



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

Reportable

CASE NO: 1515/2018

In the matter between:

MXOLISI JONAS

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

RUSI J

[1] The Constitution of the land sets great store by the right to human dignity and personal liberty. Arrest, which is a drastic invasion of these rights, is a legal act which the law restricts to limited circumstances, whether it is with or without a warrant. A person may be arrested without a warrant in circumstances that the Criminal Procedure Act 51 of 1977 (the CPA) circumscribes in section 40.

[2] On 06 September 2016, the plaintiff, a retired policeman, visited the home of one Mr Fumanekile Mzantsi in Cingco Locality in Sdwadweni Administrative Area, Tsolo district around 09h00. Mr Mzantsi subsequently alleged the plaintiff pointed a firearm at him during their interaction in the course of his visit at his home. In an alleged attempt by Mr Mzantsi and others to subdue the plaintiff during the alleged pointing with a firearm, the plaintiff sustained injuries to his body. Mr Mzantsi reported the matter to the police.

[3] Resulting from Mr Mzantsi's report, the plaintiff was arrested by the defendant's members without a warrant on 06 September 2016 and detained at the Tsolo Police Station until 08 September 2016 when he was released on bail at the Tsolo Magistrates' Court. The police claimed that in arresting and detaining the plaintiff they acted in terms of section 40(1)(b) of the CPA. In terms of this section, a peace officer may arrest a person without a warrant if he entertains a reasonable suspicion that that person committed an offence listed in Schedule 1 of the CPA.

[4] The plaintiff now holds the defendant liable for damages in the sum of R50 000.00 resulting from his arrest and R100 000.00 for his detention. He alleges that his arrest and detention were unlawful. The plaintiff made a further claim against the defendant for pain and suffering in the sum of R200 000.00. It is his contention regarding this claim that the police denied him access to medical attention for the treatment of the injuries he sustained before his detention. The defendant resists the plaintiff's claims.

The pleadings

[5] In his further amended particulars of claim dated 23 January 2026 the plaintiff alleged that his arrest and detention which were without a warrant were not justified in that in arresting and detaining him the police failed to exercise their discretion, or they improperly exercised it or exercised it in bad faith. They

failed to arrange his release on police bail even though they had a legal duty to do so. He further alleged that the police failed to bring him to court on 07 September when it was reasonably possible to do so.

[6] As regards his claim for pain and suffering, the plaintiff alleged that the police failed and/or neglected to take him to a medical facility for treatment and detained him in circumstances where they had a legal duty to assist him with obtaining medical treatment. As a result of their failure and/or neglect, he remained in their custody for two days and two hours under severe pain from his injuries.

[7] In its consequential plea dated 26 January 2026, the defendant alleged that the plaintiff was lawfully arrested without a warrant in terms of section 40(1)(b) on the reasonable suspicion that he committed the offence of pointing a firearm which is an offence listed in Schedule 1 of the CPA by reason of the fact that it may be punishable by imprisonment exceeding 6 months without an option of a fine. He was detained in terms of section 50 of the CPA on the ground that he was charged with a serious offence and had to apply for bail. He could not be brought before court on 07 September 2016 as the police were yet to obtain witness statements and his criminal profiles.

[8] In defending the claim for pain and suffering, the defendant alleged that ‘the plaintiff was handed over to the supervision of Captain Marawule (Capt Marawule) who would take him to Malizo Mpehle Hospital.’

The issues

[9] The plaintiff’s arrest and detention by the members of the defendant became common cause between the parties. His allegation that the police denied him access to medical attention and the fact that he consequently suffered pain and discomfort remained contested. Otherwise, there was no dispute regarding the fact that at the time of his arrest and detention the plaintiff had sustained

injuries from an assault by other persons before the arrival of the police at the scene of the alleged pointing of a firearm.

[10] The parties agreed that the matter would proceed only in respect of the merits of the plaintiff's claim. An application was made for the separation of the quantum of the plaintiff's claim from the merits. This application was granted.

The onus

[11] The defendant accepted the duty to begin even though the plaintiff bore the onus of proof in respect of the claim for pain and suffering. In support of its case, the defendant led the evidence of the arresting officer, Sgt Mdletye. The plaintiff was the only witness in support of his case. The parties also relied on the documents that they discovered inter se. Those documents included the contents of the docket encompassing the criminal case against the plaintiff.

The defendant's case

[12] Sgt Mdletye testified as the police officer who arrested the plaintiff in the early afternoon on 06 September 2016. It was her evidence that she arrested the plaintiff on suspicion that he had pointed a firearm at Mr Mzantsi. When she arrested the plaintiff, he had injuries on his body which, as reported, he sustained during an assault by the members of the community. The plaintiff's time of detention was 13h00 on 06 September 2016.

[13] According to Sgt Mdletye, her suspicion that the plaintiff was guilty of pointing a firearm was based on the following facts: she received a complaint while on patrol duties with Constable Hanise that the plaintiff had pointed Mr Mzantsi with a firearm which was also discharged. This incident took place inside Mr Mzantsi's house in the presence of two other persons, Ms Noncedile Tyelela and Mrs Nokwakha Sikhwatsha. On arrival at the scene of the alleged crime, she and Constable Hanise obtained the facts regarding how the offence

was committed from Mr Mzantsi. At the time, the plaintiff had been tied with a rope against the pole of the Mr Mzantsi's gate.

[14] The plaintiff's firearm, magazine and 7 rounds of ammunition were in the possession of the complainant and were subsequently handed over to them as exhibits. It was explained to her by Mr Mzantsi that he won the possession of the plaintiff's firearm during a struggle that ensued over the firearm when he together with Mrs Tyelela and Mrs Sikhwatsha attempted to subdue their assailant, the plaintiff. Since it was indicated that the firearm was discharged inside Mr Mzantsi's house, she and Constable Hanise searched Mr Mzantsi's house for the bullet cartridge and a bullet hole and they found none.

[15] As regards the statement of the complainant, which on the face of it purports to have been obtained at 14:45 on 06 September 2016, a time that fell after the plaintiff's arrest, Sgt Mdletye explained that she recorded the statement at the scene and merely caused the plaintiff to append his signature after he verified its correctness. She attended to the certification and commissioning of the statement upon arrival at the police station. In this regard Sgt Mdletye testified that it was the volatility of the situation on their arrival that informed her decision to attend to the certification of the complainant's statement at a later stage. According to her, while the plaintiff was tied he and the complainant were engaged in a verbal spat and she deemed it necessary to swiftly remove the plaintiff from the scene.

[16] Asked whether she obtained sworn statements from Mrs Tyelela and Mrs Sikhwatsha before arresting the plaintiff, Sgt Mdletye explained that she and Constable Hanise received these witnesses' verbal accounts of what transpired in Mr Mzantsi's house and only recorded their statements later at the police station. These statements which Sgt Mdletye obtained on 06 September 2019, are undated and not commissioned. Apart from them, there is a further statement

by Mrs Tyelela dated 21 February 2019 which bears no relevance to the time of the plaintiff's arrest.

[17] In regard to the alleged refusal to take the plaintiff to a medical facility for treatment before detaining him, Sgt Mdletye's version was that the plaintiff was transported to Dr Malizo Mpehle Hospital by her colleague, Captain Marawule and he returned with medication which they retained at the charge office and subsequently administered to the plaintiff as prescribed by his treating Dr. Sgt Mdletye could not explain why there was no official record of the plaintiff's transportation to and from hospital as well as a record of visits to the cells whereby the plaintiff was given treatment while in detention.

[18] The investigation diary that formed part of the discovered documents indicates that when the docket of the case against the plaintiff was placed before the prosecutor, the statements that were in the docket were those of Sgt Mdletye, Constable Hanise, and that of the complainant, all dated 06 September 2016. An entry was made by the prosecutor in the investigation diary on 08 September 2019 in which he/she instructed the investigating officer to obtain eyewitness statements. Those would be the statements of Mrs Tyelela and Mrs Sikhwatsha. It also appears from the investigation diary that on 07 September 2019, the investigating officer was instructed by the person who inspected the docket on that same day to obtain these same statements.

The plaintiff's

[19] According to the plaintiff, at no stage while in the home of Mr Mzantsi did he point anyone with a firearm. Instead, he is the one that was pointed with a firearm by Mr Mzantsi, and he was the victim of an attack on him and robbery by Mr Mzantsi together with Mrs Tyelela and Mrs Sikhwatsha. He further testified that he explained this to Sgt Mdletye at the time he was arrested. This happened when he went to Mr Mzantsi's home to follow up on a conversation

he had with him around 02h00 on 06 September 2016. The plaintiff went on to state that on that occasion, Mr Mzantsi had brought several other men to his home to make suggestions on how to deal with a challenge of stock theft in their area. He asked to discuss the matter with Mr Mzantsi at another time.

[20] When he went to Mr Mzantsi's home around 09h00 in the morning of 06 September 2016, he overheard Mr Mzantsi informing others who transpired to be Mrs Tyelela and Mrs Sikhwatsha that the reason why he brought several men to his home at 02h00 was to set a trap for him, but he escaped their trap. He confronted Mr Mzantsi with the content of this conversation. This angered Mr Mzantsi who reached out for his firearm, pointed it at him and told him to leave his house. As he was leaving, Mr Mzantsi and the two ladies grabbed and toppled him. Mr Mzantsi took his firearm, and they also pickpocketed him and took his money in the sum of R3 700.00 as well as his cellphone.

[21] The plaintiff confirmed that after he was dispossessed of his firearm and other items, he was tied to the pole of Mr Mzantsi's gate. After his arrest by Sgt Mdletye and on arrival at the Tsolo Police Station he requested to be taken to the doctor for treatment of his injuries, but his request was denied by Sgt Mdletye. According to him, Sgt Mdletye was consistently dismissive towards him and told him that he talked too much and thought he knew a lot.

[22] It was the plaintiff's version further that Sgt Mdletye did not obtain Mr Mzantsi's statement at the scene of the alleged pointing of a firearm but at the police station after he was arrested.

The parties' submissions

[23] In respect of the claims founded on unlawful arrest and detention, the case turned on whether the offence of pointing a firearm is an offence listed in Schedule 1 of the CPA. It became evident during argument by both Counsel that

if this Court finds that this offence does not fall under Schedule 1 of the CPA, that would be dispositive of the claim for unlawful arrest and detention.

[24] Mr *Msindo* referred to the case of *Mekwe v Minister of Police*,¹ an unreported judgment by a single judge of the Western Cape High Court. Like the present matter, the case of *Mekwe* concerned the plaintiff's arrest without a warrant on suspicion that he had committed the offence of pointing another person with a firearm. Mr *Msindo* placed reliance on the following passages of the said judgment by Landman J:

‘The pointing of a firearm is not an offence listed in schedule 1 of the CPA. In my view it ought to be included in the list. This brings me to the question whether the offence in question is an offence ‘the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine’ which is listed in schedule 1 of the CPA. . . Ms Ntuli, who appeared on behalf of the defendant, submitted that the Firearms Control Act 60 of 2000 (the FCA) provides that a conviction for pointing a firearm carries a sentence of imprisonment without the option of a fine. I beg to differ. . . In terms of section 121 of the FCA ‘any person convicted of a contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section’. (My emphasis.) Section 120(6) is listed in Schedule 4 and carries a term of imprisonment not exceeding 10 years. Clearly a person convicted of pointing a firearm may be sentenced to a fine or to imprisonment not exceeding 10 years.’²

[25] Although Ms *Qikila* initially indicated that she had not had occasion to consider the judgment relied upon by Mr *Msindo*, after she was afforded the opportunity to consider the argument made, she conceded Mr *Msindo*'s argument. This is a fundamental question which relates to one of the most common offences for which most arrests are made without a warrant ostensibly in terms of section 40(1)(b) of the CPA. It is expedient that I deal with the issue further despite the concession made by Ms *Qikila*.

¹ *Mekwe v Minister of Police* (1171/2014) [2016] ZANWHC 40 (17 June 2016).

² *Id*, para 10 –13.

The legal framework

[26] For ease of comprehension, it is beneficial to set out the legislative framework relevant to the offence of pointing a firearm. In terms of section 120(6) of the Firearms Control Act 60 of 2000 (the Act or the Firearm Control Act), it is an offence to point—

- (a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or
- (b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so.

[27] Section 121 of the Act provides, in turn, that ‘any person convicted of a contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section.’ The offence of pointing a firearm as envisaged in section 120(6) is among the offences listed in Column 1 of Schedule 4 and the maximum period of imprisonment that may be imposed alternative to a fine is 10 years.

[28] Schedule 1 of the CPA contains more serious offences from the violent to non-violent in nature. It includes certain common law offences of a more serious nature and serious offences created by certain statutes. The offences created by the Firearms Control Act are not part of the statutory offences which form part of Schedule 1 by mere listing. It ought to follow that for the purposes of an arrest under section 40(1)(b), they will fall under the catch-all provision if they are punishable by imprisonment exceeding six months without the

alternative of a fine. This is what the catch-all or general provision in Schedule 1 provides.

Is the offence of 'pointing a firearm' a Schedule 1 offence?

[29] The catch-all provision in Schedule 1 must be understood in this light – there are statutory offences, which, though not listed in it, are serious in nature that they warrant the imposition of a direct term of imprisonment exceeding 6 months without an option of a fine. Conversely, there are statutory offences which are less serious in nature and would not warrant punishment by imprisonment exceeding 6 months without an option of a fine.

[30] As observed by the Appellate Division in *Areff v Minister van Polisie*,³ Schedule 1 must be interpreted restrictively in the light of the fact that arrest without a warrant constitutes potentially serious interference with personal liberty. Upon the mere reading of section 121 of the Act, it makes provisions for a fine for all the offences that are listed in column 1 of Schedule 4 of the Act. The offence of pointing a firearm is among those offences. The Firearms Control Act is the principal legislation dealing with firearm-related offences.

[31] The offence of pointing a firearm as envisaged in section 120(6) of the Act is not an offence listed in Schedule 1 of the CPA. Quite apart from section 40(1)(b), there is section 40(1)(h) of the CPA which creates an independent ground of arrest without a warrant for firearm related offences, inter alia. In terms of this section, 'a peace officer may without a warrant arrest any person who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms and ammunition.' (My emphasis).

³ 1977(2) SA 900 (A) 902E.

[32] From the long title of the Firearms Control Act, its object is ‘to establish a comprehensive and effective system of firearms control; and to provide for matters connected therewith’. It seems to me that in couching the long title of the Act as it has, Parliament must have intended to regulate conduct which, though not strictly pertaining to the ownership or possession and licencing of firearms, directly affects public safety and undermines the safe use and control of firearms. The conduct of pointing a firearm at another is obviously a matter connected to the control and possession of firearms. For this reason, the offence of pointing a firearm at another without good reason is an offence in respect of which a person may be arrested in terms of section 40(1)(h) of the CPA. This ground of arrest without a warrant does not depend on this offence being a Schedule 1 offence.

[33] On these bases, I am in respectful agreement with the learned Judge in *Mekwe*, that the offence of pointing a firearm at another in contravention of section 120(6) of the Act is not an offence listed in Schedule 1 of the CPA. To the extent that the police relied on section 40(1)(b) in effecting the arrest of the plaintiff without a warrant the defendant’s pleaded justification of the arrest and detention cannot stand. The concession by Ms *Qikila* was well made. The defendant failed to justify the plaintiff’s arrest and detention.

[34] Whether, as Landman J opined in *Mekwe*, the offence of pointing of a firearm ought to be included in the list of Schedule 1 offences is an important question impacting not only policy considerations but also the interpretation of the provisions of section 40(1) of the CPA regarding the powers of the police to arrest a person without a warrant. For this reason, it is a matter I intend reverting to when it is opportune to do so in this judgment.

[35] But even if I err in finding that the offence of pointing a firearm is not included in the list of Schedule 1 offences, there are other reasons why the defendant’s defence cannot be sustained. The exercise of powers to arrest

without a warrant in terms of section 40(1)(b) entails making a value judgment based on the facts received about the alleged commission of the offence in question, and the circumstances in which it is alleged to have been committed.

[36] The test for the reasonableness of the grounds of suspicion on which a warrantless arrest may be effected, was laid down in *Mabona and Another v Minister of Law and Order and Others*,⁴ where the court held:

‘[T]he reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’

[37] The difficulty I have with Sgt Mdletye’s testimony is that even though Mr Mzantsi had claimed that the plaintiff’s firearm was discharged during the struggle that ensued when he and his two witnesses attempted to subdue the plaintiff, Sgt Mdletye’s own version was that she and Constable Hanise could not find any evidence of a discharged firearm in the form of a spent bullet cartridge or a bullet hole anywhere in the house. In the light of the plaintiff’s explanation that he was the victim of an attack in Mr Mzantsi’s house, this ought to have cast doubt on the veracity of the account of Mr Mzantsi and his witnesses regarding what transpired.

[38] Furthermore, Sgt Mdletye’s version that she verified Mr Mzantsi’s account of what occurred in his house by means of Mrs Tyelela and Mrs Sikhwatsha’s verbal statements which she recorded at the police station later that day is rendered improbable by the fact that the statements she referred to

⁴ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658G-H.

are undated and are not commissioned. What is more, the entry dated 08 September 2019 by the prosecutor who was seized with the docket of the case against the plaintiff, in which she/he instructed the investigating officer to obtain eyewitness statements of Mrs Tyelela and Mrs Sikhwatsha suggests that the statements of these witnesses were not part of the docket at the time the plaintiff appeared in court even in their undated and uncertified form. From the entry dated 07 September 2016 made by the person who inspected the docket, it becomes clear that the statements of these two witnesses had not been obtained as of 06 September 2019 when the plaintiff was arrested and detained. An irresistible finding is that Sgt Mdletye failed in her obligation to verify the facts she had at her disposal before arresting the plaintiff in circumstances where it was possible and practical for her to do so. For this reason, her suspicion that the plaintiff was guilty of pointing a firearm was not founded on reasonable grounds. On this ground alone, the plaintiff's claim for arrest and detention must succeed.

[39] As regards the plaintiff's claim for pain and suffering, Ms *Qikila* merely invited the court to make its own determination on the version presented by the defendant in the light of the absence of an official record depicting the submission of the plaintiff to medical attention. I turn to deal with this issue.

The plaintiff's claim for pain and suffering

[40] A determination of liability for delictual damages caused by the omission on which the plaintiff basis this claim rests on wrongfulness, fault, causation and the harm caused. Fault may take the form of intention or negligence. For the sake of completeness, an omission is not wrongful merely because it has caused harm.⁵ It is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A

⁵ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597.

defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.⁶

[41] In the present case, the defendant's negligence, the elements of wrongfulness and causation; and the fact that the defendant had a duty to act in relation to the plaintiff's claim for pain and suffering were not the issues before me. The parties' respective pleadings indicate as much. This claim turned on whether the defendant's version that positive measures were taken to prevent harm should prevail as being credible and therefore probable.

[42] The standard of proof in civil proceedings is that of a balance of probabilities. The court must be satisfied, on a preponderance of probabilities, that the version of the onus bearing party is true and therefore acceptable. Such probabilities must be such that, on a preponderance, it is probable that the particular state of affairs existed.⁷

[43] The essence of the defendant's pleaded defence to this claim is that the matter of taking the plaintiff to a medical facility was assigned to Captain Marawule. To substantiate this defence, Sgt Mdletye testified that Captain Marawule did, as a fact, take the plaintiff to hospital for medical attention. This is indeed different from a positive assertion that he was submitted to medical treatment. What Sgt Mdletye stated was not specifically pleaded, and this offends the trite principle that the purpose of the pleadings is to define the issues for the other party and the court and that a party has a duty to allege in the pleadings the material facts upon which it relies.⁸ That being so, Mr *Msindo* accepted that both parties ventilated the facts that emerged for the first time in

⁶ *Van Eeden v Minister of Safety and Security* (176/01) [2002] ZASCA 132; [2002] 4 All SA 346 (SCA); 2003 (1) SA 389 (SCA) (27 September 2002), para 9.

⁷ Schwikkard PJ (*et al*), *Principles of Evidence*, 4th Ed, 2016, page 627, at 32.7.

⁸ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009), para 11.

Sgt Mdletye's evidence concerning this issue, and therefore no party has been prejudiced. This is the exception to the rule as explained in *Slabbert*.⁹ I turn to determine whether the version of the plaintiff or that of the defendant on the already mentioned narrow issue of fact is credible and therefore probable.

[44] The starting point is that the defendant did not call Capt Marawule as a witness. Mr Msindo asked that I draw an adverse inference against the defendant. An adverse inference will be drawn against a party who fails to call an available witness. Failure to call a witness suggests that the said party fears that the evidence of such witness would not support its case. However, the adverse inference is dependent on two factors. The first is that such a witness would elucidate an aspect of the facts testified to by the party concerned. The second one is that the said witness was in fact available to testify. This is trite law.¹⁰

[45] When asked about Capt Marawule's whereabouts, Sgt Mdletye indicated that he was no longer employed in the SAPS and as such she has no knowledge of his whereabouts. Ms Qikila did not give any indication whether the witness is alive or not, or that for other reasons he would not be considered as an available witness. I am disinclined, therefore, to draw an adverse inference against the defendant for his failure to call Capt Marawule. This leaves this Court with the testimony of Sgt Mdletye as the only version in rebuttal of the plaintiff's claim for pain and suffering.

[46] There are two conflicting versions regarding the submission of the plaintiff to medical attention. For one version to be accepted and not the other, the court must be satisfied, on a preponderance of probabilities, that that version is true and accurate and therefore acceptable. It is trite that the estimate of the

⁹ Id para 12.

¹⁰ *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 at page 749 -750; see also *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC); *Boyce NO v Bloem* 1960 (3) SA 855 (T) at 864.

credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case. This is the well-established approach to be followed in resolving two mutually destructive versions in civil proceedings.¹¹

[47] Sgt Mdletye was at pains to explain why there is no official record of the plaintiff who was already in the custody of the police being taken out of the confines of police detention to a medical institution, and back. She conceded that such a record ought to appear in the occurrence book (the SAPS 10 register). Her assertion that the plaintiff was given his treatment at the specified times is not supported by the entries made in the occurrence book. In fact, there are no such entries in the occurrence book.

[48] It bears emphasizing that the applicable SAPS registers are not documents which were designed for a mere ‘tick-box’ exercise by those who must utilize them. They are the official record of all the actions that are taken concerning arrestees and detainees. The same is to be said regarding the registers used for recording items or articles connected with the commission of crime and which are to be used in evidence in court proceedings, and any other items such as the personal possessions of the detainees. These registers are the tools of accountability and transparency within the SAPS and are aimed at promoting the integrity of the SAPS’s case administration system. Their importance is further gleaned from the fact that the police officers who are in control of the detainees are never left to their own devices, so to speak. It is unsurprising that the said registers are inspected by the relevant officers in command of the relevant police station or charge office.

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

[49] To my mind, it is inconceivable that an incident as fundamental as the removal of a detainee from police custody for submission to a medical or other institution could be dealt with so casually as Sgt Mdletye would have the court believe. Equally improbable is the fact that a detainee's medication or prescription drugs would be handled in the informal manner that Sgt Mdletye portrayed. On these bases alone, Sgt Mdletye's testimony must be rejected for improbability and that of the plaintiff accepted as credible and therefore probable. An ineluctable finding is that the plaintiff was denied medical attention by the members of the defendant. The plaintiff's claim for pain and suffering must accordingly succeed.

Conclusion

[50] It is opportune to return to the question whether, as Landman J opined in *Mekwe*, the offence of pointing a firearm ought to be listed in Schedule 1 of the CPA in the context of an arrest without a warrant in terms of section 40(1)(b) of the CPA.

[51] It is indeed so, that South Africa is one of the countries that are ravaged by crime, most of which is committed by the use of firearms. This makes the unlawful use of firearms an equally serious matter. The inclusion of offence of pointing of a firearm in the list of Schedule 1 offences in the context of the authority of the police to arrest a suspect of this crime without a warrant is where I must respectfully differ with the sentiments of the court in *Mekwe* which Counsel who appeared in the present case shared.

[52] It must be remembered that section 40(1) of the CPA makes provision for seventeen grounds on which a person may be arrested without a warrant. Section 40(1)(h) whose provisions I have discussed above, is one of those grounds. As outlined above, although section 40(1)(b) restricts the powers of the police to arrest without a warrant to the offences listed in Schedule 1, section

40(1)(h), on the other hand, creates an independent ground of arrest without a warrant where the person is reasonably suspected of committing firearm-related offences which include unlawful conduct such as pointing a firearm at another without good reason in contravention of section 120(6) of the Firearms Control Act.

[53] I accept that in practical terms, when arresting a person for firearm related offences the police are not expected to determine whether a particular firearm related offence falls within the ambit of Schedule 1 or not. It must have been against the realization of this fact that section 40(1)(h) was promulgated to ensure that the police have lawful authority to arrest without a warrant a person who is reasonably suspected of committing a firearm related offence. For these reasons, I hold the view that it is not necessary to include the offence of pointing of a firearm in the list of Schedule 1 offences for the purposes of an arrest without a warrant in the context of section 40(1) of the CPA.

[54] Lastly, in the interests of legal certainty it behoves me to state that in the matter of *Unathi Noholoza v Minister of Police*,¹² an undefended action unrelated to the present case, I made an assertion that ‘possession of a firearm which is an offence created by section 3 of the Act is an offence listed in Schedule 1 of the CPA by reason of the fact that it is punishable by a maximum period of 15 years without an option of a fine’.¹³ In *Noholoza*, the plaintiff was arrested on suspicion that he was in possession of an unlicensed firearm. One of the material allegations that the plaintiff made in support of his claim was that this arrest without a warrant was not justified in terms of section 40(1)(a) or 40(1)(b) of the CPA. From the charge sheet and the record of proceedings in the Magistrates’ Court before which he was brought after arrest, the charge against him, at his first appearance was a contravention of section 3 of the Firearms

¹² Unreported judgment under case number 2072/2024, Eastern Cape Division of the High Court, Mthatha, delivered on 27 January 2026 (*Noholoza*).

¹³ See paragraph 18 of the judgment.

Control Act as read with several other sections of the same Act, including section 121. This offence is among the offences that do not form part the list of Schedule 1 offences.

[55] Even though the case of *Noholoza* did not turn on the specific issue whether unlawful possession of a firearm fell under Schedule 1 or not, since it was an undefended action, it is necessary that I clarify the dictum I made regarding the offence of possession of a firearm being a Schedule 1 offence, and I do so hereunder.

[56] Section 3 of the Firearms Control Act creates a general prohibition of possession of a firearm or ammunition without a licence or permit, which, in terms of section 121 of the same Act, read with Column 2 of Schedule 4, is punishable by a fine or imprisonment for the maximum period of 15 years. Section 4 of the same Act prohibits the possession of fully automatic firearms on pain of a fine or a maximum period of imprisonment of 25 years. I may add that under section 4 of the Act, a fully automatic firearm may only be licenced in the circumscribed provisions of the Act. The licencing of a semi-automatic firearm is also restricted in terms of the Act.

[57] On the other hand, the Criminal Law Amendment Act 105 of 1997 (the CLAA) makes provision, in Part II of Schedule 2, for a prescribed minimum sentence of 15 years as punishment for ‘any offence relating to the possession of an automatic or semi-automatic firearm,’ among other things. It is trite that the CLAA was enacted, inter alia, to provide for minimum sentences for certain serious offences. The tension between the sentencing provisions in section 121 of the Act and CLAA in relation to automatic and semi-automatic firearms was resolved when the court in *S v Thembaletu*,¹⁴ held:

¹⁴ 2008 3 All SA 418, at para 6.

‘The phrase ‘Notwithstanding any other law’ in the section (i.e. s 51(2)) clearly indicates that the provisions supersede all other laws on sentence and apply to all offences listed in Part II of Schedule 2. That list includes an offence referred to as of the possession of ‘a semi-automatic firearm’. The section’s wording is couched in unambiguous and peremptory terms (‘shall’), and the offences to which it applies are stipulated.’

[58] *Themba lethu* was followed in *Swartz v S*,¹⁵ where the court held that the minimum sentences applied when the specific circumstances of an offence brought it within the scope of one of the schedules to the CLAA and that the Firearms Control Act which came into effect after the CLAA was not intended to repeal this latter legislation.¹⁶ In *S v Motloun*¹⁷ the Supreme Court of Appeal held that there was no indication that the Act was intended to repeal the earlier CLAA.¹⁸

[59] The importance of the above exposition is this: more often than not, when a person is found in possession of an unlicensed firearm, the police are required to act expeditiously – they would not have had the opportunity to establish whether that firearm is an automatic or semi-automatic firearm. It is not inconceivable, despite the punishment provided for in section 121 of the Act for the general prohibition in section 3, that in a particular case, a person found in possession of an unlicensed firearm may be sentenced under the CLAA if it is found that the firearm in question, was an automatic or semi-automatic firearm.¹⁹ In keeping with this view, the offence of possession of a firearm may attract a sentence exceeding 6 months without an option of a fine. It is the view I hold that this brings the offence of unlawful possession of a firearm in contravention of the general prohibition of section 3 of the Act within the realm

¹⁵ 2016 (2) SACR 268 (WCC).

¹⁶ *Id* paras 16; 20 and 28.

¹⁷ 2016 (2) SACR 243 (SCA).

¹⁸ *Id*, para 20 and 23; see also, *S v Madikane* 2011 2 SACR 11 (ECG) paras 18 – 22.

¹⁹ See *Themba lethu*, para 11.

of the catch-all provision in Schedule 1 for the purposes of effecting an arrest without a warrant.

[60] I say this is not unmindful of the provisions of section 40(1)(h) which I have dealt with above. To my mind, an arrest without a warrant would be justified for the offence of possession of a firearm both under section 40(1)(b) and section 40(1)(h), and this will invariably be determined by the facts unique to each case. So much for the clarification of the already mentioned dictum in *Noholoza*.

[61] On the merits of the present matter, and in the light of all the foregoing, the plaintiff's claims against the defendant must succeed.

Costs

[62] The general rule is that costs must follow the result. In the present case, there are no grounds for deviating from this rule. The plaintiff must be awarded his costs as the successful litigant. Mr *Msindo* and Ms *Qikila* were in agreement that the issue of law on which the plaintiff's claim for unlawful arrest and detention turned is a complex one and that this marked this case as unusually complex. Mr *Msindo* submitted that costs are to be recoverable on scale B. Ms *Qikila* conceded this argument. The default position set by Uniform Rule 67A is that costs will be recovered on scale A unless there is justification for the application of a higher scale. The complex nature of the case will be one such justification.²⁰ There is merit to the submissions made by Mr *Msindo*. Costs on scale B are warranted.

Order

[63] In the result, I make the following order:

²⁰ *Khuza and Another v Khanyiwe* (5009/2018) [2025] ZAECHMHC 15; [2025] 2 All SA 463 (ECM) (4 March 2025), para 27.

1. The defendant is held liable for the damages suffered by the plaintiff resulting from his unlawful arrest on 06 September 2016, and subsequent detention at the Tsolo Police Station until 08 September 2016.
2. The defendant is held liable for the plaintiff's damages for pain and suffering resulting from the failure of the police at the Tsolo Police Station, to submit the plaintiff to medical treatment before his detention on 06 September 2016.
3. The determination of the quantum of damages shall stand over for determination on a later date.
4. The defendant shall pay the plaintiff's costs of suit on scale B referred to in Uniform Rule 67A.

L RUSI
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff : *Mr VV Msindo*

VV Msindo & Associates, Mthatha

For the defendant : *Adv Qikila*

Instructed by : The Office of the State Attorney, Mthatha

Heard: 26, 27 and 28 January 2026

Delivered: 17 February 2026