

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

**Not Reportable
Case no: CA155/2023**

In the matter between:

THE MINISTER OF POLICE

Appellant

and

LUVUYO DERRICK XOPO

First Respondent

THOKOZILE NGQEKAZI

Second Respondent

JUDGMENT

Notyesi AJ

Introduction

[1] The respondents sued the appellant for damages arising from their alleged unlawful arrest and detention (the detention having spanned from the early hours of 3 July 2017 to 4 July 2017) for the respective amounts of R100 000 each. Initially, there were two claims by the second respondent, claim one was for unlawful arrest and detention and claim two was for wrongful and unlawful assaults. The second respondent abandoned claim two at the commencement of the trial.

[2] At the end of the trial before the court *a quo*, the Magistrate found that the arrest and detention of the respondents was unlawful and awarded them damages in their favour in the amount of R80 000 each, with interest from the date of judgment to date of payment, plus costs. This is an appeal against the Magistrate's judgment and orders.

[3] The appeal is predicated mainly on the contention that the Magistrate had erred in finding that the appellant failed to discharge the onus resting upon the arresting officer in terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA),¹ to justify the respondents' arrest and detention. The appellant contends that the Magistrate erred and misdirected himself in concluding that there was no reason for the police to delay in verification of the names and addresses of the suspects, having regard to the evidence that the respondents were arrested in the early hours of 3 July 2017 and that the verification of the respondents' addresses could have been done within a short period of time and not over a period of more than 1 day.

[4] The appellant had submitted, in the Magistrate's Court and presently before this Court, that the arrest and detention of the respondents was lawful and justified in terms of section(s) 40(1)(b), although in their plea he had further relied on section 40(1)(f); read with sections 39 and 50 of the CPA but this was not pursued in evidence or in argument. In this regard, the appellant had submitted that the arresting officer had sufficient information at his disposal which warranted the arrest and detention of the respondents.

[5] At the commencement of the hearing of this appeal, the appellant had brought an application for condonation in respect of their late filing of the notice to prosecute the appeal. This Court granted the condonation and reinstated the appeal. The respondents did not oppose the grant of condonation and the reinstatement of the appeal.

[6] The issue for determination is whether or not:

- (a) the magistrate correctly found in favour of the respondents that their arrest and detention was unlawful and not justified in terms of section 40(1)(b) of the CPA; and
- (b) in the event that the court a quo correctly found in favour of the respondents whether or not the amount awarded was appropriate or excessive based on the evidence of the case.

Background

[7] At approximately 03h30, on 3 July 2017, the respondents were arrested by members of the South African Police Service without a warrant at or near the M17, Port Elizabeth. The arrest was admitted; accordingly, the appellant's witnesses were

¹ Criminal Procedure Act, 51 of 1977

the first to adduce evidence in the trial. In this regard, Sgt Thandisiwe Flatela and Sgt Mfusi Abel Thala testified.

[8] Sgt Flatela testified that he is a member of the SAPS holding a rank of police sergeant. According to him, on 2 July 2017, he was on duty patrolling as part of crime prevention. He was clad in full police uniform. He testified that at about 12 midnight, he received a complaint through the police radio control. The report he received was that there was a shooting incident at Seyisi area of KwaZakhele.

[9] Upon receipt of that report, Sgt Flatela proceeded to the scene of the shooting. When he arrived at the scene of the crime, he found a man already dead. Upon his enquiry about the incident, he received information that the person who had shot the deceased had run into a red Golf vehicle and fled the scene. Sgt Flatela immediately conveyed the information to his colleagues through a police radio. His colleagues, within a short space of time, informed him that the red Golf had been spotted and stopped. He immediately left the scene and proceeded to the place where the red Golf had been found.

[10] Upon his arrival at the place where the red Golf had been stopped, he found his colleagues and the occupants of the red Golf. He introduced himself to the occupants of the red Golf and told them that he was following up on a person suspected of murder. He informed the occupants that according to his information, the person who had committed the murder was alleged to have driven away in a red Golf. Sgt Flatela further testified that he then arrested the occupants in order to conduct further investigations. He then made arrangements for a prima residue test to be done and buccal samples to be taken on each of the occupants of the red Golf. He also arranged for their questioning, in order to trace the person implicated in the crime of murder.

[11] On his conclusion of the prima residue test and buccal samples, Sgt Flatela detained the respondents for what he termed 'thorough investigation to be done because of the seriousness of the offence.' According to him, the investigating officer, at that time, was at the scene of the crime at Seyisi Area, KwaZakhele.

[12] Sgt Flatela had further testified that the person who provided him with information of the murder suspect was a member of the community. He did not divulge the details of his informant.

[13] Sgt Thala also testified. He confirmed that he was the investigating officer of the murder case. According to him, he was dispatched by controller 10111 to attend

to a murder crime scene at Ndongeni Street, Seyisi, KwaZakhele. On his arrival at the scene, he found Constable A N Ndingi of New Brighton visible policing unit. Constable Ndingi had informed him that he had arrived at the scene at about 23h35 and that on his arrival, he found the body of the deceased already laying on the ground.

[14] According to Sgt Thala, he had attended the scene in the early hours of 3 July 2017 and that after completing the crime scene investigation, he went off duty. He again reported on duty on the same morning at about 07h30. When he reported for duty at about 07h30, he received the case docket from his superior commanding officer at about 10h30 on the same day. Sgt Thala testified that when he received the docket, he observed that there were suspects that were found in the red Golf and that prima residue tests were done and that buccal samples were also taken. Sgt Thala conducted his own investigations by interviewing 7 suspects that were arrested in the red Golf. The purpose of his investigation was to establish whether any of the suspects were linked to the offence.

[15] He testified that upon completing his investigations, he realised that there was not enough evidence to place them at the scene and decided to release them. He completed his investigation on 3 July 2017 and released the suspects on 4 July 2017. The delay in the release of the suspects was because he was waiting for the commanding officer to sign SAP328 documents before the suspects could be released. Sgt Thala also confirmed that on 3 July 2017, he had obtained a statement from a certain Mr Siyolo. He further testified that when he arrived at work on 3 July 2017, he saw in the docket that the suspects were arrested in the red Golf at 03h00 on 3 July 2017. According to him, the time was about 4 hours after the commission of the offence. Sgt Thala had further testified that according to the information he had in the docket, the only person who was mentioned as a suspect by the witness was one Athi. According to him, he could not find a statement mentioning a person amongst the occupants of the red Golf as the person who had shot the deceased.

[16] The first respondent testified in support of the respondents' case. According to the first respondent, they were arrested on 2 July 2017 on the freeway to Motherwell. At the time of the arrest, he was travelling in a red Golf with 6 people, including the first respondent. According to him, the second respondent is his girlfriend and mother of their child. According to the first respondent, when they were arrested by the police, they were forced to lay down and were informed by the police that they

were looking for Athi. The police took them into a police vehicle and drove to KwaZakhele police station. The police further took them to Motherwell police station where samples were taken from their mouths and testing was performed. After the tests were conducted, the police took them back to KwaZakhele police station where they were detained in separate police cells. The first respondent testified that he was detained in a single cell until he was released on 4 July 2017.

[17] The first respondent further described the conditions of the police cells in which he was detained. According to him, he had to sleep on a very slim cover which was on the floor and he was given one blanket. The police had informed him that the vehicle that they were travelling in was suspected in the commission of a murder.

[18] The second respondent did not testify.

The Legal Principles

[19] The appellant relied upon the provisions of section 40(1)(b) of the CPA to justify the respondents' arrest and detention. Section 40(1)(b) empowers a peace officer to arrest without a warrant any person 'whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from custody'. In terms of this section, what must be enquired - is whether the arresting officer had reasonable suspicion.

[20] In *Minister of Safety and Security v Sekhoto*², Harms DP stated:

"As was held in *Duncan v Minister of Law and Order*³, the jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds."

[21] The appellant, in an endeavour to justify the arrest of the respondents without a warrant, had adduced evidence of the arresting officer and the investigating officer. The upshot of their evidence has been set out in the summary above.

[22] The arresting officer need not be satisfied that the evidence proves beyond a reasonable doubt that the offence had been committed. In *Shaaban Bin Hussien and Others v Chong Fook I Kam and Another* [1969] 3 All ER 1627 (PC) at 1630

² *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 at page 315 at 320.

³ *Shaaban Bin Hussien and Others v Chong Fook I Kam and Another* [1969] 3 All ER 1627 (PC) at 1630; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

quoted with approval in *Duncan*⁴- suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. I suspect, but cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. An arresting officer is required to assess the information at his or her disposal and decide whether it is sufficient to ground a reasonable suspicion, *Mabona and Another v Minister of Law and Order and Others*⁵.

[23] Section 50 of the CPA allows the police to lawfully detain an arrested person for a period not exceeding 48 hrs before bringing him before a Court or releasing him, hence an arrest made under section 40(1)(b) of the Act is not unlawful where the arrestor entertained the required reasonable suspicion, but intends to make further inquiries after the arrest before finally deciding whether to proceed with a prosecution.

[24] In *Minister of Safety & Security v Sekhoto*⁶ it was observed –
 ‘if the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Hogate-Mohammed v Duke* (1984) 11 All ER 1054 (HL) at 1057). ... But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case.’

[25] The appellant, in the plea, had also relied upon the provisions of section 40(1)(f), and that subsection reads –
 ‘who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;’

[26] As I understand the appellant’s case before the Magistrate, this Court and the totality of the evidence presented by the appellant, the defence based on section 40(1)(f) had not been pursued. This appeal turns on whether the appellant’s witnesses had established the defence based on section 40(1)(b). I consider evidence in this regard.

⁴ *Duncan supra*

⁵ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at page 658 D

⁶ *Minister of Safety & Security v Sekhoto* 2011 (1) SACR 315 at page 327, para 29

Discussion

(i) The lawfulness of the arrest

[27] In his judgment, the Magistrate had found that the appellant's witnesses, when the evidence is considered as a whole, failed to discharge the onus that rests upon the appellant to justify the arrest and detention of the respondents. In support of his conclusion, the Magistrate reasoned as follows: –

'According to evidence the perpetrator was known by name and there is no reason the police can take days to verify actual name of suspects, furthermore one Athi was mentioned as the perpetrator of crime not six people. It was very easy for the police to sift and find that this Athi is not one of the passengers and that process would not have taken days. ... The Defendant's evidence falls below the requirements as set out in case of *Mabona & Another v Minister of Law and Order* 2 other 1988 (2) s a 654 (SE) at 658 E at 658 H.'

[28] Mr *Mnyani*, counsel for the appellant, had contended before this Court that the Magistrate, in coming to his conclusion that the appellant's witnesses failed to justify the arrest and detention of the respondents, had erred or misdirected himself in many respects, and that he had ignored the evidence of Sgt Flatela. Mr *Mnyani* submitted that Sgt Flatela had entertained a reasonable suspicion that the respondents were involved in the commission of the offence of murder at Seyisi Area, KwaZakhele.

[29] The contention, in this regard, was that the arresting officer's belief was based on information of sufficiently high quality and cogency and that it was based on solid grounds. Mr *Mnyani* contended that it was important to consider the fact that Sgt Flatela had attended the crime scene at 12 midnight and that he received information from a member of the community. He further contended that the red Golf was stopped by Sgt Flatela's colleagues within a short space of time and that the occupants of the red Golf were immediately arrested upon his arrival thereat. He emphasized that the person who had shot the deceased had fled in a red Golf and therefore, the police had reasonable suspicion for arresting the occupants of the red Golf.

[30] In advancing this contention, Mr *Mnyani* had inter alia relied on the authority of *Minister of Safety & Security v Magagula*⁷. In that case the police had sufficient information at their disposal to arrest based on a confession by a co-perpetrator which corroborated information at their disposal and the suspect pointed out the person and the suspect's identity was also confirmed by his co-employee and by himself.

[31] In the *Magagula* case, it was held that - the facts known to Inspector Nel are sufficient to establish the existence of a suspicion. That suspicion was reasonably held as the facts objectively considered establish reasonable grounds for him to have had the suspicion.⁸ The same cannot be said on a careful consideration of the facts in this case. Mr *Mnyani* had also relied on the authority of *Minister of Police v Bosman & Others*⁹. In this case, it was held that –

‘Goeda testified that once he had instructed the occupants to disembark from the bakkie, he stood outside the police vehicle. He could not say with certainty that he heard all of the information in respect of the shooting incident over the radio. It does not appear from Goeda’s testimony that there was mention of any names specifically communicated over the radio. Even if this Court were to accept that Goeda may have heard the names of the suspects involved in the shooting incident (and that not all of the respondents were suspects) over the radio, a firearm with live ammunition was found to have been thrown out of the fleeing bakkie in which all the respondents were occupants, which gave rise to a reasonable suspicion that they were involved in the shooting incident at Malabar and the possession of the firearm. In such circumstances it was reasonable for Goeda to arrest all the respondents, in order to conduct further investigation in this regard, as it could not be immediately determined which of the respondents may have potentially used the firearm in the shooting incident. This was not unreasonable in the circumstances.’

[32] In this case, Sgt Flatela did not have the details of the person that had shot the deceased at Seyisi Area, KwaZakhele. He had no information about the details of the person who had run into the red Golf. He did not even know whether the person was a male or a female. He did not ask the informant / community members

⁷ *Minister of Safety & Security v Magagula* 2017 JDR 1486 (SCA); [2017] ZASCA 103 (unreported SCA Case No: 991/2016, 6 September 2017) at para [9]

⁸ *The Minister of Safety & Security v Magagula*, supra at para 12

⁹ *The Minister of Police v Bosman & Others* (1163/2020) [2021] ZASCA 172 unreported SCA case delivered on 9 December 2021

vital questions pertaining to the identity of the person who had shot the deceased or who was seen there. He did not ask whether the person was male or female, how the person was attired, what race group the person belonged to, what was his or her complexion, whether there were any identifying features, whether he saw the registration letters and numbers of the red Golf, what time he last saw the person and the vehicle. He did not enquire from the informant or witness how many occupants were in the Golf that this person boarded or inquire from him the time he saw the person boarding this vehicle. The information at his disposal was so scant that it could not warrant the arrest of seven occupants of a red Golf that was found some time after the shooting. There was paucity of information about the identity of the suspect. Whilst the evidence is that only one person had shot the deceased and ran into a Golf, Sgt Flatela arrested 7 persons, 1 of them was a female. More significantly, there was no evidence found in the red Golf, after it was stopped and searched, which linked any of the occupants of the red Golf to the offence. Other than what Flatela was told by the undisclosed member of the community, there was simply no link to the offence of any of the occupants of the vehicle. In these circumstances, Sgt Flatela had a duty to assess the information at his disposal and confirm whether there was a link between the commission of the offence and the occupants of the red Golf. He did not do so. These facts are distinguishable from those of the *Bosman* case upon which Mr Mnyani had relied.

[33] In *Minister of Police & Another v Muller*¹⁰ it was stated –

‘Reverting to the provisions of s 40(1)(b) of the CPA, as recorded earlier, in order to carry out an arrest in terms of these provisions, the arresting officer must harbour a reasonable suspicion that an offence had been committed. In *Mabona*¹¹ Jones J considered what was required for a suspicion to be reasonable in the context of s 40(1)(b) of the CPA. He recorded:

“... 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

¹⁰ *Minister of Police & Another v Muller* 2020 (1) SACR 432 (SCA) para 20

¹¹ *Mabona v Minister of Law and Order* supra at 658 E-H

is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[34] In my view, a reasonable police officer would have analysed and assessed the quality of the information at his disposal critically, and he would not have accepted it lightly or without checking. I agree with the reasoning of the Magistrate and he correctly relied on the *Mabona* judgment. Sgt Flatela had failed to justify the arrest of the respondents and therefore the Magistrate correctly found that the arrest was unlawful. The information at the disposal of Sgt Flatela was too scanty to ground a reasonable suspicion which is required in terms of section 40(1)(b) of the CPA.¹²

The lawfulness of the detention

[35] The Magistrate, in his judgment, had found that there were no legitimate basis for the detention of the occupants of the red Golf and that consequently, the detention of the respondents was unlawful. In this regard, the Magistrate had reasoned that the police could not have taken days in order to verify the suspect. According to the Magistrate it was easy for the police to establish whether Athi was among the arrested occupants of the red Golf. I agree. Mr *Mnyani* had criticised the reasoning of the Magistrate in this regard and contended that the Magistrate had misdirected himself. Mr *Mnyani* relied, in this regard, on the evidence of Sgt Flatela, the upshot of which amounted to this summary, in essence:

- (a) the occupants of the red Golf were arrested in the early hours of 3 July 2017; and
- (b) the detention of the occupants of the red Golf was for purposes of conducting further investigations by prima residue testing, buccal samples and questioning of the arrested persons.

[36] Mr Manyani’s criticisms are unfounded if one has regard to the fact there was no evidence linking the respondents and the occupants of the red Golf to the offence of murder. There was an inherent duty upon the police to verify and assess the information at their disposal in order to determine whether they had arrested and would ultimately detain the correct persons for the offence. There was no evidence to indicate how long it would take to get the results of the prima residue, nor was

¹² *Louw and Another v Minister of Safety & Security & Others* 2006 (2) SACR 178 (T) at 184 B-D

there evidence to suggest that it was necessary to detain all the suspects. The paucity of evidence leading to the arrest of the suspects, as illustrated above was still present during the detention of the suspects, as none of that information had been obtained at the time of detention.

[37] More significantly, Sgt Thala conducted his own investigations at about 10h30 on 3 July 2017 after he had received the docket from his superior. He had realised that there was not enough evidence to link the arrested persons to the offence. He concluded that they should be released. However, he further delayed the release of the arrested persons, waiting for his superior, although he had confirmed that there was no evidence to link them with the offence. This further detention of the respondents could not be justified. This much was conceded by the appellant's counsel, that even if this court had found the arrest and the initial detention lawful, the detention after 10h30 would have been unlawful based on the testimony of the investigating officer. Accordingly, the detention of the respondents was unlawful.

[38] Mr *Le Roux*, counsel for the respondents, had submitted that the respondents ought to have been released at least on two distinct occasions. The first occasion was when their DNA samples and prima residue tests were taken before they were detained. In this regard, Mr *Le Roux* correctly, in my view, argued that there was no reason given by the police on why the statements could not have been taken at that stage and the respondents immediately released. The second occasion upon which the respondents ought to have been released, was after Sgt Thala had interviewed them on 3 July 2017 and found that there was no evidence linking them to the offence. I agree with both submissions of Mr *Le Roux*. I therefore conclude, in this regard, that the detention of the respondents from approximately 3h30 am on 3 July 2017 until their release on 4 July 2017, was unlawful.

Quantum

[39] Mr *Mnyani* had contended that the amount awarded for damages as a result of the unlawful arrest and detention of the respondents was excessive. He submitted that the Magistrate had not provided reasons for awarding the amount of R80 000 in respect of each respondent. I agree with the submissions of Mr *Mnyani* in this regard. The judgment does not provide reasons in support of the amount awarded. The judgment of the Magistrate merely makes reference to the judgment of *Minister*

of *Safety & Security v Tyulu*¹³ and *Minister of Police v Clyde Fillis*¹⁴. It is not apparent from the Magistrate's judgment how he applied the guidance set out by the cases he relied upon. In my view that is a misdirection and this Court is entitled to assess the award of damages.

[40] In *Minister of Safety & Security v Tyulu*¹⁵ the SCA held as follows-

'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party, but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the *quantum* of damages on such facts.'

[41] In *Peterson v Minister of Safety and Security*¹⁶ Plasket J held-

'The satisfaction in damages to which plaintiff is entitled falls to be considered on the basis of the extent and nature of the violation of his personality (*corpus*, *fama* and *dignitas*). As no fixed or sliding scale exists for the computation of such damages, the Court is required to make an estimate *ex aequo et bono*. The authors of Visser and Potgieter's *Law of Damages* 2nd ed, 475 have extracted from our case law factors which can play a role in the exercise.

The circumstances under which the deprivation of liberty took place, the presence of absence of improper motive or *malice* on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement) of the deprivation of liberty; the status, standing, age and health of the plaintiff; the extent of the publicity given to the deprivation of liberty, the presence or absence of an

¹³ *Minister of Safety & Security v Tyulu* 2009 (5) SA (SCA) 85

¹⁴ *Minister of Police v Clyde Fillis* Case No CA234/2014 delivered on 16 October 2018 (Grahamstown High Court)

¹⁵ *Tyulu* supra

¹⁶ *Peterson v Minister of Safety and Security* [2009] ZAECGHC 65 at para 15

apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high valued of the right to physical liberty; the effect of inflation; and the fact that the action injuriarum also has a punitive function.’

[42] In *Phakamisa Madingana v Minister of Police*¹⁷ Laing J awarded an amount of R80 000 for damages arising from the arrest of the plaintiff on 18 May 2020 and released on 19 May 2020. The detention was for one day. The court had considered that the plaintiff had been arrested in front of members of the community. The plaintiff was subjected to an embarrassing experience. He held a position of high political office and he was a leader in his church and community.

[43] In *Alvade Daniel Francis v The Minister of Police and Another*¹⁸ the appellant was detained from 16 September 2019 until 20 September 2019. In this case, the appellant was kept in an overcrowded cell of 40 to 50 persons sharing beds. The plaintiff was uncomfortable for the reason that they were being robbed and there was gang stuff. Basic food was provided twice a day. The court, after assessing the facts of the case, awarded damages in the amount of R100 000.

[44] In *Minister of Police v Nazmoul Hoque*¹⁹ the court awarded damages in the amount of R60 000 for unlawful arrest and detention. The plaintiff was arrested on 30 September 2019 at approximately 21h30 and released at approximately 08h05 on 1 October 2019.

[45] In *Peterson v Minister of Safety & Security*²⁰ the plaintiff was in custody for 8 hours and awarded R60 000 in 2011. She was awarded separate amounts for breach of duty and assault.

[46] In *Martins v The Minister of Police*²¹ the plaintiff was also assaulted, arrested and detained by the police for a period of over 24 hours. In this matter, Chetty J awarded the plaintiff R40 000 in respect of arrest and detention, and R25 000 in respect of the assault.

¹⁷ *Phakamisa Madingana v Minister of Police* Case No: 3411/2021, Eastern Cape Division, Makhanda, judgment delivered on 4 April 2022

¹⁸ *Alvade Daniel Francis v The Minister of Police and Another* Case No: CA141/2022, Eastern Cape Division, Makhanda, judgment delivered on 7 March 2023

¹⁹ *Minister of Police v Nazmoul Hoque* Case No: CA65/2022, Eastern Cape Division, Makhanda, judgment delivered in May 2023

²⁰ *Peterson v Minister of Safety & Security* *supra*

²¹ *Martins v The Minister of Police* (1400/2011) [2013] ZAECPHC 27 (4 June 2013)

[47] In *Nel v Minister of Police*²² Mbenenge JP, after considering awards made in this division, concluded that it is quite a daunting task to draw comparison between cases as they frequently lack information, *inter alia*, relating to the effect of the arrest upon the person.

[48] In *Minister of Police v Lonwabo Mjali & Others*²³ the Full Bench awarded the plaintiff a sum of R100 000 for unlawful arrest and detention which had spanned from 28 September 2014 until 30 September 2014. The plaintiff had testified that he was arrested in full view of the members of society and that he was embarrassed and humiliated during his arrest. His further evidence was that he was detained in a congested and filthy and dirty cell. The Full Court relied upon a number of cases for the factors to be considered in determining an appropriate award: -

“[27] On the score of the purpose of an award of damages, the Constitutional Court, in *Mahlangu and Another v Minister of Police*²⁴, held that damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place. With these principles of law in mind, I turn to deal with the issues raised in the instant appeal.

[29] In *EFF and Others v Manuel*²⁵, the SCA emphasized that claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of indeterminable and incommensurable factors and that in order to determine an appropriate award relevant evidence has to be presented and fully explored.

[40] However, I re-iterate that in the quantification of damages for which the appellant was held liable, it was imperative that sufficient evidence be led and fully explored to aid a fair assessment of the damages suffered by each of the respondents. The Court, in *Rahim v The Minister of Home Affairs*, said the following on this issue:

[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the

²² (CA 62/2017 [2018] ZAECGHC) 23 January 2018

²³ *Minister of Police v Lonwabo Mjali & Others* Case No: CA 91/2022, Eastern Cape Division, Mthatha

²⁴ *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BLCR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

²⁵ *EFF and Others v Manuel* (711/2019) [2020] ZASCA 172 (17 December 2020).

court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. *Inter alia* the following factors are relevant: (i) circumstances under which the deprivation of liberty took place; (ii) the conduct of the defendants; and (iii) the nature and duration of the deprivation. (Emphasis added)

[48] That being said, I share the Court's sentiments in *Diljan v Minister of Police*²⁶, with respect, when it held:

'[17] Thus, a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required *solatium*, the defendant (the Minister in this instance) should not be treated as a 'cash-cow' with infinite resources. The compensation must be fair to both parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.'

[49] I have considered the arguments by both Mr *Mnyani* and Mr *Le Roux* and the relevant authorities. Regard being had to the fact that the Constitution places a high premium on the right to freedom, which includes the right not to be deprived of freedom without just cause, the right to dignity, the right to privacy and the circumstances under which the respondents were arrested in the early hours of 3 July 2017, the unpleasant cells and the conduct of the police, especially that of Sgt Thala who failed to release the respondents, after having satisfied himself that there was no link between the respondents and the commission of the crime at least at 10h30 on the 3rd.

[50] The respondents were not arrested in full view of the public. The arrest occurred in the early hours of the day at approximately 03H30. The respondents were in custody for approximately 36 hours. The first respondent was detained in a single cell. The circumstances under which the second respondent was detained are unknown due to her failure to testify. The right to liberty is to be jealously guarded and the infringement thereof appropriately compensated. The second respondent on all the available evidence even in the absence of her own testimony was unlawfully deprived of *inter alia* her right to liberty.

²⁶ *Diljan v Minister of Police* (Case No. 764/2021) ZASCA 103 (24 June 2022).

[51] Taking due cognisance of all the relevant factors an amount of R50 000 each is considered an appropriate amount as much needed solatium for their injured feelings arising out of their wrongful arrest and wrongful deprivation of liberty.

Costs of appeal

[52] The appeal was against both the merits and the quantum. The respondents were successful in respect of merits. Damages have been awarded to the respondents in an amount more than what the appellant's counsel had proposed as an appropriate award. In my view, the respondents have been successful in their action against the appellant. The appellant was only successful in having the amount reduced, but not to the amount he had considered appropriate. In such circumstances, the respondents were substantially successful and are entitled to costs of the appeal. The costs of the appeal are accordingly awarded in favour of the respondents.

Conclusion

[53] The appeal is unsuccessful against the findings of unlawful arrest and detention.

[54] The appeal is only successful to the extent that the award of damages for the unlawful arrest and detention would be reduced from the award of R80 000 to an amount of R50 000. For the reason that the appeal is successful only to a very limited extent, the costs of the appeal is awarded in favour of the respondents. Whilst the arrest was unlawful due to their failure to properly investigate prior to arresting and detention, I must point out that the police had acted expeditiously in this particular case. The incident took place at midnight. The police reaction is highly commendable and appreciated as pointed out by the magistrate as well.

Order

[55] In the result the following order is made: –

- (i) The findings of the magistrate that the arrest and detention of the first and second plaintiff were wrongful and unlawful is confirmed.
- (ii) The order of the Magistrate in respect of quantum is set aside and replaced with the following order–
 - (a) The defendant is directed to pay to the first and second plaintiffs the sum of R50 000 each, arising out of their unlawful arrest and detention from the early hours of the 3 July 2017 to 4 July 2017, for a period of approximately 36 hours.

- (b) The defendant is directed to pay interest on the aforesaid amount at the legal rate from the date of the judgment to date of payment.
- (c) The defendant is to pay the plaintiffs' costs of suit, including counsel's fees not more than 3 (three) times the tariff of the Magistrate's Court.
 - (iii) The appellant is directed to pay the costs of the appeal.

M NOTYESI
ACTING JUDGE OF THE HIGH COURT

I agree.

F B A DAWOOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant : *Adv M Mnyani*
Attorneys for the Appellant : *Dold & Stone Inc*
Makhanda

Counsel for the Respondents : *Adv J D Le Roux*
Attorneys for the Respondents : *Neville Borman & Botha*
Makhanda

Date heard : 26 February 2024
Dat delivered : 09 April 2024