not have the right to insult him. The witness also learned from Constable Mafabatho that the plaintiff's grandmother had arrived at the police station and will provide the plaintiff with the medication prescribed for her medical condition.
- [9] During cross examination, by Mr P C Ploos van Amstel, acting on behalf of the plaintiff, it was put to WO Mhlafu that Mr Swanepoel, the plaintiff's husband,

came to the charge office on his own and was only joined by the plaintiff at a later stage. WO Mhlafulu denied this version. He confirmed that he only enquired about the registration number of the taxi, however, was informed that the registration number is not available due to the fact that the plaintiff and Mr Swanepoel, could not recall the registration number. He informed the plaintiff and Mr Swanepoel that no crime had been committed.

- [10] WO Mhlafulu conceded that he did not enquire about the possible identification of the taxi or took any statements regarding the incident. When confronted by Mr Ploos van Amstel why he failed to open a police docket and took a statement from Mr Swanepoel where after the case would be investigated further by the detectives, he explained that Mr Swanepoel and the plaintiff did not wish to lay a complaint and have a case opened. They merely wanted the driver of the taxi to be reprimanded. They attended the police station to complain about the taxi driver's behaviour and not to lay a complaint.
- [11] WO Mhlafulu testified that he would usually listen to the version of a person who came to lay a complaint at the police station and would then ascertain if all the elements of the crime are present where after he would decide "where the case leads too", in other words whether a police docket should be opened or not.
- [12] WO Mhlafulu explained that he felt humiliated by the racial insult uttered by the plaintiff and that he was angered by her behaviour. The witness further stated that he felt that the plaintiff had to be punished for calling him a "kaffir". According to WO Mhlafulu *crimen injuria* is a Schedule 1 offence. Furthermore, the offence was committed in his presence. The arrest was executed between 07h00 and 08h00 on 7 March 2019 at the police station at Odendaalsrus.
- [13] According to the testimony of Constable Mantsho Jeanette Mafabatho ("Constable Mafabatho") she was in the charge office at the Odendaalsrus police station on 7 March 2019 when Mr Swanepoel and the plaintiff entered to lay charge and open a docket regarding an incident involving reckless driving. She testified that the plaintiff and Mr Swanepoel did not have the

registration number of the taxi. She was attending to other complaints at the time when the plaintiff and Mr Swanepoel was discussing the matter with WO Mhlafu. According to her, a docket could not be opened due to the fact that the registration number of the vehicle was not available. Constable Mafabatho corroborated WO Mhlafu's evidence that the plaintiff called him a "swart kaffir polisieman" where after she was arrested on a charge of *crimen injuria*. She was under the impression that *crimen injuria* was a Schedule 1 offence and that the plaintiff could be arrested for the said offence. Subsequent to the plaintiff being seated in the charge office, the plaintiff allegedly urinated which caused her clothes and the carpet in the charge office to become wet.

- [14] Constable Makatu testified that, on the day of the incident, he was attending to a complaint in the township while utilising the only available police vehicle. He explained that other police vehicles were available but they were "not working" on that day. He testified that he did not receive a call from WO Mhlafu to assist the plaintiff and Mr Swanepoel to look for a taxi. He only received a call to take the plaintiff to Allanridge to be incarcerated on a charge of *crimen injuria*. Due to renovations being made at the police station at Odendaalsrus, no holding cells were available and detainees had to be conveyed to the police station at Allanridge. Constable Makatu explained that he made an inscription next to the charge of *crimen injuria* indicating that the charge was in connection with a domestic violence matter. He conceded that he clearly made a mistake as this case is not a domestic violence matter. He cannot explain why he wrote "DV" for domestic violence next to the charge.

The Plaintiff's Case

- [15] Mr Swanepoel testified that he, the plaintiff, as well as a male friend, Tjaart van der Walt ("Mr Van der Walt") were on their way to the hospital on the particular day to collect the plaintiff's medication. The plaintiff had been diagnosed with cervical cancer and received morphine at the hospital to alleviate the pain she suffered from. On their way to the hospital, whilst pushing their daughter's bicycle, a taxi almost ran them over. Mr Swanepoel

then left the bicycle with the plaintiff and Mr Van der Walt and went ahead to the police station which is located in the same street.

- [16] The plaintiff and Mr van der Walt took the bicycle and followed Mr Swanepoel to the police station. Mr Swanepoel testified that when he arrived at the police station he explained what had occurred regarding the incident with the taxi to a female police official. WO Mhlafulu then asked what happened and Mr Swanepoel, being frustrated to again explain his version of the events, uttered the following: "Must I again now explain everything?" Mr Swanepoel repeated the incident regarding the taxi to WO Mhlafulu who then said that there was no case to be opened. Mr Swanepoel then said the following: "...must somebody now first be killed before one can get police assistance".
- [17] Mr Swanepoel testified that he did not get any assistance from the members of the SAPD and decided to leave. Upon leaving, the plaintiff and Mr van der Walt arrived at the police station. He then told the plaintiff that "... they are busy wasting my time". According to Mr Swanepoel, WO Mhlafulu followed them while they were on their way to exit the police station and then grabbed the plaintiff by her arm. Mr Swanepoel testified that he assumed that, due to the plaintiff's medical condition, she was passing water and blood while still in the passage. Constable Mafabatho came to assist with the arrest of the plaintiff, which according to him, was rather forceful.
- [18] The plaintiff was made to wait in the charge office while her clothes were wet. A person from across the road brought a towel with which the plaintiff could cover the lower part of her body. Mr Swanepoel denied the allegation that the plaintiff uttered the racial slur as alleged by WO Mhlafulu and Constable Mafabatho. He furthermore denied that the plaintiff said that they, namely, W O Mhlafulu and Constable Mafabatho "will see their' assess".
- [19] The plaintiff corroborated Mr Swanepoel's evidence pertaining to the incident with the taxi and the events that occurred in the charge office. She denied uttering the alleged racial slur or saying anything derogatory or insulting while at the police station. She testified that her constitutional rights were not

explained to her. She received a document to sign, apparently the SAP14A, the Notice of Rights in terms of the Constitution which contain a summary of a detainee's right in terms of section 35 of the Constitution.

[20] According to the plaintiff, the conditions under which she was detained were appalling. She was not provided with dry clothes or any medication and was kept at the holding cells at Allanridge until her release at around 17h00, the same day, when WO Brits handed her a SAPS 496 notice and took her home to Odendaalsrus. The plaintiff denied the version presented by the defendant that regular cell inspections were carried out as evidenced by the Occurrence Book kept at the holding cells at Allanridge police station. A copy of the relevant notes pertaining to the cell visits performed and complaints received, as per the Occurrence Book, was submitted as an exhibit during the trial.

[21] The plaintiff denied entering the charge office with Mr Swanepoel and explained that she only arrived at the police station after Mr Swanepoel had already entered the charge office. She corroborated the evidence of her husband, regarding her and Mr van der Walt's arrival at the police station and denied uttering the alleged racial slur. The version presented by Mr Swanepoel were mostly reiterated by the plaintiff except for the part where she was not present. There were no material contradictions between the evidence adduced by the plaintiff and Mr Swanepoel.

[22] Plaintiff presented the testimony of Mr van der Walt, a 24-year-old male residing at Odenadaalsrus. On the day of the incident he accompanied the plaintiff and Mr Swanepoel when they walked their daughter to the school. Thereafter they were supposed to collect a motor vehicle from Mr Swanepoel's brother in order to travel to the hospital. On their way to collect the motor vehicle, a taxi skipped a stop street and almost ran them over. The taxi driver pulled over and Mr Swanepoel and the taxi driver had words. Mr Swanepoel, angered due to the incident with the taxi driver, dropped the bicycle he was pushing and walked off in the direction of the police station to report the incident.

- [23] Mr Van der Walt took a photograph of the taxi's registration number with his cellular phone. The plaintiff struggled to push the bicycle left behind by her husband. Mr Van der Walt took the bicycle from her and they followed Mr Swanepoel to the police station. When they arrived at the police station Mr Van der Walt entered the police station and went to the charge office where he met up with Mr Swanepoel. The plaintiff waited outside too keep an eye on the bicycle. When the witness entered the charge office he heard Mr Swanepoel complaining that the police is wasting his time. Only then did the plaintiff enter the charge office. Mr Van der Walt denied that the plaintiff uttered any derogatory words or insulted WO Mhlafu. During cross examination by Ms De Kock, counsel on behalf of the defendant, Mr Van der Walt could not provide any reason why the plaintiff was arrested.
- [24] The last witness for the plaintiff was Warrant Officer Johannes Hendrik Britz. ("WO Britz") He is a member of the SAPS and stationed at the police station at Odendaalsrus. He has 33 years' experience as a member of the SAPS. On 7 March 2019, while at the police station at Allanridge, he handed a SAP 496 document to the plaintiff to appear in the Magistrates Court at Odendaalsrus on the following day, the 8th of March 2019. The charge against the plaintiff was one of *crimen injuria*.
- [25] WO Britz testified that he has never experienced a person being detained on a charge of *crimen injuria*. In his experience, the risk of a civil claim for detention on a charge of *crimen injuria* looms greatly and, even if a person is arrested on a charge of *crimen injuria*, such an offender should be released immediately. In the event of uncertainty, a police officer should consult with his or her commander whether to arrest and detain a suspect on certain charges. A police officer, in any event has a discretion whether to arrest and detain a suspect. WO Britz testified that the plaintiff was released from the cells at the police station at Allanridge on the day of her arrest at 15h55. At approximately 16h00 he left with her from Allanridge to Odendaalsrus which is approximately a 35 minute drive. He furthermore testified that a charge of *crimen injuria* is a minor crime and a person should not be detained on a charge of *crimen injuria*.

Applicable legal principles.

[26] In actions for damages for wrongful arrest or imprisonment our courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved, it is for the defendant to allege and prove the existence of grounds in justification of the infraction².

[27] The first defendant and the first defendants' employees have a constitutional obligation not to perform any act which infringes upon the fundamental rights protecting the citizens of South Africa and which are entrenched in the Constitution.³ The most pertinent right in this case being section 12 which provides as follows:

"12. Freedom and Security of the person

- (1) 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; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way."

[28] In **Botha v Minister of Safety and Security and others, January v Minister of Safety and Security and Others**⁴ Tshiki J (as she was then) held as follows:

"It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of s 12(1) of the Constitution . . . These provisions, therefore, place an obligation on police officials, who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish, before detaining the person, the justification and lawfulness of such arrest and detention".

² Minister of Justice v Hofmeyr 1993 (3) SA 131 (AD).

³ Sections 7, 8, 10 and 12 of the Constitution.

⁴ 2012 (1) SACR 305 (ECP).

And further:

“It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is any legal justification for the further detention of the person.”⁵

[29] Subsection 40(1) of the Criminal Procedure Act reads as follows:-

“A peace officer may without warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
- (c)”

(underlining added)

[30] Section 40(1) provides for several different instances where a peace officer may effect an arrest without a warrant of arrest. Section 40(1)(a) empowers a peace officer to arrest, without a warrant, any person who commits an offence in their presence. The jurisdictional facts necessary for an arrest under section 40(1)(a) are the following:

- (i) the arrestor must be a peace officer;
- (ii) an offence must have been committed or there must have been an attempt to commit an offence; and
- (iii) the offence or attempted offence must be committed in his or her presence.

[31] The methods of securing the attendance of an accused in court for the purposes of trial are arrest, summons, written notice and indictment in accordance with the relevant provisions of the CPA. It is commendable that an arrest in terms of section 40(1)(a) should be confined to serious cases but where a peace officer does effect a lawful arrest in terms of section 40(1)(a) for what may be considered to be a less serious offence, the arrest or

⁵ Botha v Minister of Safety and Security (supra) at [29] and [30].

subsequent detention does not become unlawful merely because a summons, or notice to appear in court, would have been equally effective in ensuring his or her presence at court.

- [32] In the matter of **Olivier v Minister of Safety and Security and Another**,⁶ the court held that:

“When deciding if an arrestor’s decision to arrest was reasonable, each case must be decided on its own facts.”⁷

Discussion.

- [33] Mr Ploos van Amstel argued that WO Mhlafu acted as judge, jury and executioner and proceeded with the arrest of the plaintiff while he was agitated, angry and on his own version, felt disgraced and belittled, due to the alleged conduct of the plaintiff. What WO Mhlafu should have done under the circumstances was to have a case opened by another police officer for further investigation and to take the necessary steps to bring the plaintiff to justice, which steps did not include the arrest and subsequent detention of the plaintiff.
- [34] On behalf of the plaintiff it is contended that two scenarios exist: the first being that the plaintiff did not utter any racial related derogatory remarks as alleged and that WO Mhlafu became agitated with Mr Swanpoel’s untoward attitude. In a response he arrested the plaintiff on the grounds that she is an “easy target”. Due to the fact that the plaintiff and Mr Swanepoel testified that they were startled by the behaviour of WO Mhlafu when he grabbed the plaintiff’s arm while they were exiting the police station, it is apparent that neither of them expected the arrest, which, so the argument goes, is indicative that the plaintiff did not utter such profanities.

⁶ 2009 (3) SA 434 (WLD).

⁷ Olivier (supra) at 445C.

- [35] The second scenario is that the plaintiff did indeed utter the words as alleged by WO Mhlafu and Constable Mafabatho which caused the arrest and detention of the plaintiff. Mr Swanepoel, on his own version, became agitated and angry with the dismissive conduct of the members of the SAPD at the Odendaalsrus Police Station and decided to leave without being assisted to open a case of reckless driving. Mr Ploos van Amstel conceded that Mr Swanepoel obviously did not keep his emotional status in check and in all probability did not address WO Mhlafu in a respectful and decent manner.
- [36] Ms De Kock conceded that *crimen injuria* is not a Schedule 1 offence as proclaimed by WO Mhlafu and Constable Mafabatho. WO Mhlafu was the complainant who suffered the alleged racial abuse. He was party to all the facts and information regarding the crime of *crimen injuria* allegedly committed by the plaintiff and he did not rely on information provided to him by a complainant or another police official. The issue whether the arrestor, WO Mhlafu, entertained a suspicion regarding the offence did not come into play at all.
- [37] It was submitted on behalf by Ms De Kock that the defendants had discharged the onus of proving, on a balance of probabilities, that the arrest of the plaintiff was lawful in terms of subsection 40(1)(a) of the CPA. More particularly, it was submitted by the defendant's counsel that the arrest of the plaintiff by WO Mhlafu, viewed objectively, was justified on the basis that he is a peace officer and a crime was committed in his presence.
- [38] Ms De Kock further submitted that the court is faced with conflicting versions regarding the question whether an offence had been committed. With reference to **Stellenbosch Farmers Winery Group (Pty) Ltd v Martell et cie and Others**⁸ it was contended that an evaluation must be made concerning the credibility of the witnesses, their reliability and the probabilities of their versions. On the basis that the plaintiff testified after the testimony of her husband was adduced, she cannot escape the consequences of being

⁸ 2003 (1) SA 11 (SCA) at [5].

present in court when her husband testified. The possibility that her evidence was trimmed to accord with the testimony of Mr Swanepoel cannot be excluded. On behalf of the defendants it was argued that several aspects regarding the testimony of the plaintiff were not put to any of the defendants' witnesses.

Discussion of the facts and legal principles.

- [39] According to Mr Swanepoel he did not even have the opportunity to indicate to WO Mhlafulu that he had a photograph of the taxi's number plate. Mr Swanepoel's anger emanated from the total lack of interest regarding his complaint and that is why he said that the police officials were wasting his time.

- [40] It is evident from the facts that the members of the SAPD at the charge office did not open a docket in respect of the complaint by Mr Swanepoel. According to Constable Mafabatho, the incident with the taxi was merely "attempted reckless driving" and therefore no crime had been committed. According to her, it is required that the vehicle involved must have actually collided with a complainant and a report regarding injuries had to accompany such a complaint.

- [41] WO Mhlafulu testified that no crime had been committed by the taxi driver even though he conceded that he did not take down a statement from Mr Swanepoel or question him regarding the alleged crime and the particulars of the taxi involved. Furthermore, WO Mhlafulu's testimony that Mr Swanepoel and the plaintiff merely wanted to complain about the taxi driver's behaviour, appears to be wholly improbable and is to my mind a fabrication to explain his failure to open a docket and take a statement from the complainant.

- [42] Taking cognisance of the events that preceded the plaintiff and Mr Swanepoel's attendance at the police station, they were obviously both already agitated by the taxi driver's conduct, who on their version, uttered profanities at Mr Swanepoel when he was reprimanded by Mr Swanepoel for

driving without any consideration of pedestrians, being himself and the plaintiff.

- [43] I furthermore take into consideration that the plaintiff was on her way to the hospital to obtain morphine to be used as pain medication, due to her being diagnosed with cancer. Mr Swanepoel testified that they were walking to the hospital and did not have transport. He furthermore testified that his wife had by then received a letter from the hospital referring her to Bloemfontein for chemotherapy and radiation treatment. The fact that the plaintiff was diagnosed with cervical cancer was not placed in dispute. During her testimony the plaintiff, even though the trial commenced more than 3 years after the event, appeared to be rather thin and frail.
- [44] At the police station further delay, agitation and frustration followed. Mr Swanepoel testified that he was angry and indicated that he was not afforded any service by the members of the SAPD when he attended the police station to lay a complaint. It is apparent from the evidence that WO Mhlafu did not seriously pay attention to the complaint lodged by Mr Swanepoel and decided that he is not even going to take any particulars regarding the complaint.
- [45] According to WO Mhlafu he indicated to Mr Swanepoel and the plaintiff to be seated. He called for the only police vehicle to assist Mr Swanepoel to go and look for the taxi. Why the complainant had to investigate his own complaint has not been explained. The version presented by WO Mhlafu were denied. It seems improbable that WO Mhlafu would request Mr Swanepoel to wait for a police vehicle to assist if, on his version, the taxi driver did not commit any offence. I am of the view that WO Mhlafu fabricated his version of the events to explain the failure to attend to the complaint lodged by Mr Swanepoel.
- [46] Constable Makatu testified that the only call he received on day of the plaintiff's arrest, was to take the plaintiff to the police station at Allanridge. His testimony has a negative effect on the credibility of WO Mhlafu and confirms the testimony of Mr Swanepoel that he did not receive any assistance at the charge office. In an attempt to bolster her senior officer's decision that no

crime had been committed by the taxi driver, Constable Mafabatho astonished with her conclusion that the taxi driver merely “attempted” to drive recklessly and in any event no injuries were reported by Mr Swanepoel.

- [47] Furthermore, both WO Mhlafu and Constable Mafabatho testified that all the elements necessary for constituting the crime of reckless driving were not present. Constable Mafabatho did not consult with Mr Swanepoel regarding the incident with the taxi and most probably merely repeated what was said by WO Mhlafu in this regard. I am of the view that, on the probabilities, WO Mhlafu failed to pay any attention to Mr Swanepoel’s complaint regarding the incident involving the taxi and his version that he assisted the plaintiff and Mr Swanepoel “nicely” is highly improbable. In this regard, I accept the version presented by Mr Swanepoel that he entered the charge office on his own to lay a complaint of reckless driving and that he was not assisted. I furthermore accept the version that the plaintiff only entered the charge office a few minutes later, subsequent to Mr Swanepoel being informed that no crime had been committed by the taxi driver.
- [48] However, taking cognisance of the events that happened when the taxi driver nearly collided with Mr Swanepoel and the plaintiff, the alleged vulgar language uttered by the taxi driver and the manner in which Mr Swanepoel and the plaintiff were received when they wanted to lay a complaint at the police station, I am of the view that, on a balance of probabilities, the plaintiff did utter the alleged racial slur in accordance with the testimony of WO Mhlafu. Constable Mafabatho testified that the plaintiff was shouting and insulting her as well as WO Mhlafu for not assisting them. The plaintiff’s verbal insults most probably followed after being informed that no case will be opened by the police. I agree with Ms De Kock’s contention that something must have occurred which lead to the arrest of the plaintiff.
- [49] The denial by the plaintiff, and the witnesses on behalf of the plaintiff, that she did not say anything derogatory after learning from her husband that the police are wasting his time, are inherently improbable. Something must have angered WO Mhlafu to have stood up from his desk and walk down the

corridor to arrest the plaintiff. There can be no justification for insulting and defaming members of the SAPD or any other person for that matter, and being frustrated or angered can never be regarded as a defence or an excuse to act in such an appalling and unacceptable manner.

[50] In respect of Section 40(1)(a) police officers are given extraordinary powers of arrest. This is of course, unless justified, an infringement of liberty and human dignity. In **Minister of Safety and Security v Van Niekerk**⁹ the Court held that nuanced guidelines exist as to when to arrest without a warrant and when not. This must be read in the light of **MR v Minister of Safety and Security**¹⁰ and **Minister of Safety and Security v Sekhoto and Another**¹¹.

[51] Members of the SAPS should exercise his or her powers in accordance with section 13 of the South African Police Service Act¹² (the SAPS Act) which provides as follows:

“13 Members

- (1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.
- (2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.
- (3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.”

[52] All members of SAPS must act in accordance with the requirements of the Constitution and in doing so must have regard to, particularly, the fundamental rights of every person they are dealing with in the course of their duties.¹³ An arrest is a drastic interference with the rights of an individual's freedom of movement and the right to dignity. In the **Van Niekerk** matter, Sachs J again referred to the drastic nature of an arrest and the dilemma of how to control the discretion of police officers under section 40 of the CPA.

⁹2008 (1) SACR 56 (CC) at p64 a-b.

¹⁰ 2016 (2) SACR 540 (CC).

¹¹ 2010 (1) SACR 388 (FB).

¹² Act 68 of 1995.

¹³ Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

[53] The Standing Order (G) 341 dealing with arrest and the treatment of an arrested person¹⁴ confirms the drastic nature of an arrest and should be implemented as a last resort to ensure the presence of a person in court. The standing order provides, *inter alia*, the following:

“Securing the attendance of an accused at the trial by other means than arrest

- (1) There are various methods by which an accused’s attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.
- (2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3) below.
 - (3) A member, even though authorised by law, should normally refrain from arresting a person if—
 - a. the attendance of a person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or
 - b. the member believes on *reasonable grounds* that a magistrate’s court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Government Gazette*, (at present R1500-00), in which event such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate’s court in accordance with section 56 of the Criminal Procedure Act, 1977.”

[54] In the case of **Louw v Minister of safety and Security**¹⁵ Bertelsmann J held that: “... if an accused or suspect does not present a danger to society, will in all probability stand his trial, will not abscond, will not harm himself and is not in danger of being harmed by others, and may be able and be keen to disprove the allegations against him or her, an arrest will ordinarily not be the appropriate way of ensuring the accused’s presence”.¹⁶ With reference to an article by the late Etienne Mureinik, ‘**A Bridge to Where?: Introducing the Interim Bill of Rights**’¹⁷ and an article by Plasket J (as he

¹⁴ Standing Order (G) 341, issued under Consolidation Notice 15/1999 and titled “Arrest and the Treatment of an Arrested Person until Such Person is Handed Over to the Community Service Centre Commander”.

¹⁵ 2006 (2) SACR 178 (TPD).

¹⁶ Louw (*supra*) at 185d-e.

¹⁷ (1994) 10 SAJHR 31 at p 32.

then was) on the exercise of power to arrest without a warrant¹⁸, Bertelsmann J held as follows:

“What these statements mean is that the police are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.”¹⁹

[55] In **Charles v Minister of Safety & Security**,²⁰ Goldblatt J held that the legislator granted a peace officer the right to conduct an arrest in the circumstances set out in section 40 of the CPA, and created a situation where due compliance with that section by the peace officer is lawful and affords him or her protection against an action for unlawful arrest. In the **Charles** case the judgment in **Louw** was rejected as wrong. I am in respectful agreement with the approach adopted by Bertelsmann J in the **Louw** matter.²¹

[56] Once the jurisdictional facts for an arrest are present, a discretion whether or not to arrest arises. As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. In accordance with the Standing Order regarding the arrest of a person, a member may not arrest a person in order to punish, scare, or harass such person. There can be no doubt the discretion to arrest must be properly exercised.²²

[57] From the testimony of WO Mhlafu it is evident that he acted under the mistaken belief that, once it had been established that the plaintiff committed a Schedule 1 offence in his presence, he was obliged to arrest her. He furthermore testified that he was humiliated by her words and felt that she had to be punished for offending him. It has been established that WO

¹⁸ Controlling the discretion to arrest without warrant through the Constitution, Suid-Afrikaanse Tydskrif vir

Strafregspiegling (11) 1998 at 173.

¹⁹ Louw (supra) at 187d-e.

²⁰ (17599/01 [2006] ZAGPHC 33 (21 April 2006).

²¹ Olivier (supra) at 445 A-C.

²² Duncan v Minister of Law and Order 1986 (2) SA 805 (A).

Mhlafu was erroneously under the impression that *crimen injuria* is a Schedule 1 offence. Subsequent to becoming aware of the fact that the plaintiff was diagnosed with cancer, that she had “urinated” (as referred to by Constable Mafabatho), in the charge office and that she did not have her medication with her, the failure to assist the plaintiff to obtain dry clothes and her medication leaves one with a rather grim view of WO Mhlafu’s understanding of his obligation to treat all suspects with dignity and respect. It is evident that he, in accordance with his testimony, felt that she had to be punished for uttering the racial remarks and offensive words.

- [58] WO Mhlafu did not consider any other option to ensure the presence of the plaintiff in court. Given his constitutional duties WO Mhlafu did not exhaust the option of using a written notice to ensure the presence of the plaintiff in court. He arrested the plaintiff with the intent to punish her. The question whether an arresting officer properly, if at all, exercised the discretion vested in him as required by law was considered in the matter of **Diljan v The Minister of Police**²³. Both the arresting officers in the **Diljan** matter testified that they did not have the authority to secure the attendance of the plaintiff in court in any other way accept through her arrest. They were not aware of the fact that they were vested with the discretion of whether or not to arrest the suspect or with a further discretion whether to detain the arrestee or warn him or her to attend court. In **Diljan** the court held as follows:

“Accordingly, that they did not exercise a discretion that they unquestionably enjoyed is beyond dispute. It must therefore follow axiomatically that both the arrest and subsequent detention of the appellant were unlawful.”²⁴

- [59] In **Mpale NO v Minister of Police**²⁵, the trial court took into consideration the fact that the offence was not of a serious nature in deciding that there was no need to arrest and detain. Less stringent and less invasive procedures were available to secure the suspects’ attendance at court. Once a person has been arrested for the purpose of having him or her prosecuted, there rests a duty on

²³ Case No 746/2021 [2022] ZASCA 103 (24 June 2022).

²⁴ *Diljan* (supra) at [12].

²⁵ Unreported, GJ appeal case no A3133/2017, 26 April 2019 at [16].

a police officer, to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. The provisions of the section 12(1) of the Constitution place an obligation on members of the SAPS, who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention.

- [60] What is rather concerning is the inscription “DV”, an abbreviation for the word “domestic violence” written next to the complaint of *crimen injuria* and in the occurrence book made in connection with the arrest of the plaintiff. In terms of the provisions of section 40 (1)(q) of the CPA a peace officer may arrest any person without a warrant who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element. Constable Makatu testified that he is unable to explain why he wrongly indicated that the matter is domestic violence related.
- [61] It is common cause between the parties that the incident regarding the racial slur uttered by the plaintiff could never have been an incident of domestic violence between WO Mhlafu and the plaintiff. It appears as if the police docket and occurrence book had been interfered with in an attempt to justify the arrest and subsequent detention of the plaintiff to be in accordance with the provisions of section 40(1)(q) of the CPA.
- [62] The entire record of the proceedings regarding the criminal trial held at Odendaalsrus Regional Court (Case no: A334/2019) on the charge of *crimen injuria* was not placed before this court. A section of the record containing the testimony of WO Britz is included in the “Plaintiffs’ Discovery Bundle”. It was however placed on record that the plaintiff was acquitted and no further details pertaining to the criminal trial were made available to this court during the hearing of this matter.

[63] In light of a foregoing, this court finds that WO Mhlafu failed to exercise his discretion in a proper manner, or at all, in deciding whether the plaintiff must be arrested or not. Therefore, the defendants have failed to discharge the onus incumbent upon the defendants to prove, on a balance of probabilities, that the arrest of the plaintiff was lawful in terms of subsection 40(1)(a) of the CPA.

ORDER:

[64] In the result:

1. The defendants are liable for the unlawful arrest and detention of the plaintiff on 9 March 2019 from the time of her arrest until her release.
2. The defendants are directed to pay the costs of suit, jointly and severally, the one paying the other to be absolved.

VAN RHYN J

On behalf of the Plaintiff:
Instructed by:

ADV P C PLOOS VAN AMSTEL
KRUGER VENTER ATTORNEYS
BLOEMFONTEIN

On behalf of the Defendants:
Instructed by:

ADV. D DE KOCK
STATE ATTORNEY
BLOEMFONTEIN