



IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALAGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NO: 483/20

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
3/3/2026	[REDACTED]
DATE	SIGNATURE

In the matter between:

NKOSI SELLO NKOSINATHI

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

Nsibande AJ

Introduction

[1] This is a delictual claim of unlawful arrest and unlawful detention. The Plaintiff was arrested by members of the South African Police Service ("SAPS") 06 October 2017 and was released 07 December 2017.

Facts

[2] On 06 October 2017, the Plaintiff was arrested by members of the SAPS on charges of rape and housebreaking. The rape and house breaking occurred on the 04th October 2017.

[3] The Plaintiff was pointed out by the victim and complainant in this matter on charges for rape and housebreaking.

Issue for determination

- (i) The Court is called upon to make a determination, firstly as to which version of events is probable on a balance of probabilities between the version of the Defendant and that of the Plaintiff after the arrest.
- (ii) The Court is also called upon to make a determination of whether or not the arrest and detention of the Plaintiff was lawful or unlawful.

[4] Should it be found that the arrest and detention were unlawful, the Court is called upon to determine just and equitable redress.

Defendant's case

It is common cause to prove on a balance of probabilities that the arrest and the subsequent detention were lawful. In proving its case the Defendant called on a witness, Detective France Sando, who testified as follows:

6.1 That, he is a Sergeant member of the SAPS, and he attached to the FSC Unit, Family Violence Child Protection and Sexual offences Unit.

[8] He has been with the SAPS for 18 years and has been with the above unit for a period of 8 years.

[9] He confirmed that he is the arresting officer in CAS No. 31/10/2017, for which the Plaintiff was arrested .

[10] He testified that he received the CAS docket from the charge office for investigation. He stated that in his investigations, he visited the crime scene.

[11] According to the officer, in this matter, there were two complainants and two perpetrators, and one of the perpetrators is a brother to both of the victims.

[12] He was informed by the victims that on the morning of 05 October 2017, the first victim was asleep and was awakened by a light shone on her face, she shouted and the second victim, younger than the first victim, awoke .

[13] The perpetrator ordered the younger victim to cover herself with a blanket.

[14] While covering her face, the younger victim heard the older victim calling out the name of her brother.

[15] The first perpetrator insisted the younger victim open her legs and he raped her. The second perpetrator held a knife, the other perpetrator was at the door, allowing light into the room the victims shared.

[16] After the rape, both perpetrators exited through the garage door, taking a mobile phone from the bedroom and a TV set from the dining room.

[17] Upon further investigation it was discovered that one of the perpetrators was staying next door to the victims, and was later not found at his house.

[18] The officers went to the second perpetrator's house, the perpetrator saw the officers, and he fled. The officers gave chase, apprehended, and arrested him, who is before this Court as the Plaintiff.

[18] The Plaintiff was arrested and charged with rape, housebreaking, and theft. He was detained at Calcutta on 07 October 2017 and he appeared in Court, on a Monday.

[19] According to the officer, the Plaintiff was remanded in custody until 16th October 2017 for bail proceedings. That is the last time the officer had any contact with the Plaintiff.

[20] He testified that, according to his recollection of events, the Plaintiff was granted bail on that same day 16 October 2017. He further confirmed that in December 2017 the charges against the Plaintiff were provisionally withdrawn pending, at that stage, the release of the outcome of the testing for DNA evidence.

[21] He submitted that, therefore, the arrest was lawful as the Plaintiff was pointed out by the victim; whereafter the Court ordered his detention..

Plaintiffs' Case

[22] The Plaintiff testified that he was arrested on 06 October 2017 and was detained at Calcutta Police Station and later transferred to Hazyview. He was told that he was being arrested and detained for rape and housebreaking.

[23] He testified that on the day of the arrest, at about 10h00 he was talking to his neighbour. The police arrived and ordered him to stand still, whereafter he lay on the ground and as he laid on the ground he was handcuffed.

[24] After the arrest, he was taken to his house and upon arrival , the house was searched and he was informed by the police that they were looking for a stolen TV and a blue hoodie which the Plaintiff had worn on the day of the incident.

[25] The Plaintiff told the police that he did not own any blue hoodie but that he had an Adidas braded hoodie. He testified that he was assaulted and that none of the items sought were found in his house.

[26] Subsequently, he got to the police station, on Friday 06 October 2017, was charged Sunday, 08 October 2017, and appeared in Court on Monday 16th October 2017. He testified that from the date of his arrest on 06 October 2017 until 16th October 2017, he never left the cell in which he was detained.

[27] On 16 October 2017 he was remanded in custody for further investigations. He testified that he remained in the police cell and was later transferred to Mbombela.

[28] He testified that the toilets at the police cells were dirty and smelling. The blankets were dirty and smelly too.

[29] He further testified that he is not Marks, and he has no such nickname, and he does not know who is Marks.

[30] He was finally released from custody on 07 December 2017 when the charges were withdrawn.

Analysis

[31] It is common cause; that the Plaintiff was arrested on the 06 October 2017 on the charges of Rape, Housebreaking, and Theft.

[32] It is common cause; that the Plaintiff was arrested after he was pointed out by one of the victims.

[33] The following disputes are glaring from the Plaintiff's and Defendant's versions:

(a) The date of first appearance in Court, and

(b) The date of release from custody.

[34] Before the Court can deal with the issue of whether the arrest and detention were lawful or otherwise, it is important to deal with the two aforementioned issues. .

The Date of First Appearance.

[35] Detective France Sando's evidence is that the Plaintiff appeared in Court on the Monday after the Friday of the arrest, and the matter was remanded to 16th October 2017 for bail proceedings.

[36] The Plaintiff's evidence is that he was arrested on 6th October 2017 and only appeared in Court on 16th October 2017, where he was further detained for further investigation.

[36] On the day of the release from custody, the Detective's evidence was that, the Plaintiff was released on bail, as he did not oppose bail, on the other hand the

Plaintiff's evidence is that from 06th October 2017, he never left his cell until 16th October 2017.

[37] In October 2017 he was further remanded into custody until he was finally released on 07th December 2017.

[38] Clearly these two versions collide, and conflict with each other. No further and better evidence was provided to the Court.

[39] It is however clear to this Court that the version of Detective Sando, in so far as the first appearance is concerned, is the correct one. As this Court finds that the Plaintiff could not explain, on his version of events, why he appeared before Court on 16th October 2017. Whereas conversely the officer was able to explain that on 09th October 2017, which would be the Monday, the matter was remanded to 16th October 2017 for bail consideration.

[40] On 16th October 2017, both parties agree that the Plaintiff appeared in Court. The Defendant's version is that the Plaintiff was granted bail on that day as he did not oppose same. The Plaintiff, on the other hand, testified that he was remanded in custody for further investigation.

[41] In the absence of any documentary proof by both parties it is very difficult to make a finding in this regard.

[42] The Court is, however, satisfied that the charges against the Plaintiff were provisionally withdrawn on 07th December 2017. The investigating officer could not dispute the date of 07th December 2017 as the date on which the charges were provisionally withdrawn.

[43] The onus of proving the detention from 16th October 2017 to 07th December 2017 rests on the Plaintiff and the Plaintiff has failed to discharge such an onus. The Court is, therefore, satisfied that the Plaintiff was granted bail on 16th October 2017 as testified by the investigating officer and there is no documentary evidence, or otherwise, of further detention from 16th October 2017 to 07th December 2017 except for the testimony of the Plaintiff.

[44] The Court will, therefore, only deal with the arrest and detention of the Plaintiff from 06th October 2017 until 16th October 2017.

[45] The evidence before the Court states that the Plaintiff was arrested and detained as a result of being pointed out by the complainant.

[46] The Plaintiff was detained at the police holding cells until the 09th October 2017 where he made his first appearance, and the matter was postponed to 16th October 2017.

The Applicable Legal Principles

[47] The arrest of the Plaintiff was without a warrant, and as a result it falls squarely within an arrest in terms of Section 40(1)(b) of the Criminal Procedure Act ("CPA") which states as follows:

"A peace officer may without a warrant arrest any person —

- (a) "Who commits or attempts to commit any offence in his presence;
- (b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

[48] In *Duncan v Minister of Law-and-Order* 1986 (2) SA 805 (A), the Court made the following remarks regarding the Section 40(1)(b) arrest:

“Once the jurisdictional requirements are met, a discretion arise as to whether or not to arrest. The general requirements is that any such discretion must be exercised in good faith, rationally and not arbitrary.”

[49] The officer relied on the pointing out of the Plaintiff by the complainant. The officer indicated that the complainant relied on the voice of the Plaintiff as well as the evidence of the younger complainant to the effect that she heard the other complainant calling the name of her brother in a darkroom. This identification, as well as the fact that no other evidence pointed to the Plaintiff as the perpetrator, is concerning insofar as the arrest and detention of the Plaintiff is concerned.

[50] With the above-mentioned facts, the arrest of the Plaintiff, the Defendant failed to exercise his discretion in good faith, rationally and not arbitrarily. The officer should have made or conducted further investigations regarding the identity of the perpetrator. The Court is of the view that the pointing out of the Plaintiff by the victim was, under the circumstances, not enough to warrant arrest. The officer should have made further investigations before exercising the discretion whether or not to arrest. As the officer did not make such further investigations to establish certain facts and adduce further and particular evidence regarding the identity of the perpetrator, the decision to arrest and detain had no rationality.

[51] The Court is therefore satisfied that the arrest of the Plaintiff under the circumstances was unlawful. It follows, therefore, that the detention flowing from such arrest is also unlawful.

Quantum

[52] The Defendant having not rebutted the allegations and submissions as to unlawful arrest and detention, but also in terms of the conditions of the cells and the Plaintiff's emotional trauma as a result of the arrest and detention, the Court accepts that these are common cause.

[53] The Plaintiff was not supposed to be arrested under the circumstances, while arrested he was entitled to be detained in conditions that are consistent with human dignity¹. Section 35(2)(e) mandates that:

"Everyone who is detained, including every sentenced prisoner, has the right

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(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

[54] Consequently, this Court makes the finding that the Plaintiff was clearly detained in inhumane conditions, and the arrest and detention was unlawful. The Plaintiff is claiming compensation for the unlawful arrest in the amount of R 3 000 000.00 (Three Million Rands) and his Counsel referred the Court to a number of authorities in support of the claim and the award.

[55] In arriving at a just and equitable award, the Court deems it to be appropriate to be guided by the following decisions;

¹ Section 10 read together with Section 35(2)(e), Constitution of the Republic of South Africa, Act 108 of 1996.

[56] In *Minister of Safety and Security v Tyulu*,² Bosielo A.JA stated as follows:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts."³

[57] It is also important to refer to the following: *In Minister of Safety and Security v Seymore*⁴ Nugent JA, held:

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and a few cases are directly comparable. They are useful guide to what other courts have considered to be appropriate but they have no higher value than that."

² Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) para 26.

³ See also, *Rudolf and Others v The Minister of Safety and Security and Others* (380/2008) {2009} ZASCA 39..

⁴ Minister of Safety and Security v Seymore (6) SA 320 (SCA) para 17.

[58] In *Pitt v Economic Insurance Co Ltd 1957 (8) SA 284 (N)* ⁵ Holmes J held:

“...the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides—it must give compensation to the Plaintiff, but must not pour out largesse from the horn of plenty at the Defendant’s expense.”

[59] The Court has considered the above decisions and past awards by Courts as well as awards in this Division of the High Court. The Court is of the view that an award for unlawful arrest and detention of the Plaintiff from the 06th October 2017 to the 16th October 2017 will be an amount of R 250 000.00 (Two Hundred and Fifty Thousand Rands).

Order

[58] The Court therefore makes the following Order;

- (i) The Defendant is ordered to pay the Plaintiff an amount of R 250 000.00 (Two Hundred and Fifty Thousand Rands) in respect of the unlawful arrest and detention of the Plaintiff from 06th October 2017 to 16th October 2017.
- (ii) The Defendant is ordered to pay the costs of the suit on party and party scale, Scale B.

⁵ *Pitt v Economic Insurance Co Ltd 1957 (8) SA 284 (N)* para [E]. See also the following: *Thandanani v The Minister of Law and Order 1991 (1) SA 702 [E]*, *Olgar v The Minister of Safety and Security 2008 JDR1582*, *Motladile v Minister of Police (Motladile 414/4/2022) [2023] ZASCA 94*.


NSIBANDE

ACTING JUDGE OF THE HIGH
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Date of Hearing: 20th October 2025

Date of Jugement: 3rd March 2026