



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

CASE NO: CA 194/2019

In the matter between:

ASTON LUCIANO MCCARTHY

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

RUSI J

[1] On 12 October 2018, in Galvandale, Gqeberha, the appellant was searched and arrested by the police, without a warrant, and detained at the Galvandale police station. Aggrieved by their conduct, he sued the respondent, in the Gqeberha Magistrates' Court, for damages in the total sum of R130 000.00, alleging that the police acted wrongfully and unlawfully in so doing.

[2] On 01 October 2024, the trial court dismissed the appellant's claims, with costs, and the appellant now appeals against that judgment. Before I turn to the facts of the matter, there is a preliminary matter that arose. The respondent's heads of argument were filed late by seven days. It sought condonation for that late filing and tendered costs of the condonation application. The appellant did not oppose the application and the condonation was granted.

The factual background

[3] These are the facts forming the background of this appeal. On 12 October 2018, the appellant and six other male persons were standing on the corner of Gail and Kobus Streets in Galvendale, when two police officers arrived in a marked police vehicle. At the time, the appellant had an injury on his private part which he had recently sustained in a shooting incident unrelated to this matter. He was walking on crutches. The police arrived shortly after he had purchased a drug called "tik" (methamphetamine) from a nearby place.

[4] Upon their arrival, the police searched the men, and they found the drug in his possession. He explained to them that he was using it for pain relief. However, they put him in their vehicle, and he was taken to the Galvendale police station where he was charged and detained. He also alleged that while in detention, he suffered from pain as a result of his injury. Paramedics were summoned at his behest, and they examined him. They advised the police that his injury had become infected and recommended that he be taken to hospital for further treatment, but this never happened. Instead, he was released by Captain Jansen on 13 October 2018 on bail of R 150.00.

[5] In his pleadings, the appellant had alleged that his search was wrongful and unlawful in that he was searched without his consent or a warrant authorizing the search. It was conducted in full view of the public, without regard to decency, in an invasive manner, and it humiliated him. He contended that the police had no reasonable and probable cause to search him.

[6] He challenged the lawfulness of his arrest and detention on the ground that they were not authorized by a warrant and were arbitrary and without just cause; and his arrestor failed to exercise his discretion in arresting him or exercised it in an irrational manner. His arrestor, so the assertion continued, failed to explain his constitutional rights to him or to comply with sections 4 and 8 of the SAPS Standing Order G341.

[7] The unlawful search, he said, was an affront to his right to freedom and security of person, privacy, and dignity. For it, he claimed R50 000.00. His arrest and detention were contumelious – they infringed his integrity, and his right to liberty and dignity. He was detained in appalling and unsanitary conditions, and resulting from this, he suffered distress and discomfort. Accordingly, he claimed R80 000.00 for unlawful arrest and detention.

[8] In denying liability for the appellant's claims, the respondent contended that the police arrested him for being in unlawful possession of tik, in contravention of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992, for which he was liable to be sentenced to imprisonment up to 15 years, without an option of a fine. Accordingly, they contended that the appellant had been lawfully arrested and detained in terms of section 40(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA); and sections 39 and 50 of the same Act. As regards the claim for the unlawful search, the respondent alleged that the appellant had consented to being searched.

The trial in the court a quo

[9] The respondent bore the onus to justify the appellant's search, arrest and detention, which it had admitted. At the trial, it adduced the evidence of the three police officers, namely, Sgt Jakavula who searched and arrested the appellant, Sgt Bodlani who was in the company of Sgt Jakavula at the time of the search and arrest, and Captain Jansen who testified regarding the condition of the holding cells where the plaintiff was detained, and regarding his ultimate release on bail. It is common cause that the appellant was detained at the instance of Sgt Jakavula.

[10] According to Sgt Jakavula, while doing crime prevention duties with Sgt Bodlani along Gail Street, they received information through radio control regarding a suspicious male that was at the corner of Gail and Kobus Streets. The information went on to suggest that the said male had a firearm. On arrival at the corner of Gail and Kobus Streets they found seven males, which included the appellant, and they informed them of their reasons for approaching them. They asked to search them, to which they consented. The appellant was on crutches, and Sgt Jakavula found a small transparent packet of tik in his possession. He said that he was obliged to arrest and detain him since he was in possession of an illegal substance.

[11] Sgt Jakavula conceded that he did not inform the appellant of his right refuse to be searched and to demand a warrant for his search. He denied that he conducted the search in an invasive manner, that he injured the appellant, or that the search was conducted with no regard to decency. It was put to Sgt Jakavula that the appellant could not have consented to the search when he knew that he was in possession of an illegal substance. Sgt Jakavula's evidence regarding how the scene unfolded upon their arrival at the spot where the appellant and six other males were, was confirmed by Sgt Bodlani.

[12] A contemporaneous entry was made by Sgt Jakavula in his pocketbook, that while on crime prevention duties, they received information regarding suspicious males with firearms and that the appellant, who was among those males, consented to being searched. Much was made during Sgt Jakavula's testimony, of the fact that he failed to cause the appellant to sign the entries he made in his pocketbook as proof of the actions he took in relation to the appellant's search and arrest and the information he relayed to the appellant at that time.

[13] Captain Jansen testified that the holding cells in which the appellant was detained were clean and so were the blankets that he and other inmates with whom he was detained were using. She denied that the appellant was detained in unsanitary conditions, stating that she was personally at the holding cells and saw their conditions. According to her, a service provider is employed to clean the cells and wash the blankets that the inmates use, and the mattresses on which they sleep are aired on regular basis. She denied the suggestion that was put to her, that the appellant was released owing to the trivial nature of the offence he was charged with, stating that she released him owing to his injury.

[14] The appellant, on the other hand, testified that he did not consent to the search, but had he been asked, he would have consented. He went on to state that the search was conducted in an aggressive manner, and this aggravated his injury. He contended that it took place in full view of the members of the public, but he confirmed that tik was found in his possession. The police did not take him to hospital for treatment.

[15] The notice of rights, which is part of the record before us, depicts that the appellant was detained at 16h47 on 12 October 2018. According to the occurrence book, he was only charged at 21h50 on that day, by Warrant Officer Metelerkamp. At 18h20 on 13 October 2018 he was examined by the paramedics. He was

released on the instruction of Captain Jansen based on his injuries at 20h52 on 13 October 2025, about two and a half hours after the medical examination and report by the paramedics.

The findings of the trial court

[16] In dismissing the appellant's claims, the trial court found that the evidence of Sgt Jakavula that the appellant consented to the search was supported by that of his colleague, Sgt Bodlani, who was present when the search was conducted. The court further found that in possessing the tik, the appellant committed an offence in the presence of the police, therefore, they were entitled to arrest him in terms of section 40(1)(a) of the CPA. It further drew an adverse inference from the fact that the appellant did not call any of the six other males that he was with during the search and arrest.

The grounds of appeal

[17] Appropriately paraphrased, the grounds relied upon by the appellant in this appeal are that the magistrate erred in the following respects:

- (i) In failing to deal with the issue of the arresting officer's exercise of discretion in arresting the appellant in the light of the fact that when he was arrested, the appellant was walking on crutches and in obvious discomfort, and in finding that the appellant's arrest was justified by reason of the fact that he was found in possession of tik.
- (ii) In making a determination on the issue of the appellant having committed an offence in the presence of the police when this was not an issue she was called upon to determine.
- (iii) In failing to deal with the appellant's detention after arrest.
- (iv) In finding that the appellant consented to the search notwithstanding the crucial concession that Sergeant Jakavula made, and in not having regard to the legal principles regarding the giving of informed consent. She ought to have found that any consent that the appellant may have given when he was not aware that he had a right to insist on a search warrant, was not valid consent.

- (v) In failing to have regard to the fact that the onus was on the respondent to demonstrate that the appellant decided to relinquish his right to privacy with full knowledge of the existence of his right and an appreciation of the consequences of waiving his right, and that on the respondent's own version, the appellant decided to relinquish his right to privacy without full knowledge of the existence of his right and an appreciation of the consequences of waiving his right.
- (vi) In finding that the respondent discharged the onus to justify the search in line with the provisions of section 22(a) of the CPA.
- (vii) In her evaluation of the of evidence and in not rejecting the evidence adduced by the respondent's witnesses as false when she ought to have done so.
- (viii) In drawing a negative inference from the appellant's failure to call a witness in circumstances where the availability of that witness was not canvassed during the trial proceedings.

The parties' submissions on appeal

[18] Mr McKenzie, on behalf of the appellant, submitted that the trial court failed to properly evaluate the evidence before it. On this score, he argued, chiefly, that Sgt Jakavula failed to produce evidence in the form of an entry in the pocketbook that was countersigned by the appellant as proof of the fact that he consented to the search and was informed of his constitutional rights at the time of the search and subsequent arrest.

[19] He contended that the trial court ought to have rejected the evidence of the two police officers as unreliable, and that the adverse inference was incorrectly drawn against the appellant for his failure to call one of the males that were present during the search. If the appellant consented, so his submission continued, that consent was not an informed one, as Sgt Jakavula conceded that he did not inform him before the search, that he had the right to refuse being searched and that any incriminating articles found in his possession would be used as evidence against him.

[20] Regarding the arrest, Mr *McKenzie* submitted that the trial court was incorrect in making a finding that the arrest was, in any event, justified in that the appellant had committed an offence in the presence of Sgt Jakavula. He emphasized that Sgt Jakavula failed to exercise the discretion to arrest and detain the appellant rationally, or at all, in the light of his physical condition and his apparent discomfort, coupled to the small quantity of tik that was found in his possession. According to him, the appellant ought to have been released from custody by the police before his first appearance in court.

[21] Relying on *S v Lachman*,¹ where it was held that the argument regarding failure to advise the suspect of the right to refuse the search and implications of discovery of any article in his possession, was unsound, Ms *Morgan* submitted that in this case too, it would have been open to Sgt Jakavula to search the appellant at that time without requiring his consent. This, so she submitted, was so on the basis that there would have been reasonable grounds for him to believe that a warrant would be issued to him had he applied for one, and that applying for a search warrant first, would have defeated the object of the search.

[22] She further submitted that the respondent had succeeded in discharging the onus of justifying the arrest and detention. In this regard, she highlighted the fact that the respondent specifically pleaded that the arrest was justified by section 40(1)(a), and that it was a common cause fact that the appellant was found in unlawful possession of a drug.

[23] According to Ms *Morgan*, the nature of the offence and the fact that Sgt Jakavula intended to bring the appellant to justice meant that he exercised his discretion. She took the view that the quantity of the drug that was found in the appellant's possession had no bearing on Sgt Jakavula's exercise of his discretion.

¹ *S v Lachman* 2010 (2) SACR 52 (SCA), at para 36 and 37.

She also argued that the respondent was not called upon at the trial to answer to the failure of the police to release the appellant on bail after being charged.

The legal principles

[24] A court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court.² However, if it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. This accords well with the principle that the deference afforded to a trial court's credibility findings must not be overstated.³

[25] The powers of the police to search and seize articles without a warrant, which may afford evidence of the commission, or suspected commission, of an offence; which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere, are governed by section 22 of the CPA.

[26] A search may, in terms of this section, be conducted without a warrant in two instances. The first is where the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question. The second instance is if the police officer, on reasonable grounds, believes that a search warrant will be issued to him under paragraph of section 21(1) if he applies for such warrant; and that the delay in obtaining such warrant would defeat the object of the search. And, since gender sensitivity and respect for a person's dignity are at the core of the search of a person, it is required

² *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

³ *Makate v Vodacom (Pty) Ltd* (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016), para 40.

that in conducting a search, rules of decency and order be strictly observed. This is in terms of section 29 of the CPA.

[27] An arrest and detention without a warrant can only be effected in terms of section 40(1) of the CPA. Relevant to the present appeal are the provisions of section 40(1)(a) in terms of which a person who commits an offence in the presence of a peace officer may be arrested by that peace officer without a warrant. It has been held that a failure of the police to warn the arrestee at the time of arrest of their constitutional rights, does not invalidate the arrest *per se*.⁴

Discussion

[28] The judgment of the trial court is indeed bereft of the reasons why it rejected the version of the appellant as false and accepted that of the respondent. It behoves this Court to make an assessment of the evidence as it appears from the record of this appeal. The appeal turns on whether the trial court's findings regarding the consent to the search were correct, and whether there was, therefore, any legal basis for the appellant's subsequent arrest and detention.

[29] There are two conflicting versions regarding how the appellant's search and arrest unfolded. For one version to be accepted and not the other, the court must be satisfied, on a preponderance of probabilities, that that version is true and accurate and therefore acceptable. It is trite that the estimate of the credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case.⁵

[30] Subject to what I will state regarding the trial court's findings on the lawfulness of the search, I am constrained to agree with the Mr McKenzie's submission that an adverse inference against a party who fails to call a witness is dependent on two factors. The first is that such a witness would elucidate an aspect

⁴ *Minister of Police v Foutie and Another* (CA59/2020) [2021] ZAECHGHC 26 (9 March 2021), para 36.

⁵ *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (6 September 2002) para 5; *National Employers' General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E), at 624-5.

of the facts testified to by the party concerned. The second one is that the said witness was in fact available to testify. This is trite law.⁶

[31] To the extent that it was not established at the trial of the case whether any of the six other males were as a matter of fact available to testify, the adverse inference was incorrectly drawn against the appellant. However, this was not the only basis for the findings that the trial court made concerning the contested issue of the consent to the search. I turn to consider such other bases of the trial court's findings as they appear from the record.

The consent to the search

[32] In his own testimony during the trial of the matter, the appellant stated, in denying that he consented to the search, that, '*as a human being, he had rights, the police could not just search him.*' He further testified that had the police requested his permission to search him, he would have granted them that permission even though he knew that he had drugs in his possession. This, he said notwithstanding what was previously suggested to Sgt Jakavula, that he would not have consented to the search since he knew that he had an illegal substance in his possession.

[33] I interpose to state that the appellant confirmed that he knew that tik was an illegal substance save for the fact that he used it for pain relief. He knew, in this instance, that an incriminating substance would be discovered, yet with this knowledge, he would have given the police consent to search him.

[34] For the present purposes, in order for the police to invade the appellant's privacy by searching him in circumstances where they had no warrant authorizing

⁶ *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 at page 749 -750; see also *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC); *Boyce NO v Bloem* 1960 (3) SA 855 (T) at 864.

the search, they had to obtain his informed consent.⁷ In this regard, it had to be shown that when he consented to being searched, the appellant knew what right he was waiving and the implications of such waiver. It had to be shown that he knew that he had a right to refuse the search.

[35] We were provided with the SAPS Standing Order G341 (the standing order) which, as argued on behalf of the appellant, required Sgt Jakavula to cause the appellant to sign the entry made in the pocketbook. This, so it was argued, would stand as confirmation of the veracity of the entries that Sgt Jakavula made concerning the appellant's consent the search, and the fact that his constitutional rights were read to him upon being arrested.

[36] To my mind, the circumstances of each case, the nature of the right to be waived and the manner of its waiver ought to determine whether the waiver was an informed one. From the standing order, it is indeed manifest that the police are required to cause an arrested person to co-sign any of the entries made regarding the actions they took and the information they conveyed to that suspect or if the suspect refuses to sign, to enlist the help of any civilian available, and if no such civilian is available, to record that fact.

[37] It is doubtful, though, that the SAPS standing orders, which are internal instruments whose purpose is to give meaning to the constitutional imperatives of the protection and promotion of the rights of the arrested persons, are meant to be absolute rules of procedure in effecting searches, arrests and detention. This, I say in the light of the fact that in the exercise of their crime prevention duties, the police, as was the case in the present matter, are often expected to act swiftly.

⁷ *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC); 001 (2) SACR 66 (CC) (28 May 2001), para 62-69.

[38] The standing orders are indeed useful internal tools at ensuring accountability on the part of the police. But when the court makes a determination of the lawfulness of police conduct, it does so not as against the formalities prescribed by these instruments, but against the standard of reasonableness and good faith. It seems to me that the sensible approach in interpreting the standing orders is to determine, on a case-by-case- basis, whether there are objective facts from which substantial compliance with their provisions, spirit and purport can be discerned, bearing in mind the standard against which the lawfulness of the police conduct is measured.

[39] If, in a given case, there are objective facts which give credence to a police officer's account of the actions they took, and information given to a suspect, it can hardly lie in the mouth of the interested person (the suspect/arrestee) to argue that because there was no strict compliance with the provisions of the particular standing order, it must follow that the police conduct in executing their duties was unlawful. To conclude otherwise, would unreasonably hamstring the police in their crime prevention duties in a country where the incidence of crime continues unabated.

[40] In the circumstances of the present case, nothing should turn on the fact that the appellant did not sign the entry that Sgt Jakavula made that he had consented to being searched. The fact that a contemporaneous entry was made by Sgt Jakavula that the appellant consented to the search, viewed together with the corroboration of Sgt Bodlani and the appellant's own version as summarized above, makes the appellant's account that he did not consent to the search improbable. The finding of the trial court that the appellant did consent to the search cannot be faulted. Whether that consent was informed is the question I deal with next.

[41] Much was made in this regard, of the fact that Sgt Jakavula conceded that he did not inform the appellant before the search, that he had the right to refuse being searched and that any incriminating articles found in his possession would be used as evidence against him. This aspect must be considered against the fact that when Sgts Jakavula and Bodlani proceeded to the spot where the appellant was found in the presence of six other males, they had information that there was a male who was suspected to be in possession of a firearm. That they found not one but seven males, is of no moment, for they still had to find which of those seven males was the subject of the description they had received from radio control. They informed the said males of the reason for approaching them and requested their permission to search them.

[42] No reliance was placed by the respondent, in defending the action, on the fact that they had to act with the haste envisaged in section 22(b) of the CPA. I do not need to consider this aspect of the argument which was posited in support of the contention that the trial court correctly found that appellant consented to the search. There are, however, other reasons why the appellant's contention that the consent said to have been given was not an informed one, cannot be sustained.

[43] As mentioned, the appellant, on his own version, knew that *'he had rights as a human being, police cannot just search him'*; he knew that he had a right to be asked for his consent before being searched; he knew that he had an illegal substance in his possession; his stance was that had he been asked for permission to be searched he would not have withheld it. This demonstrates his willingness. The inescapable conclusion is that the consent that the appellant gave to being searched passed muster – it was informed consent. I turn to deal with the appellant's assertion that the search was conducted in an indecent manner; and in an aggressive manner which resulted in the aggravation of his injury.

[44] Mr *McKenzie* conceded that the appellant gave no details in the trial court of how his search was conducted without regard to decency. He conceded, too, that the appellant did not plead that the search was conducted in a rough manner, nor did he give evidence at the trial regarding how the police aggravated his injury. These concessions were well made, as indeed no such details appear from the record, nor were any material facts pleaded in support of the appellant's assertions in this regard. The appellant's testimony that the police fondled his private parts was clearly an afterthought. Accordingly, his contentions in challenging the trial court's findings regarding the lawfulness of his search cannot be sustained.

The lawfulness of the arrest and subsequent detention

[45] The appellant's contention is that because the search was unlawful, his arrest and subsequent detention were unlawful, alternatively, that Sgt Jakavula failed to exercise his discretion rationally, or at all, in arresting him. I have already determined that the appellant's search was lawful.

[50] The fact that the appellant was found in possession of tik meant that Sgt Jakavula had observed prima facie criminal conduct on his part.⁸ Therefore, in the context of section 40(1)(a), on which the respondent relied as the justification for the arrest, the appellant committed an offence in the presence of Sgt Jakavula, and he could be arrested without a warrant. Any contention to the contrary cannot be sustained. Mr *McKenzie*'s submission, that no case was pleaded by the respondent in this regard, is a ruse. I turn to deal with whether Sgt Jakavula exercised his discretion rationally, or at all, in arresting and detaining the appellant.

[51] The decision to arrest indeed entails the exercise of a discretion, and the arresting officer must be aware of that discretion. Once the jurisdictional facts for

⁸ *Tsose v Minister of Justice & Others* 1951 (3) SA 10 (A); *Korkie v Minister of Police* (2129/2020) [2022] ZAECHGHC 2 (1 February 2022), para 19.

an arrest, whether in terms of any paragraph of section 40(1), or even where the arrest is authorized by a warrant in terms of section 43 of the CPA, are present, a discretion arises, and the peace officer is not obliged to arrest.⁹ That discretion must be exercised after taking all the prevailing circumstances into consideration.¹⁰

[52] The appellant had the onus of proving that the police did not exercise their discretion properly or rationally. It was his testimony, in support of the contention that the police failed to exercise their discretion in arresting him, that in the light of the condition he was in – in pain from the injury in his private part and walking on crutches coupled to the small quantity of the tik found, they should not have arrested him. Sgt Jakavula confirmed, during his testimony, that he had a discretion to exercise whether to arrest the appellant or not, but in this case, he was ‘obliged’ to arrest him because he was in possession of a drug.

[53] Regard must be had to the following facts. The arrest of the appellant took place on the street in the circumstances already described. There should be little doubt that in those circumstances there was a need for the police to act swiftly. What is more, upon being searched, a dependence producing substance for which he had no form of permission or authorization was found in his possession.

[54] We were not referred to any authority for the proposition that the small quantity of the kind of drug that the appellant was found in unlawful possession of, was a ground, in the circumstances of the present case, for the exercise of the discretion in favour of employing other methods of bringing him to justice. We know of none. Unlawful possession of methamphetamine (tik) remains a serious offence, and its quantity would become relevant at another stage not having

⁹ *Minister of Safety and Security v Sekhotho* 2011 (1) SACR 315 (SCA), para 28 (*Sekhotho*); *Hlape v Minister of Police* (426/2023) [2024] ZASCA 68; 2024 (2) SACR 148 (SCA) (3 May 2024), para 13.

¹⁰ *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022), para 36 (*Biyela*); *Hlape v Minister of Police*, *supra*, para 13.

anything to do with the police powers to arrest the unlawful possessor. It should perhaps be unsurprising that the legislature specified no quantity in listing ‘illicit possession of any other dependence- producing drug’ among the offences in respect of which the police may not release a person before appearing in court. This, in my view, underscores the serious light in which the legislature viewed this type of offence.

[55] Interestingly, on his own showing, the appellant had been suffering from pain at the time of the impugned search and arrest, and he had taken the trouble to endure the discomfort that came with the pain when he walked some distance on crutches to buy drugs to numb his pain. Having bought the drug, he still had time to sit on the street corner with a group of other males while suffering from the pain. I find it rather disingenuous of the appellant to rely on his condition as the basis for the contention that the police did not properly or rationally exercise their discretion in arresting him.

[56] In any event, I do not conceive of any other method that the police could have used in the circumstances that prevailed at the time, in bringing the appellant to justice. Consequently, I find that Sgt Jakavula properly exercised his discretion in arresting the appellant. The arrest was lawful.

[57] Even where a person was lawfully arrested, a police officer effecting an arrest is equally enjoined to apply his or her mind to the circumstances relating to a person’s detention. This includes applying his or her mind to the question whether detention is necessary.¹¹ This is in keeping with the fact that the arrest and

¹¹ *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) at 90A; *Hofmeyer v Minister of Justice and Another* 1992 (3) SA 108 (C).

detention are two separate legal acts, even though they both result in the restriction of a person's liberty.¹²

[58] It bears mentioning that the appellant did not plead that the police should have facilitated his release on bail after he was charged. An attempt was made at the trial, and on appeal before us, to argue that the police ought to have released him on bail sooner. On the face of the record, this issue was not fully canvassed by both sides.¹³

[59] Notwithstanding Captain Jansen's testimony that she directed the release of the appellant on bail, there was no controversy at the hearing of the appeal, that she did not have the power to do so. In terms of section 59A of the CPA read with Schedule 7 of the same Act, only the prosecutor, in consultation with the police officer charged with the investigation of the offence, could authorize the release of the appellant on bail before his appearance in court.

[60] There is another difficulty that faces the appellant, which Mr *McKenzie* correctly conceded. If it is accepted, as I have found, that the initial arrest was lawful, there is no evidence to establish at what stage, thereafter, his detention became unlawful. At best for the appellant, any justification for his further detention ceased after Captain Jansen made the decision (albeit incorrectly, as mentioned) to release him on bail owing to his injury. This would be after 18h20 on 13 October 2018, which is when, as gleaned from the occurrence book, the appellant was examined by the paramedics. He was released at 20h52 on that same day, approximately two and a half hours after his examination and Captain Jansen's decision to release him.

¹² *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC), para 39; *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E) at 675d-f.

¹³ Cf *Minister of Safety and Security v Slabbert* (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009), para 12.

[61] There is no evidence in the record indicating why the appellant was kept in detention for two hours or more after the decision was made to release him on bail. It ought to follow that the respondent has failed to justify this period of the appellant's detention. What remains is a determination of an appropriate award of damages resulting from detention for approximately two and a half hours.

The quantum of damages

[62] The unlawful deprivation of a person's liberty is, in itself, a serious injury which constitutes an impermissible infringement of his/her constitutional rights to freedom and security of the person, and to human dignity.¹⁴

[63] In *Motladile v Minister of Police*,¹⁵ the Court laid down the approach to be followed in the assessment of damages as follows:

‘[T]he assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff.’¹⁶

[64] I have referred earlier to the contentions relating to the condition of the cell where the appellant was detained. The magistrate accepted the evidence of

¹⁴ *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94 (12 June 2023) para 22.

¹⁵ *Supra*, footnote 8.

¹⁶ *Id.*, at para 17.

Captain Jansen that she had personally visited the holding cell where the appellant was detained. The cell was clean, and the blankets and mattress used by the appellant were cleansed by a service provider employed to do so. In this regard reference was made to the occurrence book which details the cell visits that were undertaken after the appellant's detention.

[65] Detainees are often detained in atrocious, and at times inhumane, conditions, but it is equally true that some of the places of detention are of acceptable standards, in line with human dignity. It would be legally unsound, therefore, to assume, as a general position, that all places of detention are filthy, so to speak. Be that as it may, the deprivation of a person's liberty, even if for a short period, is a serious matter.

[66] There is, indeed, no empirical measure for the loss resulting from the violation of a person's dignity.¹⁷ Damages are awarded as a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place.¹⁸ As held in *Minister of Safety and Security v Tyulu*¹⁹ while it is always helpful to have regard to previous awards, 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.²⁰

[67] In *Syce and Another v Minister of Police*,²¹ an award of R40 000.00 was made on appeal, for the appellant's detention overnight (approximately 11 hours). In *Van der Nest NO v Minister of Police*,²² the appellant was awarded R50 000.00 for detention for less than 24 hours in November 2019, having considered, inter

¹⁷ *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA), para 20.

¹⁸ *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021), para 50.

¹⁹ 2009 (5) SA 85 (SCA).

²⁰ *Ibid*, para 26.

²¹ *Syce and Another v Minister of Police* (1119/2022) [2024] ZASCA 30; [2024] 2 All SA 662 (SCA); 2024 (2) SACR 1 (SCA) (27 March 2024).

²² *Van der Nest NO v Minister of Police* (154/2024) [2025] ZASCA 42; [2025] 2 All SA 655 (SCA); 2025 (5) SA 152 (SCA) (10 April 2025).

alia, the deterioration in the value of the currency over the years. In *Madingana v Minister of Police*,²³ Laing J awarded R80 000.00 for the plaintiff's unlawful detention overnight. In *Lenoke v Minister of Police*,²⁴ the Full Court Bench awarded the appellant R30 000.00 for unlawful detention for 3 hours. In *Liu Quin Ping v Akani Egoli (Pty) LTD t/a Gold Reef City Casino*,²⁵ a 45-year-old businessman who was unlawfully detained at the Casino for approximately three hours, for the contravention of the Gauteng Gambling Act 4 of 1995, was awarded R12 000.00.

[68] I have taken into account the fact that the appellant was unlawfully detained for over 2 hours. At the time, he was 35 years of age, and he was employed to pick up papers in front of certain offices. His highest level of education was grade 11. As held in *SA Eagle Insurance Co Ltd v Hartley*,²⁶ the Court's evaluation of an appropriate award must take into account the current day value of currency and not at the earlier time. Even though the plaintiff's arrest and detention took place in 2018, this Court is enjoined to have regard to the depreciating value of money due to the effects inflation. On a consideration of all the facts, I consider that an award of R10 000,00 is fair in this case.

Costs

[69] The appellant has been partially successful in this appeal. That being so, the aspect in respect of which he succeeded still entails an important issue – a person's right to liberty. Even though arrest and detention have the same effect of limiting a person's liberty, they are separate legal acts. Hence, the claim for unlawful detention could stand on its own. Although the claims relating to the search and arrest are separate, they are closely interlinked to his subsequent detention. The

²³ *Madingana v Minister of Police* (3411/2021) [2023] ZAECGHC 29 (4 April 2023).

²⁴ *Lenoke v Minister of Police* (CIV APP MG 27/2023) [2024] ZANWHC 277 (6 November 2024).

²⁵ *Liu Quin Ping v Akani Egoli (Pty) LTD t/a Gold Reef City Casino* 2000 (4) SA 68 (W).

²⁶ 1990 (4) SA 833 at 841D-E.

respondent made no offer to settle the dispute, and the appellant was compelled to proceed with the litigation, and the appeal, in order to recover what is due to him. In this sense, the costs of the litigation were occasioned by the attitude of the respondent. Therefore, despite the appellant's partial success, the respondent ought to carry the costs of the trial and of this appeal. It is fair and just that this be so.

[70] In the result, I would make the following order:

1. The appeal against the dismissal of the appellant's claim for unlawful search and arrest is dismissed.
2. The appeal against the dismissal of the appellant's claim for unlawful detention is upheld to the extent set out below.
3. The order of the Magistrates' Court is set aside and replaced with the following order:

‘(a) The plaintiff's claim for damages resulting from his search and arrest on 12 October 2018, is dismissed.

(b) The defendant is liable for damages resulting from the plaintiff's unlawful detention at Galvendale Police Station, Gqeberha, from 18h20 to 20h52 on 13 October 2018.

(c) The defendant is ordered to pay to the plaintiff the sum of R10 000 as damages for the said unlawful detention, together with mora interest, at the rate of 10% per annum, from the date of service of summons to date of payment.’

(d) The defendant shall pay the plaintiff's costs of the action.’

4. The respondent shall pay the costs of this appeal on scale B referred to in Uniform Rule 67A, and such costs will include the costs of the condonation application.

L. RUSI
JUDGE OF THE HIGH COURT

EKSTEEN J:
I agree.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For the appellant : *Mr P. McKenzie*
Peter McKenzie Attorneys
c/o 5 Betram Street, Makhandha

For the respondent : *Adv. Morgan*

Instructed by : The Office of the State Attorney, Gqeberha

Date heard: 25 July 2025

Date delivered: 15 October 2025