

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 4535/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE:	<u>12 MARCH 2026</u> <u>TSHIVHASE AJ</u>
SIGNATURE:	

In the matter between:

MOGOHLWANE MPHO MAFEREKE

: FIRST PLAINTIFF

MATLALA DIPOLELO

: SECOND PLAINTIFF

AND

MINISTER OF POLICE

: FIRST DEFENDANT

NATIONAL COMMISSIONER

: SECOND DEFENDANT

OF THE SOUTH AFRICAN POLICE SERVICE

LIMPOPO PROVINCIAL COMMISSIONER

: THIRD DEFENDANT

OF THE SOUTH AFRICAN POLICE SERVICE

JUDGMENT

Heard on 09 October 2025:

This judgment was handed down electronically by circulating to the parties' representatives by email and published and release to SAFLII. The date and time for handing down of the judgment is deemed to be **12 March 2026 at 14:00**.

TSHIVHASE AJ:

1. In this matter, the Plaintiffs jointly claim damages against the First Defendant on the basis that they were unlawfully arrested and detained for four (04) days at Dennilton Police Cells and thereafter detained for ten (10) days in the Paxton Correctional Services facility, and during the period of their detention, they were subjected to disgusting conditions, unpleasant and harsh treatment.
2. The plaintiffs instituted proceedings against the Defendants for damages emanating from the unlawful arrest and detention.
3. The Plaintiff alleges that at the time of their unlawful arrest and unlawful detention by members of the First Defendant, who did not have a warrant of arrest in terms of section 40 (1) of the Criminal Procedure Act 51 of 1977, and who were acting within the scope of employment with the First Defendant. Their claim for damages for unlawful arrest and detention against the Defendants is based on vicarious liability.

4. The Defendants pleaded that, without admitting liability, the Police officers acted within the scope of employment in execution of their official duties. It is therefore not denied that the Plaintiffs were indeed arrested. The pleadings insofar as denial of liability and wrongdoing by members of the First Defendant remained and were never amended until the last day, when the Defendants' Heads of Arguments were received on 21 January 2026.
5. The vicarious liability principle plays a major role in our South African legal system as it safeguards and protects innocent third parties against wrongful actions of employees committed while on duty, furthering the interest of their employers.
6. I deem it necessary to set out a discussion of the law regarding vicarious liability of employers, as found in ***Squire v SASOL Mynbou (Edms) Bpk en Andere***¹, which passage I freely translate as follows:

*"A detailed discussion of the law regarding cases of vicarious liability of employers is found in the case in the Appellate Division case of **Feldman (Pty) Ltd v Mall 1945 (AD) 733**. Watermeyer CJ, who found that the principles of the English Law are the same as our law, clearly distinguished between the concepts "within the scope of his work" and "within the scope of his authority" in the case of an employee who causes damage. The two concepts must not be regarded as the same. I quote from page 36:*

"But the expression "scope of employment" is apt to be misleading, unless one is alive to the fact that the words "scope of employment" are not equivalent to "scope of authority". One is apt, when using the expression "scope of employment" in relation to the work of a servant, to picture to

¹ 1993 (3) SA 298 (T) 303F-304F

oneself a particular task or understanding or piece of work assigned to the servant, which is limited in scope by the express instructions of the master, and to think that all acts done by the servant outside of or contrary to his master's instructions are outside the scope of his employment; but such a conception of the meaning of "scope of employment" is too narrow. Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the course and scope of his employment even if he disobeys his master's instruction as to manner of doing the work or as to the means by which the end is to be attained. A servant may even omit to do his master's work, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be legally responsible for such damage. Consequently, a servant can act in disobedience of his master's instructions and yet render his master liable for his acts."

At 741, the learned Chief Justice said with reference to the reasons for vicarious liability:

"It appears from them that a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party, the master is responsible for that harm."

The Chief Justice also referred with approval at p 743 to a passage in *Salmond on Torts*. It reads:

"A master as opposed to the employer of an independent contractor, is liable even for the acts which he has not authorised, provided they are so

connected with the acts which he has authorised that they may rightly be regarded as modes – though improper modes – of doing them... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act, a master is not responsible.”

*In African Guarantee and Indemnity Co Ltd v Minister of Justice **1959 (2) SA 437** (A), the State was held liable on this basis for damage flowing from a collision of a police vehicle which was driven by a constable who was specifically forbidden to drive the vehicle.’*

FACTUAL BACKGROUND

7. I deem it necessary to set out a short chronology of the matter in order to provide salient events and a summary of the relevant facts that are not disputed and common cause.
8. The First Plaintiff (Mogohlwane Mpho Mafereke), an adult male born on the 27th day of September 1998, was placed under arrest by members of the Dennilton branch of the South African Police Service on the 01st day of June 2018, who were at the time acting within the course and scope of their employment.
9. The Second Plaintiff (Matlala Dipolelo), an adult male born on the 13th day of February 1997, was placed under arrest by members of the Dennilton branch of the South African Police Service on the 01st day of June 2018, who were at the time acting within the course and scope of their employment.
10. The First and Second Plaintiffs’ arrest and detention happened as a result of complaint of armed robbery, in that it was alleged that on or about the 19th day of

May 2018, at or near Kgobokwane in the regional district of Mdotjana they unlawfully and intentionally assaulted Cedrick Phora and did then with force take his two mobile phone (his property) in his lawful possession after pointing and threatening him with a firearm.

11. The First and Second Plaintiffs were subsequently arrested and detained on the 01st day of June 2018 at Dennilton Police Cells until 04th day of June 2018, when they appeared in court and were remanded in custody at Paxton Correctional facility until their release on warning on the second appearance on the 14th day of June 2018.
12. When the members of the South African Police Service effected an arrest of the First and Second Plaintiffs, they had already taken and were in possession of a statement deposed under oath by Freddie Thapelo Dilebo, who could not positively identify or link the Plaintiffs in the commission of the crime of armed robbery. In his statement, he indicated that he did not manage to see the faces of his assailants.
13. The members of South African Police when effecting the arrest of the First and Second Plaintiffs without a warrant, had in their possession witness statements, of which there was no justification to effect an arrest which constitute a most drastic infringement of the rights of the Plaintiffs who have a right not to be arbitrarily deprived of their freedom without justifiable cause, which right is guaranteed as a fundamental right in terms of section 12 of the Constitution of the Republic of South Africa Act 108 of 1996.
14. Members of the South African Police are required to act within the powers granted to them by law, and when they execute their functions at all material times, should

have respect for the individual dignity and liberty guaranteed under sections 10 and 12 of the Constitution of the Republic of South.

15. It must be emphasised that the Republic of South Africa is one, sovereign, democratic state founded on the value of human dignity, the achievement of human rights and freedom and the supremacy of the constitution and the rule of law as set out in section 1 of the Constitution of the Republic of South Africa Act 108 of 1996. The Constitution further guarantees equal protection and the benefit of the law, which are key aspects of section 9 of the Constitution, and if any individual feels that their fundamental rights are violated, he/she can seek redress through the court. This is exactly why the Plaintiffs instituted an action for damages for unlawful arrest and detention; in other words, their deprivation of liberty was not justified and, as such, unlawful.
16. It cannot be ignored that this country comes from the painful past in that prior 1993 ("The interim Constitution") and the adoption of the final text in 1996 ("The Constitution"), in that the Police were heavy-handed, abrasive, intimidatory, and they were law unto themselves.
17. The Police, as they wished prior 1993, could arrest anyone on suspicion of having committed an offence and detained without trial, and individuals were treated in a heavy-handed and undignified manner.
18. The deprivation of liberty, which is unjustified, greatly inconveniences an individual. The deprivation of liberty in a form of arrest and detention constitutes a drastic

infringement of individual rights will be lawful only if the arrest and detention are lawful.

19. The requirements for lawful arrest are set out in what is referred to as pillars for consideration in section 39 of the Criminal Procedure Act 51 of 1977, as follows:

19.1 The arrest must be properly authorised, meaning with or without a warrant as dictated by statute;

19.2 Either the person submits to custody, or the arrestor exercises physical control over the arrestee, and

19.3 The arrestee must be informed of the reasons for his/her arrest, and if a copy of his/her warrant of arrest is available be issued and/or a copy handed to him/her.

20. The Supreme Court of Appeal confirmed the requirements and the aforesaid pillars for consideration of a lawful arrest in the matter of ***Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA)***.

21. The members of the South African Police are unable to justify the drastic measure to effect an arrest, rather than consider other, less invasive options to secure the attendance of the Plaintiffs before the court.

22. On receipt of the statement by the complainant, Freddie Thapelo Dilebo, who was unable to link the First and Second Plaintiffs to the commission of the crime of armed robbery under Dennilton Police Docket Cas Number: 161/05/2018, in the absence of any evidence linking the Plaintiffs to the alleged crime, members of the

Dennilton South African Police effected arrest heavy-handed, abrasive and intimidatory.

23. The Plaintiffs further stated in their Particulars of Claim that they were treated in an inhuman, heavy-handed, and undignified manner during the fourteen (14) days of unlawful detention at Dennilton Cells and Paxton Correction Service facility.

24. The Plaintiffs now approached the court for delictual claims for damages for unlawful deprivation of their liberty and the harsh conduct by members of the South African Police Services stationed at Dennilton Police Station.

THE ISSUE FOR DETERMINATION

25. When counsel appeared before me on the 09th day of October 2025, the parties advised me that they had reached a settlement agreement, which they both agreed should be made an order of court with the following terms:

- a. The Plaintiff shall instantly withdraw their claim of malicious prosecution.
- b. The Defendants shall be jointly and severally liable for the First and Second Plaintiffs' agreed and/proven damages on liability.
- c. The Defendants shall be jointly and severally liable for the First and Second Plaintiffs' costs of two counsel on a High Court party and party scale B, with the one paying and the other to be absolved, inclusive of preparations, appearance, and reserved dates for 9 and 10 October 2025.
- d. The parties shall simultaneously file their respective heads of arguments on quantum on 30 October 2025.

- e. The court shall make a determination on the issue of quantum based on the parties' heads of arguments, which determination shall be communicated to the parties by the Registrar of the court when ready.
- f. Costs in relation to quantum shall be reserved pending the determination on quantum.

26. The order granted by me, by agreement between the parties, on the 09th day of October 2025, precisely indicated what was admitted and conceded by the Defendants.

27. Paragraph 4 of the Standing Order (GG) 341 of the South African Police reminds police officers that the purpose of an arrest is not to punish the person concerned.

28. I am mindful of the fact that counsel for the Defendants, as per the order granted by me on the 09th day of October 2025, conceded that the arrest was unlawful and admitted liability. It was held in ***Airports Company of South Africa v Big Five Duty Free (Pty) Ltd and Others 2019 (5) SA 1 CC at paragraph 3*** that a court must give approval to a settlement agreement.

29. The members of the South African Police Service failed to exercise discretion and opted to lock the Plaintiffs up when they could have simply issued them with a notice to appear in court on the next available court date. It is clear from the evidence that there was no justification to have the plaintiff detained for a period of fourteen (14) days, and their arrest was accordingly unlawful.

30. When the Plaintiffs appeared in court on the 04th day of June 2018, there was no need for further detention. The fact that when members of the South African Police Services arrested the Plaintiffs were at their respective parents' residences.
31. There was no reason to believe that the plaintiffs were a flight risk; both of them are South African citizens, and further personal information could have been sourced from their parents.
32. It goes without saying that the arrest and detention of the Plaintiffs for the period of four (04) days at Dennilton Police Station Cell and further detention for ten (10) days at Paxton Correctional Service was not justified and unlawful.

GENERAL DAMAGES

33. The Plaintiffs are claiming an amount of R780 878.00 for each one of them in respect of damages. General damages in these instances will include emotional shock, discomfort, injured feelings, humiliation, and deprivation of personal liberty.
34. What is at issue before me now is to determine what amount is appropriate to compensate each Plaintiff for the unlawful arrest and detention.
35. It is common cause that the arrest of the Plaintiffs in the presence of the parents and relatives was most unceremonious and hurtful. The arrest of the Plaintiffs was effected in the view of family members and neighbours.
36. The Plaintiffs in their Particulars of Claims described the conditions of the Cell in which they were detained at Dennilton Police Station and subsequently at Paxton

Correctional Services for fourteen (14) days respectively. Further, the conditions under which they were held at the facilities were horrible, and they found themselves in the presence of strangers and hardened criminals.

37. The Plaintiffs were deprived of their liberty for a period of fourteen (14) days on the evidence which is not disputed by the Defendants, they suffered degradation and experienced trauma, which caused great distress.

38. Nugent JA in the matter of ***Minister of Safety and Security v Seymour 2006 (6) SA 320 at paragraph 17*** said the following:

"The assessment of awards for 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 directly comparable. They are useful guides to what other courts have considered to be appropriate but they have no higher value than that."

39. In the deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bono*².

40. Both parties in their Heads of Arguments referred me to the Supreme Court of Appeal as a guide on assessing damages for unlawful arrest and detention in the matter of ***Minister of Safety and Security v Tyulu***³, the following were stated:

² Law of Damages 3rd Edition, Visser & Potgieter p 545

³ 2009 (5) SA 85 (SCA) at para 26

“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.”

41. In ***Minister of Safety and Security v Seymour***⁴ the Supreme Court of Appeal stated that:

“Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernable pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection”.

⁴ 2006 (6) SA 320 (SCA) at para 20

42. Having taken all the circumstances into consideration, I have come to the conclusion that an appropriate sum for general damages for each Plaintiff is the amount of R450 000.00 (Four Hundred and Fifty Thousand Rand).

43. As a result, judgment is granted in favour of the Plaintiffs, and the First Defendants are ordered to pay each Plaintiff the following amount:

43.1. Payment of R450 000.00 (Four Hundred and Fifty Thousand Rand) for each Plaintiff in respect of damages.

43.2. The Plaintiffs' taxed or agreed party and party costs for two counsel on Scale C of action, which costs shall include, but not be limited to, the preparation fees.


TSHIVHASE M.A
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES:

For the Applicant: Adv. K Molefe & Adv. Mthunzi

Instructed by: S Twala Attorneys Inc.

For the Defendants: Adv. T.C Mokhare

Instructed by: State Attorneys, Polokwane

Date of hearing: 09 October 2025

Date of delivery: 12 March 2026