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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Date of hearing: 15 and 16 March 2017

Date of judgment: 24 March 2017

Case number 52293/2015

Not reportable

Not of interest to other judges

Revised.

In the matter between:

MICHAEL DLAMINI

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL COMMISSIONER OF THE SAPS

Second Defendant

JUDGMENT

BRENNER, AJ:

1. The plaintiff, Michael Dlamini ("Dlamini"), sued the Minister of Police as first defendant, ("the Minister"), and the National Commissioner of the South African Police Services ("the SAPS"), ("the Commissioner"), as second defendant, for damages of R3,5 million for unlawful arrest, and R3,5 million for unlawful detention.

2. The arrest occurred on 21 May 2013¹⁸ at 10h05 at the Virginia police station, in the Free State province, without warrant. Dlamini was detained at the police holding cells until 08h00 on 23 May 2013, when he made his first appearance in the Virginia Regional Court.
3. The defendants admit that the arrest was without warrant, but aver that the arrest was lawful, in that a reasonable suspicion was formed that Dlamini had committed rape, an offence listed in schedule 1 to the Criminal Procedure Act, 51 of 1977 ("the CPA").
4. Dlamini remained in custody at a local prison from 23 May 2013 until about 19 or 20 May 2015, when he was released after being acquitted on trial. He had applied for bail, but his application was refused.
5. In amplification of their denial that the arrest and detention were unlawful, the defendants aver in their plea that:
 - a. On 17 May 2013, a charge of assault was preferred against him by the same complainant in the rape case (N. S. ("S.")), and this case was pending when Dlamini appeared in Court on the rape charge;
 - b. S. had previously obtained a protection order against Dlamini in terms of the Domestic Violence Act, 116 of 1998;
 - c. On the evening of 20 May 2013, Dlamini had phoned S. to threaten her with death;
 - d. On 23 May 2013, he had sent her an sms threatening to kill her and her son;
 - e. He had previous convictions relevant to the rape offence, as well as the pending charge of assault.

6. Dlamini's case was based on his arrest on 21 May 2013 and subsequent detention for almost two years pending the rape case. But he had only cited the Minister and the Commissioner of Police, and not the NDPP or the Department of Justice. His case had to be confined to the arrest on 21 May 2013. He had made no claim for malicious prosecution by the prosecutor or unlawful detention by the Court.
7. In argument post the hearing, Counsel for Dlamini conceded that the damages claim against either defendant could not cover the two year period during which he was in custody. He contended, however, that the damages claim should be extended beyond the two days in the police cells in Virginia, to the eventual date of hearing of his bail application. This because the investigating officer should have made himself available on the date of the first appearance in Court on 23 May 2013 to dispose of the bail application on this date. Instead, he failed to do so and the hearing occurred about one week afterwards. This issue is traversed below.
8. Dlamini was arrested without warrant, and this occurred in terms of Section 40(1)(b) of the CPA. The lawfulness of the arrest being the fundamental issue, the defendants accepted the onus of proof. Captain Barend Strydom ("Strydom") testified on their behalf and Dlamini testified on his own behalf.
9. The gist of Strydom's evidence is as follows. Strydom had been employed by the SAPS for 29 years, since 21 December 1987, and was appointed a Captain on 1 October 2000. On 20 May 2013, he was on standby duty for the Virginia Detective Service, having been stationed at this unit since June 2006.
10. He received a phone call at about 18h00 on 20 May 2013, from an official at the Virginia Community Service Centre, the new appellation for the Virginia police station. He was informed of the opening of a rape case at the station. When he arrived there, he perused the contents of the docket which at that stage contained only the complaint affidavit of complainant S. He testified that he read through her affidavit and satisfied himself that all the necessary elements of a rape offence had been mentioned by her. He met S., who was present at the station.

11. The contents of S.'s affidavit are quoted verbatim below:¹⁸

"I N. S. states under oath in English

I am an Indian African female age 34 10.....residing at no [...] B. Street Virginia with cell....and I am unemployed.

On Monday at about 12:00 on 2013-05-20 I went to fetch my stuff at no [...] K. where I was staying. I was working for Visayani Security and we were staying at the same company house with my ex- boyfriend.

On the same day at about 15:00 I received a message from my ex- boyfriend via Mxit that I took his belt by mistake. I checked the belt inside my bags and found it, so we agreed on meeting at the Methodist church in Kommando Street so that I can give him his belt. We meet there at the Methodist Church and before I even gave him his belt he asked to talk to me about something else.

Then he asked me to walk with him through the street as we doesn't want his Manager to see him with me. and we walked down the street on Kommando until the T-junction with Highlands Avenue. We stand next to the road and he asked me to sit there at the empty house at Highlands Avenue. We went and sit outside that house but at the back of it and we were still talking.

After that he told me that he wants to sleep with me for the last time and I told him that he knows that we are no longer together. I will never do that and I am not that kind of a person who sleeps on the empty houses with a man. He then pushed me against the wall and I was fighting back until I fell on the ground. I told him to leave me then he jumped on top of me. He puts his arm on my throat and I couldn't scream and he lifted up my skirt and shift my panty and he put his penis inside my vagina. I tried to push him away then he removed his penis from my vagina and put it in my anus and it was very painful. Before he put his penis in my vagina he was wearing a condom then when he forced it in the anus. The condom burst and I still tried to push him then he removed the penis from the anus back to the vagina then he sperms without a condom.

After that he stood up and left me there. The suspect is my ex- boyfriend Michael Dlamini residing at no [...] K. Street Virginia and he is working at Visayani Security. There are no witnesses in this incident as we were only two at that time. And I am two months pregnant. After the suspect raped me he left the condom hanging in my vagina and I removed it and took it to the police. And I did not give anyone permission to rape

me and I request further police investigation and prosecution."

12. Strydom introduced himself to S. and interviewed her. He said that she was in a state of shock, and was emotional and crying a lot. She appeared to be depressed. She informed him that she had preferred an assault charge against Dlamini a few days before the alleged rape. He did not make further enquiries about the assault charge, nor did he attempt to access the assault docket while at the police station. S. did not mention anything about the assault charge being withdrawn. Strydom conceded that it made no sense that S., after her alleged assault a few days before the rape, had still seen fit to accompany Dlamini to the back of an empty house, alone, to speak to him.
13. Considering that S. referred to Dlamini as her "ex-boyfriend", he could not recall asking S. pertinent questions as to when she broke up with Dlamini and when they had last had consensual sex with one another. He consistently maintained that in his view, the contents of S.'s affidavit and his observations of her state of trauma were sufficient grounds to arrest Dlamini and that no further enquiries were necessary.
14. Strydom contacted a standby member of the Family, Child and Sex Unit ("the FCS") to arrange for S. to be medically examined. He handed her over to the investigating officer, Ishmael Sehume ("Sehume" or "the IO"). Later on in his office, he completed a written report containing details of the complaint. This report indicated that he had observed no injuries on S.. Strydom confirmed this fact in evidence.
15. Strydom said that he was convinced from S.'s demeanour that she was a victim of rape. He motivated his suspicion by referring to a number of theoretical courses he had attended, in 1991, 2001, 2003, 2007 and 2012, on psychologically motivated crimes. He testified that he had never encountered a situation where a rape complainant had not actually been raped.
16. On the same evening, Strydom said he learnt that Dlamini was employed as a security guard by Hannes Potgieter ("Potgieter"). Strydom knew Potgieter. He

phoned him to inform him of the rape charge against Dlamini. He asked where he could find him. Potgieter declined¹⁸ to disclose Dlamini's whereabouts because Dlamini was on guard duty and Potgieter had no relief guard to substitute for Dlamini. Potgieter informed Strydom that he would bring Dlamini to the police station the following morning after Dlamini had finished guard duty for the night.

17. At about 08h00 on 21 May 2013, Potgieter and Dlamini arrived at the station. Strydom said he read his section 35 constitutional rights to Dlamini and that he told Dlamini he was going to be arrested on a rape charge. He testified that Dlamini gave no explanation about the charge of rape nor did he proffer an alibi. Strydom said that he was not informed of the events of the morning of 20 May 2013, when S.'s personal effects were removed from Dlamini's room, in the presence of Potgieter. He contacted an FCS officer to apprise him of the situation. He thereupon arrested Dlamini and took him to the police cells. The police records indicate that this occurred at 10h05. This was the last time that Strydom had any dealings with Dlamini. He was not made aware of the outcome of the case.

18. Strydom arrested Dlamini on the strength of S.'s affidavit. At the time of arrest, no warning statement had been taken from Dlamini. Nor did Strydom have a form J88 or medical report of any nature to record the medical examination of S. It merits mention that the J88 form was not discovered by the defendants and was not contained in the docket discovered by them. I was informed by the defendants that the form had been mislaid. Dlamini did not have a copy.

19. One day after his arrest, that is, at 15h08 on 22 May 2013, Dlamini signed a warning statement. The contents read:

"My girlfriend N. went to open a rape case against me and to tell the truth I have not been with the lady and even the scene she referred to is total lie. N. was fired at Visayani Security and she did open a case of assault common against me. as such she was told to vacate the premises which the company hires for us to stay. I have at no stage had sexual intercourse at that given time."

20. Dlamini testified that he and S. had been in a relationship for about one year and four months before they had broken up on 19 May 2013. They had lived together, with her ten year old son, in a room at a house provided by Vusayani Security in Virginia for some of its employees. About six people lived in the house at the time of his arrest. He asserted that he had neither raped nor assaulted S., as alleged by her.
21. He had caught S. in the company of another man, in Virginia, on both 16 and 17 May 2013. Following an argument about this on 17 May 2013, S. had preferred a charge of assault against him on 17 May 2013. He denied having assaulted her. He testified that she would verbally abuse him and scream at him when they argued but that he never laid a hand on her. He was arrested that same day and went to court on 19 May 2013, when he was released on warning and told to return to court on a date he could not recall. However, on the same day, he was given a protection order to sign. He signed the document but was not given a copy. This document was not produced in evidence. S. informed him that the charge had been withdrawn against him and he believed her.
22. Although she said she had withdrawn the charge, he had terminated their relationship on the afternoon of 19 May 2013. His reasons for terminating relations were various. He would give money to S. to pay accounts and she would fail to pay them. He had caught her in the company of other men. He had secured employment for her at Vusayani Security as a guard. She had no respect for her work and would often abandon her post. Potgieter had fired her in mid April 2013. She had continued to live with Dlamini with his blessing as it was the policy of the firm to permit partners to live with personnel at the house.
23. He told S. that she should vacate their room the following day. She appeared to agree with him that their relationship should come to an end, and matters appeared amicable. She said she and her son would leave the following morning for Stanger, to live with her parents. That same afternoon, on their return to his room, they had consensual sex, during which he used a condom. He normally used a condom when they had sex. When this happened, either one of them

would remove it and flush it down the toilet. On this afternoon, he did not remove the condom.

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24. Dlamini was on guard duty from 18h00 on 19 May 2013 until 06h00 on 20 May 2013. On returning home, he had asked Potgieter to accompany him to the room to ensure that S. vacated it without incident. He wanted Potgieter to be a witness in case another charge of assault was laid against him. On arrival at about 07h00, S. was not there and her personal effects were still in the room. Both Potgieter and Dlamini removed her effects and placed them outside the house. Potgieter left and Dlamini went to sleep.
25. A few hours later, S. arrived at the house. She knocked on the window of the bedroom and swore at Dlamini, complaining about his having removed her effects from their bedroom. He refused to let her into the house. At about 10h00 or 11h00 she arrived with some policemen, having informed them that she had been unlawfully evicted. Dlamini asked one of the policemen to phone Potgieter. After doing this, the policeman told S. that she no longer had any right to stay in the house and that if she persisted, a charge of trespass could be laid against her.
26. The police left. S. entered the house and stole two pairs of jeans, an iron and a kettle which belonged to him. He did not contemplate laying a charge of theft against her. She told him that she was going to show him who she was, and left with her son and her personal goods. Dlamini said that this was the last time he saw her or spoke to her. This is presumably other than when he saw her in court during the rape trial.
27. Dlamini denied having made any threatening calls to S. or sending her threatening messages after his arrest on 21 May 2013. His cellphone had been removed from his possession on his arrest.
28. At about 22h00 on 20 May 2013, Potgieter phoned him to tell him of the rape charge by S. and to arrange to take him to the police station the following morning. They arrived at the station together at about 09h00 on 21 May 2013. They proceeded to Strydom's office where the latter informed them of the rape

case. Dlamini testified that Potgieter explained to Strydom what had occurred on the morning of 20 May 2013, that Potgieter had assisted with the removal of S.'s goods from the house, to safeguard her laying another assault charge against Dlamini.

29. Dlamini testified that he told Strydom that he did not assault S. nor did he rape her. Strydom told him to give his explanation to the IO. Dlamini said Potgieter complained about why Strydom still intended to lock up Dlamini despite what they had told him. Strydom replied that "there was nothing" he could do.

30. Dlamini's first appearance in Court was at about 08h00 on 23 May 2013. On this date, the case was postponed for about seven days for a bail hearing, and that day he was transferred to the local prison. Bail was eventually applied for and refused. The case went to trial. After S., another witness whose name he could not recall, and a forensic nurse, and Dlamini had given evidence, Dlamini was acquitted and released on 19 or 20 May 2013. There was never a trial concerning the assault charge preferred on 17 May 2013.

31. In the police docket, there is a typed note above the signature of the prosecutor dated 20 May 2013 which reads:

"Accused found not guilty and discharged.

Given benefit of the doubt.

Court held that complainant was not a credible witness."

32. Dlamini did not return to his former employment after his release. He resorted to performing piece work such as driving and gardening.

33. The grounds upon which Strydom harboured his suspicion of the commission of rape against S. were not reasonable. Strydom rested his laurels on the various theoretical courses he had attended which he appeared to believe had qualified him to test the veracity of a rape complainant's version by her statement and her demeanour. These factors simpliciter seemed to him to be definitive of the enquiry. He had noted no visible injuries on S. despite her allegations that Dlamini

had held her by her throat, and that she had been forcefully raped, twice vaginally and once anally. Considering this¹⁸ objective fact, he could and should have awaited the outcome of the medical examination before contemplating arrest. The medical report would have assisted in the independent determination of whether S. had sustained injuries consistent with vaginal and anal rape.

34. He should have enquired about the circumstances which had culminated in their breakup, and when this had taken place, to satisfy himself that there was no ulterior motive behind the charge. He should have had regard to the contents of the assault docket. By that stage, a medical report would probably have been obtained to verify S.'s alleged injuries in the assault.
35. Strydom and Dlamini both confirmed that Potgieter accompanied Dlamini to the station on the morning of the arrest. Strydom said they arrived at 08h00 while Dlamini said it was 09h00. The arrest time is documented in the police records as 10h05. Even on Dlamini's version, there was a window of at least one hour before he was arrested by Strydom.
36. Counsel for Dlamini did not submit to Strydom that Dlamini and Potgieter had explained the events of 20 May 2013 fully to Strydom prior to the arrest. When Dlamini testified about his and Potgieter's conversation with Strydom, Counsel for the defendants did not object.
37. Nevertheless, I believe that I can safely draw the inference that some conversation concerning the eviction of S. on the previous morning probably occurred, such as would have elicited some circumspection in the mind of an arresting officer as to the complainant's motives. But Strydom probably closed his mind to this information.
38. Even assuming that no such conversation occurred, it is plain that Strydom had already developed a misplaced confirmatory bias against Dlamini by the time of his arrest, not even awaiting the outcome of the medical examination for some form of independent corroboration of physical injuries consistent with vaginal and anal rape.

39. Strydom conceded in court that it made no sense that S., after her alleged assault a few days before the rape, had still seen fit to accompany Dlamini to the back of an empty house, alone, to speak to him. On the inherent probabilities, she would have been fearful of going to any private place alone with Dlamini after he had previously assaulted her three days beforehand.
40. Strydom did not testify that Dlamini had any previous convictions. The only criminal case he knew about was the one of the pending assault on S.. No SAP 69 form or any other proof was tendered by the defendants to support this. The allegation by the defendants that Dlamini had previous convictions consistent with the offences of rape and assault was unproven and accordingly vexatious.
41. Dlamini proved to be an unflappable witness. He was credible, honest and consistent in his version in all material respects, and remained so despite rigorous cross examination. His recollection of events was clear and coherent and he presented as a genuine and sincere witness. It was undisputed that, at the time of his arrest, he was employed and had a fixed address. He volunteered to go to the police station.
42. Dlamini said he made exculpatory statements to Strydom before his arrest. I find this to be more probable than not. Moreover, it is also highly probable that Potgieter corroborated his version. Strydom and Potgieter knew one another. There was at least one hour available for this to have occurred before Strydom arrested Dlamini. The statements about the events which preceded the preferring of the rape charge should at least have given Strydom pause to question the motives of S.. Significantly, Dlamini gave an exculpatory statement in his warning statement the following day.
43. In the result, Strydom's arrest of Dlamini on 21 May 2013 was unlawful, and Dlamini's subsequent detention until 08h00 on 23 May 2013 was unlawful. Hereafter, whatever occurred in Court and in regard to the prosecution of the case was out of the control of the police.

44. The Minister cannot be held accountable for any events post 08h00 on 23 May 2013. The delay in the pursuit of the ¹⁸ bail application is not attributable to the police but to the court system. Neither the NDPP nor the Minister of Justice was a party to this action.

45. As was stated in **Minister of Police v du Plessis 2014 C7K6I QOD 1 SCA at paragraph 28:**

"Once an arrestee is brought before a court, in terms of s50 of the Criminal Procedure Act 51 of 1977 (CPA), the police's authority to detain, inherent in the power of arrest, is exhausted.... As pointed out by Campbell AJ in the court below, before the court makes a decision on the continued detention of an arrested person comes the decision of the prosecutor to charge such a person."

46. The cause of action in the arrest is based on the action iniuriarum, for which general damages may be claimed. Special damages may be claimed under the lex Aquilia. In casu, the arrest occurred under section 40(1)(b) of the CPA. The onus is on the Minister to prove the lawfulness of the arrest. Section 40(1)(b) provides:

*"40(1) A peace officer may without warrant arrest any person-
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."*

47. Schedule 1 to the CPA includes, inter alia:

"Rape, or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law etc, respectively."

48. In **Hiemstra's Criminal Procedure Lexis Nexi's Issue 9 at 57**, the following is

stated:

"In Duncan v Minister of Law and Order 1986 { 2} SA 805 CA) @ 818 F-

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the jurisdictional facts which must exist before the power conferred by section 40 (1) (b) may be invoked, were set out as follows (1) the arrestee must be a peace officer, (2) the peace officer must entertain a suspicion, (3) it must be a suspicion that the arrestee committed a Schedule 1 offence (other than escaping) and (4) that suspicion must rest on reasonable grounds.

49. There is no fifth jurisdictional requirement for the arresting officer to consider whether there are less invasive options to bring the suspect before Court. Vide **Minister of Safety and Security v Sekhoto and Another 2011 (1) SACP 315 (SCA) par 22**, where the SCA overruled the finding that such requirement existed in **Louw and Another v Minister of Safety and Security and Others 2006 C2) SACP 1 78 T at 1 86a-187e.**

50. Arrest without warrant was summarised in **Sekhoto** as follows (vide **Hiemstra op cit at 5-8**):

- (i) the jurisdictional prerequisites for S 40 (1) (b) must be present;
- (ii) the arrester must be aware that he or she has a discretion to arrest;
- (iii) the arrester must exercise that discretion with reference to the facts;
- (iv) there is no jurisdictional requirement that the investigating officer should consider using a less drastic measure than arrest to bring the suspect before court.

51. "Reasonable grounds" are to be interpreted objectively - Vide **Duncan** supra at 814 D Per **Hiemstra OD cit 5-8**:

"... the section requires suspicion, not certainty. Such suspicion must, however, make sense, otherwise it is frivolous or arbitrary and not reasonable. There must be evidence that the arresting officer formed a

*suspicion which is objectively sustainable. See **Ralekwa v Minister of Safety and Security 2004 (1)**¹⁸ **SACR 131 T par 1.**"*

52. I refer to the case of **Olivier v Minister of Safety and Security and another 2008 (2) SACR 387 WLD.** The following occurred: Olivier, a superintendent in the SAPS based in Heidelberg, was arrested without warrant and detained for six and one half hours on a charge of theft alternatively fraud. The charges were later withdrawn. Another superintendent (who had received a call from an unidentified person) had told the arresting officer, Senior Superintendent Mokoena ("Mokoena"), that Olivier had retained certain cigarettes, alcohol, clothing and shoes seized in another case, instead of incinerating them or throwing them down a mine shaft, which was their standard modus operandi. Olivier had retained five cartons of cigarettes which lay openly on his desk in his office but explained to Mokoena that he had done so because he had to check with the area commissioner about the manner in which they were to be disposed of.

53. Following Olivier's arrest, inspections of his office and home revealed no evidence of his possession of these goods. He was released on bail at 20h00 that night. Following a damages claim for unlawful arrest, he was awarded damages of R50 000,00.

54. At p395f of **Olivier**, the Court remarked:

"The plaintiff gave an exculpatory explanation which should have alerted the second defendant (Mokoena) to the real possibility that the plaintiff at the time lacked the requisite mens rea for theft or fraud. Indeed, the second defendant seemed to know very little of the requirements of s40(1)(b) where a peace officer effects an arrest without warrant."

55. The Court held that the enquiry must be decided on its own facts but enunciated certain general principles at p398 d-f:

"This entails that the adjudicator of fact should look at the prevailing circumstances at the time when the arrest was made and ask himself the

question "was the arrest of the accused in the circumstances of the case, having regard to flight risk, permanence of employment and residence, co-operation on the part of the accused, his standing in the community or amongst his peers, the strength or weakness of the case, and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain objectives of the police investigation?" The interests of justice may also be a factor. "

56. In **The Minister of Safety and Security v Tyulu 2009 ZASCA 55 SCA dated 27 May 2009**, a 48 year old magistrate was arrested on suspicion of being drunk in public when he walked to a nearby filling station to buy a soft drink. The police had been on the lookout for a person whom a witness, one Hendricks, had identified as being drunk while driving a vehicle. Tyulu denied being drunk while walking to the filling station and denied driving the vehicle at all.
57. A medical report indicated that Tyulu's blood alcohol content was 0,23g per 100 millilitres, more than twice the legally permissible limit. Tyulu admitted having consumed six beers at home shortly before going to the petrol station. The charge that Tyulu was drunk in public was under section 154(1)(c) of the Liquor Act 27 of 1989 and section 40(1)(a) of the CPA was invoked. The drunken driving offence was in terms of section 40(1)(f) of the CPA. Hendricks eventually conceded that he was unsure whether the driver of the vehicle was indeed drunk.
58. On appeal it was found that there was no reliable evidence to prove that Tyulu was found to have been drunk at all. The DPP declined to prosecute. Tyulu was released after 15 minutes in detention. He was awarded damages of R15 000,00 on appeal.
59. In **Minister of Safety and Security and Jonathan Daniels v Johannes Francois Swart 2012 ZASCA 16 SCA 22 March 2010**, Johannes Swart ("Swart"), a sergeant of 16 years' standing, was arrested without warrant, under section 40(1)(b) of the CPA, by a co-officer, constable Jonathan Daniels ("Daniels"), from the same police station at De Doorns, on a suspicion of driving a motor vehicle on a public road while under the influence of intoxicating liquor. He

spent four and one half hours in detention. The charge against Swart was withdrawn the following day after a blood test¹⁸ revealed that his blood alcohol limit was below the permissible limit.

60. The SCA found that the only basis for Swart's arrest was the evidence from Daniels that he smelt of alcohol and that Swart's vehicle had left the road and landed in a ditch. There was no evidence that he was unsteady on his feet, that his speech was slurred that he could not walk in a straight line or that his eyes were bloodshot. On the contrary, Swart appeared to have been in full control of his senses and spoke in a friendly and coherent manner. See paragraphs 21 and 22 of the judgment. His damages award of R50 000,00 was confirmed on appeal.

61. I turn to the facts in this case. I am mindful of the premise that the suspicion must be objectively reasonable but does not require certainty. In **Shabaan Bin Hussein and others v Chong Fook Kam and others 1969 3 All ER 1626 PC at 1630**, the Privy Council said:

"suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, I suspect but I cannot prove. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."

62. The critical question to be asked is whether Strydom had enough evidence at his disposal on 21 May 2013 to create reasonable grounds for arrest without warrant, which grounds were objectively sustainable.

63. As demonstrated by the facts in the cases of **Tyulu, Olivier** and **Swart**, the grounds for arrest without warrant were tenuous at best, with a lack of reliable, independent corroboration in most instances.

64. In casu, the same situation prevailed, in the sense that Strydom unreasonably relied on the affidavit of complainant S. and on his observations of her purported traumatic emotional state as sufficient grounds for arrest. This despite indications of the absence of any ostensible physical injuries, which patently warranted an

independent medical investigation. This despite the inconsistency between her alleged assault by Dlamini three days before, and her decision to go to a vacant house alone with him after that, and despite the probability that Dlamini and Potgieter provided him with an ulterior motive for the charge.

65. For the reasons adumbrated above, the arrest of Dlamini on 21 May 2013 and his detention until 23 May 2013 was unlawful and his claim for damages against the Minister for this period is legally actionable.

66. The inclusion of the Commissioner was superfluous, but I have resolved not to grant any costs order in this regard.

67. **In the case of Minister of Safety and Security v Scott SCA case number 969/2013.** the plaintiff was awarded damages in the amount of R30 000,00 following his unlawful arrest and detention for nine hours. In the instant case, Dlamini was in custody for about two days. An award of R35 000,00 per day for 21 and 22 May 2013 is fair and reasonable in the given circumstances.

68. Defendants' Counsel did not raise the issue of an order for Magistrates' Court costs. Lawyers should be sanctioned against the launch of litigation in the High Court for cases which fall squarely within the jurisdiction of the Magistrates' Courts.

69. In this case, the defendants' defence was untenable and without factual or legal foundation. It was vexatious in the manner in which allegations were made but not proved against the plaintiff, such as those of threatening communications from Dlamini to S., and any previous convictions on the part of Dlamini. A punitive award of costs is justified.

70. The following order is granted:

- a. The first defendant is directed to pay to the plaintiff the sum of R70 000,00;
- b. The first defendant is directed to pay the plaintiff's costs on the attorney and client scale.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

23 March 2017

Appearances

Counsel for the Plaintiff: Advocate P Ngutshana

Instructed by: M A Maoba Attorneys

Counsel for the Defendants: Advocate M D Mlamonyane

Instructed by: The State Attorney