

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

Case No: 2889/2016

In the matter between:

THANDEKILE SABISA

First Plaintiff

LAWRENCE NZIMENI MAMBILA

Second Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NHLANGULELA DJP

Introduction

[1] The plaintiffs each instituted an action against the Minister of Police for wrongful arrest and detention, assault, and *contumelia* at the hands of various policemen/ women who were employed by the Department of South African Police Service. The Minister is cited as the political head of the department. He is vicariously liable in law for delicts committed by the members of his department. For those delicts, the plaintiffs each seek judgment against the Minister for the payment of damages in the sum of approximately R10m.

[2] The Minister has filed a notice of intention to defend the plaintiffs' action.

Pleadings

[3] In pleading the claims for unlawful arrest and detention the plaintiffs alleged that the members of the SAPS committed an unlawful arrest in that they did not produce any warrant authorizing them to do so and, even if the warrants had been issued in terms of the provisions of s 43 of the CPA, the members did not have justification for executing warrants against them. As regards the claim for unlawful detention the plaintiffs alleged that their detention from 18 April 2016 to 26 April 2016 was unlawful as it derives from unlawful arrest. As I understood the pleadings, duly amplified by the pleaded factual bases and evidence adduced the plaintiffs seek to hold the defendant vicariously liable for the pleaded breaches, including for the sequelae suffered as a result thereof. Ultimately, the plaintiffs seek payment of delictual damages against the defendant as a *solatium* for injuries to dignity, liberty, physical integrity, and feelings. An exception to the pleaded claims did not arise in this case.

[4] The defendant's plea to the plaintiffs' claims is rooted in the defence that since the members of the SAPS effected the arrest and detained the plaintiffs on the strength of the valid warrants of arrest issued by the magistrate of Tsolo on 18 April 2016, discovered as Item 3 and Item 4, the plaintiffs' claims fall to be dismissed. In that event, the plaintiffs cannot be heard to say that the arrest and detention were not lawful, so the argument went on. It was pleaded further on behalf of the defendant that the warrants of arrest were produced by the arresting officer and shown to the plaintiffs at the time of their arrest on 18 April 2016. It was also pleaded that the members were justified in executing the warrants of arrest. The detention of the plaintiffs from 18 April 2016 to 26 April 2016 is admitted. The assault and torture were flatly denied. In putting his defense in a proper perspective, the defendant pleaded that upon the arrest of the plaintiffs on 18 April 2016 under valid warrants of arrest, the plaintiffs were admitted to St Mary's Hospital, Mthatha on 19 April 2016, and they remained there on the authority of the court which had remanded them to 26 April 2016. In a nutshell, the defence pleaded on behalf of the Minister is that the plaintiffs' claims fall to be dismissed on the bases that they were arrested and detained lawfully, it is not true that the plaintiffs were assaulted and tortured whilst being in the

custody of the police and that they were treated in a civilized manner from the time of the arrest, incarceration in the awaiting trial police cells of Mthatha Central Police Station and until they left the custody of the police.

[4] I now turn to deal with the defence that the plaintiffs' pleading is bad for the reason that they pleaded only the case that their entitlement to judgment is predicated on the absence of warrants of arrest. It was submitted on behalf of the defendant that the plaintiffs' particulars of claim cannot call upon the defendant to answer to the case of arrest without a warrant and then add the case of the improper manner of execution of the warrants of arrest. In this regard, reliance was made on the case of *Imprefed (Pty) Ltd v National Transport Commission* ¹. It was argued that the plaintiffs did not plead an alternative claim that the existing warrants were invalid. The Court was urged to have regard only to the cause of action based on warrantless arrest as that is the claim that is defined by the plaintiffs' pleadings-in terms as stated in *Shill v Milner* ². The court was exhorted to mark its displeasure with improper pleading by dismissing the plaintiffs' claims.

[5] The submission that the plaintiffs in their pleadings drew the attention of the defendant to one case but stated a different case at the trial without recourse to the practice rules provided for the amendment of pleadings, does not have merit. In their particulars of claim, in paragraph 5.7 the plaintiffs make the following allegations:

'5. When arresting the [plaintiffs], the aforementioned police officers and other police officers, whose names are unknown to the plaintiffs:

...

5.7 did not produce any warrant [s] for the arrest of the [plaintiffs] and did not have any justification for executing a warrant of arrest on the [plaintiffs] even if one was available.'

¹*Imprefed (Pty) Ltd v National Transport Commission* ¹1993 (3) SA 94 (A) at 107C-H

² *Shill v Milner* 1937 AD 101.

[6] In my understanding of paragraph 5.7, the pleading provides for the scenarios of both the arrest with and without a warrant. And the issue being raised in both the pleadings and the evidence that was led at the trial it became plain that the gravamen of the plaintiffs' case was that the arrest and detention were unlawful. is the unlawfulness of arrest and detention. Therefore, it remains for the evidence led at the trial to bring home a final decision to be made by this court whether the arrest and detention were lawful or not.

[7] In the context that the material facts inscribed in the pleadings that crystallise the real dispute between the parties, I ruled in the case of *N. Plaatjies v Minister Police*³ that a legal objection that less than, or more than, the ideal facts to be proved or disproved should have been inscribed on the pleading is untenable. In this case, the objection is framed similarly, albeit that the defendant targets the cause of action based on arrest with a warrant that is said to have not been pleaded. I have found that, as a fact, the plaintiffs pleaded an unlawful arrest with or without a warrant. However, it will help to also state that to plead a cause of action that fails to disclose a real dispute sought to be adjudicated would be improper. This was illustrated in the case of *Christiaan Benjamin Weitz v Minister of Safety and Security and Others*⁴ where Plasket J (as he was then) said in paragraph 20:

‘ The question of how Magadlela exercised his discretion to arrest arises somewhat obliquely from the pleadings, but it was accepted by both Mr Mouton who, together with Ms Bands, appeared for Weitz, and Mr Zilwa, who appeared for the Minister of Safety and Security and Magadlela, that this was the true crux of the case. As a result, Magadlela's reasons for executing the warrant were put to Weitz in cross-examination; Magadlela testified as to how he took the decision when he was led, and did so in relation to paragraph 11 of Weitz's amended particulars of claim; and he was cross-examined on this at some length. As a result, even if it could be said not to

³*N. Plaatjies v Minister Police*, Case No. 165/2021 (03/05/2022).

⁴*Christiaan Benjamin Weitz v Minister of Safety and Security and Others* (Case no. 487/11) [2014] ZAECGHC 33 (22 May 2014) [Weitz 1].

have been raised properly in the pleadings, it was understood by the parties to have been an issue on the pleadings and it certainly was canvassed fully in the evidence. I am therefore in a position to deal with what is clearly the real issue in the trial.'

[8] In the application for leave to appeal⁵Plasket J (as he was then) stated:

'[8] The cases do not draw a distinction between an issue being pleaded inadequately and not being pleaded at all. In *Collen v Rietfontein Engineering Works*,^[2] a case I cited in my judgment, the court decided the matter on the basis of a contract that was never pleaded, and contained different terms to the one that was, because all relevant material having been produced in evidence and placed before the court, it 'would be idle for it not to determine the real issue which emerged during the course of the trial'.

[9] In *Middleton v Carr*, also a case cited in my judgment, Schreiner JA, where a party sought to rely on an unpleaded tacit contract, stated that 'where there has been a full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised'.

The onus of proof

[9] Whereas both parties admitted that the overall *onus* to prove the plaintiffs' claim lies with the plaintiffs, the duty to justify the arrests and detention lies on the minister. The reason for this is that the arresting of arrest of the plaintiffs is admitted but in law, the wrongfulness has to be justified by those policemen/ women who affected the arrests of the plaintiffs on 18 April 2/20/16. The authority for that proposition is the case of *Minister of Law and Order and Others v Hurley and Another*⁶. The duty to justify arrest does not change even if the arresting officer

⁵ *Minister of Safety and Security and Others v Christiaan Benjamin Weitz*(Case no. 487/11) [2014] ZAECHC 85 (02 October 2014) [Weitz 2].

⁶ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 668 (A) at 589D-G

arrests or purports to arrest a person on the strength of a warrant. The authority for this proposition is the *Minister of Safety and Security v Sekhoto And Another*⁷. It was agreed between the parties that the duty to lead evidence first lies with the plaintiffs as the *onus*-bearing parties.

[10] The approach towards discharging *onus* to prove wrongful detention is like the approach adopted towards proving wrongful arrest. This was authoritatively laid down in the case of *De Klerk v Minister of Safety and Security*⁸.

[11] the approach adopted by the parties finds resonance with the analysis of the provisions of the CPA that was made in *Weitz 1*. There, the following was said:

‘[8] Section 38 of the Criminal Procedure Act 51 of 1977 provides for four methods of securing the attendance of an adult in court for purposes of his or her trial. They are arrest, summons, written notice and indictment. Section 39(1) provides that arrests may be made with or without a warrant and s 39(3) states that the effect of an arrest is that ‘the person arrested shall be in lawful custody’ and he or she ‘shall be detained in custody until he [or she] is lawfully discharged or released from custody’.

[9] Section 40 deals with the circumstances in which a peace officer may arrest without a warrant and need not be considered. Section 43 deals with warrants of arrest. It provides:

‘(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

(a) which sets out the offence alleged to have been committed;

⁷ *Minister of Safety and Security v Sekhoto And Another* 2011 (1) SACR 315 (SCA) at paras. 28- 36. See also: *Gigaba v Minister of Police and Others* [4 3469/2020] [2021] ZAGPHC55; [2021] 3 All SA 495 (GP) (11 February 2021) at para 58-61D; *Malebe Thema and Another v Minister of Safety and Security and Others* 2021 (2) SACR 233 (GP) at para 10,16-19 and 23.

⁸ *De Klerk v Minister of Safety and Security* 2021 (4) SA 585 (CC) at para. 14.

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is canceled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.'

[10] Section 44 concerns the execution of warrants of arrest. It states that a warrant issued in terms of s 43 'may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof'.

[11] Section 50 deals with the procedure to be followed after a person has been arrested. Section 50(1) provides as follows:

'(a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be

brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that-

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.'

[12] Even when a warrant of arrest has been issued a peace officer has a discretion as to whether or not to execute it. In *Minister of Safety and Security v Sekhoto & another* Harms DP held that '[o]nce the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises' and that the peace officer 'is not obliged to effect an arrest'. And in *Domingo v Minister of Safety and Security* Chetty J, in this court, held that the 'trial court's finding that, once armed with a warrant, the arrestor . . . was duty bound to arrest the plaintiff without further ado, was wrong and amounts to a clear misdirection'. The discretion to arrest or not obviously must be exercised properly.

[13] In *Sekhoto*, Harms DP stated, in summary, that the discretion must be exercised 'in good faith, rationally and not arbitrarily'. Earlier in the judgment, however, he had surveyed both South African and foreign decisions, especially English cases, and had found that the discretion could be attacked based on the grounds set out – and followed consistently for over a century – in *Shidiack v Union Government (Minister of the Interior)* as well as on the further basis of irrationality.'

Background facts

[12] Both plaintiffs testified at the trial. Three witnesses testified on behalf of the Minister. Those were: Col. Loyiso Lawrence Mdingi, Capt. Batandwa Aaron Hanise and Detective Warrant Officer Mdepa. These witnesses are adult male persons.

[13] The evidence adduced is largely a common cause. On 18 April 2016, the plaintiffs were the employees of OR Tambo District Municipality (the Municipality). Mr. Sabisa served as a Councillor and Deputy Executive Mayor for the Municipality. Mr. Mambila served as a Councillor and member of the Mayoral Committee responsible for infrastructure services. Mr. Mdepa was the Investigating Officer for the police docket, described as Tsolo CAS 86/12/2015. The docket pertained to the killing of the driver for the Speaker of the Municipality (Mr. Kompela) and the attempted killing of Mr. Kompela. The three police witnesses were the members of the Hawks (the Directorate for Priority Crimes Investigation Unit of the SAPS dealing with serious crimes referred to it by the President). Two suspects, Mr. Mnyanda and Mr. Mswelanto, were arrested and caused to appear in the Tsolo Magistrates Court on 11 April 2016 in connection with CAS 86/12/2015. These suspects implicated the plaintiffs, albeit in their confession statements submitted to Mr. Mdepa. Relying on this, Mr. Mdepa set out to arrest the plaintiffs at the headquarters of the Municipality situated in Mthatha. He acted on information that a mayoral meeting was scheduled to take place in the municipal boardroom on 18 April 2016 at 15h00. The plaintiffs would be in attendance. He planned to effect arrest with the assistance of an investigation team, comprising Mr. Mdingi Mr. Hanise, Capt. Mdebuka, Capt. Bambelele, Capt. Hanise, W/O Mancgoba, D/W/O Jacob, Sgt. Nkamikula, Const. Skwatsha, Const. Mgangula, Const. Nomicibi and a few other female officers. These police officers were drawn from the Hawks. The operation was high profile in nature as it involved investigating violent clashes between political leaders within the Municipality that had aroused public attention.

[14] On the day and time of the meeting, the police descended into the venue of the meeting, found the plaintiffs present, and arrested them. In a convoy of five police

motor vehicles, the plaintiffs were driven to Butterworth Crime Intelligence Offices for interrogation, which endured from 16h30 or 17h00 to approximately 22h00. Thereafter, the plaintiffs were driven to Mthatha Central Police Station. Normally a trip to Mthatha takes about two hours, hence the estimation that the plaintiffs were locked up in the police cells of Mthatha Central Police Station at 23h55. On 19 April 2016 at 01h35 Mr. Dzingwa, the attorney, consulted with the plaintiffs. They reported to the attorney that they had been injured and were unwell. At 10h30, the plaintiffs were recorded in the OB as having complained of body pains and that they needed immediate medical attention. Mr. Mambila was given an injection in the surgery of Doctor Atkins and, thereafter, he was referred to St Mary's Hospital where he was admitted as a patient. Mr. Sabisa was also taken to his doctor, and thereafter he was referred to the same hospital. Both plaintiffs were shackled to their hospital beds and guarded by the police.

[15] On 26 April 2016, the police guarding the plaintiffs abandoned their post and, without an explanation, left the hospital. The plaintiffs' attorney arrived later on that day and caused the shackles to be removed, thus setting the plaintiffs free. Mr. Sabisa was transferred to Nelson Mandela Hospital, where he remained until 01 May 2016. On 28 April 2016, the plaintiffs attended the offices of the Hawks in Mthatha to have a summons served on them in respect of Tsolo Case No. A551/ 2016, a case registered based on CAS 86/12/2015. On 19 May 2016 that the plaintiffs did not appear before any court. Certain records from Magistrates' Court, Tsolo were discovered which confirm their non- appearances until the case in which they would have been joined as the accused was finally withdrawn. It was withdrawn against Mr. Mambila on 20 February 2016, and against Mr Sabisa in October 2016. So, the plaintiffs were neither joined in Case No. A551/2016 nor appeared in court under that case. Significantly, there was never an occasion in which a court order was made compelling them to attend Court or to commit them to detention in a hospital.

[16] I will deal with the disputed facts in the course of discussion on the issues of arrest, detention assault, and torture. When doing so, I will have regard to the

principles for resolving factual disputes that are set out in the case of *Stellenbosch Farmers' Winery Group Ltd and Another V Martell Et Cie and Others*⁹.

Evaluation of evidence against *onus* of proof

[17] It is common cause that the arrest of the plaintiffs took place at OR Tambo headquarters on 18 April 2016. The question of who effected the arrest and how it was effected is not so clear from the evidence. The plaintiffs testified that Mr Mdingi spoke in the boardroom informing the meeting that he was required to arrest the plaintiffs. It is not clear if he did inform the plaintiffs fully about the reasons for his arrest. What he told the court was that he interrupted the meeting, introduced himself and his colleagues, gave information that he was acting in terms of warrants that were in the possession of Mr. Mdepa and he, thereafter, handed the proceedings over to Mr Mdepa to give effect to the warrants. The police witness witnesses testified that Mr. Mdepa was the arrestor. Mr Mdepa confirmed this version, and most particularly he stated that he showed two warrants to the plaintiffs and told them that they were under arrest. That having happened the plaintiffs, were ushered out of the meeting to the police vehicles that were parked in the parking area. The plaintiffs disputed that the warrants were shown to them. Mr. Hanise stated that he did not see the warrants of arrest in the possession of Mr. Mdepa. He stated that Mr. Mdingi was the arrestor and that he even explained the constitutional rights to the plaintiffs before effecting the arrest of the plaintiffs. The question of whether the arrest of the plaintiffs was preceded by the execution of the warrants calls for an answer. The plaintiffs alleged that the warrants authorizing their arrest were not shown to them at all. The plaintiffs told the court that they assumed that Mr Mdingi was the arresting officer by reason that in the boardroom he told them that they were wanted in connection with the allegations of murder and attempted murder. However, their constitutional rights were not explained as, thereafter, the police simply escorted them from the boardroom to the parking area where they were caused to board in separate vehicles that were driven to Butterworth.

⁹ *Stellenbosch Farmers' Winery Group Ltd and Another V Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

[18] The view I take of this matter is that Mr. Mdepa was the arresting officer in this matter. Mr. Mdepa has, in any event, claimed to have been the source of the making of the warrants that, contrary to his claim, it is doubtful that he had them in his possession at the time of arresting the plaintiffs. In his affidavit accompanying the warrants that came to light after the event of arrest, the plaintiffs sought to be joined in the prosecution because they had been implicated by Mr. Mnyanda and Mr. Mswelanto in the commission of the crimes that were under investigation. There is no satisfactory proof that the arresting officer, Mr. Mdepa, exhibited warrants of arrest at the time of effecting arrest, and that he explained the plaintiffs' constitutional rights.

[19] The taking of the plaintiffs to Butterworth Intelligence Offices to interview the suspects, as Mr. Mdepa described it, defeated the purpose of arresting the plaintiffs because their detention after the arrest would not have been in strict compliance with the provisions of s 50 of the Criminal Procedure Act (the CPA). That is, the plaintiffs were not brought to a police station as soon as possible. Instead, they were detained in Butterworth Intelligence Offices and only to be taken to Mthatha Police Station after approximately 6 hours. It is also not in dispute that the warrants that Mr. Mdepa referred to did not authorise the trip to Butterworth, be it for interrogation or otherwise.

[20] The detention, and arrest, of the plaintiffs seem not to have been done to bring them before a court within 48 hours as envisaged in s 50 of the CPA. I make this point because the plaintiffs were kept by the police in Saint Mary's Hospital without an application having been brought for an order of the court to be granted to extend the 48 hours mandatory period. It seems to me that the issue of detaining an arrested person in the custody of the police without bringing him or her to court within 48 hours, or soon thereafter, can only be regulated using a court order as provided in s 50 (1) (d) (ii) of the CPA¹⁰. It cannot happen at the behest of an investigating officer. In essence, the investigating officer affected the arrest and detained the plaintiffs in the police cells and Saint Mary's hospital in shackles without the authority of the law.

¹⁰ Section 50 (1) (d) (ii) of the Criminal Procedure Act provides to the effect that for the appearance of an arrested person in court with 48 hours to be extended the prosecutor has to make an application before the court.

Such conduct of depriving the plaintiffs of their constitutionally entrenched right to liberty is to be deprecated.

[21] Whether I believe, or not, that the warrants were served and did achieve their purpose is not the issue. The issue is whether, assuming that the warrants were used to effect arrest, the arrest was lawful. I have already decided that the warrants were defective to the extent that they did not authorize the arrestor to take the plaintiffs to Butterworth. It is trite law that the arrested person may only be taken to the nearest police station as soon as possible. In terms of the judgment in *Weitz*, obtaining a warrant is not enough as the arrestor is still enjoined to exercise discretion whether to effect an arrest or not to do so. The important consideration seems to me to be founded on the premium that the law accords to the constitutional right to liberty. On the facts of this case, the three police witnesses, or Mr. Mdepa in particular, did not exercise discretion whether to arrest the plaintiffs or not to do so. I accept the submission advanced on behalf of the plaintiffs that the decision to arrest, rather than to summon the plaintiffs to attend court, has not been shown by the evidence to have been necessary. Mr. Mdingi told the court in no uncertain terms that he (or they) were known to the plaintiffs very well and that they had maintained a cordial relationship for many years prior to 18 April 2016. There was no bad blood between them. There was no flight risk involved in having to bring the plaintiffs to justice. Simply put, the case is not materially different from the case of *Weitz* on the facts about the exercise of discretion to arrest on a warrant. I am of the view that the decision to arrest on the strength of the warrants was not made in a lawful manner.

[22] There are conflicting versions of the parties about the issue of whether the plaintiffs were assaulted whilst being kept in the custody of the police in Butterworth Intelligence Offices. The case of *Stellenbosch Farmers' Winery* enjoins the court to make a finding on the credibility of the opposing witnesses who testified. In my opinion, the probabilities of the matter favour the plaintiff's case that they were assaulted and tortured by the police in Butterworth. Support for this finding lies in the events that are outlined below.

[23] The police investigators kept no record of the interaction between them and the plaintiffs in Butterworth. Warning statements were not obtained from the plaintiffs. The plaintiffs were handcuffed behind their backs whilst being interrogated. They were not given food. The plaintiffs were each confronted by 10 to 15 police officers during interrogation. Mr. Sabisa was instructed by Mr. Hanise to take his clothes off. A motor vehicle tube was placed over his head. He experienced difficulty breathing due to a tube covering his head. He was hit with fists and kicked with booted feet on his back. Mr. Mdepa attempted to get him to confess to the crimes of attempted murder and murder. Mr. Hanise kneeled him in the groin. Mr. Mdingi kept probing for a confession statement regardless of the unsavory treatment that the plaintiffs were subjected to. Mr. Mambila was pressured by Mr. Mdepa to confess. Clothes on his upper body were removed by Mr. Hanise. His shoes were also removed. Mr. Mdepa hit him with an open hand on the ear. The chair on which he was sitting was tipped over backward, which injured his ribs and chest. He was kicked with booted feet. Water was thrown at him each time that he lost consciousness. I agree with the submission that the assault was committed by the interrogators to get plaintiffs to submit confession statements. The police witnesses denied these allegations of assault and torture that had endured for almost 6 hours. But they did little, or nothing, to tell what they did to the plaintiffs other than that the interviews they had lasted for only five to ten minutes. Significantly, the plaintiffs' complaint about body pains as recorded in the Occurrence Book (OB) of the police cells ended in them being admitted to Saint Mary's Hospital. Surprisingly, the hospital records are missing and no explanation was proffered by any of the guards who were keeping an eye on the plaintiffs. The police witnesses were unable to explain this conundrum.

[24] Mr Mdingi was content to remove himself from the other interrogators by stating that he was not present in the office in which the plaintiffs were interrogated. Mr Mdepa told the court that all that happened in Butterworth was questioning the plaintiffs which stopped the moment that they told him that they would like to submit statements to their legal representatives. However, this version is at odds with the statement that he also made that Mr. Mdingi was the person who explained the constitutional rights of the plaintiffs in the interrogation room. Ultimately, Mr. Mdingi

was both present and absent in that room. This is untenable. Mr. Hanise also sought to extricate himself from blame by saying that assaulting and torturing the plaintiffs would not be possible to do in the five to ten minutes of questioning of the plaintiffs at separate sittings that aborted immediately the plaintiffs tendered a denial of involvement in the commission of the crimes and advised the interrogators that they will submit their written exculpatory statements through their legal representatives in due course.

[25] In my opinion, the version of the police witnesses that they effected lawful arrest and detention is not acceptable. They contradicted themselves in material respects. Numerous statements made by Mr. Mdingi and Mr Mdepa were contradicted by Mr. Hanise: such as that Mr Mdingi in the OR Tambo boardroom Mr. Mdingi merely introduced the members of the Hawks with Mr Mdepa taking over to explain the reason for their visit, the showing and reading of warrants of arrest of the plaintiffs and explaining their constitutional rights of arrest; that Mr. Mdingi entered the interrogation room, explained the constitutional rights of the plaintiffs and thereafter left the room; the interrogation started from 16h30 or 17h00 and lasted until approximately 22h00; and that Mr Mdingi bought food for the plaintiffs and the members of the police present at interrogation chamber. Mr. Hanise stated that Mr. Mdingi explained the constitutional rights, Mr. Mdepa was never in possession of the warrants of arrest at the time of arresting of the plaintiffs, Mr. Mdingi did not enter the interrogation chamber, he did not buy food at the time of five to ten minutes spent to question the plaintiffs was too short and that the interrogation terminated as early as at 8 pm. The denial that the body pains the plaintiffs complained about, and which had been endorsed on the OB of Mthatha Central Police Station, was not the proximate cause for their admission at St Mary's Hospital is unreasonable. The plaintiffs' evidence of assault and torture at the hands of the police in Butterworth is countered by a bare denial on the part of Mr. Mdingi and Mr. Hanise, and evasiveness on the part of Mr Mdepa. The explanation for the trip to Butterworth is not convincing at all. For these reasons, I, with respect, reject the version of the defendant that his members did not subject the plaintiffs to assault and torture. The

probabilities favour the acceptance of the plaintiffs' version which I find, in its essential features, to be true.

Conclusion on the liability issue:

[26] What the factual findings mean for this case is the following:

- (i) Although the warrants of arrest had been obtained from the magistrate of Tsolo they were not executed on 18 April 2016.
- (ii) There was no lawful reason for the trip to Butterworth because the plaintiffs were being sought for a criminal investigation that had commenced in Tsolo.
- (iii) The procedure that the law in terms of s 50 (1) (a) of the CPA permitted the police to comply with was breached. This position held sway for the arrest with or without a warrant.
- (iv) To the extent that the plaintiffs were not caused to appear before a court of law within 48 hours they should not have been detained in hospital under the shackles and the control of the police guards. They should have been released from police custody.
- (v) The question whether the plaintiffs were arrested with or without a warrant and detained unlawfully is answered in their favour.
- (vi) The probabilities of the case favour the finding that the plaintiffs were assaulted and tortured during interrogations in Butterworth.

Assessment of damages

[27] On the foregoing, the plaintiffs case has been proved on a balance of probabilities. The defendant is vicariously liable to pay damages on the heads as pleaded by the plaintiffs. I recap this. Each of the plaintiffs claims payment for damages in respect of wrongful arrest at R2 million; wrongful detention at R2, 5

million; assault at R3, 5 million; and for humiliation, degradation and *contumelia* at R2 million. These are of course what has colloquially been referred to as the globular amounts of general damages. They are in no way to be construed as a true measure of damages that were suffered by the plaintiffs. Counsel for the defendant made this plain in his submissions. He highlighted the difficulty that the fixing of damages may prove as the extent of damages for the assault was not proved by medical evidence. I did appreciate the submission that the amounts claimed may be excessive, and that a sum of R250 000 for each plaintiff may be an appropriate award of damages. Such difficulty is not atypical of the nature of general damages. Counsel for the plaintiff referred to certain decided cases on past awards that may serve as the guidelines¹¹.

He did this against the backdrop of the well-known legal principles, set out by Visser & Potgieter ¹² in: *Law of Damages, Third Edition*.

[28] Almost all the factors that are listed by Visser and Potgieter apply to the circumstances of this case. The plaintiffs are highly educated persons and were public representatives who enjoyed high status in both their workplace as well as in

¹¹ The cases referred to are: Minister of Safety and Security v Augustine and Others 217 SACR 332 (SCA) at para 28, Peters v Minister of Safety and Security 215 JDR 1088 (GP); Mgele v Minister of Police 2015 (7K6) QOD 74 (ECM); De Klerk v Minister of Police 2021 (4) SA 585 (CC); Foster v Minister of Safety and Security 213 [6K6] QOD166 (GSJ); Schoombee v Minister of Police and Captain Lwana Adam v Minister of Police and Captain Lwana Yawa v Minister of Police and Captain Lwana Bambilawu-Mona Wabokone v Minister of Police and Captain Lwana 2019 [7K6] QOD 515 (ECG); Hlungwani v Minister of Police 2019 (7K6) 511 (LP), Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA); Minister of Police v Mahleza (Case no. 106/2020) [2021] ZAECGHC 83 (14 September 2021); Ndlovu v Minister of Police (Case no.33237/2010) [5054/2013] [2018] ZAGPJHC 595 (11 October 2018).

¹² Visser & Potgieter in: *Law of Damages, Third Edition*, pp545-548 where they say the following: 'In deprivation of liberty the amount of satisfactory damages is in the discretion of the court and calculated *ex aequo et bona*. Factors which can play a role at the circumstances under which the deprivation of liberty took place; the presence or 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 or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disease; disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that that in addition to physical freedom other personality interests such as honour and good name, as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect and award may have on the public purse; and, according to some, the view that the *action iniuriarum* also has a punitive function.'

the communities they served. I do not doubt that the unlawful arrest and detention for nine days caused them a lot of embarrassment and humiliation and low self-esteem. The arrest and detention from 18 to 26 April 2016 deprived them of their constitutional right to liberty and dignity. The assault caused them pain and suffering. The damages suffered were contumacious. The award to be made should nevertheless not enrich the plaintiffs at the expense of the defendant, but it must be fair. The fact that the plaintiffs did not suffer visible injuries must be taken into account. I believe that the past awards made by the courts in *De Klerk v Minister of Police and Ndlovu v Minister of Police* which are not necessarily the same but comparable to the facts of the present matter, serve as the guides to be applied in the discretion to be exercised by this court. Consequently, a sum of R400 000 for unlawful arrest and detention and R110 000 for assault, torture and *contumelia* should be reasonable awards to be made in respect of each of the plaintiffs.

Costs

[28] There will be an order of costs made in favour of the plaintiffs as successful parties.

Order

[29] In the result, the following order shall issue:

On Liability:

1. The defendant is held liable to pay damages suffered by each of the plaintiffs as follows:

On quantum:

2. *For unlawful arrest and detention*

2.1 The defendant to pay the first plaintiff a sum of R400 000.

2.2 The defendant to pay the second plaintiff a sum of R400 000.

3. *For assault, torture and contumelia*

3.1 The defendant to pay the first plaintiff a sum of R110 000.

3.2 The defendant to pay the second plaintiff a sum of R110 000.

4. The defendant to pay the costs of suit, including costs of two counsel where so employed.

ZM NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearing for the plaintiff: Advocate Mullins SC

With: Advocates Kroon and Makiwane

Instructed by: Notyesi Attorneys, Mthatha.

Appearing for the defendant: Advocate Notshe SC

With: Advocate Magadla

Instructed by: The State Attorney
Mthatha.

Heard on: 13 June 2023

Date of delivery: 20 June 2023.