

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

CASE NO: 16735/08

In the matter between

STEPHEN DAVID BORAIN

First Plaintiff

JEAN PIERRE EDWARD WITTSTOCK

Second Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

Delivered: 28 November 2011

MURUGASEN J

[1] This is an action for damages arising out of the arrest and detention of the plaintiffs by a police officer acting in the course and scope of his employment with the defendant.

[2] The plaintiffs, Stephen David Borain (Borain) and Jean Pierre Edward Wittstock (Wittstock), are security officers employed by Is'khumba Senyathi Protection Services (IPS). During 2007, the plaintiffs were deployed by IPS to provide security and surveillance services and training programs for Nonke Petroleum, a company that transports fuel. On 16 October 2007 the plaintiffs intervened in an incident when a driver of a Nonke tanker unlawfully attempted to sell fuel he was transporting. The driver subsequently lodged a complaint of armed robbery against the plaintiffs. The plaintiffs were arrested approximately a year later in connection with the complaint.

[3] The plaintiffs allege that they were unlawfully arrested and detained at the

Hillcrest Police Station holding cells from 10h00 until their release from custody at approximately 22h00 on 5 September 2008 at the instance of Warrant Officer T D Mkhize acting in the course and scope of his employment with the defendant, the Minister of Safety and Security.

[4] The plaintiffs allege further that during their arrest and detention, they suffered emotional distress, embarrassment, and public humiliation and were unable to attend to their work related responsibilities. Each plaintiff consequently claims general damages in the sum of R225 000 for wrongful arrest and detention, contumelia and emotional stress. The plaintiffs also seek to recover loss of income and legal costs incurred in securing their release from custody and for related professional legal services.

[5] The defendant denies that the arrest and detention of the plaintiffs was unlawful and avers that Mkhize had, in terms of S 40(b) of the Criminal Procedure Act 51 of 1977, reasonable grounds for suspecting that the plaintiffs had committed armed robbery and/or assault with intent to do grievous bodily harm.

The trial proceeded on the merits and quantum.

Factual Matrix

[6] The following facts are either common cause or clearly established on a balance of probabilities.

- 1 Nonke Petroleum (Nonke), a company which transports fuel from the Island View and Engen depots in Durban to Johannesburg, suffered a high incidence of fuel theft during the course of such transportation.
- 2 During 2007 Nonke hired the services of IPS to provide security and surveillance as well to educate the drivers on safety on the road. The two plaintiffs held training courses for the drivers on hijacking response and safe driving.

- 3 At about 23h34 on 16 October 2007, one of Nonke's vehicles, Tanker 26 bearing registration plates NJ16089 driven by an employee Sizwe Kubeka, departed the Bayhead area and approached Shongweni at approximately 24h10. The vehicle was under covert surveillance by the plaintiffs who were following the vehicle in their own vehicle.
- 4 At the Shongweni exit from the N3 Highway, Tanker 26 deviated from its journey plan and made an unauthorised stop. The plaintiffs observed the tanker at a distance before driving up to it. They found Kubeka with an Indian male, Mahabeer, who had paid him R3000 for the fuel Mahabeer was about to move from the tanker into the flowbin which was on his vehicle. The plaintiffs interviewed Mahabeer and recorded information received from him and took photographs *inter alia* of Kubeka, the tanker, Mahabeer, his vehicle, the flowbin and siphoning equipment. Mahabeer was then allowed to leave.
- 5 They then reported the incident to the owner of Nonke, Badat, who instructed them to report the incident to his managers. Arrangements were made for the tanker to be driven back to Nonke's premises. In the interim the plaintiff's took possession of the R3000 that Mahabeer had paid to Kubeka and 2 private cellphones which were in the tanker contrary to both company policy and legislation. Kubeka however fled the scene.
- 6 On the same night the cellphones and money were handed to Nonke's operational manager, Wilken, and the tanker was driven back to Nonke's premises by another employee, Haribans. The plaintiffs compiled a report with photographs on the incident, dated 22 October 2007, which was furnished to Badat. Nonke subsequently instituted disciplinary proceedings against Kubeka who failed to attend, and was dismissed.
- 7 On 17 October 2007 at approximately 10h00 Kubeka reported that he had been hijacked to Constable Z Ngcobo at the Hillcrest Police Station. He was unable to

furnish the vehicle registration number and she called his employers as she was required to circulate the vehicle's details. A Nonke employee, Rieckerd, informed her that Kubeka had been stealing fuel and that the vehicle which he alleged had been hijacked was with Nonke. Consequently she refused to register the complaint of armed robbery as she was of the opinion that Kubeka's report was false. She made an entry to that effect in the Occurrence Book under entry 1405 at 10h45 on 17 October 2007.

- 8 Nonke's employees informed the plaintiffs of Kubeka's attempt to report the 'hijacking', and that the police had been apprised that his report was false and that Kubeka had unlawfully attempted to sell fuel.
- 9 On 22 October 2007 Kubeka reported a complaint of armed robbery and assault with intent to do grievous bodily harm at the Hillcrest Police Station, alleging that he had been robbed of 2 cellphones and R700 at gunpoint by 2 unknown white males and assaulted with an iron rod by them. He made a statement to Reserve Constable Sibiya who also opened a docket under CAS 283/10/2007. The docket was handed to Captain R S Gcwabaza who assigned it to Warrant Officer T M Radebe on 23 October 2007.
- 10 On 23 October 2007 Radebe, in an entry made at 12h45 in the Investigation Diary, recorded that Nonke had reported to him that Kubeka was lying and that he had been caught by private investigators while selling diesel; that he was not hijacked or robbed but had fled from the N3 leaving the truck. In a further entry at 14h00 on 24 October 2007, Radebe cross referenced to OB Number 1405/10/2007 and recorded 'Kindly close this docket as false'.
- 11 On 5 August 2008 the docket was handed by Capt Gcwabaza to Mkhize, with instructions to investigate the complaint and that the complainant was not robbed of his vehicle but of his money and cellphones. On 6 August 2008 Mkhize interviewed the complainant who informed him that the plaintiffs were employed

at the same company as him.

- 12 Mkhize then spoke telephonically to Badat who furnished him the plaintiff's contact numbers. Mkhize then telephoned Wittstock who undertook to attend on Mkhize at the police station. An entry dated 26 August 2008 reflects that Wittstock informed Mkhize that he had called at the police station to see him but no one attended to him. On 4 September 2007 Mkhize spoke to Wittstock who arranged to meet him with Borain on 5 September 2008.
- 13 When the plaintiffs presented themselves at the office of Mkhize at the Hillcrest Police Station on the morning of 5 September 2008, they were placed under arrest by Mkhize at approximately 10h00. While being processed in the charge office the plaintiffs were exposed to former colleagues in the police services and other persons who knew them. They were then handcuffed and escorted to the holding cells at the police station, where they were detained with other suspects. When the plaintiffs were unable to persuade Mkhize not to arrest them although they presented him with statements they had prepared from the report they had presented to Badat, Borain contacted his father to obtain legal representation and Wittstock called Badat to verify their version to Mkhize and secure their release. At the request of Mkhize, the firearms belonging to the plaintiffs were brought from their homes and handed in at the Hillcrest Police Station and entered in the SAP13 register under reference SAPS13/854/2008.
- 14 Their legal representative, attorney Storm Hattingh, attended on Mkhize at the police station during the morning while the plaintiffs were in the charge office, but failed to persuade Mkhize to release the plaintiffs although she arranged for the plaintiff's firearms to be handed in, on the understanding that the plaintiffs would then be released. She then arranged with PK Naidoo, the senior public prosecutor at Pinetown Magistrates Court for a bail application to be heard. The hearing did not take place as Mkhize did not arrive at the court with the plaintiffs. Badat also presented himself at the police station having advised Mkhize he

would do so after he attended mosque, but Mkhize was not there.

15 Hattingh was instructed to launch an urgent application to the High Court for bail. She gave notice to the State attorney, the Registrar of the High Court and the judge on duty. She then proceeded to her office with the counsel on brief and prepared the application papers. At about 19h30 she received a telephone call from Mkhize that a bail application would be held at 20h00 at the Hillcrest Police Station.

16 She instructed counsel to attend the hearing which he did with Borain's father. Senior Public Prosecutor Ngcobo of the Pinetown Magistrates court was at the police station. He perused the file and having advised Mkhize that the allegations by Kubeka were false, he endorsed the file '*nolle prosequi*'. The plaintiffs were released on warning and were directed to present themselves at the Pinetown Magistrate's court on the following Tuesday. The matter was remanded to 19 September 2008, when the charges against the plaintiffs were formally withdrawn.

Issues for determination

[7] The issues for determination by this court were :

- 1 whether the defendant had discharged his onus to prove on a balance of probabilities that the arresting officer had acted on a reasonable suspicion in effecting the arrest of the plaintiffs;
- 2 if he had not, whether the plaintiffs had suffered damages consequent upon such unlawful arrest and detention;
- 3 if they had, the quantum of damages suffered by the plaintiffs.

The Law

[8] The *onus* of proving on a balance of probabilities that the arrest and detention

were lawful is on the defendant, who in denying that the plaintiffs were unlawfully arrested and detained, relies on the provisions of s 40(1)(b) of the Criminal Procedure Act No 51 of 1977 which provides that:

‘A peace officer may without a warrant arrest a person-

(a)...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.’

[9] In **Duncan v Minister of Law and Order 1986 (2) 805 AD Van Heerden J held at page 818 para F-H :**

‘The so called jurisdictional facts which must exist before the power condoned by S40 (1)(b) of the present Act may be invoked, are 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.”

[10] Therefore while the peace officer is vested with a discretion, such discretion must be properly exercised. But ‘the test is not whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion’. (**Duncan supra 814 D-E**)

[11] Therefore the test as to whether the suspicion of the officer effecting the arrest had been reasonable is an objective test. (**Ralekhwa v Minister of Safety and Security 2004 (1) SACR 131 (T) at 134 h-i**).

[12] However, ‘reasonable suspicion does not imply that there must be a prima facie case against the suspect. Nor does a peace officer when effecting arrest necessarily have to have the intention of bringing the arrestee before court to be prosecuted. A

reasonable suspicion, coupled with the intention to make further enquiries before deciding whether the case merits prosecution, will suffice.’ **Duncan v Minister of Law & Order 1984 (3) SA 460 (T) at 460-461.**

Argument

[13] On behalf of the plaintiffs, Mr Prior submitted that the defendant had failed to discharge his onus to show that Mkhize had acted on a reasonable suspicion that the plaintiffs had committed armed robbery and/or assault, as it was apparent from the largely unchallenged evidence presented by and in support of the plaintiffs, that he failed to properly consider, investigate or access all the information relevant to the complaint against them. Instead he had relied on the statement made by the complainant some days after the incident, which contained material discrepancies with his initial report at the same police station. The plaintiffs had also testified credibly that although they were not flight risks and had made a concerted effort to persuade Mkhize that they had not committed armed robbery, they were arrested in infringement of their constitutional rights. As a result of their arrest, they had been traumatized and exposed to humiliation which constituted aggravating factors which impacted on the quantum of damages suffered by the plaintiffs. The quantum claimed by the plaintiffs viz R100 000 was an appropriate sum which accorded with the awards in other similar cases. In conclusion, Mr Prior contended that the conduct of Mkhize and the defendant warranted an order for costs on an attorney and client scale.

[14] In response Ms Jikela contended that the defendant had discharged his onus as Mkhize had had acted on a reasonable suspicion. The initial complaint had related to hijacking and not the armed robbery later reported by the complainant. Gcwabaza had reopened the docket for valid reasons as it related to the armed robbery and Mkhize’s reasonable suspicion was justified as the plaintiffs confirmed their presence at the crime scene, that they possessed firearms and that they had taken money and cellphones from the complainant. As armed robbery is an offence in terms of Schedule 6 of the Criminal procedure Act 51 of 1977, S60 (11)(a) justifies the arrest and detention. She

urged the court to find that as 'suspicion' connotes an absence of certainty and of adequate proof, Mkhize had acted on a reasonable suspicion, and that the arrest of the plaintiffs was not unlawful. She submitted further that a punitive costs order as requested by plaintiffs in argument were not justified as the defendant was entitled to defend the matter so that it could be properly adjudicated in court. Insofar as the quantum is concerned, she conceded that the plaintiffs were entitled to their legal costs and damages at the rate of R450 an hour for the 14 hours in which the plaintiffs were detained.

Reasonable Suspicion or Unlawful arrest

[15] According to Mkhize at the time of the arrest, he had the following grounds which constituted reasonable suspicion against the plaintiffs :

- 1 The statement of the complainant that he had been robbed at gunpoint by two unknown males of 2 cellphones and R700, deposited to on 23 (22) September 2007.
- 2 The interview with the complainant who informed him that the 'suspects' worked with him.
- 3 The confirmation by Badat that the 'suspects' were the plaintiffs who provided security to Nonke.
- 4 Confirmation by the plaintiffs that they were present at the scene of alleged 'armed robbery' and that they owned firearms.

[16] In **Duncan (1984) supra at 466 A-B** the court held that '...a reasonable suspicion could also conceivably be formed where a person has been seen at the scene of a crime and upon being questioned gives a false alibi or refuses to answer questions...'.

The conduct of the plaintiffs herein may be clearly distinguished from the above circumstances.

[17] The plaintiffs admitted to being at the scene of the crime with Kubeka. Wittstock testified that Mkhize requested them to come to the police station to make a statement so that the docket in respect of the armed robbery could be closed. It is apparent from the facts that as the plaintiffs were not aware of the charge laid by Kubeka with Sibiya, they were under the impression that they were presenting themselves at Mkhize's office to assist with statements in respect of the hijacking Kubeka had first alleged. They therefore prepared statements based on their report to Nonke and took it to Mkhize. Although Mkhize denies that he requested the plaintiffs to bring statements as he would have taken a warning statement from them, their evidence was not challenged when they testified. Wittstock who is the person who communicated with Mkhize, persisted that Mkhize had asked him to bring a statement on more than one occasion and that he had specifically advised Mkhize that he had attended the police station on more than one occasion between 20 August 2008 and 4 September 2008 in an attempt to give him the statement after they had spoken telephonically on 20 August 2008. Mkhize himself recorded that Wittstock had advised him that he had been at the police station in the investigation diary on 26 August 2008.

[18] Thus even before the arrangement was made for the plaintiffs to attend on Mkhize on 5 September 2009, they were cooperating with his request to make a statement albeit in respect of the alleged hijacking. In the statements which they had prepared the plaintiffs specifically state that the money (R3 000) which Kubeka had received for the fuel (R3 000) and his 2 cellphones were seized at the scene and handed to Wilken on his arrival at the scene and a report compiled and handed to Nonke thereafter.

[19] The plaintiffs testified, unchallenged, that they presented their statements to Mkhize who barely glanced at it but advised them that he was taking it to his Captain, and returned shortly thereafter to advise them that they were being arrested.

[20] In my view, Mkhize ought to have realized that he had two materially disparate

versions from Kubeka and the complainants. But more significantly, there was already a material discrepancy between Kubeka's statement and his version to Mkhize, in that he initially reported that he had been robbed by two unknown men but had informed Mkhize that the men were security guards for Nonke. Further the plaintiffs admitted to taking R3 000 from Kubeka while Kubeka stated that he was robbed of R700. These discrepancies would have been immediately apparent to Mkhize.

Therefore before taking any further action, or even forming a reasonable suspicion, it was incumbent upon Mkhize to consider and evaluate the versions of Kubeka and the plaintiffs in the light of the other information available to him and to obtain further information from the sources which were apparent from the docket itself.

[21] Radebe's notes on the Investigation diary is a clear indication that there are two versions:

One which relates to the alleged hijacking and the other to the armed robbery of cellphone and money. The docket was endorsed by Radebe with a cross reference to Occurrence Book entry OB Number 1405/10/2007 and his endorsement that the docket was closed as the complaint was false. Mkhize therefore had clear access to the detailed entry made by Constable Ngcobo, from which it was evident that Kubeka had made an earlier allegation of hijacking in which he had not reported that he had been robbed of money and cellphones. This together with the dates of the reports ought to have placed Mkhize on his guard, particularly as the earlier report was made by Kubeka on the morning of the incident and the second report some five days later. Mkhize had recourse to his colleagues to discuss their reports and conclusions but failed to avail himself of the opportunity to do so. He was evasive when crossexamined on his failure, as he initially alleged that Radebe was on sick leave, but when on his own version he admitted being with Radebe on the day of the arrest, he conceded that he had not sought any clarification from them.

[22] Although an arrest in terms of S 40 (b) envisages that further investigation will follow as there may not be a prima facie case, it would have in the aforesaid

circumstances been reasonable for Mkhize to make further enquiries to Nonke before he interviewed the plaintiffs. Badat confirmed that several telephone numbers recorded on page 11 of the police docket included his personal number and telephone numbers for senior employees of his company. Therefore Mkhize could have interviewed Badat and the employees of Nonke to obtain clarification and further information about Kubeka and the plaintiffs, even before 5 September 2008.

[23] As Mkhize had verified with Badat that the plaintiffs were still employed as 'security' for Nonke when he obtained their contact details, he could, at that stage already, have obtained further details in respect of the incident on 16 October 2007 from Badat. Had he done so, he would have been in a better position to evaluate the plaintiffs' version and the contents of their 'statements' in the light of their complicity as alleged by Kubeka.

[24] Badat would have been able to confirm that money to the value of R3 000 and two private cellphones were seized from Kubeka and handed to Wilken. Instead Badat confirmed that Mkhize did not ask him about the money or the cellphones. Had he been asked, Badat may even have furnished Mkhize with a copy of the plaintiff's report dated 22 October 2007, which would have better informed Mkhize about the complaint he was investigating, as the report consisted of photographs and a detailed narration of events locations and the items recovered. Under **Section 3 Interpretation**, the plaintiffs' report states:

'As the agreed amount of money had been handed over to the driver it was seized with two private cellular phones belonging to the driver. The money and cellular telephones were handed to Mr Wilken on his arrival at the scene.'

[25] Badat was also in a position to confirm that the plaintiffs were known to Kubeka as they had held training courses for Nonke's drivers of which Kubeka had been one. Mkhize could also have verified the conclusion by Ncgobo and Radebe that the first allegation by Kubeka of hijacking was false with Nonke which would have impacted

adversely on Kubeka's credibility and cast suspicion on his complaint rather than on the plaintiffs.

[26] In the absence of such a course of enquiry being followed by Mkhize, his suspicion that the plaintiffs had committed armed robbery, cannot be considered reasonable. But even when the plaintiffs arrived at the police station with their 'statements' and sought to persuade him of their innocence, he ought to have taken cognisance that they were not merely protesting their innocence but they were referring them to verifiable sources to substantiate their allegations.

[27] As held in **S v Purcell-Gilpen 1971 (3) SA 548 (RAD) at 554 C:**

'Where the opportunity exists either to allay or confirm an initial suspicion, that opportunity should be taken, and the failure to take it is a failure to act as a reasonable but honest man.'

[28] The response of the prosecutor Ngcobo when he read the docket that it was a bogus claim, and his questioning of Mkhize as to why the docket was opened, and the plaintiffs subsequent release on warning supports the plaintiff's contention that their arrest and detention was unlawful as there was no grounds on which Mkhize could have conceived a reasonable suspicion that they had committed armed robbery.

[29] Badat testified that although he spoke telephonically to Mkhize after Wittstock telephoned him to inform him that they required his intervention as they were being arrested, Mkhize was not interested in what he was saying and that when he went to the police station to see Mkhize personally, Mkhize was not there although he had told Badat that he would wait for him. But when Badat went back to the police station in the evening of 5 September 2008, the prosecutor from the Pinetown Magistrates court asked him about the involvement of IPS with Nonke; he had then explained that the services of IPS were employed by his company which had resulted in drastic reduction in fuel loss, and prosecution and convictions in respect of such fuel loss.

[30] However from the evidence of the plaintiffs, Badat and Ms Hattingh it is apparent that Mkhize had not conducted the investigation with an objective perspective. Not only had he failed to access the information available to him prior to the arrest of the plaintiffs, he also adopted an obstinate and uncooperative attitude.

[31] Badat testified that he believed that Mkhize had already made up his mind because when he explained what had taken place during the incident on 16 October 2007, and the attempted theft by Kubeka, Mkhize had responded that he had a statement from Kubeka and whatever Badat said to him would not matter. Mkhize had also advised him that he would be putting the plaintiffs in jail and he would see 'what would happen on Monday'.

Badat also testified that Mkhize was aggressive and repeated that he was locking up the plaintiffs and nothing that anybody could do would make a difference. In Badat's view Mkhize was deliberately disrespectful to him because when Badat requested that he discuss the report at the police station, Mkhize had replied 'Come and see me' but had failed to wait for Badat. He confirmed further that the arresting officer did not discuss or request the cell phones and the money from him.

[32] Mkhize's obstinate and uncompromising attitude is also confirmed by the plaintiffs and their attorney. Wittstock testified that the more he appealed to Mkhize, the more confrontational Mkhize became. Borain's evidence that Mkhize was also aggressive towards him and commented that he had the physical stature of a fighter who liked to beat up black people was also corroborated by Wittstock.

[33] Hattingh testified that when she introduced herself to Mkhize, he did not greet or acknowledge her. He refused to discuss why the plaintiffs had been arrested, and told her only that an investigation was pending, he was still taking statements and nothing had been finalized. He was however intent on keeping the plaintiffs in custody over the weekend. She also testified that although Mkhize had advised the plaintiffs' counsel that he would not oppose bail if the plaintiff's firearms were handed to the police, and this was done, Mkhize had failed to attend or take the plaintiffs to the Pinetown Magistrates

court, where the senior Public Prosecutor had agreed to hear the bail application. This had then led to the preparation of the urgent High Court Application, which was preempted by the plaintiffs being released before the application was moved.

[34] It is appropriate to note that the plaintiffs testified in an exemplary manner; they were clear and coherent; their demeanour was frank and credible; their evidence although largely unchallenged, remained uncompromised and consistent under crossexamination and they corroborated the testimony of each other without any material discrepancy. Badat, Hattingh and Constable Ncgobo were also clear and coherent witnesses. However despite Reserve Constable Sibiya's confidence in his ability to carry out his duties efficiently, he was confused about the discrepancy of the dates on the investigation diary and Kubeka's statement although he was confident that he had met Kubeka on one day only. But nothing turned on this.

[35] Mkhize evinced an arrogant and uncooperative attitude when testifying and initially attempted to avoid answering questions put to him by his own counsel, by alleging that his memory failed him and had to be admonished by the court after his counsel confirmed that she had consulted with him several times prior to the trial. Neither was he impressive under crossexamination. He was evasive and unconvincing in his denials of the manner in which he responded to the plaintiffs, their legal representatives and Badat and their concerted efforts to provide him with convincing and verifiable information pertaining to the falsity of the complaint of armed robbery. His conduct lent credibility to the plaintiff's allegations that Mkhize did not investigate the complaint laid by Kubeka in an appropriately objective manner and that he effected or caused the unlawful arrest of the plaintiffs.

[36] I am accordingly constrained to find that Mkhize's conduct in acting on Kubeka's complaint was not that of a reasonable man.

'The grounds of suspicion must be those must be those which would induce a reasonable man to have suspicion'. (**R v Van Heerden 1958 (3) SA 150 (T) at 152 E**)

[37] In **Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE)** Jones J held at 658 F-H:

‘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, i.e. 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 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.’

[38] As already found Mkhize’s conduct falls short of the conducted expected of the reasonable man and his suspicion was not based on solid grounds. In the premises, I am not persuaded that the defendant has discharged the onus on him and I am satisfied that the arrest of the plaintiffs cannot be justified on the grounds of reasonable suspicion.

[39] As held in **Duncan (1984) supra at 466 D-E**

‘the power of arrest without a warrant is a valuable means of protecting the community.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 avail mistaking the innocent for the guilty. they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt’.

[40] Given the constitutional imperatives that prevail in our democracy, an arrest is a

drastic invasion of personal liberty and must be justifiable despite the protection of the right to freedom of person offered by the Constitution. **(Louw v Minister of Safety & Security 2006 (2) SACR 178 (T) at 187; Le Roux v Minister of Safety & Security & Another 2009 (4) SA 491 (N))**

[41] Mkhize clearly failed to take cognisance of the obligation on him to effect arrest only if the drastic action was justifiable and there was no further evidence to support the defendant's contention that Mkhize had arrested or caused the arrest of the plaintiffs on reasonable suspicion that they had committed armed robbery.

I am therefore satisfied that the plaintiffs' arrest and detention was unlawful.

Damages

[42] The plaintiffs testified that after Mkhize advised them that they were being arrested, he provoked and challenged them by making personal comments about them and refusing to take cognisance of their service in the South African Police Services (SAPS) and that they were still contributing to law enforcement.

[43] Borain testified that he held the rank of constable in SAPS from 2001 until 2007. He thereafter established IPS of which he is the sole member. He has worked on several high profile security projects including the 2010 FIFA World Cup and has provided security services at the Sun Coast Casino. He is still a reserve police officer with a force number and works with the Rescue and Recovery Unit.

[44] Wittstock was a member of the South African Police Services from 1990 to 2007 and held the rank of Inspector. He was a senior officer involved in crime intelligence in the provincial and national offices in Durban. He was responsible for major projects, one being Operation West which targeted the import and export of drugs by syndicates, prostitution and robbery in Durban. On occasion he still assists with the management of deep cover agents. He left the South African Police Services in 2007 and joined Borain

as an operations manager in IPS.

[45] The plaintiffs were processed in the charge office in the presence of members of the public, the charge office personnel and other members of SAPS several of whom they knew. Mkhize continued to mock them in the charge office by Mkhize, and the persons present laughed at the plaintiffs. At this stage they had to remove their shoes laces and belts and hand over their keys, cellphones and wallets. Boraine was forced to clutch at his pants to prevent it from falling off and exposing the lower half of his body.

[46] Several members of the police dog unit whom Borain had worked with were present in the charge office. A senior policeman, Captain Fourie who knew Borain, enquired from him what was happening; Borain advised him that he was being arrested on a charge of armed robbery.

Wittstock confirmed that Borain had seen and spoken to Captain Fourie. He himself had seen Senior Superintendent Joseph whom he had worked with in the Durban Riot Unit. Joseph asked him why he was been arrested and what he had done; Wittstock advised him that he had not done anything unlawful, and asked Joseph to speak to Mkhize.

After they were processed, the plaintiffs were handcuffed with their hands behind their back and escorted through an open courtyard to the holding cells by two policemen.

[47] The plaintiffs testified that they were extremely humiliated and had to convince people of his innocence after their arrest had been observed. They had been handcuffed although they were not flight risks and had not physically resisted arrest in any way.

They were placed in a cell with other suspects. The plaintiffs testified to the unsanitary condition of the cell and toilet and ablution facilities.

[48] Wittstock further testified that he had an appointment with Dr Graham Fuller, a Neurosurgeon at St Augustine Hospital at 11h00 on the day of the arrest. He had had spinal surgery and one of the titanium screws in the rod fusing his spine had come loose. It had taken more than a month to get the appointment with Fuller and was on

medication for pain in the interim. When he informed Mkhize about the appointment and that it was essential that he keep the appointment, Mkhize responded that he should make another appointment. Wittstock had since undergone further surgery.

[49] None of the foregoing evidence was seriously challenged or undermined by the defendant, even after Mkhize testified. As already held, Mkhize was not a credible witness and his attitude in court lent credibility to the plaintiff's allegations about his conduct.

[50] The core business of IPS is investigating and guarding; the plaintiffs also hold health and safety and behavioral response educational courses and training for the drivers of companies they monitor. Thus the arrest of Boraine and Wittstock had the potential to impact adversely on their suitability and competence to provide such services as they offer and their reputation in the security industry. However no evidence was furnished that they had suffered any such loss consequent to their arrest.

[51] Nevertheless I am satisfied that the plaintiffs are entitled to general damages pursuant to their arrest as a result of the unlawfulness thereof, the humiliation to which they were exposed and the conditions under which they were detained.

Loss of income

[52] The plaintiffs were unable to undertake the surveillance operation which was scheduled to take place between 5 - 8 September 2007. They were in custody on 5 September 2007; they had been traumatized by their arrest, and their firearms had been surrendered to the police. There was no one else who was qualified to undertake the surveillance. Furthermore the company that employed them for the operation required the plaintiffs' specific expertise and knowledge. They consequently suffered loss of the R25 000 they would have been paid for the surveillance operation.

Legal Costs

[53] The legal costs incurred by the plaintiffs was not challenged. The statement of account from Storm & Company was in respect of the costs incurred by both plaintiffs and lay to be divided between them.

[54] During the closing address, Mr Prior advised that the quantum of the damages claimed by each plaintiff was R127 900, which sum was constituted by R100 000 for general damages the plaintiff's half share of the legal costs and the loss of income.

[55] The trial court has a wide discretion when it considers fair and adequate compensation to the injured party. It must consider all the factors and circumstances relevant to the assessment of damages and past awards.

[56] As held in **Minister of Safety & Security v Tyulu 2009 (2) SACR 282 SCA by Bosielo AJA** at 289 – 290 para [26] :

‘In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach 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 (2) SACR 271 (SCA) paras 26-29).'

[57] Relevant facts in this matter are the age of the plaintiffs, the circumstances, nature and duration of their arrest, the conditions under which they were detained, their frustrated attempts to be released on bail, their professional standing and the conduct of the police towards them.

[58] In **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)** on appeal the Supreme Court held that R90 000 was an appropriate award in respect of a 63 year old man who had been unlawfully arrested and detained for 5 days albeit 24 hours was in custody and the remaining period under police guard in hospital.

[59] In **Rudolph v Minister of Safety & Security 2009 (5) SA 94 (SCA)** the court held on appeal held that an award of R100 000 for general damages was appropriate when the appellants were unlawfully arrested and detained for 3 days and 4 nights and subjected to humiliation and under extremely unhygienic conditions.

[60] In **Minister of Safety & Security v Kruger 2011 (1) SACR 529 SCA** the court held that 'the police have a duty to carry out policing in the ordinary way. They have no business setting out to turn an arrest into a showpiece'. The suspect was shown in a television broadcast being handcuffed and led to a police vehicle. The respondent was awarded R50 000 for unlawful arrest and detention and R20 000 for *iniuria*.

[61] In **Minister of Safety & Security v Tyulu 2009 (2) SACR 282 SCA** the court found that although the detention was for a short period, there were aggravating factors: the arrestee was a magistrate arrested by people with whom he normally worked; he was manhandled and dragged into a police vehicle; he was taken to the scene of a motor collision and made out to be a criminal; he was arrested for an improper motive. As a man of considerable standing in the community he must therefore have been severely embarrassed, humiliation and shock and concomitant anguish and stress. He was awarded R15 000.

[62] Having evaluated the relevant facts in the light of the comparable cases and the Classified Listing of Inflation Adjusted Awards as set out in the Quantum Handbook 2011, I am of the view that a fair and appropriate award of general damages for the unlawful arrest and detention of the plaintiffs is an amount of R40 000 each.

Together with the award for legal costs and loss of income the plaintiffs are awarded damages in the sum of R67 900.

Costs of the action

[63] Mr Prior submitted that a punitive order for costs on an attorney and client scale is appropriate given that from the facts available, the defendant ought to have realized that the arrest of the plaintiffs was unlawful and not opposed the relief sought.

[64] Ms Jikela contended in response that the defendant has the right to defend claims against him and a punitive costs order is therefore not warranted. Further the legal expenses and loss of earnings have been established and quantified at a lesser sum than originally claimed.

[65] In **Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 855** it was held that in order to award attorney and client costs, the court had to find that 'the defendant adopted dishonest tactics in the course of the action or a vexatious and frivolous attitude towards the plaintiff or showed malicious intent to draw the matter out deliberately so that the plaintiff would be mulcted by his won costs and would not be able to continue the matter.....' .

[67] I am unable to find such an abuse of court proceedings. Further, I am not persuaded that a punitive costs order is justified merely because the defendant did not concede the merits. There is a responsibility to the public at large, from whose contributions the awards and costs of applications of this nature are paid, that matters in

which an organ of State is sued, be adjudicated in a court of law to establish liability and the degree thereof, and for a fair and equitable assessment of quantum.

Order

Judgment is granted in favour of the plaintiffs for:

- 1 payment in the sum of R67 900 to each plaintiff;
- 2 interest thereon at the rate of 15,5% per annum from date of judgment to date of final payment;
- 3 costs of suit

Murugasen J

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