

NOT REPORTABLE

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

Case no. 647/2013

In the matter between

KHAYA MNENO

Plaintiff

versus

MINISTER OF POLICE

Defendant

JUDGMENT

HARTLE J

[1] The plaintiff claims damages consequent upon his arrest and detention by a police officer acting within the course and scope of his employment with the defendant at East London on 24 April 2013.

[2] The particulars of claim allege that on the date in question at about 20h00 he was watching television at his home when a police officer by the name of Captain

Teto confronted him there and accused him of “robbery of a cellphone”. He was in fact arrested for robbery and taken to the Vulindlela Police Station in Mdantsane where he was held for “120 hours” (sic), but on a charge of assault with intent to do grievous bodily harm (“assault GBH”) instead. The arrest having been effected on a Wednesday evening, he was only taken to a magistrate’s court on the ensuing Monday. There he waited until 16h00 in anticipation of appearing, but was released “without being formally charged”, as there was no docket before court.

[3] The plaintiff pleads that the conduct of Captain Teto was “unlawful, wrongful and malicious” in that he was arrested while there was “no reasonable or probable cause”, and because the arrest was effected without a warrant.¹

[4] The defendant admitted the arrest (albeit an hour later than the time pleaded by the plaintiff), as well as the fact that he was arrested by generic members of the South African Police Service (no one in particular was identified on the pleadings) who acted in pursuance of their duties and within the scope of their employment as such. They claimed however that the arrest and subsequent detention of the plaintiff were lawful in that those responsible for arresting him were authorized to do so on the basis that “members of the SAPS are permitted to arrest anyone implicated in an offence listed under Schedule 1 with or without a warrant of

¹ On the pleadings no distinction was drawn between the two separate and distinct causes of action of wrongful arrest and malicious arrest. (See *Tödt v Ipser* 1993 (3) SA 577 (A) at 587 A-C.) The trial was conducted as if the cause of action related to unlawful arrest and detention only, but in heads of argument filed on the plaintiff’s behalf at the conclusion of the trial it was averred that “the crux of (his) case rests squarely on the *malicious* arrest and detention by Captain Thetho on the 24th to the 29th April 2013”. Malicious arrest was neither properly pleaded nor proven. It was also suggested in argument that the discretion to arrest was exercised in an improper manner because the arrest was unnecessary and a less drastic method of securing his attendance at court could have been employed, but this aspect was never pertinently raised as an issue on the pleadings. (See in this regard *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) at par [57]) In this judgment I have proceeded on the premise that the claim before me is one strictly for unlawful arrest and detention.

arrest” and that the plaintiff had indeed been accused of assault with intent to do grievous bodily harm, which is an offence listed under Schedule 1.²

[5] No specific provision of section 40 (1) of the Criminal Procedure Act (the “CPA”)³ was relied upon in the pleadings as constituting the justification for the arrest without a warrant although this was evidently the basis upon which the defence was conducted at the trial. How the defendant purported to legitimize the arrest on the pleadings however is set forth in the following terms in his plea:

“The Defendants (sic) deny the contents of this paragraph.⁴ In amplification thereof, the Defendants⁵ plead that the Plaintiff was arrested on the 24th April 2013 at about 21:00 on the following grounds:

- a. the Plaintiff was pointed out by the complainant Zikhona Goniwe as the suspect in the assault with intent to do grievous bodily harm in the case that was registered at Vulindlela Police Station as per CAS 115/04/2013,
- b. that the Plaintiff had inflicted injury in the form of bruised upper and lower eyelid and sub conjunctiva haemorrhage of the right eye of the complainant in the case,
- c. that the Plaintiff and the complainant were lovers at the time,
- d. that such act of violence was meted out by the Plaintiff to the complainant on account of jealousy,

² Assault grievous bodily harm is not listed as an offence. However “assault, when a dangerous wound is inflicted” is such a listed offence.

³ No. 51 of 1977.

⁴ The allegation under denial in paragraph 4 of the particulars of claim read as follows:

“On or about the 24th April 2013 and at or around 20h00, the Plaintiff was watching television at his home, when a police officer by the name of Captain Thetho whose full and further particulars are unknown to the Plaintiff, entered and demanded to see Plaintiff and accused him of robbery of a cell phone.” Paragraph 5 of the particulars of claim goes on further to allege that he was then arrested for robbery. To this paragraph the defendant pleaded a bare denial. The “amplification” referred to in response to the particulars of claim however no doubt purports to justify the arrest, albeit this is only dealt with in the next paragraph 5. The defendant’s plea was in my view excipiable on several bases, but no exception was taken to it by the plaintiff.

⁵ Only the Minister of Police was cited as a defendant.

- e. that the members of the South African Police Service, “the SAPS”, had a duty to arrest anyone accused of assault with intent to do grievous bodily harm, with or without a warrant of arrest,
- f. that such an offence of assault with intent to do grievous bodily harm is an offence listed under Schedule 1 and therefore, members of the SAPS are permitted to arrest anyone implicated in an offence listed under Schedule 1 with or without a warrant of arrest,
- g. that members of the SAPS carried out the arrest of the Plaintiff on the date and time given here above, without a warrant, and;
- h. that in the nature of the fact that the Plaintiff was regarded to be dangerous, (his) arrest was carried out at night, out of public view.”⁶

[6] In response to the averment that the conduct on the part of the police officer arresting the plaintiff was “unlawful, wrongful and malicious in that the plaintiff was arrested while there was no reasonable or probable cause”, the defendant pleaded as follows:

- “a. there was evidence in the hands of the members of the SAPS that were involved in the arrest of the Plaintiff that he was in fact the suspect in the docket that they were investigating, Vulindlela CAS 115/04/2013,
- b. that it was in fact the complainant in the case docket that pointed out the Plaintiff to the members of the SAPS that effected the arrest,
- c. that the complainant could have not been mistaken about the identity of the Plaintiff as she and the Plaintiff were lovers at the time of the alleged assault, and;

⁶ Since the defendant referred to Schedule 1, I suppose it can reasonably be inferred that section 40(1)(b) of the CPA is the applicable statutory provision on which reliance was intended to be placed. It is notable however that nothing is pleaded about any suspicion, reasonable or otherwise.

- d. that on the contrary, the arrest on the person of the Plaintiff was not unlawful and/or malicious and members of the SAPS that effected the arrest had reasonable cause to arrest the Plaintiff.”⁷

[7] The “issues” recognized between the parties were narrowed down pursuant to a pre-trial conference and recorded in a pre-trial minute, the relevant extract of which provides as follows:

“7. The plaintiff will require the following admission(s) from the defendant:

7.1 That the plaintiff was; on the 24th April 2013 at 20H00; arrested by a police officer, Captain Thetho; for robbery of a cellphone,

DEFENDANT DENIES THAT AND AVERS THAT THE PLAINTIFF WAS ARRESTED BY CPT THETHO ON ACCOUNT OF ASSAULT GBH ON THE PERSON OF ZIKHONA GONIWE⁸ UNDER CASE NUMBER 115/13.⁹

7.2

7.3 That the charge was later changed to assault with intent to do grievous bodily harm.

NO. THERE WAS NO ALTERATION WITH THE CHARGE, IT WAS ALWAYS ASSAULT GBH.

7.4 That the plaintiff was detained for 120 hours as he was detained from Wednesday 24th April 2013 until Monday 01st May 2013 at 16h00.

⁷ These averments seem to suggest that the defendant has missed the point about the issue being whether Captain Teto entertained a reasonable suspicion that the plaintiff had committed a Schedule 1 offence. There was never any issue regarding the identity of the plaintiff.

⁸ Evidently the substance of what was denied is both the time of arrest and that the plaintiff was arrested for an offence of robbery as opposed to assault with intent to do grievous bodily harm. This is probably what the defendant meant to deny in response to paragraph 4 of the particulars of claim and not the fact of the arrest.

⁹ This purports to be the CAS number of the docket at the Vulindlela Police Station, namely 115/04/2013.

NO PLAINTIFF WAS NOT DETAINED FOR 120 HOURS AS HE WAS ARRESTED ON 21:20 AND NOT 20:00 AS ALLEGED BY PLAINTIFF.”¹⁰

[8] At a subsequent pre-trial conference the following questions were raised by the defendant, which elicited the corresponding replies recorded below:

“1. The plaintiff is aware of the complaint of Assault with inten(t) to do Grievous bodily harm registered against him by his girlfriend or erstwhile girlfriend, Zikhona Goniwe;

PLAINTIFF ADMITS THIS. PLAINTIFF STATES, HOWEVER, THAT AT THE TIME OF ARREST, HE WAS INFORMED THAT THE CHARGE WAS THAT OF ROBBERY AND AT THE POLICE STATION THE SAID CHARGE WAS CHANGED TO THAT OF ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM.

2. The plaintiff is aware of the fact that the case that was registered by Zikhona Goniwe is still pending before Mdantsane Magistrate Court;

THE PLAINTIFF DENIES THIS AND AVERS THAT THE SAID MATTER WAS FINALISED.¹¹

3.

4.

5. The plaintiff admits or denies that the case of Assault GBH constitutes an offence, which peace officers are empowered to arrest on, with or without a warrant, and;

¹⁰ The defendant baldly denied the allegation in the plaintiff’s particulars of claim that he had been detained subsequent to his arrest but it is apparent from this recordal that the fact of the detention itself was not denied, only the duration thereof. (As an aside it is to be noted that even if the arrest had happened an hour later than 20h00, the duration of the plaintiff’s detention does not equate to 120 hours but to 115.) From the evidence adduced and the manner in which the trial was conducted the defendant sought to rely on the provisions of section 50 of the CPA to justify the plaintiff’s detention

¹¹ It emerged from the evidence that subsequent to his arrest and automatic discharge at 16h00 on the Monday, the plaintiff was summoned on the same charge again. Upon his later appearance he pleaded guilty ostensibly to the same charge of assault with intent to do grievous bodily harm.

PLAINTIFF IS A LAYMAN, HE DOES NOT KNOW NOR ADMIT THESE ALLEGATIONS.¹²

6. The plaintiff admits or denies that the injuries that Zikhona Goniwe allegedly sustained as a result of the assault on her person are as reflected on the J88 medical form.

ADMITTED BY THE PLAINTIFF.”

[9] At the commencement of the trial the parties agreed that the contents of the Vulindlela Police docket and other extracts from the police records be admitted into evidence. The following aspects are of relevance:

- 9.1 the docket was opened at the Vulindlela Police Station under CAS No. 115/04/2013 which records a complaint at the behest of the complainant, Zikhona Goniwe, of “assault grievous bodily harm” committed at 8am on 15 April 2013 at 2 Soga Street, Mdantsane, East London;
- 9.2 the docket appears to have been disposed of under the rubric “withdrawn” on a date which is not legible on the face of it;¹³
- 9.3 on 19 August 2013 the investigating officer, Sergeant Mtanda, deposed to an affidavit in the docket in which she in effect suggested to her commander that the charge be withdrawn on the basis that the

¹² Whilst the plaintiff may have had no inkling in this regard, it is regrettable that those representing him did not take issue with this question which asserts an entirely incorrect premise.

¹³ There was an issue regarding exactly when the charge was withdrawn but this had no bearing ultimately on the enquiry into whether the arresting officer had entertained a reasonable suspicion that the plaintiff had committed a Schedule 1 offence. The parties appeared to be *ad idem* that the charge had not been withdrawn by the date of the plaintiff’s arrest.

accused (the plaintiff) could not be traced; that Ms Goniwe had indicated to her that he was no longer a threat to her, and that the case had been “long outstanding (on) the roll”;

9.4 a medical report in the docket confirms that on the afternoon of 15 April 2013 Ms Goniwe had been examined by a Dr. Vaidya at the Cecilia Makiwane Hospital arising upon the complaint of assault at the behest of the Vulindlela Police. The doctor noted that she has sustained “soft tissue injury” arising upon an assault and that she bore bruises to her upper and lower eyelids and a sub conjunctival hemorrhage to her right eye. According to an “injury statement” deposed to by a police officer who was shown the injuries on 15 April 2013 at 17h00, the complainant exhibited injuries to “the right eye and head”. The statement also refers to a diagram (presumably the one reflected on the J88 report) as being in conformity with what the officer observed were the injuries sustained by her;

9.5 an affidavit was deposed to by the complainant herself (which is unfortunately undated but from the context appears to have been made contemporaneously) in support of the complaint in which she gives a pretext to the assault, namely that the plaintiff accused her of cheating on him after reading personal messages on her cell phone, and that he assaulted her as a consequence. The relevant narrative in the affidavit in this regard is recorded as follows:

“He then beat me with fist and hands on my face, I try to avoid him but I could not stop him because he was using power on against me. I got injuries on my face

left eye and I cannot see well because of what he have done to me, I got injuries on my face and head. When I am about to take my phone he did not gave me saying he is not done to beat me.” (sic)

- 9.6 the occurrence book of the Vulindlela police station reflects an entry in it dated Wednesday, 24 April 2013 opposite serial number 1980 at 21h20 to the following effect:

“Suspect detained : Sgt Songqushwa detained 01 Adult B/male Khaya Mneni for Assault GBH. CAS 115/04/2013 with SAP 14/85/04/2013. Constitutional rights explained to him as per SAP14A, Q85985640 and SAP 22 L7537649 and searched by Sgt Songqushwa with no injuries. Suspect pointed out by the complainant. It is the first time suspect arrested for this offence.”

- 9.7 the occurrence book reflects a further entry on Saturday 27 April 2013 at 17h50 confirming that the plaintiff was charged with assault with intent to do grievous bodily harm. The full entry reads as follows:

“Suspect charged: W/O Ntandani charged one black male SAP 14/85/04/2013. Khaya Mneni on CAS 115/04/2013. Assault GBH.”

- 9.8 the relevant extract from the cell register across the designated columns records the arrest, the charge, and detention of the plaintiff at the police cells until the time he was taken to court on the morning of the ensuing Monday, 29 April 2013.

[10] A further volume referred to as the plaintiff’s bundle marked Exhibit “A” was also entered into evidence by consent. The only documents of particular

significance in it are the plaintiff's notice in terms of section 3(1) of Act No 40 of 2002 in which it is acknowledged that he was charged by the police with an offence of assault with intent to do grievous bodily harm,¹⁴ and the SAP14A notice of rights¹⁵ presented to him at the Vulindlela Police Station which corresponds to serial number Q8585640. This was signed by him on 24 April 2013 at 21h25 at the behest of Constable Lento who ostensibly informed him of his constitutional rights. The notice reflects that he had been detained for the following reason: "CAS115.04.2013 ASS GBH".

[11] The methods of securing the attendance of an accused in court for the purposes of trial are arrest, summons, written notice and indictment.¹⁶

[12] There are two provisions in the CPA dealing with arrest. The first is section 40(1) which authorises an arrest without a warrant. The other is section 43 which provides that a magistrate may issue a warrant for the arrest of any person upon the written application of an attorney general (now a director of public prosecutions), a public prosecutor or a commissioned officer of police. It is preferable that an arrest rather be effected by virtue of a warrant, but the law permits arrest without a warrant provided the prescribed circumstances referred to in section 40 (1) of the CPA strictly exist. In *Mabona and Another v Minister of Law and Order and Others*¹⁷ Jones J explains why the second option is the more onerous one:

¹⁴ According to the pleadings the plaintiff was held but never "formally charged", although the emphasis on the absence of a formal charge could also relate to his failure to have appeared before the magistrate on the Monday after his arrest.

¹⁵ This is the standard notice in terms of section 35 of the Constitution Act, No. 108 of 1996 warning a detainee of his constitutional rights upon arrest and detention.

¹⁶ Section 38 of the CPA.

¹⁷ 1988 (2) SA 654 (SE) at 658F.

“It seems to me that in evaluating his information (i.e. whether a reasonable man in an arresting officer’s position and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the arrestee was guilty of the relevant offence listed in Schedule 1), a reasonable man would bear in mind that the section (i.e. section 40 (1) of the CPA) authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty.”

[13] The defendant - purportedly having pleaded a basis upon which the arrest of the plaintiff is claimed to have been was lawful, conceded that the onus of establishing that fact rested on him. The following extract from *Minister of Law and Order & Another v Dempsey* is apposite in this regard:

“I accept, of course, that the onus to justify an arrest is on the party who alleges that it was lawfully made and, since an arrest can only be justified on the basis of statutory authority, that the *onus* can only be discharged by showing that it was made within the ambit of the relevant statute. Any statutory function can, after all, only be validly performed within the limits prescribed by the statute itself and, where a fact or a state of affairs is prescribed as a precondition to the performance of the function (a so-called jurisdictional fact), that fact or state of affairs must obviously exist and be shown to have existed before it can be said that the function was validly performed.”¹⁸

[14] Since the Bill of Rights guarantees the right of security and freedom of the person which includes the right "not to be deprived of freedom arbitrarily or

¹⁸ 1988 (3) SA 19 (A) at 38B – C; *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 814 I – J; *Minister of Law & Order and Another v Hurley & Another* 1986 (3) SA 568 (A) at 587 H – 588 C and 589 D – G.

without just cause",¹⁹ any deprivation of freedom has always been regarded as *prima facie* unlawful and requires justification by the arresting officer. For this reason a plaintiff need only allege the deprivation of his freedom *and require of the defendant to plead and prove justification*.²⁰

[15] What the relevant statutory authority relied upon to validate the plaintiff's arrest was, according to Mr. Maseti who appeared on behalf of the defendant at the trial, albeit not pleaded pertinently, is that referred to in section 40(1)(b) of the CPA, which provides as follows:

- “1. A peace officer may without warrant arrest any person
 - (a) ...
 - (b) whom he reasonably suspects of having committed an offence referred to in schedule 1 ...”

[16] The jurisdictional facts for a section 40(1)(b) defence set out in *Duncan v Minister of Law and Order*,²¹ are that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

[17] As an aside I mention that subsection 40(1)(q) of the CPA may well also have been of application to the relevant fact set, but was not relied upon by the defendant as a basis to justify the arrest. This subsection validates an arrest by a

¹⁹ Section 12(1)(a) of the Constitution.

²⁰ *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A).

²¹ 1986 (2) SA 805 (A) at 818G-H.

peace officer without a warrant of any person “who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act²² which constitutes an offence in respect of which violence is an element”.²³ Violence in its ordinary meaning entails behavior involving physical force intended to hurt, damage or kill.²⁴

[18] It is trite that in justifying the arrest the defendant has to show not only that the arresting officer suspected the plaintiff of having committed an offence, but that the officer reasonably suspected the plaintiff of having committed *a Schedule 1 offence*.²⁵

[19] Schedule 1 to the CPA, which is referred to in section 40(1)(b), contains a list of offences and categories of offences in which the following (relevant to the present matter) is included:

“Assault, when a dangerous wound is inflicted.”

²² No. 116 of 1998.

²³ Domestic Violence in terms of that Act is defined to mean:

- “(a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behavior towards a complainant,

where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.”

²⁴ The Oxford Concise English Dictionary.

²⁵ *Mhaga v Minister of Safety and Security* [2001] 2 All SA 534 (Tk); *Manqalaza v MEC for Safety and Security, Eastern Cape* [2001] 3 All SA 255 (Tk).

[20] It is evident that the concepts of “grievous bodily harm” and “dangerous wound” are not necessarily synonymous as was pointed out in *Bobbert v Minister of Law and Order*.²⁶

“In my opinion, however, this ingenious argument cannot succeed. For it to succeed, the concepts of 'grievous bodily harm' and 'dangerous wound' in the context of assault would have to be synonymous to the extent that it would be said that a person who commits an assault with intent to do grievous bodily harm necessarily attempts to commit an assault in which a dangerous wound is inflicted. This, in my view, is not so.

Various descriptions of what the nature of the bodily harm intended to be inflicted must be before it can be said to be 'grievous' have been formulated by the Courts in England, Rhodesia (now Zimbabwe) and Natal. In *R v Matzukis* 1940 SR 76 it was said at 79, citing an old English case, *R v Ashman* (1858) 1 F&F 88, that

' . . . it is not necessary that such harm . . . should be either permanent or dangerous: if it be such as seriously to interfere with comfort or health it is sufficient'.

In *R v Edwards* 1957 R&N 107 Beadle J (as he then was) preferred to omit the reference to comfort, and confined the formulation to serious interference with health. In *S v Collett* 1978 (3) SA 206 (RA) at 208G-H the Court (MacDonald CJ, Lewis JP and Gubbay AJA) cited with approval the *dictum* of Viscount Kilmuir LC in *Director of Public Prosecutions v Smith* [1960] 3 All ER 161 (HL) at 171 that 'grievous' means no more and no less than 'really serious'. In *S v Moyana* 1980 ZLR 460 the Zimbabwe Supreme Court seems to have reverted to the formulation which was favoured in *R v Edwards* (*supra*). These authorities are conveniently collected and analysed in the judgment of Baron AJA in *S v Melrose* 1985 (1) SA 720 (ZS) at 721I-722I. In *S v Mbelu* 1966 (1) PH H176 (N) Miller J (as he then was) said:

'However one expresses it, it is at least clear that there must be an intent to do more than inflict the casual and comparatively insignificant and superficial

²⁶ 1990 (1) SACR 404 (C).

injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect.'

With these descriptions of the concept of 'grievous bodily harm' must be contrasted what has been said of the term 'dangerous wound' in the present context. In *R v Jones (supra)* Jennett J (as he then was) discussed the meaning of these words as they were used in the almost identically worded First Schedule to the Criminal Procedure and Evidence Act 31 of 1917, viz 'assault in which a dangerous wound is inflicted'. At 332D-F he said:

'The expression "dangerous wound" is not easy to define. One may well ask, "Is a serious wound always a dangerous wound?" A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then, however, it is not the wound which causes the danger but the sepsis. It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ.'

Whichever of the above descriptions of the term 'grievous bodily harm' is adopted, it seems to me that this concept is not always synonymous with the term 'dangerous wound'. As for the *R v Edwards (supra)* formulation, it expressly disavows any necessity that the harm should be dangerous; and, in my view, such harm can seriously interfere with the health of the victim without necessarily being likely to endanger his life or the use of any of his limbs or organs. As for the formulations which were applied in *R v Collett (supra)* and *S v Mbelu (supra)*, to my mind it is quite possible for harm to be 'really serious' or to constitute injury 'in a serious respect' without necessarily being likely to endanger the victim's life or the use of any of his limbs or organs. Of course, this is not to say that in no case does a person who assaults another with intent to do grievous bodily harm attempt to inflict a dangerous wound on his victim: obviously there are many instances where this is, indeed, the case. However, it does not follow that this must always be so, and that the mere fact that a person has committed an assault with intent to do grievous bodily harm necessarily means that he has attempted to inflict a dangerous wound.

I conclude that there was no reasonable ground on which Antha could have suspected, simply because the plaintiff was being sought by the police on a charge of

assault with intent to do grievous bodily harm, that he was guilty of an attempt to commit an 'assault, when a dangerous wound is inflicted'. His arrest of the plaintiff, being a statutory function, could, to use the words of Hefer JA in *Minister of Law and Order and Another v Dempsey* (*supra* at 38B-C) 'only be validly performed within the limits prescribed by the statute itself'.²⁷

[21] An enquiry into the legality of an arrest effected without a warrant undertaken in an earlier matter of *R v Jones*²⁸ also came up short despite the fact that an arresting officer had information that an assault with a *sjambok* by a man on a young girl aged 15 years had occurred. He also had information that the girl had an open wound on her face. Although the incident was described as a cruel and savage attack on her and the court recognized that she must have suffered excruciating pain, it yet held that without more information as to the site or extent of the wound occasioned by the blows, that that information at the arresting officer's disposal (concerning the mere fact that *sjambok* blows had been delivered to her and that she had an open wound on her face) did not afford him reasonable grounds for suspecting that "an assault in which a dangerous wound is inflicted" within the meaning of Schedule 1 had been committed.²⁹

[22] Whilst it was never gainsaid by the plaintiff that the injuries sustained by the complainant were of a serious nature, neither was any objection taken to the defendant's plea concerning the mistaken assertion that an offence of assault with intent to do grievous bodily harm is listed under Schedule 1 (which it is not), and

²⁷ at 408 (h) – 409 (i).

²⁸ 1952 (1) SA 327 (EDLD).

²⁹ I am inclined to agree with Gardner JP's observations that it is unfortunate that an officer cannot arrest without a warrant unless "a dangerous wound is inflicted" and that this does not appear to be right especially where an actual assault has been committed and force has been applied to another.

that this *per se* permitted members of the South African Police Service, indeed obliged them according to the defendant, to arrest anyone accused of such an offence or implicated in it with or without a warrant, that is not the end of the matter. I have highlighted in footnotes above the shortcomings in the pleadings in this matter which have not conduced to either party's interest and have certainly not assisted the court. The plaintiff's representatives erroneously accepted without question that the offence preferred against him (and which he was evidently prepared to accept responsibility for at an early stage after his arrest at the charge office) constituted a Schedule 1 offence and was not in issue at the hearing. But the fact that the trial was conducted on the fallacious basis of an acceptance by both parties that this was indeed so is not a premise which this court can accept because it erodes the constitutional demand that the exercise of public power by the Executive and other functionaries should not be arbitrary.³⁰ As was appositely stated in *Duncan v Minister of Law and Order*:

“The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty”.³¹

[23] The reason for the offence concerning which a suspicion is required to be reasonably held to strictly resort under Schedule 1 goes to that requirement of

³⁰ *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the RSA and Others* 2000 (2) SA 674 (CC) at paragraphs [85] – [86], and para [90].

³¹ *Duncan v Minister of Law and Order* 1984 (3) 460 (T) at 466 D.

rationality, an aspect which was authoritatively dealt with by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto* in the following terms:

“Whether his decision (that will be of the arresting officer) on that question (being whether the case is one in which that decision – which is whether to bring the suspect to court) is rational naturally depends upon the particular facts, but it is clear that *in cases of serious crime - and those listed in Schedule 1 are serious, not only because the Legislature thought so - a peace officer could seldom be criticised for arresting a suspect for that purpose*. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case - which ordinarily attract sentences of imprisonment, and are capable of attracting sentences of imprisonment for 15 years - clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.”³² (Emphasis added)

[24] Whilst I accept in principle that acts of domestic violence are amongst the most serious cases warranting the arrest by a peace officer without warrant of any person reasonably suspected of having committed such offence in respect of which violence is an element, it appears to me from the manner in which the defendant pleaded justification for the arrest that it never occurred to him at all that the arresting officer was required to apply his mind to the question whether the assault complained of by Ms. Goniwe was properly one in which a dangerous wound was inflicted and for this conscious reason resorted under Schedule 1. This follows as I said above from the flawed belief that a member can without warrant arrest anyone

³² *Supra* at par [44].

implicated in or accused of an offence of assault with intent to do grievous bodily harm because it is by its very nature an offence listed in Schedule 1, which it clearly is not. The evidence (which I will shortly deal with) confirms that Captain Teto himself labored under the same misapprehension.

[25] Whether or not an arresting officer has reasonable grounds for the suspicion entertained by him or her is a question which is required to be answered objectively. In other words the test is not whether the officer believes that he has reason to suspect, but whether, on an objective approach, he in fact had reasonable grounds for his suspicion at the time he effected the arrest.³³ Jones J in *Mabona* fashioned the enquiry in the following terms:

“Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen?”³⁴

[26] In order to satisfy this objective test the court approached the enquiry in the following manner:

“The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a

³³ *Botha v Lues* 1983 (4) SA 496 (A) at 503D; *Duncan v Minister of Law & Order* *supra* at 814 D – E.

³⁴ *Mabona* *supra* at 658 E.

conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”³⁵

[27] The reasonableness of the suspicion may only be determined upon consideration of the information which was at the disposal of the arresting officer at the time and on which the decision was based.³⁶ The grounds of such suspicion are not limited to facts which can be proved at court and may be sufficient if those facts constitute at least *prima facie* proof. In *Duncan v Minister of Law and Order Van Dijkhorst J* qualified the nature of the suspicion in the following terms:

“A lawful arrest in terms of that sub-section can be made upon a reasonable suspicion. The word “suspicion” connotes an absence of certainty and of adequate proof, as does the word “verdenking” in the Afrikaans text. As it was aptly put by LORD DEVLIN in the Privy Council in *Shaaban Bin Hussien and Others v Chong Fook Kam & Another* 1969 (3) All ER 1626, 1630:

“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.”³⁷

[28] Further, whilst there may be confirmation of the suspicion by extraneous objective factors afterwards (for e.g. a reasonable suspicion as to identity may be confirmed by an identity parade held later), this does not satisfy the jurisdictional requirement because the reasonableness of the suspicion is one of the

³⁵ Mabona *supra* at 658 G – H.

³⁶ Manqalaza *supra* at par [10].

³⁷ Duncan *supra* at 456 H – I.

preconditions for a proper exercise of the power in section 40 (1) (b) of the CPA. All jurisdictional facts must exist *before* the power is exercised to satisfy the constitutional demand for rationality.³⁸

[29] The evidence adduced at the trial in support of the legality of the plaintiff's arrest was unfocussed no doubt because of the flawed foundation that the plaintiff had committed a Schedule 1 offence without any further question being necessary in this regard. As a result the aspect of the critical jurisdictional requirement was dealt with very fleetingly or co-incidentally.

[30] The complainant testified regarding the background to her laying the criminal complaint against the plaintiff. It is common cause that they were in a love relationship and that he was provoked by jealousy to lift his hand to her after he had read certain personal messages addressed to her on her cell phone. She concedes that she cheated on him and that this was the pretext under which the assault happened. She maintained that after the assault her face felt numb and was swollen, and her head bled from the roots where he had tugged at her hair. She could not go to work that day. She was initially scared to go to the police or hospital but ultimately did so at the prompting of her mother who suggested that she lay a complaint with the South African Police Service. As an aside this testimony directed at the severity of the assault in her perception is entirely irrelevant to the enquiry because, as it turns out, she held no discussion with Captain Teto regarding the nature of the "attack" on her by the plaintiff or the injuries sustained by her.

³⁸ Manqalaza *supra* at par[13]

[31] Over the course of the next few days she says that the plaintiff harassed her in one way or another. He sent her messages on her phone, called her from numbers she did not recognize, and purported to make promises to her. He also hacked into her Facebook profile and posted a picture of a naked woman there which caused her some embarrassment. She vaguely asserted that she “had a protection order” against him, but did not go into any detail concerning this aspect except to say that she had obtained it after the assault on her. It was mentioned in passing only to explain that she and the police had struggled to find the plaintiff in order to serve the protection order on him, let alone to bring him to justice for the assault complaint itself which she had laid against him.

[32] She encountered the plaintiff again on the morning of 24 April 2013 while she was going to work when he chased her and took her phone away from her. This event it seems set the stage for him being arrested later that evening. She reported this to the police and also to her father. He was very angry. The family had been privy to her fear and experience at the hands of the plaintiff. Feeling under siege, her father took the liberty of approaching Captain Teto to discuss the matter with him. It is common cause that Captain Teto was known to her parents and worshipped with them at the same church where he was a senior leader.

[33] The sequel to this discussion was that Captain Teto and her father accompanied her to the house where the plaintiff was arrested by him in his official capacity.

[34] The plaintiff appeared to know why they were approaching him and spontaneously handed over her cell phone to them which was restored to her possession. He was told he was being arrested but was reluctant to accompany

Captain Teto to the police station until he was assured by the latter that his rights would be read to him at the police station. This duly happened at the charge office. The plaintiff was also prevailed upon there to sign for the protection order she had obtained against him, but he refused to accept service thereof.

[35] At the police station she noticed that her phone had been returned to her without the sim card in it. She reported this fact to the police as well who asked the plaintiff for it, but he indicated that he had no knowledge of its whereabouts.

[36] As far as she was concerned the reason they went to the house where the plaintiff was arrested was to get her cell phone. She achieved that objective, albeit the phone was returned to her without the sim card in it.

[37] Regarding what her father and Captain Teto understood by the visit to the plaintiff's home she could not enlarge upon except to say that her father "had already told him what had happened." Her father who had been the one to brief him was not called to testify.

[38] At the charge office she had overheard Captain Teto enquire what had happened to her complaint previously made at the station and why the plaintiff had not been arrested up until then.

[39] Captain Sabenzo Teto also testified on behalf of the defendant. He is a senior member of the South African Police Service stationed at NU14 Mdantsane. He says that Ms. Goniwe complained to him about this "attack" on her by the plaintiff and also that he had forcibly removed her phone from her possession earlier that day. That was the sum total of the information he had at his disposal.

(The complainant by contrast did not say that she had emphasized any detail to him concerning the assault itself or the injuries sustained by her.)

[40] The reason he arrested the plaintiff, so he articulated, was for the assault on Ms. Goniwe and the injuries, about which he did not go into any detail whatsoever. He rejected any notion that his involvement as arresting officer was improper either for the reason that he was not stationed at the Vulindlela police station where the complaint was laid, or because the complainant's family was personally known to him. The arrest was not unlawful, so he reasoned, since there was an old case against the plaintiff, the case number of which he had verified personally with the investigating officer. What exactly the details of the case were he did not offer at all.

[41] He emphatically denied arresting the plaintiff on a charge of robbery. According to him the plaintiff was charged with assault with intent to do grievous bodily harm on the basis of the complaint laid by Ms. Goniwe and he was expected to appear in court on such charge.

[42] Under cross examination he acknowledged that when Ms. Goniwe's made the report to him it related to both the assault charge as well as the fact that her phone had been taken by the plaintiff, but the latter event was ostensibly not critical to him and certainly did not constitute the reason for the arrest at all.

[43] He confirmed (although he had not said as much when giving his testimony in chief) that he had phoned the investigating officer *before* the arrest but evidently not to discuss the details of the charge against the plaintiff or the nature of the injuries which she had sustained. His conversation with his colleague was focused

on the issue that the plaintiff had up until then managed to evade being found by the police. The investigating officer (who he referred to in the male gender but was in fact a female officer) related to him that “he” (sic) was having difficulty finding the plaintiff and requested that if *he* happened to find him he should apprehend and detain him.

[44] Asked how he had purported to arrest the plaintiff without any warrant, he confidently reasoned that an officer could arrest someone pointed out to him for an “attack on someone”. (This statement accords with the flawed premise I have already alluded to above and is a telltale answer that Captain Teto did not give any thought whatsoever to what injuries were sustained by the complainant in the attack, simply assuming that the fact of the “attack” on her was sufficient reason without any further enquiry being made to arrest the plaintiff without a warrant.)

[45] The defendant also adduced the evidence of Sergeant Ntombizandi Mtanda who was assigned as the investigating officer in the criminal docket but she could not really take the matter further. She confirmed that she had being unable to find the plaintiff in order to arrest him on the charge laid by Ms. Goniwe. She however received a call from Captain Teto after he had arrested the plaintiff to inform her as much and to get the case number from her. She was not on duty at the time. He reported to her that he had arrested the plaintiff following a complaint that he had taken a phone from the complainant and also concerning the assault. He told her that he had recovered a phone from the plaintiff which was “broken”. To my mind this call must have been made after the arrest because it only came to light at the charge office that the complainant’s phone had been returned to her short of the sim card.

[46] Regarding the plaintiff's anticipated appearance at the magistrate's court on the ensuing Monday, all she could offer by way of an explanation for the fact that he had not been called upon to appear was that the docket was missing on the day in question. She cannot recall with exact certainty when, but it was only found in the late afternoon. By this time however the plaintiff has already been released.

[47] She found him again later quite fortuitously at a shack in the squatter camp just after he had returned from Cape Town, took him to the police station in order to have his fingerprints taken for a second time, and obtained a certain address for service of a summons on him in order to later secure his attendance in court. She also scanned and emailed the summons at his request and confirmed by telephone afterwards that he had received it. Ultimately he appeared on the original charge of assault with intent to do grievous bodily harm, pleaded guilty and was sentenced.

[48] She refuted the suggestion that she had made a point of bringing the plaintiff to court after the issue of the civil action to "strengthen" the defendant's case.

[49] She also disagreed that the plaintiff had been arrested for robbery as pleaded by him. As far as she was concerned when she spoke to Captain Teto they were *ad idem* that what was in their books so to speak was an "AGBH" charge.

[50] She reiterated that it was always the intention by the plaintiff's arrest on 29 April 2013 to have him appear in court on the charge of assault with intent to do grievous bodily harm which would have happened but for the fact that the docket went missing. In her opinion his discharge in the afternoon by the court orderlies was entirely serendipitous.

[51] The plaintiff himself testified. He agreed that he had quarreled with the complainant on 15 April 2013 and that he was angry when he became aware that she had cheated on him. According to him he had slapped her with an open hand a number of times. He conceded too that on the day of his arrest he took her cell phone, albeit he claimed that he intended to hold it as a lien only until she returned his personal possessions to him.

[52] Later he was at his home when Captain Teto arrived with the complainant and her father in tow. He denied that he had concealed his presence or sought to avoid the police officer. Since he was anticipating the complainant's arrival he claims that he had given her cell phone to a relative with the instruction that she hand it back to her once she had returned his items. He called on her in response to Captain Teto's enquiry about the cell phone and she took it from the room divider and handed it over to him.

[53] After identifying himself to him as a police officer, Captain Teto justified his presence there and the reason for the arrest being as a result of the robbery of the cell phone. He asked how it was possible to be arrested for such an offence since the complainant's phone had by then being restored to her possession. Captain Teto suggested that any discussion to be had would ensue at the police station where he was taken in a sedan motor vehicle.

[54] Once at the charge office he was prevailed upon to sign for a protection order which he heard the complainant had obtained against him. He argued with the officer that he was brought there for robbery, hence his refusal to sign for the protection order. After a discussion between Captain Teto and an officer at the

charge office he was informed that he would be kept in custody. He conceded signing the notice of constitutional rights in respect of the charge of assault with intent to do grievous bodily harm and that he was advised that he was to be held on such a charge. He learnt that the police had been looking for him on the assault complaint but refuted that they should struggle to find him as he had not changed his place of abode.

[55] He was quite prepared to accede to the complaint or at least accepted that he had committed the offence of assault and waited to be taken to court. On the Monday however his name was not called at court. At 16h00 he left for home, with the blessing of the court orderlies, since he had not been called upon by the prosecutor to appear in court at all.

[56] It was only after February 2014 (once he had already instituted the present action) that he was contacted by the investigating officer regarding the complaint and re-charged for the same offence. He denied that there was any reason for her to claim that she had been looking for him for a while. He co-operated fully in respect of the investigation and furnished an email address where he could be reached in order to appear in due course on the charge. He was summonsed ultimately, appeared, pleaded guilty and was convicted and sentenced.

[57] Under cross examination he purported to concede that there was an entitlement to arrest him because he had assaulted the complainant but claims that his objection was against the “sequence of events” or how things unfolded. The nature of his real objection was not made perfectly clear although it seems to relate to his contention that having been informed that he was to be arrested for robbery,

he was then held on a charge of assault with intent to do grievous bodily harm instead.

[58] It is common cause that the plaintiff was “accused of” and implicated in” an offence of assault with intent to do grievous bodily harm following Ms. Goniwe’s complaint made under the relevant docket, but that in itself would not have entitled a police officer to arrest him for such an offence sans warrant without any further enquiry before arresting him to confirm that the charge was indeed one properly envisaged by Schedule 1. This is a misstatement of the law and a misapprehension under which Captain Teto himself evidently laboured as well.

[59] Ironically it might have offered a complete defence to the plaintiff’s arrest without a warrant had Captain Teto offered the explanation that he had reasonably suspected the plaintiff of committing the offence of theft of the complainant’s cell phone (or robbery as the plaintiff claimed he was informed), since both theft and robbery are offences listed in Schedule 1, but he vehemently disavowed that this was the reason for the arrest. Whilst this is not a dispute I need necessarily resolve, it is more probable than not in my view that the plaintiff’s taking of Ms. Goniwe’s cell phone was in fact the reason for the arrest. The plaintiff’s version that he was informed that he was being arrested on a charge of robbery of a cell phone is consistent with the defendant’s version that he promptly handed it over to Captain Teto upon first being confronted by him, as well as Ms. Goniwe’s independent testimony as it were that this was the reason they went to look for the plaintiff and the objective sought to be achieved by the whole exercise. Even the investigating officer who was not on the scene of the arrest bore knowledge of the cell phone debacle. Be that as it may Captain Teto eschewed any reliance of a

suspicion held concerning a charge of theft and neither was this pleaded as justification for the plaintiff's arrest.

[60] What was notably absent in Captain Teto's account was any assurance at all that he pertinently considered whether the offence with which the plaintiff was charged or in which he was implicated on the "old case" was a Schedule 1 offence. One would expect this from a defendant who bears the onus to justify the arrest. Ms. Goniwe according to her testimony had no discussion with him regarding the details of the attack upon her or the nature of the injuries which she had sustained as a result thereof. If her father had related such details to him, he certainly did not expound upon this. He claimed to have had a discussion with the investigating officer concerning the docket *before* the arrest, but she contradicted him in this regard by her testimony that the discussion was had after the fact. (This would accord with Ms. Goniwe's evidence that Captain Teto made enquiries concerning the old case only once they were at the charge office.)

[61] In any event, according to both Captain Teto and the investigating officer the discussion had concerning the matter was not about the details of the complaint itself and the injuries sustained by Ms. Goniwe. Instead the reason for the call was merely to verify the case number. Further, had Captain Teto carefully and critically analyzed the relevant information in the docket there does not appear to be any suggestion of an assault of a more critical or serious nature such as is envisaged by the listed offence of assault referred to in Schedule 1. The injuries noted were soft tissue injuries and the narrative reads as if the assault were an "assault common". The fact that the face of the docket records a complaint of assault with intent to do grievous bodily harm does not make it an assault envisaged by Schedule 1 and the investigator's own views held regarding the

matter (even if she had shared them with Captain Teto before making the arrest) would not have exonerated him from undertaking his own enquiries in this regard. The arrestor is required to apply his mind himself before making the arrest and should not rely too readily on what he is told by a colleague (if he was told by her at all). If Captain Teto had been informed of the intricate and essential details on the basis of which he could make the assessment that the assault was more than an assault common, he certainly did not take the court into his confidence in this regard.

[62] In order to ascertain whether a suspicion that a Schedule 1 offence had been committed is reasonable, there is required to be an investigation into the essentials relevant to each listed offence.³⁹ In an instance such as this however where the arresting officer assumed erroneously that a complaint of assault with intent to do grievous bodily harm is a Schedule 1 offence without any qualification, it is obvious that he would as a result have made no enquiries into the essentials and therefore could not have satisfied himself that a Schedule 1 offence had been committed by the plaintiff. The proven facts also point to a failure on his part to have considered the relevant matter before him.

[63] In the result the defendant's purported reliance on section 40(1)(b) of the CPA cannot succeed and the plaintiff's arrest was unlawful. So too the entire period for which the plaintiff was detained (115 hours), following the illegal arrest, is unlawful as well.

[64] In the assessment of damages it is irrelevant in my view that the plaintiff was later summonsed to appear for the same offence and that he accepted

³⁹ Ramakulukush v Commander, Venda National Force 1989 (2) SA 813 (V) at 836G – 837B.

responsibility for the assault and pleaded guilty. This does not ameliorate the underlying illegality of the arrest and detention.

[65] There are no standout features that justify anything more than the usual compensation for an infringement of this nature which other courts have imposed in recognition of the principle that unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual. Although something was made of the fact that the plaintiff could have been brought before the court earlier notwithstanding the 48 hour rule, this was not pertinently pleaded.⁴⁰

[66] The plaintiff is a young student who did not claim vociferously that the impairment to his dignity was marked or that the experience held any lasting terror for him. Of course any unlawful arrest and detention must be assuaged by a suitable award of damages in order to give recognition to the fact that:

“In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual.”⁴¹

⁴⁰ Where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will best on the arrestee. *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 819 A.

⁴¹ *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707 B.

[67] In *Olgar v Minister of Safety and security*⁴² Jones J in assessing damages for an unlawful arrest and detention observed that:

“In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the ‘horn of plenty’, at the expense of the defendant.”⁴³

[68] In this instance I do not find the evidence established that Captain Teto was guilty of any malice. His failure is that he did not consider the details of Ms. Goniwe’s complaint itself and her injuries rather than just verifying the case number because he believed without further ado that the mere fact of the open docket of “Assault GBH” afforded him the automatic right to arrest the plaintiff without a warrant. He subjectively believed he was entitled to arrest him. It was suggested that there might have been some impropriety around him involving himself in an official capacity in acting on the complaint of a different police station than his and in respect of a family known to him, but his reply that he was expected to act without fear or favour on any complaint made anywhere in the Republic convinced me of his stern sense of duty. It would no doubt have been advisable for him to steer clear of the matter for fear of a perception of bias and/or conflict of interest, but the evidence did not establish that he bore the plaintiff any malice. In any event it could not have been seriously suggested that the purpose of

⁴² Unreported ECD case no 608/07.

⁴³ At par [16].

the arrest (assuming its validity) was not to bring the plaintiff to justice. Even on the plaintiff's version he was prepared to go to court to answer the charge of assault. His only confusion related to why, having been informed that he was being arrested for robbery, he was then charged with assault with intent to do grievous bodily harm.

[69] Having regard to all the circumstances and factors necessary to be taken into account I consider damages in the sum of R72 000.00 to be fair with costs to follow that result on the appropriate tariff of costs applicable in the magistrate's court. It was always the contention of the defendant that the action could have been disposed of in the magistrate's court and that he intended to argue, in the event of the plaintiff succeeding, that costs should be limited to the scale applicable to that court. In my view there was no complex issues in the matter, the amount claimed in respect of the unlawful arrest and detention was limited to R100 000.00, and the action could have proceeded in that court where litigation is less expensive.⁴⁴

[70] There was a request in the heads of argument filed on the defendant's behalf that I make an order in his favour in respect of costs reserved on 18 November 2015, but no basis was held out to me why I should do so. Those costs will therefore be costs in the cause.

[71] I issue the following order:

(1) The defendant is ordered to pay to the plaintiff:

⁴⁴ Vermaak v Road Accident Fund [2006] JOL 1693 (SE) at par [5].

- (a) damages in the sum of R72 000.00, together with interest thereon at the legal rate calculated from date of judgment to date of payment; and
- (b) costs of suit on the appropriate scale applicable to proceedings in the magistrate's court, together with interest thereon at the legal rate calculated from date of *allocatur* to date of payment.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 29 February & 1 March 2016

DATE LAST HEADS OF

ARGUMENT DELIVERED: 17 March 2016

DATE OF JUDGMENT: 14 June 2016

APPEARANCES:

For the plaintiff: Mr. Mayekiso instructed by Diko Attorneys, King William's Town (ref. Mr Diko/VIV003)

For the defendant: Mr. Maseti instructed by The State Attorney, King William's Town (ref. Mrs Pillay 805/13 – P8)