

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
13/12/2012	<i>E. M. busi</i>
DATE	SIGNATURE

CASE NO:21313/2011
and

26083/2011

13/12/2012

In the matter between:

MAHLOMOLA LAZARUS MAFA
SYDNEY JOSEPH NYATHI

FIRST PLAINTIFF
SECOND PLAINTIFF

and

MINISTER OF POLICE
WARRANT OFFICER MPHUTI

FIRST DEFENDANT
SECOND DEFENDANT

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] Two matters were placed before me on 8 August 2012, namely, case number 21313/2011 in respect of Mahlomola Lazarus Mafa, whom I shall refer to as the first plaintiff, and case number 26083/2011 in

respect of Sydney Joseph Nyathi, whom I shall refer to as the second plaintiff. The parties had agreed at a pre-trial conference that the two matters be consolidated. The matters were as a result consolidated for purposes of this hearing.

- [2] The plaintiffs' respective claims against the defendants is for the sum of R3 510 000, in respect of damages for unlawful arrest and detention. The plaintiffs were arrested by Constable Fouche (Fouche) on 2 July 2010 for allegedly robbing the manager of Castle Corner Bar at gunpoint and were held in detention until 27 October 2010.
- [3] At the commencement of the trial it was made clear that apart from the question of damages, the only dispute to be adjudicated upon was whether the arrest of the plaintiffs fell within the ambit of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 (the Act).
- [4] According to the parties the following facts were common cause between them: that the plaintiffs were arrested by a peace officer, Constable Fouche, on the 2 July 2010 and detained until 27 October 2010; they were arrested for the offence of armed robbery that forms part of the offences in Schedule 1 of the Act; as there was no evidence linking the plaintiffs to the offence the senior prosecutor issued a *nolle prosequi* certificates against both plaintiffs. What remained to be determined by this court was whether at the time Fouche arrested the

plaintiffs, he entertained a suspicion that rested on reasonable grounds.

- [5] The parties were also agreed that the *onus* was on the defendants to prove that Fouche had reasonable grounds for arresting the plaintiffs, and that as a result the defendants should be the first to lead evidence.

EVIDENCE

- [6] The defendants called Fouche, the police officer who arrested the plaintiffs to give evidence. Fouche's evidence was to the effect that on 21 June 2010 he received a radio call about a commission of a business robbery at Castle Corner Bar (the Bar). At the Bar he was shown a CCTV material, which showed what happened during the robbery. The manager of the Bar, Mr Scholtz, gave him a description of the robbers who had held the staff at gunpoint. Mr Scholtz said one of the robbers was big, tall and had a round face. Fouche also had an opportunity to observe the robbers on the video footage, which was also downloaded onto his laptop. One of the robbers was wearing a jacket with a Ferrari emblem at the back (the Ferrari jacket) and a baseball cap. The robbers were using a white Ford Laser motor vehicle as their getaway motor vehicle. This motor vehicle did not have its original Ford wheel caps but had what Fouche referred to as after-sales wheel caps.

- [7] Fouche gave his informers the description of the robbers and the Ford Laser and instructed them to be on the lookout for them. On 2 July 2010 he was phoned by one of the informers that the Ford Laser fitting the description he had given them was parked at the Island Paradise Tavern. Before he went to the tavern he called for back-up. At the tavern he found a white Ford Laser with after-sales wheel caps parked outside. Before he went into the tavern he looked at the video footage. There were about eight people in the tavern. He enquired about the owner of the Ford Laser parked outside. Two people stood up and said they were the owners. He then requested them to step outside with him. When they were outside he showed them the video footage. These two persons fitted the description of those who were on the video footage. They were the same height and built with the same facial features. One of the suspects had a baseball cap on and he also looked similar to one of the people on the footage. He asked them of their whereabouts on the day of the robbery, and as they could not answer him he then arrested them. He took them to the Mamelodi East Police Station. He made two statements at the police station about the arrest of the plaintiffs.
- [8] Under cross-examination and with specific reference to the investigating diary, it came out that the criminal trial was postponed several times for further investigation and that as at 19 July 2010 the prosecutor had as yet not been informed about the registration number

of the motor vehicle and how the plaintiffs were linked to the case and the circumstances under which the plaintiffs were arrested.

- [9] Both plaintiffs testified. According to them, on 2 July 2010 they were having drinks at a tavern known as Paradise Island. Fouche, in the company of other police officers, entered the tavern and ordered the patrons to stand against the wall with their arms raised. They then conducted body searches on everyone in the tavern.
- [10] Fouche then called the first plaintiff outside and showed him the video footage on his laptop. He showed him someone and said it was the first plaintiff and the first plaintiff denied that it was him. There were other police officers in the vicinity that were also watching the video footage and they in a chorus also said that the person on the video footage was the first plaintiff. Fouche then took out a machine and took the first plaintiff's fingerprints. He was then handcuffed and taken into a police van.
- [11] The first plaintiff testified that he was put in the police van because Fouche insisted he had similar features with one of the persons who were on the video footage. Whilst in the van they brought another person, the second plaintiff.
- [12] After the first plaintiff was arrested, Fouche went back into the tavern and asked for the owner of the white Ford Laser parked outside. The

second plaintiff confirmed that he was the owner and he was told that that motor vehicle had been involved in a robbery. He was handcuffed and put in the police van with the first plaintiff. At the time of the arrest the two plaintiffs did not know each other.

[13] At the time of his arrest the first plaintiff was employed at Ford Motor Corporation at Watloo as a hoisting machine operator. He testified that on the day of the robbery he was at work. When he came out from detention he found that he had been dismissed from work. A disciplinary hearing was held and he was reinstated.

[14] Two months after the first plaintiff was released from detention he approached attorneys, Seoka Attorneys, and instructed them to write a letter notifying the first defendant of his intention to institute action against it for an amount of R500 000. A summons for the amount of R500 000 was issued on the 26 January 2011 and withdrawn on the 6 April 2011. His testimony is that he instructed his attorneys to withdraw the summons because he later realized that he had incurred some debt, which he was still paying and that the amount of R500 000 was not enough. His current attorneys issued another summons claiming R3 510 000. According to the first plaintiff's testimony the amount claimed was for time spent in detention, the trauma and all related matters. He was, however, not able to provide a breakdown of the amount of damages claimed.

[15] The second plaintiff testified that he owns that motor vehicle, the white Ford Laser, since 2008. He was not shown the video footage that was shown to the first plaintiff. On the date and time it is alleged he committed the robbery he was at home. His testimony was that he was not happy about the time he spent in prison because the cell conditions were humiliating. Since his release the police have not contacted him.

[16] The second plaintiff, however, did not have knowledge of any action that was instituted before this one. He did not know anything about a letter of demand issued by Seoka Attorneys. He said he did not mandate Seoka Attorneys to claim on his behalf. His claim is for R3 510 000 being for his unlawful arrest and detention and for compensation of his motor vehicle that he used as a taxi. The motor vehicle was impounded by the police and has not been functional since he got it back from the police.

[17] Under cross-examination the second plaintiff insisted that he was arrested on Thursday the 1 July 2010 and finger printed on the 2 July 2010. Whilst arrested he did not apply for bail as he did not have money to pay it.

[18] After their arrest the plaintiffs were taken to the Soshanguve Police Station. They appeared in court on Monday 5 July 2010 and were

remanded in custody. They were released on 27 October 2010, 117 days after their arrest.

[19] Whilst so detained they were taken to an identity parade but they were not identified. The prosecutor later issued a *nolle prosequi* certificate in respect of their case.

[20] When addressing me, the defendants' counsel contended that the second defendant did not comply with the provisions of section 3 of Act 40 of 2002 due to the fact that he testified that he did not mandate Seoke Attorneys to issue the notice on his behalf in terms of that Act. She, however, submitted that she would not take issue with the said non-compliance as, according to her, it was highly improbable for Seoke Attorneys to have acted without the second plaintiff's mandate. She, therefore, shifted this evidence to the second plaintiff's credibility. In addition she also submitted that some of the second plaintiff's evidence in court was at variance with certain paragraphs of his particulars of claim, namely: that in court he testified that he did not issue a section 3 notice whereas in paragraph 6 of his particulars of claim he alleges that a notice was issued; and he testified further that he was arrested on 1 July 2010 whereas in his pleadings he alleges that he was arrested on 2 July 2010. The defendants' counsel prayed that the court should, in respect of these discrepancies, make an adverse inference in regard to the credibility of the second plaintiff's evidence.

[21] The plaintiff's counsel on the other hand noted the fact that the defendants' counsel did not take issue with the second plaintiff's non-compliance with section 3 of Act 40 of 2002. He, however, contended that the defendants' argument could still be unsuccessful because for the defendants to challenge such non-compliance they should have raised an objection before and/or after summons by means of a special plea. He referred me to the following judgments in that regard: **MADINDA v MINISTER OF SAFETY & SECURITY** 2008 (4) SA 312 (SCA), **MINISTER OF SAFETY & SECURITY v DE WITT** 2009 (1) SA 457 (SCA) and a judgment of the full bench of the South Gauteng High Court in **COCHRANE v CITY OF JOHANNESBURG** 2011 (1) SA 553 (SGC) at 558l.

THE ISSUE TO BE DECIDED

[22] The main issue to be decided by this court is whether Fouche proved that at the time of arresting the plaintiffs he had reasonable suspicion to arrest them.

ARREST

[23] The defendants' counsel contended that at the time of arresting the plaintiffs, the arresting officer, Fouche, had a reasonable suspicion that the persons he was arresting had committed a schedule 1 offence, that is, armed robbery. She submitted that Fouche could clearly identify the

white Ford Laser with the after sales-wheel caps that was parked outside the tavern as the one he identified on the video footage. He arrested the second plaintiff because he confirmed that he was the owner of the Ford Laser. He arrested the first plaintiff because he wore a baseball cap similar to the one worn by the person he saw on the video footage, and his description fitted the one depicted on the footage. According to Fouche he was arresting the correct people he suspected had committed the offence.

- [24] The plaintiffs' counsel, however, argued that the defence did not prove reasonable suspicion on the part of Fouche. According to him, Fouche relied on the description of one of the suspects as provided to him by Mr Scholtz. However, Fouche got the description wrong and gave his informers incorrect information. Fouche was looking for a short person with a round face whereas Scholtz had said the suspect was a big and tall person with a round face. Scholtz is the person who was robbed and had the opportunity to see the persons who attacked them at the bar. He also had a chance to review the video footage before he made a statement to the police. This description is also confirmed by his statement to the police. Scholtz met with Fouche immediately after the incident and gave him this description. But, Fouche arrested a short person with a round face. According to Scholtz's statement the short suspect was wearing a Ferrari jacket and a baseball cap. According to Fouche the first plaintiff was wearing a baseball cap when he arrested him however the first plaintiff testified

that when he was arrested he was wearing the jacket he was wearing in court – which was not a Ferrari jacket – and a 'beany' hat. In this respect, counsel referred me to **MABONA & ANOTHER v MINISTER OF LAW & ORDER** 1988 (2) SA 654 (SECLD) and **OLIVIER v MINISTER OF SAFETY & SECURITY & ANOTHER** 2009 (3) SA 434 (SGC).

[25] The plaintiffs' counsel contended further that Fouche relied on the chorus of the police who were with him who said the person on the video footage was the first plaintiff. Fouche was supposed to have exercised more care and diligence, more so, as he was dealing with informers.

[26] The test to be applied in determining whether a peace officer "reasonably suspected" a person having committed an offence within the ambit of section 40 (1) (b) is objectively justiciable. The question is not whether a peace officer believed that he or she had reason to suspect, but whether, on an objective approach, he or she in fact had reasonable grounds for his or her suspicion. The test is that of a reasonable man with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting peace officer. See **DUNCAN v MINISTER OF LAW AND ORDER** above at 811J – 812A and 814D – E and **MINISTER OF LAW AND ORDER v HURLEY AND ANOTHER** 1986 (3) SA 568 (AD) at 579F – 580I.

[27] Fouche's testimony is that at the time of arrest he already had information that the plaintiffs were the persons who committed the offence. Scholtz informed him about the identity of the first plaintiff. He had an opportunity to study the video footage of the robbery whilst he was at the scene of the crime. He went to the tavern where he found the plaintiffs after a tip off from one of his informers. He had given the informers the description of the first plaintiff based on the information from Scholtz and what he had observed on the video footage. He had downloaded the video footage onto his laptop and when he arrived at the tavern he had an opportunity to study the footage again and confirmed that indeed the persons depicted in the footage were the plaintiffs. Even after he had called the plaintiffs outside the tavern he was certain that they were the persons on the video footage. The first plaintiff was at the time of arrest still wearing a baseball cap similar to the one on the video footage.

[28] According to Fouche, both plaintiffs owned up to being the owners of the white Ford Laser that was parked outside the tavern. This Ford Laser was the same one that was depicted on the video footage. Fouche had had an opportunity to study the Ford Laser from the video footage firstly whilst still on the scene of the crime. He studied the footage again when he arrived at the tavern and confirmed that the Ford Laser was the one depicted in the footage. What distinguished the Ford Laser according to him were its wheel-caps. The Ford Laser

did not have the original Ford wheel caps but what he referred to as "after sales wheel-caps".

[29] The question thus is whether on the information at the disposal of Fouche would a reasonable peace officer have arrested the plaintiffs? My view is that he would not have.

[30] When evaluating the evidence I was faced with two irreconcilable versions on this issue. The plaintiffs' version was that there were no grounds for Fouche to suspect that they had committed the robbery. Their testimony was to the effect that on the day they were arrested they were at a tavern enjoying their respective beers when Fouche in the company of other police officers came to the tavern and arrested them. Their version is that the police walked into the tavern and ordered all the patrons to stand against the wall with their arms raised, they then searched them.

[31] The first plaintiff's testimony was that after being searched Fouche asked him to step outside with him. Outside he was shown the video footage and Fouche told him that the person on the footage was him. He saw the person on the footage and it was not him. He told Fouche so but Fouche did not listen to him. According to the first plaintiff Fouche was overpowered by the other police officers who chorused that it was him on the video footage. He also denied that on that day he was wearing the baseball cap that Fouche testified he was wearing.

He was wearing the same clothes he was wearing in court when he testified and a 'beany' hat.

[32] The second plaintiff testified that he was arrested for no reason other than that he was the owner of the Ford Laser that was parked outside the tavern. He said Fouche went out with the first plaintiff and when he came back he asked for the owner of the motor vehicle parked outside. He stood up and told Fouche that he was the owner and he was arrested. He was never shown the video footage but was arrested the moment he owned up to the motor vehicle.

[33] The defendants' version, on the other hand, is that Fouche went into the tavern and asked for the owner of the Ford Laser parked outside the tavern. Two people stood up and owned up to being the owners of the motor vehicle. Fouche then asked them to step outside with him. Outside he showed them the video footage and said they were two of the people on the footage. He then arrested them.

[34] The technique generally employed by a court in resolving factual disputes where there are two irreconcilable versions before it is to make findings on: the credibility of the factual witnesses; their reliability and the probabilities of the matter. See **STELLENBOSCH FARMERS' WINERY GROUP & ANOTHER v MARTELL ET CIE & OTHERS** 2003 (1) SA 11 (SCA) at para 5.

- [35] When evaluating the evidence, I found the plaintiffs' evidence to be satisfactory in that although there were discrepancies in the second plaintiff's evidence, the plaintiffs, however, corroborated each other.
- [36] The first plaintiff was a good witness he did not contradict himself in his evidence in-chief nor did he contradict himself during cross-examination.
- [37] The second plaintiff, though, was not a satisfactory witness in all respects. There were discrepancies in his testimony under cross-examination. Firstly, he gave false evidence in respect of the required notice to the first defendant. He denied that he gave instructions to Seoka Attorneys to issue the notice to the first defendant. I am in agreement with the defendants' counsel that it is highly improbable that Seoka Attorneys would have issued the notice without instructions from the second plaintiff. Secondly, the second plaintiff also contradicted himself by saying the arrest occurred on Thursday 1 July 2010. It is common cause that the plaintiffs were arrested on 2 July 2010.
- [38] However, the proper test for the reliability of a witness is not whether the witness is truthful or indeed reliable in all that he or she says, but whether on a balance of probabilities the essential features of the story which he or she tells are true. See **SANTAM BPK v BIDDULPH** [2004] 2 All SA 23 (SCA) at para 10.

[39] When looking at the totality of the evidence before me my view is that the discrepancies in the second plaintiff's evidence are not really material. To my mind, on the balance of probabilities the essential features of his evidence are true. This is so because the first plaintiff corroborates that evidence. That the second plaintiff was arrested with the first plaintiff on 2 July 2010 and released from detention on 27 October 2010 is undisputed. Both plaintiffs testimony as to how they were arrested corroborated the other.

[40] The evidence of the defendants' witness, Fouche, was to me not satisfactory. Although there were no discrepancies in his evidence as such, I, however, found his version of how he arrested the plaintiffs improbable. I found it highly improbable: that when Fouche enquired about the owner of the motor vehicle two people stood up and claimed to be the owners of the motor vehicle; that he did not even enquire who of the two is the real owner, but just arrested both of them; that people who had recently been involved in a robbery using the motor vehicle which was parked outside would readily stand up and own up to that motor vehicle when approached by the police – not even one but two of them; that Fouche did not confiscate the baseball cap which the first plaintiff was wearing at the time of arrest if that baseball cap was indeed similar to the one in the video footage; that if the people arrested were the same ones who were on the video footage, the police did not provide the prosecution with that footage immediately;

and also that if the plaintiffs were the people on the footage they were not easily identified at the identification parade.

- [41] In my view, Fouche's testimony was highly improbable and I could as a result, not rely on it. I, therefore, concluded that the version of the plaintiffs must be accepted as truthful and that of the defendants be rejected as unreliable. Consequently the defendants failed to discharge the *onus*.

DETENTION

- [42] The contention by the defendants' counsel on the issue of detention is that the defendants are not liable. According to her, the plaintiffs were lawfully arrested and were brought before court within the time prescribed in section 50 of the Act. She contended that even if the arrest was unlawful, the Minister of Police could only be liable until Monday morning when they were brought to court, from that day they were kept in detention at the behest of the magistrate whose discretion it was to keep them in custody.

- [43] The plaintiffs' counsel on the other hand submitted that since the arrest was unlawful the detention flowing from there was as a result also unlawful. There was no evidence linking the plaintiffs to the offence as *per* the inserts referred to in the investigation diary. These inserts indicate that the police were aware that no evidence linking the

plaintiffs to the crime existed and should have informed the prosecutor as such. He contended that the defence did not call Constable Mphuthi, the investigating officer, to give evidence about the conduct of the police from the time of arrest until the plaintiffs were released and that this should be interpreted adversely against the defendants.

[44] 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. It is indeed so that 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 **MINISTER OF SAFETY AND SECURITY v SEKHOTO** 2011 (5) SA 367 (SCA) at 383 para 42.

[45] However, the discretion of a court to order the release or further detention of a suspect is dependent upon the information provided to it by the prosecutor when applying for the further detention of the accused. The prosecutor on the other hand depends on the information provided to her or him by the investigating officer.

[46] It is, therefore, obligatory for police officers to first establish the legal justification for the further detention of a person so as to relay such

information to the prosecutor. The prosecutor must also apply his or her mind to the information provided so that he or she is in an informed position to decide whether or not to apply for the further detention of the person in custody. The prosecutor has a duty to establish the facts which justify the incarceration of a detained person and to relay same to the presiding officer. It is upon these facts that a court will exercise its discretion whether to release or further detain an accused. It is my view that an investigating officer is duty bound to disclose all the information, whether positive or adverse to the case, to the prosecutor.

- [47] A failure by either the investigating officer or the prosecutor to comply with these duties could lead to damages being awarded to an aggrieved party. See **BOTHA v MINISTER OF SAFETY AND SECURITY & OTHERS; JANUARY v MINISTER OF SAFETY AND SECURITY & OTHERS** (unreported, ECP case nos 575/09 and 576/09, 1 April 2011)
- [48] The contention by the plaintiffs' counsel is that the plaintiffs were kept in custody for this long because of the tardiness of the police in investigating the case. He is correct.
- [49] It is common cause that the plaintiffs were arrested on 2 July 2010 and only released on 27 October 2010, ie 117 days later. It is also common cause that they were brought before court on Monday 5 July 2010, which was the first court date after their arrest. It is further common

cause that they were further detained at the behest of the court. The case was postponed several times for police investigation.

[50] My view is that the tardiness of the police is the cause of the plaintiffs being detained for so long, in this instance. The investigating officer failed to provide the prosecutor with the information at his disposal. According to the notes in the investigating diary, on 19 July 2010, the prosecutor made a request that an identification parade be conducted as soon as possible with all the witnesses who can identify the suspects. The identification parade was held on 5 August 2010 and the plaintiffs were not positively identified but the police failed to relay this to the prosecutor. At the time the identification parade was held the matter had been postponed to the 11 August 2010. On that date the prosecutor was not informed that the plaintiffs were not positively identified. The prosecutor made another entry in the investigating diary on that date instructing the police to conduct an identity parade as soon as possible with all witnesses.

The case was further postponed to the 22 September 2010 even on this day the police failed again to inform the prosecutor about the outcome of the identification parade.

[51] On the 19 July 2010 the prosecutor had also requested the police to verify the registration number of the getaway motor vehicle from the CCTV footage and to trace the registered owner of the motor vehicle.

There was no need, in my view, for the case to be postponed for investigation in order to make this information available to the prosecutor. This information was already available to the police but the investigating officer failed and/or neglected to provide it to the prosecutor. Firstly, the registration number of the Ford Laser could have been immediately provided because the Ford Laser had been in the possession of the police from the day the plaintiffs were arrested. Secondly, the video footage of the scene of crime was by then already in the possession of the police. This is confirmed by a note made by the police on the 8 July 2010 in the investigating diary. Fouche also had a copy. He downloaded the video footage onto his laptop at the scene of crime. According to him he used that video footage to arrest the plaintiffs. The second plaintiff had also informed Fouche that he was the owner of the Ford Laser. The question is why did the police not provide the prosecutor with this video footage immediately. The availability of the video footage could have assisted the prosecutor to determine earlier whether the plaintiffs were linked to the crime.

- [52] The police kept asking the prosecutor to postpone the case for further investigation whilst they had the information required by the prosecutor at their disposal. Should this information have been given to the prosecutor a *nolle prosequi* certificate could have been issued earlier than 27 October 2010. My view is that at all material times, the police knew that they did not have evidence against the plaintiffs. They misled the prosecutor. And based on the lack of information the

prosecutor had no choice but to request the court to postpone the case. The court as such did not have the full information when exercising its discretion to further detain the plaintiffs.

[53] I am in agreement with the plaintiffs in this respect. If the police were diligent in their investigations the plaintiffs would not have been kept this long in detention. I find therefore that the defendants are liable for the full period of detention of the plaintiffs.

[54] This case turns on its peculiar facts and is not meant to create a precedent that where the arrest is found to be unlawful, the ensuing detention would be unlawful as well. Each case must be determined on its own circumstances.

QUANTUM

[55] In respect of the quantum, the defendants' counsel submitted that both plaintiffs provided no evidence about damages for *contumelia*, trauma, dignity or reputation. According to her, the plaintiffs testified about special damages, which were not pleaded in their particulars of claim. They failed as a result to prove damages.

[56] The plaintiffs' counsel, on the other hand, submitted that the plaintiffs did not have to quantify the amount claimed. The amount, according to him, has been stated in paragraph 6 of their respective particulars of

claim. His further argument was that a person unlawfully arrested suffers trauma and loss of dignity even though he or she is not an outstanding member of the community. He said the plaintiffs were claiming general damages, which are normally suffered by a person who has been unlawfully arrested and detained. In assessing these damages the court must consider the length of time spent in detention; the fact that once arrested for robbery people start talking and this diminishes a person's standing among his neighbours. The first plaintiff had to go through a disciplinary hearing. His reputation has been diminished as a result among his colleagues. Damages are awarded taking into account the plaintiffs' particular circumstances. He submitted that an appropriate amount for damages in the circumstances of this matter would be R1 500 000 in respect of each of the plaintiffs. The length of time in custody must count in their favour.

- [57] Proof of damages is treated differently from proof of a point in issue which goes to the merits. If the plaintiff fails to adduce available evidence about damage, absolution follows; but if he or she adduces evidence, but fails to quantify the damage precisely, the court must make an estimate as best it can. Failure to prove the correct amount of compensation to which one is entitled is not necessarily as damaging as failure to prove a right to compensation. See **ESSO STANDARD SA (PTY) LTD v KATZ** 1981 (1) SA 964 at 970 and CWH Schmidt & H Rademeyer: **LAW OF EVIDENCE** Issue 10 at 3 - 36

[58] In this instance, I am satisfied that the evidence adduced by the plaintiffs suffices for me to make an estimate of the damages they suffered. The plaintiffs, as *per* their respective particulars of claim, are individually claiming a global amount of R3 510 000 in respect of general damages for the loss of freedom, *contumelia*, trauma and damages to their dignity and reputation and not special damages.

[59] The plaintiff's counsel conceded as much that the amount of R3 510 000 claimed by each plaintiff is excessive in the circumstances of this case and that an appropriate amount should be R1 500 000 in respect of each plaintiff. He contended that this amount is fair in the light of the courts normally awarding R25 000 per day.

[60] The plaintiffs were deprived of their liberty for 117 days. The length of time a person is detained after arrest is not the only factor to be considered when determining damages: all the relevant circumstances deserve consideration. However, in this instance, very scanty information has been provided. What can be considered is that both plaintiffs were arrested in the presence of other patrons of the tavern and as such lost their standing in their eyes. They spent 117 days in detention. The first plaintiff had to undergo a disciplinary process to be reinstated in his employment and as such also lost his standing among his colleagues.

[61] Comparison with previously decided cases does not help in most cases, as few cases are rarely directly comparable. No two cases can be on all fours. I however had to consider previously decided cases only as a guide of how other courts awarded damages. The following are the judgments that I took into consideration: in **ZEALAND v MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT & ANOTHER** [2009] JOL 23423 (SE) the plaintiff was detained for 1 932 days, the registrar having failed to issue a liberation warrant and he was awarded R2 000 000 which translates to R2 312 000 in 2012 according to R Kock: Quantum Yearbook 2012; in **TOBANI v MINISTER OF CORRECTIONAL SERVICES NO** [2000] 2 All SA 318 (SE) plaintiff was detained for 61/2 months and was awarded R50 000 which translates to R99 000 in 2012 in terms of R Kock: Quantum Yearbook 2012. The plaintiff in that case had failed to take reasonable steps to alert the prison authorities of his plight; in **MTHIMKHULU & ANOTHER v MINISTER OF LAW & ORDER** 1993 (3) SA 432 (ECD) the plaintiffs were detained for 144 days and depending on the type of work they were doing they were awarded R41 920 and R40 000 respectively. The amount of R40 000 translates to R142 000 in 2012 in terms of the R Kock: Quantum Yearbook 2012; and in **THANDANI v MINISTER OF LAW & ORDER** [1991] 1 All SA 39 (E) the plaintiff was kept in custody for 68 days and awarded R22 000 which will translates in 2012 to R117 000 in terms of R Kock: Quantum Yearbook 2012.

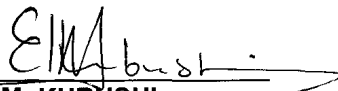
[62] The award of general damages is by no means an easy task. There is no basic formula for the assessment of this kind of damages. To arrive at a fair and just amount both objective and subjective factors may have to be taken into account as appears in the cases quoted above. The facts of each particular case must be looked at as a whole. A court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. See **TOBANI v MINISTER OF CORRECTIONAL SERVICES NO** [2000] 2 All SA 318 (SE) at 326e and **MINISTER OF SAFETY & SECURITY v SEYMOUR** 2006 (6) SA 320 (SCA) at para [17].

[63] Having considered the guidelines in the cases quoted above and taking into account the circumstances in this instance, my view is that, an amount of R200 000, as general damages, in respect of each plaintiff is appropriate and will constitute a *solatium* commensurate with the injury inflicted.

[64] In the premises I make the following order:

- i. The plaintiffs succeed in their respective claims in respect of the merits and quantum;

- ii. The plaintiffs are awarded damages in the amount of R200 000 each plus interest thereon at 15.5% from the date of service of the summons;
- iii. The defendants are to pay the costs of this action jointly and severally the one paying the other to be absolved.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

HEARD ON THE	: 08 AUGUST 2012
DATE OF JUDGMENT	: 13 DECEMBER 2012
PLAINTIFFS' COUNSEL	: ADV F.M.M SNYMAN
PLAINTIFFS' ATTORNEY	: MAKHAFOLA & VESTER INC
DEFENDANTS' COUNSEL	: ADV G.E. NAMENG
DEFENDANTS' ATTORNEY	: THE STATE ATTORNEYS