

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA70/2023

In the matter between:

MINISTER OF POLICE

Appellant

And

MZIKAYISE OSE

Respondent

JUDGMENT

Bloem J

[1] Mzikayise Ose, the respondent, was arrested by Mandisi Hlwempu, a member of the South African Police Service, on Friday, 5 April 2019, whereafter he was detained until Monday, 8 April 2019. After his release from detention he instituted action against the Minister of Police, the appellant, claiming that he was unlawfully arrested and detained by members of the South African Police Service acting within the cause and scope of their employment as servants of the state. The court a quo found that the respondent was unlawfully arrested and detained and awarded R300 000 as damages, together with costs of the action. An application for leave to appeal was refused by the court a quo. It is with the leave of the Supreme Court of Appeal that the appellant appeals against the order and judgment of the court a quo.

[2] The facts are briefly that during the evening of Friday, 5 April 2019 the respondent was travelling home along the N2 outside Grahamstown when he came across a group of people. His wife and nine-year-old son were inside the vehicle with him. He stopped at the side of the road to enquire what was happening. He learned that a vehicle or vehicles had collided with cows, that the police had been at the scene of the collision (the accident) and that they accompanied the drivers of the

vehicles to the Grahamstown police station. Persons helped themselves to the carcasses of the cows. He requested whether he could have some meat whereafter a hindleg and the head of a cow, both still unskinned (the meat), were placed in the boot of his vehicle.

[3] Near the Committees Drift police station he was stopped at a roadblock. Captain Hlwempu came across the meat in the boot of the respondent's vehicle. He called for an explanation and the respondent said that he obtained the meat from the scene of the accident. The respondent, his wife and his son were taken to the Committees Drift police station.

[4] It is common cause that captain Hlwempu made a call to the Grahamstown police station to enquire whether the accident had been reported at that police station. However, there is a dispute as to the response to that enquiry. Captain Hlwempu testified that the response he received from the person to whom he spoke was that "*Grahamstown police did not know about an accident which occurred in their area*". On the other hand, both the respondent and his wife testified that captain Hlwempu had switched on the speaker of the telephone which he used and they heard the conversation between him and the police officer on the other side. Both testified that the police officer on the other side confirmed that the accident had been reported at that police station. The respondent and his wife also testified that after the police officer had confirmed the reporting of the accident at the Grahamstown police station, captain Hlwempu said to the respondent that he was lucky.

[5] The respondent left the police station to check on his son who was still inside the vehicle. Upon his return, he noticed captain Hlwempu putting his hand on his wife's breast. When he testified, captain Hlwempu denied such inappropriate behaviour. He acknowledged that subsequent to the respondent's arrest and detention, he faced disciplinary proceedings arising from a complaint that the respondent's wife had lodged against him in respect of the alleged inappropriate behaviour in the police station.

[6] In a statement that captain Hlwempu made a few hours after the respondent's arrest, he said that, before he took the respondent to the police station, he "*then warned the suspect that he is under arrest for being in possession of stolen meat. I*

then took the suspect to the police station.”

[7] Captain Hlwempu testified that he reported the matter to the commander of the stock theft unit in Grahamstown, who, in turn, contacted the stand-by police officer in that unit, Sakhekile Nzipho. Sergeant Nzipho testified that after he had been informed by his commander of a person who had been arrested and waiting at the Committees Drift police station, he contacted the Committees Drift police station to establish what the case was all about. A colleague informed him that the arrested person had been found in possession of the meat which he claimed to have obtained from the scene of the accident. Sergeant Nzipho then contacted the Grahamstown police station to establish whether such an accident had been reported at that police station. After receiving confirmation thereof, he drove to the scene of the accident where he found evidence of the accident, like debris and intestines on the tarred surface of the road. Sergeant Nzipho testified that he drove to the Committees Drift police station, approximately 45 kms from Grahamstown, where he found captain Hlwempu, constable Mbilana and the respondent. He noticed that the police officers were busy with paperwork regarding the respondent's arrest.

[8] After the docket had been handed to him, captain Hlwempu informed him that the respondent would be detained in Grahamstown. Sergeant Nzipho transported the respondent to Grahamstown where he was detained at the Joza police station until Monday, 8 April 2019. The respondent's evidence was that before he set foot in court on the Monday, a police officer informed him, while he was still inside the court cell, that he would not go to court and that he could go home. It turned out that the public prosecutor declined to prosecute the respondent. It is against the above factual matrix that it must be decided whether the court a quo correctly found that the respondent was unlawfully arrested and detained.

[9] The starting point is the reason for the respondent's arrest. As pointed out above, in his statement captain Hlwempu said that the respondent was arrested because he was *“in possession of suspected stolen meat”*. In another statement, which was also made on 6 April 2019, captain Hlwempu said that at 23h55 on 5 April 2019 he arrested the respondent *“for the offence of possession of suspected stolen meat”* and that *“he was in possession of suspected stolen meat in the boot of his vehicle”*. The face of the case docket, wherein captain Hlwempu is identified as the complainant, identified the nature and description of the offences as theft,

possession of suspected stolen meat and transport of carcass without the required documentation.

[10] In the light of the contents of the case docket, I have no doubt that the charges of theft and transportation of the carcass without the required documentation were an afterthought. That is apparent from the way in which those offences had been inserted on the front cover of the case docket. Immediately under the heading 'Nature and description of offence' is written 'Possession of suspected stolen meat'. The date, time and place where the alleged offence occurred were inserted. However, the same cannot be said for the offences of theft and transportation of a carcass without the required documentation. The word 'Theft' has been written above the heading and the offence of 'Transport of carcass without the required documentation' was written below the space provided for the description of the offences. Secondly, in none of the statements that captain Hlwempu made is reference made to either theft of the carcass or a portion thereof; or that the respondent transported the meat without the required documentation. Thirdly, the appellant pleaded that the respondent "*was lawfully arrested and detained on a charge of being in possession of suspected stolen meat*". In the circumstances, the court a quo was correct in its finding that the respondent was arrested because he was allegedly in possession of suspected stolen meat. It must accordingly be determined whether the court a quo correctly found that the respondent was unlawfully arrested and detained.

[11] The appellant relied on section 40(1)(a), (b) and (e) of the Criminal Procedure Act 51 of 1977 to justify the respondent's arrest without a warrant of arrest. Section 40 provides for the circumstances under which a police officer may arrest a person without a warrant of arrest. In so far as it is relevant to this case, section 40(1) provides as follows:

"(1) A peace officer may without warrant arrest any person-

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

...

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

...

(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.”

[12] The Stock Theft Act 57 of 1959 (the Stock Theft Act) was promulgated to combat theft of stock and produce.¹ Each of sections 2 to 10 thereof, except for sections 5 and 9, creates different offences. Section 2 provides as follows:

“Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give satisfactory account of such a possession shall be guilty of an offence.”

[13] The elements of the offence under section 2 are that the person (i) was found in possession of (ii) stock or produce (iii) in regard to which there is a reasonable suspicion that the stock or produce had been stolen; and (iv) the suspect is unable to give a satisfactory account of such possession.² It is undisputed that the respondent was found in possession of stock, which, in terms of section 1 of the Stock Theft Act, includes the carcass or a portion of the carcass of a cow. The next enquiry is whether captain Hlwempu could be said to have had a reasonable suspicion that the meat was stolen. That depends on the circumstances of the case. In *S v Nomtebe*³ the accused was found in possession of five goats with kids and six sheep in a kraal. She failed to explain her possession of the stock. The magistrate, based on those facts, believed that he was entitled to infer that the stock was stolen and convicted the accused of theft. The reviewing Judge did not agree that that was the only reasonable inference to be drawn. The mere fact that the accused was in possession of the stock did not lead to the irresistible inference (in this case, a reasonable suspicion) that they had been stolen. He concluded that the absence of such inference (reasonable suspicion) meant that the accused was not called upon to give any explanation for her possession.

¹ *S v Nader* 1963 (1) SA 843 (O) at 848F-G.

² *R v Ismail and Another* 1958 (1) SA 206 (AD) at 209H and *S v Kane* 1963 (3) SA 404 (T) at 405H.

³ *S v Nomtebe* 1970 (4) SA 162 (E).

[14] Although section 2 requires a reasonable suspicion, and not certainty, the suspicion must be based on solid grounds to be reasonable. Would a reasonable person in captain Hlwempu's position with the same information as him, have considered that there were good and sufficient grounds for suspecting that the meat in the boot of the respondent's vehicle was stolen? A reasonable person will analyse and assess the quality of the information at his disposal critically and check it where it can be checked.⁴ The information at captain Hlwempu's disposal when the alleged reasonable suspicion was formed, was that the respondent had the meat in the boot of his vehicle shortly before midnight on the night in question. Captain Hlwempu's undisputed evidence was that the roadblock, where the respondent's vehicle was searched and the meat found, was set up because of the high incidence of stock theft in the area. In my view, if regard is had to the above circumstances under which the meat was found in the respondent's possession, captain Hlwempu had grounds for reasonably suspecting that the meat was stolen. That is not the end of the enquiry in terms of section 2 of the Stock Theft Act.

[15] The respondent was called upon to give a satisfactory account of the meat in respect whereof captain Hlwempu entertained a reasonable suspicion that it had been stolen. An explanation, to be satisfactory, must be such that it gives an account of the possession of the suspected stolen meat in the sense that the possession thereof was in good faith and innocent in regard to the purpose of the Stock Theft Act.⁵

[16] The respondent's explanation was that, when he arrived at the scene of the accident, he stopped his vehicle at the side of the road and asked the people who had gathered what they were doing. The response was that vehicles had collided with cows, that the police were there but had left with the drivers of the vehicles involved in the accident. He saw those persons taking meat for themselves. He asked them to give him some of the meat and they obliged by giving him the hindleg and head. When he was cross-examined about whether he had permission from the owners of the cows to take meat from the carcasses, his response was that he asked the people on the scene of the accident and that he took the meat "*because those people did not show that it doesn't belong to them. I asked for it and they gave me.*" He then drove off.

⁴ *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SECLD) at 658E-H.

⁵ *S v Nader* fn 1 at 848F-G.

[17] I am of the view that the facts of this case are no different from a truck loaded with cooldrink which overturned and persons who come across the overturned truck help themselves to the cooldrink. If one of those persons was found not far from the scene of the overturned truck with, for example three crates of cooldrink, each crate containing 12 2-litre bottles of cooldrink in his possession, there would, in my view, be a reasonable suspicion that the cooldrink had been stolen from the truck. An explanation that others allowed him to take the cooldrink and that the police had taken the driver of the truck to the police station or to a medical practitioner, would not be a satisfactory explanation for the cooldrink in such person's possession. Similarly, a reasonable person would not have had a *bona fide* belief that he was entitled to take the meat, even though members of the South African Police Service were on the scene and had thereafter taken the drivers of the vehicles to the police station. It is accordingly found that the respondent did not give a satisfactory account to captain Hlwempu of his possession of the meat. In the circumstances, all the requirements of section 2 of the Stock Theft Act were met.

[18] I now deal with whether the appellant established that he was justified to arrest the respondent in terms of section 40(1)(a), (b) or (e) of the Criminal Procedure Act, as pleaded. In my view, and regard being had to the elements of the offence created under section 2 of the Stock Theft Act, that offence was committed in the presence of captain Hlwempu, as envisaged in section 40(1)(a) of the Criminal Procedure Act. That is so because the respondent was found in possession of the meat in regard to which captain Hlwempu had a reasonable suspicion that it was stolen and the respondent was unable to give a satisfactory account of his possession of the meat.

[19] The jurisdictional facts for a defence under section 40(1)(b) of the Criminal Procedure Act are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.⁶ Absent one of the jurisdictional facts, a defence based on section 40(1)(b) cannot succeed. I will, in favour of the appellant, assume that each of the jurisdictional facts for his defence under section 40(1)(b) has been established, except whether the offence created under section 2 of the Stock Theft Act is an offence referred to in Schedule 1 of the Criminal Procedure Act. The closest offences

⁶ *Minister of Safety and Security v Sekhoto* [2010] ZASSCA 141; 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA); [2011] 2 All 157 (SCA) par 6.

to the offence under section 2 of the Stock Theft Act are “*Theft, whether under the common law or statutory provision*” and “*Receiving stolen property knowing it to have been stolen*”. It was specifically held in *S v Buthelezi*⁷ that the offence created under section 2 of the Stock Theft Act “*cannot be said to be “theft” or “stock theft”, nor are they the same as receiving stolen property well knowing it to have been stolen*”. I respectfully agree with that finding. The reason therefor is that those are separate offences, distinct from the offence created under section 2 of the Stock Theft Act. Since a jurisdictional fact is absent from a defence under section 40(1)(b) of the Criminal Procedure Act, the appellant failed to show that the respondent’s arrest was justified in terms of section 40(1)(b).

[20] The appellant also pleaded that the respondent’s arrest was justified in terms of section 40(1)(e) of the Criminal Procedure Act. The jurisdictional facts for a defence under section 40(1)(e) are that (i) the arrestor must be a peace officer; (ii) the suspect must be found in possession of property; (iii) the arrestor must entertain a reasonable suspicion that the property has been stolen or illegally obtained; (iv) the arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property; and (v) the arrestor’s suspicion must rest on reasonable grounds. It will be noted that section 40(1)(g) deals specifically with a person reasonably suspected of being or having been in unlawful possession of stock or produce, as defined in any law relating to the theft of stock or produce. The law that relates to the theft of stock or produce is the Stock Theft Act. In my view, section 40(1)(e) deals with property generally, whereas section 40(1)(g) deals specifically with stock or produce. The appellant has for some inexplicable reason not relied on the provisions of section 40(1)(g) in his plea, with the result that the inclusion of reliance on section 40(1)(e) as a defence excludes reliance on section 40(1)(g) as a defence. It therefore means that, because the Legislature specific deals with stock or produce in section 40(1)(g), reference to property generally in section 40(1)(e) excludes stock or produce.

[21] In the circumstances, the appellant cannot rely on section 40(1)(b), (e) or (g) of the Criminal Procedure Act. He had been able to establish the jurisdictional facts for the defence of section 40(1)(a) only. But, even if the conclusion that the appellant cannot rely on or has failed to satisfy the requirements of section 40(1)(b), (e) or (g) is wrong, and even if it should have been found that the jurisdictional facts of section

⁷ *S v Buthelezi* 1967 (2) 540 (N) at 541E-F.

40(1)(b), (e) or (g) had been established, the finding regarding the respondent's unlawful arrest and detention will remain the same, for the reasons set out hereunder.

[22] Once the jurisdictional facts for an arrest in terms of section 40(1)(a) are present, captain Hlwempu had a discretion whether to arrest or not.⁸ He would have had the same discretion had the respondent been arrested under section 40(1)(b), (e) or (g). It means that the presence of all the jurisdictional facts of the defence under section 40(1)(a) does not mean that an arrest is lawful and that the police officer must or shall arrest. The court must still determine whether the facts justify the suspect's arrest. The lawfulness of an arrest will be closely connected to the facts of the situation.⁹ One of the contentions upon which the appeal turned in *Hlape v Minister of Police*¹⁰ was whether Mr Hlape's arrest was unlawful because, as he alleged, the arresting officer did not exercise the discretion conferred on him before arresting Mr Hlape. Section 40(1) states when, the jurisdictional factors of any of those subsections have been establish, a police officer *may* arrest the suspect without a warrant of arrest.

[23] A distinction needs to be drawn between the failure to properly exercise the discretion conferred on the arresting officer by section 40(1) of the Criminal Procedure Act and a failure to exercise the discretion at all.

[24] An arrestee who alleges that his arrest was unlawful because the arresting officer failed to properly exercise the discretion conferred on him under section 40(1) or failed to exercise the discretion at all, bears the onus of proving such failure, rendering his arrest unlawful. The exercise of the discretion to arrest must be rational. The test whether the discretion was rationally related to the purpose for which the power to arrest was given is an objective one.

[25] A police officer who effects an arrest in terms of section 40(1) of the Criminal Procedure Act exercises a public power. The decision to arrest must accordingly be rational to pass constitutional muster. The Constitutional Court expressed itself in this regard as follows:

⁸ *Minister of Safety and Security v Sekhoto* in fn 6 par 28.

⁹ *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 58 (CC) par 20.

¹⁰ *Hlape v Minister of Police* [2024] SASCA 68.

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”¹¹

[26] A court will be very slow to interfere with the discretion that has been exercised as long as the exercise of that discretion is objectively rational. The court would not interfere if it is of the view that the arresting officer exercised the discretion “*in a manner other than that deemed optional by the court*”. The standard of rationality is not breached as long as the discretion is exercised within the bounds of rationality.¹² An arresting officer has to collate facts and exercise his discretion based on those facts. Those facts may include an investigation of the exculpatory explanation provided by the suspect.¹³ It is upon an examination of those facts that an arresting officer has to exercise his discretion.

[27] Captain Hlwempu conceded that he had no reason to believe that the respondent did not own a fixed property, gave him a wrong address, lied when he said that he was employed by the Nqushwa Municipality, or would not appear in court if issued with a summons. In *Tsose v Minister of Justice and Others*¹⁴ it was held that where a person to be charged has a fixed or known address, it is generally desirable that a summons be issued to secure his attendance at trial. In the light of what follows, it is unnecessary to establish and deal with the information at captain Hlwempu’s disposal to determine whether he exercised the discretion to arrest properly.

[28] In terms of section 38(1) of the Criminal Procedure Act, the methods of securing the attendance of a suspect, who is 18 or older, in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment. The Police

¹¹ *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) par 85.

¹² *Sekhoto* fn 6 par 39.

¹³ *Groves NO v Minister of Police* [2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC) paras 52 and 60.

¹⁴ *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) 17G-H.

Standing Order (G) 341¹⁵ acknowledges that an arrest constitutes one of the most dramatic infringements of the rights of an individual. Members of the South African Police Service are therefore advised to regard arrest as a last resort, to be utilised only in those cases where less invasive options are unavailable.

[29] The situation is different when the discretion conferred on a police officer by section 40(1) of the Criminal Procedure Act is not exercised at all. In *Director-General: Department of Home Affairs and Another v Mavericks Revue CC*¹⁶ the Department of Home Affairs granted a corporate permit to the respondent corporation to employ 70 exotic dancers in terms of section 21 of the Immigration Act 13 of 2002. A functionary within the Department of Home Affairs declined to issue work permits to the dancers unless each of them paid a fee for a work permit; and provided a cash deposit as security for repatriation. It was common cause that the functionary had a discretion, albeit delegated, to require payment of a repatriation deposit. The Department of Home Affairs had instructed the functionary to ask for a repatriation deposit in all similar cases. She executed that instruction and did not exercise the discretion conferred on her by regulation 18(6)(b)(iii). The court assumed that regulation 18(6)(b)(iii) allowed for further security (in addition to the security that was provided when the respondent corporation obtained the corporate permit) to be demanded at the functionary's discretion. The high court found that, by merely executing the instruction, the functionary failed to exercise any discretion at all, with the result that her decision was unlawful. The Supreme Court of Appeal confirmed that finding.¹⁷

[30] Captain Hlwempu's evidence was that, after the jurisdictional facts had been established, he did not consider other methods of securing the respondent's attendance at court. The relevant portion of his evidence reads as follows:

"Mr Nguta: So let me try to get this from you. Did you consider issuing him with a summons?

Mr Hlwempu: No.

Mr Nguta: Okay, then it is simple. You never exercised any discretion. You never considered it.

Mr Hlwempu: No sir.

¹⁵ The Police Standing Order was issued under Consolidated Notice 15/1999.

¹⁶ *Director-General: Department of Home Affairs and Another v Mavericks Revue CC* 2008 (2) SA 418 (SCA).

¹⁷ *Mavericks* fn 16 paras 15 and 16.

Mr Nguta: Yes, that is perfect. In your mind there was only one thing possible, arrest him. You did not consider any other alternative. You already said that.

Mr Hlwempu: Yes.”

[31] I am satisfied that, in the light of the above evidence, captain Hlwempu did not exercise the discretion conferred on him by a section 40(1) of the Criminal Procedure Act before he arrested the respondent. In the circumstances, the respondent’s arrest was unlawful.

[32] Mr Petersen submitted that captain Hlwempu had no alternative but to arrest the respondent because the alternatives provided for in section 38 of the Criminal Procedure Act were not available to him. I shall deal with only the option of a written notice.

[33] In relevant part, section 56(1) of the Criminal Procedure Act reads as follows:

“If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice ...”.¹⁸

[34] Captain Hlwempu testified that he was unaware of the value of the cows which had been killed in the accident, but he would not sell a cow for less than R10 000. If regard is had to the fact that the respondent was not arrested for theft of a cow, a carcass thereof or any portion of such carcass, it is in my view improbable that a sentence exceeding a fine of R5 000 would have been imposed upon conviction of an offence under section 2 of the Stock Theft Act. That is particularly the case if regard is had to his undisputed version of how the respondent came to be in possession of the meat. Nothing prevented captain Hlwempu from handing a written notice to the respondent to appear in court, thereby avoiding the invasive procedure of an arrest. In all the circumstances, the respondent’s arrest was unlawful, with the result that his detention was also unlawful.¹⁹

¹⁸ With effect from 30 January 2013 a fine should not exceed R5 000.

¹⁹ *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at 600g-h.

[35] The purpose of awarding damages is not to enrich a claimant, but to offer him solatium for his injured feelings. There should be a rational link between the harm caused and the damages awarded. The award should accordingly be commensurate with the harm. In the final analysis, each case must be decided on its facts, which must be looked at as a whole. The quantum of damages must be determined on those facts²⁰ and be fair not only to the claimant, but also to the party who has been ordered to pay the damages.

[36] An award of damages for unlawful arrest and detention must express the premium that our courts place on the right to freedom as well as the right to have a person's right to dignity respected and protected.²¹

[37] Mr Petersen submitted that the amount of damages awarded by the court a quo was so excessive that it calls for intervention by this court. Counsel relied primarily on *Minister of Police v Khedama*²² wherein the appellant was arrested on 3 December 2011 and thereafter detained until her release on 12 December 2011, nine days after her arrest. She was arrested at an airport when she was in the company of her employer and his wife.

[38] After her arrest she was initially detained at the Tongaat police station in a small cell. The conditions in the cell were like those reflected in most recent law reports relevant to conditions in a holding cell. It was dirty, the toilet inside it caused a terrible smell, there were filthy blankets and the food provided was inedible. Those conditions made it almost impossible for her to sleep. Six days after her arrest, she spent a night in a cell in Mthatha. The roof of that cell was leaking while it was raining that night. The conditions in the cell were no different from those described above. On the following night she found herself in another cell in East London with other female prisoners. The following morning, they continued their journey to Cape Town. They stopped at a petrol station where she, for the first time in seven days, freshened up in the washroom of the petrol station. They finally arrived in Cape Town during the night of 11 December 2011. The following day she appeared in the magistrate's court and was granted bail. It finally transpired that she was not the person sought.

²⁰ *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) par 26.

²¹ *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) par 15.

²² *Minister of Police v Khedama* [2024] ZAKZPHC 23.

[39] Ms Khedama testified how traumatic the experience of her arrest and detention was. Her relationship with her employer was badly affected because of her arrest and detention. On her return to work she was demoted from being a sales manager to a salesperson. There was expert evidence that she had symptoms of anxiety, flashbacks, hypervigilance, sleep deprivation and reduced libido after her arrest and detention. The diagnosis was that she had probably suffered from post-traumatic stress disorder.

[40] In the light of the above factors the trial court awarded the sum of R1 000 000 to Ms Khedama.²³ Not satisfied with that award, the appellant appealed to the full court against that award. The court had regard to other cases²⁴ as a guide to award what it considered as an appropriate award. It considered that the award of R1 000 000 by the trial court was out of proportion to the injury inflicted. In respect of the other authorities, it said the following:

“Mindful of the traumatic experience of Ms Khedama and in no way attempting to diminish or detract therefrom, one must, in my view, when considering the appropriateness of the award of the court *a quo* have regard to the awards of our courts in even more horrific circumstances. For instance, in *Mahlangu*, several police officers tortured the first plaintiff to make a confession. Subsequently, he and his supposed co-perpetrator were placed in ‘solitary confinement for two months in order to protect them from attack and taunting by fellow detainees who believed that they killed their relatives.’ They were detained for eight months and 10 days and were awarded R500 000 by the Constitutional Court in May 2021. Also in *W[...] v Minister of Police* the court took into account the appalling conditions of the cells in which Mr W[...] had been kept, he was subjected to being controlled by a gang who raped other prisoners and he was raped on two occasions. Mr W[...] later had his own cell, with a bed, but was then in isolation. He was detained for 13 months, and was awarded R500 000 in 2014.”

[41] Having considered the circumstances under which Ms Khedama was arrested

²³ It appears that, had Ms Khedama’s particulars of claim not been limited to R1 000 000, the trial court might have awarded R1 760 000 in respect of wrongful arrest (R100 000); wrongful detention, calculated at R80 000 per day for 12 days (R960 000); defamation (R500 000); and general damages (R200 000).

²⁴ *Mahlangu v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC); 2021 (7) BCLR 698 (CC) par 51 and *W[...] v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA); [2015] 1 All 68 (SCA).

and the conditions under which she was detained, the full court deemed that the sum of R350 000 was appropriate.

[42] Counsel also referred to *Motsaathebe v Minister of Police*²⁵ wherein the plaintiff was unlawfully arrested and detained for one day in “*inhumane conditions. There was no water. The latrine was not functioning. The blankets in the cell were inadequate given the number of detainees*”. On 19 January 2024 he was awarded R30 000 for damages arising from his arrest and detention.

[43] I have also considered *Rudolph*²⁶ wherein the appellants were unlawfully arrested at about 17h00 on a Friday and released at about midday on the following Tuesday. They were subjected to what the Supreme Court of Appeal described as humiliating conditions. Those conditions were that “*the cell in which they were held was not cleaned for the duration of their detention. The blankets they were given were dirty and insect-ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water. Throughout their detention the first appellant, who suffers from diabetes, was without his medication. They were not allowed to receive any visitors, not even family members.*” On 31 March 2009 the Supreme Court of Appeal awarded each of the appellants the sum of R100 000 for arrest and detention. That sum equates to R217 000 in 2024.

[44] In *Diljan v Minister of Police*²⁷ the Supreme Court of Appeal warned against the “*progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts*”. The court referred to the high court judgment in *Khedama* as an example. That was before the full court reduced the award granted by the trial court to R350 000. The appellant in *Diljan* was arrested at about 16h00 on a Friday and thereafter detained until the following Tuesday morning. She did not appear in court. The court described the conditions under which she was detained as appalling. The police cell in which she was detained was filthy with no hot water; the blankets were dirty and smelling; the toilet was blocked; she was not provided with toilet paper; she was not allowed visitors; and she could not eat the bread and peanut butter that was the only food provided to her. She was deprived of visitation rights by her family and that resulted in her not

²⁵ *Motsaathebe v Minister of Police* [2024] ZANWHC 8.

²⁶ *Rudolph* fn 20 par 27.

²⁷ *Diljan v Minister of Police* [2022] ZASCA 103 par 20.

receiving medication for her heart condition. Her arrest caused her humiliation which was exacerbated by her children, grandchildren and neighbours witnessing her arrest. On 24 June 2022 the amount of R120 000 was awarded to her for arrest and detention. That amount equates to R135 240 in 2024.

[45] In the present case, I have considered that the respondent was arrested in the presence of his wife and son; is a leader at his church; is permanently employed by a local municipality; after his arrest, he witnessed captain Hlwempu putting his hand on his wife's breast; it was the first time that he was arrested; he was detained in a filthy cell and given a thin plastic mattress with filthy blankets, causing him not to sleep during the period of detention; shared the cell with other persons; was provided with inedible food; and the police officers refused to accept the food that his wife wanted to give him. Taking all the facts of this case into account and having regard to comparable cases, particularly *Rudolph* and *Diljan*, I am of the view that an appropriate amount of damages would be R160 000. Since the difference of what was awarded by the trial court and what I deem appropriate is so vast, the amount of R350 000 should be reduced to R160 000.

[46] Although Mr Petersen submitted that the trial court should have awarded costs on the magistrate's scale because, so he submitted, the respondent could have issued summons in that court, I am not persuaded that the trial court erred in that regard. The trial court considered the issue of costs and exercised its discretion and did not misdirect itself in that regard. It is pointed out that in *Diljan*, the magistrate's court and the high court, sitting as a court of appeal, dismissed the appellant's claim for damages for arrest and detention. The Supreme Court of Appeal upheld the appeal against the dismissal of her claim and ordered the appellant to pay the costs of the appeal, as well as the costs incurred in the magistrate's court and the high court. Those costs were on the high court scale. There is no reason to disturb the finding of the trial court that the appellant should pay the respondent's high court costs.

[47] Although the appellant has been substantially successful in this appeal, I am of the view that it would be appropriate for each party to pay his own costs occasioned by the appeal. The respondent should not be burdened with having to pay the costs relating to the appeal.

[48] In the result, it is ordered that:

1. The appeal is upheld to the extent set out in paragraph 2 hereunder.
2. Paragraphs 2 and 3 of the order of the court a quo are set aside and replaced with the following:

“2. The defendant shall pay to the plaintiff the sum of R160 000 as and for damages for the aforesaid unlawful arrest and detention.

3. The defendant shall pay interest on the sum of R160 000 at the prescribed rate of interest, calculated from the date of judgment, being 19 May 2022, to the date of payment”.

3. Each party shall pay his own costs relating to the appeal.

GH BLOEM
Judge of the High Court

Brooks J.

I agree.

RWN BROOKS
Judge of the High Court

Laing J.

I agree.

JGA LAING
Judge of the High Court

APPEARANCES

For the appellant: Mr F Petersen, instructed by the State Attorney, Gqeberha and Netteltons Attorneys, Makhandha.

For the respondent: Mr M Nguta with Mr L Dinisa, instructed by Mgangatho Attorneys, Makhandha.

Date of hearing: 20 May 2024.

Date of delivery of judgment: 11 June 2024.