



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No
Circulate to Regional Magistrates:	Yes/No

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

Case No 1402/08

In the matter between

HUBERT TEBOGO BOOI

Plaintiff

And

THE MINISTER OF SAFETY AND SECURITY

Defendant

Heard On: Between 15/03/2011 and 06/12/2013

Delivered On: 28/02/2014

JUDGMENT

PAKATI J

1. The plaintiff, Mr Hubert Tebogo Booi, an adult male pensioner, instituted two claims for damages against the defendant, the Minister of Safety and Security of the Republic of South Africa (“the Minister”), for alleged wrongful arrests and detentions. In the first claim he was arrested on 01 May 2007 by Capt Mafa and other members of the South African Police

Services (“SAPS”), without a warrant and detained on a charge of rape and murder. In the second claim he was arrested by W/O Henk Van der Merwe on 03 September 2007 and other members of the SAPS on charges of theft and/or fraud. The plaintiff alleged that he was humiliated and deprived of his right to freedom and that his right to privacy, dignity and bodily integrity were also violated. It was confirmed that during the commission of the offences on 16 April 2006 (first claim) and 28 July 2007 (second claim) the plaintiff was in Goedemoed Prison in Aliwal North from 17 October 2005 to 21 June 2006 and in Kimberley police cells from 01 May 2007 to 31 July 2007 for the murder charge.

2. The defendant admitted the arrests and detentions but pleaded that the arrests and the consequent detentions were lawful and were carried out in terms of s40 (1) (b) of the Criminal Procedure Act 51 of 1977 (“the CPA”). The police officials claimed to have had reasonable suspicion that the plaintiff committed the offences. The defendant pleaded further that the further detentions after he appeared in court were authorised by the magistrate.
3. The following facts are common cause: That the plaintiff was arrested by Captain Mafa without a warrant on 01 May 2007; that his residence was searched without a warrant; that he appeared in court for the first time on 03 May 2007; that the charges were withdrawn against him on 31 July 2007; With regards to the second claim it is also common cause that he was arrested by W/O Van der Merwe on 03 September 2007 without a warrant; that he first appeared in court on 05 September 2007 and the charges were withdrawn on 25 October 2007. It was not in dispute that the plaintiff was brought to court within 48 hours of his arrest on both occasions.

THE FIRST CLAIM

4. The plaintiff testified that after midnight on 01 May 2007 he was at his home with his mother, Ms Martha Booysen, when he was arrested. He was taken to Witdam Police Station. In the morning around 08h00 Capt Mafa booked him out of the police cells and took him to his office at Transvaal Road Police Station. He instructed W/O Koti and Capt Sebase to fetch a certain man known as 'Pampoen', whose real name is Olebogeng Mokgoro, from Kimberley Prison. He interrogated the plaintiff who gave him a document confirming that he was in prison at the time that the said offences were committed and that his correctional officer was Mr Piet Moss. Capt Mafa refused to accept his explanation. He assaulted the plaintiff and shocked him with electric wires while his head and face were covered with a black plastic bag thereby suffocating him. His hands were cuffed and his feet manacled at the time. He was forced to sign a document composed by the captain containing a version which he was told to repeat before the magistrate. As the pain was unbearable he succumbed and signed the document. He did not know the deceased in the murder and rape charges.
5. At about 14h00 on 02 May 2007 the plaintiff was taken to Magistrate Williams to make a confession. He gave details of how and when the murder was committed as dictated to him by Capt Mafa. The Magistrate noticed that his feet were swollen and recorded that fact and endorsed and directed on the detention warrant (J7) that he should be taken to a doctor. However, Capt Mafa did not comply with the Magistrate's directive. The plaintiff did not reveal to the Magistrate that he was induced and assaulted to make the confession because Capt Mafa had threatened him with further assault if he did.

6. Capt Mafa testified that the plaintiff admitted having committed the offences in question. The plaintiff described how he stabbed the deceased using an object called an awl/pricker (els) which was described as a long, sharp and small instrument that is used to mend shoes. That the plaintiff threw the instrument away thereafter. Capt Mafa denied assaulting the plaintiff in any manner. He denied further that he unduly influenced him to make a confession. He insisted that the plaintiff did not inform him of his *alibi* at anytime between his arrest and detention otherwise he would not have arrested him. This extract appears on the record of proceedings before the Magistrate in Case Number B2486/07 on 04 June 2007:

“BESKULDIGDE: My Edelabaar, ek het eintlik ‘n probleem man. My Edelaagbaar, voor ek nou Regsvertegenwoordiger gaan appoint My Edelaagbaar, want ek hoor nou die Staat hierso maak nou om te sê die saak moet nou weer uitgestel word vir verdere ondersoek. Dan weet ek nie hoekom die Staat die saak uitstel vir verdere ondersoek, dan die Ondersoek Beampde hy weet vir ‘n feit dat dit is ‘n verkeerde man wat hulle gearresteer het. Want daar is volle bewys dat dit is ‘n verkeerde man wat hulle gearresteer het. Nou ek weet nie hoekom nou moet die saak nou uitgestel word vir verdere ondersoek nie en ek sal net gevra het My Edelaagbaar moet die...(onhoorbaar).

HOF: Het julle nie ‘n verhoor van jou nie? Wat staan daar?

BESKULDIGDE: My Edele... Beampde ook wees.”

7. The above is indicative of the fact that the plaintiff intended to bring it to the attention of the Magistrate that he was in Goedemoed Prison when the graveyard murder took place but the Magistrate failed to hear him out. He had the document in his possession that he pointed out to Capt Mafa

during the interrogation. According to Capt Mafa this information was brought to the court's attention for the first time on 25 July 2007.

8. Capt Sebase testified that W/O Koti joined him in Capt Mafa's office. He noticed that the plaintiff walked with difficulty. During the interview he and W/O Koti sat in another office opposite Capt Mafa's. The door of Capt Mafa's office was open. From where he sat he could see the plaintiff. About an hour later Capt Mafa requested him and W/O Koti to arrange with Const Borraine to take the plaintiff to a Magistrate for a confession, which Const Borraine did. They then left. Capt Sebase denied that Capt Mafa assaulted the plaintiff in any manner in his presence. He also denied that he and W/O Koti went to the local prison looking for Pampoen. This concocted version was corroborated by W/O Koti.

9. According to W/O Koti Capt Mafa found him, the plaintiff and W/O Sebase in Capt Mafa's office. From the waiting area where he and Capt Sebase sat he could not see what happened in Capt Mafa's office because his back turned against the wall. However, he could hear that they were talking but could not hear what their conversation was all about. He and Capt Sebase later went to their respective homes.

10. Ms Seraline Louise Kock testified that the plaintiff was an assistant driver in her and her husband's taxi business. She got to know that at some stage the plaintiff was in custody in connection with the graveyard murder case. On 14 October 2013 she sat in court whilst Capt Sebase and W/O Koti testified in the case before me in the High Court. Amazed at the denial of their knowledge of the identity of Pampoen, she went to Kimberley Prison on 15 August 2013 to make enquiries. She was furnished with a document, SAPS 127, which plaintiff's counsel, Mr Schreuder, handed in

as “Exh B1 and B2”, whose heading is **‘Temporary Transfer of Detainee/Sentenced Prisoner’**. This document shows that on 02 May 2007 Capt Mafa requisitioned Pampoen Therence Mokgoro regarding the graveyard murder. Capt Sebase received the said Pampoen into his custody from prison the same day. The document bears Capt Mafa’s and Capt Sebase’s signatures. The second page has Capt Sebase’s photograph. This evidence was common cause or at least not disputed.

THE SECOND CLAIM

11.W/O Petrus Henk Van der Merwe testified that he arrested the plaintiff on 03 September 2007 at 05h15 on allegations of theft and/or fraud. It was alleged that they stole a bag containing a wallet, bank cards and a petrol card from a certain lady in Kimberley Hospital. Moses Setlaba, the then co-accused of the plaintiff, was said to have informed W/O Van der Merwe that he received the petrol card from the plaintiff. He led W/O Van der Merwe to the plaintiff’s residence where he was arrested. According to W/O Van der Merwe the plaintiff confirmed that Setlaba was known to him; that the plaintiff pointed out the office where the bag was removed. At no stage did the plaintiff inform him that he was in prison during the commission of the said offence. On two different occasions he was taken to Bloemfontein for an identification parade which was never held. Two witnesses who came to identify Setlaba and the plaintiff at a certain garage in Bloemfontein only pointed out Setlaba but did not know the plaintiff. This evidence was not disputed.

12.The plaintiff denied knowing Setlaba. He testified that W/O Van der Merwe knew him since 2000. The warrant officer accused him of being the person depicted in a photo with the alleged suspects. According to

him the police targeted him because he was exonerated in two cases which W/O Van der Merwe investigated against him.

13. W/O Van der Merwe also investigated a murder case referred to as ‘the Platfontein murder’ which the plaintiff was charged for during September 2009. He testified that the plaintiff handed himself over to the police and admitted having committed the murder. According to W/O Van der Merwe the plaintiff pointed out a murder scene 7 kilometres away from the correct scene. He informed Van der Merwe that he threw the deceased’s property into a dam behind Witdam Police Station in Galeshewe which was found to be untrue. These charges were later withdrawn against the plaintiff.

14. The plaintiff further testified that in 2009 he knocked off from work at 1 Beach Road, Floors, and went home in the company of Mr Kok. At home his mother told him that the police were as a matter of urgency looking for him. He and Mr Kok rushed to the police station where he was told that he was sought for a murder case that happened at Platfontein. W/O Van der Merwe told him that he at last got him. He denied knowledge of the murder in Platfontein.

15. The onus of proving the lawfulness of the plaintiff’s arrests and detentions rests upon the defendant to be discharged on a balance of probabilities. See **MINISTER OF LAW AND ORDER AND ANOTHER v DEMPSEY 1988 (3) SA 19 (A)** at 38B-C; and **ZEALAND v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2008 (2) SACR 1 (CC)** at paras 24 and 25. The defendant seeks to discharge this onus by relying on s40 (1) (b) of the CPA in respect of the arrests. It provides:

“40 Arrest by peace officer without a warrant

(1) A peace officer may without a warrant arrest any person –

(a) ...

(b) [W]hom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) ... ”

16. Chapter 2 of the Bill of Rights guarantees that everyone possesses inherent dignity and to have their dignity respected and protected. These rights include the right to freedom and security of the person and not to be deprived of freedom arbitrarily or without just cause. It also provides for the right to privacy and the right to be free from all forms of violence. Kriegler J in **EX PARTE MINISTER OF SAFETY AND SECURITY AND OTHERS: IN RE S v WALTERS 2002 (2) SACR 105 (CC)** at 123 para 30 held:

“[30] ...The arrest of a person by definition entails deprivation of liberty and some impairment of dignity and bodily integrity.”

17. Van Heerden JA in **DUNCAN v MINISTER OF LAW AND ORDER 1986 (2) SA 805 (A)** at 818 G-H set out the jurisdictional facts which must exist before the power conferred by s40(1) (b) of the CPA may be invoked as follows:

“(1) The arrestor must be a peace officer.

(2) He must entertain a suspicion.

(3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).

(4) The suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power.”

18. It is a statutory fact that murder, rape and theft and/or fraud are offences contained in Schedule 1 of the CPA. Capt Mafa and W/O Van der Merwe were senior officials and peace officials and were therefore authorised in terms of s40 of the CPA to arrest the plaintiff without a warrant on condition they reasonably suspected that the plaintiff committed a Schedule 1 offence. The crucial issue therefore is whether the defendant's servants had a reasonable suspicion that the plaintiff committed the said offences as pleaded.

19. Regarding the first claim Capt Mafa testified that he received information from an informer that the plaintiff committed the rape and murder and intended fleeing to Kuruman. On the strength of this information he and the other members proceeded to arrest the plaintiff and searched his home. During the arrest Capt Mafa told the plaintiff where and when the murder took place, ie 18 April 2006 at the cemetery. However, he did not inform him what the name of the deceased was until they got to the police station. The plaintiff's testimony was that he did not know who the deceased was. This was never disputed. **In MABONA AND ANOTHER v MINISTER OF LAW AND ORDER AND OTHERS 1988 (2) SA 654 (SE)** at 658E-H Jones J stated:

“The test of whether a suspicion is reasonably entertained within the meaning of s40 (1) (b) [of the Criminal Procedure Act, 51 of 1977], is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). 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? It seems to me that in evaluating his information a reasonable man would bear in mind that the section 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. 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 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.”

20. Capt Mafa conceded that the only information he had against the plaintiff was the informer’s report to him and the now flawed confession. The plaintiff was arrested at his home. In my view Capt Mafa should have considered it necessary to check out the information that the plaintiff was about to abscond to Kuruman. Finding him at home should have created a doubt in his mind and must have acted with greater circumspection before arresting him. He did not analyse and assess the quality of the

information at his disposal critically. This information was not elaborated upon nor was it corroborated.

21. Ordinarily, a police arrest is based upon a sworn complaint sometimes supported by sworn statements by other witnesses. In the case of an informer, however, who insists on anonymity his/her identity is jealously protected by the police and the statement safeguard is therefore lacking. This does not mean that the police cannot arrest a suspect without a warrant in the absence of sworn statements implicating him. Each case is dealt with according to its own merits. I am of the view that where no sworn statement is available a police officer will less readily entertain a suspicion. See **Mabona supra at 659B-C**.

22. The same can be said for the evidence of W/O Van der Merwe who testified that he arrested the plaintiff after he received information from Setlaba that the plaintiff was involved in the commission of the theft and/or fraud. W/O Van der Merwe conceded that that was the only information he had at his disposal when he arrested the plaintiff. In my view it was not possible for the plaintiff to have pointed out the office where the bag was stolen because he was in custody when the theft was committed. The other disturbing factor is that Setlaba's warning statement contained in Exh A mentioned nothing about the plaintiff and his involvement in the crime charged to reinforce what W/O Van der Merwe said.

23. In my view W/O Van der Merwe also did not critically examine the information or follow it up. He failed to even make sure that the two identification parades in Bloemfontein took place. He confirmed that he never personally spoke to Capt Oelofse who was responsible to arrange

the parades and also failed to question why they were called off. He was present when the witnesses at the garage failed to point out the plaintiff as a suspect. It is not clear what inferences Capt Mafa and W/O Van der Merwe drew from the facts at hand which caused them to suspect the involvement of the plaintiff in the commission of the crimes. W/O Van der Merwe was very evasive in answering simple and straightforward questions. He refused to concede that the prosecutor was concerned as regards how the plaintiff was implicated in this matter even though there was an entry in the investigation diary on 05 September 2007 to the following effect: *“Hoe word die beskuldigdes verbind? Hulle is nêrens deur die getuies uitgewys nie en dit is nie op die rol geplaas nie.”*

24. I am satisfied that no grounds for the suspicion existed let alone a reasonable suspicion that could have been entertained for the plaintiff's arrest on both occasions.

25. The events leading to the making of the confession by the plaintiff have a bearing on whether the plaintiff was assaulted and induced to make the said confession. The plaintiff testified that during the course of the interrogation Capt Mafa assaulted him in an attempt to extract an admission that he committed the graveyard murder. He said that during the interrogation Capt Mafa completed a document titled **‘Verklaring Rakende Onderhoud Met Verdagte’**. In para 7 of this document Capt Mafa noted the following: *“Ek het aan die verdagte gevra om die beserings aan my te wys en ek het die volgende waargeneem: Geen beserings nie.”* He signed it at 12h00 on 02 May 2007. Capt Mafa arrested the plaintiff on 01 May 2007 but recorded no injuries. The next morning at 08h00 he had him in his office for interrogation. The plaintiff

was thereafter brought before Magistrate Williams at 14h15 on the same day of the confession.

26. Magistrate Williams recorded that the plaintiff's feet were swollen. It does not make sense that the Magistrate would note some injuries if there were none. This shows that the plaintiff's feet were indeed swollen. This reinforces the plaintiff's version that he was injured before he was taken to the Magistrate to make the purported confession. When Capt Mafa was asked to explain this he insisted that the plaintiff had no injuries.

27. Capt Sebase and W/O Koti also denied the assault on the plaintiff. These desperate efforts to convince the Court that no assault on the plaintiff took place are in vain and false. The evidence clearly shows that they conspired to save Capt Mafa's skin. Their evidence was unreliable taking into account their false denial that they went to prison to fetch Pampoen on Capt Mafa's instructions. The uncontroverted evidence of Ms Kock shows in fact that they gave perjured evidence.

28. The plaintiff's evidence that Capt Mafa dictated his statement that he made to the Magistrate has significance when one has regard to the post mortem report of the deceased conducted by Dr Denise Lourens. According to the doctor there is no indication therein that an awl that was mentioned in the confession was used during the commission of the murder. When Capt Mafa was asked to reconcile this finding with the alleged confession he was constrained to concede that neither the post mortem nor the docket mentioned the awl as the probable murder instrument. He testified that he did not look at the post mortem report but Dr Lourens told him about the awl. When he could not take the cross examination punches anymore he changed his version and said: "*Maybe I*

confused the cases because I move with a lot of cases.” He was very evasive and kept adjusting his version when asked whether Dr Lourens mentioned the word ‘els’ in any other case. In this instance it was clear that Capt Mafa tried to mislead the Court and was deliberately untruthful. I am satisfied that the plaintiff was assaulted by Capt Mafa who also composed what to tell the Magistrate.

29. The following allegations can be gleaned from the plaintiff’s particulars of claim:

“[6] Since his arrest on [01] May 2007 until the date of his release on 31 July 2007, Plaintiff was unlawfully kept in custody by Captain Mafa and other members of the SAPS whose identities are unknown to [the] Plaintiff.

[9] Since his arrest on [02] September 2007 until his release on 25 October 2007, [the] Plaintiff was unlawfully kept in custody by members of the SAPS whose identities are unknown to [the] Plaintiff.”

30. It is important at this stage to distinguish between wrongful and unlawful arrest on the one hand and malicious arrest on the other. Margo J in **NEWMAN v PRINSLOO AND ANOTHER 1973 (1) SA 125 (W)** at 127H-128A expounded the difference which was approved in **REYLANT TRADING (PTY) LIMITED v SHONGWE AND ANOTHER [2007] 1 ALL SA 375 (SCA)** and stated:

“Stated shortly, the distinction is that in wrongful arrest, or false imprisonment, as it is sometimes called, the act of restraining the plaintiff’s freedom is that the defendant or his agent for whose actions he is vicariously liable, whereas in malicious arrest the interposition of a

judicial act, between the act of the defendant and the apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longer the act of the defendant but the act of the law. The importance of the distinction is that, in the case of wrongful arrest, neither malice nor absence of justification need be alleged or proved by the plaintiff, whereas in the case of malicious arrest it is an essential ingredient of the plaintiff's cause of action, which must be alleged and proved by him, that the defendant procured or instigated the arrest by invoking the machinery of the law maliciously".

31. A consideration of when it would be competent for a court to pronounce upon matters not raised in the pleadings was pronounced by Holmes JA in **SOUTH BRITISH INSURANCE COMPANY LIMITED v UNICORN SHIPPING LINES LIMITED 1976 (1) SA 708 (A)** at 714G as follows:

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue."

Nowhere in the pleadings or was any evidence led to prove malicious prosecution by the plaintiff against the defendant.

32. The District Court record (Exhibit A) showed that on 03 May 2007 when the plaintiff appeared in court for the first time his case was postponed for a formal bail application and further investigations. This happened because Capt Mafa opposed his bail at that stage because he claimed that he had not verified the plaintiff's address. The evidence revealed that Capt Mafa and the other members arrested the plaintiff at his home.

There could have been no uncertainty about his residential address. It is therefore inexplicable why Capt Mafa still needed to verify his address. On 13 June 2007 the case was still on the roll for the same reason and postponed to 13 July 2007. It was only on 02 July 2007 that Capt Mafa recorded in the investigation diary (part of Exh A) that the plaintiff could be granted bail of R1000-00. The prosecutor was also expected to analyse and evaluate the information in the diary and decide whether to oppose or support the granting of bail in the circumstances.

33. When an accused person is brought before a magistrate by the prosecutor and the magistrate orders his further detention that is the role of the court and not of the arrestor or the police. Harms DP in **MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER 2011 (5) SA 367 (SCA)** at para 42 stated:

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

See also **ISAACS v MINISTER VAN WET EN ORDE 1996 (1) SACR 314 (A)** where the court found that the unlawful detention of an accused ceases when the magistrate issues the detention order in terms of s50 (1) of the CPA. The relevant part of s50 (1) provides as follows:

“50 (1) (c) Subject to paragraph (d) if such an arrested person is not released by reason that –

- (i) [N]o charge is to be brought against him or her; or bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.”*

34. Needless to say, it is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended. See **MINISTER OF LAW AND ORDER v KADER 1991 (1) SA 41 (A)** at 51C.

35. The defendant correctly persisted that the plaintiff’s unlawful detentions ceased when the Magistrate authorised further detention of the plaintiff. The plaintiff’s detention therefore from 04 May 2007 to 31 July 2007 and 06 September 2007 to 25 October 2007 cannot be attributed to the defendant considering that it is the Magistrate who ordered the further detention at the prosecutor’s request. The plaintiff is only entitled to damages from 01 May 2007 to 03 May 2007 in respect of the first claim and from 03 September to 05 September 2007 for the subsequent claim. The arrests and detentions of the plaintiff on the initiative of the police are approximately three and a half days.

36. It is evident that the arrests and detentions of the plaintiff for the period just determined were not justified and therefore unlawful. The defendant therefore failed miserably to discharge the onus of proving that the arrests and detentions were lawful.

37. **I now turn to the issue of quantum.** The plaintiff in his particulars of claim alleged that ‘he suffered damages in the amount of R500 000-00 which amount is a global amount and cannot be reasonably be apportioned to the individual rights violated.’ In **MINISTER OF SAFETY AND SECURITY v TYULU 2009 (5) SA 85 (SCA)** at para 26 Bosielo AJA held:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for some infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 – 29).

38. In the award of damages previous jurisprudence should be used as a guideline only taking into account that the appropriate award is in the

discretion of the court. In **PROTEA ASSURANCE CO. LTD v LAMB 1971 (1) SA 530 (A)** at 535B-D Potgieter JA had this to say:

*“The further question that arises is to what extent, if any, this court should be guided in its assessment of general damages by awards in previous decided cases. In the case of **Sigournay v Gillbanks, 1960 (2) SA 552 (AD)** at p556, SCHREINER JA, is reported to have said:*

*“Nothing like a hard and fast rule or definite standard is to be found in a matter so closely linked with the particular circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in size of awards, where the circumstances are broadly similar. As was said by Innes CJ, in **Hulley v Cox 1923 Ad 234** at p 246, a comparison with other cases though never decisive is instructive. I respectfully agree in this connection with the statement of Ormerod, LJ in **Scott v Musial, (1959) 3 WLR 437** at p 446, that there emerges ‘a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case’ to which general idea a Court of appeal should give regard.”*

39. I take into consideration that the plaintiff was unduly influenced to make a confession. He testified to physical assault on him by Capt Mafa. However, no claim for assault was included by the plaintiff in his pleadings. It only came out during cross examination by Mr Botha, who initially appeared for the plaintiff, and when the plaintiff gave evidence. The plaintiff described how Capt Mafa ordered him to take off his clothes and left him with short pants. He poured cold water over him and caused

him to fall on his back from a chair whilst his head and face were covered in a plastic bag. He was electrocuted while he was handcuffed. In these circumstances, in my view, this was degrading treatment. Nevertheless, the plaintiff greatly exaggerated the assault. The Magistrate only noticed his swollen feet as the other forms of assault did not leave any physical scars but there was psychological trauma as well.

40. I am bitterly disappointed that this matter was not settled out of court. The arrests and the detentions were obviously unlawful. When Mrs Seraline Kock produced the documentary evidence that Capt Mafa and his team gave perjured evidence there was no reason for the defendant to litigate further on the merits. It was a sheer waste of taxpayers' money.

41. Regard being had to previous awards and what the plaintiff went through and the perjured evidence given by the police, I am of the view that an award of R270 000-00 would be an appropriate award.

42. It would be a travesty of justice if costs were not awarded on a punitive scale. I must show my displeasure for the persisting conduct by the police to fabricate evidence and to try and mislead this Court and the Magistrates Court.

In the result I make the following order:

- 1. Judgment is granted for the plaintiff, Hubert Tebogo Booi, in the sum of R270 000-00 (two hundred and seventy thousand rand) in respect of the unlawful arrest and detention for the period 01 May 2007 to 03 May 2007 and 03 September 2007 to 05 September 2007.**

2. The defendant, the Minister of Safety and Security, is ordered to pay interest on the awarded damages at the rate of 15.5% per annum calculated from 15 days after date of judgment to date of payment.
3. The defendant is ordered to pay the costs of this action on an attorney and client scale.

BM PAKATI

JUDGE

On Behalf of the Plaintiff: Adv J.J. Schreuder

Instructed by: GARRY BOTHA ATTORNEYS

On behalf of the Defendants: Adv S. Erasmus

Instructed by: OFFICE OF THE STATE ATTORNEYS

