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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

Case: 5702/2018

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES

(3) REVISED: Yes

DATE: 20 October 2025

SIGNATURE:

In the matter between:-

F[...] M[...] M[...]

PLIANTIFF

AND

MINISTER OF POLICE

DEFENDANT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be 20 October 2025 at 10:00 am.

JUDGEMENT

Mashifane AJ.

1. The plaintiff brought a claim for damages against the first and second defendant alleging in his particular of claim that on 19 November 2015 and at

Seshego the second defendant, acting within the scope of his employment with the first defendant, unlawfully arrested and detained him.

2. The defendants defended the action and raised a special plea of non-compliance with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. At the commencement of the trial, the defendants abandoned their special plea. In their plea to the plaintiff's claim, the defendants pleaded they have no records of the plaintiff being arrested and detained by any police official on the date mentioned in the particulars of claim.

3. The plaintiff was the first to testify and called two more witness. The defendant called no witness. He testified that on 19 November 2015 was walking in Luthuli when suddenly a group of people attacked and assaulted him on allegations of theft. They took him to his home while still there the police arrived and took him to the police station. Upon arrival at the police station, he was detained in police cell together with adult inmates and made his first appearance at Court after three days. He was then placed at Bosasa place of safety.

4. During his detention at the police station, he complaint of being in pain because of the assault but he was not assisted. Two of the adult inmates raped him and every time they were to use the toilet, he was instructed to hold a blanket as if is curtain to shield them from being seen by other inmates. The rape incident was reported to the second defendant and his reply was that the plaintiff was crazy.

5. The next witness for the plaintiff was Dr Jabu Mokwena, a Clinical Psychologist who testified that on 14/09/2016 and 19/10/2016 acting on instructions from the plaintiff's attorneys he assessed the plaintiff and prepared a medico legal report. His findings were that sexual assault on the plaintiff resulted in psychological disturbance on his overall psychological well-being. He showed symptoms of Dysthymic Depression, and was likely to develop a post- traumatic stress disorder. He was also likely to develop self-esteem issues and problems with intimacy in a relationship in future if psychological intervention was not sought. He recommended that he be referred to physician and the neurologist for further assessment.

6. Eric Mbombi a 55 year old adult male was called as the last witness for the plaintiff. He testified that he is residing at Luthuli Park in Seshego. During the month of November 2015 he was at home when he heard people coming through the passage shouting "thief-thief". He went out of his yard and noticed that the group was assaulting the plaintiff. He knew plaintiff as they were residing in the same street, four houses away from each other.

7. He went closer but stood a distance away and he heard the crowd saying that they were going to burn the plaintiff's parental home. He saw a police bakkie coming at the high speed and the group dispersed. Two police officers alighted from the bakkie and took the plaintiff, locked him at back of the bakkie and drove-off.

8. In his testimony the plaintiff referred to the copy of the charge he discovered and produced which was then admitted as evidence. According to the charge sheet the person arrested was the plaintiff, his date of arrest was 26 November 2015 under Seshego Cas number 700/11/2015 and made his first appearance on 30 November 2015. The second defendant appears as the investigating Officer.

9. In his the oral submissions that counsel for the plaintiff argued that despite the difference on the date of arrest as per plaintiff's particulars of claim, oral evidence and the charge sheet the court should find that the plaintiff was arrested and detained and that such arrest and detention was unlawful. He submits that the pleading reads on or about 19 November 2015 and that covers the date of 26 November 2015.

10. On contrary it was argued on behalf of the defendants that in their plea the defendants specifically denied arrest and detention on the date mentioned in the plaintiff's particulars of claim and that plaintiff armed with documentary evidence failed to amend his pleadings before and during the trial and for these reasons the plaintiff's claim must fail.

11. The plaintiff pleaded and testified that he was arrested on the 19 of November 2015 but his documentary evidence in the form of a charge sheet shows the date of arrest and detention as 26 November 2015. The defendant on the other hand denied the arrest of the plaintiff and detention on the pleaded date and called no witnesses.

The issue before this Court is whether despite the self-contradictory evidence of the plaintiff and without the pleadings being amended can the Court accept a particular date as the correct date of arrest and hold the defendant liable to compensate the plaintiff for his arrest and detention.

12. It is also tried that it is impermissible for the party to plead one case and at the trial attempt to prove the other, but each case should be determined on its own merits. As I have indicated the only issue before the Court is whether to accept the proven date as the date of arrest and this calls for the court to exercise its judicial discretion.

13. To properly exercise its discretion, I propose that the followings issues should t be determined first:

- a. Whether the evidence prove arrest and detention of the plaintiff on specific date.
- b. The nature, reliability and credibility of the evidence independently proving the date of arrest.
- c. Whether the plaintiff deliberately misdirected the Court.
- d. Will the acceptance of the proven date as the correct date of arrest result with any prejudice to the defendant, and
- e. Any other factor which in the opinion of the Court is relevant.

14. The defendants do not deny the arrest but date. The charge sheet shows that the plaintiff was arrested on 26 November 2015 and that Warrant officer Dikgale from Seshego Police Station was assigned to investigate the case. The charge sheet was discovered and produced by the plaintiff and form part of the trial bundle. It was therefore made available to the defendants in advance as one of the documents intended to be used during the trial. The documentary evidence in the form of a charge sheet is the most reliable evidence which on balance of probabilities prove the correct date of arrest.

15. I find no reason to believe that the plaintiff deliberately misled the Court on the date of arrest and detention. At the time of his arrest and detention the plaintiff was

still a minor and he testified more than nine years from the date of arrest. The plaintiff initially testified that he was arrested by 23 November 2015 and through the questions from his counsel, he conceded that the correct date is the date as per pleadings. There is nothing that he would have gain as an advantage to his case in mentioning the wrong date.

16. The question is whether in accepting the date as per charge sheet will the defendant suffers any prejudice. To fairly answer the question the Court must determine if the defendants were aware or ought to have been aware of the correct date of arrest. I find that litigation history of this matter plays a vital role in determination of this issue. During the discovery stage the plaintiff issued notice in terms of Rule 35(1) of the Uniform Rules calling upon the defendant to discover under oath documents relating to any matter in the action whether arising between the plaintiff and defendant. The defendants served and filed a discovery affidavit without the first schedule in which the defendants were supposed to list documents they intend to use during the trial.

17. The plaintiff proceeded in terms of Rule 35 (3) (6) of the Uniform Rules to request for inspection of the of the following documents: - (1) pocketbook of detective Dikgale dated 26 to 30 November 2015, (2) SAPA 14A (Notice of Constitutional rights), (3) occurrence book of Seshego Police Station dated between 26 and 30th November 2015, (4) Cell register of Seshego police station and (5) Police docket under Cas No:" 700/11/2015, and (6) court case No:C847/15.

18. When the defendants failed to make available the above-mentioned documents the plaintiff launched an application to compel the compliance and on 15 February 2022 the Court ordered the defendants to comply with the plaintiff's notice in terms of Rule 35(3) and (6). In March 2022 the defendants filed an affidavit in which they averred that they were not in possession of requested documents and that their whereabouts were unknown.

19. The litigation background of this matter does not convince me that the defendant was unaware or may not have been aware of the correct date of arrest of the plaintiff. The plaintiff mentioned in full details of the documents he believed to be

in possession or control of the defendants and with that information the defendant ought to have been aware of the date of arrest. There appears no risk of prejudiced against the defendants, the claim had not prescribed as at the date of institution of the action and it is not their defence that they will suffer prejudiced.

20. This Court considers that this matter involves the arrest and detention of a minor child in a manner that violated his Constitutional rights. In every matter that involves the child his or her interest are of paramount importance. It is for these reasons that I believe the court faced with date of arrest being the only issue in dispute should guard against rejecting the plaintiff's claim unless it is proven that there is a likelihood that the acceptance of the none pleaded date of arrest would result with a prejudice to the defendant's defence. I therefore accept that the plaintiff was arrested by the second defendant on 26 November 2015 and detained until 30 November 2015.

21. The arrest by its nature is prima facie unlawful in that it violates the person Constitutional right to the freedom of movement and that basis that once the arrest has been proven or accepted the duty to proof its lawfulness rest on the defendant. The defendant did not plead justification for the arrest of the plaintiff or tender evidence to that effect. In addition to the detention becoming automatically unlawful once the arrest is found to be unlawful the detention of the plaintiff with adult persons comes as a double sword against the defendants.

22. It is trite that the onus rests on a defendant to justify an arrest. Rabie CJ, as he then was, explained in **Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E-F**. *"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."*

23. In **Duncan v Minister of Law and Order for the Republic of South Africa (Duncan) [1986] 2 All SA 241 (A); 1986(2) SA 805 (A) at 818F-H**. it was held that an *"arrest without a warrant would be justified as envisaged ins 40(1)(b) of the CPA if the following jurisdictional facts were present: (i) the arrestor must be a peace-officer;*

(ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. The learned Judge of Appeal stated further that 'If the jurisdictional requirements are satisfied, the peace officer may involve the power conferred by the subsection; ie, he [or she] arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf Holgate-Mohamed v Duke [1948] 1 All SA ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed."

24. The above-mentioned jurisdictional requirements are the defences available to the defendant which the defendant must plead and prove. In this matter the defendant preferred to plead a bare denial and even after having heard the evidence of the plaintiff and his witnesses did not call or present any evidence to justify the arrest. The detention of the plaintiff with adult inmates was unlawful as it is prohibited by the Constitution.

25. The evidence as per the plaintiff and his eyewitness strongly suggest that at the time he was apprehended the police were rescuing him from the angry members of the community who were assaulting him. I am however convinced that shortly thereafter a decision to arrest him was made and for that reason he was detained in the police cell with other awaiting trial offenders.

QUANTUM

26. The plaintiff testified that at the time of his arrest he was being assaulted by the members of the community. I do not think that this conduct of him being arrested in the presence of the members of the community would have embarrassed him. I find that under the circumstances of this case immediate and adequate intention of the police at that stage which was to rescue him from the angry mob.

27. At the time of his arrest and detention the plaintiff was still a minor aged 15 years. He was detained with adult inmates, and they sexually assaulted him. His attempts to lodge a complaint with the second defendant were ignored or washed

away as nonsensical. Once the police take into their custody any person and for whatever reason, they assume the responsibility to care, defend and protect him or her. The protection includes detaining him or her in cell which should be considered less dangerous guided by his or her age, the offence he or she is facing and whether is a first or repeated offender.

28. Section 28 (1) (g) of the Constitution Act 108 of 1996 provides that a child has right not to be detained unless as a measure of last resort, in which case, in addition to the rights the child enjoys under section 12 and 35, the child may be detained only for a short period of time, and has the right to be kept separately from detained persons over the age of 18 years.

29. In **Raduvha v Minister of Safety and Security and Another [2016] ZACC 24; 2016 (2) SACR 540 {CC} at para 4** the Constitutional Court found the detention of a child to be unlawful in that it was in violation of her above- mentioned constitutional rights. The second defendant turned a blind eye on the plaintiff's constitutional rights as child and even when requested for assistance he chose to ignore the fact t that the child wellbeing was in danger.

30. In his book "**Potgieter {et al), Visser & Potgieter: Law of Damages** (Juta, 3rd edition, 2012), Potgieter made the following observations: "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."

31. In ***Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA)** Bosielo AJA held that: *"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 iniuria 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."*

32. What informs the awarding of damages for unlawful arrest and detention is the constitutional right to the freedom of movement and security of the plaintiff as a person which should be jealously protected. Every person has the right not to be deprived of freedom arbitrarily or without just cause. It is for this reason that an award for damages should express the importance of the constitutional right to an individual's freedom.

33. Far and above the fact that the plaintiff was a child, his detention and experience of being sexually abused by the inmates left him with long term psychological injury. He testified about this ordeal nine years after the incident but even during his testimony he could not contain himself when asked about what he experienced in the police cell. He was generally subjected to a humiliating treatment which by exercise of reasonable care the second defendant or any other police officer who participated in his detention of should have been avoided.

34. The plaintiff claimed an amount of R800 000.00 as compensation for his general damages and the same amount was argued on his behalf. On the other hand, the counsel for the defendants argued that the medico legal report has no bearing on the case in that it does not have the date of arrest or sexual abuse and therefore in the event this court finds it necessary to compensate the plaintiff he proposed the sum of R100 000.00.

35. Having accepted that the plaintiff was arrested on 26 November 2015¹ do not find it necessary to take the argument about the absence of the date on the medico legal report any further than to say the report was compiled at the instant and request of the plaintiff and is relevant to the case at hand.

36. I have found that the plaintiff was unlawfully detained from 26 to 30 November 2015 which amounts to four nights in custody. There is no reason why he was not brought to court on Friday the 27 of November, which was the first available court day following the day of his arrest. His detention was therefore unnecessarily prolonged and that is an act of malice.

37. In conclusion, and before I pronounce the amount of compensation, I find it necessary to comment on the manner in which the plaintiff's legal representatives handled his claim. It is expected of practitioners to take every step reasonably possible to ensure that they have correct instructions or information. Our rules allow for amendment of pleadings at any stage of the proceedings before judgement. I find no reason why the plaintiff's attorneys served and filed a charge sheet which provide for a different date of arrest and yet failed to amend the plaintiff's particulars of claim. His counsel too was not helpful either. It was apparent throughout the trial that the only issue in dispute was the date of arrest and still did not consider amendment of the pleadings, instate he wanted to argue against the documentary evidence he produced as evidence.

38. In determining the appropriate compensation, I have considered the plaintiff's age at the time of his arrest and detention, the conditions under which he was detained and that he was raped by the inmates, the psychological injury he suffered and continues to suffer as a direct result of his detention and the unreasonable

prolonged period of detention and finds the first defendant liable to compensate the plaintiff in the amount R600 000.00.

39. There is no reason why I should deviate from the general principle that cost should follow the order and make the following order.

1. The first defendant is ordered to pay the plaintiff the sum of R600.000.00 as compensation for his unlawful arrest and detention with interest calculated at the rate of 10.50 % per annum calculated from the date of judgment until the date of final payment of the capital amount.

2. The costs of suit on party and party scale B with interest calculated at the rate of 10.50 per cent per annum allocator. calculated from 30 days from the date of

RS Mashifane
Acting Judge of the High Court
Limpopo Division, Polokwane

APPEARANCES

For the plaintiff

Adv JM Letsoalo: Instructed by L Molepo Inc Attorneys

And

For the defendant

Mr. TA Masethe : State Attorney, Polokwane

Date of trial 24-25/04/2025, and 24/06/2025

Date of Judgment 20/10/2025