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

CASE NUMBER: 5022/2017

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 10/10/2025

SIGNATURE:

In the matter between:

SADIKE DERICK KHOSA

PLAINTIFF

AND

MINISTER OF POLICE

DEFENDANT

JUDGMENT

STRÖH JA

[1] The *Plaintiff* (Sadike Derick Khosa) instituted an action for damages against the Minister of Police, (hereinafter the *Defendant*), claiming an amount of R 300 000-00 (Three Hundred Thousand Rand)for the *unlawful arrest* on the 1st May 2013, payment of R 3 700 000.00 (Three Million Seven Hundred Thousand Rand) for the alleged *unlawful detention* for three(3) years six(6) months and nineteen (19) days as from the 29th April 2013 to the 17th November 2016, payment of R 900 000,00 (Nine Hundred Thousand Rand) for *impairment of dignity and reputation and*

humiliation, payment of R 2 000 000,00 (Two Million Rand) for deprivation of freedom of movement and liberty, and an amount R 1 000 000,00 (One Million Rand) for loss of amenities of life and psychological trauma and discomfort.

[2] The members of the *South African Police Services* ("SAPS") arrested the *Plaintiff* without a warrant on the 1st May 2013, for allegedly committing the offences of assault with intent to do grievous bodily harm and murder. He was detained at Ritavi Police Station. The members of SAPS were acting in the course and scope of their employment and pursuing the interest of the *Defendant*.

[3] In his particulars of claim, the *Plaintiff* alleged the arrest and detention was unlawful! as there was no **justa causa** for his arrest and detention. Due to the arrest and detention as aforementioned, the *Plaintiff* was injured in his **dignitus** and his right to movement was unlawfully infringed upon.

[4] The *Plaintiff* further alleged in his particulars of claim that he was denied bail throughout his period of detention which was from the 29th April 2013 to the 17th November 2016, which was three (3) years six (6) months and nineteen (19) days. The *Plaintiff* was subsequently found not guilty on all charges conferred upon him and discharged on the 17th November 2016.

[5] In the amended plea filed on 2nd June 2021, the *Defendant* pleaded to the *Plaintiff's* amended particulars of claim dated 12th October 2020 , as follows:

(a) The *Defendant* admit that the *Plaintiff* was lawfully arrested *without a warrant after he handed himself over to members of the Defendant* after being implicated as a suspect in the crime, assault with the intention to do grievous bodily harm and murder.

(b) The arrest and detention were justified by the provisions of section 40(1)(b) and section 40(2) of the Criminal Procedure Act, Act 51 of 1977 as amended ("the CPA").

(c) The *Plaintiff* was one of the suspects who were involved in the commission of the crime.

- (d) *Defendant* will rely on the statements of the witness Ms Tinyiko Dunga and statements of the other suspects that were arrested before the *Plaintiff's* arrest, which suspects were members of the community that assaulted the deceased who later died in Letaba Hospital. Such statements form part of the docket as discovered and should be read as if incorporated herein.
- (e) The *Plaintiff* was identified by the suspects in the criminal trial that the *Plaintiff* was one of the community members who together with them assaulted the deceased.
- (f) After being arrested the *Plaintiff* was detained in terms of section 50 of CPA and appeared before the Magistrate within 48 hours.
- (g) Because *Plaintiff* committed a serious crime and also because of the fact that he had previous conviction, bail for the *Plaintiff* was opposed and Bail was subsequent denied.
- (h) The police officers who are members of the *Defendant* were acting in terms of the CPA and that they complied with sections 40 and 50 of the CPA.
- (i) The arresting officer of the *Plaintiff* was a peace officer as defined in the Act. He had a reasonable suspicion that the *Plaintiff* committed a Schedule 1 offence of assault with the intention to do grievous bodily harm and murder.

[6] It is common cause that on the 1st May 2013, the *Plaintiff* was arrested by the police and detained at Ritavi Police Station and appeared in court within 48 hours. It is also common cause that the *Plaintiff* remained in custody until discharged on the 17th November 2016.

[7] Before the trial started, the parties had agreed that there would be separation of merits and quantum.

[8] *Regarding the lawfulness of the arrest and detention, the defendant bears the onus to prove the grounds of justification.*¹ That is so because the justification for the detention following an arrest until detainee's first appearance in court continues to

¹ **Minister of Law and Order v Hurley** 1986 (3) SA 569 (A) 589 E-F

rest on the police.² *The defendant also has an onus of proving the lawfulness of the plaintiff's continued detention until the 17th November 2016.* The general principle is that the *onus* rests on the detaining officer to justify the detention because *detention is prima facie unlawful*.³

The Plaintiff bears the onus only when he alleges that the arresting officer failed to exercise his/her discretion rationally. The parties agreed that the Defendant would commence leading evidence in respect of lawfulness of the arrest and calling one of the police officers to lead evidence regarding the deceased detaining officers' evidence (Hearsay Evidence - Section 3(1)(c) of Act 45 Law of Evidence). Once the *Defendant* has lead evidence that the arrest was lawful and the court accepts the hearsay evidence, the onus shifts to the *Plaintiff* then to prove that the arrest of the *Plaintiff* did not meet the threshold in terms of Sect 40 of the CPA and that the arresting officer of the *Plaintiff* did not have the reasonable suspicion as needed at the time of the arrest.

[9] To prove his case against the *Defendant*, the *Plaintiff* testified himself and called one other witness Kaizer Lala Shipalana. The *Defendant* called Sgt Jonas Alex Malunganyi (one of the two police officers first on the crime scene), W/O Jonas Shikwambana (who arrested one of the other suspects in the criminal case against *Plaintiff* and who testified on behalf of the detaining officer of the *Plaintiff*) and Tinyiko Annickie Dumela (one of the witnesses at the crime scene) to testify on their behalf.

The evidence of Sergeant Jonas Alex Malunganyi

[10] On the 28/29th April 2013, Sgt Malunganyi was on duty with Constable Phakula at Ritavi Police Station. He received a complaint regarding a person that was attacked by a Mob at Nkowankowa. They rushed to the place where the crime occurred. On their arrival, they saw that the deceased was already assaulted, and the assault continued while they were at the crime scene. They enquired from the

² **Minister of Police and v Another v Du Plessis** [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) at para 17.

³ See **JE Mahlangu and Another v Minister of Police** [2021] ZACC10 at para [32] where it was held that once it has been established that the constitutional right not to be deprived of one's physical liberty has been interfered with, the deprivation is *prima facie* unlawful, and the infringer bears the onus to prove that the inference was justified.

bystanders at the crime scene as to who assaulted the deceased, but no-one came forward to testify as to what occurred at the crime scene. They then rescued the deceased from the persons assaulting him and placed the deceased in the police van. They decided to drive directly to the Letaba Hospital with the deceased who was at that stage still alive. After the hospital, Sgt JA Malunganyi went back to the police station and opened a skeleton file. The main reason for the skeleton file was because the name of the deceased was not known to him at that stage.

[11] During cross-examination, Sgt Malunganyi conceded that in 2013, he was already 5 (five) years in the Police Services and had enough knowledge to work as a police officer. He also confirms that he is a Peace Officer in terms of the CPA. He further testified that he did not arrest the *Plaintiff* and also in his statement on page 126 and 127 of the police docket he did not mention the *Plaintiff* by name. When asked by the court if he knew the deceased's name, he testified that he knew but forgot the name while testifying in this trial.

The evidence of Warrant Officer Martiharini Jonas Shikwambana

[12] W/O Shikwambana testified as to what he knew regarding the offences of assault with intent to do grievous bodily harm and murder which occurred on the 28/29 April 2013 to which he replied, "Mob Justice". When asked what he understands by the meaning of "Mob Justice" he replied, "person killed by many community members". He also responded by testifying that the reason for Mob Justice is usually an "intruder in the community".

[13] He was referred to page 114 of the police docket and replied: "it is statement of suspect Sadike Derick Khosa". According to this witness, the interview was done by the investigating officer (1/0) Detective Warrant Officer (D/W/O) BK Homu. He further confirmed that it was D/W/O Homu who signed the statement in respect of the interview with *Plaintiff* on page 86 of the police docket. The reason why he could confirm it was because each police officer has a unique service number. He used this service number of D/W/O Homu to obtain the death certificate of D/W/O/ Homu which was also handed in this court as exhibit "A".

[14] It was mentioned that page 85 of the police docket is part of the interview statement that started on page 114 of the police docket. Paragraph 6 on page 85 of the police docket contained the following: "Hereafter the suspect declares, or answer to the questions as follows: On Sunday 2013.04.28 at about 22:00 I was at home when I heard a voice of somebody calling for help. After that I went out and proceeded to the direction where the person was calling or shouting for help. When I arrived in the street I found a lot of people who were busy assaulting a male person who was wearing a Kaizer Chiefs T-Shirt and his lower part of his body was naked. After that I asked a lady who reside in the same street who is known as Bonita's mother whether the police were called. She informed me that they had only two police vans. I then phoned Ritavi police and directed them to the scene and they arrived. I didn't participate in the assault, and I didn't even identify those who were assaulting the unknown black male." This interview statement was signed by the plaintiff on the 1st May 2013. The statement was also commissioned by this witness. The witness confirmed that he was not the arresting officer for the Plaintiff. When asked who was, he replied: "D/W/O Homu." The witness testified that he was the arresting officer for other suspects in the same criminal trial that the suspect was involved in.

[15] The witness was further referred to page 90-92 of the police docket to which he confirms that the statement was made by D/W/O Homu on the 2nd May 2013 at 15:52. Paragraph 1 - 9 of this statement of D/W/O Homu contained the following: "Ritavi cas 296/04/2014 Baldwin Kavana Homu state under oath in English: "I am a b/male 50 years old, ID 6[...]0 and a resident of house No 182/8 Nkowankona . Cellular No 0[...]. Employed by the department of Safety and Security stationed at Ritavi police station . Tel 0[...].

On Monday 2013.04.29 at about 17:20 I was doing investigation at Mbambamencisi village when I arrived at a certain homestead where the deceased is alleged to have been found in the door. When I asked the daughter of b/female Tinyiko Annickie Dumela about the incident which is alleged to have started at her home, she informed me that she was not at home when it happened.

Thereafter she informed me that she only heard that, an unknown b/male has entered at her homestead and pushed the door begging her mother to open the door. She alleged that her mother summoned people or community members to come and

assist. She further told me that it was alleged that the deceased first entered at b/male Freddy Mathye's home.

She then pointed out to me the homestead of b/male Freddy Matythy's home. When I arrived at b/male Freddy Matthy's homestead, I found him. When I asked him about the unknown b/male who was assaulted at Mbambamenasi near his homestead, he told me that the deceased first came at his home.

He further told me that the unknown b/male first knocked at his house's window. He alleged that when he wanted to know who was knocking at the door, the unknown b/male runaway. According to him he heard his neighbour known to him as Bonnita's mother shouting for help. When I asked him about the people who assaulted the deceased, he gave me a report that he was one of the people who assaulted the deceased.

He then gave me a list of people he alleged that, they participated in the assault of the deceased. He alleged that b/male Sadike, Zakaria Seoka, Elia Thembain, David and Ishy their surnames unknown are some of the people who assaulted the deceased. After that I told him to come to Ritavi with the above-mentioned people and the reason for that, was because I wanted to first get a statement from b/female Tinyiko Annickie Dumela.

On Tuesday 2013.04.30 I was expecting the listed people to come and see me but they did not turn up. On Wednesday 2013.05.01 I was at Ritavi police station when b/male Derrick Sadike Khosa came and I arrested him. I explained his right to him and charged him.

On Thursday 2013.05.02 at about 09:00 detective warrant officer Shikwambana M.J arrested the second suspect b/male Freddy Matthy.

I know and understand the contents of this statement. I have no objection to taking the prescribed oath. I consider the prescribed oath to be binding on my conscience."

[16] The witness testified that he knew Freddy Mathye and that he was the one who arrested him. He was referred by his legal representative to Page 94 of the police docket to which he confirms that it is his statement that he made on the 2nd May 2015. Paragraph two of this statement under oath by this witness contained the following: " On Thursday 2013.05.02 at about 09:00 I was on duty when a b/male who identified himself as Freddy Matthy came personally at the office and alleged that he was suspect of a murder case."

[17] The witness was asked if he also know Tinyiko Annickie Dumela to which he replied "She was the one who shouted for help after deceased went to her place".

[18] Page 76 of the police docket to which this witness testified, is his arrest statement of two more suspects in the Plaintiff's criminal trial. The names of these two suspects were Sagaria Justice Seska and Phanyane Eliah Seska.

[19] The witness was asked by his legal representative to identify page 107 of the police docket to which he replied: "statement interview suspect- Freddy Mattheye dated 2nd May 2013". Page 108 and 109 of the police docket is part of the interview statement by Freddy Mattheye and Paragraph 6 on page 109 contained the following: " Hereafter the suspect declares, or answer to questions as follows: I deny all the allegations against me , on Sunday 2013.04.28 at about 21:16 I was at home at Mbambamencisi Village when I heard a knock at the window. I tried to find out as to who was that person and there was no respond. I tried to find out as to who was that person and he started to runaway.

I then heard Bonnita's mother crying for help. I rushed to Bonnita's mother and find a certain unknown b/male wearing a Kaizer Chiefs t- shirt, brown trouser and a pair of white Nike takkies, he was surrounded by a group of many people who were assaulting him.

Whilst the group of people (mob) were assaulting him the said b/male was shouting "darling" referring to Bonnitas mother that how can she let people to kill him, Bonnitas mother went aside.

The unknown b/male was assaulted by the mob from 21:00 and people were busy phoning the police since then until on Monday 2013.04.29 at about 01:00 when the police came and took the deceased away.

I didn't assault the deceased as it is alleged and whilst the deceased was being assaulted he was shouting Bonita's mother.

Amongst the people who were assaulting the deceased I didn't identified anybody"

[20] The witness was referred to paragraph 4 and 6 of the *Plaintiff's* Particulars of Claim and more specifically to the "unlawful! arrest and detention" by the Police and

was asked what is his comment. He answered as follows: "There must be prima facie evidence - No need for warrant if evidence is direct"

On the question of what direct evidence is, he testified:" that I saw the suspect do this- no need for warrant".

On the question of what is your reason for arresting someone, he testified: " his involvement on the crime"

[21] The witness further testified that the Bail form for the *Plaintiff* is on page 113 of the police docket which indicated that Bail was applied for on the 2nd May 2013 and that Bail was not granted. The witness confirmed that he was not present at the hearing of the Bail application.

[22] The witness testimony was further that SAPS 69 of the *Plaintiff* indicated that he had previous convictions and that he was convicted on 3rd August 2011 for the offence of assault with intent to do grievous bodily harm. He further testified that the reason for refusal of bail with his experience as a police officer was because of the SAPS 69, especially with the charge of murder.

[23] The witness further testified that the reason why the description on the police document on page 129 of the police docket was initially assault, was because when the deceased was brought to hospital, he was still alive. It was changed to murder when he passed away.

[24] The witness confirms that he is aware of the contents of section 40(1)(b) of the CPA. He was referred to the pleading which refers to murder which is a schedule one offence to which he replied "Correct".

[25] The witness was also referred to page 115 of the police docket by his legal representative, which I don't accept as evidence in this trial. The reason for not accepting this evidence is because page 115 of the police docket refers to a progress report of the deceased in hospital. No evidence was led to who the person was that made these comments on this progress report.

[26] On the next day of this trial this witness provides this court with a copy of return of non-service on Rodney Sekgobela. The return of non-service was marked exhibit "B". The witness was referred to page 62-64 of the police docket by his legal representative, which evidence I don't accept as part of this trial. The reason for not accepting this evidence by another person as the person whose statement this is because it cannot be seen as an excuse to not get hold of the person whose statement this is and then not give a proper reason except to say cannot serve subpoena on the person to come testify in court.

[27] The witness was the referred to Section 40 of the CPA and was asked what informs the arrest to which he replied: "statement by witnesses implicating the Plaintiff".

[28] During cross-examination the witness testified that he is not an expert but that he was an experienced Police Officer. He was also asked if he knew the grounds to arrest a person without a warrant and then he mentioned a few which included section 40(1)(a) of the CPA. He again confirms that he was not the arresting officer of the *Plaintiff* and he further confirms that the *Plaintiff* was arrested because of being a suspect to the crime. He was further asked in cross examination what do you confirm before arrest to which he replied: "suspicion of crime". He also confirms under cross-examination that a statement of a witness in crime is one of the grounds for arrest of an accused. He was also referred to page 62-64 of the police docket which I, for reasons given later in this judgment, don't accept as part of the evidence.

[29] Under further cross-examination he was asked what page 108 and 109 of the police docket is to which he replied: "it is an explanation statement by Freddy Matthee." The legal representative for the *Plaintiff* referred the witness firstly to page 91, paragraph 6 of the police docket which is the deceased D/W/O Homu statement in which he stated that Freddy Matthee gave him a list of people involved in the crime which include the *Plaintiff*. Secondly, he referred the witness to Page 108 paragraph 8 of Freddy Matthee statement in which he stated that he could not identify any of the people who were assaulting the deceased. He the witness was asked: "do you agree these two statements contradicted each other" to which he replied: "he does not agree". When asked why not, the witness replied: "page 108 is

an explanatory statement written by Freddy Mattheye, he (Freddy) was talking and he was writing". The court then asked what is page 90 and 91 of the police docket, to which the witness answered: "that it is a sworn statement under oath by the deceased D/W/O Homu". He the witness was again asked: "you agree that Freddy Mattheye Paragraph 6 page 108 contradicts Homu's page 91 Paragraph 6", to which the witness answered: "correct".

[30] In further cross-examination the witness was asked the question that he is not in a position to assist the court as to what suspicion the arresting officer had when arresting the *Plaintiff*. The witness replied: "he is in a position". When asked how can you assist the court with suspicion of Homu when arresting *Plaintiff*, the witness replied: "sworn statement by Tinyiko Annickie Dumela".

[31] It was further indicated to the witness that *Plaintiff* handed himself over to the police and was not arrested as indicated by the deceased D/W/O Homu in his statement on page 92 of the police docket.

[32] In re-examination the witness was referred to page 111, paragraph 2 and 4 of the police docket and ask if that was the statement he was referring to when ask about the suspicion of deceased arresting officer D/W/O Homu when arresting *Plaintiff* to which he confirm.

[33] Paragraph 2 of page 111 of the police docket states the following: " On Monday 2013.04.29 at about 07:30 I received a call from Ritavi station and informed that, a certain unknown b/male was assaulted at Mbambamencisi village. The caller informed me that the unknown b/male has passed away at Letaba hospital where he was admitted".

[34] Paragraph 4 of page 111 of the police docket states the following: "After obtaining a statement of the witness b/female Tinyiko Annickie Dumela, I went to look for the suspects b/males Freddy Mattheye and Sadike and I did not found them. On Wednesday 2013.05.01 at about 09:10 I was at Ritavi police station when b/male Derrick Sadike Khosa arrived. I explained to him that he was under arrest and further

explained his rights to him after telling him that he is under arrest. I then charged him and later detained him."

The evidence of Tinyiko Annickie Dumela

[35] This witness testifies that what occurred on the 28 April 2013 was "Mob Justice". When asked the question that the *Plaintiff* indicated that he did not participate in "Mob Justice" what did the witness saw, she replied he was involved. She testified that: "at the time that the assault took place - person trying to run away - Sadike (Plaintiff) blocked the man and assaulted him with open hand and kicked him".

[36] The witness was referred to page 68 of the police docket to which she confirmed that it is her statement that she made and paragraph 2 contains the following: "On Tuesday 2013.04.30 I submitted two statements, I mention the names of Rodney and Sadike and I can confirm that they are two different people who both participated in the assault of the deceased". Paragraph 3 of the same statement contained the following: "The two above-mentioned b/males are both the residents of Mbambamencisi village and are my neighbours".

[37] The witness testified in her own words as to what happened on the crime scene on the 28th April 2013 as follows: " Sunday evening at about 9:30 the evening I heard a bang on my door. The person said I must open will leave in the morning. I ask if ever he came to my house. He bang and said please open. I heard people talking. Son of mine said I must open. I told him I will not open. I then open the door three boys were there excluding the deceased. It was Rodney, Sagarika and Justice. Third person name was Freddy he is criminal stealing. They were assaulting the person in her presence".

[38] In cross -examination the witness testified that the deceased D/W/O Homu:"might have written and left out but what she is telling is what she saw." She was again referred to page 68 of the police docket which is her statement to which she confirms the content of paragraph two. When asked in cross examination regarding the two statements in paragraph two of her statement she replied:" I was

not the one who told the police that I submitted two statements". She further testified that: "Officer Homu was the one writing statement and submitted I made two statements". She after giving testimony for some time in the witness stand, was asked what occurred on the date in question, she then admitted that she made two statements.

[39] In her further cross-examination the witness was ask if she agrees that the document on page111 of the police docket and more specifically paragraph four was not part of the statements before this court in the civil proceedings to which she replied: "I don't agree -I give evidence"

[40] In re-exam the witness confirmed that she made the first statement on the 29th April 2013 but could not remember all the content.

Evidence for the Plaintiff

The evidence of Kaizer Lala Shipalang

[41] The testimony of the first witness for the *Plaintiff* is that of his neighbor. Herewith the testimony of the witness in his own words: " We were sitting at homestead drinking. Himself, Sadike and the owner of the homestead went to buy beer. Before we could reach the Tavern we heard a lot of noise. We said we would go and see what's happening. When we arrived a lot of people was standing around a person lying on his back on the ground one shoe missing. We asked amongst the people who gathered, they said person was assaulted. We asked whether they called the police- they replied police were taking long time to arrive.

While Sadike was on the phone he said they are coming. We did not stand longer and proceed to Tavern to buy beer and meat . Back to the homestead together with Sadike"

[42] The witness in his testimony denied that Sadike was involved in Mob Justice, contrary to what the previous witness Tinyiko Annickie Dumela said. His testimony was that the previous witness gave Sadike (*Plaintiff*) the number to phone the police.

[43] In cross-examination the witness testified that the other person's name together with him and the *Plaintiff* at the homestead was Olia Phalula. The witness was asked why his testimony differs from that of the statement by the *Plaintiff* to which he replied: "that's what I say". He again confirms that he was with *Plaintiff* the evening of the 28th April 2013 and he again confirmed that the *Plaintiff* phoned the Police from the place the assault occurred.

[44] In re-exam the witness testified that he was not part of the criminal case and that he did not testify in the criminal case. He was asked again why his testimony differs from that of *Plaintiff* to which he replied he doesn't know, and he also doesn't know what *Plaintiff* said in his statement.

The evidence of the plaintiff

[45] The *Plaintiff* answer to the question as to whether he is convenient in English was: "don't understand". When asked why was he here in court he replied: "I am here in relation of murder case". When asked to elaborate he replied: "I was arrested for nothing - don't know anything."

[46] The plaintiff then went on to testify in his own words what occurred on the evening of the 28th April 2013. His testimony was : " I was at neighbors home-passing time. We were going to buy beer at Spasha Shop. When we go to the Spasha Shop - Someone was screaming for help. We found person laying on ground. Person was assaulted. I only was able to identify owner of the house where the person was assaulted. Only wearing T-shirt. I ask the owner if she called the police. Said yes, it was long time ago three vans all out. He requested contact number of Police from homeowner. He then called the Police. I explained to female police about the assault and place. He went to his house. Police phoned him back and ask directions." The *Plaintiff* was asked if he was present when the deceased was taken to hospital, to which he replied: "no". He also testified that the police phoned the next day to ask him to come into the police station.

[47] The plaintiff was referred to page 85 of the police docket to which he confirmed it is his signature but denied certain parts of these two paragraphs under

paragraph six on page 85 and more specifically he did not hear anybody shouting as well as that he heard somebody calling for help. The plaintiff testified that he never said that he heard somebody calling for help, he said what he said was: "I was going to buy beer".

[48] The plaintiff explained that the difference between his testimony in this court and that of the statement referred to on page 85 of the police docket is, in his own words: "Police Officer not making it easy - he assaulted him with open hand".

[49] The Plaintiff confirmed that he was not found guilty in the murder criminal trial.

[50] In cross -examination the defendant legal representative firstly try to get the Plaintiff to deny the legality of the statement which was, that the statement on page 85 of the police docket doesn't contain the truth, secondly that the content of statement was not what happened , thirdly when asked questions beaten with open hand and fourthly he was under duress when statement was taken. Plaintiff also testified that the deceased D/W/O Homu assaulted him. He testified that he did not tell his current legal representative that D/W/O Homu assaulted him.

[51] The plaintiff further in cross-examination testified that he went with Shipalang to the Police Station. He was asked if Shipalang was Kaizer to which he replied "yes". The plaintiff clarifies the word homestead as sometime the home of Kaizer where he sometimes sleep for the night. The plaintiff further confirms that they went to the tavern to buy beer. When asked if the plaintiff knew Rodney, he said he saw him.

[52] The plaintiff was further asked questions in cross examination regarding the statement of Sekgobela, but that statement was not accepted as part of the evidence for reasons I will give later in this judgment.

Issues

[53] The legal issues for the determination are whether: (i) the plaintiff was lawful arrested and detained in terms of section 40(1) (b) of the CPA; (ii) the defendant was liable for the plaintiff's continued detention from the date of arrest 1st May 2013 till

date of his discharged on the 17th November 2016 , (iii) the allowance of Hearsay Evidence - Section 3(1)(c) of Act 45 Law of Evidence and (iv) reasonable suspicion of arresting officer.

The lawfulness of the arrest

[54] S40(1)(b) of the CPA provides that a peace officer may, without a warrant arrest any person whom he reasonable suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody. The arrest would be lawful if the arresting officer establishes the jurisdictional factors, and he/she may invoke the power conferred by section 40(1)(b) to arrest the suspect unless the plaintiff demonstrates that the discretion to arrest him/her was exercised unlawfully.⁴ The jurisdictional requirements for a lawful Arrest under section 40(1) (b) defence are:

- 54.1 the arrestor must be a peace officer.
- 54.2 the arrestor must entertain a suspicion.
- 54.3 the suspicion must be that the suspect committed a schedule 1 offence;
and
- 54.4 the suspicion must rest on reasonable grounds.

[55] If the arresting officer succeeds in establishing these jurisdictional factors, the arrest would be lawful, unless the plaintiff establishes that the discretion to arrest him/her was exercised in an unlawful manner.⁵

⁴ In **Minister of Safety and Security v Sekhoto and Another** 2011(1) SACR 315 (SCA), Harms DP quoted with approval the dictum **Duncan v Minister of Law and Order** at 818H-J and 819A-B where Van Heerden JA held: " If jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection ,i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf **Holgate-Mahomed v Duke** [1984] 1 All ER 1054 (HL) at 10576). No doubt his discretion must be properly exercised. But the grounds on which the exercise of such discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case. All that need be said for the purposes of point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the Legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee (cf **Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another** 1966 (2) SA 503 (A) at 512; **Groenewald v Minister van Justisie** 1973 (3) SA 877 (A) at 884)"

⁵ In **Minister of Safety and Security v Sekhoto and Another** 2011(1) SACR 315 (SCA) para 30 and 38

If one or more of the jurisdictional factors is/are not met, the arrest would be unlawful. The relevant enquiry is whether suspicion was reasonable thereby establishing the jurisdictional factors.⁶

[56] In the case before this court, it is undisputed that D/W/O Homu was a peace officer and that the crime assault with intent to do grievous bodily harm and murder is a schedule 1 offence. In dispute is whether he, D/W/O Homu entertained a suspicion that the plaintiff had committed an offence of assault with intent to do grievous bodily harm and murder. A further aspect of the dispute is whether his suspicion rested on reasonable grounds, which must be considered against the applicable principles and the relevant matrix.

Whether the suspicion was based on reasonable grounds

[57] In **Mabona and Another v Minister of Law and Order and Others**⁷, Jones J held: "The test of whether a suspicion is reasonable entertained within the meaning of section 40(1)(b) is objective (**S v Nel and Another** 1980 (4) SA 28 E at 33E-H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect

⁶ See **Nkosinathi Justice Banda v Minister of Police N.O** [2020] ZAECHGHC 55 para 40)

⁷ **Mabona and Another v Minister of Law and Order** 1988(2) SA 654 (SE) at 654 E-H; also **Shaaban Bin Hussein and Others v Chang Fook Kan and Another** (1969) 3 All ER 1627 (PC) the court held: " Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; " I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end"

is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion"

[58] The plaintiff alleges that his arrest was unlawful! and that there was no **justa causa** for his arrest.

Detention

[59] Detention is, in and by itself, unlawful. The onus rests on the detaining officer to justify it.⁸ The Constitutional Court remarked that the question whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in section 12 of the Constitution, is a constitutional matter. S 12(1) of the Constitution guarantees that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and also not to be detained without a trial.

[60] The plaintiff alleges that after he was arrested, he was detained for a period of three (3) years six(6) months and nineteen (19) days as from the 29th April 2013 to the 17th November 2016. He further alleges that there were no reasonable and/or objective grounds justifying his detention. He contends that his detention was wrongful and without reasonable and probable cause.

[61] In **Mvu v Minister of Safety and Security and Another**⁹ Wills J cited with approval **Hofmeyr v Minister of Justice and Another**¹⁰ and remarked:

"[10] In **Hofmeyr v Minister of Justice and Another** King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and that the failure by a police officer properly to do so is unlawful. The minister's appeal

⁸ **Zeeland v Minister of Justice and Constitutional Development and Another** 2008 (2) SACR 1 (CC) (2008) (4) SA 458; 2008 (6) BCLR 601) para 24

⁹ **Mvu v Minister of Safety and Security and Another** 2009 (2) SACR 291 (GSJ) para 10

¹⁰ **Hofmeyr v Minister of Justice and Another** 1992 (3) SA 108 (c)

was unanimously dismissed by what was then known as the Appellate Division of the Supreme Court. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all.

This, it seems to me, and in my very respectful opinion, enables one to get a better grip on an issue which has been debated in the law reports in recent cases such as **Minister of Correctional Services v Tobani; Ralekwa v Minister of Safety and Security; Louw v Minister of Safety and Security and Others; Charles v Minister of Safety and Security; Olivier V Minister of Safety and Security; and Van Rensburg v City of Johannesburg.**

On the question of unlawful detention per se, as a concept to be considered separately from the question of arrest, it is my respectful view, instructive to read the **Tobani** case in which Jones and Leach JJ, together with Govender AJ, upheld, in an appeal to the full court, the judgment of Froneman J. I also agree with the general approach of Horwitz J in the **Van Rensburg** case even though, in that case, the facts are distinguishable from the present one at least in as much as a warrant for arrest had been issued."

Further detention from 2nd February 2013 to 17th November 2016

[62] It is common cause between the parties that the Plaintiff was detained for the whole period from his arrest on the 2nd February 2013 till the 17th November 2016, when the court in the criminal trial found the Plaintiff(accused) not guilty.

POLICE LIABILITY ON UNLAWFUL ARREST

[63] **JE MAHLANGU and ANOTHER v MINISTER of POLICE**¹¹ the Constitutional Court discussed the issue of *unlawful arrest and detention* as follows:

" [25] The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be

¹¹ **JE Mahlangu and Another v Minister of Police** (2021) ZACC 10

arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity¹², are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote, and fulfil these rights, as well as all other fundamental rights.¹³ They are also part of the founding values upon which the South African constitutional state is built.¹⁴

[26] The police, like any other state functionary in the country for that matter, are constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by law.¹⁵ That is the basic component of the rule of law and one of founding values of our Constitution.

The impairment of dignity, reputation, humiliation and the deprivation of freedom of movement and liberty

[27] The unlawful deprivation of liberty, with its accompanying infringement of the right to human dignity, has always been regarded as a particularly grave wrong and a serious inroad into the freedom and rights of a person.¹⁶ In **Thandani**¹⁷ the court said that:

"sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a [person] in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual."¹⁸

HEARSAY EVIDENCE UNDER THE 1988 ACT AND THE CONSTITUTION

¹² Section 10 of the Constitution states that every person has inherent dignity and everyone has the right "to have their dignity respected and protected."

¹³ Section 7(2) of the Constitution. Note too that section 7(1) provides that "[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".

¹⁴ Section 1(a) of the Constitution states that "[t]he Republic of South Africa is one, sovereign state founded on the following values" including, "human dignity, the achievement of equality and the advancement of human rights and freedoms"

¹⁵ **Masetha v President of the Republic of South Africa**[2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 80

¹⁶ **Peterson v Minister of Safety and Security** [2009] JOL 24495 (EGG)

¹⁷ **Thandani v Minister of Law and Order** 1991 (1) SA 702 (E)

¹⁸ Id at para 707 A-B

[64] *Section 3 of the 1988 Act* provides:

3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice."

[65] In **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) Cameron JA held : " It is obvious that the 1988 Act , although pre-constitutional , must so far as possible be read in the light of the Constitution and to give effect to its fundamental values. The Constitution requires as much. Only if the statute's provisions cannot be read conformably with the Constitution would the question of unconstitutionality arise. In my view Goldstein J was, however, clearly right to reject the constitutional challenge. The statute does not license the wholesale admission of hearsay. Long before the Constitution came into effect the common law was alert to the dangers such an approach would have entailed. Not only is hearsay evidence-that is, evidence of a statement by a person other than a witness which is relied on to prove what the statement asserts - not subject to reliability checks applied first-hand testimony

(which dismisses its substantive value), but its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it.¹⁹

For these very reasons, this Court emphasized more than four decades ago that "hearsay, unless it is brought within one of the recognized exceptions, is not evidence, ie legal evidence, at all".²⁰

[66] Quoted the dictum of Cameron J in **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) at para 14 "The 1988 Act does not change that starting point. Subject to the framework it creates, its provisions are exclusionary.²¹ Hearsay not admitted in accordance with its provisions is not evidence at all. What the statute does is to create supple standards within which courts may consider whether the interest of justice warrants the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail. *The Act thus introduces the very feature this Court held common law lacked, namely "a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity"* (Own emphasis)

[67] "Aside from the importance of these cautionary words, a trial court must in applying the hearsay provisions of the 1988 Act be scrupulous to ensure respect for the accused's fundamental right to a fair trial. Safeguards including the following are important:

- First, *a presiding judicial official generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. (Own emphasis) More specifically under the Act, it is the duty of a trial Judge to keep inadmissible*

¹⁹ See HL Ho "A Theory of Hearsay (1999) 19 Oxford Journal of Legal Studies 402. In **Lee v The Queen** (1998) 72 ALJR 1484 the High Court of Australia stated the process point thus (para 32): "And the concern of the common law is not limited to the quality of evidence, it is a concern about the matter of trial. One very important reason why the common law sets its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial"

²⁰ Para 13 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) and **Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours** 1958 (3) SA 285 (A) 296F (Schreiner JA)

²¹ **S v Ramavhale** 1996 (1) SACR 639 (A) at 647 d-e per Shultz JA

*evidence out, [and] not to listen passively as the record is turned into a papery sump of "evidence". (Own emphasis).*²²

[68] "A further consideration bearing on the constitutionality of the statute is that this Court has construed the nature of the power the relevant provisions confer on judges in a way that underscores the rigorous legal framework within any decision to admit hearsay evidence will be scrutinised:

*" A decision on the admissibility of evidence is, in general, one of law, not discretion, and this Court is fully entitled to overrule such a decision by a lower court if this Court considers it wrong"*²³ (Own emphasis)

[69] "In making the admission of hearsay evidence subject to broader, more rational and flexible considerations, the 1988 Act's general approach is moreover in keeping with the developments in other democratic societies based on human dignity, equality and freedom.

The Supreme Court of Canada, for instance, has underlined the need for increased flexibility in interpreting the hearsay rule, and subject to safeguarding the interest of the accused, has distilled two criteria (reasonable necessity and reliability) governing its admission."²⁴

[70] "The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinize its probative value, including its reliability. The provisions enshrined these entitlements. *But where the interest of justice, constitutionally measured, requires that hearsay evidence be*

²² Para 17 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), Bill of Rights s 35(3), **S v Zimmerie en n ander** 1989 (3) SA484 (C) 492F-H (FriedmanJ, Tebbutt and Conradie JJ concurring), **S v Ramavhale** 1996 (1) SACR 639 (A) 651c.

²³ Para 22 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA), **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another** 1997 (1) SA 1 (A) 27E (EM Grosskopf JA, Corbett CJ, Nestadt JA, Schultz JA and Plewman AJA concurring)

²⁴ Para 23 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) .), In term of s 39(1)(c) of the Constitution, when interpreting the Bill of Rights a court "may consider foreign law" , Section 36(1) permits limitation of a right if reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", **R v Khan** [1990] 2 SCR 531 (SCC)

*admitted, no constitutional right is infringed. Put differently, where the interest of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant".(Own emphasis)*²⁵

[71] Quoted the dictum of Cameron J in **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) at para 45: " 'Probative value ' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but will it do so reliability?"²⁶

[72] "The *high probative* value of the evidence in this case, and the *objective* guarantees of its *reliability*, provide the *compelling justification* that must always be *sought if hearsay evidence is to play a decisive or even significant part in convicting an accused*" (Own emphasis) ²⁷

[73] In **S v Ndhlovu and Others** Cameron J cited with approval **S v Ndhlovu and others** 2001 (1) SACR 85 (W) and remarked: "But, as Goldstein also observed, where the interest of justice require the admission of hearsay, the provision 'does not require the absence of all prejudice'.²⁸

[74] In **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another, McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC** 1997 (1) SA 1(A) Grosskopf, JA held: "The matter of hearsay is now governed by statute. Sec 3 of the Law of Evidence Amendment Act 45 of 1988 provides that hearsay evidence is admissible, subject to certain exceptions Sec 3 (4) defines "hearsay evidence" as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any other than the person giving such evidence"²⁹

²⁵ Para 23 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) Compare **S v van der Sandt** 1997 (2) SACR 116 (W) 132 b-f

²⁶ Para 45 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA)

²⁷ Para 47 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA)

²⁸ Para 51 **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA)

²⁹ **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another, McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC** 1997 (1) SA 1(A) page 55-56

Expert Evidence

[75] "The evidence should be admitted, it was argued, because of a scientific nature, or alternatively, that it relates to a state of mind. In support of latter proposition reliance was placed on **Hollywood Curl (Pty) Ltd and Another v Twins Products (Pty) Ltd** 1989 (1) SA 251 J 252G.

I doubt whether either leg of this argument is correct. It is true that an expert may sometimes refer to hearsay sources in support of his views. However, if his views are entirely based on assertions which he obtained from somebody else, it is difficult to contend that the probative value of his evidence does not depend on the credibility of such other person.

And in so far as the evidence is said to relate to a state of mind, this may be true in respect of some replies. It is not necessary, however to pursue this matter any further since I consider that, even if it is hearsay, the evidence should have been admitted under one of the exceptions provided in the statute."³⁰

[76] "This would ,however not be practical course to follow. First, it would require the evidence of a large number of people. Second, the persons comprising such a sample should of course have no interest in the outcome of the proceedings" ³¹

Evidence in Civil/Criminal Matters

[77] "I turn now to the effect to be given to the evidence. The approach of the court a qua was to analyse each item and to show that, by itself, it has little or no probative value. In my view this is a wrong approach. We are dealing here with circumstantial evidence. In the well known case of **R v De Villiers** 1944 AD 495 Davis AJA, dealing with a similar argument in a criminal crime case, said (at 508-9):

³⁰ **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another, McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC** 1997 (1) SA 1(A) page 57-58

³¹ **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another, McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC** 1997 (1) SA 1(A) page 59

" The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

Apart from the nature of the onus, the same rules apply of course in civil cases."³²

[78] In **S v Libazi and Another** 2010 (2) SACR 233 (SCA) D Mlambo, J held" The ruling by the high court and the proper approach to s 3(1)(c) featured prominently before us. In this regard it was argued that the statement properly construed amounted to a confession and as such was inadmissible against anyone else other its maker in terms of the s 217 ³³ of the Criminal Procedure Act 51 of 1977 (the CPA). An alternative argument was that if it were found that the statement was not a confession but an admission, that it was similarly not admissible against the appellants in terms of s 219A ³⁴ of the CPA.

[79] " In this regard a *confession* is generally described as

' an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law. On the other hand an *admission* is referred to as 'a

³² **McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another, McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC** 1997 (1) SA 1(A) page 61-62

³³ 217 Admission of confession by accused

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.

³⁴ This section provides: 'Admissibility of admission by accused

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in adverse evidence is a foundational component of the fair trial rights regime decreed by our Constitution ins 35(3).

statement or conduct adverse to the person from which it emanates.' These definitions were approved by the Constitutional Court in **S v Molimi**. "³⁵

[80] "Our Constitution requires rights to be construed generously to ensure the widest protection possible. Rights ought not to be cut down by reading implicit restrictions into them, In -roads into the protection that the right affords should in all instances be justified. The right to challenge evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall , upon the mere production at the proceedings in question of the document in which the admission is contained-

(a)be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of admission and any question put to such person by the magistrate'

Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him. As Schwikkard puts it in her analysis of **Ndhlovu**:

' The right to challenge evidence, in so far as it is an essential characteristic of an adversarial trial and primarily directed at the truth- seeking, goes beyond merely establishing the reliability of hearsay in question."³⁶

³⁵ **S v Libazi and Another** 2010 (2) SACR 233 (SCA) para 8 , **R v Becker** 1929 AD 167 at 171 , Du Toit et al (see footnote 52 in **Molimi** (CC)),**S v Molomi** 2008 (2) SACR 76 (CC) para 28 corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter , if a certificate by the interpreter appears on such document to effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of admission and any question put to such person by the magistrate'

³⁶ **S v Libazi and Another** 2010 (2) SACR 233 (SCA) para 11, **S v Zuma** 1995 (2) SA 642 (CC) at para 14; **S v Mahlangu** 1995 (3) SA 391 (CC) at para 9; Constitution 3. Every accused person has a right to a fair trial, which includes the right- j. to adduce and challenge evidence

[81] "An even more compelling consideration militating against the wholesale application of the rule in **Ndhlovu** is rooted in the injunction to courts to treat co-accused or accomplice evidence with caution. While the prejudice to the accused of admitting the co-accused statement is very high and limits constitutional rights to challenge evidence and remain silent, various cautionary rules operate to make the probative value of the co-accused statement very low. In this regard, it is a widely acknowledged rule that evidence of an accomplice should be treated with extreme caution since, as Holmes JA put it: ' First , (the accomplice) is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency.

Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit".³⁷

[82] "Also apposite in this regard are the remarks of this court in **Balkwell & another v S** in which it was pointed out that: ' **Ndlovhu** too readily dismissed concerns expressed in **S v Ramavhele** 1996 (1) SACR 639 (A), which cautioned (at 649C-D) that a court should hesitate long in admitting hearsay evidence that plays a decisive or even a significant part in convicting an accused person."³⁸

[83] "For all the foregoing it is apparent that I do not regard the **Ndhlovu** approach as all encompassing. The matter at hand is a case of the classical 'absent witness' as opposed to **Ndlovu** and **Molimi** where the makers of the statements testified disavowing the statements attributed to them. In our case, Shasha was clearly an accomplice and did not testify. This effectively emasculated the court from evaluating the evidence in the statement and applying the necessary cautionary rules. This, in my view, clearly mitigated against the admission of the statement as hearsay evidence against the appellants. I also am not persuaded by the state's argument that the failure by Shasha to testify was mitigated by the evidence of

³⁷ **S v Libazi and Another** 2010 (2) SACR 233 (SCA) para 14, **S v Hlapezula & Others** 1965 (4) SA 439 (A) at 440D-E. See also **S v Gentle** 2005 (1) SACR 420 (SCA) ; **S v Scott-Crossley** 2008 (1) SACR 223 (SCA); **S v Makeba and another** 2003 (2) SACR 128 (SCA); DT Zeffertt, A P Palzes, A St Q Skeen **The South African Law of Evidence** 2003 pp 801-804.

³⁸ **S v Libazi and Another** 2010 (2) SACR 233 (SCA) para 15

Mbulawa who, the state asserted, could have been cross-examined on the statement as his evidence, so the submission went, was similar to that contained in the statement, Strickly speaking this is not factually correct.

Fundamentally, however, Mbulawa was not the author of the statement and he could conceivably never be cross-examined on its contents,"³⁹

[84] **Mashago Dumisani Promise v Passenger Rail Agency of South Africa** ...M R Phooko , AJ held" It is now settled that the standard of proof in a civil case is proof on the balance of probabilities. This entails that the Plainntiff, who bears the burden of proof, must prove that his version is more probable than that of the Defendant. Even though the Defendant has some duty to adduce evidence, the burden of proof remains on the Plaintiff throughout the trial. As was correctly stated by Van der Spuy in **Salamolele v Makhado**,:

'It is common cause that the plaintiff bears the overall onus of proof ... it may be that the defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on the plaintiff."⁴⁰

[85] In **Zealand v Minister for Justice and Constitutional Development** [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC) at para 25 the Constitutional Court held that:

" It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In absence of any significant South African authority, Grosskopf JA found the law concerning the

³⁹ **S v Libazi and Another** 2010 (2) SACR 233 (SCA) para 16

⁴⁰ **Mashago Dumisani Promise v Passenger Rail Agency of South Africa** para 12; **Pillay v Krishna and Another** 1946 (AD) 946 at 952-3; **Salamolele v Makhado** 1988(2) SA 372 (V), at 374

rei vindication a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that Court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rest on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."

[86] In **Hurley**⁴¹, the Supreme Court of Appeal stated the following:

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.⁴²

[87] In paragraph 70 of this judgement the Supreme Court of Appeal said in **S v Ndlovu and Others**⁴³ the Bill of Rights contains the right to challenge evidence. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinize its probative value, including its reliability. The provisions enshrined these entitlements.

[88] In paragraph 71 of this judgement Cameron J in **S v Ndlovu and Others** said at para 45 ; " Probative value ' means value for purposes of proof. This means not only, "what will the hearsay evidence prove if admitted?', but will it do so reliability?"

[89] From the above two mentioned paragraphs the right to challenge evidence, the probative value, what evidence will proof as well as reliability plays a huge role in deciding whether hearsay evidence be admitted.

⁴¹ **Minister of Law and Order v Hurley** (1986) ZASCA 53; 1986 (3) SA 568 (A) (Hurley)

⁴² Id at 589 E-F

⁴³ **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA)

[90] The first question to be answered is *whether the plaintiff was lawfully arrested and detained in terms of section 40(1)(b) of the CPA*.

[91] If one looks at the requirements as set out in paragraph 54 of this judgement, one needs to answer each question on its own.

[92] The Plaintiff was arrested by D/W/O Homu, who was a policeman in duty of SAPS and meets the first requirement of *a peace officer arresting the accused (Plaintiff)*.

[93] The second requirement is that *the arrestor (D/W/O Homu) must entertain suspicion*. The *suspicion* of D/W/O Homu is one aspect that could not be answered by himself, since D/W/O Homu is deceased and could not testify at this trial. The *suspicion* of D/W/O Homu must be entertained by the evidence of one of his colleagues (W/O Marthiharini Jonas Shikwambana), which brings in the question of hearsay evidence and as to allow it in terms of section 3(1)(c) of Act 45 of the Law of Evidence.

[94] In cross examination W/O Marthiharini Jonas Shikwambana was asked if he could assist the court to the suspicion of the deceased D/W/O Homu to which he replied statement of another witness who testified in this trial before this court a certain Tinyiko Annickie Dumela.

[95] The third requirement is *the suspicion must be that the suspect committed a schedule 1 offence*. To answer this question one has to look at the evidence of the first witness Sgt Jonas Alex Malunganyi who was one of the first witnesses to testify in this trial. The evidence of the witness was that "on their arrival (at the scene of the crime) they saw the deceased was already assaulted and the assault continued while they were at the crime scene. They enquired from the bystanders at the crime scene as to who assaulted the deceased but no-one came forward to testify as to what occurred at the crime scene." The question as to whether the crime was a schedule 1 offence is clearly answered by this witness. It however doesn't answer the question as to the suspicion of the arrestor as to the crime of schedule 1 offence. The evidence given by Tinyiko Annickie Dumela in her statement as set out in

paragraph 36 of this judgement is: "On Tuesday 2013.04.30 I submitted two statements, I mention the names of Rodney and Sadike and I can confirm that they are two different people who both participated in the assault of the deceased." This confirms what was said in paragraph 95 of this judgement.

[96] The fourth requirement to be answered is: "*the suspicion must rest on reasonable grounds*". To answer this question one has to answer the question what is reasonable grounds. Is reasonable ground, a statement by one witness alleging what happened at the crime scene enough to arrest a person without a warrant when two of the suspects who was arrested on the basis of one statement, in their own statements to the police deny their involvement in the crime.

[97] The aspect of reasonable grounds is discussed in paragraph 57 of this judgement and as I saw it necessary to repeat the paragraph:" In **Mabona and Another v Minister of Law and Order and Others**⁴⁴, Jones J held: "The test of whether a suspicion is reasonable entertained within the meaning of section 40(1)(b) is objective (**S v Nel and Another** 1980 (4) SA 28 Eat 33E-H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section

⁴⁴ **Mabona and Another v Minister of Law and Order** 1988(2) SA 654 (SE) at 654 E-H; also **Shaaban Bin Hussein and Others v Chang Fook Kan and Another** (1969) 3 All ER 1627 (PC) the court held: " Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; " I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end"

requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion"

[98] If one looks at the requirement of reasonable grounds one comes to the conclusion that it is something that cannot be considered lightly.

[99] If reasonable grounds cannot be considered lightly, the question to be answered then as discussed in paragraph 80 of this judgement and I quote: "Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him. As Schwikkard puts it in her analysis of **Ndhlovu**:

'The right to challenge evidence, in so far as it is an essential characteristic of an adversarial trial and primarily directed at the truth- seeking, goes beyond merely establishing the reliability of hearsay in question."

[100] The evidence lead in this trial and the caselaw quoted in this judgement makes it clear that the plaintiff was not lawfully arrested and the suspicion is not a reasonable suspicion and is it flighty and arbitrary as mentioned by the Honourable Jones J in the **Mabona and Another v Minister of Law and Order and Others**.

[101] The second question to be answered is: *Is the Defendant liable for the Plaintiff continued detention from date of arrest.*

[102] In **JE Mahlangu and Another v Minister of Police**⁴⁵ at paragraph 43 the Constitutional Court held: " It is now trite that public policy is informed by the Constitution.⁴⁶ Our Constitution values freedom, and understandably so when regard is had to how before the dawn of democracy freedom for the majority of our people was close to non-existent. The primacy of" human dignity, the achievement of equality and the advancement of human rights and freedoms" is recognized in the founding values contained in section 1 of the Constitution. Section 7(1) of the

⁴⁵ *JE Mahlangu* above n 11

⁴⁶ *Barkhuizen v Napier* [2007] ZACC 5; 2007(5) SA 323 (CC); 2007 (7) BCLR 69] at para 57

Constitution provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". These constitutional provisions and the protection in section 12 of the right of freedom and security of person are at the heart of public policy considerations."

[103] In **Woji v Minister of Police**⁴⁷ the Supreme Court of Appeal said: " In the context of section 12(1)(a) of the Constitution and the decision by the Constitutional Court in *Zealand* , an examination , of the legality of the manner in which the Magistrate's discretion to further detain Mr Wojji was exercised, cannot be precluded simply by the existence of the Magistrate' order. The Constitutional Court in *Zealand* did not require the decisions of the respective Magistrates to be set aside, before the lawfulness of the appellant's detention could be determined. Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of section 12(1)(a) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individual's detention unlawful for the purposes of a delictual claim for damages".

[104] In **JE Mahlangu and Another v Minister of Police**⁴⁸ the Constitutional Court said; "The Minister is therefore, liable to compensate the applicants for the period of their detention from the date of their arrest, being 30 May 2005, to the date of their release on the 10th February 2006".

[105] The witness W/O MJ Shikwambana testimony in paragraph 22 of this judgement is that the Plaintiff was denied bail due to SAPS 69 indicating that the Plaintiff had previous convictions for the offence of assault with the intent to do grievous bodily harm.

[106] The question to be answered is not if the Magistrate rightfully refused the bail but as stated in **Woji**⁴⁹ " if the detention is not justified by acceptable reasons and is

⁴⁷ *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) at para 27. See also *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (2) SACR 1 (CC) ; 2008 (6) BCLR 601 (CC)

⁴⁸ *JE Mahlangu* above n 11 at para 49

⁴⁹ *Woji* above n 47 at para 27

without just cause in terms of section 12(1)(a) of the Constitution, the individual's right not to be deprived of his or her freedom is established."

[107] The detention doesn't start at the Magistrate refusal to deny bail but starts at the arresting officer D/W/O Homu decision to arrest the Plaintiff and to keep him in detention till first date of appearance in court. If D/W/O Homu exercised the caution that was necessary described in **Mabona and Another v Minister of Law and Order and Others**⁵⁰, the Plaintiff would have never been detained and the Magistrate decision would never have come into play.

[108] The result of the decision of D/W/O Homu was detention for the Plaintiff for three (3) years and six(6) months and nineteen (19) days whereafter he was found not guilty to any crime committed on the 28th April 2013.

[109] The third question to be answered is: *The allowance of Hearsay Evidence- Section 3(1)(c) of Act 45 Law of Evidence.*

[110] Paragraph 64 till paragraph 74 in this judgement broadly discussed the issue of hearsay evidence and the circumstances under which to allow it as evidence in a trial.

[111] As already mentioned in paragraph 100 of this judgment, this court doesn't allow the hearsay evidence on the basis of suspicion.

[112] Section 3(1)(c) of Act 45,1988 of the Law of Evidence sets out seven aspects of which the trial court must be aware as to allow hearsay evidence. The first aspect is *nature of the proceedings*. The claim in this case is one of delictual damages caused by an illegal arrest and detention. The second aspect is the *nature of the evidence*. The evidence is that of a written statement made by the deceased who was the arresting officer of the *Plaintif*. The third aspect is *the purpose for which the*

⁵⁰ **Mabona and Another v Minister of Law and Order** 1988(2) SA 654 (SE) at 654 E-H; also **Shaaban Bin Hussein and Others v Chang Fook Kan and Another** (1969) 3 All ER 1627 (PC) the court held: " Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; " I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end"

evidence is tendered. The evidence tendered as hearsay evidence plays a decisive role in determining the question whether the evidence could be accepted against the *Plaintiff* as to whether the arresting officer (deceased) of the *Plaintiff* legally arrested the *Plaintiff* in terms of the CPA. The fourth aspect is *the probative value of the evidence*. This is clearly set out in paragraph 71 of this judgement and I quote: Probative value ' means value for purposes of proof. This means not only, "what will the hearsay evidence prove if admitted?', but will it do so reliably?" The fifth aspect is *the reason why the evidence is not given by the person upon whose credibility the probative value depends*. The reason why this evidence is not given by the person is because the person is deceased. The sixth aspect is *to a party which the admission of such evidence might entail*. The *Plaintiff's* claim would not succeed if this evidence was allowed. The seventh aspect is *any other factor which should in the opinion of the court be taken into account*. This court is of the opinion that no such evidence exist.

[113] This court also doesn't allow the hearsay evidence when considering all seven aspects of the allowance of hearsay evidence.

[114] The evidence in this trial and the caselaw quoted in this judgement makes it clear that the plaintiff is to be compensated for the period of his detention that is from the date of its arrest, being 29th April 2013 to the date of his release on 17th November 2016.

In the circumstances the following order is made:

1. The Plaintiff's arrest by the Defendant was unlawful;
 2. The Plaintiff's detention from the 29th April 2013 to the 17th November 2016 was unlawful;
 3. The Defendant to pay cost as agreed between the parties alternatively as allowed by the Taxing Master.
 4. The quantum hearing of this action is postponed sine die.
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Appearance:

For the Plaintiff: R Sithole

Instructed by: Sithole Risuna Attorneys, Polokwane

For the Defendant: P Malatji

Instructed by: State Attorneys, Polokwane

Dates Heard: 22nd-23rd October 2024 and 16th July 2025

Date Reserved: 16th July 2025

Date Delivered: 10th October 2025