

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION: MTHATHA)**

Case no: 952/2016

In the matter between:

LUNGISANI MPHINDWA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NDAMASE AJ:

Introduction

[1] The plaintiff, an adult male taxi operator, seeks damages against the defendant, resulting from the plaintiff's alleged wrongful and unlawful arrest and detention. The claim is premised on vicarious liability, it being alleged that the perpetrator of the alleged acts was at the time employed by the defendant and had committed the alleged unlawful acts during the course and scope of employment with the defendant.

The pleadings

[2] The particulars of claim attached to the summons dated 18 March 2016 (the first particulars), sets forth the cause of action as being damages suffered as a result of the wrongful and unlawful arrest and detention of the plaintiff by one Detective Constable Mthetheleli Mvuyisi Nkomo (hereinafter referred to as “*Nkomo*”). The arrest is reported to have happened without a warrant and in full view of members of the public on 2 April 2015 at Mount Fletcher Taxi rank in Mount Fletcher. Consequent to his arrest by Nkomo, the plaintiff alleges that he was taken to Mount Fletcher police station where he was detained for five (5) days until he appeared in court on Tuesday 7 April 2015 where he was arraigned on a charge of assault with intent to do grievous bodily harm. He was released from detention on 7 April 2015 when he was admitted to bail. Accordingly, he claims his detention was unlawful.

[3] The plaintiff claims to have suffered damages amounting to R450 000.00, R350 000.00 whereof is for wrongful and unlawful arrest and detention and R100 000.00 for *contumelia*.

[4] In its defense, the defendant contends that the plaintiff was detained and charged with assault with intent to do grievous bodily harm. It denied that the arrest and the subsequent detention were unlawful and pleaded that the arrest fully complied with laws regulating arrest without a warrant as the arresting officer had reasonable grounds to suspect the plaintiff had committed an offence.

[5] The plaintiff sought to amend the first particulars and, there being no objection, the amended particulars of claim was delivered on 28 February 2018 (*second particulars*). The second particulars differs materially in style and particularity in detail in relation to the allegations made in the first particulars. The amendment includes a substitution of the plaintiff’s residence from “*Magedla Administrative Area in the district of Libode*”, with

"Magedla Administrative Area, Mount Fletcher". The significant amendment however relates to the head of damages claimed and the total amount thereof having been revised to be R600 000.00 made up as follows:

[5.1] R60 000.00 for unlawful arrest; and

[5.2] R540 000.00 for unlawful and wrongful detention which includes damages for discomfort, shock, injury to dignity, deprivation of enjoyment of amenities of life, insult to person, humiliation, pain and suffering.

[6] Notwithstanding the amendment to the plaintiff's particulars, the defendant did not file any amendment to its original plea and proceeded on the basis of its original plea to the first particulars. However, at the commencement of the proceedings, counsel for the defendant moved an *impromptu* application from the Bar for the postponement of the trial on the basis that he, shortly before the proceedings could commence, realized that the plaintiff had filed an amendment to his particulars of claim and was therefore not in possession of the revised index to the pleadings incorporating the second particulars together with the revised trial bundle. He further submitted that the developments pertaining to the pleadings had not been brought to his attention by those instructing him (the State Attorney). On being probed by the court he advised that he had been on brief since 5 May 2016. No substantive application was made and consequently, the postponement was refused and the matter was directed to proceed.

[7] In refusing the postponement, the court took the view that a postponement is an indulgence which a party seeks from the court. Based on the explanation given for the postponement, the court was not convinced with the reasons furnished, particularly when one has regard to the fact that the plaintiff's amendments were effected and served upon the defendant's attorneys of record some ten (10) months prior to the scheduled hearing date. In addition, both parties' legal representatives had attended a case flow management conference before a Judge to have the matter certified ready for trial and on the basis of such appearance, the matter was indeed certified trial ready and a directive for

the allocation of a trial date issued by the presiding Judge. The court was therefore not inclined to entertain a postponement based on the lack of preparedness by the defendant's counsel who had been seized with the brief from 2016. For the above reasons, the application for postponement suffered an ill fate, hence it was refused.

[8] At the commencement of the proceedings, the defendant's counsel conceded that even though in terms of rule 39 (13) of the Uniform Rules of Court it was incumbent upon the plaintiff to adduce evidence first, the matter had to proceed in line with the parties' agreement reached during the pre-trial conference and as recorded in the pretrial minute, which is that the defendant bore the duty to begin and the onus to justify the lawfulness of both the arrest and detention of the plaintiff.

The Evidence:

[9] The facts pertaining to the plaintiffs' arrest are largely common cause and in regard to the plaintiff's arrest may be summarized as follows:

[9.1] On the 29th March 2015, Moses Tumo Tsibuli (the complainant"), was involved in a motor vehicle accident with another vehicle owned by one Matanzima Mhlaba (Mhlaba) and consequent thereto, a dispute ensued between the complainant and Mhlaba leading to the assault of the complainant by Mhlaba and the community members of Jojweni location in Mount Fletcher. As a result of the assault, the complainant sustained multiple wounds. As a result of the assault and the injuries sustained, the complainant was admitted to hospital on the same day and released the next day on 30th March 2015. On the same day of his release, the complainant opened a case of assault against Mhlaba and other persons that had formed part of a mob of Jojweni location in Mount Fletcher.

[9.2] Two (2) days after the case had been opened, the complainant called the investigating officer, Nkomo, to inform him that one of the people who assaulted him

from amongst the mob was at Maclear route taxi rank and that he could see and recognize him and wanted to point him out. After the telephone call, Nkomo set out and went to meet with the complainant and upon his arrival at the taxi rank, the complainant pointed out the suspect, the plaintiff in these proceedings.

[9.3] Nkomo enquired from the complainant if he was indeed certain that the man he was pointing out was one of the assailants and the complainant confirmed he was. The name of the suspect was at the time unknown to both Nkomo and the complainant.

[9.4] After the pointing out Nkomo testified that he introduced himself to the plaintiff, produced his appointment card and informed him who he was. Nkomo further testified that the plaintiff cooperated with him and as a result of this, acting without a warrant to arrest the plaintiff, arrested and detained him in police cells from the 2nd April until the 7th April 2015. On being probed further by the defence counsel, Nkomo testified that when he received the call from the complainant, he had already been investigating the matter and had looked at the J88 form as contained in the docket and had found that the complainant had sustained deep injuries and very serious wounds on his head which injuries fell under Schedule 1. He testified that prior to the telephone call from the complainant he had attempted to get in touch with one of the witnesses, one Mr Bidibidi, on the 1st April 2015, a day after the complaint was laid with the police. Mr Bidibidi was however not available to immediately make a statement to the police but was only available to do so on the 21st April 2015, long after the plaintiff's arrest. Further explanation given by Nkomo on the reasons for the immediate arrest of the plaintiff without a warrant was that he relied on the assurances given by the complainant about the identity of the plaintiff.

[9.5] Under cross-examination Nkomo submitted that the purpose of the arrest and detention of the plaintiff was to ensure his appearance in court. He further stated that based on the conversation with the complainant about the identity of the plaintiff and having observed the J88 form where he had noticed that there were about 3 wounds/lacerations in the complainant's head, he formed a view that these wounds were deep wounds and was accordingly satisfied he could effect the arrest.

[9.6] Further under cross examination, Nkomo readily conceded that he ought to have interviewed at least Mr Bidibidi prior to the arrest, but due to his unavailability he relied on the complainant's reassurance that the plaintiff was one of the

assailants. He explained that it was the injuries and deep wounds he observed from the J88 form that influenced his decision to arrest but conceded that one of the injuries was a one (1) cm laceration deep. Having regard to the above circumstances, Nkomo testified that he saw no reason to obtain a warrant before effecting the arrest.

[9.7] In support of the plaintiff's case, Lungisani Mphindwa who is the plaintiff testified and proffered a version contrary to that presented on behalf of the defendant. The plaintiff denied that Nkomo told him the reasons for his arrest. The plaintiff's presentation of his case was however all over the place as his counsel's manner of leading the witness left much to be desired. It was characterized by various objections raised by defense counsel and which were sustained by court due to the fact that he consistently fed the witness with evidence rather than leading the witness on the factual matrix. The court at some stage had to observe a brief adjournment at the instance of the plaintiff's counsel in order to enable the plaintiff's counsel to compose himself and continue with his evidence in chief. Briefly, this witness touched on the undesirable treatment and inconvenience he experienced during the period of his detention. Notwithstanding the above, the court found him to be a credible witness.

Unlawful arrest

[10] Any arrest without a warrant which is not specifically authorized by law is *prima facie* unlawful. Our courts have therefore deemed it fair and just to require the arrestor to bear the onus of proving that his or her arrest was justified in law.¹ In *Minister of Justice v Hofmeyr*² (per Hoexter JA) held:

"The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our courts have adopted the

¹*Goliath v Minister of Police* (ECG) unreported case no CA107/2017 of 14 November 2017 at para 3; *Minister of Law and Order v Hurley* 1986(3) 568 (AD) at 589E-F.

²1993 (3) SA 131 (A) at 153D-E.

rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction”

[11] The requirements for a lawful arrest without a warrant are accordingly set out in section 40 (1) (a) and (b) of the Criminal Procedure Act, 51 of 1977 (“the CPA”). The provisions of section 40 (1) (a) and (b) of the CPA read as follows:

“(1) A peace officer may without warrant arrest any person—

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

[12] In *Duncan v Minister of Law and Order*³ Van Heerden JA explained the jurisdictional facts that must be established for a successful defence under section 40 (1) (b) as being that:

[12.1] the arrestor must be a peace officer;

[12.2] the arrestor must entertain a suspicion;

[12.3] the suspicion must be that the arrestee committed an offence referred to in Schedule 1, other than an escape from lawful custody; and

[12.4] the suspicion must rest on reasonable grounds.

³ 1986 (2) SA 805 (A) at 818G-H.

[13] Schedule 1 to the CPA refers to a number of offences in respect of which arrest could be made without a warrant, one of them being “*an assault when a dangerous wound has been inflicted which is likely to endanger life or the use of a limb or organ.*”

[14] From the above it is clear that before the arrestor can arrest the arrestee, he or she must have reasonable grounds for suspecting that the arrestee has inflicted a wound on another person which was likely to endanger the life or the use of a limb or organ. This much was confirmed in *Bobbert v Minister of Law and Order*⁴ where the plaintiff was arrested on the basis of an entry that the arresting officer had read in a police register to the effect that the plaintiff was sought on a charge of assault with intent to do grievous bodily harm. The court held that because the sole basis for the plaintiff’s arrest in terms of section 40 (1) (b) was the arresting officer’s suspicion that the plaintiff had committed an assault with intent to do grievous bodily harm, there was no reasonable ground for the arresting officer to suspect that an assault in which a dangerous wound had been inflicted . It was held that the term “*grievous bodily harm*” was not always synonymous with the term dangerous wound. The court concluded that it does not follow that a person who intends to do grievous bodily harm necessarily intends to inflict a dangerous wound.

[15] It is common cause that Nkomo is a peace officer. The critical issue to be decided is whether or not Nkomo, had reasonable suspicion that the plaintiff had committed an offence referred to in Schedule 1, which was likely to endanger the life or the use of limb or organ of the plaintiff. If he had held such a suspicion then the arrest would have been lawful by reason of the provisions of section 40(1) (b) of the CPA.

[16] In *Mabona and another v Minister of Law and Order and others* ⁵the court held that the information upon which the reasonable suspicion is based that a Schedule 1 offence has been committed must be at the arrestor’s disposal at the time of arrest. The arrestor will critically analyse and assess the quality of that information and will not accept it without checking it where it can be checked.

⁴ 1990 (1) SACR 404 (C).

⁵ 1988 (2) SA 654 (SE) at 658 G-H.

[17] The test as to whether the arresting officer's suspicion is reasonable must be assessed objectively.⁶ This principle was explored in *Duncan* where it was held that the suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion.⁷ Once the required suspicion exists an arresting officer will be vested with discretion to arrest, which he must exercise rationally.⁸

[18] Mr *Siwahla*, counsel for the plaintiff, limited his submissions to the plaintiff's heads of arguments submitting that the absence of a warrant of arrest rendered the arrest of the plaintiff unlawful because assault with intent to do grievous bodily harm as pleaded by the defendant is not one of the offences listed in Schedule 1.

[19] Mr *Siwahla* further submitted that from Nkomo's testimony it is not so far to discern that the charging of the plaintiff with assault GBH was formulated by Nkomo upon the reading of the of the complainant's statement and the J88 form. From the analysis of the J88 form, the complainant had sustained 1cm laceration on his forehead and it is the plaintiff's argument that the nature and extent of the injuries as depicted in the J88 form do not constitute a dangerous wound as to fall within the purview of Schedule 1 offences.

[20] Further it was the plaintiff's submission that the investigating officer failed to verify the information at his disposal and investigate the circumstances of the assault itself and determine from the injuries sustained, the nature and the seriousness of the wounds and whether the wounds were inflicted intentionally or accidentally. Mr *Siwahla*, in substantiating his submissions, relied on amongst others *De Klerk v Minister of Police*.⁹ In that case the appellant had been arrested for assault with intent to do grievous bodily harm following an altercation between the appellant and the complainant. In the plea, the

⁶ *S v Nel and Another* 1980 (4) 28 SA (E) at 33H.

⁷ *Duncan* (note 3 above) at 814.

⁸ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at 373 B-C.

⁹ 2018 (2) SACR 28 (SCA).

respondent had not relied upon the relevant part of Schedule 1 and nothing had been said about whether or not the wound inflicted was dangerous. There was further no evidence by the respondent that an investigation had been carried out to ascertain the nature and extent of the wound. The court held that it was insufficient that the arresting officer had relied on the statement by the complainant and the J88 form only when she made the decision to arrest. The court further held that the arresting officer failed to investigate further the circumstances of the assault itself, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. In rejecting the respondent's version that it exercised its discretion to arrest in a proper manner, the court held that the arresting officer had wrongly assumed that the assault had been committed with intent to do grievous bodily harm and that the offence was listed in Schedule 1.

[21] In the present case, the defendants' plea which was not amended to deal with the allegations contained in the second particulars, contained critical averments as basis for the arrest of the plaintiff without a warrant. The relevant averments are *inter alia* that:

- “(a) the defendant admits that the plaintiff was detained at Mount Fletcher Police Station charged with assault with intent to do grievous bodily harm;
- (b) the arresting officer had reasonable grounds to suspect that the plaintiff had committed an offence;
- (c) the plaintiff's arrest and subsequent detention fully complied with laws regulating arrest without a warrant;
- (d) the defendant denies that it is liable to pay to the Plaintiff any amount claimed”.

[22] From the plea it becomes clear that the defendant's basis for the warrantless arrest was a suspicion by Nkomo that the plaintiff had committed an offence for which he had been charged, in this case, an assault with intent to do grievous bodily harm. This is notwithstanding the fact that assault with intent to do grievous bodily harm is not one of the offences referred to in Schedule 1. There was simply no reliance on Schedule 1 in the defendant's plea justifying the arrest other than a bold statement that the “*arrest was lawful on the basis that it complied with the laws regulating arrest without a warrant*”.

[23] The court was unimpressed with Nkomo's testimony as an arresting officer. His evidence was not in keeping with a police officer of 13 (thirteen years) experience. In his evidence in chief when asked to briefly explain what prompted him to arrest the plaintiff on the day in question, his testimony clearly demonstrated that the evidence that was before him at the time of arrest was not sufficient to enable him to effect arrest with or without a warrant. He did not appreciate the elements of the offence for which he was arresting the plaintiff in circumstances where he had not obtained a warrant of arrest. His testimony revealed that his investigations were incomplete. He had not done an assessment or analysis of the quality of information he gleaned from the docket, including the J88 form. The nature of the injuries relied upon by Nkomo had not been established by him even when he met the complainant during the pointing out of the plaintiff. There was no evidence led to establish that he had observed any physical injuries on the complainant at any stage up to the period of the pointing out and that the injuries were in keeping with what he observed from the J88 form particularly so when one has regard to the fact that the pointing out happened a mere 4 (four) days after the alleged incident. He had not obtained any statements from any witness. The pointing out by the complainant is not characterized by any particularity of description or features of the plaintiff as the perpetrator of the offence and he gave no evidence to link the plaintiff to the offence for which he was arrested. In my view, he simply gave no consideration to the circumstances he was faced with.

[24] The concession made by Nkomo that at the time of the arrest that the plaintiff's name was unknown to himself and to the complainant prior to him taking a drastic action to arrest the plaintiff points to a dangerous inference that there is a strong likelihood that he arrested an incorrect person who had played no part in the assault of the complainant.

[25] It bears mentioning that in some instances the defence pursued a line of defense during the course of trial which had not been pleaded when, by reason of it being a special defense, it ought to have been. Absent an objection from the plaintiff's camp, I nevertheless allowed the evidence where Nkomo sought to rely on his observation of what he called "*the deep wounds he observed from the J88 form and from his own reading of*

the J88 form he found complainant had deep injuries or wounds on the head and that these wounds were very serious wounds and that they were falling under Schedule 1". This evidence, for the reasons stated above, had no merit and was ill founded because the defendant's plea made no mention of a suspicion by Nkomo that the assault involved an infliction of a dangerous wound which was likely to endanger the complainant's life or use of limbs other than mentioning a suspicion that the plaintiff had committed an assault to do, the complainant a grievous bodily harm. This much was confirmed by the Supreme Court of Appeal in *De Klerk* when it referred to the matter of *Minister of Safety and Security v Slabbert*:

““A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.””¹⁰

[26] In applying the principles laid down in *De Klerk (supra)*, it becomes evident that there was no justification for the arrest of the plaintiff based on the statement of the complainant and the perceived injuries gleaned from a J88 form and that there was no information upon which Nkomo could reasonably have suspected that the plaintiff had inflicted dangerous wound on the complainant. He clearly wrongly assumed that assault GBH is an offence listed in Schedule 1.

[27] Accordingly, it can hardly be said that the facts known to Nkomo at the time of the plaintiff's arrest were sufficient to establish a successful reliance on section 40 (1) (b) defence. I am therefore satisfied that the defendant failed to establish that Nkomo reasonably suspected the plaintiff to have committed an offence referred to in Schedule 1. His arrest was therefore unlawful. The ensuing detention must similarly have been unlawful.

¹⁰ *De Klerk* (note 9 above) at para 7.

Quantum

[28] The issue remaining is whether the damages claimed is a fair and reasonable compensation in relation to the arrest and detention.

[29] It is trite law that in assessing the appropriate award, the Court should have regard to the previous awards made by courts in similar matters. The deprivation of liberty is a serious matter and in such cases a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification¹¹.

[30] Whilst the plaintiff's evidence was not the best of the evidence in supporting and substantiating his allegations as pleaded in the second particulars, of course owing to no fault of his but to his legal counsel, I have found comfort in the statement made by Spilg J (Modiba AJ concurring) in *Mofokeng v Minister of Police*¹² regarding failure by a plaintiff to lead evidence that allows court to take all relevant factors into account when determining the amount of damages for unlawful arrest and detention:

"It would therefore be incorrect to conclude that a party will only be entitled to a nominal award if he or she does not eloquently and vividly describe the effects of the arrest and detention. Moreover the court is entitled to assume that, barring any evidence to the contrary, a plaintiff will suffer a loss of self-worth, will perceive that others have a lower estimation of him, that he will suffer embarrassment, is likely to lose a degree [of] self-confidence and will experience vulnerability, humiliation and a feeling of being impotent as a consequence of a wrongful arrest and detention." (Added emphasis.)

¹¹ *Rahim and Others v Minister of Home Affairs* 2015(4) SA 433 (SCA) at para 27.

¹²(GJ) unreported case no 2014/A3084 of 17 February 2015 at para 29.

[31] In analyzing the plaintiff's evidence I have had regard to the fact that the plaintiff having filed a significant amendment in relation to his head of damages and quantum, the defendant proceeded on the basis of its original plea to the first particulars.

[32] The plaintiff alleged that he suffered considerable humiliation and trauma as a result of the unlawful arrest which was carried out publicly and in the humiliating and degrading manner in full view of the members of the public in the taxi rank and hence the claim in the amount of R60 000.00 in relation to unlawful arrest. He submitted that he was subsequently detained at Mount Fletcher Police Station and later at Elands Heights Police Station for 5 days from 2nd April to the 7th April 2015 until he was made to appear in Court and thereafter admitted to bail and eventually the charges against him were finally withdrawn on the 3rd August 2015. He stated that he only realized he was under arrest when he was handcuffed and placed in a police truck. He mentioned that he was experiencing incarceration for the first time and that this experience was very traumatic for him. As a result of the unlawful detention, he suffered discomfort, shock, injury to his dignity, deprivation of liberty, deprivation of amenities of life and insult and pain and suffering and hence the claim in the amount of R540 000.00 for these head of damages.

[33] In substantiating these damages, the plaintiff testified that during the detention he was kept in a small room in the police cells in leg irons in appalling conditions. He was unable however to paint a more clearer picture to the court of the conditions under which he was detained other than to state that he was assaulted by the other inmates he found in detention and that he felt cold as the blankets he used at night were not warm enough. The unsatisfactory evidence was largely as a result of the plaintiff's counsel asking leading questions that were met with objections from the defendant's camp and which were subsequently disallowed by the court. Under cross examination he confirmed that during the period of his detention, he was given food and water; there were lights in his cell at night; his cell had ablution facilities; and he never opened a case of assault by the inmates as he did not know of his rights to do so.

[33] In *Nel v Minister of Police*¹³, Mbenenge JP, highlighted the guidelines that are pivotal to a determination of quantum. In so doing he relied on *Minister of Safety and Security v Tyulu* wherein the following is stated:

““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 (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph & Others v Minister of Safety and Security & Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26-29).””¹⁴

[34] Coming to the determination of an appropriate award, Mr *Siwahla* appearing for the plaintiff sought to rely on *Mtola v Minister of Police*¹⁵ as the basis of what is fair and reasonable quantum in the circumstances and where the court awarded a sum of R10 000.00 in damages for the detention which was held to be unlawful only to the extent that it went beyond the statutory 48 (forty eight) hour period. What the plaintiff’s counsel overlooked however was that when he made the submissions before the court, this judgment had already been overturned on appeal. The appeal court had found the arrest and detention to have been unlawful where the circumstances had pointed to the arresting officer as having effected the arrest without carefully analyzing and assessing the

¹³ (ECG) unreported case no CA62/2017 OF 23 of January 2018.

¹⁴ Ibid at para37.

¹⁵ (ECM) unreported case no1110/2013 of 19 March 2015.

information at his disposal and simply relying on the complainant's *ipse dixit*. The court made an award in the sum of R125 000.00 as fair and reasonable damages.

[35] In dealing with awards, I have thus had regard to previous awards including made in this Division:

[35.1] In *Mkwati v Minister of Police* (ECM) unreported case no 2902/2013 of 23 January 2018 the plaintiff was arrested whilst walking from a school meeting and placed in the back of a police van which was driven in a manner that tossed him, causing him to hit his head against the van's body panel. At Nqgeleni Police cells, he was detained for 5 days, and the cells were dirty, smelly, principally because of proximity to a blocked toilet. The plaintiff also suffered at the hands of cell mates who ill-treated him. He was awarded damages in the sum of R560 000.00 for arrest and detention.

[35.2] In *Hoco v Mtekwana and Another* 2010 (2) SACR 536 (ECP) the plaintiff was arrested without a warrant and detained for almost four days. He was awarded compensation of R80 000.00.

[35.3] In *Goliath v Minister of Police*¹⁶, the appeal court found the arresting officer to have arrested the appellant without ascertaining the severity of the complainant's injuries including the nature of the injuries sustained and without any information upon which he could reasonably have suspected that the appellant had inflicted a dangerous wound upon the Respondent. This is after the arresting officer had arrested the appellant without physically examining the wounds. The arrest was held to be unlawful and so was the detention which lasted for 38 hours. It was the appellant's first experience of being in custody. The court awarded R50 000.00 damages as compensation for both the unlawful arrest and detention.

¹⁶ (ECG) unreported case no CA 107/2017 of 14 November 2017

[36] Accordingly, in arriving at the question of an appropriate quantum, I have had to consider the above circumstances including the personal circumstances of the plaintiff, the absence of evidence linking him to the crime, the humiliation he suffered as a result of his arrest, the trauma he went through as this was his first experience of being in custody and the fact that he was deprived of his liberty as he was prevented by his arrest and detention from spending Good Friday and Easter holidays with his family following his arrest on Thursday, the 2 April 2015. In the premises and having regard to previous awards, I am satisfied that an award R480 000.00 would be fair and appropriate in the circumstances of this case.

[37] The costs shall follow the result.

Order

[38] In the result, I make the following order:

1. The plaintiff's arrest on 2 April 2015 is declared unlawful.
2. The plaintiff's detention from 2 April until April 2015 is declared unlawful.
3. The defendant is directed to pay the plaintiff damages in the sum of R480 000.00 consequent upon the arrest and detention together with interest thereon at the prescribed legal rate from the date of judgment.

4. The defendant shall pay the plaintiff's costs of suit together with interest there on payable from a date 14 days from the date of the *allocutor* to the date of final payment.

B NDAMASE

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF : M. Siwahla

INSTRUCTED BY : Poyo Siwahla Incorporated

COUNSEL FOR DEFENDANT : M Mkhosana

INSTRUCTED BY : The State Attorney

Mthatha

HEARD ON : 05 DECEMBER 2018

DELIVERED ON : 26 FEBRUARY 2019