

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2020/38012

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED. NO

DATE: 04/03/2025

SIGNATURE:

In the matter between:

LIZETTE CONAMIE VAN ROSS

Plaintiff

and

MINISTER OF POLICE

Defendant

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 28 February 2025.*

JUDGMENT

VELE AJ

Introduction

- [1] The plaintiff has issued summons against the Defendant for the recovery of the sum of R 200 000.00, being damages that she suffered as a result of the unlawful arrest and detention she encountered at the instance of the members of the South African Police Services (SAPS), who were at the time acting within the cause and scope of their employment with the defendant. The Plaintiff was arrested on 30 August 2020 and released from custody on 31 August 2020, without appearing in court. The defendant entered an appearance to defendant and pleaded that the arrest and detention were lawful.
- [2] As the defendant alleged that the arrest and detention were lawful, he attracted the duty to begin and the burden of proof in terms of Rule 39 (9) of the Uniform Rules.

Factual background

- [3] The following aspects were common cause between the parties. The plaintiff complied with section 3 of Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002 and State Liability Act 20 of 1957. The citation and locus standi of the parties is not in dispute.
- [4] The plaintiff handed herself over at Randfontein Police Station on 30 August 2020 at around 13H00, after the police did not find her at home during their visit. The plaintiff was arrested without a warrant of arrest. The police officer who arrested her acted within cause and scope of his employment with the defendant. The plaintiff was detained until 31 August 2020, when she was released at the court cells without appearing before a magistrate.

Issues

- [5] In dispute is the unlawfulness of the arrest and detention, as well as the quantum. The times of arrest and release are also in dispute.

Defendant's Evidence

- [6] Since the defendant is alleging that the arrest and detention were lawful, he attracted the onus and the duty to begin. The defendant led the evidence of Sergeant Samuel Sekhosana (Sgt Sekhosana) who testified that he is a police officer in the employ of the SAPS, holding the rank of a Sergeant, with 22 years working experience and stationed at Randfontein police station. His duties entailed investigating case dockets and attending crime scenes, in and around Randfontein. On 30 August 2020 at around 13H00, he was on duty and deployed to the Crime Office, when the plaintiff arrived and introduced herself as Ms Lizette Van Ross and informed him that police were looking for her at her home on 28 August 2020, whilst at work in connection with a docket that was opened against her.
- [7] Sgt Sekhosana perused the docket and found that statement A1 implicated her in an assault with intent to do grievous bodily harm (GBH), wherein Ms Zhan Erasmus was the complainant. He further perused the form J88 which reflected the injuries sustained by the complainant. He arrested her after satisfying himself that she indeed was the person mentioned in the docket. He informed her of her rights before detaining her, without any injuries. Whilst inside the cells, he read her of her rights as set out in SAP 14 Rights Form and she confirmed she understood before signing and handing her a copy Exhibit "A". His reason for detaining her was for her to be taken to court.
- [8] Sgt Sekhosana was cross examined and confirmed that the plaintiff did not inform him that she committed the offence, but stated she came in as police were looking for her. He further stated that she told him she was present at the scene. He further stated that the plaintiff elected to exercise her right to remain silent, as she indicated she was going to give her version in court. He did not include the fact that, she said she was present, as it was his arrest statement not the suspect statement. He confirmed that he perused the form J88 and confirmed that the clinical findings were that the victim suffered minor bruises on the eye. He further stated that he considered two J88 forms, the other being

that of Ms Phillips. He confirmed that the offence she was suspected of having committed was a Schedule 1 offence. Since it was assault GBH and not common assault, he had no discretion to release her on warning, but to arrest and detain pending the decision.

- [9] Sgt Sekhosana testified that he was not aware of the Instructions relating to Arrest and detention of suspects issued and signed by the National Commissioner of SAPS, Commissioner Sithole, on 19 November 2019¹ which provides guidelines to be followed in arresting and detention of suspects. He was presented with a copy. Instruction AG 1(b) of the Instructions, is directing the Commanders to refrain from instructing members to arrest people for minor offences, in instances where the police officers have no jurisdiction, like common assault, in following instances:

“(i) where there no warrant of arrest issued,
(ii) assaults not committed in the presence of the arresting officer,
(iii) assault that did not take place in the cause of domestic violence incident, and the member has no reasonable belief that the victim is in danger of imminent harm if the perpetrator is not arrested.”

- [10] Sgt Sekhosana further testified that he had a reasonable suspicion that a Schedule 1 offence in the form of assault with intent to do grievous bodily harm was committed and relied on section 40 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act). He had no discretion as this was an assault GHB matter, which he could not issue a written notice to appear in court for. He did not consider releasing her on bail or warning as he merely arrested her not charged her. As to what transpired after handing her over to the cells for detention is in the domain of the Cells Commander, Sgt Sekhosana could not testify as to the condition of the cells, but gave a brief description thereof.

- [11] Sgt Sekhosana denied that notice of right was not read to the plaintiff, stating that he initially verbally explained and then read them in the cells area from the

¹ Dated 2019/11/19 under Reference no 1/1/4/1.

Notice of Rights in terms of the Constitution,² that she signed after indicating she understood and was given a copy. He further stated that he had no comment regarding the fact that she was given dry bread and black tea for both supper and breakfast the following morning, as his duties were discharged when he handed her over at the cells.

- [12] Sgt Sekhosana was re-examined and stated that his decision to arrest was the correct one in the circumstances, as the charge of assault GHB may be converted into attempted murder. He further stated his duties seized after he detained the plaintiff.

Plaintiff's Evidence

- [13] The plaintiff gave evidence that she is currently 32 years old, residing at house number 1[...] M[...] Street, Toekomsrus, in Randfontein and employed by Stock Counter since 2013. On 30 August 2020, she visited the local police station, after receiving a message from her grandfather that police officers were looking for her. She heard that someone opened a case against her, though she was not involved. She denied informing Sgt Sekhosana that she assaulted someone, saying she informed him she was there for the case of Erasmus and the Steyn family. Sgt Sekhosana confirmed that her name appeared on the statement inside the docket.

- [14] the plaintiff further denied that the Notice of Rights was read to her, stating she was just handed the copy and then detained. She confirmed that she informed the police officer that she would make a statement in court. She was never informed that she could apply for bail. She was detained in appalling conditions, as the cell was dirty and overcrowded, as they were seven in a small cell. She was provided with one dirty blanket and a very thin mattress. The toilet facility was without a door, had no toilet paper and filthy. The shower only had cold water, so she did not bath before going to court the following morning. She further stated that once at court, she was not provided with food, though

² Section 35 of Constitution of Republic of South Africa.

released at 16H30. She was released without appearing in court. She was aggrieved by the arrest, as she did not appear in court. She also felt embarrassed as she had to inform her supervisor (at work) that she was arrested.

[15] During cross examination, the plaintiff denied assaulting the complainant. She testified that her reason for handing herself in at the police station was to clear her name but not admission of guilt. She confirmed that the other two suspects were her aunt and grandmother. She denied being present when the assault took place. She was referred to paragraph two of the complainant statement to the police which reads: *“On Wednesday 20-08-2020 at about 21H30, I was at my residential place with my friend Larich, she had an argument with Lizette and her family intervened. They insulted my friend and the assaulted her with kicking in the face and one was hitting her with a cell-phone.”* She had no reply thereto, as she merely said she was not present.

[16] The plaintiff confirmed that she informed the police that she was going to give her evidence in court, as she elected to remain silent. She had no answer to the statement that she went to the police to clear her name but elected to exercise her right to remain silent. She denied that rights document was read to her and stated that she could not read and understand English very well. She was further not being truthful when she stated that bail rights were not explained to her, as the “Bail Information” form that she was referred to had information that could only have been provided by her, like her marital status and children for example. She was referred to paragraph 7.2 of the amended particulars of claim, which reflects that she was released from court at 15H30, not 16H30 as per her evidence, to this she had no clear answer.

[17] The plaintiff was re-examined and denied that Sgt Sekhosana spoke to her in Afrikaans. This was not canvassed with him to get his response. She repeated that she went to the police station in order to prove her innocence.

[18] In reply to the court's question about the COVID 19 Regulations lockdown and court hours regulations, she changed her tune and stated she was not sure of the time she was released as she did not have a watch.

Analysis of Evidence

[19] The Court is faced with two mutually destructive versions of which if it accepts the one it should dismiss the other as false. In this regard the Court refers to the following cases:

- a. Selamolela v. Makhado*,³
- b. Mabona and another v. Minister of Law and order and others*⁴
- c. Ramakulukusha v. The Commander Venda National Force*⁵

[20] The defendant's witness, Sgt Sekhosana, gave his evidence in a cool, calm and collected fashion. He did not contradict himself on material aspects, though he was evasive at times. His evidence was not much of assistance, as he indicated that he merely arrested her and the decision to detain was taken by Warrant Officer Mathabathe, who took the warning statement and charged her. The defendant made an election to close the defence case without calling Warrant Officer Mathabathe, the officer who decided to charge the plaintiff to come and state as to what factors he took into consideration when he decided to detain her.

[21] The defendant was fully aware of the fact that, the plaintiff in paragraph 7 of her particulars of claim, alleged that she was subject to inhumane treatment in the cells, as cell was filthy, overcrowded, with no privacy when inside the toilet. The Cell Commander on the shift was not called to testify on the condition of the cells. As for Sgt Sekhosana, he was very evasive in this regard referring everything to the Cell Commander.

³ 1988 (2) SA 372 (VSC)

⁴ 1988 (2) SA 654 (SECLD)

⁵ 1989 (2) SA 813 (VSC).

[22] The plaintiff was a very evasive witness, who failed to answer simple questions. Her demeanour was that of someone who had something to hide. She was hell bound in trying to deceive the court, as though she could read English fluently, she wanted to create an impression that she was unable to follow the proceedings. In many instances, she was ready to answer as soon as the question was put to her, without waiting for it to be interpreted, an indication that she was following. She tried to deny being informed about the option to make a statement to the police officer or the make one in court. She indicated that she was not familiar with the process, yet her option to give evidence in court, was exercised, an indication that the rights were explained.

[23] The time of her release from custody, kept on changing from 15H30, 16H30 to not sure. When asked by the court as to why she was kept at court until 16H30, as it was during lockdown and the court operating under COVID 19 Regulations with no trial matters proceeding. She had no answer, she later conceded she was not sure of the time of release, as she had no means to check the time. If so, why choose 16H30 of all the times?

[24] The plaintiff's personal information, she is 32 years old, and resided with the Steyn family, her maternal family members at the time of the incident. All we know from her evidence is, she was employed by Stock Counters at time of incident, which is contradicted by the pleadings. There is no information about her highest academic achievement, whether she is married or not, and if she has children. She is not claiming for loss of income as a result of being incarcerated. She did not give any explanation why she alleged that she was humiliated as she did not say how many people saw her being arrested and how far was this spread. Interesting enough is that the plaintiff stated that she informed the police officer the name of the complainant but failed to explain how did she get hold of this information, as she denied being present, though when Sergeant Sekhosana testified that she told him she was present but did not take part in the assault was never challenged. She was referred to the complainant's statement and had no clear answer to the fact that she was the central figure of the commotion.

[25] She indicated that she was subjected to inhumane treatment whilst in custody as she was placed in a cell with six other persons, given a thin mattress and a dirty blanket. She was given dry slices of bread and black tea for both supper and breakfast. The cell had no privacy as the toilet had no door. Though the defendant was aware that it is her case that she was ill-treated, which is disputed, no witness to testify about the condition of the cells was called and no reason whatsoever was advanced in this regard.

[26] The defendant did not call the person who took the decision to charge the plaintiff, to give reasons as why less stringent measures to ensure her attendance in court were not followed as per the directions of the National Commissioner that were already almost a year in operation at the time. Since the police officer was not present when the offence was committed, and that she voluntarily came to the police station, why not issue her with the notice to appear, or at least fix her either police or prosecutor's bail? When one considers the fact that the only injuries sustained by the complaint, as reflected on the J88 was a small bruise above the eye of 2 Centimetres by 2 centimetres and no other injuries recorded. Clearly Sergeant Sekhosana did not apply his mind, when he decided to detain the plaintiff, as he disregarded the provisions of both section 40 of the CPA and the standing Instructions of the National Commissioner.

[27] Sgt Sekhosana acted against the Instruction AG8 which provides any arrest without a warrant in instances that are outside sections 40 and 42(1) of the Criminal Procedure Act, will be unlawful. If indeed correct that he perused the docket and the Form J88, it would be clear that the injuries were so minor not to warrant the arrest of the plaintiff, more especially under the circumstances where the plaintiff brought herself in. He acted in contrast to the provisions of Instruction AG 10, which provide that where a suspect's attendance to court can be secured by way of referring the matter to public prosecutor to issue the summons to appear in terms section 54 of the Criminal Procedure Act, such less stringent method should be applied. The charging officer was not called, so we do not know what he considered before deciding to detain her. The plaintiff's arrest and detention could not be justified in the circumstances.

[28] Rabie CJ placed the onus to prove that the arrest was lawful on the members of the SAPS in *Minister of Law and Order and Others v Hurley and Another*⁶ where the following appears:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another should bear the onus of proving that his action was justified in law.”

[29] Bosielo JA in *Minister of Safety and Security and Another v Swart*⁷, held the following:

“It is rite that the reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether any reasonable person confronted with the same set of facts, would form a suspicion that the person has committed a Schedule 1 offence. *M v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ)”

[30] The current legal position is that an arrest or detention is prima facie unlawful and the onus is on the defendant to prove its lawfulness. Since the defendant are relying on the provisions of Section 40 of the Criminal Procedure Act, which reads as follows:

“Arrest by a peace–officer without a warrant

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

(a);

(b) “whom he reasonably suspects of having committed a Schedule 1 offence, other than the offence of escaping from lawful custody; ...”

⁶ 1986 (3) SA 568 (A) at 589 E–F

⁷ 2012 (2) SACR 226 (SCA) at para 20.

(2) If a person may be arrested under any law without a warrant and subject to conditions or existence of circumstances set out in that law, any peace officer may without a warrant arrest such a person subject to such conditions or circumstances.”

[31] Section 40 of the Criminal Procedure Act empowers a peace officer to arrest a person who commits an offence in his presence or a person, whom he has a reasonable suspicion that has committed an offence that is set out in Schedule 1 thereof. In this regard the plaintiff was arrested for allegedly assaulting two complainants, which occurred in the absence of the arresting officer.

[32] The cumulative effect of the evidence before court, it is clear that though Sgt Sekhosana acted without malice as he indicated that he arrested the plaintiff based on the evidence contained in the case docket, his decision to arrest was ill informed in the circumstances, as he acted contrary to the Instructions Relating to Arrest and Detention of Suspects,⁸ issued by then National Commissioner of Police of the SAPS which was enacted following the Constitutional Court decision in *De Klerk v Minister of Police*.⁹ Under Instruction 5(b), officers are instructed to arrest without a warrant for assault with intent to do grievous bodily harm only in instances where a dangerous wound has been inflicted or an attempt to inflicted a dangerous wound on the victim. It is clear from his arrest statement that he did not comply with Instruction 5(b) as it did not contain all elements of the offence, extent of the wound and any other factor he based his belief that the wound was dangerous.

[33] To say that the provisions of section 50(1)(b) of the Criminal Procedure Act were followed, would be to strain the language and intention of the Legislature, as it is clear that the police officer who arrest a suspect without a warrant will be applying his/her discretion and must comply with the requirements as set out in *Duncan v Minister of Law and Order*¹⁰, especially the fourth aspect that require that suspicion must rest on reasonable grounds.

⁸ Dated 2019/11/19 under Reference no 1/1/4/1

⁹ 2021 (4) SA 585 (CC)

¹⁰ 1986 (2) SA 805 (A) at 818

[34] Sgt Sekhosana perused the docket and saw the J88, and if he merely applied his mind, he could have concluded that less evasive method like warning her for court the following day would have sufficed. He did not follow the Instructions of the National Commissioner that were aimed at addressing this very aspect, as the assault was not committed in his presence and the injuries were so minor to qualify for assault GBH. The above was reinforced by Harms DP in *Minister of Safety and Security v Sekhoto and Another*¹¹ wherein the following appears:

“While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. Her or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court. The purpose of the arrest is no more that to bring the suspect before the court. ... Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crimes – and those listed in Schedule 1 are serious. ... On the other hand, there will be cases, particularly where the suspected offense is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest ...”

[35] The current case is the classic example, as the injuries were so trivial that common assault should have been the charge. In terms of Instruction 5(f), since she had a fixed address, easily traceable, and responded to the police visit to her home (by coming in on her own), Sgt Sekhosana could have ensured that the investigations were completed and the docket handed over to the public prosecutor to make decision and issue the summons to appear in terms of section 54 of the Criminal Procedure Act.

[36] It is clear that the defendant is wrongly relying on section 40(1)(b) which reads as follows:

¹¹ 2011 (1) SACR 315 (SCA) at para 44

“whom he reasonably suspects of having committed a Schedule 1 offence, other than the offence of escaping from lawful custody;”

[37] Section 12 of the Constitution provides as follows:

“Freedom and Security of the person

12.(1) everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) free from all forms of violence from either public or private sources; ...”

[38] The plaintiff herein was guaranteed the right in section 12 of the Constitution, which was without just any cause curtailed and needs to be appropriately compensated and looks upon the court to do right in this regard. The court should, however in its endeavour to achieve this, not lose sight of the other aspects of compensation and introduce a wholesale change. It is true that this was a serious infringement as a result of the arrest the plaintiff spent a night in custody and further endured some hours in court before she was released without appearing, rendered the defendant liable for her claim.

Quantum

[39] In as far as the quantum is concerned; the court will take into consideration the fact that there is no evidence that the plaintiff was subjected to inhumane treatment, though evidence is the cell condition was sub-standard, and she was released without appearing before the court. In line with recent cases of the similar nature, the court agrees that unlawful arrest and detention were serious violations of the individual's rights, subject to compensation being awarded.

[40] The court refers to *May v Union Government*¹² where the court emphasised the seriousness of the conduct that is unlawful on the part of the police officers.

¹² 1954 (3) SA 120 (N).

The court further refers to the case of *Minister Safety and Security v Seymour*¹³ where an amount of R500 000.00 was reduced to R90 000. 00 as an award for unlawful arrest and detention.

[41] In *Minister of Safety and Security v Tyulu* ¹⁴ the respondent, a Magistrate, had his award reduced to the sum of R15 000.00 by the Supreme Court of Appeal, compensating him for unlawful arrest and detention on the basis that the duration was for a short period, despite his social standing and the manner in which the arrest took place.

[42] In *Olivier v Minister of Safety and Security and Another*¹⁵ the plaintiff was a senior police officer who was arrested by the police in full view of his colleagues then detained at the same police station where he was employed. He claimed the sum of R150 000.00 and was awarded R50 000.00 to the satisfaction of all involved.

[43] It is clear that in as far the general damages are concerned; the court should treat each case on its own merits taking into consideration the general trend of similar cases. In this regard the court will echo the words of Bosielo JA in *Tyulu*¹⁶; wherein the following was stated:

“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

¹³ 2006 (6) SA 320 (SCA)

¹⁴ [2009] ZASCA 55

¹⁵ 2009 (3) SA 434 (W)

¹⁶ *Tyulu* at para 26

mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.”

[44] The court further refers to the decision of the Supreme Court of Appeal in *Minister of Police v Dlwathi*¹⁷ wherein the court held that the object of compensation of the victims was more in solace for the wrong they have suffered than to enrich them.

[45] The court further refers to the decision of this court per Wepenaar, J in *Sondlo v Minister of Police*¹⁸ wherein the court raised its concern about the high awards granted against minister of police, as this was paid out of public funds, stating the awards should compensate for the wrongful action than enrichment of victims.

[46] In this regard the court refers to the work of the learned writers, *Neethling, Potgieter and Visser*¹⁹ where the following was said regarding the factors that the court has to consider when assessing the amounts that can be paid as compensation for damages as follows:

“factors which play a role in the assessment of the amount of damages are the following : the circumstances under which the deprivation of the liberty occurred, the presence or absence of malice or an improper motive on the part of the defendant, the harsh conduct of the defendant, the duration of the deprivation of liberty, the social status and age of the plaintiff, the fact that the plaintiff was the author of his own misfortune, the degree of publicity afforded to the deprivation of liberty; and whether the defendant has apologised or provides a reasonable explanation for what

¹⁷ [2016] ZASCA 6

¹⁸ [2012] ZAGPJHC 14.

¹⁹ *Neethling's Law of personality, Second Edition, Lexis Nexis, Butterworth, Durban, 2005* at p 121.

happened. In addition, awards in previous comparable judgments, following the inflation, may be taken into account.”

[47] The social standing as well as family life of the plaintiff was not canvassed. The plaintiff’s highest educational level is not canvassed.

[48] The court has taken into consideration, all the factors as set out by the authors *Neethling et al* above and the recent trends in case law, the court finds that the compensation befitting to the plaintiff herein is the sum of R75 000.00, as it was clear that she was not ill-treated in anyway.

Costs

[49] In as far as costs are concerned, the court will follow the decision of the Supreme Court of Appeal in *De Klerk v Minister of Police*,²⁰ where the following appears:

“With regard to costs, although the total quantum awarded is far below the jurisdiction of the high court, the matter concerned the unlawful deprivation of the appellant’s liberty and he was justified in approaching the high court ...”

[50] The court is inclined to award plaintiff costs on high court scale A, as in the circumstances the lower courts, could have granted her the relief sought with less costs. The plaintiff’s claim was within district court’s jurisdiction as claim was for R200 000.00.

Order

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

²⁰ 2018 (2) SACR 28 (SCA) at para 18.

1. The Defendant is ordered to pay the Plaintiff damages in the sum of R75 000, 00 (Seventy-Five Thousand Rand only)
2. The Defendant is ordered to pay interest at the prescribed rate of 10.25% per annum on the aforesaid sum from the date of summons.
3. Costs of suit on High Court scale A, including counsel's fees.

SO VELE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

Counsel for Plaintiff: Advocate L Swart
Instructed by: JJ Geldenhuys Attorneys

Counsel for Defendant: Advocate MM Maphutha
Instructed by: State Attorney, Johannesburg

Date of Hearing: 28 January 2025
Date of Judgement: 04 March 2025