



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

7 November 2025

DATE

SIGNATURE

CASE NUMBER: 42827/2019

In the matter between:

KEITH GWATA

FIRST PLAINTIFF

EVANCE GWEMA

SECOND PLAINTIFF

And

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY FIRST DEFENDANT

THE MINISTER OF POLICE

SECOND DEFENDANT

SUMMARY: *Delict- Claim for unlawful arrest and detention. The jurisdictional requirements for unlawful arrest and detention.*

ORDER

HELD: *The Plaintiffs' claim is dismissed with costs including costs of Counsel.*

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is a delictual claim instituted by the Plaintiffs against the defendants arising from their alleged unlawful arrest and detention which took place on 5 June until 26 June 2019. The First Plaintiff is Mr Keith Gwata, an adult male. The Second Plaintiff is Mr Evance Gwema an adult male. Both Plaintiffs were duly represented by Mr D. Bessinger. The First Defendant, is the City of Johannesburg Metropolitan Municipality which tendered without prejudice offer in respect of the Plaintiffs' claims and was excused from the proceedings. The Second Defendant is the Minister of Police duly represented by Adv. O.C. Tommy.

[2] The merits and quantum were not separated. The evidential material consisted of viva voce evidence of factual witnesses and documentary evidence consisted of the following-

- (1) Exhibit A: J15 (CaseLines 7:7).
- (2) Exhibit B: Written statement by Sergeant Nape Johanna Manyelo.
- (3) Exhibit C: Trial bundle (CaseLines 7:2).
- (4) Exhibit D: Trial bundle (CaseLines 7:3).

BRIEF BACKGROUND:

[3] It was common cause that on 5 June 2019 the Plaintiffs were arrested by Metro Police Officers who acted within the scope of their employment with the First Defendant. The Plaintiffs were firstly detained at Johannesburg Police Station cells and later detained at Johannesburg Central Prison until their release on bail on 26 June 2019. As a result of the arrest, and detention, the Plaintiffs instituted action for damages by issuing summons on 4 December 2019 against both Defendants which summons were served on the Second Defendant on 7 February 2020 and served on the First Defendant on 15 October 2020. The trial proceeded only in respect of the Second Defendant following an offer by the First Defendant. There was delay in delivering the judgment which was caused by the lack of tools of trade which had an unfortunate effect of creating backlog with priority given to urgent matters. This is greatly regrettable.

THE ISSUES FOR DETERMINATION:

[4] There are three issues for determination. The first issue is the lawfulness of the arrest and detention of the Plaintiffs on 5 June 2019. The second issue is who was liable for the further detention of the Plaintiffs following their Court appearance until their release on 26 June 2019. The third issue is the quantum of the damages suffered by the Plaintiffs.

THE SECOND DEFENDANT'S CASE:

[5] Mr Bongani Michael Dube identified his statement he made which he made after he ran into trouble with certain people while he was on duty. This statement was made after he reported the matter at the police station. He testified that on 5 June 2019 which was a Wednesday he was on duty as a security officer posted around Kerk and Eloff Streets in Johannesburg. His colleague, Thembinkosi who was posted around Bree and Eloff Streets ran into a problem and called for a back-up. He together with other colleagues went to where Thembinkosi was posted to provide the back-up. Upon arrival, Thembinkosi made a report that he was having a problem with certain people who were refusing to leave the spot. They pleaded with to those people, informing them that they were not allowed to sell at that Street. The people refused to leave. He identified one of the Plaintiffs.

[6] He, together with his colleagues, they grabbed the table that was used by those people. He was then attacked and hit twice by one assailant on the back of his shoulder and wrist with a piece of plank. His colleagues tried unsuccessfully to intervene. At that time, he was assaulted by a mob of three to five people. He described one assailant as having dreadlocks and the second assailant he identified as one of the Plaintiffs who was wearing a reflector jacket with an MTN emblem. He escaped the mob and ran to the office where he reported the incident at the control room which called the manager. He was transported to the police station using the company vehicle where he made a statement. He testified that while he was at the police station, three assailants who had been arrested by the members of the Johannesburg Metropolitan Police Department (JMPD) were brought to the police station.

[7] He was asked at the police station to identify his assailants which he did. He explained that he got the names of his assailants after they stated their names as Keith Gwati, Harry Kazi and Granse Gwena which he wrote in his statement¹. He informed the court that he sustained injuries on his wrist, shoulder and head. The assailants were taken inside the police cells. After reporting the incident at the police station, his manager took him to Netcare Hospital for medical assistance. The hospital put him on a two-week treatment programme for the injuries on the wrist, head and shoulder. During his programme, he was off work for seven days. He testified that he was in pain due to the injuries. He indicated that he wanted the assailants to be arrested and jailed. During cross examination, he was asked who wrote the statement, he indicated that

¹ The names as pronounced by the witness in court.

he had informed the police officer that he would not be able to write his statement in English. He made the statement which he narrated in Isizulu and the police officer wrote it down.

[8] He conceded that he signed the statement after he was told to sign it. When asked whether he was assaulted on the shoulder or wrist, he stated that he was hit on the wrist (pointing at the right- hand wrist). When it was pointed out to him that he was showing the injury on the right side, he stated that he was not being specific. He was asked who hit him with the piece of plank, he indicated that the assailant was not in court. He testified that he was also hit with a fist. He indicated that only two assailants assaulted him, however the Metro Police arrived with three assailants which indicated to him that the third person was involved. He testified that due to the fact that he was not present (at the scene) the assailants were pointed out by his colleagues to the Metro Police. He was not interviewed by the Metro Police. He was asked about the owner of the table that he and his colleagues grabbed, he stated that it belonged to the assailant with dreadlocks.

[9] It was put to him that paragraph 6 of his statement was different from his testimony, he disagreed. The issue of the difference in content of the statement and the evidence he gave in court was pursued (in that it was stated that he was hit on the shoulder while it was also indicated that he was hit on the head with the piece of plank). It was put to him that there is a material contradiction between the evidence he gave in court and what was contained in his statement he explained that the incident took place a long time ago. He further indicated that he could not relate exactly how the incident happened. He stated that he could not remember if he was hit with a brick. When asked how he could not recall what happened, he remarked that the incident happened a long time ago.

[10] It was put to him that on the investigation diary it was noted that A1 never went to hospital, he stated that the entry was incorrect. It was further put to him that according to the Investigating Officer's affidavit, he kept asking for J88 which was never provided, this was denied by the witness. He testified that he was never asked for the J88. It was put to him that the Plaintiffs' version was that they were working for MTN doing marketing for airtime and they were not hawkers. He remarked that the client City Property did not allow the displaying of MTN products and as security they were following client instructions. It was put to him that according to the First Plaintiff, he questioned why they were targeted at the exclusion of other hawkers. He (the witness) stated he was not there and would not answer. It was also put to him that there

was an argument between the First Plaintiff and the security officer which resulted in the security officer pepper spraying the First Plaintiff. He (witness) had no knowledge of that.

[11] It was put to him that the First Plaintiff went home to wash off the effect of the pepper spray, he remarked that the First Plaintiff was supposed to approach their office. It was put to him that the First Plaintiff returned to the scene and continued to work which was at that time that the witness arrived. He indicated that he did not know that. He denied that he made trouble. It was put to him that it was the owner of the table that had sweets which were thrown into a bin that fought him, he stated that no sweets were thrown into a bin. In re-examination, he indicated that he was hit with the piece of plank on the hand and head. He testified that after the arrival of the assailants at the police station he did identify them as the people who assaulted him. Based on the questions by court, he was asked to clarify the issue regarding the allegations in his statement that more than two people assaulted him. He testified that the ones he observed were two suspects.

[12] Mr Citizen Ngobeni is a Sergeant in the SAPS stationed at Johannesburg Central Police Station with a total of fifteen years of service. He has been doing the duties of an Investigating Officer for four years. He testified that on 5 June 2019 he was on standby duty when he got a report about a case that was being opened by a complainant. He went to the Client Service Centre to meet the complainant. He met the complainant, Mr Dube who was bleeding on the hand and head and interviewed him.

[13] The complainant reported that a brick was used and he knew the identity of the three suspects who assaulted him. He observed the injuries on the complainant and realised that the offence was assault with intent to do grievous bodily harm. The complainant expressed that he wanted to open a case. After the interview, he left the complainant with uniform officers who were going to assist the complainant to open a case. Later on, JMPD arrived at the police station. He approached the complainant and asked him if these were the suspects who confirmed.

[14] Sgt Ngobeni proceeded to identify the Plaintiffs in court as the suspects and remarked that if he was not mistaken. The suspects were detained in the cells for assault with intent to cause grievous bodily harm. In the afternoon he visited the cells to charge the suspects. He testified that suspects who are charged for assault with intent to cause bodily harm are not released. He indicated that as an Investigating Officer, he had to interview the suspects. He

introduced himself to the suspects, showed them his certificate and explained their legal rights and why they were arrested. A copy of their rights (SAP14A) was given to the suspects. He established that the suspects' nationality to be from Zimbabwe and Tanzania. He informed the court that as an Investigating Officer, his duty was to verify the suspects' address and he their requested passports. The suspects indicated that someone will bring their passports to the police station but the passports were not brought to him.

[15] Sgt Ngobeni testified that he conducted the interview in English and the suspects understood him. He did ask the suspects about their version who elected not to make a statement but indicated that they will speak in court. He explained that the rights were explained before the interview started. After he finished interviewing the suspects, he took their fingerprints. He informed the suspects when they will appear in court. Before the suspects were taken to court on 7th, he enquired about their passports who reported that they were still waiting. The docket was left with the Prosecutors. At the time the docket was left, the suspects' legality was not verified. He testified that the case was remanded because the address and legality (indicated as papers) were not verified. He stated he did not know why the matter was remanded from 10 June 2019 to 18 June 2019.

[16] He indicated that he called the complainant several times to request the J88 without success. The charge was withdrawn but he did not know why. He proceeded to describe the cells at Johannesburg Central Police Station as follows- they are big with toilets that affords privacy; they can accommodate four to five suspects; there are mattresses and blankets for each suspect which are clean. He testified that the cells are cleaned. He proceeded to describe the conditions of the cells at Johannesburg Prison as bigger than the cells at the police station; they appeared clean. Sgt Ngobeni testified that the suspects did not make any complaints about the cell conditions. In cross examination, when asked who detained the Plaintiffs, Sgt Ngobeni indicated that he did not know. He indicated that he was not involved in the investigation, the first time he spoke to the Plaintiffs was on 6 June 2019.

[17] When asked if he had a statement from SAPS that the Plaintiffs were detained, he conceded that he did not. It was put to him that Sgt Manyelo in her statement did not state that she arrested the Plaintiffs, this was conceded. It was put to him that Metro Police have no authority to detain, he remarked that Metro Police had the authority because the suspects were pointed by witnesses at the scene. When confronted about where he obtained such information, he remarked that thought that someone pointed the suspects and conceded that he was

making assumptions. It was put to him that the cells were dirty, this was denied. He had no comment about the state of the food.

[18] When asked why were the Plaintiffs addresses not verified, Sgt Ngobenj explained that the Plaintiffs matter was not the only matter he was working on. He was asked why he did not fetch the Plaintiffs' passports, he remarked that the Plaintiffs indicated that a family member will be bringing the passports. He was not given details of that family member. When asked if he did not think he had a duty to book the Plaintiffs out to fetch their passports, he stated that it was not the only matter he was working on. He conceded that he was aware that it was crucial to get the documents. He was questioned at length about the duty to follow up on the passports, he maintained that the Plaintiffs informed him that their passports were with a person. It was put to him that he was changing his version, this was denied.

[19] He testified that he contacted the complainant regarding J88 and it appeared that he did not go to hospital. It was put to him that it appeared that the complainant was not cooperative, he conceded. When confronted about the reason why the case was withdrawn, he had no comment. He conceded that the complainant did not give him the details of witnesses. He indicated that the section 212 statement (CPA) was issued by Department of Home Affairs and he had no idea how Home Affairs got details of the Plaintiffs as the passports were not brought to him. It was put to him that the Prosecutor will accept the information from the Investigating Officer if a passport was verified, this was conceded. It was put to him that the legality of the Plaintiffs was verified, he remarked that he noticed and maintained that he was not in possession of the passport.

[20] He was asked why was the verification of the legal status was not presented to Court, he remarked that he was not in possession of the document. He conceded that the affidavit which was filed for bail application was incorrect as it alleged that the deponent was the Investigating officer where else he was and explained that in cases of assault they work together. He explained further that he did not know if he was on leave or not at the time. It was put to him that someone neglected to inform the Court about verification of status, he remarked that he did not know.

[21] He explained further that he did not who received the documents as there was no signature and if it was true that it was the police who made inquiry at Department of Home Affairs and did not disclose to court, it would be mean someone failed. In re-examination he

testified that he was working on twenty dockets. He testified further that the docket was returned on 20 June 2019 and before that date he did not have the docket. From the Court's questions, he indicated that it was possible for a civilian to go to Department of Home Affairs to make inquiries.

THE PLAINTIFFS' CASE:

[22] The First Plaintiff testified that on 5 June 2019 he was in the company of his colleague working when a security officer approached them. The security officer indicated to him that he was not allowed to sell airtime at Jeppe and Eloff Streets and he asked the security officer why he was targeted to the exclusion of other hawkers. This led to a verbal argument. The security officer took out a pepper spray and sprayed it on his face. Though the spray affected his eyesight, he was able to see other hawkers approaching the security officer. After about ten minutes, he left the scene and went away to wash his face at home which was approximately two hundred metres away. At home he washed his face and stayed for an hour before he returned to the scene.

[23] On his arrival at the scene, he noticed that there were more security officers present who were arguing with the hawkers. He put back the reflector (jacket) and continued with his work. He did notice that the Second Plaintiff was there doing his own work. Approximately ten minutes later Mr Dube and other security officers arrived. Mr Dube went straight to a table which contained sweets, picked it and threw the sweets into a bin. The owner of the table went to Mr Dube and the two started pushing each other. He was seated and could not see the rest of the incident. Mr Dube was surrounded by many people. He denied touching Mr Dube. Then Metro Officers arrived in a Quantum and the other hawkers ran away. There were five other people who were selling MTN who removed their reflectors due to fear while he and the Second Plaintiff kept their reflectors on.

[24] Metro Officers spoke to security officers and thereafter approached him and the Second Plaintiff. He was grabbed by his belt and taken to the Quantum. The Second Plaintiff and another person were also taken inside the Quantum. They were all transported to Johannesburg Central Police Station and handed to South African Police Services. Mr Dube was at the police station by the counter with police writing. He did not see Sgt Ngobeni. They were put inside a cell with many other people with an estimated number to be twelve of thirteen. He described the cell as having no toilet, that it smelled of urine and dirty. They remained in the

first cell for three hours standing due to lack of chairs before they were taken upstairs. Upstairs they were together in a cell which had three other people before being given Notice of Rights.

[25] He described this second cell as being slightly bigger than the first cell, that it was dirty and it had a smelly and dirty mattress and blankets with lice. They remained in this second cell until their appearance in Court. The cell had a toilet which nobody used in order to avoid the smell. They were given a meal in the evening of pap and chicken which he did not eat. He testified that the following day he thought that they would be released but they were not. They were given tea and bread in the morning, lunch and supper. On the 6 June 2019 they were taken out of the cell and brought to the Investigating Officer who explained the allegations and took their fingerprints. They were given a document. The following day the Investigating Officer informed them that they were going to Court. They were transported by a truck to Court. He testified that they were many inside the truck and they had to squat.

[26] He testified that the case was postponed for verification of passports and addresses. They were transported from court to prison which was a painful ride that took twenty to thirty minutes. He described the sleeping quarters in prison as being like a class room with metal bunk beds and there was a shortage of mattresses. He stated that there was a washing facility and that they received meals twice a day. During the period of detention, they had to adhere to a schedule. He testified that the experience was degrading, embarrassing and humiliating. In cross examination he testified that after he was pepper sprayed he went back to the scene after 12h00. When asked about the incident, he explained that there were fifteen people who were involved in the fight. He denied that Mr Dube pleaded with them to move from the street.

[27] It was put to him that he was positively identified by Mr Dube, he remarked that he did not touch him as he was far away from him. He informed the Court that they knew each other and if Mr Dube said he did not know him, he was lying. He testified that JMPD (officers) first spoke to the security officers before approaching them. He was never informed by JMPD officers that he was under arrest. He stated that he did not see the Second Plaintiff fight with Mr Dube. When asked if he had any injuries, he remarked that he only had a bruise from the pepper spray. It was put to him that in the investigation diary it was noted that he had an injury, he denied that he had an injury. He conceded that he did not open a case. When asked if he saw anyone hitting Mr Dube with a piece of plank, he stated that he did not see. He stated that he did not know why his attorney did not give the passport to the Investigating Officer.

[28] It was put to him that he was not employed by MTN, he insisted that he was so employed. He testified that the manner they were arrested was unfair and he denied once more that he assaulted Mr Dube. It was put to him that he was in Court ordered detention, he had no comment.

[29] The Second Plaintiff testified that on 5 June 2019 he arrived at work as usual at Jeppe and Eloff Streets around 11h00. He noticed security at an estimated distance of four to five metres away approaching the First Plaintiff. An argument started after the security asked that the First Plaintiff should move who remarked to the security that other hawkers were not asked to move. The security officer took out a pepper spray and sprayed the First Plaintiff in the eyes. People including him tried to see what was happening.

[30] The First Plaintiff went home and the attention shifted to other hawkers who were selling sweets. The security officer was unable to move the hawkers who were refusing to go and called for back-up. Mr Dube arrived at the scene followed by three other security officers. When Mr Dube arrived, he had been seated in a triangle position. At a distance estimated to be eight metres away, he observed that Mr Dube approached a table containing sweets and threw the sweets into a bin. A fight started between the owner of the sweets and Mr Dube.

[31] He testified that he then saw Mr Dube running away. He did not see Mr Dube assaulted with a piece of plank. After the departure of Mr Dube there were people who calmed the situation. After a while a Quantum arrived and Metro Officers approached and spoke to the security officers. He was then approached by the Metro officers who grabbed him and put him inside the Quantum together with the First Plaintiff and Kazi. He testified that he was not told of the reason except being informed that they are being taken to the police station. At the police station, he saw Mr Dube at a counter talking to the police. They were taken to the holding cells which was behind the counter. He indicated that it was terrible to be in there. He described the cells as smelling and had old urine. Later they were taken upstairs and given a document around 17h35.

[32] The content of the document was never explained, they were only told to sign. He also described the cell upstairs as being bigger than the first one and there were five to six other people inside. There was a toilet which if used would bring smell. There was a mattress and thin blankets. They were provided with food which he did not eat because the chicken was not good. The next day he ate the tea and bread for breakfast as he felt hungry. He testified that he

did have an interview with Sgt Ngobeni who informed them that the following day they would appear in court. Sgt Ngobeni did enquire about their passports and they informed him that the passports were left at home. He testified further that they did not make a call to their relatives but the people who saw them getting arrested are their relatives.

[33] The following day Sgt Ngobeni came to inform them that they were going to appear in Court. They were transported to Court in a police truck and they had to squat during the ride which was challenging. He testified that they were taken out of the truck into a big cell and had to wait until their names were called and then taken into a small cell. Later that day around 16h00 they were taken to prison. The trip to prison was longer which was worse because of squatting. He described the prison facilities as a class room with bunk beds and with a lot of people. He testified that on the first night he slept in D section before being moved to the juvenile section. He received meals thrice a day.

[34] He testified that at the juvenile section he was allowed to be outside and his family visited him and brought biscuits and cigarettes which could be traded for food. He indicated that he felt embarrassed after he was arrested in front of other people which experience was emotionally hurting. In cross examination when asked about the time when the fight started, he indicated that it was 12h00. He testified that the hawkers were not wearing reflectors (jackets). He stated he observed the owner of the table charged at Mr Dube. It was put to him that he should have seen Mr Dube being hit with a plank, his remark was that he did not recall that. He testified that he agreed with the First Plaintiff who challenged the security officer because they were not hawkers. It was put to him that on three occasions Mr Dube positively identified the First Plaintiff. His response was that perhaps he (Mr Dube) knew him (First Plaintiff) before.

[35] He reaffirmed that he was not involved in the scuffle. He conceded that the person referred to in the investigation diary was him but he stated that he was not in a position to explain the injuries that were noted on him in the investigation diary. He denied that he had any injuries. He conceded that there were eye witnesses to the assault. He testified that at the time Metro arrived and spoke to the securities, they were the only ones wearing MTN logo. He disagreed that he saw Sgt Manyelo there. He further disagreed that he was injured. He testified that at the police station they were asked about their passports and they indicated that the passports were left at home.

[36] It was put to him that he failed to give an explanation about the incident and he stated that he was not asked. He conceded that he did exercise his right to silence. He further conceded that the passports were not brought to Court. He agreed that the case was remanded for bail application and he was released on bail. It was put to him that according to the testimony of Sgt Ngobeni, the cells are clean, this was denied. He conceded that he did not complain about the state of the cells. When asked about the number of people who were in the truck (which transported detainees to Court), he conceded that he was not sure.

SUBMISSIONS:

(a) Plaintiffs' submissions:

[37] All submissions made in the written heads of argument have been duly considered including the cited cases. The contention made on behalf of the Plaintiffs was that the claim for damages is based on the infringement of the Plaintiffs' constitutional rights to human dignity, freedom and security of the person, freedom of movement and the entitlement to conditions of detention that are consistent with human dignity. The submission made is that it is trite law in South Africa that where the arrest is unlawful the initial detention prior to first appearance in Court is automatically unlawful. The contention made Mr Bessinger on behalf of the Plaintiffs was that the Second Defendant can only escape liability for the Plaintiffs' initial detention if it is established that the arrest of the Plaintiffs was lawful.

[38] The argument advanced on behalf of the Plaintiffs was that the arresting officer Sgt Manyelo could not be called to justify the arrest as she passed away. The Court only has her affidavit. The contention was that in her affidavit Sgt Manyelo does not indicate on what grounds she exercised her discretion to arrest the Plaintiffs. At best Sgt Manyelo had a report about the assault. For this reason, it was submitted that the Second Defendant failed to establish the required statutory jurisdictional facts prior to the arrest of the Plaintiffs. It was contended that the complainant Mr Dube did not take the matter any further as he contradicted himself.

[39] It was submitted that it was incumbent upon the arresting officer prior to arresting the Plaintiffs to do an investigation to establish whether a dangerous wound was inflicted for purposes of Schedule 1 of the CPA. The argument was that the arresting officer could not have formed a suspicion based on reasonable grounds that a Schedule 1 offence was committed because the Plaintiffs were arrested in the absence of the complainant. The contention was that

the arrest of the Plaintiffs was unlawful hence the initial detention at the police station prior to the first appearance in Court was also unlawful.

[40] In the event that the Court finds to the contrary, the submission was that the South African Police Services members were obliged to consider afresh once the Plaintiffs were placed in custody of the Second Defendant whether their continued detention was justified and lawful. Reference was made to **Botha v Minister of Safety and Security and Others; January v Minister of Safety and Security and Others 2012 (1) SACR 305 (ECP)** para [29].

[41] The argument was that the SAPS members were obliged to consider whether detention was necessary and the failure to do so caused the detention to be unlawful. It was submitted that the Investigating Officer indicated that he was not involved in the detention of the Plaintiffs and therefore there was no evidence before Court showing that the initial detention was reasonable. The argument was that the detention of the Plaintiffs was unlawful due to the failure by the Investigating Officer to get the Plaintiffs passport prior to their first appearance in Court to verify their status and their addresses which resulted in further harm. It was submitted that the probability was that it could only have been a police officer who made the legality status enquiry at the Department of Home Affairs which meant that by 8 June 2019 the Second Defendant was in possession of the Plaintiffs' passports.

[42] The contention was that the Second Defendant failed to disclose this information to the Court on the Plaintiffs' first appearance which resulted in a further detention until their release on 26 June 2019. It was submitted that the harm suffered by the Plaintiffs was closely linked to the wrongful act and the Second Defendant should be held liable to compensate the Plaintiffs for the entire period of detention. In relation to the quantum, the argument was that the amount to be awarded fell within the Court's discretion according to equity and good conscience. It was submitted that the Court's decision must be fair and just. Reference was made to **Motladile v Minister of Police 2023 (2) SACR 274 (SCA)** para [17]. The argument was that the Plaintiffs were detained for twenty-one days in conditions which were not consistent with human dignity.

[43] The contention was that the Plaintiffs experienced humiliation that went beyond that which was inherent in being detained. At the Johannesburg Central Police Station, the initial holding cell was crowded with no toilet facility. The Plaintiffs were forced to stand for three hours before they were detained in another cell which was unhygienic with no bathing facility prior to their first appearance. The submission was that after they were detained at prison, they

were forced to clean the cell and when they were transported to Court, they had to squat in a truck that was overcrowded. Reference was made to various comparative judgments for awards. Lastly, the contention was that interest on the award to be from date of service of the summons.²

(b) Second Defendant's submissions:

[44] All of the submissions and cited cases have also been considered. The written heads of arguments made on behalf of the Second Defendant are voluminous, therefore not all of the contentions were captured, though duly considered. It was submitted that the arrest and detention of the Plaintiffs were lawful therefore liability was denied which warranted the dismissal of their claim with cost. In her written heads of argument, Counsel proceeded to set out the history of the litigation in chronological order.

[45] The contention was that in order to attack the lawfulness of the detention, the Plaintiffs were required to advise the Defendant in the pleadings of the specific issue otherwise the Defendant would be compelled to lead evidence of every conceivable ground of attack. Counsel cited among others Eksteen J in **Sandi v Minister of Safety and Security and Another (CA 272/2012) [2017] ZAECGHC 104** (13 September 2017) para [6] who held that the grounds upon which it is contended that the detention is unlawful must be pleaded.

[46] The argument was that the Second Defendant was unable to prepare for the case he was required to meet in terms of the submission of foreseeability which was put to the investigating officer Mr Ngoben. The contention was that in the event this Court was considering to attach any weight to the submission of foreseeability, same ought to be rejected on the basis that despite an objection, the submission was permitted. The argument was that at the time of the arrest of the Plaintiffs, the jurisdictional elements of the arrest as pleaded were present in terms of section 40 (1)(b) of the CPA. In regard to the detention, the contention was that it was lawful and in terms of section 50 of the CPA for remands for bail not exceeding seven days. The legal principles were outlined in details by Counsel.

[47] Applying the legal principles to the facts, the argument was that Sgt Manyelo was a peace officer within the description who had an opportunity to speak with eye witnesses at the scene. After getting the report, Sgt Manyelo had no reason to leave suspects at the crime scene. The contention was that it was not probable that the Plaintiffs would be put inside the

² The date of service was 7 February 2020 and the interest rate at that period was 10% per annum.

Quantum without being spoken to. On the absence by Sgt Manyelo, the submission was that there was evidence that this Court can make inferences. It would be impractical to expect Sgt Manyelo to first go to the police station and then return to the scene to apprehend the suspects. Counsel cited a number of cases including **Molahlehi v Minister of Police (47/2021) [2021] ZAFSHC 47 ; (A146/2020)** delivered on 25 February 2021.

[48] The contention made was that a reasonable suspicion need not be confirmed for the purposes of effecting an arrest. It was argued that an exculpatory explanation was not a jurisdictional requirement for a lawful arrest. The contention was that the element of reasonable suspicion was fulfilled. Counsel submitted that the element of discretion was fulfilled and **Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA)** was cited. In respect to the arrest of the Plaintiffs it was argued that it was lawful and their detention was also lawful as it was in accordance with section 50 of the CPA. Counsel proceeded to make further arguments in the event that it was found that the detention was unlawful. All further submissions were considered.

[49] On the aspect of Court remanded detention, the argument was that the Court was obliged to follow all applicable guidelines and bail procedures that govern the decision to grant or refuse bail. Various cases were referred to including **S v Vermaas; S v Du Plessis 1995 (3) SA 292 (CC)** which emphasised that the prime consideration is whether an accused will stand trial. The submission was that the legality of the detention after first appearance is dependent on the lawfulness of the Court's own order. The argument was that it would be unfair to hold Sgt Ngobeni solely responsible for the docket as he did not have exclusive control over it. It was contended that the section 212 statement did not clarify who enquired about the legality from the Department. The contention was that it would be a miscarriage of justice if the Minister of Police was held liable on the basis that the Plaintiffs were detained in accordance with section 50 of the CPA.

THE LAW:

[50] A claim under the *actio injuriarum* for unlawful arrest and detention has specific requirements- (a) the plaintiff must establish that their liberty has been interfered with; (b) the plaintiff must establish that this interference occurred intentionally in depriving of liberty and (c) the deprivation of liberty must be wrongful and (d) the plaintiff must establish that the conduct of the defendant must have caused both legal and factually the harm for which compensation is sought. See **De Klerk v Minister of Police 2021 (4) SA 585 (CC)** para [14].

[51] An arrest (with or without a warrant) constitutes an invasion of the rights of a suspect including the rights to freedom and security of the person as envisaged in section 12 of the Constitution and not to be deprived of freedom arbitrarily or without just cause. It is trite that the purpose of arrest is to bring the suspect to court for trial. An arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court. When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own facts. There is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective. See **Tsose v Minister of Justice 1951 (3) SA 10 (A)** at 17H.

[52] The Plaintiffs' claim against the Second Defendant is based up vicarious liability. The test for vicarious liability was articulated in **Minister of Police v Rabie [1986] 1 All SA 361 (A)** para [8] as follows- *'it seems clear that an act done by a servant solely for his own interests and purposes although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act of the servant does so fall, some reference is to be made to the servant's intention (cf Estate Van der Byl v Swanepoel 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.'*

[53] The Plaintiffs' claim must therefore be determined within the prism of the Constitutional values and the Bill of Rights. It is trite that the onus is upon the arresting officer to justify the arrest. An arrest can be effected with or without a warrant. An arrest without a warrant is sanctioned by section 40 (1) (b) of the Criminal Procedure Act of 1977 (Act 51 of 1977) as amended (the CPA) which provides that-

'A peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody.'

[54] The phrase 'may' in section 40 (1) (b) of the CPA denotes a discretion on a peace officer whether or not to arrest once there is reasonable suspicion. The test whether or not a suspicion is reasonable was explained in **Biyela v Minister of Police 2022 (1) SACR 235 (SCA)** as follows-

'[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific

and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information.'

[55] In **Groves NO v Minister of Police 2024 (1) SACR 286 (CC)** it was held-

'[52] The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40 (1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.

[60] Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.'

[56] There are four jurisdictional facts that must be satisfied before the discretion to arrest arises³, they are:

- a) The arrestor must be a peace officer;
- b) The arrestor must entertain a suspicion;
- c) The suspicion must be that the suspect has committed a Schedule 1 of the CPA offence;
- d) Such suspicion must be based on solid ground.

[57] To sum up, the standard of what constitutes a reasonable suspicion is very low and must be based on specific facts or information. Whether the suspicion was reasonable in any prevailing circumstances is determined objectively.⁴ What this postulate is that a reasonable person in the position of the arresting officer possessing the same information would consider good and sufficient grounds for suspecting that the plaintiff committed a crime.

³ See *Duncan v Minister of Law and Order 1986 (2) SA 805 (A)* at 818G-H.

⁴ See *Biyela v Minister of Police (1017/2020) [2022] ZASCA 36* para 34.

[58] Detention by itself is prima facie unlawful unless justified. Section 50 (1) of the CPA as amended finds application which provides that –

‘(a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (d) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.’

[59] On post Court appearance detention for purposes of liability it was reasoned in **Isaacs v Minister van Wet en Orde 1996 (1) SACR 314 (A)** on legal causation. Theron J in **De Klerk v Minister of Police** supra at para [45] cautioned that Isaacs cannot be interpreted as a bar to all claims for unlawful detention following a court ordered remand. Theron J reasoned that Isaacs is not authority for the proposition that remand pursuant to an unlawful arrest will be lawful.

[60] In **Mahlangu and Another v Minister of Police (1393/2028) [2020] ZASCA 44** (21 April 2020 para [18] it was held *‘Although the lawfulness or otherwise of a court order for an arrested person’s judicial detention depends primarily on the conduct of the prosecutor and/ or the magistrate, the police can incur liability for damages for detained persons being denied their freedom after their appearance before a court, notwithstanding the court having ordered such detention.’* On appeal to the Constitutional Court⁵, Tshiqi J opined at para [37] that the decision by the Court a quo to relieve the Minister from liability for damages suffered after a further remand order was made implied that the obligation on members of the police to make proper and complete disclosure to the prosecutor of the facts relevant to the further detention did not exist. Tshiqi J stated further that the obligation on the police to disclose all relevant fact to the prosecutor is to be regarded as a duty that remains for as long as the information withheld is relevant to the detention.

ANALYSIS:

[61] It was common cause that on 5 June 2019 the Plaintiffs were arrested initially by Metro Police and transported to Johannesburg Central Police Station. It was further common cause that the complainant opened a case against the Plaintiffs on the allegations that they assaulted him. The Plaintiffs’ claim proceeded only in respect of the Second Defendant after it was disclosed to this court that there is a ‘without prejudice offer’ made by the First Defendant in

⁵ JE Mahlangu and Another v Minister of Police [2021] ZACC10 (decided on 14 May 2021).

terms of Rule 34 of the Uniform Rules⁶. As the result, the proceedings continued only in respect of the Second Defendant's claim. It was common cause that the Plaintiffs were arrested and detained at the instance of the members of the Second Defendant during the scope of their duty. The onus was on the Second Defendant to justify the lawfulness of the arrest and detention of the Plaintiffs.

[62] The first issue for determination was the lawfulness of the arrest and detention of the Plaintiffs. The complainant, Mr Dube who was called as a witness was a single witness on the allegations that he was assaulted by the Plaintiffs. The approach on the assessment of a single witness as compounded in **Daniels v General Accident Ins Co Ltd 1992 (1) SA 757 (C)** found application. In that matter it was held '*the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth.*' In addition, Section 16 of Civil Proceedings Evidence Act 25 of 1965 was also applied which provides that '*Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.*'

[63] It is well to recall that credibility of a witness cannot be judged in isolation but it requires to be considered in light of all the proven facts and the probabilities as coloured in each case.⁷ I was confronted with mutually destructive versions- Mr Dube testified that while he was on duty as a security officer, he was allegedly assaulted by assailants. In his A1 statement⁸, he averred that five assailants assaulted him but only three were arrested. In his A1 statement he named them as Harry Kazi, Keith Kwati and Evans Gwema. This resulted in the arrest and detention of the Plaintiffs. On the other hand, the Plaintiffs denied that they laid a hand upon Mr Dube.

[64] As trite, the correct technique to resolve factual disputes the Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities. See **Stellenbosch Farmers' Winery Group Ltd and another v Martell et CIE and others 2003 (1) SA 11 (SCA) pages 14 I-J to 15 A- G**. See also **National Employers' General Insurance Co Ltd v Jagers 1984(4) SA 437(E)**.

[65] To determine the first issue, the evidence clearly proved that the Second Defendant's involvement came as a result of the case being opened at the instance of Mr Dube as per A1. In as far as the Second Defendant was concerned, as soon as Mr Dube laid a charge, the

⁶ See Price v Price (696/89) [1990] ZASCA 87 (11 September 1990).

⁷ See Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) para [5].

⁸ CaseLines 7:2.

members of SAPS were obligated to act upon it. Was it reasonable therefore to arrest the Plaintiffs who were brought into the police station? I am persuaded that it was indeed. I am so persuaded on the basis of the evidence that Sgt Ngobeni who was on standby duty on the 5 June 2019 testified that the complainant Mr Dube was present at the Client Service Centre in order to report a crime of assault. Sgt Ngobeni observed that the complainant had injuries and was bleeding on his head. In addition, the complainant identified the Plaintiffs as the alleged assailants. Mr Dube was asked how he knew the names of the suspects and he explained that he overheard their names when they were speaking with the police.

[66] Therefore on the issue whether or not the arrest was unlawful the following questions had to be asked – did the police officer who opened the docket entertain a reasonable suspicion that an offence has been committed at the time when an identifying witness Mr Dube was present at the police station? Did the police officers have the discretion to disregard or ignore the reporting of an offence? Applying the objective test, would a reasonable police officer faced with the same facts (a bleeding victim of crime, the alleged assailants being identified as the perpetrators) have exercised his or her discretion to arrest and detain? Was it reasonable for on the police officer (s) to conclude or infer from the injuries on the complainant Mr Dube (being on the head) that indeed an assault with intent to cause grievous harm had been committed?

[67] I am persuaded that the police formulated a reasonable suspicion that the Plaintiffs committed a crime based on the identification by Mr Dube. The evidence was that Sgt Ngobeni saw the complainant Mr Dube and even advised the complainant to seek medical attention. A reasonable police officer under the circumstances which were prevailing on 5 June 2019 would have reached the only conclusion that Mr Dube was a victim of crime and has identified his assailants who were brought to the police station by Metro. In fact, it appeared to be fortunate that the alleged assailants were present in the police station while Mr Dube was still there which gave Mr Dube an opportunity to identify his assailants rather than for the police to go back to the scene to look for the suspects. The corollary was that had the police officers not acted in the manner they did (to effect an arrest on the suspects), the failure to act would have amounted to dereliction of duty.

[68] A reasonable police officer under the same circumstances would have entertained a reasonable suspicion that an offence had been committed and exercised his or her discretion to arrest and to detain. On the issue of detention, Sgt Ngobeni's evidence was that police officers

are not allowed to release a suspect who is charged with an offence of assault with intent to cause grievous bodily. The contention made on behalf of the Plaintiffs was that Mr Dube did not take the matter any further. I am in respectful disagreement with this assertion. I make this finding on the basis that it was Mr Dube who opened the case against the Plaintiff which led to their arrest and detention. For this reason, Mr Dube was a material and relevant witness.

[69] The contention made on behalf of the Plaintiffs was that the late Sgt Manyelo had not indicated in her statement how she exercised her discretion. This contention respectfully fails to consider that evidence must be holistically assessed. The First Plaintiff in his testimony informed the Court that the Metro first spoke to the security officers at the scene then came to him and Second Plaintiff. The only reasonable inference that I could draw was that the Metro officers received a report which they acted upon. It was not as if without a reason they came to the Plaintiffs and arrested them.

[70] In any event, I reiterate that in my humble view, the relevant period as far as the Second Defendant was concerned was at the time when the suspects were brought to the police station. It would be a different scenario had the police driven to the scene and arrested the Plaintiffs. Apart from the view that the actions by Sgt Manyelo could not be imputed on the Second Defendant, it is my humble view that the shortcomings in the affidavit by Sgt Manyelo was countered by the evidence from the Plaintiffs that there was consultation with the security officers. On acceptance of such evidence, on acceptance of the evidence that the Plaintiff visually had injuries (despite their attempts to deny injuries) a reasonable Metro Officer would reasonably suspect that the Plaintiffs were the assailants.

[71] In the event that my view is deemed incorrect, I am persuaded that the arrest at the scene was informed by the consultation between Metro and the security which was reasonable under the circumstances. Put differently, the evidence was that Mr Dube came to the scene in company of other security officers as back -up for his colleague Thembinkosi. The evidence was that Mr Dube was assaulted during the day in the presence of his colleagues. It was evident that after Mr Dube was allegedly assaulted, he ran away leaving his colleagues at the scene. The only inference from these proven facts was that the security officers that Metro officers spoke to were Mr Dube's colleagues. On accepting that Metro Police first spoke to the security officers, the only inference drawn was that Metro received a report.

[72] There were weakness and strong points in the credibility of Mr Dube. The weak point was in relation to the internal inconsistency on the number of assailants and the instruments used. The strong point was in relation to his relate in logical manner what happened on 5 June 2019. Mr Dube explained that this was due to the passage of time. In my humble view, the internal inconsistencies were not material enough to adversely impact on his credibility. What was importance was that at all material times Mr Dube identified the Plaintiffs as his assailants.

[73] According to Sgt Ngobeni, he interviewed Mr Dube and observed his injuries on the basis of which he concluded that the offence was assault with intent to cause grievous bodily harm (Mr Dube who was bleeding on the head). In my view, the head is a critical body part and once the complainant alleged the instruments used (according to A1 as a brick and a plank) it constituted a dangerous wound unless disproved by J88. One important factor from the evidence by Sgt Ngobeni was that police officers are not permitted to release a suspect who is charged for this kind of offence. There was no evidence which proved that the arrest and detention of the Plaintiffs were not for the object of ensuring their attendance in Court. Whether it was Sgt Ngobeni or any other police officer, the standing rule for a suspect facing assault with intent to cause bodily harm was not to release them. Based on the charge that the Plaintiffs were arrested for, the uncontested version was that such suspects could not be released.

[74] This Court was not called upon to determine whether or not such a standing rule was correct and in the interest of justice or did not offend the Constitutional values and the Bill of Rights. What was clear from the evidence was that a reasonable police officer would have effected an arrest under the prevailing circumstances. On the proposition made on behalf of the Plaintiffs was that the detention was unlawful, I am not persuaded that the decision to detain on 5 June 2019 constituted an unreasonable exercise of discretion on the basis of the standing rule. In my humble view, it would be unreasonable to expect any police officer to release a suspect contrary to the standing order. I am not persuaded that the decision to detain the Plaintiffs (who were identified by the complaint who was bleeding thus clear as day light that he was injured) was unlawful.

[75] The First Plaintiff's evidence with respect had some improbabilities. He testified that he was pepper sprayed and he could not see, yet at the same time he was able to see other hawkers approaching the security officer. His evidence was that Mr Dube was surrounded by the owner of the table and other hawkers and he did not touch him. I found it improbable that the complainant Mr Dube would be mistaken about his assailants when the incident took place

during the day. I am persuaded that it was improbable that the Metro police would grab any of the Plaintiffs without following the protocol of informing them of the allegations or at the very least of introductions. This version in my view was far-fetched.

[76] It had to be recalled that the Plaintiffs were identified by the complainant at the police station on the basis of which the First Plaintiff was arrested and detained. The First Plaintiff denied that he was injured. It was highly improbable that the author of the note in the investigation diary would have been mistaken about the presence of any injury. The only reasonable inference why the First Plaintiff distanced himself from the note in the investigation diary is that he did not want this Court to find that he was involved in the assault on Mr Dube. The improbability in the First Plaintiff's version affected his overall credibility.

[77] I also found the version of the Second Plaintiff to be improbable. He stated that he did not see a plank at the scene which would not account for the injury that Mr Dube sustained. After all, Sgt Ngobeneni who was unknown to the complainant Mr Dube observed that he was bleeding on the head. Somehow, all that the Second Plaintiff saw was that people were around Mr Dube yet in broad day light he was unable to see Mr Dube being assaulted. He further distanced himself to the entry that when noted him as having some injuries. The only inference was that he did not want this Court to find that he was involved in the assault of Mr Dube because to do so meant that there was reasonable suspicion that a crime had been committed. The improbability in the Second Plaintiff's version affected his overall credibility.

[78] In relation to the detention post first appearance in Court, I accept the evidence that the detention was ordered by the Court for purposes of verification of the Plaintiffs' legal status and addresses. During cross examination of Sgt Ngobeneni on the reasons why he did not go to fetch the Plaintiffs' passports. Sgt Ngobeneni's answer in that he was informed by the Plaintiffs that there was a relative who was bringing the passports was reasonable. It would be remiss to ignore the known fact that SAPS have limited resources. In addition, Sgt Ngobeneni explained that the Plaintiffs' matter was not the only matter he was tasked to deal with. This in my view was a reasonable explanation.

[79] Sgt Ngobeneni was cross examined at length about the section 212 statement from Department of Home Affairs and he consistently maintained that it was not him to obtained it. It was an easy exercise to obtain a statement from the author of the section 212 on who made the inquiry or call the author. Surely a report ought to have been kept in this regard. In the absence

of credible evidence that there was mala fide by Sgt Ngobeni or any member of SAPS, I was not persuaded that there was deliberate and mala fide non-disclosure to the Court.

[80] It appears that the Plaintiffs want this Court to infer that the police withheld this information as the basis to make a factual finding that the further detention was as a result of non-disclosure. It is best to recall the trite legal principle that to draw an inference it must be the only inference. See **R v Blom 1938 AD** at 188. On the facts of this matter, there are other reasonable inferences such as the lawyer could have made the inquiry at the Department of Home Affairs. I make this remark on the basis on Exhibit A in which it was indicated to the Court that the legal representative handed the documents to the Investigating Officer.

[81] There was no credible evidence placed before this Court to the effect that a member of public was barred from making legality inquiry. This was not a matter of taking judicial notice of the procedures for such inquiries. For this reason, there are other reasonable inferences for the presence of section 212 statement. There was no evidence of any witness to gainsay the version of Sgt Ngobeni that he was not in possession of the passport or had knowledge about the section 212 statement.

[82] It had to be recalled that the Plaintiffs were legally represented. It was highly improbable that a legal practitioner would be complacent to the disregarding of a client's rights to liberty. According to Exhibit A (J15), the matter was postponed on 18 June 2019 among other reasons for the Investigating Officer and bail application. On 19 June 2019 it was indicated that the matter was remanded for formal bail application and Investigating Officer who was noted as being on leave and the matter was remanded to 25 June 2019 and then rolled over to 26 June 2019. On all of the Court proceedings, I was not persuaded that there was a deliberate, mala fide non-disclosure on the members of the police.

[83] I found Sgt Ngobeni to be a fair witness who created a fairly good impression to this Court. He was not shy to make concessions which were not favourable to him. For example he was asked –

‘Q: What happened at Court?’

A: I don't know. We left the docket and we went.’

[84] The contention made on behalf of the Plaintiffs was that Sgt Manyelo in her statement does not indicate on what grounds she exercised her discretion to arrest the Plaintiffs

consequently the Second Defendant failed to establish the required statutory jurisdictional facts prior to the arrest of the Plaintiffs. This contention in my humble view failed to recognise that Sgt Manyelo set the ball in motion and her involvement with respect was more relevant to the delictual claim against the First Defendant.

[85] Any liability claimed against the Second Defendant was as a result of the conduct by Sgt Ngobeni. I hold this view on the basis that the members of SAPS during the initial arrest at the scene were not involved. In respect to the arrest at the police station, the evidence clearly established that Sgt Ngobeni exercised his own discretion to arrest and process the Plaintiffs. Put differently, at the time Sgt Manyelo brought the suspects at the police station, Sgt Ngobeni exercised his own discretion to effect an arrest. He then proceeded to process the suspects.

[86] It is prudent to address the discrepancies in the evidence of Sgt Ngobeni and Mr Dube in relation to the J88 (whether or not Mr Dube was contacted several times to get J88). The approach is that the Court is obliged to evaluate holistically any contradictions by considering the merits and probabilities. The Court is further obliged to decide the number of such contradictions and whether they are material, the reasons for the contradictions and the plausible explanation for the contradictions.⁹

[87] It is trite that not every contradiction affects the witness's credibility. See **S v Mkhle 1990 (1) SACR 95 (A)** at 98F-G. Non- material deviations or contradictions are deemed not necessarily relevant. Having assessed the inconsistencies between Mr Dube and Sgt Ngobeni, I am not persuaded that there were so material as to affect their overall credibility. In respect to internal contradictions in Mr Dube's testimony, he explained that he was unable to recall everything due to the passage of time. This was a reasonable explanation.

[88] On the second issue for determination, on who must be held liable for the further detention post the Plaintiffs' first appearance in Court. It was argued on behalf of the Plaintiffs that the Second Defendant must be held liable for the full duration of detention. The contention was made on the basis of the probability in that the police officers failed to disclose to the Court the legal status of the Plaintiffs. This was after the enquiry was made from the Department of Home Affairs. This contention pre-supposes that there was no disclosure made to the Court. It has to be recalled that the bridge between the Court and the police officials in a Criminal Court is through the Prosecutor. In simply terms, the party that alleges such a failure of disclosure is

⁹ See *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593F-594G.

required to produce credible proof for such non-disclosure. I would have expected that the Prosecutor (s) who dealt with this matter to be called to confirm indeed whether or not there was non- disclosure by the police or Investigating Officer.

[89] There is another reason why this contention was not persuaded, the uncontested evidence by Sgt Ngobeni was that he enquired about the passports from the Plaintiffs who had indicated at the time of the arrest that a person would be bringing the passports. In addition thereto, from the first court appearance the Plaintiffs were legally represented. The instruction from the Prosecutor noted on the investigating diary dated 10 June 2019 read '*please verify accused persons' legality (Defence promised to give you papers).*' I reiterate that it was highly improbable that a legal practitioner would have been complacent in the trampling of his clients' rights. There was insufficient evidence in my view to make a finding that there was non-disclosure made to the Court and therefore this caused the detention to be unlawful.

[90] The contention made on behalf of the Plaintiffs was that there were no reasonable grounds to arrest and detain the Plaintiffs by the Second Defendant. I reiterate that this is without merit for the following reasons-

- (1) According to Sgt Ngobeni, the complainant Mr Dube was observed to be bleeding and expressed the intention to open a case against his assailants.
- (2) When the complainant expressed an intention to open a case, it meant that police officers were under duty to act on this. The failure to act when a crime has been reported would amount to dereliction of their oath and duty.
- (3) The Second Defendant's version was found to be more probable in that upon the arrival of the JMPD Metro Officers, Sgt Ngobeni verified with the complainant the identity of his alleged assailant who confirmed it. This meant that Sgt Ngobeni had reasonable grounds to suspect that the Plaintiffs committed a crime and to arrest the Plaintiffs. See **Minister of Safety and Security and Another v Swart 2012 (2) SACR 226 (SCA)** para [20].
- (4) The evidence proved on a balance of probabilities in favour of the Second Defendant that the Plaintiffs were arrested for the purpose of taking them to court. They were taken on the first available occasion. There was no evidence or assertion that the police officers were mala fide in their treatment of the Plaintiff by keeping them in custody and by the failure to take them to Court.

[91] I am satisfied that all of jurisdictional requirements were met. The Plaintiffs were brought before the Court within the prescribed period of 48 hours and their further detention was lawful on the basis that their legality status had to be verified. There were insufficient proven facts to infer that there was non-disclosure by the members of SAPS which caused further detention of the Plaintiffs until their release. The further detention of the Plaintiffs post first appearance, was for the purposes of verification of legality and address verification. I was persuaded that the detention post the first appearance was at the instance of the Court and therefore it was lawful.

CONCLUSION:

[92] In conclusion, having assessed the evidence holistically I am persuaded that the Second Defendant proved on a balance of probabilities that the arrest and detention of the Plaintiffs were lawful and justified. In view of this finding, I deemed it unnecessary to rule on the third issue of quantum. Consequently, the Plaintiffs' claim against the Second Defendant has to be dismissed.

COSTS:

[93] The basic principle on costs is that costs are awarded by the Court applying its discretion which is exercised judicially¹⁰. The trite position is that costs follow the result. I find no reasons to depart from the trite principle that costs should follow the result.

Order:

[94] In the circumstances the following order is made:

- (1) The Plaintiffs' claim is dismissed with costs including costs of Counsel.


MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

¹⁰ See *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).

Appearances:

On behalf of the Plaintiffs

Instructed by

: Mr D. Bessinger

: Bessinger Attorneys

: no 1082 Albertina Sisulu Road

: Kensington, Johannesburg

On behalf of Second Defendant

Instructed by

: Adv. O.C. Tommy

: The State Attorney

: 10th Floor North State Building

: 95 Albertina Sisulu Street, Johannesburg

Date of Hearing

: 11 October 2024

Date of Judgment

: 7 November 2025