



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 505/2023

In the matter between:

K[...] M[...]

Applicant

and

MINISTER OF POLICE

Respondent

JUDGMENT

ZONO AJ:

Introduction

- [1] The plaintiff instituted action proceedings against the defendant for damages arising from plaintiff's assault, arrest and detention that took place on the 31st December 2020 by the members of the South African Police Service. It is averred that the defendant is vicariously liable for the delicts committed by the members of South African Police Service acting

within the course and scope of their employment with the defendant. It is further averred that the police station in which these delicts took place is under the authority and control of the defendant.

- [2] The plaintiff avers that the members of the defendant failed to produce a valid warrant of arrest when they were effecting the arrest. The members should have considered to warn the plaintiff for court in terms of Section 56 of the Criminal Procedure Act 51 of 1977 (the CPA). The members stated as a reason for his arrest that the plaintiff has contravened the terms of the protection order, thereby exposing the complainant to imminent harm. The arresting officer has no reasonable ground to suspect that the plaintiff had contravened terms of the protection order. The plaintiff avers that there was no reasonable ground to suspect that the complainant in the domestic violence case would suffer imminent harm as a result of the breach.

- [3] With regard to the assault, the plaintiff avers that Sergeant Vazi and other members pushed him, used force and pepper sprayed him at Vulindlela Police Station. He was thereafter taken to NU1 Police Station where he was detained in the cells over the weekend until the 04th January 2021 when he first appeared in court and was denied bail. After he was denied bail he was taken to be further detained at East London Correctional Service in Westbank. The plaintiff pleads that charges against him were withdrawn on numerous occasions but was released only on 24th August 2021, which period total seven months in custody. The conditions in the cells were plagued with poor ventilation, lack of sanitation, inadequate ablution facilities, lack of privacy etcetera.

[4] The defendant pleads that the arrest was effected on the day in question with a warrant of arrest, which was also discovered and admits that the members were acting within their course and scope of their employment with him. The plaintiff was arrested and detained for contravening the provisions of section 17(1) (a) read with section 1, 5 and 6 of Domestic Violence Act of 1998. The defendant further pleads that the plaintiff was in lawful custody in terms of Section 39(3) and 50 of the CPA. The plaintiff was arrested to bring him to justice. He was brought to court within the requisite 48 hrs period¹. Subsequent remands were made by the court at the instance of the prosecution. With regard to the assault, the defendant pleads that the members used a minimum force to overcome plaintiff's aggressiveness and to defend themselves. The plaintiff was argumentative and uncooperative. He refused to have his finger prints taken. It is denied that plaintiff's charges were withdrawn on several occasions. The plaintiff abandoned his bail application. He was indeed released from custody on 24th August 2021.

[5] During evidence it became common cause that the plaintiff was arrested on 31st December 2020 and his first appearance was on 04th January 2021. The plaintiff was arrested for the alleged contravention of the terms of the protection order. He was released on 24th August 2021 from custody. Force was used by the members. In what follows I deal briefly with issues that were disputed in evidence.

[6] The defendant disputed the existence of the protection and the warrant of arrest flowing therefrom. However, both documents were discovered and

¹ Section 35(1)(d)(i) of the Constitution; Section 50(1) of Criminal Procedure Act 51 of 1977.

made available for use by the court. During cross examination the plaintiff was constrained to admit that no withdrawal of charges was ever granted by the court. Instead, there is a clear record that he abandoned his bail application. I will revert to this later in this judgment. An issue that appear to be dispositive of the claim of arrest and detention is the one around service of the protection court order. The matter was set down for determination of both merits and quantum.

Assault

- [7] Assault consists in unlawfully and intentionally applying force to the person of another directly or indirectly; or threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat². Snyman³ defines assault as follows:

“Assault consists in unlawfully and intentionally (a) applying force, directly or indirectly, to the person of another; or (b) inspiring a belief in another person that force is immediately to be applied to him.”

An assault is committed by a positive act or a threat. It can be committed by a physical act of violence or by inspiring a belief that a force is to be applied. The onus vests with the plaintiff.

- [8] The basic rules governing the incidence of the onus of proof have been set out in the case of *Pillay v Krishna*⁴. The three rules are: the case of *Pillay*⁵ The three rules are the following:

² LAWSA, Volume 6, Page 248 Para 247

³ CR Snyman

⁴ *Pillay v Krishna and another* 1946 AD 946 at 951-2

⁵ *Pillay v Krishna and Another* 1946 AD 946 at 951-2

- has “(a) if one person claims something from another in court of law, then he to satisfy the court that he is entitled to it.
- (b) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quo ad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.
- and
- (c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.”

[9] In *National Employers General Insurance Co Ltd*⁶ Eksteen AJP had this to say:

“...Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of credibility of the witness will therefore be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false”.

[10] The onus of proving the elements of the assault is on the plaintiff. Both parties were *ad idem* about the fact that the plaintiff bears the onus of proof in respect of the claim of the assault. Although there is also a claim arising from plaintiff’s arrest and detention in respect of which onus of proof lies with the defendant, parties agreed that a duty to begin is on the plaintiff. The court accepted that approach⁷. Both in the pleadings and in evidence, the parties are *ad idem* that the members of the South African

⁶ *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 E-G.

⁷ Rule 39(13) of the Uniform Rules of Court (URC).

Police Service committed assault. The issue for determination is whether that assault was justified.

- [11] The defendant, as indicated above, posits a version, as will elaborately be dealt with hereinunder, that the members used a minimum force to overcome plaintiff's aggression and violent advances with a view to escape or flee. Although not specifically mentioned the facts of this case demonstrate that the defendant relies on the provisions of Section 39(1) and 49(2) of CPA. In *Bato Star*⁸ O'Regan J Held that:

“27. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative”.

This judgment gave Constitutional stamp to a plethora of judgments that were followed before our constitutional dispensation⁹.

- [12] Section 39(1) of CPA provides that:

“(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body”.

- [13] Having said the above section 49(2) of CPA provides thus:

“(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing....”

⁸ *Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 40 (CC); 2004 (7) BCLR 687 (CC) Para 27.

⁹ *KeHeringham V City of Cape Town* 1934 AD 80 at 90; *Yannakou v Apollo Club* 1974 (1) SA 614 (a) 623 F-H.

[14] The correlation between section 39(1) and 49(1) of CPA underscores the necessity of application of force to overcome the resistance or to prevent the suspect from fleeing. The force must be used as a tool to effect the arrest and to subdue the suspects aggressiveness and attempt to flee. The test of proportionality balances the nature and degree of the force used and the threat posed by the suspect to the safety and the security of the police officers¹⁰. The test seeks to ensure that the purpose of arresting the suspect is achieved. It is fundamentally important that the purpose of use of force is not punitive or retaliatory. Should the force use be punitive or retaliatory that would constitute an excess that is legally impermissible.

[15] Lastly, the use of force in terms of the statute must be to enable the police officer to achieve the Constitutional objects ¹¹ of the police service. Section 205(3) of the Constitution provides that:

“3. *The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*

[16] In paragraph 6 of the plea of the defendant makes the following averments:

“6.1 *The defendant pleads that:*

6.1.1 *Upon arrival at Vulindela Police Station, plaintiff was uncooperative, argumentative and aggressive towards members of the South Africa Police Service (the members).*

6.1.2 *The members had to use a minimal degree of force to defend themselves, alternatively restrain the plaintiff.*

6.1.3 *The defendant admits its members used pepper spray in her/his/ their efforts to defend themselves, alternatively to restrain the plaintiff” (sic).*

¹⁰ **S v Walters** 2002 (2) SACR 105 (CC) Para 21.

¹¹ Section 205 (3) of the Constitution.

[17] For purposes of this topic, I will sift the evidence that relates to the assault. The plaintiff testified that when the plaintiff became aware that he was being arrested at Vulindlela Police Station, he asked Sergeant Vazi about the case he was involved in, investigated by the same Sergeant Vazi. Sergeant Vazi became angry and sought to handcuff him with cuffs fixed on the wall. He refused to be handcuffed by pulling his arm back as Sergeant Vazi at that time had already grabbed his hand. The scuffle ensued. In the midst of the scuffle another female Police Officer came to assist Sergeant Vazi and applied pepper spray on him and the police officers ultimately managed to handcuff him. The plaintiff confirmed that he refused to have his fingerprints taken.

[18] Sergeant Vazi makes common cause with parts of the plaintiff's version. He testified that on his arrival at Vulindela Police Station with the plaintiff, he announced to the police officers present thereat that the plaintiff was under arrest. He further sought section 35 warning form and an arrest register to process the arrest of the plaintiff. It is at that stage plaintiff's attitude and demeanour changed and became belligerent. According to Sergeant Vazi the plaintiff charged towards him as he was confronting him about another case. Sergeant Vazi was investigating in which plaintiff was a witness.

[19] He sought to handcuff him, and scuffle ensued. Sergeant Vazi felt overpowered by the plaintiff and he called for assistance from the two female police officers who were on the other side of the office. At that time the plaintiff wanted to overpower Sergeant Vazi so that he may escape or flee. Sergeant Nongqele came with a pepper spray and handcuffs and used pepper spray to calm the plaintiff. The plaintiff was

successfully handcuffed. They thereafter managed to control the plaintiff and process his arrest, save for the fact that they were unable to take plaintiff's finger prints as he was refusing.

[20] Sergeant Nongqele confirmed that there was a scuffle between Sergeant Vazi and the plaintiff and she came to assist as the plaintiff was saying he could not be arrested by Sergeant Vazi. Sergeant Vazi and Nongqele agreed to apply the pepper spray to calm the plaintiff down as he was seemingly overpowering Sergeant Vazi. Pepper spray was applied and plaintiff was handcuffed.

[21] Plaintiff's evidence and that of two defendant's witnesses demonstrate that there was application of force and a pepper spray was used to overcome the plaintiff to subdue to the arrest. The evidence confirms that there was application of force onto the plaintiff. The remaining issue for determination is whether the assault was justified in terms of the law. It is also important to allude to the fact that the plaintiff emphasized that he was never hit by the police officers, but was pepper sprayed.

[22] If plaintiff's version is anything to go by, that he was cunningly taken to the police station by Sergeant Vazi, and became aware of the arrest when he was already at the police station, it logically makes sense that out of disappointment and feeling conned/ tricked by Sergeant Vazi that he would rapidly change his attitude and demeanour. Both the plaintiff and Sergeant Vazi mentioned that the plaintiff enquired at the police station about the case Sergeant Vazi is investigating where the plaintiff is a witness.

[23] I am of the view that the plaintiff heard for the first time in the Police Station that he was being arrested. That view is supported by the fact that, when the plaintiff was interacting with Sergeant Vazi at his home, he requested to be given opportunity to take with him a document that relates to the other case Sergeant Vazi was investigating. That piece of testimony is not gainsaid. The rhetoric question is; why would the plaintiff be allowed to take a document that is totally unrelated to the case for which he was arrested if at his home there was no talk about that case. It is highly possible that the plaintiff got infuriated by Sergeant Vazi's deceit. The common cause fact that at the police station Sergeant Vazi and plaintiff conversed about the other case in which the plaintiff is involved is in synch with and rhymes well with what Sergeant Nongqele said that the plaintiff said he could not be arrested by Sergeant Vazi.

[24] He might probably have said that in the context of his disappointment and anger arising from Sergeant Vazi's trickery. Those words that he could not be arrested by Sergeant Vazi might possibly have been accompanied by his action of attempting to leave the police station. It is gainsaid that the plaintiff resisted or attempted to flee the arrest. The fact that the plaintiff is said to have co-operated from his home to the police station is not insignificant. He co-operated because he probably was not aware of his arrest until the time when he was being processed at the police station.

[25] In *Stellenbosch*¹² Nienaber JA held:

¹² *Stellenbosch Farmers' Winery Group Ltd v Another v Martell and others* 200 (1) SA 11 (SCA) at Para 5.

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

- [26] On the conspectus of all this, the probabilities are that the plaintiff got belligerent and sought to resist his arrest and at the same time attempted to leave the police station. It is that reaction that triggered the application of force and pepper spray. It is my considered view that there is no way the plaintiff could have been arrested, except to apply the force for purposes of arrest and bringing him to justice. It is my considered view that the force was proportional to the threat and force used by the plaintiff to pave way for his flight. I find solace for this view on the fact that there is no evidence that there was further force that was used on the person of the plaintiff after he was successfully handcuffed. No injuries were reported to have been inflicted on the body of the plaintiff. The plaintiff himself

categorically stated that he was not hit by the police officers, but was pepper sprayed.

[27] In the amalgam of this I come to a conclusion that plaintiff's assault would have been in terms of Section 39(1) and 49(2) of CPA. However, a brutal question, that depends on the next topic for an answer, is whether provisions of section 39(1) and 49(2) of CPA are applicable if the arrest is unlawful. It must generally be accepted that a person can lawfully resist an unlawful arrest and as a corollary provisions of section 39(1) and 49(2) of CPA would not come to the aid of the arresting officer and those who are assisting him. These provisions are applicable only if the arrest is lawful. This now drives me to the next topic of arrest and detention. I will come back to this topic later in this judgment.

Unlawful Arrest and Detention

[28] It is apparent from the charge sheet that the plaintiff was arrested under CAS No 18/12/2020, Case Number of which was A18/2025. The annexure to the charge sheet is worded thus:

"That the accused is/are guilty of the crime of contravening the provisions of section 17(1) read with section 1.5, 6, 7 and 17 of Domestic Violence Act, Act 116 of 1198 contravention of Protection order.

In that a protection order was issued on 24-07-2018 at Mdantsane Court, in terms of which the said accused was prohibited and/or ordered and /or directed to: - not assault, insult, abuse, harass, threaten or intimidate T[...] M[...] in any way possible.... And this that the protection order was duly served on the accused and is still in force and that the accused did upon or about 05-12-2020 and at or near St Mary Newlands in the District of East London wrongfully and unlawfully contravened a prohibition and/or condition a prohibition order against him/her in that the accused: - insulted the complainant calling her as and shit" (sic).

[29] It is now plain that the court order that is alleged to have been contravened was granted on the 24th July 2018. The record shows that the 24th July 2018 was a return day where final court order was granted. The domestic violence proceedings were instituted on the 11th June 2018 and on the 13th June 2018 the plaintiff was served with papers calling upon him to show cause on the 24th July 2018 why a final order cannot be granted. It appears that a final order was granted on the 24th July 2018 *inter alia*, prohibiting the plaintiff from physically and verbally abusing the complainant and further prohibiting any other controlling abusive behaviour. The plaintiff was prohibited from committing any act of domestic violence or to enlist the help of another person.

[30] Section 6(5) of the Domestic Violence Act 116 of 1998 provides thus:

“(5) On the issuing of a final protection order the court must direct that—
(a) the original of such order must be served on the respondent within 48 hours or as soon as reasonably possible; and
(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8 (1) (a), must be served on the complainant, in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court.”

[31] Section 7 of the Act provides that:

“(7) Subject to the provisions of sections 5C (3) (c) and 7 (7) (b), a final protection order issued in terms of this section—
(a) is of force and effect from the time that the existence and content of the order have been served on the respondent; and
(b) remains in force until it is set aside, and the execution of such order is not automatically suspended upon the noting of an appeal.”

The meaning of the word *serve* is subsumed in the definition of the word *deliver* in the Magistrates' Courts Rules¹³ which is defined to mean:

“To file with registrar or clerk of the court and serve a copy on the opposite party either by hand-deliver, registered post, or where agreed between the parties or so ordered by court, facsimile or electronic mail”.

Section 6(5) of the Act contemplates service of the copy of the court order by the clerk of the court, sheriff or peace officer identified by the courts. The court identified in the final order the peace officers in the following words:

“A copy of this order and interim protection order as well as the warrant of arrest for the respondent must be forwarded to the Vulindela Police Station.”

These documents can only be forwarded for a singular purpose, which is to serve the documents in terms of section 6(5) of the Act; otherwise forwarding documents to the police station would be absurd¹⁴.

[32] There is no evidence or averment that shows that the final protection order granted on the 24th July 2018 was served in terms of the Act and or Magistrates Court Rules¹⁵. The only indication of service available in the record is in respect of the domestic violence papers which were served on the 13th June 2018 by Vuyisile Nkalo who is recorded as an empowered officer. The service of domestic violence papers was obviously before the return date of the 24th July 2018 when the final order was granted.

¹³ Rule 2 of the Magistrate's Courts Rules.

¹⁴ **SATAWU and another v Garvas and others** 2013(1) SA 83 (CC); 2012 (8) BCLR 840(CC) Para 37; **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) Para 28

¹⁵ Rule 9 of the Magistrates Court Rules

[33] The plaintiff, throughout his oral testimony denied knowledge of the protection order, even when he was shown same in the record during cross examination. That denial is underpinned by the following crucial fundamental averments set out in the amended particulars of claim:

“5.1.6 The arresting officer failed to produce a valid warrant of arrest, the protection order that was allegedly breached by the plaintiff and the affidavit regarding the contravention of a protection order, during the arrest of the plaintiff” (sic).

This drives me to the question of onus.

[34] In Hurley¹⁶ Rabie CJ held:

“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”.

It has long been firmly established in our law that every interference with physical liberty is *prima facie* unlawful. Once the claimant establishes that an interference has occurred, the burden falls upon the person causing the interference to establish a ground of justification¹⁷.

[35] Section 12(1) of the Constitution provides that:

“Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial”.

The conduct or action of the arresting officer was an affront to this constitutional right. This right may be limited¹⁸ in terms of law of general application to the extent that the limitation is reasonable and justifiable in

¹⁶ **Minister of Law and Order v Hurley** 1986(3) SA 568 (A) 589 E-F.

¹⁷ **Zealand v Minister of Justice and Constitutional Development and Another** 2008 BCLR 601 CC, 2008 (2) SACR 1 (CC) Para 25.

¹⁸ **Mbalela v Minister of Police** (1086/2018) [2025] ZAEC 8 (18 February 2025) Para 40.

an open and democratic society based on human dignity, equality and freedom¹⁹. The defendant is therefore constrained to justify the action of Sergeant Vazi who was an arresting officer.

[36] It is clear from plain meaning of the provision of section 7(1) of the Act that a final order shall be in force and effect from the time that order is served upon the respondent. The converse of that is that a final order shall not be in force and effect if it has not been served upon the respondent. The final protection order is of no force and effect if it has not been served upon the respondent. Simply put, the court order is not operational and executable. The non-operativeness of the order renders same not functional and accordingly not effective. It is in a dormant and inactive state.

[37] It is unequivocal that the plaintiff was arrested on the basis of a court order that was not operative. There cannot be a breach of a court order that is not in force or that is ineffective as a result of its dormant state. In effect no offence relating to breach has been committed if the court order was ineffective. The arrest on that basis was thus unlawful. The defendant has dismally failed to discharge an onus resting on his shoulders to show that the court order that was allegedly breached by the plaintiff was of force and effect. He would only do that by proving that service thereof was effected in terms of the law.

[38] The purpose of service of the court order is simple to advise the respondent of the contents of the court order. If a court order is not

¹⁹ Section 36(1) of the Constitution.

served, the terms thereof can hardly be known by the person who is expected to comply and obey it. The purpose of the service is to ensure that a person, when deciding to disobey the court order does that wilfully and with intention. Because a breach of a court order is akin to a contempt of court order, it requires that a person charged of disobedience was not only wilful; but was also intentional and deliberate in not complying or disobeying the court order.

[39] A little wonder why the prosecution against the plaintiff was stopped in terms of section 6(b) of CPA and the plaintiff was consequently acquitted. It is not far to seek, based on the above findings, that the prosecution realized that its case had no prospects of success on account of lack of service of the court order. I therefore come to a conclusion that the arrest of plaintiff by Sergeant Vazi was not only unlawful, it was also arbitrary.

[40] One vexing issue that required comment. I have alluded above that the plaintiff was tricked and deceived by Sergeant Vazi and ultimately lured to the Police Station where the plaintiff learned for the first time that he was under arrest. He was taken from his home under false pretences that he was going to deal with another matter. That conduct is antithetical to the ethos of our Constitution and the law. That conduct lacked the high standard of professional ethics contemplated in and by section 195 (1)(a) of the Constitution. This section leaves no room for the deceit and trickery. The police officer is expected to be upfront with the suspect and as part of his introduction inform the suspect of the real reason for his visit at his home.

[41] The plaintiff seeks damages for his detention. The plaintiff is entitled to the damages arising from his detention up to and including the date of his first appearance in court. However, the plaintiff seeks damages for his further detention post court appearance from the defendant. There is no evidence tendered to support the contention that the defendant was responsible for plaintiff's further detention after his first appearance. The prosecution and the court were central in the management of plaintiff's case during and after his first appearance in court. An opportunity was given to the plaintiff to apply for a bail and he abandoned that opportunity and the plaintiff proffers no explanation for that election. To be precise on the 03rd February 2021 the Magistrate's Court recorded as follows:

"Accused person before court, i/c Bail abandoned, accused asked questions, raising other issues that he was not charged and did not ask to be sent to bail court. Matter transferred back to A court. Court explained to no success"
(sic)

The investigating officer was excused. The record demonstrates that the plaintiff never had an intention of applying for bail. This is gleaned from the fact that the plaintiff stated on 03rd February 2021 that he never asked that the matter be sent to bail court.

[42] It is unequivocal that the plaintiff was not an innocent party in so far as his further detention, after his first appearance in court. He refused to get his finger prints taken. It was explained that finger prints are for purposes of profiling the accused. Without finger prints accused pending cases and previous convictions cannot be known. That information is crucial for determination of accused bail. The plaintiff therefore is obviously not entitled to damages arising from his detention after his first appearance.

His lack of cooperation and argumentativeness rendered him to be the author of his own misfortune.

Assault, Arrest and Detention

[43] I have found that plaintiff's arrest and detention up to the date of his first appearance were unlawful. I left the issue of assault hanging for this determination.

[44] Whilst it is plain that the plaintiff was assaulted by the members of the defendant, it is also established that such assault was meted out to subdue the plaintiff to the arrest. It is further accepted that such assault was proportional to the degree of threat and force the plaintiff was presenting. For that reason, the defendant seeks refuge to the provisions of sections 39(1) and 49(1) of the CPA. The first question now is: Are the provisions of section 39(1) and 49(1) of CPA available to the arrestor in circumstances where the arrest is unlawful?

[45] Those sections are meant to equip the police officers to discharge their duty in terms of the law. Arresting is part of their duty²⁰. These two prescripts aim at assisting the police officers to effect lawful arrest. It is inconceivable that the law can be used to break the law. A police officer who takes the law into his own hands cannot seek refuge to these provisions. The doctrine of legality, which is inextricably linked to the rule of law does not countenance contravention of the law²¹. The law cannot countenance contravention of the law. It is a basic principle of our

²⁰ Hiemstrar's Criminal Procedure, Page 5-21.

²¹ *Lester v Ndlambe Municipality* 2014 (1) ALL SA 402 (SCA); 2015 (6) SA 283 (SCA) Para 27 and 28.

law that a court can never lend its aid to the enforcement of an illegal act²². An assault committed by members of the South African Police Service with the sole purpose of effecting an unlawful arrest is unjustifiable. I accordingly come to a conclusion that plaintiff's assault by members of the defendant was unjustifiable and accordingly renders the defendant liable for damages arising therefrom. This leads me to the issue of quantum.

Quantum

[46] The plaintiff was arrested on 31st December 2020 and detained at the instance of the members of the defendant until 04th January 2021 when he was making his first appearance in court. The period of detention was four nights. The right to liberty is inextricably linked to human dignity²³. Unlawful arrest and detention constitutes an inroad into the freedom and right of an individual²⁴.

[47] Section 12 deals with freedom and security of the person. Importantly it provides as follows in relevant parts:

“Everyone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) to be free from all forms of violence from either public or private sources;*
- (d) not to be tortured in any way; and*

.....

(2) Everyone has the right to bodily and psychological integrity.....”

²² *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) Para 77.

²³ *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA); *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (SCA) Para 25.

²⁴ *Thandani v Minister of law and order* 1991 (4) ALL SA 904 (A).

Section 10 deals with dignity as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected”.

[48] In *Diljan*²⁵ Makaula AJA had the following to say:

“[18] The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in *Protea Assurance Co. Ltd v Lamb*:

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.’

[49] In *Tyulu*²⁶ the Supreme Court of Appeal held:

“[26] 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

²⁵ *Diljan v Minister of Police* (746/2021) [2022] ZSCA 103 (24 June 2022) 22 JDR 1759 SCA Para 18-19.

²⁶ *Minister of Safety and Security v Tyulu* 2009 (5) SA 58 (SCA); 2009 (2) SCAR 282 (SCA); 2009 (4) ALL SA 38 Para 26.

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 awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29)."

[50] A plaintiff is a male person who is described in the particulars of claim as having been born on the 05th October 1976. Apparently, he is staying at his home with other members of his family. No further personal circumstances of the plaintiff were made available to me. Circumstances outlined in paragraph 36 above fits four squarely in the determination of an award. He was arrested on 31st December 2020 when he was relaxing at home. He appeared in court on 04th January 2021. As alluded to above he spent four nights in custody before his first appearance. I have considered other comparable cases in this Division. An amount ranging from **R20 000.00** to **R25 000.00** has been granted in comparable case for a period not exceeding 24hrs. I therefore come to a conclusion that an amount of **R80 000.00** is appropriate as a compensation for plaintiff's arrest and detention from 31st December 2020 to 04th January 2021.

[51] With regard to assault, pain was inflicted upon the plaintiff by Sergeant Vazi and Nongqele. However, no injuries were sustained by the plaintiff. The pain was inflicted by means of a pepper spray which was used to

subdue the plaintiff to arrest. In the circumstances a compensation of **R20 000.00** for the assault is suitable.

[52] In the result I would make the following order:

1. The defendant is liable to pay to the plaintiff an amount of **R80 000.00** (*Eighty Thousand Rands*) in respect of his unlawful arrest and detention from 31st December 2020 to 04th January 2021.
2. The defendant is liable to pay plaintiff damages arising from his assault on 31st December 2020 in the amount of **R20 000.00** (*Twenty Thousand Rand*).
3. The defendant is liable to pay costs of suit.

A.S ZONO

JUDGE OF THE HIGH COURT(ACTING)

APPEARANCES:

For the Plaintiff : Adv TEKO

Instructed by : Msitshana Incorporated

No. 72 Cnr Hill and High Street

Office 114, Old Sanlam Building

Makhanda

Tel: 046 940 0634

Ref: Mr Msitshana/Buncoko/M[...]

Email: msitshanaincorporated@telkomsa.net

For the Defendant :Adv JOZI

Instructed by :SHENXANE,N INCORPORATED

87 High Street

Office 28

Fidelity Building

Makhanda

Tel: 072 869 7024/ 064 502 0575

Email: shenxanenkulie@gmail.com

Matter heard on : 25 August 2025

Delivered on : 16 September 2025