Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG

CASE NO: 20/2023

In the matter between:

FELICIA LONGMAN **PLAINTIFF**

and

MINISTER OF POLICE **DEFENDANT**

DATE JUDGMENT RESERVED : **29 NOVEMBER 2024**

DATE OF JUDGMENT : **15 JANUARY 2025**

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **15 January 2025 at 10h00.**

ORDER

(i) The defendant is ordered to pay the plaintiff the amount of R 40.000.00 together with interest at the prescribed rate from date of service of summons to date of payment.

(ii) The defendant shall pay the costs of suit on a party and party scale as prescribed in the High Court tariff.

JUDGMENT

REDDY J

Introduction

[1] The plaintiff instituted a delictual action against the defendant, the Minister of Police, pursuant to her warrantless arrest, for her unlawful arrest and detention from 12 May 2022 (at approximately 10h00) to 13 May 2022(at approximately 11h00). The action was defended. The defendant pleaded that the arrest of the plaintiff was justified in terms of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977, ("the CPA"). There was no separation of liability and quantum within the context of Rule 33(4) of the Uniform

Rules of Court, ("the Rules"). Consequentially, the action encompassing lability and quantum were determined conjunctively.

The defendant's case

[2] On 12 May 2022, Sergeant Jacobs, ("Jacobs"), received Vryburg docket bearing CAS 57/05/2022. The docket included the statement of the complainant, Catherine Tabe, ("Tabe") a medico legal report and the investigation diary, ("the SAPS 6"). Jacobs perused same. Jacobs contended that certain aspects of the Tabe's statement warranted further investigation to determine "really what happened."

[3] To achieve this purpose, Jacobs proceeded to Tabe's premises where further investigation was conducted. Significantly, no additional statement was deposed to by Tabe. The relevance of same will become apparent. Tabe then pointed out the suspects which included the plaintiff. After introducing himself to the suspects (including the plaintiff), Jacobs executed the arrest of all suspects in the presence of female Sergeant English. The three accused were arrested on allegations of kidnapping and assault with intent to do grievous bodily harm. Jacobs then read the rights of the accused in terms of the section 35 of the Constitution. The accused were then transported to the SAPS at Vryburg.

[4] The suspects were detained in the holding cells. According to the cell commander, the female cells were inspected and found to be in humane state to serve the purposes of detention without starving off the rights of detainees.

The plaintiff's case

[5] The plaintiff confirms her arrest and that of her two cohorts. It is so that all three were transported to the SAPS Vryburg, where the usual processing took place. This included the taking of fingerprints and culminated with the constitutional rights of all being explained. Thereafter, they were escorted to the holding cells. Whilst the holding cells was not occupied, it was not fit for humane detention.

[6] The conditions of detention can be succinctly set out as follows. A terrible odour permeated the cell which emanated from a leaking latrine, which flowed onto the cell floor. When the latrine was to be used, there was no privacy. Additionally, the cell was cold and there was an absence of hot water. The plaintiff was given a blanket with no sponge. Furthermore, the shower was not working.

Legal principles

[7] The defendant admitted the arrest and detention. Consequently, the defendant bore the onus of proof. This then required of the defendant to justify the lawfulness of the arrest and the subsequent detention of the plaintiff on a balance of probabilities. This much was conceded to by counsel for the defendant. This concession was correctly made and in accordance with the principles enunciated in *Minister of Law and Order and Others v Hurley and Another* [1986] SA 568[A] where the following was said:

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person

who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[8] In *JE Mahlangu and Another v Minister of Police* 2021 ZACC 10 at paragraph 32 this position was reiterated as follows:

"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 unlawful and the defendant bears the onus to prove that there was a justification for interference."

[9] A good point of departure would be to examine the purport of the empowering provision namely, section 40[1] [b] of the CPA as pleaded by the defendant. It reads as follows:

[1] A peace officer may without warrant arrest any person-

[a].....

[b] whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

[10] In *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141, [2011] 2 All SA 157[SCA], 2011[5] SA 367[SCA] at paragraph 6 the SCA said the following in respect of the jurisdictional requirements of the section 40[1][b] of the CPA:

"As was held in Duncan v Minister of Law and Order, the jurisdictional facts for a defence are that [i] the arrestor must be a peace officer; [ii] the arrestor must entertain the suspicion must be that the suspect[arrestee] committed an offence

referred to in schedule 1; and [iv] the suspicion must rest on reasonable grounds. '

Discussion

[11] The warrantless arrest of the plaintiff according to Jacobs was founded on two statements that were contained in the docket. The first of Tabe and the medico legal report.

[12] The evidence of Jacobs was unsatisfactory in material aspects. The statement of Tabe given its broad sweeping allegations and ambiguity should have necessitated further investigation prior to the arrest of the plaintiff. The contention of Jacobs that within the context of criminal process further investigation undoubtedly can continue is unquestionably. The jurisdictional requirements that govern an arrest are markedly different from the investigative process that may precede and continue post the execution of an arrest. In the circumstances of this case, the arrest of the plaintiff was to be founded on statutory delineated jurisdictional grounds. In this regard, the failure of Jacobs to have recorded a supplementary affidavit from Tabe is telling. More peculiarly, Jacobs did not find an additional affidavit explicating these events. See: *Minister of Safety & Security v Sekhoto* 2011 (1) SACR 315 at page 327, para 29

[13] It is a hallow principle of our law that the jurisdictional requirements relied on by the section 40(1)(b) of the CPA must be shown to exist at the time Jacobs executed the arrest on the plaintiff. *Ex post facto* considerations cannot be applied to justify the arrest retrospectively.

[14] It is common cause that Jacobs is a peace officer in the employ of the defendant. Further, it is indisputable that assault with intent to do grievous bodily harm and kidnapping are offences cited in Schedule 1 of the CPA.

[15] On the conspectus of the evidence that was before Jacobs, Jacobs could not have reasonably suspected that the plaintiff to have committed an offence referred to in Schedule 1. This was a fissure in the case for the defendant. The statement of Tabe at best was vague. It failed to delineate essential details of the alleged perpetrators. The repetitive use of the word **"they"** was woefully inadequate to have inferred alleged unlawful on the part of all the suspects.

[16] Moreover, as can be gleamed from the statement the details that surrounded the alleged commission of these offences, are not described with sufficient particularity. Simply put, the roles that were played by each of the suspects are not described. Notably, in the Tabe's report to the examining medical examiner, she stated that whilst walking in the street she was attacked by two women. Jacobs effected an arrest on three women.

[17] Jacobs attempted to reinforce his decision to arrest the plaintiff by referring to certain conversations that he may or may not have had with the plaintiff. Extra curial statements with the plaintiff as then

accused with regards her presence or absence at the crime scene is generally inadmissible. Even if these statements were admissible and accurate it is peculiar that the plaintiff's exculpatory statements denying any involvement in any criminal allegations were not afforded due weight. Peace officers who act within the purview of section 40[1][b] of the CPA should investigate exculpatory explanations by a suspect before they can form a suspicion. See: *Louw and Another v Minister of Safety and Security and Others* 2006 [2] SACR 178 [T at 184, *Liebenberg v Minister of Safety and Security* 2009, ZAGPPHC 88]. To this end, when the plaintiff attempted to proffer an explanation, she was dismissed by Jacobs.

[18] When an arresting officer has a suspicion, investigative steps should be pursued to determine the reasonableness of the suspicion. [*R v Heerden* 1958 [3] SA 150 71.

[19] In *Mabona v Minister of Justice* 1988 [2] SA 654 SEC the following was stated as regards suspicion:

> 'the reasonable man will therefore analyse and assess the quality of information at his disposal critically and will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion that will justify the arrest. This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based on solid grounds.' See: *Brits v Minister of Police and Another* (756/2020) [2021] ZASCA 161 (23 November 2021).

[20] On application of the law to the facts it could not be found Jacobs had a suspicion of any crime been committed based on the evidence at his disposal at the time the plaintiff was arrested. On the conspectus of the evidence, there existed no suspicion that the plaintiff committed an offence referred to in Schedule 1 of the CPA. The arrest of the plaintiff in the absence of a suspicion axiomatically renders the arrest unlawful. That signals the death knell for the case for the defendant as the jurisdictional factors set out in section 40[1][b] of the CPA are symbiotic in nature.

Quantum

[21] In *Visser & Potgieter, Law of Damages Visser & Potgieter, Law of Damages*, 3ed Pages 545 – 548, the following factors are listed that can play a role in the assessment of damages:

> "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 (e.g. 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 *actio iniuriarum* also has a punitive function".

[22] There is no underscoring, that each case will be considered on its own unique particularities. The conditions in which the plaintiff was detained have been alluded to. It needs no regurgitation.

[23] In the *Minister of Safety and Security v Tyulu Minister of Safety* (327/08) [2009] ZASCA 55 (27 May 2009) Bosielo JA postulated on issues a court should take into consideration when assessing what would be an appropriate amount of damages in matters of this nature as follows:

> "In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not 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 made 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 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 of the facts of the particular case and to determine the quantum of damage on such facts (Minister of Security and Seymour 2006 (6) SA 320 (SCA) at para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) [2009] ZASCA 39 paras 26-29)."

[24] Paramount in the exercise of a court's discretion judicial discretion is balance. Regarding balance Holmes J (as he then was) stated in *Pitt v Economic Insurance Company Limited* 1957 (3) 284 (D) at 287E that:

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense." See: *De Jongh v Du Pisani N.O. 2005 (5) SA 547 (SCA) para 60.*

[25] In terms of section 12(1) of the Constitution, everyone has the right to freedom and security of person. The right to freedom and security is further sub classified in section 12(1) (a) –(e). There is no underscoring that freedom is a precious right that must be jealously guarded. See: *Thandani v Minister of Law and Order* 1991[1] SA 702 [E] at 707, *Masisi v Minister of Safety and Security* 2011 [2] SACR. In *Olgar v Minister of Safety and Security*, 2008 JDR 1582 (E) at paragraph 16, Jones J observed that a just award of damages should express the importance of the constitutional right to individual freedom. At the same time, the award should properly consider the facts of the case, the personal circumstances of the victim, and the nature, extent, and degree of the affront to his or her dignity and sense of personal worth. See: *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) at paragraph 22, Masiteng v Minister of Police (A139/2022) [2023] ZAFSHC 175 (12 May 2023) at paragraph 13.

[26] Viewing the facts of the case, as well as recent awards made by our courts in comparable cases and the steady decline in the value of money, I believe that justice would be done were I to award the plaintiff an amount of R40 000.00, (forty thousand rand).

Costs

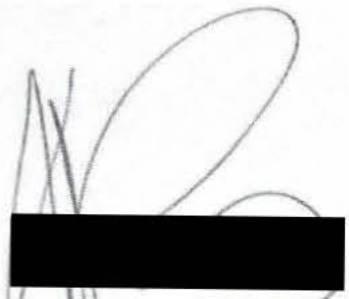
[27] The plaintiff should not be rendered out of pocket due to pursuing this matter, the normal rule on the issue of costs should apply. Although the quantum falls within the jurisdiction of the Magistrate's Court, the plaintiff was, in my view, justified in seeking redress in the High Court. It is important that our courts accord to the deprivation of a person's liberty when determining the scale on which to award costs. In *De Klerk v Minister of Police* [2018] ZASCA 45; [2018] 2 All SA 597(SCA); [2018] (2) SACR 28(SCA) paras 18 & 55, which also concerned an unlawful arrest and detention, the Supreme Court Appeal contended that although the total quantum awarded [R30 000] is far below the jurisdiction of the High court, the appellant was justified in approaching the high court because the matter concerned the unlawful deprivation of his liberty. See: *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) at para 26. Accordingly, I will award costs on the High Court scale.

Order

[28] I accordingly make the following order:

(i) The defendant is ordered to pay the plaintiff the amount of R 40.000.00 together with interest at the prescribed rate from date of service of summons to date of payment.

(ii) The defendant shall pay the costs of suit on a party and party scale as prescribed in the High Court tariff.



A REDDY
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA ,NORTH WEST DIVISION,
MAHIKENG

APPEARANCES

Date of Hearing:	05 November 2024
Date written heads submitted by plaintiff:	28 November 2024
Date written heads submitted by defendant:	28 November 2024
Date of Judgment:	15 January 2025
Counsel for Plaintiff:	Adv D. Smith
Attorney for Applicant:	Nienaber & Wissing Attorneys 10 Tillard Street Mahikeng
Counsel for Defendant:	Adv Lehabe
Attorneys for Defendant	State Attorneys Cnr Sekame Road 1st Floor, East Gallery Megacity Complex Mmabatho