

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

Case No:74452/2017

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
21 October 2022**

In the matter between:

T M A

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

Mazibuko AJ

1. The plaintiff claims damages arising from his arrest and detention on 25 May 2015 on charges of housebreaking and theft.

2. His particulars of claim state that he was unlawfully arrested without a warrant by members of the South African Police Services (SAPS), whose full and further particulars are unknown to him.

3. At the time of his arrest, he was assaulted by SAPS. As a result of the assault, he bled from the mouth. He was never given medical treatment even though he was in police custody.

4. On 26 May 2015, he appeared before the Magistrates' court. He applied for bail, which was opposed by SAPS, and consequently denied by the court.

5. He was detained and remained incarcerated from 25 May 2015 to 26 July 2017, two years and one month. On 26 July 2017, the charges against him were withdrawn, and he was released from custody.

Onus

6. The defendant pleaded that the alleged further detention from 26 May 2015 until 26 July 2017 was not within the defendant's nor the defendant's employee's powers, as this was the magistrate's decision.

7. Counsel, on behalf of the defendant, submitted that the plaintiff's arrest was lawful. To justify the plaintiff's arrest, the defendant called two police officers as witnesses; Sergeant Seleke Ephraim Molawa (Molawa) and Constable Pogiso James Montwedi (Montwedi), who led evidence on the arrest of the plaintiff.

Defendant's case

Molawa

8. Molawa testified that he had been a member of the SAPS for 15 (fifteen) years. On the date in question, he was on duty. One Mr Tsholo (Tsholo), a School Principal at Phogole Primary School in Makwassie, came to the police station and reported a case of housebreaking and theft that occurred at his place of employment.

9. Molawa assisted Tsholo in opening the case and obtaining his statement. Tsholo reported that numerous classes were broken into, and items were taken. The items taken were pupils' school bags and 2-litre bottles containing coins. Molawa registered the docket on the system. Together with his colleague Constable Montwedi, he went out to patrol. Whilst patrolling, they were stopped by one Mr Phume, who complained about his brother, Teffo's behaviour. They went with Mr Phume to where Teffo stays to reprimand him.

10. Upon arrival at Teffo's place, Molawa noticed a 2-litre bottle containing coins and two school bags. The 2-litre bottle of coins and the schoolbags fitted the goods described by Tsholo as having been stolen during the housebreaking at the school. On inquiry, Teffo told them the plaintiff and others brought them to him for sharing the previous night. One of the names he mentioned was the plaintiff.

11. Teffo took them to the plaintiff's place. They found the plaintiff's grandmother, who showed them the plaintiff's room. Upon entering his room, they found the plaintiff and noticed one 2-litre bottle with coins inside and two school bags, which matched the description the complainant gave earlier that day.

12. Upon inquiry, the plaintiff told them he had made plans with other guys. They arrested him for housebreaking and theft of the said items as they were not satisfied with his explanation of how he came into possession of the goods.

13. At the police station, he stated that some items were under his bed at home. They went back to his house and found the goods under the bed. The plaintiff voluntarily gave the goods and provided information about how they were acquired and who was involved. They then went and arrested all the other implicated individuals. The plaintiff was taken to the cells, whereas the other suspects were taken to consult with the social worker due to their age. They were never assaulted.

14. Under cross-examination, Molawa stated that he believed he took all necessary statements from relevant people. However, he could not explain why none of them was contained in the docket. He confirmed his arrest statement. He

alleged it was a supplementary statement but could not refer to any original statement in the docket or the bundle before the court.

15. In his statement, he testified that the plaintiff voluntarily gave information and the goods to the police. It was put to him that a criminal who had stolen goods was unlikely to simply volunteer and hand over such goods to the police.

Montwedi

16. His evidence unfolded in line with the evidence tendered by Sergeant Molawa. Under cross-examination, he admitted and agreed with Sergeant Molawa that a police officer investigating a complainant or a case was obliged to obtain a statement from all complainants, witnesses and suspects.

Further documentation

17. The defendant made an application requesting that certain documentation be allowed into evidence before the court, which they had recently obtained, and never discovered to the plaintiff. The plaintiff objected as it was not procedurally introduced through the discovery process. It was also argued on behalf of the plaintiff that there was no proper explanation by the defendant why the documentation was only belatedly made available especially considering that the matter was previously postponed to allow the defendant an opportunity to make a further discovery.

18. The application was dismissed, as any party seeking to utilize any documentation in any trial is obliged to disclose and discover such documentation before trial. Failure to discover the document will bar the party from making any reference or relying on such a document at the trial.

19. The state closed its case.

Plaintiff's case

Mr T

20. Mr T, the plaintiff, testified that on 24 May 2015, his friend "Storch" came to his house carrying a school bag containing two pairs of black safety boots. He asked him to keep them safe for him. He later met with Storch at a butchery. They had a few drinks, and he went back home. He spent some time at a party next to his home and then, later, retired to bed.

21. On 25 May 2015, Molawa and Montwedi came to his house. They came with Storch, and they were beating him up. They got into his shack and ordered him to produce the goods. He gave them Storch's schoolbag containing the safety boots, as they came with him, and he was being beaten up.

22. He was arrested and taken to the police station. He made a statement to the police. He appeared in court for a bail application, but Sergeant Galebowe (Galebowe) from SAPS, the investigating officer, opposed his bail application. Galebowe never interviewed him at any stage before and after his arrest.

23. Prior to his arrest, he lived with his grandmother, whom he adored deeply. To be separated from her for such a long time was extremely painful. They are a struggling family living in poverty. He lost valuable time and opportunities in life while behind bars. The experience is stressful and emotional.

24. He also testified on the conditions in jail, which were horrible. The jail was dirty and overcrowded. It had mice. There was violence and fighting among the inmates and police brutality. The food was unhealthy. He was tattooed by force by the inmates, resulting in him contracting HIV. He learned he was HIV positive when he went for circumcision while in jail. The police knew about his HIV status and frequently took him to the clinic to obtain treatment.

25. After more than two years in jail, he was released and told to go home because the charges were withdrawn due to a lack of evidence. He was released back to the community with tattoos all over his body. He hates tattoos, and people look at him strangely, suspiciously, thinking he is a criminal.

26. He was released without full explanation, and the police never apologized to him for keeping him in jail without a valid reason for such a long time.

27. Under cross-examination, he denied mentioning to Molawa that he and his friends had made a plan the previous night.

28. Under re-examination he indicated that the police knew where his home was, and they could access and speak to his grandmother anytime they wished to. His birth certificate was available to the police as he did not have an identity document at the time.

Mashudu Malivha (Mashudu)

29. Mashudu testified that she is a Clinical Psychologist with over 28 years of experience, having worked in hospitals and corporate institutions and now working in her private practice. She does road accident funds and other matters. She stated that a clinical psychologist's role is to ensure a patient's mental well-being. They interview the patients, carry out assessments, determine the diagnoses and then recommend the treatment for each patient using different tools.

30. She interviewed and assessed the plaintiff and prepared a report. She observed that the plaintiff was traumatized by the arrest and incarceration. He developed severe depression. He is worried about his future as he thinks it looks bleak. He is fatigued, suicidal and withdrawn from society. He suffers from low libido, irritable moods, and an inability to make decisions. He lost the amenities of life.

31. In her findings, the plaintiff suffers from neurocognitive impairments (clinical impairments). He needs support as the rebuilding journey is not an easy one. She testified that it is difficult to treat severe mental depression. However, intensive treatment can be undertaken to correct the plaintiff's ailment. The plaintiff's memory was average.

Issues

32. The issues in dispute which the court should decide on are:
- (a) whether the plaintiff's arrest was unlawful.
 - (b) whether the defendant should be liable for further detention of the plaintiff, which is from and including 25 May 2015 to 26 July 2017.
 - (c) Whether the plaintiff has proved that he was assaulted by the members of the South African Police Services, and
 - (d) If the plaintiff has satisfactorily proved the above, what is the appropriate amount of damages should the plaintiff be awarded as compensation?

Legal principles and discussion

33. **Section 40(1)(b)** of the Criminal Procedure Act (the Act) reads as follows:

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

(b) whom he reasonably suspects to have committed a schedule 1 offence other than the offence of escaping from lawful custody".

34. In the matter of **Minister of Safety and Security v Sekhoto and Another (2011 (1) SARC 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; 131/10 (19 November 2010)**, Harms DP stated:

Para [6], "As was held in **Duncan v Minister of Law and Order**, the jurisdictional facts for a section 40 (1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds."

35. Para [28], "Once the required jurisdictional facts for an arrest, whether in terms of any paragraph of s40(1) or in terms of s43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary

powers is essentially a matter construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to effect an arrest." This was made clear by this court in relation to section 43 in **Groenewald v Minister of Justice (1973 (3) SA 877 at 883G-884B)**.

36. Molawa testified that the plaintiff voluntarily gave the goods and information to them. He did not testify that Storch disputed the explanation proffered by the plaintiff in relation to the goods. Besides the goods the plaintiff gave to the SAPS, nothing else linked him to the commission of the said crime.

37. From Molawa and Montwedi's evidence and the docket's statements, no other information was provided that could have caused the SAPS to entertain any reasonable suspicion that the plaintiff was involved in the commission of the alleged crime. The plaintiff testified that he gave them the goods and had no information other than that Storch brought them to him for safekeeping. Also, he made a written statement explaining how he possessed the said goods.

38. I find that the defendant has not established all the jurisdictional facts for a defence based on section 40(1)(b). The arresting officer, Molawa, did not properly exercise his discretion to arrest the plaintiff. The plaintiff gave the police a statement about how he came in possession of the said goods, which he handed over to the police. He explained that Storchy brought them to his house for safekeeping. The plaintiff has proved that the discretion was exercised improperly. The arrest was, therefore, unlawful.

39. It is common cause that after the arrest, the plaintiff was detained in police cells and appeared before the court on 26 May 2015. It is already found that the arrest was unlawful. It follows then that so was his detention from 25 May 2015 till his first appearance before the court. There was no justification for his detention as his arrest was unlawful.

40. Regarding further detention post-first court appearance. On 26 May 2022, the plaintiff brought a bail application, which was opposed and bail was denied. The defendant pleaded that it was not within its powers to detain further or release the plaintiff as this was the discretion and decision of the prosecuting authority and the court.

41. **Section 50(1) of the Act** reads as follows: *(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 warrant, to any other place which is expressly mentioned in the warrant.*

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

(c) Subject to paragraph (d), if such an arrested person is not released by reason that

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A; he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

42. In **Woji v The Minister of Police (92/2012) [2014] ZASCA108 (20 August 2014)**, the Supreme Court of Appeal followed **Zealand v Minister of Justice and Constitutional Development and Another (CCT 54 of 2007) [2008] ZACC 3 (11 March 2008)**. It held: *"the Minister of Police was liable for post-appearance detention where the wrongful and culpable conduct of the police had materially influenced the decision of the court to remand the person in question in custody.* The reasoning is that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor.

43. In **De Klerk v Minister of Police**¹ it was held: *"To impose liability on the respondent (police) for the entire period of the detention, in the circumstances of this matter, would not be exceeding the bounds of reasonableness, fairness and justice...it would be fair and just to impute liability to the respondent."*²

44. In **Mahlangu and Another v Minister of Police (CCT 88/20)[2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 MAY 2021)**, *The court found that the prosecutor opposed bail based on the unlawful confession. Including the unlawful confession in the docket, with the intention that it be relied upon, was not too remote for delictual liability to attach to the police.*

45. In para 19, the court held that *the police had failed to inform the prosecutor that the accused's confession was obtained unlawfully by duress.*³ *The confession was used by the prosecutor in support of his opposition to the bail application. The court stated that the obligation of the police to disclose all the relevant facts to the prosecutor is to be regarded as a duty that remains for as long as the information withheld is relevant to the detention.*⁴

46. It can be accepted that, after effecting arrest, the arresting officers have less to nothing to do with the court proceedings. Galebowe was the investigating officer. In these proceedings, he did not testify. No necessary information, including, the charge sheet or necessary facts, was placed before this court as to why the bail application was opposed. The police docket was also not of assistance in this regard. To this end, the reasons Galebowe opposed bail are unknown as he did not testify before this court, nor does it appear in the docket.

47. The evidence is also to the effect that Galebowe, an investigating officer, never interviewed the plaintiff or the plaintiff's family members. The investigating officer never confronted the plaintiff with his statement for all the period he was detained.

¹ [2019] ZACC 32
² at para. 87 of the judgement
³ at para. 19 of the judgment
⁴ at para. 37 of the judgement

48. The prosecution relies on the information provided by SAPS on whether or not to oppose bail. In *casu*, Galebowe testified against granting bail to the plaintiff. I accept that the plaintiff was not granted bail due to the information, whether correct, complete, sufficient or otherwise, provided or not provided by Galebowe during the plaintiff's bail application. In the premises, the defendant is delictual liable for the further detention of the plaintiff from 25 May 2015 to 26 July 2017.

49. In relation to the assault on the plaintiff, no cogent facts or information by the plaintiff, nor from the police docket, were placed before the court to make a determination. There is no evidence to analyze. The plaintiff failed to prove that the members of the defendant assaulted him. Therefore, there is no justification to hold the defendant vicariously liable for that alleged act of assault by the police since the plaintiff did not prove such an act.

50. Now that the plaintiff has satisfactorily proved the defendant's liability, I turn to quantum. In assessing damages for unlawful detention, it is crucial to appreciate that the primary purpose is not to enrich but to offer the aggrieved party some much-needed solatium for their injured feelings.

51. Therefore, *damages awarded need to be commensurate with the injury inflicted. The awards need to reflect the importance of the right to personal liberty and the seriousness with which the arbitrary deprivation of same is viewed. It is impossible to determine an award of damages for this kind of injuria with any mathematical accuracy. Though previous cases are followed as a guide, slavishly following them can prove treacherous. The correct approach has been adopted as having regard to all the facts of the particular case and determining the quantum of damages on such facts. See Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17; Rudolph and others v Minister of Safety and Security and Another 2009(5) SA 94 (SCA)(2009) ZASCA at 39 paras 26-29.*

52. In *casu*, taking all the relevant factors into account, including the living conditions in custody, the plaintiff being tattooed and contracting HIV, as well as the period of two years and one month spent in custody post-first court appearance and previous awards in two unreported cases; ***Khedama v The Minister of Police***

2022 JDR 0128 (KZD) and Dilijan v Minister of Police (Case no 746/2021) [2022] ZASCA 103 (24 June 2022), a fair and reasonable amount in the circumstances is R2 000 000 (two million rand).

53. In my view, the defendant must be held vicariously liable for the unlawful arrest and detention of the plaintiff, including further detention until his release. It is also justified that the damages amount claimed by the plaintiff must be awarded to the plaintiff.

Order

54. For these reasons, the following order is made;

1. The arrest and detention of the plaintiff from 25 May 2015 to 26 July 2017 are declared unlawful.
2. The plaintiff is awarded damages in the sum of R2 000 000 (two million rand).
3. The defendant shall pay the costs of suit.

N. Mazibuko
Acting Judge of the High Court, Gauteng, Pretoria

This judgment is digitally submitted by uploading it onto Caselines and emailing it to the parties.

Counsel for the Plaintiff:

Mr M Tjiana

Instructed by:

Makapan Attorneys, Pretoria

Counsel for Respondents:

Mr T Matambela

Instructed by:

The State Attorney, Pretoria

Date of hearing:

29 July 2022

Judgment delivered on:

21 October 2022