



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

CASE NO: 18474/2012

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER
JUDGES: NO
(3) REVISED: NO

DATE: 10 July 2025

SIGNATURE: _____

In the matter between:

MADONDO MLANDELI MUZIWENKOSI

Plaintiff

And

MINISTER OF POLICE

Defendant

ORDER

- (i) The Defendant is ordered to pay the Plaintiff an amount of R650 000.00 for the unlawful arrest and detention of the Plaintiff.
- (ii) The Defendant is ordered to pay a legal rate of 15.5% interest of the above amount effectively from the date of demand until it is settled in full.
- (ii) The Defendant is ordered to pay the costs of this application on attorney and client scale and on Scale B for one Counsel.

Summary: Application for damages-unlawful search and arrest. Criminal Procedure Act of 1977. South African Police Service Act and Constitution, 1996. Protection of a reasonable belief of arrest without a warrant. Deprivation of security and freedom of the Plaintiff was not justified. Application for damages was granted.

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is an application for damages arising out of the alleged unlawful arrest and detention of the Plaintiff against the Minister of Police on 09 August 2011. On 11 August 2011 following his detention at Moroka Police Station being charged for defeating the ends of justice with Moroka Cas Number: 311/08/2011, he was then transported to the Protea Magistrate Court. The Senior Prosecutor declined to prosecute due to lack of evidence. He was later released on the same day as the 11th of August 20211.

[2] Upon his release, the Plaintiff instituted a claim for damages in respect of wrongful and unlawful search, arrest and detention which also comprised of (i) defamation, (ii) false and malicious prosecution; (iii); damage of the motor-vehicle; and (iv) misplacement of the MISDM / Sim Card.

[3] The claim was opposed by the Defendant in that members of the South African Police Service (SAPS) are statutorily mandated when they have a reasonable belief or suspicion that a crime is going to be committed or has already been committed to conduct a search without a warrant. In essence, the Defendant persisted that the execution of the arrests and detention of the Plaintiff was justified in the circumstances and the claim ought to be dismissed

Factual Background

[4] In this case, the Plaintiff is employed as a Police Officer by SAPS and stationed at Moroka Police Station. He was arrested at the Merafe Hostel, Soweto in Johannesburg in the morning on 09 August 2011 on suspicion of being involved in a syndicate of motor-vehicle theft. He was later detained at Moroka Police Station and charged for defeating the ends of justice after having been warned of his constitutional rights and his suspect statement obtained. Thus, in the morning of 11 August 2011, he was transported from Moroka Police Station to Protea Magistrate Court. At the Magistrate Court, the Senior Prosecutor declined to prosecute due to lack of evidence. During his arrest, that was effected by Warrant Officer Mavhayisi Phineous Ngobeni, Captain Matsepe, Constable Mathome who had passed on and other SAPS members that were stationed at Moroka Police Station, he was physically made to lie down on his stomach with handcuffed hands on his back. Members of the media, in particular, Star and Sowetan Newspapers, and according to the Plaintiff, were given permission to take pictures, publish and write a story about the arrest. His picture including the story about his arrest were duly published nationally. Following his arrest, SAPS instituted an internal disciplinary hearing in his capacity as the Plaintiff's employee. However, the internal disciplinary hearing found him not guilty of any misconduct or wrongdoing.

Submissions

Case for the Defendant

[5] The Defendant called three witnesses, namely Warrant Officer Sergeant Ngobeni, Captain Matsepe and Lt Colonel Vikash Singh.

[6] The first witness, Warrant Officer Ngobeni testified that he was a SAPS Member in good standing with 25 years' experience and member of the Flying Squad. He attested that he attended the crime scene on the said date tracing the suspects who were allegedly involved in stealing and stripping of motor-vehicles in the Mapetla area. Warrant Officer Ngobeni alongside Captain Matsepe and Constable Mathome went to Mapetla panel beaters and found two people that were stripping or working and spray painting a Toyota Hi-Ace combi and then arrested them. The two arrested persons claimed that the combi was brought by Mr Mvelase in company of the Plaintiff. Warrant Officer Ngobeni testified that they proceeded to Block (09) near House No 212B at Merafe Hostel having been informed by the informant that there were seats of his minibus that he pointed them to the police later. Warrant Officer Ngobeni's testimony was that he was informed by Mr Nhlapo that he heard a driver of a black Golf communicating on cellphone about the police presence. As I do not intend to exhaust the testimony, Warrant Officer Ngobeni testified that the Plaintiff, being the driver of the Golf, had a firearm and a Motorola cellphone. He then took the cellphone and compared the dialed numbers with the slip they found at the panel beaters at Mapetla to trace the suspect they were looking for: Mr Mvelase. It was his testimony that he identified himself the Plaintiff who on the other hand failed to explain Mr Mvelase's cellphone numbers that were also used in his cellphone. He then explained the Plaintiff's rights and arrested him and was charged at Moroka Station with CAS 311.08/2011 for defeating the ends of justice because his cellphone was used in the commission of the crime

[7] The second witness, Captain Matsepe, testified that he was leading the operations on the day in question. Captain Matsepe having joined the police in 1994, grew and was

promoted to the rank of Captain in 2020. I am not to repeat his testimony as it was similarly situated to Warrant Officer Ngobeni about the unfolding of the events on the said date. However, it is trite to mention that whilst at Mapetla, Captain Matsepe testified that he received information that there was a “Zola-Budd” taxi that was stripped at Merafe Hostel and ordered Warrant Officer Ngobeni to attend to it. He then stayed behind with the two suspects and in his testimony, he caused them to lie down on their stomachs whilst calling the station commander who then arrived with the duty officer and later the Local Criminal Record Centre (LCRC). He also testified that photographers and the breakdown services also came, and the "Zola Budd" combi was loaded with the stolen parts from the Hostel and that he proceeded to Moroka police station where he detained the two suspects who were arrested at Mapetla. Let me reiterate, their testimonies with Warrant Officer Ngobeni were similarly situated and need no further presentation herein.

[8] The third witness, Lt Colonel Singh testified that he grew within the ranks of the police service with career progression that is traceable to 1990. Following his professional growth within the police, he was appointed as the Section Head Employee Relations in the year 2019. In this role, he was responsible for giving guidance to the commanders as to the registration of disciplinary investigations, recommendations and procedures to follow in appointing the disciplinary committees and registrations of disciplinary verdicts to the SAPS members files.

[9] The testimonies provided served as a yardstick against which to test the genuineness of the presented evidence.

Case for the Plaintiff

[10] The Plaintiff testified on his own behalf. He submitted that as a result on the Defendant’s unlawful conduct, he suffered grave humiliation and injury in his dignity. He testified about his experience of detention at Moroka Police Station where he endured inhuman treatment which also constituted the limitation of his liberty rights. His detention also affected his family and with the community looking at him with ‘unholy’ eyes. His

Colleagues as well developed as sense of distrust as he was perceived as a criminal that was involved in a syndicate of motor-vehicle thefts. During his arrest, by members of SAPS Flying Squad, the Police made him lie down with handcuffed hands in his back. He contended that he was exposed as a criminal in front of the public including the media houses that took pictures of him and had them reported in the newspapers. Before his arrest, there were circumstances that led to the arrest itself. I do not intend to repeat them as they are referred to in the Defense submissions. Thus, it is trite to mention that the Plaintiff submitted that he had his service firearm and his cellphone was requested to be handed over and on his enquiry for the purpose, it was grabbed from him by Warrant Officer Ngobeni. The firearm was taken by Warrant Officer Ngobeni who also confiscated and had to pay its monthly subscription despite not enjoying its use. It was only returned to him on 12 February 2022 after having had to pay a monthly subscription of R159.00 for a 6-month period. On its return, he discovered that the Sim Card was missing and had to purchase a new Sim Card and did a swim swap at a cost of R136.00

[11] The motor vehicle, belonging to Sharon Lakuma with Numbers XRJ 970 GP, who had given him permission to use, was also confiscated during his arrest and thus on his release he was given back the motor-vehicle in an undrivable position. He also discovered that it was stripped of certain parts and had to attend to the repairs and made his own means to take it home.

[12] As a result, the Plaintiff suffered damages in respect of his unlawful arrest, detention, *contumelia*, malicious prosecution, deprivation of freedom and defamation and damage to his property, motor-vehicle and cellphone as an infringement of his constitutional rights with reference to human dignity, freedom and security of the person and privacy.

[13] Consequent to his arrest, it is common cause between the parties that the Plaintiff was arrested by SAPS members and detained at the Moroka Police Station on 09 August 2011 and was subsequently released on 11 August 2011. The Senior Prosecutor at the

Protea Magistrate Court declined to prosecute due to the lack of evidence. This, being undisputed, the issue to be determined was to establish broadly whether:

- (i) the search and arrest were lawful including all the claims associated with the arrest, and
- (b) if not, then the quantum of damages to be awarded to the Plaintiff.

[14] The principles in matters such as the present in determining wrongfulness as the crux of the claim for damages are well-established. Thus, a brief overview of the regulatory framework serves as a guide for the determination of the rationality of the Plaintiff's claim for unlawful search and arrest.

Applicable legal principles

[15] It was important to lay the framework for the determination of this matter by reference to the South African Police Service Act 68 of 1995 (SAPS Act). The rationale was motivated by the core content of the claim against the Defendant, which touches on the way in which he exercises his authority in pursuance of the fulfilment of his mandate. Further, the SAPS Act is interdependent with the Criminal Procedure Act of 1977 (CPA) as primary sources of law that serve as an empowering regulatory framework to the Constitution of the Republic of South Africa, 1996, (Constitution) in the protection of the security and liberty of a person, (preamble: SAPS Act, CPA and section 12 of the Constitution).

[16] Having said that the SAPS Act as envisaged in the preamble requires police service to:

- (a) ensure the safety and security of all persons and property in the national territory.
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter [2] of the Constitution.
- (c)
- (d)

[17] It is evident that irrespective of the conduct of any person including the ones such as the Plaintiff, who are suspected of having committed or about to commit a crime must be treated without any disregard of their rights. This means that enforcement agencies including the police are required not only to follow procedure but to adhere to the substantive translation of such procedures into reality. The protection of the freedom and security of each person is of highest regard in the new constitutional dispensation. Further, it is also my submission arbitrariness that is characterised by cruelty, inhuman and degrading treatment is prohibited in all facets of policing service.

[18] Although I am not to venture into the application of international law it is trite to mention that article 9 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) protects the 'freedom and security of a person by prohibiting any form of arrest that will deprive a person such freedom except on reasonable and procedural safeguards as established by law'. Similarly, the African Continent with the adoption of the African Charter on Human and Peoples Rights, 1981 as envisaged in article 6 is not left behind of the prescripts of the community of nations and 'prohibits all forms of torture, cruelty, inhuman or degrading treatment of punishment'.

[19] Let me revert, the context of this case is guided by the application of the CPA which gives effect to the overall scheme of the constitutional prescriptions. The CPA is a determinant of how the Defendant exercises his authority in ensuring a just and crime-free society. In the execution of the Defendant's mandate, a police official is defined as "any member of the Force as defined in section 1 of the CPA". The police official must exercise the authority in ensuring effective police service within the prescripts of the law. They are required to search and arrest anyone who is suspected of committing or about to commit a crime wherein a warrant of arrest may be issued by a magistrate or judge. However, there are exceptional circumstances where a search and arrest to search and seize any article or property may be effected without a warrant of search and arrest. Such circumstances are justified when a police officer reasonable believes that there are articles or property that will be used as a tool for or are going to be used for the commission of a crime. In these circumstances, section 22 of the CPA provides:

“A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes:
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.

[20] It is further provided in section 40 that:

- (1) a peace officer may without warrant arrest any person:
 - (a) who commits or attempts to commit any offence in his presence;
 - (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
 - (c...q)
- (2) If a person may be arrested under any law without a warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant

arrest such person subject to such conditions or circumstances.

[21] However, section 40 is preceded by section 29 which provides for decency and order in conducting the search and reads follows:

“A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.”

Therefore, section 29 serves as a ultimatum to ensure compliance with the prescripts of the law. This section tightens loose ends in the functioning of the police service. This further means that the primary sources of law (CPA, SAPS Act and the Constitution) cannot be relegated to a mere procedural requirement without them being translated into reality.

[22] I am of the view that an arrest without a warrant is an exceptional circumstance that is provided for by law. These circumstances may justify the deviation from adherence from the procedural safeguards of the law. They are also not obligatory as they are subject to the discretion of the police officer whether to undertake an action. However, this is also not an absolute discretion as the said police officer would have to explain and give reasons of not acting in circumstances that warranted his intervention.

Discussion

[23] This matter was characterised by principles of the lens of liability that entailed a sequence of claims that emanated from a single act of the alleged unlawful search and arrest without a warrant. I do not intend to repeat the common cause because it was not disputed as noted above.

[24] This case therefore was comprised of a balancing act between adherence to the procedural safeguards in the exercise of authority by SAPS Members and how such authority is effected in practice. The Defence, therefore, had to lead evidence regarding the lawfulness of the conduct of the Police Officers on the day in question.

[25] The Defence Counsel in this matter, on her submission, justified the alleged unlawful search and arrest without a warrant as reasonable under the circumstances. She held that the Police received a *tip-off* that the Plaintiff was at Mr Mvelase's residence which was raided by police because of the suspicion of being involved in theft of taxis. She concretised the justification by the corresponding numbers that were found as evidence of communication between the Plaintiff and that of Mr Mvelase. The corresponding numbers do not constitute certainty about the content of the call except for a speculation that the Plaintiff called Mr Mvelase about the Police presence. Of further, uncertainty, if this Court had to test the content of such a call, what was Mr Mvelase's response to the said call about the police presence? Does it mean calling a person entailed a positive action from the person called about the content of the call that was transmitted to him/her. This was of equal application in this matter as well. The tip-off received, this Court acknowledges the fundamental role of the informants for the credible information that they provide to enforcement agencies, thus, in this matter, the content of the message remained core to the justification of the search.

[26] Further, as the Defendant contended, the police were protected by section 40(1) of the CPA which carries a standard of a reasonable suspicion which was qualified by the Plaintiff's resistance to hand over his cellphone. The Defence Counsel argued that the consequent arrest and charge for defeating the ends of justice was protected by section 40(1). As substantiated, the Plaintiff undermined the lawful authority of the Police to effect an arrest in terms of section 49(1)(b) of the CPA. The Defence Counsel concretised the charge as a misdirection by the Plaintiff's representative on his failure to distinguish the application of section 40(1)(b) and 49(1)(b). Therefore, as argued, the arrest was justified by the further conduct of the Plaintiff for refusing to hand over the cellphone who said

“cellphone for what” who in his own submission, confirmed that he indeed spoke to Mr Mvelase.

[27] This Court acknowledges the independence to determine the case according to its own merits, which is also linked to the test for reasonableness of the suspicion to effect an arrest. As expressed by Musi AJA in *Biyela v Minister of Police*¹:

“The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively. ... What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured reasonable suspicion that the arrested person committed a Schedule 1 offence. ... The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. *The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration,*” (emphasis added and all footnotes omitted).

[28] Similarly, long before the attainment of democracy, a judgment that was brought to the attention of this Court by both parties in Van Heerden JA in *Duncan v Minister of Law and Order of the Republic of South Africa*² held:

¹ 2023 (1) SACR 235 (SCA) at paras 34-36.

² [1986] 2 All SA 241 (A) at para 8.

“test is not whether the police officer has a reason to suspect but whether on an objective approach, he in fact has reasonable grounds for his suspicion and had properly exercised his discretion in making the arrest,” (emphasis added)

[29] I am persuaded by both *Biyela* and *Duncan* judgments that the crux of the issue is not the reasonableness of the suspicion itself but how, objectively, such exercise of the discretion was properly executed. The issue was related to the conduct of the Officers and how they exercised authority in effecting the arrest of Plaintiff. Simply put, this Court did not have any inference on the search and arrest without a warrant itself. The objective test in *Biyela* and *Duncan* judgments qualified the reasonableness of the arrest without warrant by its proper exercise within the contours and framework of the laws. As also mentioned above, section 29 of the CPA sets the bar high in respect of the way in which the search and arrest must be conducted by qualifying the obligation with the principles of “decency and order”.

[30] It is my opinion that *Duncan* might have been decided long before the attainment of democracy in 1986, thus its application as evidenced in *Biyela* still found relevance in South Africa’s constitutionalised democracy. It was then (*Duncan*) that the liberties of each person without any distinction were of significance as is the case today. Such relevance was justified by the fact that the crux of the issue was and or always been the conduct and the way in which the arrest was effected despite the reasonable belief that a crime was or was going to be committed.

[31] The suspicion should not be based on a “gut feeling” of the alleged reasonableness for effecting arrest. There is a needed balance of the application of the interests in this matter because the Police could have advised the Plaintiff the reasons for the handing over of the cellphone and not simply ask for it because of a suspicion that the Plaintiff was “arrested for speaking to Mr Mvelase”. The reason for being arrested for speaking to Mr Mvelase was unsustainable. Thus, as this Court opined the Police are required by law to inform those alleged to have committed the crimes of their rights. That role entails the content of the information relating to the constitutionalised rights regarding the arrest and

not some mere reference for having spoken to another person. The Police could not have literally asked the Plaintiff to hand over the cellphone for a simple reason of having a suspicion about the call to Mr Mvelase without a core-content of the linkage of the transmission of information between the parties. It is the basic principle of law that the Police were supposed to have advised Plaintiff of the search, in this context, the purpose of handing over the cellphone otherwise the principle of explaining the constitutional rights will remain stagnant. This contention was evidenced by the Plaintiff on what I referred to as “retaliation” when he said, “cellphone for what”. The suspicion should involve an affirmative discretion to arrest without a warrant. This Court is not to promote non-adherence to the laws, but it refuses the failure to balance the procedural *vis-à-vis* the translation of such laws into reality.

[32] It is my conviction that the Defence Counsel missed the sharpened legal interpretation of section 40(1)(b) by her narrow reliance on the principle of the justified arrest without a warrant. It is my view that the objects of section 40(1)(b) were interpreted as rigid and cold regarding the way in which the officers had to exercise their discretion. The discretion today was long set and established before the attainment of democracy in 1986 (*Duncan*). During that period, the context was different as it was characterised by police brutality which was articulated by Langa J in *S v Makwanyane*³ as follows:

“The emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life.

³ 1195 (6) BCLR 665 at para 218.

[33] Although *Makwanyane* was interpreted in the context of the protection of the right to life, such principle was of equal application in this matter because of the interdependence of rights. Further, that interpretation in the post-1994 period extends to the conduct upon which Police Officers execute their mandate and eliminate any form that may subject the Minister to unnecessary litigation at the expense of the public purse.

[34] It is, therefore, the view of this Court that both the SAPS Act and CPA fall within the broad umbrella of the Constitution. This contention, as drawn from Langa J at para 222 in the same case: *Makwanyane* that the post-1994 period:

“Signaled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution. It also signaled a new dispensation, as it were, where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom. ... For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, [must] be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society’s own regard for human life and dignity by refusing to destroy that of the criminal. *Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well,*” (emphasis added and all footnotes omitted).

[35] Further, the Defence Counsel dismissed the claim for defamation as unjustified. She brought to the attention of this Court the judgement in *Visse v Wallach’s Printing & Publishing Co Ltd*⁴ that held “there has to be an uncompromised identification of the Plaintiff in the publication.” The Defence went further and held, “a reader without average intelligence could not have attributed the published pictures and identify the Plaintiff

⁴ 1946 TPD 441 at 446.

without his face being seen". Additionally, the fact that the Plaintiff is a Police Officer in the area and being known by many people did not justify his claim because there are many other police officers that stay in the same area. In this regard, the publication could have also been a reference to them. According to the Defence Counsel with reference to the *Visse* judgment, the Plaintiff had to prove that the publication was of direct reference to him.

[36] This Court did not find credence in this argument. Warrant Officer Ngobeni was on a Witness Stand and under oath confirmed the arrest of the Plaintiff. He also confirmed that he was the arresting officer with Sunglasses on his forehead as appeared in the newspapers. Let us assume there was no publication at all and the arrest being witnessed by "readers without average intelligence". The question that the Court raises, what constitutes the public? What characteristics are endowed to the said public? Is there a justified criterion for the average intelligence and those without such intelligence?

[37] This Court is not to answer the above questions, thus, it contends that even if there was no publication of the Plaintiff's pictures, the fact that there were people witnessing the arrest, was evidence of the Plaintiff's identity in front of the people that were not in a closet. It is my opinion that publication is not limited to media houses. The fact that a person was watched being arrested at the lowest level by people with no average intelligence did not detract from the context that the Plaintiff was subject of public scrutiny. The publication was a clear reference to him as the alleged member of the criminal syndicate as reported in the said newspapers. The argument about the people of the lowest level of intelligence could not have linked the story to the identity of the Plaintiff was nothing more than a fruitless argument which cannot be classified as having a legal basis. The test of a reasonable person whether by people of average intelligence and those that do not possess it had the potential to create a lasting effect on the credibility of the Plaintiff. It must be noted that even if the Plaintiff had to be offered a right to reply to the alleged allegations as published, the potential lack of trust in him will always linger over his head.

[38] In addition, this Court acknowledges that even if media houses appeared without an invitation, such purpose would have justified its role in providing information for public consumption. Mokgoro J similarly expressed the contention in *Case v Minister of Safety and Security*⁵ that “the media has equal rights to write and publish for the benefit of the public failing which that right would be seriously undermined.” However, in this case, the issue was not a justified publication that was subject to public consumption but a humiliating and degrading storytelling to the people about the Plaintiff’s unwarranted conduct without authorisation or protocols of the police service. The publication had serious repercussions for the Plaintiff’s good standing with his employer as he was subject to an internal disciplinary process which was kick-started by a trial in the media. The outcome of both the external and internal processes against the Plaintiff might be favourable to him but the irreparable harm of his good standing remained compromised and trust in him compromised.

[39] Similarly, the Defendant’s argument about the damage to the motor-vehicle and lost sim-card was a bare denial of the claim against him. The Defense Counsel acknowledged that the Plaintiff submitted proof that the “car was received and signed off as in good condition ... and further signed an indemnity form absolving the Defendant from any form of liability. The Defendant also confirmed that the car belongs to the Plaintiff and was not used in the Commission of an offence. In this instance, the post-signage was not preceded by a pre-inspection of the car wherein the status of the car could have been established. The pictures showing the towing of the vehicle, as this Court argued above, about the non-appearance of the Plaintiff’s pictures in the national newspapers are of equal application herein. The presented pictures were indicative of the damage to the motor-vehicle. Despite the arguments about the timeframes upon which the pictures were taken, it was the view of this Court that the car was received in a drivable status, thus on its release following its being in possession of the Police was thereafter found damaged. Similarly with the cellphone that was confiscated on 09 August 2011 and to be handed over to the Plaintiff on 12 February 2012 with a damaged sim-card was indicative of the Defendant as being “non-economical with the acceptance of liability”.

⁵ 1996 (5) BCLR 609 at para 28.

[40] The Defence Counsel on her closing argument about the employer's right to subject an arrested officer to an automatic disciplinary action which was also solicited during cross-examination was to dispel the question of malicious prosecution. The Plaintiff explained the processes involved regarding the procedures that are followed to the extent of the invitation of an external chairperson to preside over the hearing who will then make a recommendation on what needs to be done. In this instance, the Plaintiff submitted that he saw no need for automatic disciplinary action because there was no basis for such a hearing which was also confirmed by the outcome of the internal hearing itself. However, the Defence argued that the Plaintiff misplaced the application of the automatic right and for not applying for a review of the flawed procedure within a stipulated timeframe.

[41] However, a "mere right" for an automatic institution of the disciplinary action for anyone, not only the Plaintiff leaves a bitter taste in my legal reasoning. An automatic right cannot be equated with the need to ensure compliance with the primary sources of the law that are committed to the protection of the liberty of each person. In turn, their general application reinforces the protection of fundamental freedoms that are accorded by the Constitution. Therefore, an automatic right that is founded in a policy or internal rule cannot take precedent over the empowering statutes that give effect on the supreme law of the Republic.

[42] The automatic right was also "kicked out of the prosecutorial chambers" in the "employer's backyard". Similarly with the external processes, the Plaintiff was not even put in a witness stand to plead his case because there was no minute evidence that could have been tested before the Court. The question is then raised, what was the basis of the employer's automatic right to institute a disciplinary process that was based on non-existent misconduct? It is my opinion that the Defendant was on a fishing expedition to find any other factors which were not of concern in this case because both the external and internal processes could not find any credible evidence that could have served as a determinant of the Plaintiff's misconduct. The Defendant's conduct amounted to what I

refer to and consider as a show of “who has power and who has not” in “forking out of the legal knives” to defend or safeguard interest. I believe the Defendant abused his authority which was confirmed by the second Witness, Captain Matsepe before this Court that on effecting arrest they are aggressively putting a ‘legal boot’ at the neck of criminals even to those that might not pose any danger to the police as was the case of the Plaintiff who was made to lie on his stomach and hands handcuffed on his back. Such conduct needs to be frowned upon because it does not have a place in the new constitutional dispensation for the functioning of the police service. This is the conduct that should not be celebrated but to be given the contempt it deserves for letting the quality of the procedural safeguards in police service slip through the fingers.

[43] Further, the Defence Counsel put before this Court the rules of evidence in that it must be careful of a testimony of a single witness unless credibility may be granted to it. The caution is justified, and jurisprudence has been produced in this regard. It is not disputed that a cautionary approach should form the basis of the consideration of the evidence of a single witness. As expressed by Gqamana J in *Baisley v S*⁶ held:

“The evaluation of the evidence of a single witness requires the trial court to consider such evidence in the context of and together with all other evidence adduced at the trial to prove the [substance of the claim against the Defendant].”

[44] The Defence Counsel tested the credibility of Plaintiffs evidence on cross-examination. I must also state that the principle of cross-examination is of fundamental importance in ensuring the Court is provided with the broader framework of the presented evidence. In this regard, the Constitutional Court in *President of the Republic of South Africa v South Africa Rugby Football Union*⁷ contextualised the importance of cross-examination and held:

⁶ [2024] ZAECHGHC 37 at para 15.

⁷ 1999 (10) BCLR 1059 at para 61.

“The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.”

Satchwell J in *Swanevelde v Road Accident Fund*⁸ cited with approval the importance of cross examination in the afore-mentioned case and held

“By failing to cross examine in any meaningful way on [several] important aspects of the plaintiff's claim, [either of the parties] legal representatives [would leave] [several] issues unexplored, several weaknesses unexposed, several alternatives unexplored. By so doing, they [would lay have opened] to the very real possibility that the court would accept this unchallenged evidence in the absence of any serious critique thereof. The court [would then] be deprived of the opportunity to receive a more complete spectrum of evidence upon which to base its factual and credibility findings.”

[45] Therefore, it is evident that the purpose of cross examination in a civil claim is for both parties to have their cases proved on a balance of probability which set a standard lower than that of criminal law that must be proved beyond reasonable doubts. In this regard, the Defence Counsel on her cross-examination solicited information regarding the statement the Plaintiff made to the police on the night of 09 August 2011. Counsel for the Defendant sought to establish the Plaintiff's relationship with Mr Mvelase whom the Plaintiff alleged, knew him as his brother's friend and having met him several times at his brother's place. His brother was an advocate wherein the Plaintiff stated that he had no

⁸ [2007] ZAGPHC 201 at para 20.

mutual relationship with Mr Mvelase and except for his knowledge as his brother's friend. The Defence Counsel further took aim at establishing the reasons as to why the Plaintiff called him several times including being called by his wife that Mr Mvelase was looking for him. The Plaintiff stated that Mr Sandile Radebe (co-accused) admitted that when he was called by Mr Mvelase looking for Mr Madondo (the Advocate) he mistakenly gave Mr Madondo (the Police Officer) as he saved both in his cellphone without distinguishing them (Advocate and Police Officer). In this regard, the Defense Counsel was persistent in sorting clarity about the professional identity of his brother, whether he was an Advocate or Lawyer. The Defence Counsel was not satisfied that the Plaintiff when he responded that he could not make a distinction between an Advocate and a Lawyer. The Defence then put it to the Plaintiff that he was not speaking the truth. In this instance, the Court had to intervene and explained that the use of terminology should not be the basis to test the Plaintiff's evidence. However, the Defence was insistent that the Plaintiff was not speaking the truth. Further, the Plaintiff's *viva-voce* evidence was put on the stand regarding his going to Merafe Hostel at Block 11 looking for Mr Sandile Radebe whilst his place of residence was recorded as 192 Scheepers Street in Mapetla East. This is immaterial because the substance and content of the dispute was glaring evidence of the arrest and how such arrest for both was undertaken.

[46] On the whole, the Defendant's defence was qualified by the three Witnesses mentioned above. First, Warrant Officer Ngobeni, Warrant Officer Matsepe and Lt Colonel Singh. I am not to regurgitate their evidence and Lt Colonel Singh's functional role I would refer to it as a 'mere advice' on the protocols to be followed regarding the institution of the disciplinary hearing against members of the police. Therefore, his evidence did not warrant any scrutiny from this Court because it did not deal with the content of the allegation and the hearing (misconduct) itself. This Court left his testimony as is. I am also not going to be repetitive, and I will limit this Court to the contentions that were not raised and addressed above in the Defendant's argument.

[47] In support of the defence case, as noted, Warrant Officer as a first witness, his testimony, particularly on cross-examination, was evasive and even lacks memory of the

sequence of the events despite being an arresting officer. Of great concern, was his limited understanding of the basic purpose of the Pocket Book which requires Police Officers to record their daily activities to an extent of not bringing it to court which could also serve as the basis of the record of his daily activities. If Warrant Officer Ngobeni, with many years in the Police Service would have less regard on the basic principle, remains a conduct that should not be promoted. Of further concern was his evasive and limited understanding of the Standing Orders relating to the protocols on media involvement within SAPS. As an arresting officer, this Court is of the view that he was or supposed to have known the protocols to be followed when a SAPS Photographer to be assigned for a special assignment to take photos at the crime scene. However, it is not of this Court to determine what he could have done in the circumstances.

[48] This Court is also not to make any negative inference about the quality of training provided in the Police Service, thus the years and experience with attributes acquired could have provided a foresight on handling matters of this nature. Other than the CPA and SAPS Act, it remains doubtful whether he had never heard of the Constitution and its supremacy. He also refused to agree on glaring concessions that he also made about the presence of the media during the arrest. He denied that the Journalist were called by him. His evidence was not free of inconsistencies and his memory of the sequence of events leaves too much to be desired by this Court.

[49] The second witness: Captain Matsepe, “Zonke Phantsi” (*everyone down*) as a parable of an approach used to effect an arrests raises a question whether it is applicable to those people that do not pose a danger to the arresting officer as is the case of the Plaintiff. It was also not alleged that the service firearm found in his possession was used as a tool to retaliate from a reasonable arrest. I am baffled by the adoption of the “Zonke Phantsi” (*everyone down*) as a reasonable conduct that required to be found credible by the Court. This Court believed it would not tiptoe around blatant evidence of wrongfulness that came far away from justifying the conduct of the Defendant. The Defendant also justified their way of arrest as difference in their work. This Court does not dispute the distinction considering the scourge of crime in the country. Thus, of great concern was a

blanket approach between those people that allegedly committed crimes that do pose a danger and those that do not. Even with the ones posing a danger, the police, on an assumption that they were also taught on how to deal with people who committed violent crimes and danger to the police, I am of the affirmative view that the “Zonke Phantsi” parable could not have been part of the syllabus or in the training manual. In fact, there was no evidence led that “*Zonke Phantsi*” was part of the curriculum except for being used independently by Police Officers at Moroka Police Station, not as a nationwide parable but as an associated practice in effecting arrest. An associated practice could therefore not be justified as a principle in effecting an arrest. The Defence argument falls flat on this ground alone for having overstepped the boundaries of authority vested in him.

[50] In a democratic country with a constitutionalised role in the functioning of the police service, this Court found difficulty in arresting officers, on their own submissions, trampled on the constitutional rights of the Plaintiff. This was also extended to their personal and professional integrity which overshadowed the quality of the efficiency of the police service. The police service is tasked with a huge responsibility not only to enforce the law but to have regard for the way in which they undertake such a task.

[51] This Court does not deny the fact that the police service is always finger-pointed for lack of urgency in crime situations. However, the scourge of crime that is currently ripping out the country requires the police service to be cautious on how to exercise their authority to avoid negativity regarding their functioning. The failure to conduct a justified arrest, the Defendant exposed himself to litigation that has serious implications for the use of public funds as he must dig deeper into the human and financial resources of the state because of the unlawful conduct by police officers. Litigation is not a mere financial cost but an emotional and human cost. The police that were supposed to be at work servicing the ordinary citizens of the country had to take a witness stand and elaborate on the events that took place some years back. On the other hand, public confidence and interests are likely to be eroded because members of the public are in danger of unlawful arrest and detention. The Minister was, through the scope of employment of his officers, vicariously liable for the conduct of his employees.

[52] It is my opinion that the Defendant acted wrongfully and unlawfully on the search and arrest with the consequent result of harm to the reputation and damage of the Plaintiff's property. As emphasised herein, it was the unjustifiable conduct itself that overshadowed the reasonableness of the belief in the crime that was going to be committed or had been committed. The "act" itself "poured cold water" on an opportune moment to advance the principles of effecting a search and arrest without a warrant. It also limits the infusion of the SAPS Act as an empowering statute to the Constitution which then leaves the Constitution itself remaining out of reach for the evolution of its principles into substantive reality. This area of the law will remain stifled because a window of opportunity to develop through an independent arbiter was lost in a judicial stand.

[53] The Defendant was a vexatious litigant in dismissing malicious prosecution, because of what this Court views as abuse of the limited human and financial resources of this Court. In this case, two processes absolved the Plaintiff of any wrongdoing and even the Senior Prosecutor could not put the Plaintiff in a witness stand to test the credibility of the evidence of the alleged crimes. I am encouraged by the Prosecutor's decline to prosecute the Plaintiff in that the prosecutorial authority is empowered with an oversight role to assess the quality of evidence that will be the basis for prosecution, (section 179(2) of the Constitution). Van Heerden AJ in *Minister of Justice and Constitutional Development v Moleko*⁹ was cited with approval by Reddy J in *Koji v Director of Public Prosecutions*¹⁰ that for a successful claim of malicious prosecution, "a claimant must allege and prove:

- (a) that the defendants set the law in motion (instigated or instituted the proceedings);
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with malice (or *animo injuriandi*); and

⁹ 2009 (2) SACR 585 (SCA) at para 8.

¹⁰ [2025] 1 A SA 680 (NWM) at para 21.

(d) that the prosecution has failed.”

[54] This Court would not even qualify this case as a failed prosecution because, as argued above, the Prosecutor exercised his or her independent discretion without any influence that could have undermined the prosecutorial objectives. Thus, the Plaintiff’s humiliation of being arrested, detained and transported to Court with a potential for prosecution and only to be established later that there was no evidence to prosecute, was an indirect form of malicious prosecution. The question was, why would this not be a malicious action to subject the Plaintiff to unnecessary exercise with no basis to justify it. The Defendant, his own processes failed to attribute any liability to the Plaintiff’s misconduct, thus he was prone to defend the claim against him.

COSTS

[55] This Court is guided by long established principles regarding *quantum*. The jurisprudence that has already been developed was and continues to be affirmative and lays the framework in determining the *quantum* to be awarded in cases such as the Plaintiff. The Courts have been unanimous that the *quantum* is not designed to serve as a “milking or cash cow” for the aggrieved parties against the executive, in this instance, the Minister of Police. It is meant to offer reasonable compensation in line with the merits of each case. In this matter, the parties brought to the attention of this Court a principle that was developed by Bosielo AJA in *Minister of Safety and Security v Tyulu*¹¹ judgement and held:

“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

¹¹ 2009 (5) SA (SCA) at para 26.

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

[56] Similarly, Kathree-Setiloane AJA in *Motladile v Minister of Police*¹² brought more meaning to the determination of the reasonableness of the *quantum* to be awarded an aggrieved party as the Judge held:

“Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must [consider] ... include:

- [(a) the circumstances under which the arrest and detention occurred;
- (b) the presence or absence of improper motive or malice on the part of the defendant;
- (c) the conduct of the defendant;
- (d) the nature of the deprivation;
- (e) the status and standing of the plaintiff;
- (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant;
- (g) awards in comparable cases;
- (h) publicity given to the arrest;
- (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff].”

[57] These factors constitute a “holistic approach” in determining *quantum*. The merits, both factual and legal, were contested by the Defendant and the Plaintiff even failed to prove his personal and social standing. Further, the arrest without a warrant was justified in that it was motivated by an immediate possibility of evading the arrest or the evidence

¹² 2023 (2) SACR 274 (SCA) at para 17.

being destroyed. As argued above, the issue and argument herein were not the arrest without a warrant itself, but the conduct itself regarding the way in which such action was effected.

[58] In these circumstances, the Plaintiff claimed a total amount of R2 002540.00 (Two Million Two Thousand Five Hundred and Forty Rand Only) which was structured as follows:

- (1) R500 000,00 (five hundred thousand rands only) in respect of wrongful and unlawful arrest structured at R300 000 for violation of constitutional rights and *contumelia* at R200 000 deprivation of freedom and discomfort suffered by client.
- (2) R500 000,00 for unlawful and wrongful charge of defeating the ends of justice.
- (3) R500 000.00 (five hundred thousand rands only) for defamation.
- (4) R1000 000,00 (one million rands only) in respect of malicious internal prosecution.
- (5) R1 450.00 (one thousand four hundred and fifty rand only) in respect of fair/reasonable and necessary costs of replacing the parts striped from his motor-vehicle.
- (6) R1090.00 (954,00 (nine hundred and fifty-four rands only) for costs incurred in terms of his cellphone contract whilst not enjoying the service thereof and R136,00 for replacing the Sim Card.

[59] The Plaintiff further claimed interest in the afore-said amount at the legal rate of 15.5% calculated from the date of demand to the date of payment. On the other hand, the Defendant left the consideration of the claim at the discretion of this Court and that it must also consider comparative case law in this regard. However, the Defence considered the amendment of the Plaintiff's Particulars of Claim dated 29 November 2022 which is the claimed amount above.

[60] It is my conviction that the claims are not to be considered independently of each other because they emanate and flow from an unjustified single conduct of a search and arrest without a warrant. Further, this Court acknowledges the significance of comparison and lessons from existing jurisprudence but does not constitute a similar approach in the determination of the merits of each case regarding the factual and legal circumstances upon which a particular matter arose. The principle of “independent merits” equally applies in the context of such comparisons and lessons.

[61] In this case, the Defendant dismissed the claim in its entirety because the police were justified in their action as they gave effect to the mandate as prescribed by law (section 22 of the CPA). I am not to repeat the arguments this Court made in the text, thus, the dismissal failed to consider the high value which is placed on the liberty of the person by the CPA, SAPS Act which give effect to the Constitution including the jurisprudence that had since been developed (*Duncan* and *Biyela*). The contestation of the conditions of detentions which were not adequate for human living left this Court raising questions as it was contended that conditions at Moroka Police Station were more adequate.

[62] Having regard to the conspicuous of factual and legal factors, the Defendant failed to consider the effect of the “conduct itself” because of the narrow focus on the rigid application law regarding the arrest without a warrant and did not consider how such laws were translated into reality.

[63] The Defendant failed to appreciate the effect of the arrest on the Plaintiff as a Police Officer wherein his reputation and good standing was compromised both in his professional and personal lives. This Court attached weight to the publication of the story in national newspapers despite the Defendant arguing against it as of irrelevance to the Plaintiff’s identity because his pictures were not descriptive of his identity and could have been any other police official staying in his neighbourhood. Further, a reader without average intelligence could not have linked the story to his identity. This is difficult to comprehend because the story itself, with people witnessing the arrest constituted great

humiliation to his personhood and professional status. In this regard, the potential of the mistrust by members of his community and his Colleagues because of the arrest has the potential not to be wiped out any time soon.

[64] The Plaintiff was exonerated by two legal processes which also left him with a dented reputation even though they were in his favour. The way in which the Defendant handled this matter could not be disregarded by this Court which is required to apply the law without any fear or impartiality (section 165(2) of the Constitution).

[65] At the risk of repetition, this Court considered the spectrum of the circumstances of this case as well as the effect of comparative jurisprudence. It is therefore my considered view that an amount of R650 000.00 will be a reasonable and fair compensation of the Plaintiff's unlawful search and arrest. The reasonableness of the amount was motivated by the Plaintiff's inability to quantify the claimed amounts in each of the claims made. A further motivation was borne, as noted above, this claim emanated from a single event of unlawful and wrongful search and arrest and therefore, there is no justified legal basis upon which to separate the claims.

[66] The Plaintiff sought costs on an attorney and client scale. This is justified considering that the Defendant does not only carry the executive authority but an obligation to substantively transmit such authority into reality. The Defendant, as a sphere of executive authority carries a primary responsibility to ensure the proper execution of the mandate bestowed on him through the scope of the employment of his Police Officers.

[67] Accordingly, it is ordered as follows:

[67.1] The Defendant is ordered to pay the Plaintiff an amount of R650 000.00 for the unlawful arrest and detention of the Plaintiff.

[67.2] The Defendant is ordered to pay the legal rate of 15.5% of the above amount with effect from the date of demand until it is settled in full.

[67.3] The Defendant is ordered to pay the costs of this application on attorney and client scale and on Scale B for one Counsel.

N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

***Delivery:** This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines, and its date of delivery is deemed 10 July 2025.*

Date of Hearing: 26, 27 February 2025, 25; 26, 27 March 2025 and 23 June 2025

Date Delivered: 10 July 2025

Appearances:

Counsel for Applicant: Advocate MD Magadlela
Instructing Attorneys: Ndlebe Msuthu Inc Attorneys

Counsel for Defendant: Advocate Adriana Bevilacqua

Instructing Attorneys: The State Attorney