



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 901/2017
Heard: 28/07/2020 – 30/07/2020
Argued: 11/11/2020
Delivered on: 22/01/2021

In the matter between:

MICHAEL ITHUSANG BAIKAI	First Plaintiff
DANIEL SAREL STONE	Second Plaintiff
FREDDY POTSO MODISAEMANG	Third Plaintiff
DANIEL TSHETLHO	Fourth Plaintiff
TLOTLOYAONE PETER BAREKI	Fifth Plaintiff

and

THE MINISTER OF POLICE	Defendant
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Quorum: Mamosebo, J

JUDGMENT

MAMOSEBO J

[1] The plaintiffs instituted a delictual claim for damages against the defendant, the Minister of Police, in the amount of R500,000.00

(Five Hundred Thousand Rand) each for the alleged unlawful arrest and detention.

[2] The issue that falls for determination is whether their arrest and detention were unlawful; if so, whether the Minister is liable to compensate them for the period of their detention from 30 December 2016 to 03 January 2017.

[3] The Constitutional Court has, in *De Klerk v Minister of Police*¹ articulated the specific requirements that claimants have to meet in a claim for *actio iniuriarum* for unlawful arrest and detention as follows:

- “(a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.”

See also *Minister of Law and Order and Others v Hurley and Another*².

The defendant's case

[4] The defendant's witnesses testified first by virtue of the *onus* reposed on the Minister. The actual arrest and detention are mainly common cause. On Friday 30 December 2016 Sgt Thuso Nkadimang, a member of the South African Police

¹ [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) at para 14

² 1986 (3) SA 568 (A) at 589E - F

Service (SAPS) attached to the Stock Theft Unit, and the arresting officer, was on duty at Kuruman on a joint operation when he received an instruction from Brig Baloyi to attend to an assault complaint at Kuruman Hospital where he met Mr Selumi who confirmed to him that he had brought Mr Willie Moagi who, at that stage, was receiving medical attention. Sgt Nkadimang left a J88 medical form for completion by the medical personnel. He returned to the police station and waited for Mr Selumi and Mr Moagi.

- [5] Mr Selumi and Mr Moagi later met Sgt Nkadimang at the police station. Sgt Nkadimang testified that Mr Moagi reported to him that he went to his workplace on 29 December 2016 where he met his employer, Mr Freddy Potso Modisaemang, the third plaintiff, to collect his wages as his services had been terminated. Mr Modisaemang was in the company of four unnamed male persons. Mr Modisaemang instructed the four men to force Mr Moagi into a kombi. They drove him to the cattle post outside the village. There, they forced him to sit on top of hot burning rocks while being accused of having stolen Mr Modisaemang's sheep. He denied the accusation.
- [6] After the assault they returned to Mr Selumi's place. Mr Daniel Tshetlho (the fourth plaintiff) informed Mr Selumi that they were looking for their lost sheep in his kraal. Sgt Nkadimang was informed that present at that stage were Mr Tshetlho, Mr Modisaemang, Mr Moagi, Mr Michael Baikai (the first plaintiff), Mr Tlotloyaone Bareki (the fifth plaintiff) and Stouter (full names not provided), who is Mr Daniel Sarel Stones' shepherd, who was

also accused of theft. Permission was granted by Mr Selumi for them to search the kraal but they drew a blank.

- [7] Sgt Nkadimang, in private, observed that Mr Moagi had whip marks on his back, with blisters or burn wounds and his skin was excoriated. The said injuries were depicted on photos 1, 2 and 3 under CAS 210/12/2016. Sgt Nkadimang obtained the complainant's statement on the same date (29 December 2016) and registered the docket at Mothibistad Police Station.
- [8] Sgt Nkadimang obtained the physical address of Mr Modisaemang from Mr Selumi. Sgt Nkadimang was in the company of four Public Order Policing Unit members and four members of the Tactical Response Unit. He introduced himself to Mr Modisaemang and explained the purpose of his visit which was to arrest him for the assault with intent to cause grievous bodily harm to and kidnapping of Mr Moagi. Sgt Nkadimang asked him who was in his company when certain incidences are said to have occurred. He identified Baikai, Stone, Tshetlho and Bareki (the plaintiffs). Modisaemang was then arrested and placed at the back of the van. They drove to the other plaintiffs' residences and arrested them after their rights were explained. All of them elected to remain silent.
- [9] Mr Selumi confirmed to Sgt Nkadimang that the plaintiffs, at the back of the police van, were the ones present at his home the previous day. They did not deny it. Mr Moagi was also invited to identify the men at the back of the police van. He positively identified them as the perpetrators. Sgt Nkadimang detained the

plaintiffs at Kuruman Police Station. The docket was handed over to the Mothibistad detectives. W/O Schalk was the investigating officer.

- [10] Sgt Nkadimang refuted the claim in the plaintiffs' Particulars of Claim that he had acted on false information provided by those who had implicated them, alluded to above. He also disavowed the averment that he had acted without reasonable or probable cause because he had acted on witness statements alleging assault with intent to cause grievous bodily harm and kidnapping which he accepted to be true. The Minister pleaded that the offences committed fall under Schedule 1 and that Sgt Nkadimang had reasonable suspicion that the plaintiffs had committed the alleged offences and wanted to secure their attendance in court.
- [11] It is common cause that the arrests were without a warrant. The plaintiffs were arrested on Friday, 30 December 2016 and their first court appearance was scheduled for Tuesday 03 January 2017. W/O Schalk took the docket to court. The plaintiffs were also brought to court on 03 January 2017 at 08:30 by Cst Keet as recorded under Serial Number 97. Sgt Nkadimang learned later that despite the plaintiffs having been taken to court they did not appear before a magistrate as the matter was not enrolled on the court roll.
- [12] After the arrest and before detention of the plaintiffs Sgt Nkadimang completed a **"Notice of Rights Form"** for all the plaintiffs having explained s 35 of the Constitution to them. The

form shows the full names and signatures of the detainees, and of the person who had explained the rights as well as the date, time and place of signature. There is also a statement regarding **“Interview With Suspect Form”** attached. The plaintiffs were interviewed the following day, Saturday 31 December 2016. They all declined to make statements and opted to give an explanation in court.

- [13] The complainant, Mr Willie Moagi, was not called to testify but his statement made to the police, which formed part of the docket, was handed up by agreement between the parties, and on which evidence witnesses were cross-examined. Adv MJ Merabe, counsel for the defendant, applied for the statement to be admitted by court in terms of s 3(1)(c) of the Law of Evidence Amendment Act³. Adv GI Mothibi, counsel for the plaintiffs, objected to its admission on the basis that its admission will be prejudicial to the plaintiffs’ case. The basis upon which the statement was handed in by consent was merely to show that it was faithfully recorded and not as proof that its contents purveys the truth of what had transpired. Mr Moagi was not called as a witness because counsel for the Minister, Adv Merabe, informed Court that he was suffering from a mental instability and was

³ 45 of 1988

Sec 3(1)(c) provides:

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(c) the court, having regard to –

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

incoherent during consultation. I admitted the evidence in the interests of justice.

- [14] A copy of the investigation diary, Part 'C' of the docket, was part of the documents handed in. The entries in the diary are quoted in full because they form the crux of the dispute:

The top entry is, as explained by Sgt Nkadimang, made by the Branch Commander and addressed to the Public Prosecutor (PP). He wrote:

- “1. Case docket to court for first appearance;*
- 2. Investigation is not complete;*
- 3. Witnesses' statements and completed J88 is outstanding. J88 will be collected from the hospital;*
- 4. Criminal Profiles for suspects requested from the LCRC.”*

- [15] The prosecutor recorded the following response in the investigation diary:

“Case not enrolled.

- 1. Complainant single witness testify against 4 unknown males;*
- 2. Identity in dispute – the complainant in A1 para 6 state doesn't know those men, that he would not be able to identify them even if he can see them later;*
- 3. Obtain J88 and witnesses' statements;*
- 4. Investigate and bring case for decision.”*

The “*complainant in A1 para 6*” at 2 above is Mr Willie Moagi.

- [16] The second witness to testify for the defendant is Mr Selumi. He was not at his home when a group of people arrived but was later summoned. Mr Tshetlho informed him that they were in pursuit of stolen sheep belonging to a woman who was in their company. He explained to her that his sheep stay in the kraal and are not

taken out to graze. He permitted them to enter his kraal to search for her sheep. Though she entered the kraal with Stouter (the shepherd) and searched for the lost sheep none were found. They left with Stouter and Moagi.

- [17] The following morning Mr Selumi saw Mr Modisaemang driving a minibus with passengers towards the veld. He immediately asked his neighbour, Mr Sebolao, to accompany him to Mr Modisaemang's cattle post for feedback. He recognised Mr Stone and Mr Modisaemang but the other male person was unknown to him. Modisaemang reported to him that Moagi and Stouter undertook to compensate him for the missing sheep. He and Mr Sebolao then departed.
- [18] Later that same day he was called to Mr Sebolao's residence where he found Mr Moagi lying on his stomach across the bed and exhibited to them burn marks on his thighs and buttocks. He also had whip weals on his back. He was taken to hospital. Moagi reported to him that the men who had come to his residence searching for their sheep had inflicted those injuries.
- [19] The last witness to testify for the defendant was W/O Schalk, the then investigating officer who later resigned from the South African Police Service (SAPS). He testified that the docket was taken to court but was not enrolled for the reasons stated in the investigation diary. He confirmed that the suspects were taken to court and released by the court orderly after the public prosecutor had decided not to enrol the case. The suspects were informed that the case required further investigation. He did not complete

the investigation because he left the SAPS. He confirmed that the plaintiffs were taken to the Kuruman court holding cells to appear in court. The defendants' case was closed on this note.

The plaintiffs' case

[20] All five plaintiffs testified. Their case is that they were each arrested at their residences on 30 December 2016. Mr Freddy Modisaemang testified first. He says Mr Moagi arrived at his home and reported that there was no water at the cattle post and that some sheep had died. He demanded to be placed in possession of the carcasses or skins of the dead sheep or to be shown where the carcasses were buried to satisfy himself. Accompanied by Mr Daniel Stone, his wife and Mr Moagi they headed to the cattle post in his kombi. Thereat, Moagi failed to answer or show him the remains. He also demanded to see the missing lambs. Moagi explained that they were buried but could not exhibit them.

[21] Modisaemang phoned Tshetlho to join them at the cattle post. Tshetlho arrived with Baikai and Bareki. Modisaemang persistently interrogated Moagi about the whereabouts of his sheep and lambs. Stouter, who was present, suggested that Moagi should tell them where they normally take the sheep to. The entourage then boarded the kombi and headed to Mr Selumi's residence as directed by Moagi. Tshetlho telephonically contacted Selumi to return to his home since he was absent. On arrival Selumi was given a full report. They searched Selumi's premises but did not find anything. Moagi offered to pay

compensation for the missing sheep. Modisaemang transported the two shepherds back to the cattle post.

[22] On 29 December 2016 Modisaemang was joined by Stone at the cattle post. They found Stouter but Moagi was missing. Selumi arrived at the cattle post and enquired about the progress and informed Modisaemang that Moagi is his employee. On Friday 30 December 2016 Modisaemang and Stone discovered that the shepherds had disappeared from the cattle post. The SAPS members arrested Modisaemang at home. He directed the police to the residences of the other plaintiffs who were also arrested and placed in a police vehicle.

[23] The police went to Selumi's place. Selumi identified all the detainees who had engaged with him, Moagi and Stouter. It is common cause that they were detained from 30 December 2016 to 03 January 2017. They were taken to Mothibistad court cells where they remained until just after 10:00 on the morning of 03 January 2017. All five of them were informed by a SAPS member that they can go home. They never entered the court room. They denied ever assaulting or kidnapping Moagi.

[24] The second to testify was the second plaintiff, Mr Daniel Stone. His evidence accords with that of Modisaemang in so far as it relates to him and his wife Lizzy. He adds that he had opened the kraal for his own sheep to graze as Stouter had not opened for them before he disappeared. He then left with the sheep to the veld leaving everyone at the cattle post. He spent the whole day in the veld. The shepherd was absent again on 29 and 30

December 2016. He spent the entire day of the 30th at his home where he was arrested. He denies having witnessed or participated in any assault or kidnapping of Moagi. In essence he pleads an alibi.

[25] Mr Tlotloyaone Bareki was the third to testify. On Wednesday, 28 December 2016, Tshetlho arrived at his home and informed him that Modisaemang had problems at his cattle post. He and Baikai accompanied Tshetlho to the said cattle post where a report was made to them by Modisaemang regarding the missing sheep and the failure by Moagi to account for them. Otherwise his account dovetails that of Modisaemang except where he added that Selumi had hit Stouter twice on his head with a hosepipe and was reprimanded by members of the community. The entourage left his premises and later parted ways. On Friday 30 December 2016 he was arrested at his home. Bareki denies ever assaulting or kidnapping Moagi.

[26] Mr Daniel Tshetlho, the fourth plaintiff, says he was telephonically contacted by Modisaemang who invited him to his cattle post complaining about his missing livestock. All five plaintiffs and Lizzy converged at the cattle post. Moagi and Stouter (the shepherds) were present. The shepherds were interrogated about the missing sheep and lambs. Stouter suggested to Moagi that he disclose their whereabouts. The entire party went to Kagung to the given address, which was Selumi's home. Selumi permitted them to search his kraal. After Stouter had hinted where the sheep might be Selumi grabbed him by his head, threw him to the ground, took a hosepipe and hit him. He was reprimanded by

members of the community. They did not find what they were looking for and left. Tshetlho says he never left his home on 29 December 2016 where he was arrested on Friday 30 December 2016.

- [27] The last witness to testify was Mr Michael Baikai, the first plaintiff. His narrative broadly followed that of the other plaintiffs who testified before him as regards to what had transpired at both the cattle post and Selumi's premises. He is silent on Stouter's alleged assault by Selumi. He remained homebound on Thursday 29 December 2016 where he was arrested on Friday, 30 December 2016.

Applicable legal principles

- [28] The remarks by Langa CJ in *Zealand v Minister of Justice and Constitutional Development and Another*⁴ are apposite:

"[24] ...The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken."

See also *Minister of Law and Order and Others v Hurley and Another*⁵.

- [29] The plaintiffs argued that their detention was unreasonable and unjustifiably infringed upon their rights under s 12 (1)(a) and (b) of the Constitution⁶ which stipulate:

⁴ 2008 (4) SA 458 (CC) at 468 para 24

⁵ 1986 (3) SA 568 (A) at 589E

*“(1) Everyone has the right to freedom and security of the person, which include the right –
 (a) not to be deprived of freedom arbitrarily or without just cause;
 (b) not to be detained without trial.”*

[30] In summary, therefore, the plaintiffs’ case is that they were arrested without a warrant on trumped up charges of assault with intent to do grievous bodily harm and kidnapping registered under Case Number 210/12/2016, Kuruman Police Station. They further alleged that as a result of the wrongful and unlawful arrest and detention they suffered harm in respect of which they seek to hold the Minister of Police liable for the entire period of their detention (30.12.2016 – 03.01.2017). They argued that the unlawful arrest and detention and the failure by the Minister to bring them before court had caused them to suffer damages in the amounts set out in their respective Particulars of Claim.

[31] In the Minister’s plea the arrest and detention are admitted but liability is avoided by alleging that Sgt Nkadimang had a reasonable suspicion that the plaintiffs had committed the offences of assault with intent to cause grievous bodily harm and kidnapping. It is accordingly denied that the arrest and detention were unlawful.

[32] Sgt Nkadimang testified that at the time of effecting the arrests on all the plaintiffs at their residences he had identified himself and the unit he was attached to. He informed them individually of the purpose of his visit: being to arrest them in connection with the assault and kidnapping charges levelled by Mr Moagi. He asked Mr Modisaemang, who was arrested first, in whose company he

⁶ The Constitution of the Republic of South Africa, 1996

had been. He named the other four plaintiffs and took him to their residences where the same process was followed before their arrests.

- [33] Sec 40(1)(b) of the Criminal Procedure Act⁷ (CPA) 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 lawful custody.

Van Heerden JA made this pronouncement in *Duncan v Minister of Law and Order*⁸:

“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 Holgate-Mohammed v Duke [1984] All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds of 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.”

- [34] After their arrest and detention at the police station all the plaintiffs elected to state their case in court. They had the constitutional right to remain silent and no adverse inference can be drawn from their election.

- [35] Harms DP made the following remarks in *Minister of Safety and Security v Sekhoto*:⁹

⁷ 51 of 1977 as amended

⁸ 1986 (2) SA 805 (A) at 818 H - J

⁹ 2011 (5) SA 367 (SCA) at 383 para 42

“[42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.”

[36] I endorse the reasoning expressed by Marais AJ in *Zweni v Minister of Police and Another*¹⁰ where he said:

“[25] Whether further investigation is warranted before an arrest is effected must surely depend on the facts of each case. An objective assessment of the three statements available indicates there were reasonable grounds to arrest without the need for further investigation.

[26] The requirement is that the arresting officer only has to form a suspicion. I agree with Jones J when he said, “This is not to say that the information at his disposal must be of sufficient high quality and cogency to engender him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty.”

[37] There is no gainsaying the fact that the third plaintiff, Mr Freddy Pitso Modisaemang, was the chief protagonist in this whole episode. He is responsible for inviting or assembling the four other plaintiffs at his cattle post or was instrumental in such assembly. He transported Mr Willie Moagi (the assault and kidnap victim), Mr Daniel Stone (second plaintiff), and Mr Stone’s wife (Lizzy) to his cattle post. He specifically phoned Mr Daniel Tshetlho (fourth plaintiff) to join him at the post. All other plaintiffs were fully briefed and were present when Moagi and Stouter were interrogated. All of them went to Selumi’s house and summoned him to his (Selumi’s) house. They all knew that one or both

¹⁰ (2629/2003) (2016

shepherds had implicated Selumi in the theft of Modisamang's sheep.

[38] All the plaintiffs deny that they had assaulted Moagi or had witnessed his assault. The injuries to Moagi are described as follows by Sgt Nkadamang to whom Moagi had complained: He observed (in private) whip weals on his back; blisters or burn wounds and that his skin was excoriated. The injuries were also depicted on photos 1, 2 and 3 which photos are exhibits. In light thereof that the J88 Form was not produced, evidently never collected from hospital, it is necessary to use photos 1 and 2 to depict the horrendous injuries to his buttocks. See Appendix "A" to this judgment. Photo 3 is a blown-up (close-up) picture and is too graphic and invasive to annex hereto because it shows his private parts and is therefore omitted.

[39] It is unquestionable that Moagi was uninjured before his interrogation by the plaintiffs. There can be no doubt that he was injured whilst they kept him captive and that they had inflicted all the injuries. The evidence of Selumi is devastating against the plaintiffs. He found Moagi sprawled on the bed seriously injured. He wasted no time in conveying him to hospital where he received treatment. Brig Baloyi promptly ordered an investigation. The plaintiffs must suffer the same fate because they conspired to protect each other and opted not to explain how Moagi had received multiple injuries in their presence. No outsider would have done so.

[40] It is clear from the testimony of Sgt Nkadimang, being a peace officer, that the arrest was effected upon a reasonable suspicion that an offence falling under Schedule 1 had been committed. The decision to arrest them therefore was for the purpose of bringing the plaintiffs before court, which was done. He arrested the plaintiffs in the exercise of his discretion. I did not discern in the papers or from the oral evidence that Sgt Nkadimang had acted arbitrarily or irrationally in the exercise of such discretion. Essentially, all the four jurisdictional factors alluded to in *De Klerk v Minister of Police* referred to in para 3 of this judgment (above) were established by the defendant.

I therefore find that the arrest was lawful.

[41] The 30th December 2016 was a Friday and Monday, 02 January 2017, was a public holiday. The earliest court day after the arrest was 03 January 2017. What stands for determination is whether under those circumstances the detention for that period was arbitrary or without just cause in terms of s 12(1)(a) of the Constitution. The following remarks by O'Regan J in *S v Coetzee and Others*¹¹ are poignant:

"[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]. Our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair."

[42] Since the earliest available date to appear was 03 January 2017 the encroachment on the plaintiffs' physical freedom cannot be

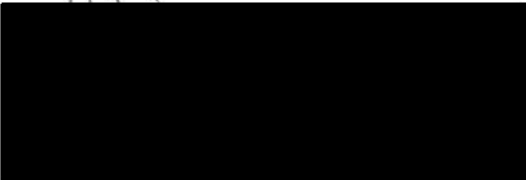
¹¹ 1997 (3) SA 527 (CC); 1997 (1) SACR 379 (CC); 1997 (4) BCLR 437 (CC) at para 159

said to be arbitrary or without just cause. Consequently, based on *Sekhoto and Zweni* in paras 36 and 37 above, the defendant cannot be held liable for the unlawful arrest and detention of the plaintiffs. The head of damages claimed must therefore also fail.

[43] **On the question of costs.** There is no reason why costs should not follow the result.

[44] In the result the following order is made:

The action is dismissed with costs.



MC MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the 1st to 5th Plaintiffs:

Instructed by

For the Defendants:

Instructed by:

Adv GI Mothibi

Mjila & Partners

Adv MJ Merabe

State Attorney

PHOTO 1

[APPENDIX "A"]



PHOTO 2

