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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 549/2021

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

PRIVATE PANANA MOJE

Plaintiff

And

THE MINISTER OF POLICE

Defendant

Coram: Lever J

JUDGMENT

Lever J:

1. The plaintiff's claim against the Minister of Police, the defendant, arises out of an alleged unlawful arrest. It is alleged in the Particulars of Claim that the arrest took place on the 4 May 2019 at or about 22H00 at Postmasburg. It was alleged to be an unlawful arrest and detention from the date of arrest up until the 12 November 2019.
2. The plaintiff framed his claim in the following manner:

- "6. After his arrest, the Plaintiff was transported and detained at the instance of the arresting officer. The Plaintiff was unlawfully detained until 12 November 2019 at or about 16H00, whereafter he was released from Postmasburg Magistrates Court.
7. Both the arrest and subsequent detention of the Plaintiff were unlawful, on one or more of the following ground/s:
 - 7.1 The arresting officer failed to properly familiarise himself with the merits of the case, prior to exercising his discretion to arrest or not;
 - 7.2 The arresting officer did not take into account the plaintiff's rights in terms of Section 12 of Act 106 of 1996;
 - 7.3 The plaintiff was arbitrarily and without good cause deprived of his freedom;
 - 7.4 The arresting officer failed to consider utilising alternative methods to secure the attendance of the Plaintiff at Court, as there was no urgency and/or necessity to proceed with an arrest.
8. The arresting officer had no right to interfere with the Plaintiff's constitutional right to freedom, in that:
 - 8.1 The Plaintiff did not pose any risk to the community;
 - 8.2 The Plaintiff was not a flight risk;
 - 8.3 There were no grounds present to reasonably suspect that the Plaintiff would harm himself, or any other member of the public;
 - 8.4 There was no urgency for the arrest of the plaintiff;
 - 8.5 The fact that the Plaintiff had a fixed address and was easily traceable, was not taken into consideration;
 - 8.6 The police never had any reasonable grounds to effect arrest on (sic) the Plaintiff.

9. **AND OR ALTERNATIVE:**

The arrest and/or subsequent detention of the Plaintiff was unlawful due to the fact that the arresting officer had no *prima facie* case and/or reasonable grounds to arrest the plaintiff and/or subsequently detain him.

10. **AND OR ALTERNATIVE:**

The arrest and/or subsequent detention of the Plaintiff was further unlawful due to the fact that the Arresting Officer did not consider, alternatively comply with the provisions of Standing Order G341 of the South African Police Services. The arresting officer's aim when arresting the Plaintiff were none of the following:

- 10.1 To further investigate the matter;
- 10.2 To prevent the Plaintiff from committing any further offences;
- 10.3 To protect the plaintiff against himself or any other members of the public."

3. The defendant responded to the said Particulars of Claim by pleading as follows:

"6. **AD PARAGRAPH 6**

Save to admit that the Plaintiff was detained, the balance of the allegations contained in this paragraph are denied.

7. **AD PARAGRAPH 7 AND 8**

The content of this (sic) paragraph and its subparagraphs are denied. The Defendant specifically pleads that the Plaintiff was arrested in terms of Section 40(1)(b) of the Criminal Procedure Act in that the arresting officer had a reasonable suspicion that Plaintiff committed a schedule 1 offence.

8. **AD PARAGRAPH 9**

The contents of this paragraph are denied. The defendant pleads further that a prima (sic) case is not a requirement for an arrest in terms of Section 40(1)(b) of the Criminal Procedure Act.

9. **AD PARAGRAPH 10**

The contents of this paragraph are denied."

4. By agreement between the parties, the merits of this trial were separated from the quantum. The special plea relying on the required notice as contemplated in Act 40 of 2002 was not pursued. For present purposes the paragraphs from the Particulars of Claim and the Plea thereto, quoted above, define the issues to be determined by this court at this time.
5. The defendant accepted the onus of proof and the duty to begin and led the evidence of three witnesses, whose evidence will be dealt with hereunder.
6. The law for claims relating to unlawful arrest is that a person is entitled to liberty and any deprivation of such liberty must be done on lawful grounds which the defendant must establish.
7. The law on what is required for a lawful arrest, where the defence is based on section 40(1)(b) of the Criminal Procedure Act¹ (the CPA), was re-visited and restated by the Supreme Court of Appeal (SCA) in the now well-known case of *MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER*². The SCA in the Sekhoto case, considering the position of an arrest without a warrant under the provisions of section 40(1)(b) of the CPA quoted the requirements as set out in the case of *DUNCAN v MINISTER OF LAW AND ORDER*³ with approval, and set out the position as follows:

“[6] As was held in *Duncan v Minister of Law and Order*, the jurisdictional facts for a s 40(1)(b) defence 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 (the arrestee) committed an offence referred to in schedule 1; and (iv) the suspicion must rest on reasonable grounds. ...”⁴
8. The SCA in Sekhoto’s case considered whether there was now a fifth jurisdictional fact required, being as set out by Bertelsmann J in the case of

¹ Act 51 of 1977.

² 2011 (5) SA 367 (SCA).

³ 1986 (2) SA 805 (A) at 818G-H.

⁴ Sekhoto., above., p. 373 at para [6].

LOUW & ANOTHER v MINISTER OF SAFETY & SECURITY & OTHERS⁵, that arrest being an invasion of the constitutional right to liberty that the police are required to consider if there are no less invasive means to bring the suspect before court than the immediate arrest and detention of the said suspect. The SCA in the Sekhoto case held that there was no such fifth jurisdictional fact required.⁶

9. As the SCA in the Sekhoto case point out even if the four jurisdictional facts are established the arresting peace officer then has a discretion whether to arrest or not.⁷ This discretion must be properly exercised.⁸ Such discretion must be exercised in good faith, rationally and not arbitrarily.⁹ It points out that: “The standard is not perfection or even optimum, judged from the vantage of hindsight – so long as the discretion is exercised in this range (ie being exercised in good faith, rationally and not arbitrarily), the standard is not breached.”¹⁰
10. In Sekhoto, the SCA points out that the said considerations of good faith, rationality and absence of arbitrariness do not tell the court what factors the peace officer must weigh-up in exercising this discretion. On this aspect the SCA offers the following guidance:

“[40] ... An official who has discretionary powers must, as alluded earlier, naturally exercise them within the limits of the authorising statute, read in the light of the Bill of Rights. Where the statute is silent on how they are to be exercised, that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner described by Langa CJ in *Hyundai*.

[41] In this case the legislature has not expressed itself on the manner in which the discretion to arrest is to be exercised: that must be discovered by inference. And in construing the statute for that purpose,

⁵ 2006 (2) SACR 178 (T) at 186a-c and 187e.

⁶ Sekhoto., above., at p 377 para [22].

⁷ Sekhoto., above., at p. 379 para [28].

⁸ Sekhoto., above., at p. 379 para [29].

⁹ Sekhoto., above., at p. 382 para [38].

¹⁰ Sekhoto., above., at p. 382 para [39].

the section cannot be viewed in isolation, as the court below appears to have done.”¹¹ (references omitted)

11. In relation to arrest without a warrant as contemplated in section 40(1)(b) the SCA in Sekhoto examined the CPA and the purpose of an arrest being to bring a person to trial. The arrest is but the first step in this process and the person arrested must be brought before a court as required by law. The authority to further detain to secure attendance at a trial is within the discretion of the court. In these circumstances the SCA concluded that: “It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether the decision on that question is rational, naturally depends on the particular facts, ...”¹²
12. The SCA in Sekhoto, as Stretch J indicates in the matter of BARNARD v MINISTER OF POLICE¹³ does not decide that “...the prudent policeman endowed with a discretion to arrest is at large to simply ignore less invasive methods, and, in doing so, to fail to exercise that discretion properly or at all.”¹⁴
13. The onus of establishing that an arresting officer did not exercise such discretion properly or at all rests upon the person alleging that, ie in this case the plaintiff.¹⁵
14. The questions as to whether the necessary jurisdictional facts have been established by the defendant or not and the question as to whether the discretion of the arresting officer was exercised properly or at all are questions of fact. In these circumstances the evidence adduced on behalf of the defendant needs to be set out in some detail.
15. An armed robbery took place in Postmasburg on the 30 April 2019. A businessman involved in the cash loans business had just withdrawn some

¹¹ Sekhoto., above., pages 382 – 383 at paras [40] and [41]. The reference to *Hyundai* as it appears in the quoted passage is a reference to 2001 (1) SA 545 (CC) at paras [21] to [26].

¹² Sekhoto., above., pages 383 – 384 para [44].

¹³ 2019 (2) SACR 362 (ECG) at page 374 para [48].

¹⁴ Barnard’s case., above at para [48].

¹⁵ Sekhoto case., above., pages 384 and 385 paras [48] and [49].

R800,000.00 cash from a bank in Postmasburg, whereafter he was accosted, shot and injured and robbed of the R800,000.00 cash. The evidence led established that the robbers were four black men.

16. The factual question to be decided by this court is, was there sufficient evidence at the time of the arrest, being the 4 May 2019, to link the plaintiff to the said robbery in the manner contemplated by the four jurisdictional grounds required to affect an arrest without a warrant in the manner contemplated by section 40(1)(b) of the CPA.

17. Thereafter the court will consider whether on the established facts the arresting officer exercised a discretion at all and if so whether the exercise of such discretion was done in good faith, rationally and not arbitrarily.

18. Finally, this court will determine on the established facts whether the plaintiff is entitled to damages for wrongful detention and if so, up to what point as against the present defendant, being the Minister of Police.

19. In his attempt to discharge the onus of establishing the four jurisdictional requirements to effect an arrest without a warrant as contemplated by section 40(1)(b) of the CPA the defendant led the evidence of three witnesses. The three witnesses concerned are: Lieutenant-Colonel (Lt-Col) Aggrey Sylvester Magugu (Magugu); Lt-Col Jan Andries Adios Witbooi (Witbooi); and Warrant Officer (W O) Stefaans Mangate (Mangate). All of whom are peace officers in the South African Police Services (SAPS). It is common cause that they were all acting within the course and scope of their employment with the defendant at all material times.

20. The plaintiff elected not to testify.

21. Lt-Col Magugu testified that at the time of the incident on the 30 April 2019, he held the rank of Captain in the SAPS. His duties at that time were to investigate murders and robberies in the entire Northern Cape Province. He was ordinarily based in Kimberley. His commanding officer the Late Brigadier De Waal ordered

him to go to Postmasburg to investigate the relevant armed robbery. He travelled from Kimberley to Postmasburg that very evening.

22. On arrival in Postmasburg he was directed to a house situated at 8 Motlaretshiba Street, Dichoko, Postmasburg. In the trial, this house was described as the secondary crime scene. Lt-Col Magugu arrived to find several police officials and vehicles at this house. He arrived just in time to witness three suspects being removed from the ceiling of this house.
23. Lt-Col Magugu then subsequently learnt that when the police arrived at the secondary crime scene, that three suspects fled and hid in the ceiling of that house and that Katlego Moje, the plaintiff's cousin, fled out of the back door with a certain Victor Might. Victor Might, it turns out was to be used as a witness in the armed robbery criminal trial.
24. Bloodstained clothes were found in the dustbins at the said house. These clothes matched the eyewitness descriptions given of those involved in the said armed robbery.
25. The next day Lt-Col Magugu also learned that on the 30 April 2019 Katlego Moje, the plaintiff's cousin, was at the home of Victor Might in a security housing complex belonging to Polomela Mines. The report was that Katlego Moje alighted from the vehicle he had been travelling in and broke a window at Victor Might's house. Katlego Moje then returned to the vehicle, a KIA SUV and the car drove off.
26. Lt-Col Magugu obtained this information from two witnesses, one a neighbour Cecilia Van Der Westhuizen and the other a security guard employed at the housing security complex. The security guard, Motsamai Clive Manere informed Lt-Col Magugu that he got the information from Victor that Katlego Moje was on his property and had broken a window at his house. Mr Manere informed Lt-Col Magugu that he observed that the person who was on Victor's property left in the passenger seat of a silver KIA with registration number K[...].

27. Lt-Col Magugu testified that he had this information before the arrest of the plaintiff, although the relevant written statements were only taken some time after the arrest of the plaintiff.
28. Lt-Col Magugu traced the registration number of the said KIA motor vehicle and found it was registered to the plaintiff, Private Panana Moje. He found out that the plaintiff was staying in Dichoko not far from where the others were arrested at the secondary crime scene. His investigators visited the plaintiff's house for a couple of days trying to get hold of the plaintiff.
29. Lt-Col Magugu testified that he was looking for the plaintiff because Katlego Moje fled the secondary crime scene with Victor Mhete and he suspected that plaintiff, Panana Moje, might have assisted Katlego Moje to flee Postmasburg. The basis for Lt-Col Magugu's suspicion that the plaintiff might have assisted his cousin to flee Postmasburg was not disclosed at this stage and it seems was only partially confirmed after the arrest when Lt-Col Magugu interviewed the plaintiff. I say partially confirmed because no basis was laid or established that prior to his transporting his cousin to Pampierstad plaintiff knew his cousin was in fact fleeing from the police.
30. Then Lt-Col Magugu testified that he learnt that the plaintiff was back in Postmasburg and that he gave an instruction to bring the plaintiff in for questioning. Counsel for the defendant, Mr Davis, then asked Lt-Col Magugu specifically whether he gave an instruction to bring the plaintiff in for questioning or whether he gave an instruction to arrest the plaintiff. To which Lt-Col Magugu responded that he instructed W O Mangate to bring the plaintiff in for questioning but that if it was possible to arrest the plaintiff, the plaintiff should be arrested.
31. Then Counsel for the defendant, Mr Davis, asked Lt-Col Magugu if he knew whether the plaintiff was brought in for questioning or whether plaintiff had been arrested. To which he responded that the plaintiff was brought in for questioning. Lt-Col Magugu testified that he interviewed the plaintiff. That during such interview plaintiff admitted that he drove Katlego Moje, his cousin, to Pampierstad at the request of the said Katlego Moje. Plaintiff indicated during the said

interview that on the day of the relevant robbery he was in Dichoko, Postmasburg. Plaintiff indicated during the said interview that he received a call from his cousin Katlego to pick him up in the township, which he did and that he took Katlego to Pampierstad that evening.

32. Lt-Col Magugu testified that the plaintiff could not explain why Katlego asked him to take him to Pampierstad that evening.

33. Lt-Col Magugu then testified that after the interview he then sought guidance from the office of the Director of Public Prosecutions (the DPP) and that he was advised by the office of the DPP to detain the plaintiff for armed robbery. Acting on this advice the plaintiff was detained on a charge of armed robbery.

34. In his evidence-in-chief Lt-Col Magugu indicated that the plaintiff had applied for bail and that it was refused. At this point Lt-Col Magugu testified that he cannot recall why bail was refused as it was a long time ago.

35. Lt-Col Magugu testified that the plaintiff was not at the scene during the actual robbery concerned.

36. Mr Davis, Counsel for the defendant, asked Lt-Col Magugu in-chief why the plaintiff was detained. To which Lt-Col Magugu answered due to the seriousness of the crime.

37. A leading question was then put to Lt-Col Magugu by Mr Davis. This question was to the effect that Sgt Mangate arrested the plaintiff, where is he (Mangate) stationed? Mr Du Plessis, who appeared for the plaintiff did not object to this question. Up to that point it had not been the direct evidence of Lt-Col Magugu that W O Mangate had been the arresting officer in this matter. Lt-Col Magugu's answers had been ambiguous on this aspect. In any event, in response to Mr Davis' leading question, Lt-Col Magugu's response was directed at the part of the question dealing with W O Mangate being stationed at the Organised Crime Branch in Kimberley with Lt-Col Magugu and he did not take the bait and left the

question as to who in fact effected the arrest of the plaintiff ambiguous at that point of his evidence.

38. Lt-Col Magugu testified that he and his team remained in Postmasburg until all the suspects were arrested.

39. Mr Davis asked Lt-Col Magugu when his team, including W O Mangate arrived, whether they familiarised themselves with the docket and what the matter was about. To which Lt-Col Magugu responded that yes that there would normally be a briefing and that they were all aware that they were looking for the plaintiff.

40. Then, in-chief, Mr Davis asked Lt-Col Magugu whether the plaintiff was an accused in the criminal trial relating to the relevant robbery. Lt-Col Magugu responded, no, the charges against the plaintiff were provisionally withdrawn after instructions from the Office of the DPP pending the outcome of the criminal trial. That concluded Lt-Col Magugu's evidence in chief.

41. In cross-examination, Lt-Col Magugu confirmed the fourth suspect in the relevant robbery was identified as Katlego Moje, the plaintiff's cousin. That the information provided at the briefing was that Katlego Moje drove a white BMW vehicle which the suspects used to get away from the primary crime scene. That at that time there was never a suspicion that any other black males were involved in the robbery itself.

42. Lt-Col Magugu confirmed that at least one of the wounded suspects removed from the ceiling of the secondary crime scene co-operated fully with the investigation and made a statement about how the robbery was executed and this statement made no mention of the plaintiff.

43. Lt-Col Magugu confirmed that at the secondary crime scene where three of the suspects were arrested, he was informed that Katlego Moje, the plaintiff's cousin, had escaped through the back door with Victor Might when the police arrived on the scene.

44. Lt-Col Magugu confirmed that Victor Might had aided the suspects in dressing their wounds at the secondary crime scene, but that Victor Might was not a suspect and was never arrested. Victor Might was interviewed and he gave a statement, possibly before the arrest of the plaintiff, but he did not implicate the plaintiff in any way.
45. Mr Du Plessis asked Lt-Col Magugu why Victor Might was not arrested in circumstances where it was established that he assisted the suspects where in the case of the plaintiff Lt-Col Magugu only had a suspicion that plaintiff had assisted one of the suspects, his cousin Katlego, yet plaintiff was arrested. Lt-Col Magugu did not directly answer this question.
46. Lt-Col Magugu confirmed that Victor Might had not in any manner implicated the plaintiff in the relevant robbery.
47. Lt-Col Magugu confirmed that a lady, an employee of the bank, one Joyce Kubeta, was arrested for assisting those involved in the relevant robbery with information. She was allowed out on bail and her bail was not opposed. She later became a section 204 witness for the prosecution. Lt-Col Magugu confirmed that she had not implicated the plaintiff in any way in respect of the relevant armed robbery.
48. Mr Du Plessis asked Lt-Col Magugu if at the time of plaintiff's arrest, there was any information on oath linking the plaintiff to the robbery itself. Lt-Col Magugu answered the plaintiff aided his cousin Katlego to flee knowing he was wanted. Also, that according to the other suspects, the money was still with Katlego.
49. Mr Du Plessis then pressed the point that he was referring to the robbery itself in his previous question. To which Lt-Col Magugu responded there was no information linking the plaintiff to the main crime scene where the robbery occurred, but that in his previous answer he was referring to the plaintiff aiding his cousin Katlego.

50. Mr Du Plessis put to Lt-Col Magugu that the relevant charge in those circumstances would be defeating the ends of justice. To which Lt-Col Magugu responded that he asked for guidance from the office of the DPP and that he was directed to charge the plaintiff with armed robbery.

51. Mr Du Plessis then asked Lt-Col Magugu if at the time of the plaintiff's arrest there was any information that plaintiff had unlawfully and intentionally assaulted anyone. To which Lt-Col Magugu responded that plaintiff was not at the main crime scene where the robbery took place.

52. Mr Du Plessis then asked if there was any information that the plaintiff had received any of the money being the proceeds of the robbery. Lt-Col Magugu responded that the information at his disposal was that Katlego had the money and that it was only the plaintiff and Katlego that fled from Postmasburg. Lt-Col Magugu continued that he would not know if plaintiff received any of the money because neither the plaintiff nor Katlego wanted to discuss the money. Clearly, this statement that they did not want to discuss the money could only have been obtained after the arrest of the plaintiff.

53. Mr Du Plessis then put to Lt-Col Magugu that in his evidence-in-chief he did not state that the plaintiff transported Katlego with the money as a reason for the arrest. To which Lt-Col Magugu responded that he maintains it now because Mr Du Plessis asked. In the context of the fact that if he had such information that plaintiff knew of the robbery and that he was assisting Katlego to evade arrest with the money it would certainly be a basis for a reasonable suspicion that plaintiff was involved in a schedule 1 offence, such answer in the present context is simply not reasonable and nor is it credible in the circumstances disclosed to this court. If Lt-Col Magugu had such information on or before plaintiff's arrest, it would clearly have been front and central to his evidence in chief, which it was not.

54. Mr Du Plessis then asked Lt-Col Magugu if there was any evidence that plaintiff knew what his cousin Katlego did. To which Lt-Col Magugu replied that he

wouldn't know if plaintiff knew what Katlego did. This is at odds with Lt-Col Magugu's answer to the previous question.

55. Lt-Col Magugu confirmed that after his arrest plaintiff co-operated with him.

56. Mr Du Plessis put it to Lt-Col Magugu that after plaintiff was informed of his rights and prior to his warning statement and despite plaintiff electing to have legal representation plaintiff voluntarily informed him that his cousin Katlego told plaintiff and he requested to be taken to Pampierstad. Lt-Col Magugu confirmed this to be correct.

57. Mr Du Plessis then put to Lt-Col Magugu that during his interview with the plaintiff, plaintiff told him that he (the plaintiff) had no knowledge of Katlego's involvement in the robbery. Lt-Col Magugu disputed this saying he asked the plaintiff that question but that that was not the plaintiff's reply. Mr Du Plessis then asked Lt-Col Magugu what was plaintiff's reply. Lt-Col Magugu's response was evasive of Mr Du Plessis original line of questioning regarding plaintiff's knowledge of his cousin Katlego's involvement in the robbery. Finally, on this aspect Lt-Col Magugu asserted that the plaintiff told him that his cousin Katlego said to him that something had happened and that he needed to get to Pampierstad and that plaintiff did not mention any emergency. This is at odds with Lt-Col Magugu's response to a proposition put to him by Mr Du Plessis only a few minutes prior to this assertion.

58. Lt-Col Magugu again asserted that he was in Postmasburg the whole time since the date of the robbery. The relevance of this will manifest itself when I deal with the evidence of Lt-Col Witbooi.

59. Lt-Col Magugu confirmed that he was aware that at the material time the plaintiff was employed. Lt-Col Magugu also confirmed that the plaintiff had voluntarily surrendered his cell phone.

60. Mr Du Plessis put it to Lt-Col Magugu that the plaintiff handed over his cell phone to prove that plaintiff had no knowledge of Katlego's involvement in the robbery or

what happened in the robbery. To which Lt-Col Magugu responded he would not be able to say if plaintiff knew or did not know of his cousin Katlego's involvement in the robbery or what happened in the robbery.

61. Mr Du Plessis then asked Lt-Col Magugu if he found anything on the plaintiff's cell phone. To which Lt-Col Magugu responded that he found nothing incriminating the plaintiff on the said cell phone.

62. Mr Du Plessis then referred to page 248 in the plaintiff's trial bundle, which is a copy of the charge sheet, which shows that the plaintiff was charged with robbery with aggravating circumstances. Mr Du Plessis then asked Lt-Col Magugu whether he agreed that plaintiff should be linked to a fair degree before the plaintiff was charged with robbery with aggravating circumstances. To which Lt-Col Magugu responded that plaintiff had aided a person to flee with the money. Given the seriousness of the matter for him that was enough and that he was advised to charge the plaintiff with the robbery by the office of the DPP.

63. Mr Du Plessis asked Lt-Col Magugu if the office of the DPP gave advice to arrest the plaintiff. To which Lt-Col Magugu responded when he contacted the office of the DPP the plaintiff had already been arrested and that the office of the DPP advised that the plaintiff should be charged with the offence set out in the charge sheet.

64. Then Mr Du Plessis asked Lt-Col Magugu who decided to arrest the plaintiff. To which Lt-Col Magugu responded that the arresting officer would come and explain that to the court.

65. Lt-Col Magugu confirmed that at the time of the arrest he only had verbal statements from the neighbour and the security guard already referred to and that the written statements came after the arrest of the plaintiff.

66. Lt-Col Magugu confirmed that in terms of the SAPS Standing Order G341 that arrest without a warrant should be used as a last resort.

67. Lt-Col Magugu confirmed that he received information the day after the robbery relating to plaintiff's involvement in transporting his cousin Katlego. In the context of Lt-Col Magugu's evidence viewed holistically, this can only relate to the plaintiff transporting his cousin Katlego to the house of Victor Mthembu because Lt-Col Magugu testified earlier that it was only after his interview with the plaintiff that he was informed that plaintiff transported Katlego Mthembu to Pampierstad.
68. Lt-Col Magugu was asked if at the time of the robbery he was a Captain. The response to this question left this court in the dark as to what the factual position was at the material time. Lt-Col Magugu responded: "Let me correct that currently I hold the rank of Lt-Col." Then Mr Du Plessis put to Lt-Col Magugu as a senior officer he could have issued the warrant of arrest. Lt-Col Magugu responded that no, only a full Colonel can sign a warrant of arrest.
69. My understanding of the law in this regard is that any commissioned officer in the SAPS can issue a warrant of arrest, but the practice is that such officer should not issue a warrant in a matter in which they are directly involved.
70. Then there was a line of questioning relating to the surrender of the plaintiff's cell phone. Lt-Col Magugu could not confirm that the said cell phone was handed to Lt-Col Witbooi on the 1 May 2019. He could also not confirm that the plaintiff surrendered his cell phone before his arrest and his position was that the surrender of such cell phone may have been handled by one of the other investigators on the investigation team. Lt-Col Magugu's position was that at the time of plaintiff's arrest he did not know that there was nothing on the said cell phone to incriminate the plaintiff.
71. Then Mr Du Plessis put to Lt-Col Magugu that his evidence in chief was that he instructed W O Mangate to bring the plaintiff in for questioning and if it was possible to arrest plaintiff to do so. Mr Du Plessis also put it to Lt-Col Magugu that plaintiff was arrested after his interview with Lt-Col Magugu. To which Lt-Col Magugu responded that he did not know if plaintiff was arrested at plaintiff's house and that the arresting officer would be able to answer that question.

72. In response Mr Du Plessis put to Lt-Col Magugu that he was the investigating officer in the relevant case. The implication being that in those circumstances Lt-Col Magugu should know the answer to the preceding question. To this Lt-Col Magugu responded that although he was the lead investigator he did not do everything and that they worked as a group.

73. Then Mr Du Plessis put to Lt-Col Magugu that even if the plaintiff was arrested before his interview with Lt-Col Magugu that Lt-Col Magugu would have condoned the plaintiff's arrest. Lt-Col Magugu confirmed this as being correct.

74. Mr Du Plessis then put to Lt-Col Magugu that this would have been the position irrespective of whether he conducted an interview with the plaintiff. Lt-Col Magugu responded yes based on the information he had at hand.

75. Mr Du Plessis then put to Lt-Col Magugu that the criminal charges against the plaintiff were withdrawn on the 12 November 2019. Lt-Col Magugu confirmed that the criminal charges against the plaintiff were withdrawn but said he could not recall the date.

76. Mr Du Plessis asked, if as the investigating officer he knew the reason for the withdrawal of the criminal charges against the plaintiff. Lt-Col Magugu responded that the charges were provisionally withdrawn against the plaintiff pending the outcome of the criminal trial.

77. Mr Du Plessis then put to Lt-Col Magugu that it was the plaintiff's version that he was informed in court that the charges were withdrawn because there was no evidence linking him to any of the events related to the relevant robbery. Lt-Col Magugu responded that, that is the plaintiff's version.

78. An exchange then followed as to whether there was an official notice from the DPP relating to the withdrawal of those charges and whether there was documentary evidence of this. In the present circumstances this does not take the matter further and will not play a part in the reasoning of this court. For

present purposes it is sufficient that all parties agree that the charges were withdrawn and this court can draw its own inferences from that fact.

79. The plaintiff's version was put to Lt-Col Magugu in some detail. Plaintiff elected not to testify so his version in so far as it conflicts with the evidence adduced on behalf of the defendant is not evidence before this court. On plaintiff's version he was arrested at his home on the 4 May 2019 which is consistent with most of the evidence adduced on behalf of the defendant.

80. In substance that was the evidence of Lt-Col Magugu. The second witness called by the defence was Col Witbooi. It appears from the evidence given by Col Witbooi that the main reason he was called as a witness for the defendant was to rebut the plaintiff's version as it was put to Lt-Col Magugu. As plaintiff did not testify himself and plaintiff's version is not evidence before this court, most of Col Witbooi's evidence will not assist this court to determine if the defendant has established the four jurisdictional requirements necessary to justify a defence under section 40(1)(b) of the CPA. Col Witbooi's evidence might be useful in assessing the reliability and credibility of the evidence of Lt-Col Magugu.

81. Col Witbooi gave a description of what happened at the secondary crime scene and testified that Lt-Col Magugu arrived at the secondary crime scene while it was still an active crime scene. Col Witbooi testified that he kept contact with Lt-Col Magugu during the investigation of the said armed robbery. Col Witbooi testified that Lt-Col Magugu arrived in Postmasburg on the same evening as the robbery, but that Lt-Col Magugu was in and out of Postmasburg during the said investigation. This is at odds with the evidence of Lt-Col Magugu whose evidence was to the effect that he remained in Postmasburg until all the suspects were arrested and placed in custody.

82. Col Witbooi confirmed that the Organised Crime Unit took over the investigation and they ran all the activities related to the investigation and that he never received a cell phone from the plaintiff.

83. The first time Col Witbooi met the plaintiff was at the magistrate's court at some stage during the criminal trial. Col Witbooi confirmed that he had no involvement in the physical investigation of the relevant robbery.
84. Col Witbooi did not know when the criminal charges were withdrawn against the plaintiff.
85. Col Witbooi confirmed that in the SAPS Captains and Colonels are commissioned officers. Col Witbooi confirmed that commissioned officers can issue a warrant of arrest and that at the time as a Captain, Lt-Col Magugu could in fact issue a warrant of arrest. This is a direct contradiction of Lt-Col Magugu's evidence.
86. Col Witbooi confirmed that at the secondary crime scene when three of the suspects were arrested there were police armed with assault rifles. That even when the suspects were transported to and from court the escorts were armed with R5 assault rifles. That in serious cases such as the relevant robbery it was routine to have people armed with such weapons.
87. The final witness called by the defendant was W O Stefaans Mangate. He is a warrant officer in the provincial organised crime unit of the SAPS. At the time of the relevant robbery, he worked on what was described as the Trio crimes which *inter alia* involved armed robbery, business and house robbery as well as kidnapping.
88. W O Mangate was on duty on the 30 April 2019. On that evening, he received an order to be at Postmasburg on the 1 May 2019 to be part of the team to investigate an armed robbery. They drove through to Postmasburg and met Lt-Col Magugu at a guesthouse. Where Lt-Col Magugu explained the case to them.
89. W O Mangate said they were told that one of the suspects worked at the mine and they should check if he was at work. They were referring to Katlego Moje's cousin who they would like to question, being the plaintiff in this matter. At this point it needs to be noted that W O Mangate referred to the plaintiff's cousin

interchangeably as Katlego or Kagiso Moje, from the context it is clear that this referred to the same person and the discovered documents confirmed that he bore both of the said forenames.

90. W O Mangate testified that they looked for Katlego Moje's cousin at his place of work but the feedback they were given was that he was not at work. It appears that this took place on the 1 May 2019, being a public holiday.

91. W O Mangate testified that he tested the registration number of the KIA motor vehicle and found it was registered to P.P. Moje. Although at the time of his evidence W O Mangate could not remember the relevant vehicle registration number apart from the fact that it ended in NW indicating the vehicle was registered in the North-West Province.

92. W O Mangate testified that he got such registration number from Lt-Col Magugu who informed him that he had got the said registration number in a statement from a witness.

93. W O Mangate testified that after he got the registration number Lt-Col Magugu asked him to check if the plaintiff was at work. This aspect has already been dealt with above.

94. W O Mangate testified that he and his partner did not work during the daylight hours of the 4 May 2019, that they only went on duty that evening. That Lt-Col Magugu contacted them and asked them to be on the lookout for the plaintiff and his cousin Katlego. W O Mangate's evidence was that they then did patrols in the environs of Postmasburg and its surroundings. Then at some point during their patrols Lt-Col Magugu contacted them and told them that he had received information that the plaintiff is at his home.

95. W O Mangate then testified that they then drove to the plaintiff's residence and they found a man who at that time was unknown to him. He introduced himself to that person and explained the reason why he was at his residence at that time. The said man introduced himself to him as Private Panana Moje, the plaintiff, he

stood in the door of his house and was wearing a white vest with a blue overall that had yellow stripes just above the knees.

96. W O Mangate then testified that he informed the plaintiff that he was going to arrest him on a charge of armed robbery. W O Mangate testified that he explained the rights of a person being arrested to the plaintiff. He then loaded the plaintiff in the vehicle they were using at the time and took him to the police station where the plaintiff was handed to Lt-Col Magugu for questioning.

97. W O Mangate testified that after Lt-Col Magugu had questioned the plaintiff, Lt-Col Magugu handed the plaintiff back to him. He then proceeded to the charge office with the plaintiff to obtain a form 14A. W O Mangate explained that a form 14A was a formal notice to the plaintiff of the rights he has under the constitution on being arrested.

98. After the form 14A was completed W O Mangate handed a copy of the said form together with his own statement to Lt-Col Magugu and took the plaintiff to the cells.

99. W O Mangate testified that Lt-Col Magugu told him that Kagisho (Katlego) Moje was part of the relevant robbery and that plaintiff took him away before the police could arrest him (Katlego). This is at odds with the evidence of Lt-Col Magugu, which was to the effect that he only obtained the information that plaintiff had taken his cousin Katlego to Pampierstad during his interview with the plaintiff.

100. W O Mangate testified that the docket was available when the investigating team had meetings with Lt-Col Magugu. He stated that he had read the docket before he arrested the plaintiff. He stated that there were statements of the police involved as well as other statements in the docket at the time. From the contents of the docket, he had established that the plaintiff was not at the primary crime scene. In respect of the secondary crime scene W O Mangate testified he was not sure if the plaintiff collected his cousin from the secondary crime scene or if plaintiff's cousin went to plaintiff's house.

101. W O Mangate then said that the information he had at his disposal before the arrest of the plaintiff, he had obtained from Lt-Col Magugu.

102. W O Mangate then testified that he had seen the statement of Victor Might to the effect that someone told him that the plaintiff's vehicle was at his residence. However, the statement of Victor Might was only taken on 5 June 2019 after the arrest of the plaintiff. Also, such statement does not correspond with W O Mangate's earlier evidence.

103. Mr Davis then asked W O Mangate to confirm his earlier testimony that he received a call from Lt-Col Magugu to arrest the plaintiff and Mr Davis asked W O Mangate if Lt-Col Magugu told him on what charges the plaintiff was to be arrested. To which W O Mangate responded that Lt-Col Magugu told him to arrest the plaintiff on a charge of armed robbery. This is at odds with Lt-Col Magugu's evidence that he was only advised by the DPP's office of the charge to be preferred against the plaintiff after his interview with the plaintiff.

104. Then Mr Davis asked W O Mangate given the fact that he had established that the plaintiff was not at the primary crime scene where the robbery took place why did he believe it was appropriate to arrest the plaintiff on a charge of armed robbery. To which W O Mangate responded that Lt-Col Magugu informed him that he had contacted the Office of the DPP who allegedly advised Lt-Col Magugu that the plaintiff should be charged with armed robbery. Clearly, this cannot be correct for the reason already set out in the preceding paragraph.

105. W O Mangate then testified due to the seriousness of the armed robbery he held the plaintiff.

106. Mr Davis asked W O Mangate if he considered charging the plaintiff and releasing him to a court date. To which W O Mangate replied that the Investigating Officer had to take the decision as to what to do with the plaintiff after his arrest.

107. Mr Davis asked W O Mangate why he believed the plaintiff had genuinely committed a crime. To which W O Mangate responded because the plaintiff moved his cousin from the vicinity to a destination that was unknown to him at the time he gave evidence. As indicated above, this could not have played a role in W O Mangate's decision to arrest plaintiff because on the evidence of Lt-Col Magugu, which W O Mangate concedes was his only source of information relevant to the arrest of the plaintiff, Lt-Col Magugu only found out that plaintiff had removed his cousin Katlego from Postmasburg after interview with the plaintiff, which interview on W O Mangate's evidence only took place after the arrest.

108. W O Mangate testified that during the arrest of the plaintiff, he asked the plaintiff for his cell phone which the plaintiff voluntarily surrendered to him and granted W O Mangate permission to scroll through the information stored on that phone. W O Mangate found that the call log and the messages file were empty. After scrolling through the said phone's memory, he placed the phone in an evidence bag and handed it to Lt-Col Magugu. This is at odds with the evidence of Lt-Col Magugu on this aspect.

109. W O Mangate testified that at a certain time Katlego Moje, in the company of an advocate representing him, handed himself over to W O Mangate.

110. Mr Davis then asked W O Mangate if he had any reason not to give effect to the command of Lt-Col Magugu to arrest the plaintiff. To which W O Mangate responded he had no reason not to carry out such order.

111. Mr Davis then asked W O Mangate if he had any reason not to arrest the plaintiff based on the information given to him by Lt-Col Magugu. To which W O Mangate responded he had every confidence in Lt-Col Magugu.

112. Mr Davis then asked W O Mangate based in the information given to him by Lt-Col Magugu and the information contained in the docket did W O Mangate have a suspicion that a crime had been committed by the plaintiff. To which W O Mangate responded yes, he prevented the police from arresting his cousin.

Whether this constituted a schedule one offence was not canvassed by the defendant in leading the evidence of W O Mangate. For that matter neither of the other two defence witnesses canvassed this question.

113. This concluded the evidence in chief of W O Mangate. Mr Du Plessis commenced his cross-examination by asking at what time did he and the others who had travelled to Postmasburg from Kimberley arrive at the guesthouse in Postmasburg where the first meeting was held on 1 May 2019. W O Mangate replied that they had left Kimberley at 7am and they arrived at the said guesthouse between 10 and 11 that morning.

114. W O Mangate testified that it was during this first meeting that Lt-Col Magugu informed them that he had certain statements and had to collect others. Mr Du Plessis asked him if Lt-Col Magugu had informed them that he had statements that connect the plaintiff to the robbery. W O Mangate did not answer this question directly, he simply repeated that Lt-Col Magugu had received information and had to fetch certain statements. This answer did not deal with the central enquiry inherent in Mr Du Plessis' question.

115. Mr Du Plessis asked W O Mangate if on the 1 May 2019 Lt-Col Magugu informed him that he had statements linking the plaintiff to the robbery. In response to this question W O Mangate said yes Lt-Col Magugu did inform them he had statements linking the plaintiff to the relevant robbery.

116. W O Mangate said he did not have sight of these statements and that he had only read the statement of Victor Might. From the discovered documents it emerges that the statement of Victor Might is dated 5 June 2019, quite some time after the plaintiff's arrest and so could not have played a role in the decision to arrest the plaintiff. It also calls into question W O Mangate's testimony that he had read the statement of Victor Might before the arrest in question.

117. Mr Du Plessis put to W O Mangate that Lt-Col Magugu relied on two persons whose statements linked the plaintiff to the relevant crime, namely Cecilia Van Der Westhuizen, whose written statement is dated 21 September 2019 and

Motsamai Clive Manere whose statement is dated the 5 May 2019. W O Mangate answered that Lt-Col Magugu can be correct, but he was constrained to admit that he did not read those two statements before the arrest of the plaintiff. However, he said he remembers that on the night of the 1 May 2019 Lt-Col Magugu mentioned Cecilia.

118. W O Mangate confirmed that the plaintiff was arrested on the 4 May 2019 before either of the written statements of Van Der Westhuizen or Manere existed.

119. W O Mangate confirmed that in his evidence in chief that he testified that he relied upon both the contents of the docket and the instructions of Lt-Col Magugu. However, W O Mangate was forced to admit under cross-examination that the contents of the docket did not link the plaintiff to the relevant robbery. W O Mangate testified that he informed the plaintiff that the reason for his arrest was that his cousin was involved in a robbery and he had removed his cousin from Postmasburg to avoid arrest. W O Mangate could not answer the question when it was pointed out to him that neither the statement of Van Der Westhuizen nor that of Manere stated that plaintiff removed Katlego from Postmasburg. He was further forced to admit that the information provided to him by Lt-Col Magugu on 1 May 2019 was not supported by the statements that were eventually placed on the docket.

120. W O Mangate admitted that he effected the arrest of the plaintiff on the strength of an order from Lt-Col Magugu. Mr Du Plessis pressed W O Mangate as to whether he had a choice to arrest or not, to which W O Mangate responded that he had a choice and that he arrested the plaintiff based on the information at his disposal.

121. W O Mangate testified that the plaintiff was not considered armed and dangerous the only connection being that he helped his cousin.

122. At this point it is apposite to point out that W O Mangate did not impress as a witness. He gave contrived explanations as to the dates on the statements referred to above. He at times did not answer questions directly and he was also

not above tailoring his answers to try and deal with the difficulties he found himself in under cross-examination.

123. That is substantively what emerged from the cross-examination of W O Mangate.

124. Turning now to consider the four jurisdictional facts required to be established for a defence based on section 40(1)(b) of the CPA. Firstly, both Lt-Col Magugu and W O Mangate agree that it was in fact W O Mangate who was the arresting officer. It is common cause between the plaintiff and the defendant that W O Mangate is a peace officer in the sense contemplated by section 1 of the CPA. Accordingly, the first jurisdictional fact is established.

125. The second jurisdictional fact is intertwined with the fourth jurisdictional fact, because for the purposes of section 40(1)(b) of the CPA the only suspicion that is relevant is one that is based on reasonable grounds. Both Lt-Col Magugu and W O Mangate testified that they suspected that plaintiff had aided his cousin. Whether this suspicion was based on reasonable grounds or not will be considered later in this judgment.

126. The third jurisdictional fact to be established by the defendant must be that the suspect, in this case the plaintiff is suspected of committing an offence which is referred to in Schedule 1 of the CPA.

127. What the evidence of Lt-Col Magugu and W O Mangate establishes is that the information prior to the arrest of the plaintiff available to them was that a vehicle whose registration number was traced back to the plaintiff was seen transporting the plaintiff's cousin Katlego Moje to and from the house of Victor Might in Postmasburg. This was the only information available to them on which a suspicion could be formed. Both Lt-Col Magugu and W O Mangate confirmed in their evidence that the plaintiff could not be linked to the principal crime scene where the relevant robbery occurred.

128. At most on these facts the plaintiff could have only committed the crime of being an accessory after the fact or possibly obstructing the course of justice. Neither of those crimes are specifically included in Schedule 1 of the CPA. In these circumstances such crimes can only be considered a Schedule 1 offence if the defendant can establish that there are reasonable grounds to believe that if convicted the plaintiff would have been sentenced to a sentence exceeding six months imprisonment without the option of a fine. The defendant did not even attempt to deal with this aspect which is required by the defence raised by the defendant.

129. The defendant tried to avoid this question inherent in this third jurisdictional fact by referring to the advice allegedly received from the office of the DPP. The advice allegedly given by the office of the DPP was to charge the plaintiff with armed robbery. There are several difficulties and problems inherent in the defendant's version of this alleged advice from the office of the DPP. The first and most glaring problem for the defendant is that on the evidence of Lt-Col Magugu he only phoned the office of the DPP after plaintiff had been arrested on the evidence of W O Mangate. Accordingly, this advice from the DPP could not have been available when the plaintiff was in fact arrested.

130. Although Lt-Col Magugu was initially ambiguous as to whether the plaintiff was arrested before or after his interview of the plaintiff, later in his evidence he said that the time and circumstances of the arrest would be facts known to the arresting officer. Lt-Col Magugu's evidence on this point was that W O Mangate was the arresting officer. W O Mangate was adamant in his evidence that the arrest took place before the plaintiff was interviewed by Lt-Col Magugu.

131. The alleged advice from the office of the DPP is problematic on several different levels. Lt-Col Magugu does not disclose who he allegedly talked to at the office of the DPP. Then the earliest he could have phoned the office of the DPP would have been after 11pm on the night of 4 May 2019. It is inherently improbable that he would find anyone at the office of the DPP at that hour. If the office of the DPP was phoned the next day during business hours it is more problematic for the defendant as it is then further removed from the actual arrest.

132. Finally, Lt-Col Magugu testified that the charges were withdrawn against the plaintiff by the representative of the DPP who ran the criminal trial. This must have taken place prior to the plaintiff being asked to plead to the charge, otherwise plaintiff would have been entitled to a verdict. Lt-Col Magugu's evidence was the charges were provisionally withdrawn pending the outcome of the criminal trial. There is only one credible reason why a prosecutor would withdraw charges in those circumstances.

133. All of this shows that the alleged advice from the office of the DPP was nothing more than a red herring obtained *ex post facto* that was drawn across this court's path several times to confuse and obfuscate rather than establish a *bona fide* defence.

134. Clearly, there was no credible evidence available on the evidence of both Lt-Col Magugu and W O Mangate to suspect that plaintiff had committed a schedule 1 offence. When asked about this both witnesses simply referred to the seriousness of the offence. This could only have been a reference to the robbery itself. However, both witnesses were unable to link the plaintiff to the robbery itself and admitted that plaintiff was not on the scene of the robbery and they admitted that they had no grounds to believe the plaintiff received any of the proceeds of the robbery. The high-water mark of the information that they eventually obtained against the plaintiff, even if it was obtained after the arrest was that plaintiff took his cousin Katlego to Pampierstad after the robbery. As already set out above this in and of itself does not establish that a Schedule 1 offence might have been committed by the plaintiff. In the circumstances, the defendant, on whom the onus rests, has failed to establish the third jurisdictional fact.

135. Turning now to the fourth jurisdictional fact which the defendant needs to establish to rely on the defence contemplated by section 40(1)(b) of the CPA being that the suspicion entertained rests on reasonable grounds. On the facts of this case, all the concerns raised in respect of the third jurisdictional fact set out above apply equally to the fourth jurisdictional fact that must be established by

the defendant. In these circumstances, it cannot be said that the suspicion entertained by either of the defendant's witnesses rested on objectively reasonable grounds. In these circumstances, the defendant has failed to establish the fourth jurisdictional fact.

136. Insofar as the discretion of the arresting officer might be relevant in these circumstances, it is clear from the evidence of W O Mangate that he simply carried out an instruction given by Lt-Col Magugu. There is no evidence that W O Mangate made any attempt to exercise a discretion of his own as to whether in the circumstances he should effect an arrest. In these circumstances, clearly W O Mangate did not exercise a discretion at all.

137. For all of these reasons this court concludes that the defendant has not established that the arrest of the plaintiff was lawful as contemplated in section 40(1)(b) of the CPA. Accordingly, such arrest was unlawful and the defendant is liable to pay damages to the plaintiff in respect of such unlawful arrest.

138. It follows from the unlawful arrest that the detention is also unlawful. As can be seen from the extract of the pleadings quoted above, the plaintiff pleaded that the present defendant being the Minister of Police was responsible both for his unlawful arrest and unlawful detention up until 16H00 on the 12 November 2019. As can also be seen from the extract of the pleadings quoted above the defendant effectively denied the allegation that defendant was detained until the date and time set out above.

139. Defendant accepted the onus in the pre-trial conference to prove the legality of both the arrest and the detention. This is consonant with what the law requires. The plaintiff pleads he was detained until 12 November 2019. Defendant in his plea admits detention and denies the remaining allegations in paragraph 6 of the Particulars Of Claim. The plaintiff gives no evidence to confirm such date. The defendant does not concede it. The defendant on whom the onus rests also adduces no evidence to show when the plaintiff was brought before a magistrate who authorised the further detention. The detention would be lawful from the time

a court authorises it.¹⁶ There is a further difficulty we know there was a bail application which was refused. However, we also do not know the date of the bail application. Nor do we know if it was opposed on reasonable grounds.

140. The upshot of this is that both the plaintiff and the defendant are guilty of lapses in the way both prepared and presented their respective cases. The defendant argues that it was never plaintiff's case that he was not brought before court within 48 hours therefore Mr Davis argues I should only find the detention unlawful for 48 hours beyond the arrest. The defendant cannot shift the onus in this manner, it was and remains incumbent upon the defendant to adduce evidence that the plaintiff was indeed brought before court at a specified date and time and that the further detention was indeed authorised by the court.

141. By the same token the plaintiff knew that the date and time of the plaintiff's release was placed in dispute in the pleadings, plaintiff ought to have placed some evidence before the court to substantiate this. This plaintiff failed to do. Even though merits have been separated from the quantum by agreement this court is trapped and has to consider the merits in regard to the duration of the unlawful detention of the plaintiff. In these circumstances this matter could not simply be decided on where the onus lay.

142. The remaining issue is the issue of costs. The plaintiff was substantially successful and there is no reason to deprive the plaintiff of his costs. Considering the nature of the claim and the issues raised, in my view scale B is the appropriate scale on which costs should be ordered.

143. Plaintiff also asks this court to award the costs of the postponement on the 14 and 15 March 2023. However, I see from the relevant order that those costs were ordered to be in the cause.

In the circumstances the following order is made:

¹⁶ Sekhoto., above., at para [42].

- 1) The arrest of the plaintiff was unlawful.
- 2) The subsequent detention of the plaintiff was also unlawful.
- 3) The duration of the unlawfulness of the subsequent detention is to be determined at the proceedings to establish the quantum of the plaintiff's claim.
- 4) The defendant shall pay the established or agreed damages flowing from the said unlawful arrest and detention.
- 5) The defendant shall pay the party-and-party costs up to this point on scale B.
- 6) The proceedings in relation to the quantum of plaintiff's claim are postponed *sine die* for a date to be arranged with the registrar.

L. G. Lever

Judge

Northern Cape Division, Kimberley

Representation:

For the Plaintiff:

ADV HC DU PLESSIS

Instructed by:

C/O PGMO ATTORNEYS INC

For the Defendant:

MR C DAVIS

Instructed by:

OFFICE OF THE STATE ATTORNEY

Date of Hearing:

26 February 2024

Date of Judgment:

30 May 2025