



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

CASE NO: 39290/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHERS JUDGES: NO	
(3) REVISED	
13/08/2025	
DATE	SIGNATURE

In the matter between:

**SELLO MKWANAZI
PIETER SELAMOLELA SETHOLE**

**FIRST PLAINTIFF
SECOND PLAINTIFF**

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

MOTHA, J:

Introduction

[1] It is trite that any arrest and detention without a warrant in South Africa is prima facie unlawful, unless justified in law. When examining the alleged unlawfulness of the

plaintiffs' arrest and detention, this court was confronted with two sobering questions:

- a) Is it not *contra bonos mores* that our law affords better protection for the constitutional rights of accused persons¹ than for those of crime victims² in some cases involving the Minister of Police?
- b) Is it not an affront to the fabric of our society for a prosecutor and a defence lawyer to cajole an innocent accused into signing a settlement agreement, paying a complainant money to withdraw serious charges, under the guise of a mediation agreement?

[2] Following the alleged unlawful arrest and detention for allegedly stabbing the complainant and inflicting a severe wound from the neck to the chest requiring ten stitches, the plaintiffs seek damages of R800 000.00 each from the defendant.

[3] Once their actions against the defendant were consolidated under case number 39290/21, the plaintiffs proceeded with the claim for unlawful arrest and detention from 24 November 2020 to 18 January 2021. It is common cause that the plaintiffs were arrested without a warrant by the police officer who was acting within the course and scope of her employment with the defendant.

[4] As already foreshadowed, any arrest and detention without a warrant is *prima facie* unlawful, and the detaining officer (the infringer) bears the onus of proving that the interference with another's physical freedom is justified in law³.

[5] To justify that the arrest and detention of the plaintiffs were in accordance with s 40(1)(b) of the Criminal Procedure Act 51 of 1977(CPA), the defendant called three

¹ Section 12(1)(a) of The Constitution of the Republic of South Africa.

² Section 12(2) of The Constitution of the Republic of South.

³ Minister of Law and Order v Hurley: 1986 (3) SA 568 (A) at 589E-F.4

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

witnesses: the arresting officer, Sergeant Paulinah Tintswalo Mathebula, Sergeant Raymond Shogole, and the public prosecutor, Mrs. Phongola-Nkosi.

[6] In prosecuting their claims, both plaintiffs testified but did not call any witnesses.

The first plaintiff's evidence in chief:

[7] Sello Mkwanaazi testified that on 24 November 2020, he was at work when his employer called him and his fellow employee, Peter, into his office and informed them that three police officers were looking for them. Upon entering the office, one of the police officers, Sergeant Mathebula, informed them that they were under arrest for attempted murder. She told them that he, Sello, had kicked the complainant while Peter stabbed him, all because of a woman. When Peter tried to explain, he was shouted down by one of the police officers and told that they would talk in court.

[8] The arresting officer neither asked for their version nor requested their identity documents. From their workplace, they were driven in a police car to the scene of the incident. When they asked the police to obtain the CCTV footage of the incident from the pub owner, the police refused. Finally, they were taken to Wierdabrug police station and detained. Inside the cells, he was handed a paper to sign quickly without being told what it was, because there was a commotion and the arresting officer wanted to vacate the cells. He testified that his right to apply for bail was not explained to him until his second court appearance.

[9] The conditions in the cell they occupied were appalling; it was dirty, lacked blankets, and the sponge used for sleeping was thin and filthy. There was no hot water, and the shower was not functional. Throughout their stay at Wierdabrug, they did not take a bath. To use the toilet, one had to be escorted to another outside the cell, because the one in their cell was not working. Furthermore, they received weak tea with half a spoon of sugar, chicken cooked in water, samp with drumsticks, and sometimes gravel pap. About six people were kept in their police cell. During his incarceration, he was worried about his wife, who was pregnant at the time.

[10] They remained detained at Wierdabrug police cells until 26 November

2020, when they were taken to court. After their court appearance, they were transferred to Kgosi Mampuru Prison, where they were held with 43 other people in a 9 x 9 cell. The blankets and sponges were for sale at Kgosi Mampuru. As was the case in Weirdabrug, in Kgosi Mampuru Prison, there was no hot water, and they were fed two thin slices of bread and tea with fish at midday.

[11] Explaining how the incident happened, he said that the fight for the knife involved Peter, Brown (the complainant), and Rasta, Brown's friend. Brown was injured during that fight, and he, Sello, never even got near Brown. Brown took the knife, and Rasta took Brown's phone. Later that day, Peter met Rasta at a garage and confronted him to return Brown's phone, because he did not want to get into trouble.

[12] He testified that their lawyer called them outside the courtroom and told them that Brown wanted to withdraw the charges. They did not agree with that because they wanted a chance to speak for themselves, asserting they were innocent. When they entered the courtroom, Brown was seated with their lawyer and the prosecutor. They were told that Brown wanted R2000.00 to withdraw the case. Eventually, they signed the papers agreeing to give Brown two thousand. He testified that he was not involved in the negotiations.

Cross-examination

[13] Under cross-examination, he stated that he heard for the first time that they were arrested for assault GBH and robbery in court. He admitted that Sgt Mathebula explained to them what happened in the pub. According to Sgt Mathebula, they were arrested for attempted murder, he said. He conceded that their employer promised to arrange a lawyer for them. He denied that the complainant pointed them out, asserting that the complainant was not present in the office when they were arrested. To prove that he was not present, he said the police officers could not identify Sello or Peter. He insisted that it was only when they were on their way to the police station that he saw the complainant at a spaza shop. It was put to him that it was not denied that Brown was present at the time of the arrest. He denied ever seeing him in their employer's office.

[14] He was confronted with paragraph 2 of the statement signed by the plaintiffs, which reads:

“The parties hereby agree that the matter will be withdrawn subject to the following: the accused apologizes to the victim, and he accepts. They will compensate him R2000 for his loss, money to be paid on the 13th of April 2021 before 14H00. Failure to pay, the case will be re-enrolled.”

[15] He stated that although he signed the statement, they never reached an agreement about the money with their lawyer, Mr. Mokantsi. Still under cross-examination, he reiterated that Mr. Mokantsi informed them that Mr. Brown wanted to withdraw the case, and they told their lawyer that they would never agree to that because they had not done anything wrong. He stated that Mr. Mokantsi informed them that the case was going to be withdrawn that day. The prosecutor, handling the case, came with papers and instructed them to sign quickly because they wanted to close and the bail bond offices were closing soon. He then signed.

[16] He said that he never read or knew what was said in the document given to them by the prosecutor. He testified that they did not pay Mr. Brown.

The second plaintiff's evidence in chief.

[17] Peter Sithole testified that he was 42 years old and both illiterate and innumerate, with his highest level of education being grade 4. On 4 November 2020, he was on lunch when his boss called him into his office. He was confronted by three detectives, who asked for his name. Detective Mathebula informed him that he had stabbed someone with a knife. When he tried to explain, one of the police officers shouted at him and told him that he would speak in court. On their way to the police station, he informed the police that the pub where the incident occurred had cameras. The police ignored him and drove them to Weirabrug Police Station. At the police station, the police took their cell phones, which they

never received back. Sergeant Mathebula charged and escorted them to the cells without reading them their rights. He denied signing any documents.

- [18] He testified that the cells, blankets, and sponges used as mattresses were dirty. The toilet and shower were not working. There was no hot water, and the food did not follow his doctor's instructions. He ran out of medication for his medical condition. Moreover, his mother was very ill during his incarceration.

Cross-examination

- [19] He denied the existence of an agreement to drop the charges. He denied that Brown was present at the office when they were arrested. Like Sello, he saw the complainant at a shop while they were on their way to the police station. He confirmed that Sgt. Mathebula told him he had stabbed Brown with a knife. He insisted that one of the detectives yelled at him, and he could not continue talking. He challenged the assertion that Sgt. Mathebula told them about the charges of assault GBH and robbery. He denied signing any documents and remembered being handed a blank paper to sign.

- [20] At Kgosi Mampuru Prison, the cells, blankets, and sponges used for sleeping were filthy. He told the court that the cold water was throttled, and the pap they were fed was dry. According to his doctor's instructions, he said that he was not supposed to eat fried or fatty food. He was supposed to eat vegetables and brown bread. The food at both prisons was contrary to his doctor's instructions; he was not provided with the medicine for his illness. In the cells, he testified that there were 13 inmates at Wierdabrug and 46 at Kgosi Mampuru.

The evidence in chief of the defendant's first witness.

- [21] Sergeant Paulinah Tintswalo Mathebula testified that on 24 November 2020, she arrested the plaintiffs (Mr. Mkwana and Mr. Sithole). On 25 November 2020, she interviewed the complainant, Mr Fihlela, who told her that he was at Indogo pub in the Weirdabrug shopping centre on 21 November 2020, at 21h30. He was approached by two gentlemen known as Peter and Sello. Peter accused him of

dating his girlfriend, and they all went outside. When outside, they both assaulted him; Peter drew a knife and stabbed him on the left side of his ear down to his chest. They also took his phone. Upon removing the scarf he was wearing, Sergeant Mathebula saw 10 stitches from his left ear to his neck.

[22] Having received information from the complainant about where the plaintiffs worked, she requested an escort from two of her colleagues. Accompanied by the complainant and her colleagues, Sgt Mathebula proceeded to the plaintiffs' workplace and met their employer. She testified that she introduced herself as a police officer and informed him that they were investigating a case of assault GBH, and robbery, which had been opened against Peter and Sello.

[23] The employer promptly called Peter and Sello, and when they entered the office, the complainant confirmed that they were the ones who had attacked him. Sello assaulted and pushed him to the ground so Peter could stab him. She again introduced herself as a police officer and told the plaintiffs that a case had been opened against them for assault GBH, and robbery. When she asked them about the matter, they did not answer. She informed them that they were under arrest for those crimes and explained their rights in the presence of their employer. She told them that they had the right to a lawyer; if they could not afford one, a state lawyer would be appointed for them. When she informed them that they could apply for bail, their boss commented that they would use the company lawyer. He immediately phoned the lawyer and said they would call to apply for bail. She then placed them under arrest and drove to the police station, where they were detained.

[24] At the police station, she informed the police that they were arrested for assault GBH and robbery. When asked about the absence of an arrest warrant, she said that a person could be arrested and detained without a warrant for robbery. She insisted that she told them they were arrested for assault GBH and robbery. However, on the Notice of Rights, she recorded that they were charged with assault GBH. She testified that she wrote assault GBH because it was the more serious offense. She added that this did not mean they were not charged with robbery, and they knew this because she had told them.

[25] When the defendant's counsel asked her why she arrested the plaintiffs, she said it was because the charges they faced were serious. She reiterated that she told them they had a right to apply for bail and could not give them police bail because of the seriousness of the charges. When asked about recording the charge of assault GBH only on the Notice of Rights, she said they would go to court and explain. Her second attempt at an answer was that assault GBH was more serious and did not attract police bail, but they knew that they were facing robbery as well. On the Statement Regarding Interview with Suspect, it was written that Sello faced assault GHB and robbery and Peter faced assault GBH and common robbery.

[26] Since the charges were serious, she could not release them on police bail, she testified. Commenting on the cleanliness of the holding cells, she stated that the cells were cleaned regularly, although she was not aware of the cleaning schedules. On the issues of bail, she testified that when they appeared in court for the first time on 26 November 2020, she indicated that she did not oppose bail, and the matter was postponed to 9 December 2020 for a bail hearing. On 9 December 2020, Sergeant Shogole took the docket to court because she was on leave. When Sgt Shogole telephoned her, she told him that she was not opposing bail.

Cross-examination

[27] When asked why she went to the plaintiffs' workplace, she said that it was to arrest them. Hence, she was accompanied by the complainant and her colleagues. In her possession, she had a docket containing the complainant's affidavit and a form from the hospital. She testified that before effecting the arrest, she had interviewed the complainant and taken a statement. When pressed on this issue, she testified that the statement was taken on 25 November 2020 and commissioned on 26 November 2020, when it was brought to court. She agreed that the affidavit was not before her at the time of the arrest of the plaintiffs.

[28] She was asked if she knew about exercising her discretion in arrests. She said she was aware of the discretion, but in this case, she had to arrest them because they had committed serious offences. When asked if she had considered bringing them to court by serving them with a notice or by warning, she said, "We are talking about assault GBH and robbery—serious charges. Therefore, even police bail was not permissible."

[29] When asked which offences fell under Schedule 1, she testified that she did not know them, nor was she familiar with Schedule Seven offences. She said assault fell under Schedule 6 but reiterated that she did not know about the Schedules. It was put to her that the offences faced by the plaintiffs fell under Schedule 7.

[30] She was asked about police bail, and she said the accused lawyer had to apply for bail. It was put to her that, in terms of Schedule 7 offences, the plaintiffs qualified for police bail. She reiterated that their lawyer was supposed to help them apply for bail.

[31] Again, when asked about exercising her discretion, she explained that she did not consider any other means to secure their attendance, because they were charged with serious offences. Therefore, she had to arrest them because they had committed serious crimes, assault GBH and robbery. She mentioned that it was not like they had committed common assault.

[32] She was asked if she was aware of the Police Standing Order G341 issued in 2011. She replied that she did not know it. She was directed to paragraph 3 of the Standing Order, which states:

"Securing the attendance of an accused at the trial by other means than arrest (1) There are various methods by which an accused's attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.

(2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3)."

[33] When asked why she did not summon the plaintiffs, she responded that the charges were serious. She restated that if a charge was serious, there was no other option besides arrest. She said charges were not the same. Even if she did not know the schedules, she said she knew which offences led to arrest.

[34] She was asked if she considered that the plaintiffs were not flight risks, and she replied that this was the reason she did not oppose bail. She stated that she believed they had fixed addresses and were employed. When asked why she did not warn them, she explained they had committed a serious offence. When pressed on the issue of her discretion, she said that because it was a serious offence, she did not have any discretion in those cases and had to arrest.

[35] She was asked why she did not mention the robbery on the Notice of Rights. She insisted that they were informed about the assault GBH and the robbery. Counsel put to her that the plaintiffs would deny being informed of the robbery charge; she responded that they bought the complainant a new phone. She also mentioned that she obtained a statement from the victim, confirming that they met and bought him a phone.

[36] Having pointed out that the charge of robbery was not recorded in the Occurrence Book dated 2020-11-24, counsel submitted that the plaintiffs denied being arrested for assault GBH, and robbery. She said they were lying. She was referred to the Investigating diary, which only mentioned the charge of assault GBH. In response, she said that they knew about the robbery. She was pointed to the SAPS 14, which also recorded that Peter and Sello were charged with assault GBH. She explained that the person who completed the SAPS 14 and the Occurrence Book (OB) did so based on the Notice of Rights. However, all

court documents listed assault and robbery, she remarked. She said the Notice of Rights, which is SAPS 14A, SAPS 14, and an OB are connected. Counsel put to her that the plaintiffs did not know which charge they were facing. She answered that all court documents indicated they were charged with assault, GBH, and robbery.

[37] Since the plaintiffs did not know which charge they were facing, they did not know which case they needed to apply for bail in, as they were only facing assault GBH, according to the Notice of Rights, counsel continued. She stated that they were aware of all the charges.

[38] She was asked why she did not consult Rasta, a witness, before effecting the arrest. She testified that she looked for him but could not locate him, and, additionally, the complainant was present. When asked about the CCTV footage at the pub, she stated that she went after the arrest to interview the security officer but was unable to find assistance. She was also questioned about the reason for not applying for a warrant of arrest, considering the seriousness of the offence and the Police Standing Order, which required that arrest should be used as a last resort to secure the attendance of an accused. She explained that they were facing serious charges.

[39] The cross-examination gravitated towards the topic of her discretion, as counsel asked once more if she believed she had discretion on serious charges to secure a person's court attendance without arrest. She responded that charges differ. Counsel put to her that since she did not know the schedules, she could not justify the arrest under section 40(1)(b) of the CPA.

[40] Finally, she said that on the way to the police station, she asked Peter why he wanted to kill someone over a girlfriend. His answer was "my sister, this guy, was my friend, but made me angry by sleeping with my girlfriend of five years", she concluded.

[41] He testified that on 24 November 2020, he was on duty when Sergeant Mathebula asked him and another colleague to accompany her as backup because she was going to meet two male suspects. Upon arriving at the school where the suspects worked, they met a white man who claimed to be the suspects' employer. They asked him to call the two suspects, and he obliged. When the suspects entered the office, Sergeant Mathebula informed them about the case that had been opened against them, involving assault GBH and robbery of a cell phone. The suspects did not respond to Sergeant Mathebula's utterances. She read them their rights and informed them that she was placing them under arrest. When she told them they had the right to apply for bail, their employer volunteered that he was going to call the company's lawyer to bring a bail application. Throughout, the complainant was present.

[42] They transported the accused to the police station. After entering the police station with the suspects, he then went to do other things. The next occasion he was involved in this matter was on 9 December 2020, when Sergeant Mathebula was on leave and a bail statement was requested in court. Having established that Sgt Mathebula was not opposing bail, he completed the bail statement and took the docket to court.

[43] When questioned about the condition of the cells at Weirdabrug, he stated that they had a cleaner and a chef. He testified that the cells were always clean when he fetched the suspects to court.

Under cross-examination

[44] Under cross-examination, he was asked about the purpose of going to the school with Sergeant Mathebula. He responded that Sgt Mathebula asked them for a backup because she was going to arrest two male suspects. He was asked why the notice of rights reflected assault GBH only. He responded by saying that when the plaintiffs were arrested, they were read their rights and two charges were mentioned, assault GBH and robbery. Accordingly, he did not know why

the notice of rights reflected assault GBH only.

[45] He was asked when a police officer can arrest without a warrant. He responded that it depended on the situation and stated that a police officer could arrest without a warrant in some instances. He mentioned that he thought Sergeant Mathebula had used her discretion as the complainant had explained to her when he opened the case. He was asked what discretion Sgt Mathebula exercised because, according to her, this was such a serious offence that she had to effect an arrest. He said that, in his view, if, during the interview with the complainant, he formed the impression that there was danger, he would arrest. Furthermore, he stated that police officers are not all the same and their experiences vary. In response to the reactions of the plaintiffs at the school, he said that they did not resist arrest nor make any other remarks except for greetings. He was asked if there was any conversation during their journey to the police station, he stated that there was none. The only discussion he remembered was at the school when Sgt Mathebula effected the arrest and informed them of the charges.

[46] He was asked whether the charges, assault GBH and robbery, were classified as Schedule 1 offences. He responded that they were not. Furthermore, when asked about police bail, his reply was that the plaintiffs' lawyer should have applied for it. He confirmed that he furnished the bail statement on 9 December 2020. He conceded that he did not visit the cells during the plaintiffs' period of incarceration.

Evidence in chief of the defendant's third witness – Portia Tumelo

[47] Her testimony was that she attended to the matter when it was transferred to the Regional Court. She testified that she was approached by the attorneys of the accused (Plaintiffs) to explore entering into an informal mediation agreement with the complainant. An informal mediation agreement is a method employed in an attempt to finalise criminal matters by inviting the accused and complainant to a round-table discussion. She testified that under an informal mediation agreement, the accused would apologise to the complainant for their conduct. If the complainant accepted the apology, an informal mediation agreement will be

completed, setting out the terms and conditions of the agreement. The document will be signed by all the parties involved.

- [48] The effect of the agreement is that it is binding on the parties, provided there is no breach of the terms. In case of non-compliance with the terms, the prosecution may reinstate the charges. She explained that the *modus operandi* is that the matter appears at the District Court, and the prosecutor would complete a J15 form. The charge sheet would then be given to the Clerk of the Court for filing. At the next court appearance, the Clerk of the Court would bring the charge sheet to the prosecutor to be placed inside the docket for that particular appearance.

Cross-examination

- [49] Under cross-examination, she testified that the matter appeared on 26 November 2020 and was postponed to 02 December 2020 in terms of S50(6) of the Criminal Procedure Act, also for an affidavit to confirm that the police were not opposing bail. On 02 December 2020, the matter was postponed to 09 December 2020 for the investigating officer. On 09 December 2020, the bail statement was unavailable because the investigating officer was on leave, and the senior prosecutor arranged for someone else to handle the bail application. The matter was postponed to 17 December 2020, when the bail application commenced, and then postponed to 12 January 2021. Finally on 18 January 2021, the plaintiffs were released on bail of R4000.00. She testified that during negotiations, the Plaintiffs were seated on the bench behind the prosecutor while their attorney spoke to the prosecutor and consulted with them. She stated that they requested the prosecutor, in the presence of their attorney, to call the complainant for a discussion, as they wanted to apologise and express their remorse.

- [50] She averred that, at first, she was reluctant to withdraw the matter due to the seriousness of the offense. After speaking with the complainant, she decided to proceed with the arrangement, and all parties signed the document. It was put to her that the plaintiffs would deny involvement in the negotiations, claiming it was their attorney who handled everything and instructed them to sign without reading the document. In response, the prosecutor stated that this was not true,

as the Magistrate repeated what the parties had agreed upon and asked the plaintiffs for confirmation. Additionally, she contested that their attorney forced them to sign, explaining that the plaintiffs agreed to the arrangement.

The law

[51] The point of departure in cases of unlawful arrest and detention is that everyone is guaranteed the constitutional right not to be arbitrarily deprived of freedom and security of the person, as outlined in s 12(1). Section 12(1)(a) of the Constitution of the Republic mirrors Article 9 of the International Covenant on Civil and Political Rights, which was adopted on 16 December 1966 and entered into force on 23 March 1976, and reads:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

[52] In *Zealand v Minister for Justice and Constitutional Development and Another*,⁴ the constitutional court held: “The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom.”

[53] In the matter of *Mahlangu and Another v Minister of Police*,⁵ it was held:

“It follows that in a claim based on the interference with the constitutional right not to be deprived of one’s physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is *prima facie* unlawful and the defendant

⁴ CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC) ; 2008 (2) SACR 1 (CC) ; 2008 (4) SA 458 (CC) (11 March 2008

⁵(CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021

bears an onus to prove that there was a justification for the interference.”⁶

[54] Therefore, it “seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”⁷

[55] For actions to be justified in law, the jurisdictional factors must exist as stated in *Duncan v Minister of Law and Order*⁸:

“The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- (1) The arrestor must be a peace officer.
- (2) He must entertain suspicion.
- (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- (4) That suspicion must rest on reasonable grounds.”

[56] Of paramount importance is that once the jurisdictional requirements have been met, it is not the end. The peace officer has discretion whether or not to exercise the power conferred by the section, namely, to arrest the suspect. The discretion must be exercised properly. It is noteworthy that “the grounds upon which the exercise of such a discretion can be questioned are narrowly circumscribed.”

[57] Although the SCA in *Minister of Safety and Security v Sekhoto*⁹ was incorrect concerning s 43 of the Criminal Procedure Act, and it is rare for one to confidently pen that the Supreme Court of Appeal erred, it was correct to hold:

⁶ Supra 36.

⁷ Minister of law and order v Hurley para 66

⁸ 1986 (2) 805 AD

⁹ [2010] ZASCA 141; [2011] 2 All SA 157 (SCA)

“ In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest.”¹⁰

[58] Still focusing on the discretion, the court in *Sekhoto* held:

“A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof.”¹¹

Evaluation and Analysis of the evidence.

[59] There is no dispute that Sgt Mathebula is a peace officer. In terms of s 40(1)(b) of the CPA, she was required to entertain a suspicion that the arrestee committed an offence listed in Schedule 1. She testified that she did not know the offences listed in Schedule 1, nor whether assault GBH and robbery are included in Schedule 1. Devoid of such knowledge, it is difficult to see how she could have entertained a suspicion on reasonable grounds or how she could have effected an arrest in compliance with the Act.

[60] She failed to investigate possible exculpatory explanations made by the plaintiffs when they requested an examination of the pub's CCTV footage. Furthermore, it does not help her case that she was unaware of the existence of the Police Standing Orders G341.

[61] Even if I were wrong to cast doubt on her failure to appreciate what was expected of her when arresting without a warrant, she was simply oblivious to the fact that even where the jurisdictional factors have been met, she still needed to exercise her discretion and exercise it rationally. Her mantra was that in this case she had to arrest for the offences were serious.

¹⁰ Sekhoto at para28

¹¹ Supra para 49

[62] On the issue of exercising her discretion, the plaintiffs amended their pleadings to read:

“Alternatively, the plaintiff pleads that in the event that the court finds that the arrest of the Plaintiff was justified under the provisions of section 40 of the Act (which is denied) then the Plaintiff pleads that his arrest is unlawful as the arresting officer failed to exercise his discretion on whether to arrest the plaintiff and knew that the purpose of the arrest was not to take the Plaintiff to court alternative that the Plaintiff would not be prosecuted.”

[63] To demonstrate that Sgt Mathebula did not exercise her discretion at all, let alone in a rational manner, counsel posed the following questions:

Counsel: “But you still decided to arrest.”

Sgt Mathebula: “As I said, they committed a crime. A serious one.”

Counsel: “And you appreciated you have a discretion to arrest or not.”

Sgt Mathebula: “But on this one, I have to arrest. On the assault GBH and robbery.”

Counsel: “So you do not have a discretion on that?”

Sgt Mathebula: “No!”

[64] It was clear to me that she did not understand her role in bail proceedings, especially when cross-examined about police bail. On a balance of probabilities, a proper analysis of the full conspectus of evidence, in my view, permits only one conclusion that the defendant failed to comply with s 40(1) (b) of the CPA. Consequently, the arrest and detention were unlawful.

[65] The next question is the continued arrest after appearance in court. Focusing on subsequent detention, the court in *De Klerk v Minister of Police*¹² held:

“[62] the deprivation of the liberty, through arrest and detention, is per se

¹² [2019] ZACC 32

prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was such cause for the later deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the legal principles of legal causation, having regard to the applicable tests and policy consideration. This may include a consideration of whether a post appearance detention was lawful. It is these policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.”

[66] During the plaintiffs’ first appearance in court, on 26 November 2020, Sgt Mathebula did not inform the public prosecutor that she was not opposing bail; otherwise, the prosecutor would have mentioned that in her testimony. The issue of bail was first addressed when she was already on leave on 9 December 2020. Further examining the post-court detention, the court in *De Klerk* held:

“[81] Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant’s further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala’s knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her,

and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the Magistrate do not amount to a fresh causative event breaking the causal chain."

[67] Sergeant Mathebula knew that the plaintiffs would be further detained after their court appearance, but for her unlawful arrest of the plaintiffs, they would not have been detained. She accepted this consequence of the continued detention of the plaintiffs. Therefore, I find that the continued detention of the plaintiffs after their court appearance was unlawful.

Quantum

[68] In the matter of *Minister of Safety and Security v Tyulu*¹³, Bosielo AJA 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 it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to our awards made in previous cases to serve as a guide,

¹³ 2009 (5) SA 85 SCA

such an approach if slavishly followed can prove to be treacherous.”¹⁴

[69] In order to establish the monetary value for the deprivation of one’s Bill of Rights, several factors must be considered, including those outlined in Visser & Potgieter, Law of Damages, third edition, pages 545–548.

“In deprivation of liberty, the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bona*. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or ‘malice’ on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse and, according to some, the view that the action *iniuriarum* also has a punitive function.”

[70] To arrive at a just and equitable solatium, it is essential to have a helicopter view of the entire case. First, one must consider the factors that led to the deprivation of liberty and assess what occurred during the deprivation of liberty. Finally, the circumstances that led to the termination of the deprivation of liberty need to be evaluated.

[71] In considering the factors that led to the deprivation of one’s liberty, the why, how, where, and when are some of the questions to be examined. The alleged reasons

¹⁴ Supra para 26

for the deprivation, the why. Where the plaintiff was arrested is also one of the important factors, be it at home in front of his or her children, or at work in front of his or her colleagues. And how he was arrested. Each case is unique.

[72] When examining what occurred during the deprivation of liberty, the list is endless. It includes incidents such as the abuse suffered in the cells, starvation, the period spent in custody, the plaintiff's age, and the like.

[73] Finally, the factors that led to the termination of deprivation must be assessed, such as whether the plaintiff was the author of his misfortune, or the plaintiff faced trumped-up charges which were eventually withdrawn, *nulli prosequi*, or he or she was acquitted of them.

[74] In justifying her submission that the plaintiffs should be awarded R800 000.00 each, counsel for the plaintiffs referred this court to the following matters:

In *Moloi v Minister of Police* (216/2016) [2023], the plaintiff was employed at the SAPS. He was arrested in front of his colleagues and community members. He had to undress into civil clothes in front of female colleagues. He was incarcerated for 66 days. The plaintiff was awarded general damages of R550 000-00. Adjusted for inflation, this is approximately R583 049-33 in 2024 money.

In *Pheloane v Minister of Police* (1359/14) [2018] ZANWHC 14 (24 May 2018), the plaintiff was arrested and detained for 55 days. He was kept in appalling circumstances. He was awarded R350 000-00 (approximately R472 529-98 in 2024).

In *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (Ck), the 65-year-old plaintiff was arrested and detained for 49 days without justification. He was awarded R90 000-00 (approximately R271 031-85 in 2024).

In *Links v Minister of Safety and Security and Another* 2015 (7K6) QOD 62 (ECP), the 27-year-old plaintiff was arrested and detained for nearly 3 months.

He was awarded R250 000-00 (approximately R395 317-73 in 2024).

In *Woji v Minister of Police* 2015 (7K6) QOD 95 (SCA), the plaintiff was arrested and detained for 13 months. He was awarded R500 000-00 (approximately R790 635-45 in 2024).

In *Richards v Minister of Police* 2015 (7K6) QOD 206 (GJ), the 23-year-old plaintiff was arrested and detained for 115 days. He was awarded R500 000-00 (approximately R790 635-45 in 2024).

In *Payi v Minister of Police and Another* (2063/2019) [2024] ZAECPHC 15 (22 February 2024), an amount of R900 000-00 was awarded for the plaintiff who was in custody for 32 days.

[75] The defendant's counsel submitted that an amount of R300 000.00 is appropriate under the circumstances. She referred the court to the matter of *Mahlangu and Another v Minister of Police* 2021(7) BCLR 698(CC), in which the plaintiffs were arrested for 8 months. They were awarded an amount of R550 000 and R500 000.00, which currently translates to R670 000.00.

[76] In *Minister of Safety and Security vs Seymour* 2006 (6) SA 320 (SCA), the court, at paragraph 17, held:

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that."

[77] I have considered that the plaintiffs were arrested at work and in front of their employer. At Weirbrug, the plaintiffs did not have a bath for almost three days as the shower was not working. The conditions in the cells were atrocious, and the cell they were kept in was dirty, lacked blankets, and the sponge used for sleeping was thin and filthy. There was no hot water, and the toilet did not work.

It must have been humiliating to be escorted to the toilet every time one wanted to visit it.

[78] The second plaintiff has a medical condition, and when his medication ran out, he was not assisted with medication. He had to consume food contrary to his doctor's instructions.

[79] I have factored in that they apologized to the complainant and offered to pay him R2000.00. Additionally, I am mindful of that a daily mathematical computation of the amount to be awarded is fraught with pitfalls and has been correctly jettisoned¹⁵. To me, a lump sum figure is more appropriate than segmenting the awards into arrest, detention, and post-court appearance detention, which tend to lead to overcompensation. That said, I am of the view that the amounts of R500 000.00 for the first plaintiff and R530 000.00 for the second plaintiff are appropriate.

[80] With regard to interest, the plaintiffs sought the defendant to be held liable for interest at a rate of 7% per annum a tempore mora from the date of demand, being 29 April 2021, to the date of final payment. I am of the view that it is just to order that the defendant should be held liable for interest from the date of judgment to the date of final payment. Section 2A (5) of the Prescribed Rate of Interest Act 55 of 1975 reads: "Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

[81] In the matter of *Minister of Police v Khedama*,¹⁶ the court held:

"The common law principle was rendered obsolete by section 2A of the PRI Act which states that interest runs from date on which payment of the debt is claimed by service of demand or summons, whichever date is earlier, subject

¹⁵ Motladile v Minister of Police [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) para 17.

¹⁶(AR259/2022) [2024] ZAKZPHC 23 (18 March 2024)

to the court's discretion.[17] Section 2A(5) of the PRI Act provides the court with a discretion to 'make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run'."

Conclusion

[82] I find the defendant liable for the unlawful arrest, detention, and post-court appearance detention of the plaintiffs. It is trite that costs follow the result, and I see no reason to veer off that well-trodden path.

[83] This case leaves a sour taste in the mouth. I cannot help but imagine a situation where one stabs someone and then pays him or her to drop the charges with the blessings of the prosecutor and the court. Later, more than half a million rand is awarded to one for the state's infringement of one's s 12(1)(a) constitutional rights. At the same time, the victim is left in the lurch, or, in this case, his constitutional right to bodily and psychological integrity is worth R2000.00. Surely, there is a crying need to develop the law to protect the constitutional rights of victims, lest some rights become more equal than others.

ORDER

1. That the defendant is ordered to pay to the first plaintiff the sum of 500 000.00 and the second plaintiff the sum of R550 000.00 for the unlawful arrest, detention and post-court appearance detention.
2. That the defendant is liable for interest on the amounts of R500 000.00 and R550 000.00 at a rate of 7% per annum a tempore mora from the date of judgment, being 13 August 2025, to the date of final payment.
3. That the defendant pays the plaintiffs' costs of suit on the high court scale, including costs of counsel on scale B together with interest thereon from 14 (fourteen) days after taxation of the plaintiff's costs to date of payment.



M. P. MOTH
JUDGE OF THE HIGH COURT,
PRETORIA

Date of hearing: 14 & 16 October 2024, 24 & 25 March 2025, and
Heads of Argument 6 May 2025.

Date of judgment: 13 August 2025

APPEARANCES:

For the Plaintiffs:	Adv L. Swart
instructed by:	JJ Geldenhuys Attorneys
For the Defendant:	Adv T. Pilusa
instructed by:	State Attorney, Pretoria