



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 027462/2018

(1)	REPORTABLE:	NO
(2)	OF INTEREST TO OTHER JUDGES:	NO
	DATE	SIGNATURE
	12 August 2024	

In the matter between:

NONYANA ANTHONY MAMATSHELE

Plaintiff

and

MINISTER OF POLICE

First Defendant

MASEDI STEPHEN RAMOSHABA

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

JUDGMENT

SHEPSTONE AJ:

A. Introduction

- [1] This is an action for damages arising from the alleged unlawful arrest and detention of the plaintiff by members of the South African Police Service (SAPS) on 16 October 2017. The plaintiff claims damages against the first and second defendants for unlawful arrest and detention, and against the third defendant for malicious prosecution in the amount of R 2 100 000 (two million one hundred thousand rand) “...*being in respect of general damages and contumelia, being impractical to distinguish between the individual components of the damages claimed*”.
- [2] On the first day of trial the plaintiff withdraw his claim for malicious prosecution against the third defendant, and tendered costs. Hereinafter, when I refer to the first and second defendants collectively I shall refer to them as the defendants.
- [3] The second defendant sergeant Ramoshaba was at all times relevant to this action acting within the course and scope of his employment with the first defendant.
- [4] The plaintiff was arrested by sergeant Ramoshaba without a warrant at his workplace on 16 October 2017 on a charge of intimidation.
- [5] The plaintiff was detained in the police cells at Morkem Park police station until 18 October 2017 when he appeared in court. He was remanded in custody and released on bail on 29 October 2017. The criminal charges against him were subsequently withdrawn on 8 May 2018.

[6] The defendants deny that the arrest and subsequent detention of the plaintiff was unlawful. They contend that the arrest was lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("CPA") as sergeant Ramoshaba arrested the plaintiff on suspicion of committing the offence of intimidation. I emphasise at the outset that It was common cause between the parties that the crime of intimidation is not a Schedule 1 offence.

[7] The first defendant admitted the arrest. In accordance with a myriad of authorities the first defendant accepted the duty to begin.

B. Pleadings

[8] I have to comment on the state of the pleading before I assess the evidence adduced at the hearing of this matter.

[9] The pleadings bundle was uploaded on CaseLines on 1 March 2022. It consists of the original combined summons dated 20 July 2018, and the defendant's plea dated 24 October 2018. This may be unremarkable to the reasonable practitioner reading this judgment, however, the problem is that the plaintiff served a notice of his intention to amend his particulars of claim on the state attorney during November 2022.

[10] The plaintiff's notice of his intention to amend his particulars of claim reads:-

"TAKE NOTE THAT the Plaintiff intends to amend the whole particulars of claim as follows:-"

- [11] This was followed by a completely new iteration of the particulars of claim without alerting the defendants to what parts of the particulars the plaintiff intended to amend.
- [12] The defendants were apparently not as offended as I am with the lack of adherence to the Uniform Rules as they did not object to the irregular step taken by the plaintiff.
- [13] The plaintiff then delivered his amended pages on 29 November 2022.
- [14] What is more egregious is that the defendants did not make any consequential amendments to their plea. Furthermore, the plaintiff's attorneys did not replace the original particulars of claim with the amended version on CaseLines.
- [15] Prior to the amendment the particulars of claim read:-

"12.1 UNLAWFUL OR WRONGFUL DETENTION

12.1.1 The arrest of the Plaintiff was wrongful and/or unlawful in that it was an arrest without a warrant.

12.1.2 The arrest was not in accordance with Section 39(1) of the Criminal procedure Act 51 of 1977 as amended (hereinafter "the CPA") in that the Plaintiff was not informed promptly of the reasons for his arrest.

12.1.3 The arrest could therefore not be justified in terms of Section 40 of the CPA as Plaintiff did not commit or attempt to commit any offence in the presence of the arresting offices.

12.1.4 The arrest contravened the provisions of Section 35 of the Constitution, in that the Plaintiff was not informed promptly of the reasons for his arrest.”

[16] After the amendment the case evolved as follows:-

“11. The Plaintiff's arrest was wrongful, unlawful, and malicious in that:

12.1 He did not commit the offence he was charged with;

12.2 He did not commit an offence in the presence of a peace officer;

12.3 There was no reasonable suspicion that he had committed a Schedule 1 offence;

12.4 There was no reasonable and/or probable cause for his arrest;

12.5 The Second Defendant and the arresting members of the SAPS failed to explain to the Plaintiff his Constitutional Rights;

12.6 The arresting members of the SAPS failed to comply with (4) and (8) of the Police Order G341;

12.7 The Second Defendant and the arresting members of the SAPS conduct was not justified in terms of section 39(1) and 40 of the Criminal Procedure Act 51 of 1977; and

12.8 The Second Defendant and the arresting members of the SAPS conduct encroached the provisions of section 35 of the Constitution, in that, the Plaintiff was not informed promptly of the reasons for his arrest.”

- [17] There is at least an oblique reference in the revised particulars of claim to the failure by the arresting officer to harbour a reasonable suspicion that the plaintiff had committed a Schedule 1 offence.
- [18] The plaintiff's particulars of claim, both before and after the amendment, allege that the plaintiff was charged with the offence of intimidation. Regrettably, neither version highlighted the fact that intimidation is not an offence under Schedule 1 of the CPA. This was a material fact which ought to have been pleaded.
- [19] The fact that the offence of intimidation is not a Schedule 1 offence was also not raised by the parties in any pre-trial procedures.
- [20] The parties thus came to court without having identified the quintessential issue, which if raised might have led to a concession of liability by the first defendant.

C. Facts

Sergeant Ramoshaba

- [21] Sergeant Masedi Stephen Ramoshaba, a police sergeant stationed at Norkem Park since 2008 and promoted to sergeant in 2023, provided an account of his investigation into an intimidation complaint filed by Mrs. Nalaba.
- [22] In his testimony, he described how he received the complaint through radio control and promptly attended to it. Sergeant Ramoshaba explained that the matter was already under investigation, and an investigating officer had been appointed.

- [23] Upon arrival, he interviewed Mrs. Nalaba, who pointed out the plaintiff.
- [24] Sergeant Ramoshaba stated that his suspicion that the plaintiff had committed a Schedule 1 offence was based on the complainant's account, the fact that the plaintiff and the complainant worked together and the plaintiff's apparent state of 'fright'.
- [25] Sergeant Ramoshaba gave evidence that he approached the plaintiff, introduced himself, and questioned him regarding the contents of the statement provided by Mrs. Nalaba. He noted that the plaintiff appeared to be frightened. After gathering sufficient information and forming a reasonable suspicion, he decided to proceed with the arrest.
- [26] Sergeant Ramoshaba stated that he followed the procedural requirements for the arrest. He read the plaintiff his rights from his pocketbook and informed him of the reasons for his arrest.
- [27] The plaintiff was then detained and transported to Kempton Park, where he was processed and handed over to the detective office.
- [28] Sergeant Ramoshaba gave evidence that he effected the arrest on the same day he received the complaint. He clarified that he had received the complaint from radio control and, using the provided case number 961/10/2017, located and reviewed the relevant docket. He affirmed that upon reading the statement, he formed a suspicion and proceeded to interview the complainant and the plaintiff.
- [29] Under cross examination sergeant Ramoshaba asserted that the plaintiff appeared frightened, which he interpreted as an indication of guilt. Advocate

Vobi for the plaintiff challenged this assumption, putting to sergeant Ramoshaba that mere fright does not constitute sufficient grounds for arrest.

[30] Advocate Vobi questioned sergeant Ramoshaba on the procedural correctness of his actions, to which he maintained that a case had indeed been opened and that he was fulfilling his duty to attend to the complaint.

[31] Advocate Vobi then shifted focus to lawfulness of the arrest, specifically questioning Ramoshaba on the legal grounds for the arrest given that intimidation is not a Schedule 1 offence. Sergeant Ramoshaba defended his arrest of the plaintiff stating that he formed a reasonable suspicion after reading the complainant's statement.

[32] Sergeant Ramoshaba conceded that he not was aware that intimidation was not classified as a Schedule 1 offence. Sergeant Ramoshaba then revealed that he could not remember whether he underwent any training regarding the provisions of the Criminal Procedure Act.

[33] He justified his actions by asserting that he acted on a reasonable suspicion formed from the complainant's detailed account and the plaintiff's reaction. He was asked why he did not seek a warrant before the arrest, to which he responded that the immediate circumstances and the urgency of the situation guided his decision to act promptly.

[34] Advocate Vobi questioned why sergeant Ramoshaba did not defer to the assigned investigator before making the arrest. Sergeant Ramoshaba explained that while an investigating officer was appointed, his role required him to take immediate action to prevent further potential intimidation.

[35] Last, advocate Vobi pointed out that sergeant Ramoshaba did not mention all the facts in his initial statement. Sergeant Ramoshaba admitted this oversight but stressed that the material facts were captured.

The plaintiff

[36] The plaintiff is an adult male who was employed at Just Work in Chloorkop at the time of the incident giving rise to this action.

[37] On 16 October 2017 he was arrested without a warrant for an offence that is not classified as a Schedule 1 offence. Despite this, he was processed, read his rights, and detained in cells. He appeared in court on 18 October 2017, where the matter was postponed for address confirmation and a formal bail application. He was released on bail of R2000 on 29 October 2017.

[38] The plaintiff detailed his background and employment history for the year 2017. He worked in Benoni, Kingsway, and Chloorkop as a general worker, earning R1200 per month. He mentioned that he completed Grade 12 and had an apprenticeship in the gold mining industry.

[39] His was involved in the church. He was in a leadership position and was in charge of the finances of the church.

[40] The plaintiff's testimony included a description of his treatment while in custody. After arriving at the Norkem Park police station he was eventually taken to a holding area where he was questioned and searched. He noted the unpleasant conditions in the cell, including the smell and lack of basic hygiene facilities.

- [41] The plaintiff described the events following his arrest, including being taken to court and the conditions he endured. He mentioned that he was not provided with adequate food or bedding and was subjected to unsanitary conditions. The cell was dirty and overcrowded, and he was anxious throughout his detention.
- [42] The plaintiff gave evidence that the detention stripped him of his human dignity and personal freedom, and he was held in inhumane conditions.
- [43] He was confined in dirty and foul-smelling cells. There were no showers or bathing facilities available for him. There was a shortage of blankets, requiring them to be shared among those in the cell. He mentioned having to trade his plate of food for a blanket to stay warm at night. The toilet facilities were filthy. The sleeping sponge and/or mattress provided was dirty, and there was a scarcity of mattresses, forcing some of the detainees to sleep on the floor. The cell was unhygienic and overcrowded, with more than 20 individuals in the cell.
- [44] He felt fearful and anxious throughout his detention, as he had never experienced arrest and detention before.
- [45] He was released on bail and returned to his place of work, however, he lost his employment which he ascribed to his arrest and detention.
- [46] After his release from detention he faced ongoing difficulties and reputational damage due to the arrest.
- [47] Throughout his evidence, the plaintiff spoke of the impact of the arrest on his personal and professional life. He highlighted the loss of trust from his

community and church, as well as the interruption of his plans to start a business. He stated that the arrest and subsequent treatment were unwarranted and had caused significant harm to his reputation and future prospects.

C. Law and Issues

[48] The main legal issues for determination are whether the arrest of the plaintiff without a warrant was lawful in terms of section 40(1)(b) of the CPA, whether the subsequent detention of the plaintiff was lawful, and the quantification of the plaintiff's damages, if any

[49] Section 40(1)(b) of the CPA provides that a peace officer may arrest any person without a warrant whom he reasonably suspects of having committed an offence referred to in Schedule 1.

[50] The requirements for a lawful arrest under section 40(1)(b) were set out in ***Duncan v Minister of Law and Order***.¹

[50.1] The arrestor must be a peace officer;

[50.2] The arrestor must entertain a suspicion;

[50.3] The suspicion must be that the plaintiff committed a Schedule 1 offence; and

[50.4] The suspicion must rest on reasonable grounds.

¹ 1986 (2) SA 805 (A)

[51] For the detention following arrest to be lawful, the arrest itself must have been lawful.

[52] As held in Minister of ***Safety and Security v Sekhoto***,² even if the jurisdictional requirements for arrest are met, the arrestor must still properly exercise their discretion in deciding to arrest.

[53] The onus is on the defendants to prove that the arrest and detention were lawful. The plaintiff bears the onus in respect of the malicious prosecution claim.

D. Application of Law to Facts

[54] I turn now to apply the legal principles to the facts of this case.

Lawfulness of the arrest

[55] The first two requirements for a lawful arrest under section 40(1)(b) are clearly met - Sergeant Ramoshaba was a peace officer who suspected the plaintiff of committing an offence.

[56] However, the third requirement is not met. Intimidation is not listed as an offence in Schedule 1 of the CPA. The defendants have therefore failed to show that Sergeant Ramoshaba suspected the plaintiff of committing a Schedule 1 offence.

² 2011 (1) SACR 315 (SCA)

[57] In the circumstances, Sergeant Ramoshaba could not have harboured a reasonable suspicion that the plaintiff had committed an offence justifying arrest without a warrant. At best, he acted hastily on incomplete information.

[58] Even if the jurisdictional requirements for arrest were met, I find that Sergeant Ramoshaba failed to properly exercise his discretion in deciding to arrest the plaintiff. There is no evidence that he considered alternatives to arrest or that arrest was necessary to ensure the plaintiff's attendance at court.

[59] The plaintiff was employed and had a fixed address. A warning to appear in court would likely have sufficed.

[60] For these reasons, I conclude that the arrest of the plaintiff was unlawful.

Lawfulness of the detention

[61] As the arrest was unlawful, the subsequent detention of the plaintiff was also unlawful. Even if the initial arrest was lawful, there is no evidence that the need for continued detention was properly considered during the period of 16-29 October 2017.

E. Relief and Costs

[62] The plaintiff has succeeded in proving that his arrest and detention was unlawful. He is therefore entitled to damages.

[63] The plaintiff in his particulars of claim sought "...*general damages and contumelia*". I understand the pleader to mean that the plaintiff suffered general damages for contumelia.

- [64] Contumelia refers to a feeling of injustice experienced by an individual whose bodily integrity or dignity has been wrongfully and intentionally infringed upon.³ It goes beyond mere insult, encompassing a broader sense of personal violation. When such infringement occurs, the affected person may pursue legal action through the *actio iniuriarum*, seeking satisfaction for the harm done to their personality. The damages awarded in such cases are primarily aimed at addressing the injured feelings and are determined based on what is considered just and equitable.
- [65] The assessment of contumelia takes into account various factors, including the intensity of physical and mental suffering, any sentimental loss experienced, and the social or cultural status of the plaintiff. It is distinct from claims for pain and suffering, focusing instead on the emotional and harm caused to the dignitas of the plaintiff.
- [66] A plaintiff's cause of action in a claim for unlawful arrest and detention is not based on the *actio legis aquiliae*; instead, it originates from the *actio iniuriarum*. The *actio iniuriarum* is specifically tailored to address wrongful and intentional infringements of personality rights, including claims such as unlawful arrest and detention.
- [67] Therefore, while the *actio legis aquiliae* relates to delicts concerning the wrongful harm to person or property, the appropriate basis for a claim of unlawful arrest and detention is the *actio iniuriarum*.

³ ***Molele v Van Heerden*** (60192/2015) [2018] ZAGPPHC 609 (28 March 2018)

- [68] During argument advocate Vobi submitted that the plaintiff had suffered a loss of income as a result of his unlawful arrest and detention. The plaintiff, however, did not plead a claim for special damages nor did he adduce any evidence from which I could assess such a claim.
- [69] That is not to say that a plaintiff cannot sue a wrongdoer under the *actio legis aquiliae* if he has suffered special damages causally related to his unlawful arrest and detention. The only proviso is that such a cause of action must not only be pleaded, but also proved with evidence.
- [70] The plaintiff's claim for loss of income is dismissed. I now turn to the plaintiff's claim for damages based on the *actio iniuriarum*.
- [71] In ***Minister of Safety and Security v Tyulu***⁴ the Supreme Court of Appeal addressed the issue of damages for unlawful arrest and detention. The court stressed that the primary purpose of damages is to provide solace for the injured party's feelings rather than to enrich them. It highlighted the importance of personal liberty and the serious nature of arbitrary detention, indicating that damages should reflect the gravity of the rights infringements. The court ultimately awarded damages to the plaintiff, reinforcing the principle that unlawful detention causes significant emotional and psychological harm.
- [72] In the matter of ***Minister of Safety and Security v Seymour***⁵ the court reiterated that the assessment of damages should take into account the emotional distress and humiliation suffered by the plaintiff due to the unlawful actions of the police. The court also noted that while previous awards

⁴ [2009] ZASCA 5; 2009 (5) SA 85 (SCA).

⁵ [2006] ZASCA 3; 2006 (6) SA 320 (SCA).

can serve as a guide, each case must be evaluated based on its unique circumstances. The decision underscored the need for courts to be cautious in determining damages to ensure they are appropriate and just.

[73] In his claim against the minister of Police in the *De Klerk v Minister of Police*⁶, the appellant argued that the police's actions were wrongful and that he suffered harm as a result of his unlawful arrest and subsequent detention. He contended that the police should be held liable for the entire period of his detention, including the time after his first court appearance, asserting that the unlawful arrest was the direct cause of his continued detention. The case raised significant legal questions regarding the liability of the police for unlawful detention following a court remand and the relationship between the initial unlawful arrest and the subsequent detention ordered by the magistrate.

[74] The Constitutional Court held that the harm suffered by de Klerk was primarily the deprivation of his liberty, which is a significant personality interest. The unlawful arrest and subsequent detention constituted a violation of his constitutional rights, particularly the right to freedom and security of the person as protected under section 12 of the Constitution.

[75] The length of time de Klerk was unlawfully detained was a critical factor. He was held in custody for approximately seven days following his initial appearance in court. The court took into account the entire period of detention, from the unlawful arrest until his release, as relevant to the assessment of damages.

⁶ *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019),

- [76] The court examined the circumstances surrounding the arrest and the subsequent actions (or inactions) of the police and the magistrate. The fact that de Klerk was not given the opportunity to apply for bail and that the magistrate failed to consider his release were significant in establishing the wrongful nature of his detention.
- [77] The court considered the psychological and emotional impact of the unlawful detention on de Klerk. This included the stress and humiliation associated with being wrongfully imprisoned, which contributed to the non-patrimonial damages he sought.
- [78] The Constitutional Court also factored in broader public policy implications, emphasising the importance of holding the state accountable for unlawful actions by its agents. This consideration aimed to deter future unlawful arrests and ensure that the rights of individuals are protected.
- [79] The court applied the principles of the *actio iniuriarum*, which governs claims for non-patrimonial damages, focusing on the need for compensation that reflects the seriousness of the infringement of de Klerk's rights. Ultimately, these factors guided the court in determining that de Klerk was entitled to R300 000 in damages for the unlawful arrest and detention, reflecting both the severity of the harm suffered and the need for accountability.
- [80] In ***Rathebe v Minister of Police and Another***⁷ the plaintiff sought R400,000.00 for his unlawful arrest and detention and R200,000.00 for malicious prosecution. He described the conditions of his detention as

⁷ [2024] ZAFSHC 69 (1 March 2024).

deplorable, detailing the lack of basic amenities and the psychological impact of being incarcerated. He also highlighted the social stigma and emotional distress he suffered as a result of the allegations and his subsequent detention, which affected his reputation and livelihood.

[81] The court evaluated the length of time the plaintiff was unlawfully detained, which was from April 14, 2019, to May 15, 2019. The court recognised that the plaintiff spent two nights in the Makwane police station under poor conditions before being transferred to the Harrismith Correctional Facility, where he remained for approximately a month.

[82] The court took into account the deplorable conditions the plaintiff experienced during his detention. He described the police cells as filthy, lacking basic sanitation, and providing inadequate bedding. The court acknowledged the psychological and emotional impact of such conditions on the plaintiff.

[83] The court considered the emotional distress and humiliation the plaintiff suffered as a result of his arrest and detention. The plaintiff testified about the stigma he faced in his community, the impact on his reputation, and the trauma associated with being wrongfully accused of a serious crime like rape.

[84] The court noted that the plaintiff was self-employed as a motor mechanic before his arrest and that he lost his customers due to his incarceration. Although the plaintiff attempted to engage in scholar transport after his release, he faced difficulties in securing employment, which contributed to his financial distress.

- [85] The court recognised the long-term effects of the allegations on the plaintiff's social standing. He expressed feelings of being regarded as a "bad person" in his community, which affected his relationships and interactions with others.
- [86] The court referred to previous cases to guide its assessment of damages. It considered awards made in similar cases of unlawful arrest and detention, taking into account the specific circumstances of each case. The court emphasised that while previous awards can provide a reference, each case must be evaluated on its own merits.
- [87] The court reiterated that the primary purpose of awarding damages in cases of unlawful arrest and detention is to provide a form of solatium for the injured feelings of the aggrieved party, rather than to enrich them. This principle guided the court in determining an appropriate amount that would adequately compensate the plaintiff for his suffering without being excessive.
- [88] The court acknowledged that the plaintiff was deceased at the time of the judgment, which meant that any award would be made in favour of his estate. This consideration influenced the court's approach to ensuring that the award was fair and reasonable, avoiding any perception of being overly generous.
- [89] By weighing these factors, the court aimed to arrive at a just and equitable award that reflected the harm suffered by the plaintiff while adhering to legal principles governing damages in such cases. Ultimately, the court awarded R300,000.00 for the plaintiff's claim of unlawful arrest and detention.

- [90] Taking into account the circumstances and duration of the plaintiff's detention, the humiliation he suffered, and the impact on his dignity and reputation, I consider an award of R450 000 to be appropriate compensation.
- [91] The plaintiff has been substantially successful and should be awarded his costs.
- [92] The defendants did not concede liability and put up a "hopeless" defence on the lawfulness of the plaintiff's arrest and subsequent detention. While the plaintiff's particulars of claim could have been more articulate, I won't hold that against him. Ultimately, scarce judicial resources were wasted by the defendants' conduct in the litigation, for which the plaintiff should not be out of pocket.
- [93] Sergeant Ramoshaba's conduct also deserves censure. A detective had been assigned to the case yet sergeant Ramoshaba did not consult the detective prior to the arrest of the plaintiff. Even more egregious is that the a police officer who has been in the SAPS for over 15 years does not know that intimidation in the context of this matter was not a schedule 1 offence.
- [94] The plaintiff did not seek costs against sergeant Ramoshaba personally, nor did I warn him of the possibility that I would order him to pay the plaintiff's costs.
- [95] Accordingly, in the exercise of my discretion in respect of the costs of this action the first defendant is ordered to pay the plaintiff's costs on the attorney and client scale. I do not think that the costs of two counsel are warranted.

F. Order

[96] In the result, I make the following order:

[96.1] The first defendant is ordered to pay to the plaintiff damages in the amount of R450 000.

[96.2] Interest on the amount in paragraph 1 at the legal rate of interest from date of judgment to date of payment; and

[96.3] The first defendant is ordered to pay the plaintiff's costs on the attorney and client scale.



Ross Shepstone

ACTING JUDGE OF THE HIGH COURT

12 August 2024