

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA****LIMPOPO DIVISION, POLOKWANE****CASE NO: 9472 / 2022**

- (1) REPORTABLE: NO
(2) OF INTEREST TO THE JUDGES: YNO
(3) REVISED.

DATE: 11/12/2025

SIGNATURE:

A handwritten signature in black ink, which appears to be "J. M. Lemekwane", is written over a black rectangular redaction box.

In the matter between:

JAN MORAKA LEMEKWANE

Plaintiff

And

MINISTER OF POLICE

Defendant

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **11 DECEMBER 2025**.

JUDGMENT

NGCANGCA AJ

INTRODUCTION

- [1] The Court is called upon to Adjudicate on a Civil claim for damages, instituted by the Plaintiff. The Plaintiff based his claim for damages he suffered due to his Unlawful arrest and Detention. Which was carried out by the Defendant or his employees, during the scope of their duties.
- [2] The Plaintiff is at such claiming damages at an amount of R1 Million Rands, for the Damages he suffered. The first aspect will be for the Court to determine, if the Arrest and subsequent Detention was Lawful and Justified as the Defendant contend that.

BACKGROUND

- [3] The Plaintiff in his Summons alleges that on the 23RD September 2021 around 19:00, at Munnik Street Polokwane around Mall of the North vicinity he was unlawfully arrested by the South African Police members and unlawfully detained until the 27TH September 2021 at Polokwane Police cells on suspicion that he was in Possession of Drugs or Nyaope and also Dealing with them or Selling.

- [4] The Defendant in it's Plea contend that, they arrested the Plaintiff after he was found in Possesion of Drugs or Nyaope at the area or vicinity alledged by Plaintiff.

ISSUES // FACTS IN DISPUTE

- [5] Based on the brief background, from the Plaintiff Summons and the Defendant Plea. And cardinal aspects laid down by both Parties in their evidence, the Court has to adjudicate in this matter, determine if the Arrest and Detention was Unlawful.
- [6] The Defendant started to tender evidence and called the Police officer who effected the Arrest of the Plaintiff. He is Constable Magano, a member of the Provincial S.A.P.S flying squad with 7 years expierence as a Police officer. He said they were doing patrols with Constable Netshikweta driving around Polokwane in the evening. They stopped a VW Jetta car blue in colour and which was driven by Plaintiff.
- [7] Having stopped the suspicious vehicle, he went to introduce himself to the driver, who was alone in the car and requested him to come outside to be searched. His crew member Constable Netshikweta was standing at distance from them, but keeping observation. Nothing he found on the suspect.
- [8] He proceeded to search the car inside, he found 4 big plastic bags under the driver's seat. Inside the 4 plastic bags each bag contained about 100 small plastic packets containing Drugs or Nyaope. He asked Plaintiff about them, Plaintiff confirmed that is his drugs and is selling them.

- [9] They arrested the Plaintiff and called the forensic personnel, to seal the Drugs in the presence of Plaintiff. He testified that , they were Drugs or Nyaope what was found in the Plaintiff car and based on his illustrated experience of working as a cop and always arresting people in possession thereof and Plaintiff confirming same. Accused constitutional rights were explained, he was take to Police station for detention and Drugs were booked on SAP13 in the Presence of Plaintiff.
- [10] The arrest was conducted without a warrant of arrest, he testified that he effected it in terms of **Section 49 of the Criminal Procedure Act**, which permit him to arrest without a warrant.
- [11] At all material times, the Defendant witness was subjected to cross examination by the Plaintiff legal representative.
- [12] The Plaintiff testified also and cardinal in his testimony, was new evidence which he never put to the Defendant to either corroborate or dispute. Key aspects were the following: He alledged that Defendant was driving alone, without Constable Netshikweta. He stopped and searched him while he was alone and found the said plastics containing Drugs or Nyaope.
- [13] He further said, he was escorted by Defendant to Netshikweta house and when they arrived there, he was subjected to horrific beating by Defendant and Netshikweta. There after he was taken to the Police station for detention and no constitutional rights were explained to him.
- [14] Plaintiff in his testimony, he admitted being stopped at Munnik Street in the vicinity of the Mall of the North. He said he was given a plastic containing loaves of bread and cold drink to provide someone in his nearby village. He

placed the plastic on the back seat of the car and did not check if there was plastic inside containing Drugs.

LEGISLATION // CASE LAW

- [15] The two Police officials were on duty doing routine patrols around Polokwane. It was illogical to be expected to be in possession of a search warrant and an arrest warrant, not knowing for which purpose / kind of offence and against whom. Their patrol was directed at any form of unlawful conduct.
- [17] At such **Section 40 of the Criminal Procedure Act** allowed them to effect an arrest without a warrant. The Court is firstly tempted to visit the statute concerned. **Section 40** of the said Act laid down a number of instances where an arrest can be done without a warrant by a Peace Officer. Subsection (1) (a) thereof , allows Arrest by a Peace Officer without a warrant of arrest , any person who commits an offence in his / her presence or attempts to commit offence in his / her presence.
- [18] The relevant instance is listed in **section 40 (1) (b)** of the said act. The section say *“a Police officer may arrest without a warrant any Person whom he reasonably suspect of having committed an offence referred to in Schedule 1”*.
- [19] The Defendant testified that, the Plastic containing Drugs was found inside the motor vehicle the Plaintiff was driving. Plaintiff did not dispute that, but to alledge that he was given it by someone whom he told him was containing bread to deliver.

The element of Possession or control either physical or mental by Plaintiff was existing. Plaintiff admitted to have knowing the Plastic and did receive the Plastic, though he was told it had bread not contained Drugs.

- [20] **Section 49 (1)(b) of the Criminal Procedure Act 51 of 1977** is the key legislation governing arrest without a warrant. Persuasive judgments considered by the Court were the following: (1) **EDWARD DITSELE AND 3 OTHERS // MINISTER OF POLICE AND OTHER FREE STATE HIGH COURT CASE NO: 805 /2019 (25 JANUARY 2023)** Plaintiffs were arrested for selling alcohol without license and possession of dagga. Plaintiffs were seen by Police selling alcohol in Mangaung Township from the back of their bakkie.

Police parked their unmarked vehicle opposite the Plaintiffs car, people were seen flocking there and coming back with liquor quantities. After a while, they went to the said car and found many quantities of alcohol and lots of cash. Plaintiffs did not had a license to sell alcohol, packets of dagga were also found.

Arrest was effected for illegal sale of alcohol and possession of dagga. The action of the Police in arresting the Plaintiffs, were held to be reasonable, justifiable and followed by rational suspicion which was confirmed.

The action by Plaintiffs for unlawful arrest and detention was dismissed. The Police had followed up the suspicion of illegal sale of alcohol, observed the operation / selling process, went to search the car and found large quantities of alcohol, lots of cash and dagga.

- [21] Another case which is binding to be followed until overturned by Constitutional Court is: **SANDILE BIYELA // MINISTER OF POLICE. SCA (1017 /2020) ZASCA 36 . Heard on 15 January 2022 and delivered on :01 April 2022**

In this case, the Magistrate Court had awarded damages for unlawful arrest and detention in favour of Biyela. He was arrested together with a group of persons who were seen in Durban CBD damaging a parked Bus, while they were travelling in a Taxi.

The scene of the crime and commission thereof, was seen by CCTV operator in the CBD who is a Police officer. He dispatched information to his colleagues who were patrolling the streets. Acting on that information, Police traced the Taxi and found it and searched it. Inside the Taxi, they found bricks, stones and knob kerries which were used to damage the Bus and all occupants were arrested including the Appellants.

Appellants, lodged Unlawful arrest action in the Magistrate Court and damages were awarded to them. Main reason, for the award according to the Court was that the alledged CCTV operator did not had exact recollection of the incident when he testified in Court.

On Appeal at the Provincial Division of the High Court, in Petermaritzburg due to dissenting views of the Court. The case was referred to Appeal Court on special petition.

At the Court of Appeal, the Judgement of the Magistrate Court was set aside and Dismissed. The Court held that , the credibility of the CCTV operator was not an issue which the Court was supposed to have considered when awarding Damages. The Court held that, the conduct of the Police who

effected an arrest was important. They investigated the allegations, and found stones, bricks and knob kerries which were linked to damaging the Bus and effected the arrest.

ANALYSIS OF FACTS BY PARTIES AND THE LAW

- [35] The Defendant informed the Court about the search conducted on the Plaintiff car, who was driving and alone. Plastic being found and containing drugs, which were further opened at Police station and sealed in the presence of the Plaintiff.

That possession was never denied, but for the Plaintiff to say he was given the plastic by another person who informed him it contained bread to deliver .The Plaintiff was in control and possessed the said plastic with drugs. Ownership thereof was denied by the Plaintiff.

But for the suprising testimony of the Plaintiff, being that he was arrested by only one Constable Magano who was doing the patrol alone. And upon arrest he was taken to Mr Netshikweta house , only for him to be assaulted due not respecting.

Aspect which this Court is finding to be impossible, given that it was not disputed or put to the Defendant Constable Magano when he testified that, he was with Mr Netshikweta when Plaintiff was arrested.

- [36] Section 40 (1) (b) has been to have been complied with by Defendant, he opened the plastic contents in the presence of Plaintiff and further went to seal them in his presence after he had satisfied himself that they were Drugs.

At all material times, Plaintiff was in possession and control of those Drugs. Defendant acted reasonably in confirming that according to his knowledge and experience the contents he found were Drugs.

RULING // COURT FINDINGS

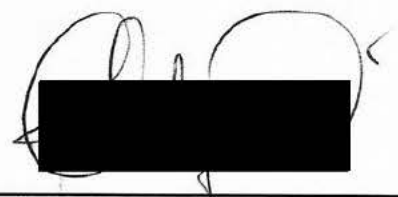
[37] Firstly the Court has to consider the ambit of **Section 40 (1)(b) of the Criminal Procedure Act 51 of 1977**, where a Peace Officer can effect an Arrest if they reasonably suspect that a person has committed a schedule 1 offence, except escaping from lawful custody.

[38] Defendant is a Police officer and classified as a Peace officer.

[39] The Plaintiff testimony, only confined itself in denying Ownership of Drugs not possession.

ORDER

[46] Plaintiff's Claim is hereby dismissed with costs.



L.K. NGCANGCA

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

**FOR PLAINTIFF : ADV. MAKGOPA
POLOKWANE**

FOR DEFENDANT : ADV.RAKGOHO,STATE ATTORNEY (POLOKWANE)

HEARD ON : 22 AUGUST,12 &29 SEPTEMBER, 20 OCTOBER 2025

JUDGEMENT DELIVERED ON : 11 DECEMBER 2025

POLOKWANE HIGH COURT