REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA.

EASTERN CAPE DIVISION – GRAHAMSTOWN

CASE NO: 1203/2010

In the matter between:

NEVER NDLOVU **PLAINTIFF**

and

MINISTER OF SAFETY AND SECURITY **FIRST DEFENDANT**

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT **SECOND DEFENDANT**

Summary– Delict– *Iniuria*– Unlawful arrest without warrant– Detention for initial two days– Appearance in terms of s 50(1) of Criminal Procedure Act 51 of 1977– Plaintiff remanded in custody and further detained for 7 days pending formal bail application ordered– No information available to prosecutor and Magistrate and considered for purposes of the further detention– Lawfulness of such further detention.

Damages– For unlawful arrest and *contumelia*– Two day detention prior to appearance in terms of s 50(1) of Criminal Procedure Act 51 of 1977 – Damages for continued detention totalling eight days post order of Magistrate for formal bail application.

Freedom and security of the person– s 12(1)(a) of the Constitution– right to personal liberty and not to be deprived of freedom arbitrarily fundamental. Deprivation and limitation of right to freedom must be justified.

JUDGMENT

MAGEZA AJ:

[1] Plaintiff herein is a Zimbabwean holding a lawful South African work permit and presently resides in Walmer, Port Elizabeth. The matter concerns his arrest without warrant by members of the Police at Joza Township, Grahamstown and he sues for delictual damages. The Policemen involved were all in the employ of First Defendant and were at all material times acting in the course and scope of their employment with the said First Defendant. The arrest took place around 18h00 on the 21st October 2008, where-after he was detained in the cells at the Grahamstown Police Station for a two day period until his Court appearance on the 23rd October 2008. Once the matter was placed before the Magistrate, Grahamstown on the 23rd October, it was, at the instance of the Prosecution, postponed for a seven day period for a formal bail application and Plaintiff was remanded in custody and detained in the Grahamstown Prison for a period of 7 days until the 30th October 2008 when he was granted bail of R500.00. Bail was paid on the 31st, on which day he was then released from custody.

[2] First defendant, after leading evidence of the arresting officer, Warrant Officer Van der Ross and in the course of the cross-examination of Van der Ross by Mr Van Niekerk appearing for Plaintiff, conceded the unlawful nature of the arrest and consequent detention for the two day period prior to Plaintiff's first Court appearance. There remains on this aspect for this Court to make a determination on the measure of damages averred by Plaintiff to have been suffered consequent to such arrest and detention.

[3] In so far as the further detention for seven days at the Grahamstown prison, it is argued on behalf of the Defendants that such further detention was lawful, as such occurred pursuant to the order of the Magistrate in terms of section 50(1) of the Criminal Procedure Act 51 of 1977. For this contention Defendants rely on the decision in *Isaacs v Minister of Law and Order and Others, (infra).* In light of the Defendants argument, the second determination to be made by this Court pertains to the lawfulness of the continued detention subsequent to the matter having been placed on the Court roll before the Magistrate and consequently postponed by order of the said Court, for a formal bail application. In this regard and as set out in the amended Particulars of Claim, Plaintiff sues the Second Defendant on the basis that:

> "The continued detention of the Plaintiff following his appearance in court on 23 October 2008 was jointly due to the malice or negligence of the servants of the Second Defendant, more particularly in that the state prosecutor, acting in the course and scope of his employment, failed to inform the Court of all relevant facts pertaining to the continued detention of the Plaintiff, and failed to procure the release of Plaintiff from custody

when he could and should have known that there was no evidence upon which Plaintiff could successfully be prosecuted."

In the event that the second issue is answered in favour of the Plaintiff, the Court must then determine the delictual damages consonant therewith.

[4] The evidence tendered by Plaintiff was to this effect that he was born in October 1984 and came to South Africa around the year 2000 as a result of the social instability and internecine political violence in Zimbabwe, which violence also led to his father's death in that country. He is an entrepreuner and owns a company that is involved in the construction industry doing tiling and that at the time of his arrest he, was engaged as a sub-contractor in two simultaneous renovation contracts in the Grahamstown area, one with Settlers Hospital and the other with Grahamstown Meat Distributors. During this time he lived in extension 4 in Joza renting a flatlet. On the morning of the 21st October 2008 he was on site when one Golden, an employee of the main contractor – WBHO, brought a laptop to him and requested him to assist by installing therein a Windows Computer Software program. Plaintiff says he was known for his technical abilities in handling computer repairs and fixing related computer glitches.

[5] Sometime later that same day and at approximately 17h00, he received a call from Golden to meet him outside his (Plaintiff's) home in Joza to fetch the laptop. He came outside with the laptop in its black bag and realised Golden was there in the company of about eight men in two unmarked vehicles. These men were all members of the South African

Police Services and one of them asked him to hand over the computer that Golden had informed them he had given to him. He duly handed it to the one man and another of them suggested they go into his flat to see if he had any other 'stolen' property in his home. They did not ask for his permission nor did they present him with a search warrant. His girlfriend, Thabisa January with whom he had a child, was with him at the time.

[6] The men searched his house and asked if he was the owner of the goods therein and required him to produce proof of its ownership. They then proceeded to remove the goods from his flat and instructed him to come with them. They took him to Grahamstown Police Station where he was then summarily locked up in a cell with four other unknown men. He did not get any food or drink. At about 22h00, he was removed from the cell by two Policemen and led to another room where his fingerprints were taken. He asked them why he was being arrested and he was told he was being charged for 'possession of stolen property'. These two Policemen had not formed part of the group that had initially arrested him. He told them the goods were his and they advised him to go and get receipts and invoices thereof, this despite his being incarcerated. He was taken back to the cells where, for two nights, he slept on the floor with a grey blanket next to a toilet and washing-basin. He was made to appear on the Thursday morning in Court and his matter was remanded to the 30th October for a formal bail application.

[7] At this Court appearance, the Prosecutor did not discuss the matter with him in any way and the Policeman who had arrested him was not in Court. There was no investigator and none of the persons that had arrested him were in attendance. He was told that the matter was being postponed to the 30th October. On his next appearance, he was told that bail was set at R500 which bail money was paid on his behalf on the

following day the 31st October. On the 9th December 2008 the charges were withdrawn and all his goods were returned to him by the Police. Regarding his conditions of incarceration at the Grahamstown prison, he said he was locked up in a cell with some 28 other men awaiting trial. These men referred to him as a 'kwere-kwere' because of his accent and he was each morning, made to clean the toilets and sweep floors after making their beds. He was at all times sacred and lived in fear of what they might do to him if he did not adhere to their orders.

[8] In lengthy and detailed cross-examination by Mr Sandi for the Defendants, he said he had lived at the Joza extension 4 address for about 4 months whilst working on the construction sub-contracts. This was the same address at which he was arrested by the Police and there was no visible house number thereon. It was put to him that he had given the Police at the Police Station cells the number 23 as the house number but he could no longer recall this detail. He had at all times simply presumed Golden to be the owner of the laptop. It was put to Plaintiff that the Police would say they had met up with him in 'Qwambe street' and not his home, an imputation he denied.

[9] Mr Sandi put to the witness that he had signed a statement at the Police cells before the two policemen who attended to him that night at 22h00. This was admitted by Plaintiff and, asked to read from the statement, the following detail was read into the record:

> "I Never Ndlovu of my own free (will) hereby declare in Xhosa as follows. I am residing at 23 Extension 4 Joza Grahamstown and my identity number is as follows. Date of birth 19841014, I work as a contractor, occupation at Grahamstown Meat Distributors, my telephone number is as follows: 073 448

1242. I have been informed by number 70639248, rank Constable, Full name: Pumsie Buthi, of my rights. I would like to state the following concerning the allegations against me. Will make my statement at the Court."

[10] Asked to confirm that a Mr Van der Ross had been the lead police officer who had effected his initial arrest, he could not tell the policeman's name as he did not know, save to say that it was a coloured man who appeared to be the leader of the group of eight. He said from his arrest at extension 4, he was never interviewed in any way by the eight policemen and the first time this happened was with the two policemen in the Police cells, unrelated to the arresting eight men. Mr Sandi then put it to Plaintiff that Mr Van der Ross would say that when they found him in possession of the stolen laptop they became suspicious and believed that perhaps more stolen items could be found at Plaintiff's home and that was why they had acted in the way they did. The Plaintiff explained that Van der Ross could not have mistaken him as having stolen the laptop since he was in the company of Golden to whom the laptop belonged. Furthermore that the items seized by Van der Ross and his team from his flat were items which were in ordinary use such as his own LG computer on which he was working, his LG flat screen TV, DVD player, speakers and other electrical gadgets and items.

[11] Asked if he had met the Prosecutor at Court on 23 October, Plaintiff said he saw someone at Court talking to the Magistrate whom he assumed was the Prosecutor. He sat at Court with other detainees in a line on a bench prior to their cases being called and when his case was called out he never heard what the Prosecutor said to the Magistrate. He was only told that the matter was being postponed for a formal bail application and he was asked if he wanted legal aid. He said he does not

know Court procedures and that when one is arrested and has to face a Magistrate in Court, one gets very scared. He was not given the opportunity to address the Court and consequently, he did not even know he was at liberty to simply tell the Court the gadgets were his own. Mr Sandi, in cross-examination, emphasised that when Plaintiff was asked if he needed Legal Aid, he could have told the Court that the goods were his and that nothing had prevented him from telling the Prosecutor that he had been arrested and detained for being in possession of his own goods.

[12] It was furthermore put to Plaintiff that the policeman, Constable Buthi who interviewed him at 22h00 would say that he had no fixed address. That he gave a number 23 extension 4 Joza and when he went there, no one knew the Plaintiff. Plaintiff answered then that:

> "I will not know because all I know is that these men that came to take me by my place, they took me, they went inside where I stayed, they knew exactly where I stayed at that present moment, so they could have just gone straight there to that house… they knew exactly where they took my things. So I would presume they would know exactly where to go to look for me if they wanted to find out about where I was staying because they did not take my things whilst I was walking in the street. They took my stuff inside my house where I was staying." (see paragraph 10-20 page 61 of record).

[13] There were questions put to Plaintiff about his having been arrested around the year 200 as an illegal immigrant, which fact he admitted as having occurred prior to him having secured a work permit and which

work permit he lawfully held at the time of his arrest by Van der Ross in connection with the present matter.

[14] The next witness, Thabisa January, is the mother of Plaintiff's 5 year old daughter and she testified that on the 21st October, she was watching a television program at Plaintiff's home when someone called Plaintiff who later went out with a black bag. Within minutes, about three plainclothes Policemen entered and searched the premises. They enquired as to the ownership of the goods in the house and started removing these from the premises. She was in shock as a result of what was going on. The Policemen then left with Plaintiff. In cross examination, Mr Sandi put it to the witness that according to Van der Ross she was not with Plaintiff that evening and her version was a ruse to lend credence to Plaintiff's testimony. She denied this and was emphatic regarding her presence there at the time in question. She confirmed she was at the time in a relationship with Plaintiff and that she used to regularly visit Plaintiff.

[15] Plaintiff then closed his case and the defence called Mr Edward van der Ross who testified that he is a Warrant Officer and an area Commander of a special task team dealing with serious robberies and housebreakings within the Grahamstown precinct and has a team of six detectives under his wing. On the 21st October 2008, as a result of information received and pursuant to a break-in at the offices of Wesbank where a laptop had been stolen, he proceeded with the team to a house at Hlalani location to look for a known suspect associated with the break-in and theft. He had together with members of his team, apprehended one Nkosinathi Kapa who told them that he had given the stolen laptop to one Golden to sell for him. They then traced Golden, who in turn said he had sold it to Never (Plaintiff) and so they all went to extension 4 in Joza. He said Golden directed them to Plaintiff's home but that he had pointed

out Plaintiff in Qwambe street next to a shop. This he said was about 19h30 in the evening.

[16] He saw that Plaintiff had a black bag strapped over his shoulder and when asked, Plaintiff first said it was his laptop, then immediately changed and said it belonged to someone else and then again said Van der Ross could take the laptop if he wanted to do so. He said he then told Plaintiff that the laptop had been stolen in a housebreaking incident and that he was arresting him for being in 'possession of stolen property'. They went to Plaintiff's premises which they found locked but he says Plaintiff found the key in his pocket; they found the items they later seized and he asked who they belonged to and Plaintiff again gave various explanations and because he did not have receipts he decided to arrest him. He took him to the Police Station and left him there after booking him in the cells. He thereafter had no further involvement in Plaintiff's continued detention and subsequent Court appearances and did not know what took place subsequent to the said arrest and detention.

[17] Asked if he was aware that one Constable Buthi had taken over the matter that evening and had from then on dealt with the Plaintiff as detainee, he said he had not known this. According to him, Constable Buthi never at any stage discussed the matter with him and had not communicated on any issue relating to the Plaintiff's arrest and detention. He did not further concern himself with Plaintiff's case and did not attend Court on the 23rd October. No other policeman or Public Prosecutor associated with the matter had contacted him about the matter on or before the Plaintiff's Court appearance on the 23rd October.

[18] The defence thereafter called Captain Peter Green, Sector Commander in the Detective Branch for the Grahamstown area, as the next witness. He told the Court that as Sector Commander, it was at the time his responsibility to peruse and allocate case dockets to the eighteen investigating Officers under his control. On perusing the docket in this matter on the morning of the 23rd, he noticed that one Constable Buthi had, as a preliminary investigator who took over from Van der Ross, completed a Bail Form which was part of the record of investigations in the docket. This Bail Form is a pro-forma document which when completed by an investigator, assists those who work with the docket as well as the Prosecutor who handles cases at the first Court appearance stage. According to his evidence;

> "When the prosecutor receives that information as well as the information contained in the investigation diary, which is very important because that is made by an officer, the prosecutor would then evaluate that information and the decision will be made either to grant bail for the accused or to oppose bail." Para 10 page 165 of record.

This according to him, is the information on the basis of which, he instructed that bail be opposed at Plaintiff's first appearance. Noted on the Bail Form was that Constable Buthi had, on the 22nd, made an entry stating that he had visited the address referred to as 23 extension 4 Joza and that one "Nonzuki Gwazoli or Gwazake" had informed him that Plaintiff was unknown at the said address. On the basis of this, he had made the entry in the Bail Form that Plaintiff has no fixed address and that consequently Plaintiff was a flight risk.

[19] Captain Green also noted from this docket that one Captain Seymour had, on the same 22nd, made an entry that the owner of the goods be traced, that is, the same goods belonging to Plaintiff and that in addition he observed that certain unrelated witness statements were wrongly contained in the Plaintiff's docket. He assigned the docket out to one Constable Brown with the note,

> "… docket for your investigation please, comply with Superintendent Seymour's instructions, obtain the witness statement of the team" – paragraph 15 page 157 of record.

He also recommended that Brown should trace the owner of the property and should to this end, place an advertisement in the local newspapers. On being asked by Mr Sandi, he said he estimated the value of the goods, inclusive of the laptop, to be in the order of R6 000 to R8 000. He said that in line with what Seymour had discovered on perusing the docket, the laptop recovered by Van der Ross did not belong to the same docket as that pertaining to the Plaintiff's arrest, but to a different docket in respect of a different suspect. He instructed Brown to follow this up. He recommended bail be opposed for the following reasons:

a. The laptop owner was to be traced and in evaluating the goods forming the subject matter of the Plaintiff's arrest, he included the laptop and added its value.

b. The Plaintiff did not have a fixed address.

c. The owner of the goods removed by Van der Ross from Plaintiff's home still needed to be traced and the Police needed to place adverts in local newspapers.

d. The serial numbers of the said property had to be circulated within an internal Police tracing system.

e. The Plaintiff had previous cases.

f. The SAP69 report which would indicate the existence or absence of previous convictions was outstanding.

[20] In cross-examination, he explained that he never at any stage sought to clarify any uncertainty on any of the outstanding issues with Van der Ross. This he said was due to the fact that he had very little time that morning to do so and that, in any event, he was not the investigator. He would have received all the new dockets at 07h30 and had to be in a meeting at 08h00. These meetings ordinarily last until 08h45 and all the dockets had to be at Court by 09h00. The dockets would not be taken to Court by the specific case investigator to consult with the Prosecutor as investigators were tied up investigating many other cases. This would leave the Prosecutor relying entirely on the Bail Form as well as his (Green's) recommendation regarding whether or not to grant bail. Incidentally he himself would have relied on the same Bail Form, prepared by Constable Buthi.– see para 5 to 25 page 171 of record, read with para 15 to 25 of page 182 thereof.

He furthermore conceded that the preliminary investigator, Constable Bhuti could, if there was anything he was uncertain of, have easily contacted Van der Ross as complainant and arresting officer. He acknowledged, pursuant to a question posed by myself, that these Police officers are always immediately available and within easy reach of one another in the Grahamstown area.

[21] At this point and having heard these witnesses, it appeared to me when I raised this question that Constable Bhuti could simply have asked Van der Ross to come out and accompany him to where he had arrested the Plaintiff or to have booked Plaintiff out for an hour to visit this home address and the work addresses which were in the docket and furnished by Plaintiff. After all, this arrest took place midweek and this would have been the reasonable and rational manner of approaching an issue as critical to the granting of bail as an identifiable and reliable address connected to a suspect in any case. Furthermore, it was clear from the docket that Van der Ross himself had failed to enter details of the Plaintiff's address on the docket at the time of arrest and in his own statement as arresting officer, a factor the oversight of which was grossly irregular for an experienced Police team leader. With regard to the alleged pending cases, Captain Green did not contact Inspector Potgieter, the investigator in the so-called outstanding cases. There was nothing to suggest that Inspector Potgieter was unavailable and Constable Bhuti had also failed to clear this up with a simple telephone call in light of the ramifications to Plaintiff's freedom.

[22] The bulk of cross-examination by Mr Van Niekerk for Plaintiff was devoted to the matter of the role the laptop played in his decision regarding bail. This elicited a great deal of confusion and apparent contradictions in his efforts to explain precisely what had informed his own views in relation to the laptop. Asked whether the laptop did not belong to a separate case, he conceded this and said,

> "M'Lord if I read Colonel Seymour's entry, he said that A2 doesn't belong here, in other words that means that when I read the docket at the time, that that laptop was referring to another case because the laptop was not part of the

possession case where the property was handed into the SAP13." Para 5 page 168 of record.

Despite this admission, he still took it into account in the overall determination as a relevant consideration to Plaintiff's right to bail. He later under cross-examination acknowledged that he had been told that the laptop had in fact been handed to its owner. This it turned out, had taken place on the 21st, the very day of Plaintiff's arrest.

[23] Mr Lionel Prince the Prosecutor who handled the remand on the 23rd October explained that the matter was enrolled at what was then known as the Reception Court. This Court had since been done away with and is no longer in existence. It was, during its life, a first appearance Court and the practice then was that the docket would come from the Police to the District Control Prosecutor who would then familiarise him or herself with its contents and then attend to drawing up the charges where required. He said,

> "The prosecutor who is doing the remand or the first, who is physically dealing with the case in Reception Court usually do not read the docket, that has been done already by the Control Prosecutor." Para 15 page 246 – record.

He admitted he did not read the A1 witness statement of the arresting officer Van der Ross. Furthermore that he simply received and implemented a decision of the Control Prosecutor and not his. Then again, whilst being taken through the comments made by Captain Green referred to above, Mr Prince watered down the thrust of this initial admission by stating that he in fact had made the decision to oppose bail.

I enquired as to this discrepancy in his evidence and he resolutely said he took the decision in this particular case. He said his decision making was informed by the detail in the Bail Form as discussed above. In essence, he relied on the same set of facts relied on by Captain Green in recommending the refusal of bail. He then duly requested a postponement to the 30th October for a formal bail application with the Plaintiff in custody, which postponement, the Magistrate had then ordered.

[24] Under cross examination, he again admitted that he never read the A1 statement setting out how and where the Plaintiff was arrested, and that he only focused on the Bail Form. It was put to him that he could not have formed the opinion that there was a *prima facie* case without reading the statement of Van der Ross and his answer was that since the docket had come from the Control Prosecutor, it would only have been on the basis that a *prima facie* case had been determined by the Control Prosecutor. - See para 5 page 267 – record.

Asked by Mr Van Niekerk if;

> "… you do not think it would have been appropriate for you to say, do you have a fixed address because then he would have told you, listen I have got a home, I am not sure of the number, I am a tiling contractor busy with two big contracts in Grahamstown, would that had made a difference if you had heard that from him?' his answer was, "Maybe it should, maybe it would have." Page 271.

The defence then closed its case without calling Constable Buthi, the one Police official central to the course which this matter took after Van der Ross' (belatedly conceded) unlawful arrest.

Liability for the delict after the first appearance.

[25] The defence in argument relied entirely on the decision in *Isaacs v Minister van Wet en Orde 1996 (1) SACR 314 (A)*. In this decision the Court, per Grosskopf JA, held that an unlawful arrest and detention ceased to be so once the Magistrate issued a detention order in terms of section 50(1) of the Criminal Procedure Act 51 of 1977. Insofar as is relevant for present purposes, the section reads as follows:

> "A person arrested with or without warrant shall as soon as possible be brought to a police station … and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding 48 hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause of his arrest…" (my underlining).

[26] In the *Isaacs* decision, it had been argued for Appellant that once the arrest was found to be unlawful, all subsequent steps taken thereafter were similarly unlawful including the order for the further detention made by the Magistrate. In arriving at the Court's finding, the learned Judge referred with approval to his earlier finding in *Minister of Law and Order v Kader 1991 (1) SA 41 (A).* The facts in *Kader* concerned the legality of the Respondent's detention, on the 17 June 1986, in terms of section 29 of the then Internal Security Act 74 of 1982. In the Court's analysis of section 50(1) of the Criminal Procedure Act 51 of 1977, it found that the

section had a twofold purpose, the first being that the section required that an arrested person must be brought before a Court timeously. In so far as the second purpose, he went on to say;

> "Tweedens magtig die artikel die hof om die verdere aanhouding van die gearresteerde vir doeleindes van sy verhoor op 'n aanklag van 'n misdryf te gelas. By die uitoefening van hierdie bevoegdheid kan die hof gevra word om verskillende sake te oorweeg, bv, of dit hoegenaamd nodig is dat die gearresteerde aangehou word eerder as om op borg of waarskuwing vrygelaat te word. 'n Aangeklagde kan ook betwis dat daar voldoende getuienis teen hom is om sy verdere aanhouding te betwis." (my underlining); (Isaacs supra at 322C).

In *Kader* (supra) at page 51B, the same learned Judge had similarly found that:

> "All that the section contemplates is that the purpose of the detention through-out must be to secure the attendance of the accused at his trial upon the charge which, it is expected, would be preferred against him. It goes without saying that it is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended." (own emphasis).

[27] The Court in which the Plaintiff first appeared was a 'Reception Court' conceded as not having been intended to entertain formal bail

applications at which a Court could evaluate the full circumstances of the case and 'verskillende sake te oorweeg'. (see paragraph 26).

It was not one where an accused could have the opportunity to, '… ook betwis dat daar voldoende getuienis teen hom is om sy verdere aanhouding te regverdig'. (see paragraph 26)

Furthermore, it was commented in *Isaacs* that:

> "In die meeste gevalle sou dit waarskynlik genoeg wees om die aanklaer tevra, in sodanige besonderheid as wat nodig mag wees, watter inlighting in die vervolging se besit is, en na aanleiding van die aanklaer se antwoord te besluit of die beskuldigde se verdere aanhouding gelas moet word."

It was not possible for the Magistrate at the said Court to even begin to acquaint himself with the true circumstances of the Plaintiff's arrest because even the Prosecutor did not know these. He admitted that he had never read the statement of Van der Ross. He only concerned himself with the Bail Form content collated and prepared by Constable Buthi. In those circumstances the Court could not, as was stated in *Isaacs*, at 322D, properly determine the question of bail in order to familiarise itself with the matter.

In addition, the further detention of Plaintiff for a seven day period was for purposes of a formal bail application and not,

> "… to secure the attendance of the accused at his trial upon the charge…" contemplated.

[28] It would be fundamentally irregular for an accused to be made to appear in a Court without the prospect of bail contrary to section 50(1) of the Act. I am furthermore unable to find in *Isaacs* any general rule which

affirms as lawful, the continued detention of an accused for a purpose other than to secure his attendance at his or her trial and in addition, one that authorises the continued detention of an accused without the Magistrate having embarked on a satisfactory amount of familiarisation into the circumstances of such accused's arrest prior to considering what order is most appropriate under the circumstances in terms of section 50(1) of the Act.

[29] I also do not find that *Isaacs* is authority for the view that in all cases, the circumstances of the initial arrest and the lawful requirement thereof are immaterial once a Magistrate orders his or her further detention after a mechanical first appearance where, as in the present case, not even the Prosecutor knew the circumstances of the said arrest and whether such was lawful or not. That course would acutely offend the Bill of Rights and the Constitution. The Court in *Isaacs* commented, *inter alia*, at 322F:

> "Natuurlik, as daar onvoldoende gronde was om hom in hegtenis te neem, sal daar dikwels ook onvoldoende gronde wees om sy verdure aanhouding te gelaas, maar dit is nie noodwendig so nie."

It escapes me how in general an unlawful arrest and detention could mutate into one which is lawful on the facts detailed in the present matter. For purposes of my finding it is sufficient that on the facts before me, there is nothing that would suggest compliance even with the very principles set out in *Isaacs* as referred to herein. To hold that, even where a Magistrate did not enquire into the future detention of an arrestee – particularly one who is unrepresented – and no-one, including the

Prosecutor had information upon which a proper decision could be taken, that *Isaacs* still finds application, would be to take formalism too far.

Constitutional considerations.

[30] There are in addition, further considerations to take into account in light of the supremacy of the Constitution and the Bill of Rights.

Section 12 of the Constitution of the Republic of South Africa 108 of 1996 provides that:

> "(1) Everyone has the right to freedom and security of the person, which includes the right –
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) …
> (d) …
> (e) …

Section 35(2) of the Constitution provides that:

> "Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –
>
> (a) …
>
> (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court

day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released.

(c) …

(d) to be released from detention with or without bail, unless the interests of justice require otherwise."

[31] The rights enunciated above are Constitutional pre-trial rights afforded those who are arrested and detained by Police and entitle the arrested individual to be brought before a Court within a reasonable time and that, at the first appearance in Court, such individual must be released, charged or given a reason for the further detention.

[32] Section 50(1) of the Criminal Procedure Act 51 of 1977 is a procedural provision the purpose of which is to define a procedure regarding timeous appearance at Court and manner of arriving at a decision with regard to admission to bail or refusal thereof. No legislation can be interpreted in a manner that offends the Bill of Rights and the Constitution and it is imperative that the same must be read in such a way that it conforms to the Bill of Rights and the Constitution.

[33] Section 39(2) of the Constitution places a general duty on all Courts to always promote the spirit, purport and objects of the Bill of Rights. This is a duty which must be carried out even where the respective litigants have not raised or relied on a provision of the Constitution. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor*

Distributors (Pty) Ltd 2001(1) SA 545, 2000 (10) BCLR 1079 (CC) at para 21-26, Langa CJ made the following points, that:

a. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

b. Judicial officers must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided it can reasonably be ascribed to the section concerned.

[34] The right of an individual to their freedom and security is governed by the Constitution. Section 12(1) guarantees both substantive and procedural freedoms. The curtailment of one's freedom and security cannot, as was the case prior to the advent of our Constitution, be arbitrary but such curtailment must be supported by reasons and justified in accordance with the demands of the Constitutional State. In *S v Coetzee 1997 (3) SA 527 (CC) at para 159* O'Regan described these rights as:

> "… two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [procedural component]… Our Constitution recognises that both aspects are important in a

> democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair."

[35] The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so and may not occur 'arbitrarily'; there must be a rational connection between the deprivation and some objectively determinable purpose. See *De Lange v Smuts NO 1998 (3) SA 785 (CC).*

[36] In *Zealand v Minister of Justice and Constitutional Development 2008 (6) BCLR 601 (CC),* a decision in which the Appellant had, following a successful appeal against a different conviction, been kept in custody with sentenced prisoners pursuant to a series of orders by the Magistrate remanding the matter for trial, the Court found his continued detention to have been unlawful despite these being authorised by a Magistrate. The basis being, *inter alia,* that the encroachment on his physical freedom had not been carried out in a procedurally fair manner and was not justified by acceptable reasons. The Constitutional Court disagreed with the earlier decision of the Supreme Court of Appeal which, following the decision in *Isaacs* (supra), had held that-

> "…to detain someone contrary to his or her status does not… affect the lawfulness of the detention, which arises from the court order and not from the place or manner of detention."

The Court per Langa CJ disagreed with the above finding and at para 42 went on to express that:

> "This reasoning ignores the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause contained in section 12(1)(a) of the Constitution. That right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates orders remanding the applicant in detention is not sufficient to establish that the detention was not 'arbitrary or without just cause'."

and that:

> "The inevitable conclusion is that the applicant was unjustifiably detained in a manner that violated his right not to be deprived of freedom arbitrarily and without just cause, Further that the violation cannot be justified under section 36 of the Constitution because it was not 'in terms of a law of general application'."

[37] It may be so that there is the factual difference that in *Zealand*, the appellant had been incarcerated in a section with convicted prisoners serving sentences. The answer to that is that both incarcerations were based on the orders of a Magistrate in terms of section 50(1) of the Criminal Procedure Act. The supposed authority was derived from the said section.

[38] In conclusion, it is my considered view that on the facts pertinent herein this matter does not fall within the *ratio* in *Isaacs*. The Reception Court was not set up to deal with matters as provided for by section 50(1)

of the Criminal Procedure Act; the Prosecutor in charge did not read the statement of the arresting officer to satisfy himself with the question whether or not there was a *prima facie* case against Plaintiff; the Prosecutor failed to apply his mind to the matter before him and did not even know the facts relating to the Plaintiff's arrest. The Magistrate furthermore neither postponed the matter for trial nor familiarised themselves with the circumstances of the Plaintiff's arrest; the Court did not ordinarily entertain bail applications and was designed for mechanical postponements. Had these officials done so, they would have become aware that there was no basis to postpone the matter for a formal bail application and would not have ensured that the Plaintiff is remanded in custody without bail or in the alternative, released on warning. In the circumstances, his detention post the Magistrate's ordering the further remand violated his Constitutional rights to freedom and cannot be justified in terms of a law of general application and was consequently unreasonable, arbitrary and palpably unlawful.

Quantum of damages.

[39] I have already dealt with the lack of grounds on which the Plaintiff was arrested as well as his living conditions whilst awaiting his first Court appearance and his treatment by those incarcerated with him in prison following his remand in custody. The fact that his detention would have disabled him from operating his own tiling contract in accordance with his contractual obligations would in itself have compounded the undignified and harshness of his experience. He appears to be a hard-working, focused and diligent individual who has made something of himself despite the circumstances of his having left his country of birth due to that country's continued political instability and attendant dislocation of some of its citizens.

[40] The unlawfulness of the arrest and detention between the 21st and 23rd has, as already stated, been conceded by the First Defendant. What renders this initial arrest and detention avoidable was the fact that it took place mid-week with ample availability of all Police personnel to visit employer addresses of the two entities Settlers Hospital and Grahamstown Meat Suppliers furnished to Constable Buthi and the extension 4 Joza address with Plaintiff and/or Warrant Officer Van der Ross. The goods were not only Plaintiff's own goods and gadgets but that nothing untoward about them could suggest they were possibly stolen. The goods were seized from his house and consisted of individual ubiquitous day to day items such as a workstation computer, television screen and even included condoms.

[41] Van der Ross contented himself with locking the Plaintiff up after having completed a statement lacking in the requisite material detail covering all the circumstances pertaining to the arrest and then extricated himself from any further responsibility in the matter. He failed to enter details of where he had arrested the Plaintiff; did not follow up with the investigators and created the immediate impression that Plaintiff had been incarcerated in connection with the laptop.

[42] Although Constable Bhuti was not called and hence was not able to explain his conduct, it appears to me from the evidence that was led that he acted irresponsibly. He could have so easily verified the home address by making a simple call to Van der Ross. He could have gone there with Plaintiff. He already had clear work addresses furnished to him but still noted on the docket that Plaintiff had provided false information and did not have a verifiable address. He must have known that being labelled as someone of no fixed address elicits an immediate wariness on the part of investigating Police and Court officials. He passed this misleading

information to others including Captain Green and the Prosecutor Prince who both took it at face value and did not have their curiosity awakened by the fact two work addresses were reflected and had been provided.

[43] The Prosecutor did not so much as read the statement of the arresting officer and only did what he was used to in the Reception Court, implement what he explained as the District Control Prosecutor's decisions. He could not have believed himself when he told this Court that he applied his mind to the question whether there was a basis to conclude that the was indeed a prima facie case because on his own evidence, he never read Van der Ross' scanty statement. In addition, he was never in a position to furnish the Magistrate with a rounded picture of the Plaintiff's circumstances as required by law. Even more importantly for purposes of my findings, the Prosecutor on his own evidence admitted that the Reception Court did not deal with the formal bail hearings at all. All these failures were, in light of the Plaintiff's Constitutional rights, most unreasonable and leaves one with the sense Plaintiff was dealt with arbitrarily.

[44] The matter of assessment of damages falls within the purview of the Court whose discretion must be judiciously exercised taking various factors into account. The manner in which the continued detention was handled by the authorities, duration thereof, degree and level of exposure to mental anguish and stress, conditions of detention and diminution in the eyes of claimant's community are just some of the factors that affect the award. All associated circumstances must be accorded proper evaluation and consideration.

[45] In *Thandani v Minister of Law and Order 1991 (1) SA 702 (E) at 707B,* Van Rensburg J observed:

> "In considering *quantum*, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual."

[46] Visser and Potgieter, Law of Damages 2nd edition at 475 outline some of the factors to be taken into account in the awarding of damages to include:-

> "The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and the nature (e.g. solitary confinement) of the deprivation of liberty; the status, age and health of the plaintiff; the extent of publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the *action injuriarum* also has a punitive function."

[47] In *Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at 93 d – f,* Bosielo AJA (as he then was) commented:

> "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 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 is viewed in our law…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. *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 2009 (5) 94 (SCA) ([2009] ZASCA 39) paras 26-29).*"

[48] In an unreported decision of this Court per Jones J in *Olgar v Minister of Safety and Security [ECD 18 December 2008 (case 608/07) at para 16]*, the following was stated:

"In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant."

[49] In a recent judgment, my brother Sandi J in *Juan Jonathan van der Merwe v Minister of Safety and Security [case number 2565/2009],* (in which reference is also made to the decision of Plasket J in *Petersen v Minister of Safety and Security 1173/2008),* Plaintiff had been arrested on Friday and kept in custody until his release on the Monday. At paragraph 52, the Court observed as follows:

"On the question of quantum I have been referred by Mr Cole to unreported decisions of this division. The first one is the matter of *Fubesi v The Minister of Safety and Security case no. 680/2009* where a plaintiff was awarded damages in the sum of R80 000.00 for arrest without warrant and a detention which lasted for three days and about 18 hours. In the matter of *Tommy Petersen v The Minister of Safety and Security 1173/2008,* the plaintiff was assaulted by members of the police force. He was arrested and dragged from his home in only a pair of shorts. At the police station he was assaulted. He was arrested at 20h00 and released at about 04h00. He claimed damages for unlawful arrest and detention and for the assault on him. In respect of the unlawful arrest and

detention the plaintiff was awarded R60 000 and R120 000 in respect of the assault which was a fairly serious one. Having considered the fact of this matter and the judgment to which I have been referred, I am of the view that the amount of R120 000 would be reasonable in respect of the unlawful arrest and detention. In so far as the assaults are concerned I propose to award an amount of R2000 in respect of each assault"

[50] I am also mindful of the decision in *Mvu v Minister of Safety and Security and another 2009(6) SA 82 (GSJ)* in which Willis J, feeling suitably chastised by the Supreme Court of Appeal (*Seymour* decision) acknowledged the conservative approach of our Courts and awarded damages in the sum of R30 000 for a day's detention. (see also *Ramakulukusha v The Commander Venda National Force 1989(2) SA 813 (V).* All these decisions however are influenced in the final determination by the specific facts of each case.

[51] Taking into account all of the afore-going, I make the following order:

1. Judgment is entered in favour of Plaintiff:

(a) In respect of the unlawful arrest, attendant *contumelia* and detention between the evening of the 21st to the morning of the 23rd October 2008, damages in the amount of R55 000.00

(b) In respect of the unlawful detention in prison between the 24th October to 31st October 2008, damages in the sum of R175 000.00

(c) The Defendants are ordered, jointly and severally, to pay interest on the damages awarded in (a) and (b) above at the legal rate from a date fourteen days after date of this judgment to date of final payment.

(d) Costs of suit together with interest calculated at the legal rate from a date fourteen days after the *allocator* to the date of payment.

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PT MAGEZA

ACTING JUDGE

Heard: 10-12 MAY 2011

Delivered: 12 AUGUST 2011