

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 2004/2019

In the matter between:

CARLTON EDMUND THEONIEL SMITH

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Bloem J:

1. This is an action for damages by the plaintiff against the defendant, the Minister of Police, arising from his arrest and detention. The plaintiff initially instituted action also against the Minister of Justice, as the second defendant, and the National Prosecuting Authority of South Africa, as the third defendant. He has subsequently withdrawn his claims against those two defendants and tendered to pay the costs in respect of his withdrawn claims.
2. In his particulars of claim the plaintiff alleged that on 8 September 2018 and at Cradock he was arrested without a warrant by warrant officer Kerneels van Rooyen (Kerneels, as he is known) on a charge of housebreaking with intent to steal and theft. He was then detained at the police holding cells at Cradock until 10 September 2018 when he appeared in the magistrate's court at Cradock. After his appearance in court on 10 September 2018, he was further incarcerated at the instance of members of the South African Police Service. He was held in custody until 20 September 2018 when he was released after a successful formal bail application. The state withdrew the case against him on 15 November 2018.

3. The plaintiff alleged that his arrest and detention were wrongful, unlawful and without justification. He alleged that, as a result of his unlawful arrest and detention, he suffered damages in the sum of R500 000.00 in respect of the deprivation of his liberty, loss of privacy, shock and trauma, emotional pain and suffering, loss of earnings and the impairment of dignity and contumelia.
4. The defendant admitted that Kerneels arrested the plaintiff and that he was detained at the cells of the Cradock police station from 8 to 10 September 2018. He denied that the plaintiff's arrest was wrongful and unlawful. Relying on the provisions of section 40(1)(b) of the Criminal Procedure Act,¹ the defendant pleaded that the plaintiff was arrested without a warrant because Kerneels reasonably suspected him of having committed the offences of housebreaking with the intent to steal and theft, alternatively, housebreaking with the intent to commit an offence unknown to the state (the suspected offences).
5. The defendant alleged that, when the plaintiff appeared in court on 10 September 2018, the matter was postponed to 12 September 2018 to secure legal representation for the plaintiff and for further investigation pertaining to the verification of his address and profile. When the plaintiff appeared in court on 12 September 2018, the matter was postponed to 20 September 2018 to enable the plaintiff to make a formal bail application. The plaintiff was released on 20 September 2018 after bail was granted and he paid in the sum of R300. The defendant denied that the plaintiff's detention was wrongful and unlawful.
6. Since the defendant admitted that Kerneels arrested the plaintiff and caused his detention until his first appearance in court on 10 September 2018 (the initial detention), the onus was on him to justify the arrest and detention. That is so because an arrest constitutes an interference with an individual's liberty. It is for that reason that the person who deprives an individual of his liberty bears the onus of proving that his or her action was justified in law.² The defendant sought to justify the plaintiff's arrest by relying on section 40(1)(b) of the Criminal Procedure Act, which provides that a peace officer may without warrant arrest any person:

¹ Criminal Procedure Act, 1977 (Act 51 of 1977).

² *Minister of Law and Order and others v Hurley and another* 1986 (3) 568 (AD) at 589E-G.

“(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

7. The jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must have entertained a suspicion; (iii) the suspicion must be that the suspect had committed an offence referred to in Schedule 1; and (iv) the suspicion rested on reasonable grounds.³
8. It is common cause that Kerneels, who arrested the plaintiff, is a peace officer and that the suspected offences for which the plaintiff was arrested are offences referred to in Schedule 1. What is in issue is whether or not Kerneels had reasonable grounds for suspecting that the plaintiff had committed the suspected offences.
9. The plaintiff testified that he lives with Ruth Plaatjies, his partner, at her parental home at Rustoord, Cradock. On Friday, 7 September 2018 and at the request of his neighbour, he cleaned her garden between 10h00 and 14h00. She paid him R30 with which he bought meat and homemade beer. He and his partner consumed the beer at home. Between 5 and 6 o’ clock that evening, he walked with some rose tree shoots (the trees), which he had collected from his neighbour’s garden, to the house of Virginia Smith, the complainant. She had asked him for rose trees earlier in that week. Upon his arrival, she told him that she did not feel well and did not have money to pay for the trees. He left the trees on her stoep and went to his aunt’s house, which was not far from the complainant’s home. There he met his cousin, Veronice Pieterse. The two of them went to a shop where they bought bread, potatoes and spices. On their way home, they past a tavern where they bought two bottles of sherry. Upon their arrival at his aunt’s home, they consumed one bottle of sherry. He then went home where he and his partner prepared supper, consumed the other bottle of sherry and went to bed after he had smoked dagga.

³ *Minister of Safety and Security v Sekhoto and another* 2011 (1) SACR 315 (SCA) at par 6.

10. When he woke up at approximately 7 o'clock on the Saturday morning, he dressed himself in his partner's black tracksuit trousers and T-shirt and put on his black jacket, cap and takkies. He put the clothes, which he was going to wear when attending a funeral later that day, in a black bag and arranged with his partner to meet her at the funeral. As he was walking along the side of the N10 towards his mother's house at Michausdal, Cradock to have a bath, the police stopped him. He knew both policemen who alighted from the police van (the van). Kerneels greeted and asked him where he had slept the night before. He informed him where he had been sleeping. He asked him whether he knew anything about the trees. He informed Kerneels that he took the trees to the complainant's house the previous day. Kerneels told him that someone who was dressed in black clothes had broken into the complainant's house during the night. He informed Kerneels that he was at the complainant's house during the previous afternoon. Kerneels told him that he should accompany them to the complainant's house. He showed him the clothes that he intended to wear to the funeral but Kerneels was not interested. He once again informed Kerneels that he knew nothing about the break in at the complainant's house.
11. He accompanied the policemen to the complainant's house, where he was left sitting in the back of the van. The two policemen entered the house. Shortly thereafter the three of them walked towards the van. The complainant looked into the back of the van and said that the plaintiff was indeed the person who had broken into her house. He begged her and said that it was not him. The policemen took a docket from the vehicle and returned with the complainant to her house where they remained for some time. When they returned, they drove to the police station via a dumping site where the policemen looked at something. They also drove past his aunt's house as well as his partner's parental home. At both houses he shouted at the policemen to stop but they did not stop.
12. At the police station he was taken in the direction of the cells where his bag was taken from him. He was placed in a cell until he was taken to court on Monday, 10 September 2018. The case was postponed until 12 September 2018 to secure legal representation for him. He was thereafter detained at the police cells at the Cradock police station until he appeared in court on 12 September 2018. The case was then postponed to 20 September 2018 to enable him to

make a formal bail application. He was detained at the Middelburg Correctional Centre until he returned to the Cradock police station on 19 September 2018, where he was detained in the cells until he appeared in court on the following day. He made a successful bail application whereafter he was released from detention.

13. The plaintiff testified that he could not have committed the suspected offences because he was in bed with his partner throughout the previous evening until approximately 7 'o clock on the morning of 8 September 2018.
14. Ruth Plaaityies confirmed that she is in a love relationship with the plaintiff for the past seventeen years. She testified that on the Friday the plaintiff worked in their neighbour's garden after which he returned with rose shoots as well a R30 that he received from his neighbour. They bought meat and homemade beer. Upon their return, they consumed the beer. The plaintiff left with the rose shoots between 5 and 6 o'clock that afternoon. He returned at about 7 o'clock with bread, cigarettes, a bottle of sherry, spices and potatoes. He said that the complainant did not want to have the rose shoots. They prepared supper and consumed the bottle of sherry. After dinner the plaintiff undressed his blue overall pants and black overall jacket. She then did his and her laundry after which they went to bed. She testified that the plaintiff did not leave their room until approximately 7 o'clock the following morning.
15. When they woke up she prepared the clothes which he intended wearing to a funeral later that day and placed them in a black backpack. He was dressed in her black tracksuit pants and the black jacket that he wore the previous day. He left the overall pants behind because he wanted her to wash it. When he left, he said to her that he was going to have a bath at his parental home. They agreed to meet later during the day at the funeral. She did not see him later that Saturday. When he did not return by 9 o'clock on the Sunday morning, she went looking for him, but did not find him. She denied that she spoke to Leicester Booysen (sergeant Booysen) at her house on the Saturday or Sunday.
16. She learned for the first time on the Monday from her mother that the plaintiff had been locked up. She went to the magistrate's court at Cradock where she met

sergeant Booyesen who asked her what she was doing at the court. She told him that she had been told that the plaintiff would appear in court on that day. He asked her whether the plaintiff was with her on the Friday night. When she confirmed that he was indeed with her, he asked whether he did not arrive "*with cellphones or something else*". She told him that he arrived with the potatoes, bread, etc. She did not have further discussions with him.

17. Ms Plaaityjes testified that, prior to his arrest, she and the plaintiff had been living together for approximately one year. He was not working prior to his arrest, other than doing odd jobs earning between R80 and R150 per day, depending on the type of work he was required to do. She was unable to say how much he earned per week.
18. Kerneels testified that, as he and constable Lewis were patrolling the streets of Cradock at about 6 o'clock on the Saturday morning, they received a report of the suspected offences at the complainant's house. They went to her house where they interviewed her. She informed them that, as she woke up, she saw a figure busy with the drawers in her house. She did not see his face. She told them that he was built like the plaintiff. He was dressed in a black pair of trousers and black jacket. She informed them that the person had stolen three cell phones and a bag. While they were interviewing the complainant, her daughter received a call to the effect that the plaintiff was seen walking along the N10 towards Michausdal. He and constable Lewis drove towards the N10 and stopped the vehicle where they found the plaintiff near the N10. He was dressed in a black pants and black jacket.
19. He informed the plaintiff that he was being arrested because he broke into the complainant's house that morning and stole some items. The plaintiff denied the allegations against him. Having placed the plaintiff in the back of the van, they returned to the complainant's house. He reported to the complainant that they had arrested the plaintiff. She went to the van and accused the plaintiff of having broken into her house. He denied that he broke into her house. After constable Lewis had completed the complainant's statement, they went to the police station. After certain paperwork had been completed, the plaintiff was placed in a cell at the police station. The plaintiff did not have a bag in his possession

when he was arrested. The last time that he dealt with the plaintiff was when he was placed in the cells.

20. Sergeant Booysen testified that the docket regarding the complaint of the suspected offences was allocated to him on the Saturday morning after the plaintiff's arrest. At that stage only the statements of the complainant and the arresting officer were in the docket. Having read those statements, he interviewed the complainant, who informed him that she suspected that it was the plaintiff who had broken into her house and that he was at her house during the previous day. He then interviewed the plaintiff at the police station who told him that he knew nothing about the break in at the complainant's house and that he was at his partner's house the previous night. He then went to Ms Plaatjies who told him that she was unaware when the plaintiff left home. With her permission he searched her home but did not find a TV, which was stolen from the complainant's house. He thereafter activated his informer to be on the lookout for a TV which could be for sale by a private person. His informer did not furnish him with any additional information.
21. He decided to charge the plaintiff at about midday on the Sunday as he was meant to appear in court on Monday, 10 September 2018. As part of the process of charging the plaintiff, he took his warning statement wherein the plaintiff referred to his visit to the complainant's house and his aunt's house on the Friday, that he slept at his partner's house that night and that he was on his way to Michausdal on the Saturday morning when he was arrested. He also prepared, what was referred to as the bail form. It is a document completed by an investigating officer containing a suspect's personal information and whether or not the police would oppose bail. He took the plaintiff's fingerprints for purposes of establishing whether he had previous convictions, as well as comparing them with the fingerprints which had been lifted at the scene of the crime.
22. He did not accompany the plaintiff when he went to court on the Monday. He received the docket on Friday, 14 September 2018 when he noticed an entry made by the public prosecutor that he must prepare himself for a bail application. He went to court on 20 September 2018 and told the public prosecutor that he

would not oppose bail. He deposed to an affidavit to that effect. The magistrate granted bail to the plaintiff in the sum of R300.

23. The information that Kerneels had at the time of the plaintiff's arrest was that the plaintiff was at the complainant's house during the previous day, that someone was in her house that morning, that the suspect was dressed in a black pants and black jacket, that he was built like the plaintiff and that the plaintiff was dressed in a black pants and a black jacket when he was arrested. The question is whether a reasonable person with that information would have considered that there were good and sufficient grounds for suspecting that the plaintiff had committed the suspected offences. In *Mabona and another v Minister of Law and Order and others*⁴ meaning was given to the concept of reasonable suspicion. Jones J said the following in that regard:

“The question is whether his suspicion was reasonable. The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of 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 authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will 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

⁴ *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SECLD) at 658E-H.

certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

24. In cross-examination Kerneels conceded that he did not suspect that it was the plaintiff who had committed the suspected offences. He also conceded that, before arresting the plaintiff, he should have enquired where he was at approximately half past five that morning, but that he did not do so. In re-examination, he testified that the complainant was sure that it was the plaintiff who had broken into her house. Yet, when the court requested him to clarify his evidence in cross-examination and re-examination in that regard, he gave the following evidence:

“MR VAN ROOYEN: She did not say it is Carlton. She said that – the person who was in her house, the body build is like Carlton. She did not say for sure that it is Carlton, M’Lord.

COURT: You can understand Warrant Officer, ultimately this is what the case is about and I need to understand your evidence and quite frankly I do not understand your evidence. Help me to understand what she said to you.

MR VAN ROOYEN: At the interview she said she saw the body structure. The clothing description, the black jacket and the black trouser. She also mentioned that the previous day he was there with the same clothing description. That is why she mentioned in the interview, she can be sure it is Carlton.

COURT: No, that it is. She is sure that it could be Carlton.

MR VAN ROOYEN: Could be, ja. It could be Carlton.

COURT: Now that is what I do not understand. It is one thing to say the person that I saw in my house is Carlton. There can be no doubt about that. I am definitely sure that the person that I saw in my house could have been Carlton. What does the second one mean to you.

MR VAN ROOYEN: Could have been.

COURT: Because that is your evidence.

MR VAN ROOYEN: Could have been.

COURT: *So, what does it mean?*

MR VAN ROOYEN: *Dit kan moontlik.”*

25. Mr Madokwe, counsel for the defendant, submitted that Kerneels entertained a reasonable suspicion that the plaintiff had committed the suspected offences. Counsel relied on Kerneels' evidence that the complainant had informed him that she suspected the plaintiff; that the complainant's daughter received a report that the plaintiff was seen walking along the N10 while the policemen interviewed her; and, when the plaintiff was stopped, he was wearing black clothing. The section requires an arresting officer's suspicion to be reasonable. It must be based on reasonable grounds. In this case, Kerneels relied on the complainant's suspicion, not his own suspicion. What is more, is that he did not ascertain the grounds upon which the complainant's suspicion was based. His evidence was that the complainant informed him that she did not see the intruder's face.
26. In my view, the information at Kerneels' disposal did not form a solid basis upon which a reasonable suspicion could be founded. What was submitted on behalf of the defendant means that Kerneels arrested the plaintiff because he was dressed in black clothing when he was found walking near the N10. At best for the defendant, when the plaintiff was arrested wearing black clothing, it could be said that Kerneels may have had a suspicion that he could have been the intruder that the complainant saw. But that suspicion would not have been based upon solid grounds. It would accordingly not have been a reasonable suspicion. The information was hopelessly inadequate for purposes of forming a reasonable suspicion. Kerneels testified that, when he told the plaintiff of the reasons for his arrest, the plaintiff denied that he broke into the complainant's house. Kerneels should, at that stage, have assessed the quality of the information at his disposal. His evidence was that he took the plaintiff to the complainant's house and reported to her that they had arrested the plaintiff. When the complainant saw the plaintiff, she accused him of having broken into her house. That was the very same person who did not identify the intruder to the policemen less than an hour earlier. Kerneels could also have gone to the plaintiff's partner to establish whether the plaintiff was indeed at home at the time when the complainant had her house broken into. That information could easily have been checked, but he failed to do so.

27. I reject sergeant Booysen's evidence to the effect that, during the course of the Saturday morning, he visited Ms Plaaitjies. If that was the case, he would most probably have minuted a statement from her to the effect that the plaintiff was with her at all material times. The least he could have done in that regard was to make an entry to that effect in the investigation diary. His failure to record his alleged visit to Ms Plaaitjies gives credence to her evidence that sergeant Booysen did not visit her at any stage over that weekend and that she met him for the first time at court on the Monday.
28. In the circumstances, I am satisfied that the defendant has failed to demonstrate that, when Kerneels arrested the plaintiff, he had a reasonable suspicion that he committed the suspected offences. The plaintiff's arrest was accordingly unlawful.
29. Regarding the plaintiff's initial detention, Mr Madokwe submitted that, because the plaintiff's arrest was lawful, it follows that his initial detention was also lawful. For that submission, counsel regard on section 39 (3) of the Criminal Procedure Act, which reads as follows:
- "The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody."*
30. The arrest contemplated in section 39 (3) of the Criminal Procedure Act is a lawful arrest. The subsection provides that the person who has been lawfully arrested shall be in lawful custody until lawfully discharged or released from custody. Counsel did not make submissions on the initial detention in the event of the arrest being found to have been unlawful. Since the arrest was found to have been unlawful, it follows that the initial detention was also unlawful.⁵ In the circumstances, the plaintiff's initial detention was also unlawful.
31. The plaintiff complained that his detention after his first appearance in court (the subsequent detention) was wrongful and unlawful. In paragraph 9 of his

⁵ *Minister of Law and Order, Kwandebele, and others v Mathebe and another* 1990 (1) SA 114 (A) at 122B-D. Although *Mathebe* deals with different legislation, the principle remains the same that, if an arrest is tainted by illegality, the detention would also be illegal or unlawful.

particulars of claim, the plaintiff pleaded that his subsequent detention was wrongful and unlawful, in that Kerneels and the other members of the South African Police Service who were involved in the investigation of the suspected offences against him:

“9.1.1 Knew alternatively ought to have known that no reasonable objective grounds or justification existed for the Plaintiff’s continued and subsequent detention.

9.1.2 Could easily have ascertained, by taking simple investigative steps, that no such grounds or justification existed, but failed to take any such steps.

9.1.3 Failed in their duty to inform the public prosecutor(s) dealing with the matter that no such grounds or justification existed.

9.1.4 Failed to take any steps to ensure that the Plaintiff was released from detention as soon as was possible.”

32. The defendant pleaded *inter alia* that:

“7.2.2 The relevant case docket of the South African Police Service contained sufficient information to warrant the prosecution of the Plaintiff with bail being set at R300.00.

7.2.3 In terms of section 42 of the National Prosecuting Authority Act 32 of 1998 no person is liable in respect of anything done in good faith under the said Act.

7.2.5 All functions performed by the relevant public prosecutors with regard to the criminal prosecution were performed in good faith.

7.2.6 The relevant public prosecutors neither acted with animus iniuriandi nor maliciously.

7.2.7 The rights contained in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 are subject to certain limitations, including the general limitation set out in section 36. The basis upon which the Plaintiff was lawfully arrested, detained and prosecuted is set out above. Section 205 of the Constitution specifically mandates members of South African Police Service to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. Section 79 of the Constitution mandates the National Prosecuting Authority to

institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.

7.3 *The detention of the plaintiff following his appearance in court on 10 September 2018 and thereafter occurred pursuant to orders issued by and at the instance of the presiding magistrate who is not an employee of the defendants.”⁶*

33. For the defendant to be held liable for the plaintiff's subsequent detention, the plaintiff was required to show that he suffered harm and that the harm was caused by a wrongful and intentional act (or failure to act) on the part of the defendant or a member of the South African Police Service who investigated the suspected offences. The only member who investigated the suspected offences was sergeant Booyesen. It is undisputed that the plaintiff suffered harm when he was deprived of his liberty during the subsequent detention.
34. In paragraph 9 of his particulars of claim, the plaintiff alleged that the subsequent detention was wrongful because Kerneels and/or sergeant Booyesen failed to prevent the subsequent detention when he or they acted in the manner set out in paragraph 9.1 of the particulars of claim. The plaintiff's claim is that one or both of the policemen had a duty to protect the plaintiff's right not to be deprived of his freedom, but that they failed to protect that right when they acted in the manner set out in paragraph 9 of the particulars of claim.
35. The issue, on the pleadings, is whether the conduct of Kerneels and/or sergeant Booyesen, in relation to the harm suffered by the plaintiff as a result of the subsequent detention, was wrongful. The plaintiff did not plead causation. In other words, he did not plead that his subsequent detention was caused by his unlawful arrest. The case pleaded by the plaintiff distinguishes it from *de Klerk v Minister of Police*⁷ where the plaintiff pleaded that his subsequent detention was

⁶ The defendants at the time were the Minister of Police, the Minister of Justice and the National Prosecuting Authority of South Africa.

⁷ *de Klerk v Minister of Police* 2020 (1) SACR 1 (CC).

caused by his wrongful arrest.⁸

36. Section 35⁹ of the Constitution guarantees certain rights to persons who have been arrested and detained as suspects. In terms of section 35(1)(d)(i) any person who has been arrested by the police for allegedly committing an offence has the right to be brought before a court as soon as reasonable but not later than 48 hours after arrest. The duty to take the arrested person to court rests on the police. In terms of section 35(1)(e) any arrested person has the right, at the first court appearance, to be charged or to be informed of the reasons for the detention to continue, or to be released. The decision to charge the arrested person falls exclusively within the domain of the National Prosecuting Authority, represented in these proceedings by the public prosecutor. In terms of section 35(1)(f) any arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. The power to release an arrested person from detention vests in the presiding officer. Three different institutions of government (the South African Police Service, the National Prosecution Authority and the Judiciary) have separate constitutional obligations to perform when a suspect makes his or her first appearance in court after being arrested.
37. The Constitutional Court has upheld the doctrine of separation of powers. In terms of that doctrine the different arms of the state should refrain from interfering on the terrain of the other. That doctrine is implicated in this case. Two arms of the state are involved, namely the executive and the judiciary.

⁸ Id paras 19 and 20.

⁹ Section 35(1)(d), (e) and (f) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right -

“(d) to be brought before a court as soon as reasonably possible, but not later than —

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

38. In this case sergeant Booyesen, who operates under the executive arm of the state as a member of the South African Police Service, complied with his constitutional obligation by ensuring that the plaintiff was brought before a court as soon as reasonably possible. It was for the National Prosecuting Authority, represented by the prosecutor, to determine whether or not the plaintiff should be charged. The prosecutor decided to charge the plaintiff with the suspected offences. It was then for yet another arm of the state, the judiciary, to determine whether it would have been in the interests of justice to have the plaintiff released from detention.
39. After sergeant Booyesen had complied with his constitutional obligation to ensure that the plaintiff was brought before the court, two further constitutional obligations had to be taken by two different role players. The first was that the prosecutor had to decide whether or not to charge the plaintiff. He decided to charge him with Schedule 5 offences and indicated that the state would oppose the plaintiff's release on bail. The second was that the magistrate decided not to release the plaintiff from custody.
40. As the investigating officer, sergeant Booyesen had the constitutional obligations to take the plaintiff to court as soon as reasonably possible. He complied with that obligation. Once sergeant Booyesen had taken the plaintiff to court, he had no power to charge the plaintiff or to release him on bail or order his further detention. Those powers belonged to the prosecutor and magistrate respectively.
41. The plaintiff adduced no evidence to demonstrate that either Kerneels or sergeant Booyesen or both of them acted in a wrongful or unlawful manner in terms of his constitutional obligation in relation to the harm suffered by him as a result of his subsequent detention. The harm was caused by the prosecutor who indicated that he would oppose bail and by the magistrate who postponed the case. It cannot be said that Kerneels or sergeant Booyesen wrongfully caused the subsequent detention when, all they did, was to execute their constitutional

obligations to take the plaintiff to court, to elect to oppose bail, to charge the plaintiff and decide not to release him from custody. In the circumstances, Kerneels or sergeant Booyesen's conduct or omission in relation to the plaintiff's subsequent detention was not wrongful. Since the plaintiff failed to establish wrongfulness on the part of any member of the South African Police Service in respect of the harm suffered by the plaintiff as a result of his subsequent detention, it is unnecessary to deal with the question of causation. The plaintiff's claim based on his subsequent detention must accordingly be dismissed.

42. I am of the view that considerations of public policy would render it unfair and unreasonable to impute delictual liability to the police, especially if regard is had to sergeant Booyesen leaving the issue of the plaintiff's release on bail in the hands of the prosecutor, that he caused the plaintiff to be brought before a magistrate on the Monday, that the prosecutor and the magistrate took decisions in which neither Kerneels nor sergeant Booyesen took part.
43. In all the circumstances, the defendant should be held liable for the plaintiff's unlawful arrest and his detention until his first appearance in court. The police did not act wrongfully in respect of his subsequent detention. The defendant can accordingly not be held liable for the plaintiff's subsequent detention. It means that the defendant should compensate the plaintiff for his arrest and detention for two days.
44. Regarding the quantum of the damages suffered by the plaintiff as a result of his arrest and initial detention, the Constitution places a high premium on the right to freedom, which includes the right not to be deprived of freedom without just cause. Regard was had to the plaintiff's personal circumstances, the circumstance under which he was detained and the majority judgment in *de Klerk v Minister of Police*.¹⁰ In my view the sum of R100 000.00 is appropriate to compensate the plaintiff for damages suffered by him.

¹⁰ *de Klerk v Minister of Police* 2018 (2) SACR 28 (SCA).

45. The plaintiff was substantially successful. He is accordingly entitled to the costs of the action, save for the costs of the first day of trial on 31 October 2022 when the case was postponed to the following day to enable the plaintiff to effect the amendment of his particulars of claim. He should pay the defendant's costs occasioned by that postponement. Since the plaintiff could have obtained judgment in the sum of R100 000 in the magistrate's court, there is no reason why the defendant should pay High Court costs.

46. In the result, it is ordered that:

1. The plaintiff's claim for unlawful arrest and detention by a member of the South African Police Service from 8 to 10 September 2018 is upheld.
2. The defendant shall pay to the plaintiff the sum of R100 000 as damages for his above unlawful arrest and detention.
3. The defendant shall pay interest on the sum of R100 000 at the prescribed rate, such interest to run after 30 days from the date of this order to date of payment.
4. The plaintiff's claim, that members of the South African Police Service caused his further detention after his first appearance in court on 10 September 2018, is dismissed.
5. The defendant shall pay the plaintiff's costs of the action on the magistrate's court scale, such costs to include counsel's fees, which fees shall not exceed thrice the amount specified in the applicable tariff, and exclude the costs occasioned by the postponement on 31 October 2022.
6. The plaintiff shall pay the defendant's costs occasioned by the postponement on 31 October 2022.

For the plaintiff:	Mr W Olivier, instructed by Coetzee and Venter Inc, Cradock and McCallum Attorneys, Makhanda.
For the defendant:	Mr V Madokwe, instructed by the State Attorney, Gqerberha and Lulama Prince Attorneys, Makhanda.
Date heard:	31 October 2022, 1 and 2 November 2022.
Date of delivery of judgement:	4 April 2023.