REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/18449

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

1 November 2024
DATE

In the matter between:

JIMMY HENRY COETZEE Plaintiff

and

MINISTER OF POLICE First Defendant

NATIONAL PROSECUTING AUTHORIT Second Defendant

JUDGMENT

VALLARO AJ

Introduction

[1] In this matter, the plaintiff, an adult male, born on 8 June 1967, instituted an action against the MINISTER OF POLICE *("the First Defendant")* and the NATIONAL PROSECUTING AUTHORITY (*"the Second Defendant")* claiming delictual damages for unlawful arrest, unlawful detention (pre- and post- first appearance in court) and malicious prosecution. The plaintiff was arrested without a warrant.

[2] The issues before the Court are:

a. Whether the arrest of the plaintiff was unlawful;

b. Whether the subsequent detention of the plaintiff from the day of arrest to the first appearance in court (19 September 2019 to 23 September 2019) was unlawful;

c. Whether the detention of the plaintiff after the first appearance in court, from 23 September 2019 to 9 October 2019 was unlawful;

d. Whether the plaintiff has proved malicious prosecution;

e. If applicable, the determination of the plaintiff's damages.

The defendants' pleaded case

[3] In terms of an amended plea, the first defendant admitted that the plaintiff was arrested on charges of possession of a dangerous weapon and specifically pleaded that the arrest was effected in terms of S40(1) of the Criminal Procedure Act 51 of 1977, read with S3 of the Dangerous Weapon Act 15 of 2013 and Sections 1 and 119(1)(a) of the Correctional Services Act 111 of 1998. Further the defendants plead that the plaintiff was detained in terms of Section 50(1) of the Criminal Procedure Act 51 of 1977. (Amended plea para 6: CaseLines 0002-4)

[4] The further detention at the Johannesburg Prison was effected in terms of S60 of the Criminal Procedure Act.

[5] The defendants pleaded that reasonable investigation steps were taken prior to the plaintiff's arrest and the second defendant pleaded that at the time of

the plaintiff's first appearance at court, a criminal case of possession of a dangerous weapon was already open with the South African Police Services and sworn statements and/or affidavits were contained in the police docket.

Facts not in dispute

[6] The plaintiff was arrested on 19 September 2019 at the Johannesburg Magistrates Court by Warrant Officer Molapo, acting in the course and scope of his employment with *the first defendant.*

[7] Warrant Officer Molapo is a peace officer as defined in the Criminal Procedure Act 51 of 1977.

[8] The arrest was carried out without a warrant for possession of a dangerous weapon in terms of S3 of the Dangerous Weapons Act 15 of 2013.

[9] The plaintiff was detained from 19 September 2019 to 23 September 2019 in the cells at Johannesburg Central Police Station.

[10] On 23 September 2019, the plaintiff appeared before a magistrate (his first appearance before the court). Bail was denied.

[11] The plaintiff was then detained at the Johannesburg Prison until 9 October 2019.

[12] The plaintiff complied with the provisions of Section 3 of the Institution of Legal Proceedings Against Certain Organ of State Act 40 of 2002.

The plaintiff's evidence

[13] The plaintiff's case rested on the evidence of the plaintiff alone.

[14] He testified that he has been living at the same address in Alberton for some 40 years. He lives with his wife and two adult children. He is unemployed. He has a standard 8 level of education. He is diabetic, asthmatic and has high blood pressure for which he is on chronic medication.

[15] On 19 September 2019 he was at the Johannesburg Magistrate's Court to attend to his son's case (his son was then a minor and apparently facing a murder charge).He arrived at the Court around 08h30 to 08h45.

[16] In court he went to sit on a bench with his son's legal representative as was his custom. The plaintiff testified he had been coming to court for four and a half years for his son's case. In fact, all the defendants' witnesses stated that they knew the plaintiff as they had seen him often in court.

[17] He testified that as his son was a minor, there had to be two monitors present in court. The first time his son was called on that day, the monitors were not in court so the magistrate stood the matter down and his son was taken back to the cells.

[18] The court continued with other cases.

[19] Some half an hour later, the plaintiff was approached by an office worker who asked him to go outside the courtroom. That person then took a glass object out his jacket pocket, showed it to the plaintiff and told him he had been seen passing the glass object to his son in court and he asked the plaintiff why he had done that. The plaintiff told him he did not know anything about this and went back into court.

[20] About 15 minutes later, his son was recalled and he (the plaintiff) went to stand with the legal representative, the monitors were now present and a new court date was set.

[21] He testified that he then walked out of court, between 12h00 and 13h00 and left the legal representative in court. As he came out the door he found the office worker and a policeman who cuffed him and arrested him. They took him down to the cells.

[22] He testified that they assaulted him, kicked him and stood on him. At this stage of the evidence he started crying.

[23] The plaintiff asked the policeman why he was being arrested and he was told it was because he had given his son the glass object. The plaintiff testified

that he asked them to look at the cameras because he had not done anything of the sort.

[24] He testified that he never had any direct contact with his son whilst in court as “they didn’t allow it”. He had not seen his son being searched by anyone.

[25] Between 17h00 and 18h00 he was transported to Johannesburg Central Police Station. He recalls it was dark and there were no lights in the police station and the police officers were using their cell phones for light.

[26] He was booked and put in a cell with two foreigners.

[27] He was not informed of his constitutional rights and nothing was explained to him. He asked a policeman to see a doctor as he was in pain and he explained that he required his chronic medication. His request was ignored. He was not informed about his right to apply for bail. His family did not know where he was. He had not eaten that day and was given food later.

[28] The cell conditions were bad. There was a toilet in the cell. The flushing mechanism did not work. There was no toilet paper. There was no water although water was leaking from the toilet. The floor was wet. He was given a sponge and a blanket. He had no medication on him. The next day he was offered some food from a family member visiting one of the cell mates. Later that night the detainees were given samp to eat. He could not shower as there was no water.

[29] On the Saturday the detective arrived and called the plaintiff’s name. He informed the plaintiff that he was being charged with possession of a dangerous weapon. The plaintiff asked him where was this weapon? He was told not to be clever.

[30] The plaintiff testified that he was handed a page with rights written on it and he was told to sign the document. It was not read to him. He read it on his own when he was returned to the cell. On 23 September 2019 along with many others he was transported in a large van to the Johannesburg Magistrate’s Court.

[31] He appeared before a magistrate. The charge was read to him. Bail was denied. He had a state legal representative. The case was postponed.

[32] In response to a direct question from the court as to whether he had applied for bail and the reason for it being denied, the plaintiff vaguely said that the reason for the denial of bail was the “seriousness of the charge”.

[33] He was then transferred to the Johannesburg Prison in a police truck.

[34] On arrival at the Johannesburg Prison, he was made to kneel. Thereafter he was put in a cell with about 30 other men. He was made to undress and he had to walk in front of everyone naked. He set down his blanket where he found a space near to the toilet. The conditions were very bad. He could shower but there was only cold water. He felt very bad as he had never been subjected to such a dismal environment.

[35] Due to his arrest and detention, he was unable to be appointed in the NG Kerk as a deacon and he had been helping out in a charity organisation with soup kitchens and the like, but as a result of the arrest he was no longer accepted.

[36] On 9 October 2019, at his appearance, the Court said he was no longer being detained and he was given a further court date to appear. He continued to appear in Court at intervals and then the charges were withdrawn due to lack of proof. No apology or explanation was forthcoming from the police or anyone.

[37] The Notice of Rights in terms of the Constitution (which was annexed to the particulars of claim, Caselines 001-12) was given to him on 21 September 2019 whilst in the Johannesburg Police Station. The plaintiff remained adamant throughout cross examination that it was not his signature on the document and equally adamant that the date reflected on it as 19 September 2019 was incorrect. The document indicates that the plaintiff was arrested for possession of a dangerous weapon.

[38] Under cross examination, a document titled South African Police Service STATEMENT REGARDING INTERVIEW WITH SUSPECT, (this document formed part of the docket, CaseLines004-32) was put to the plaintiff. The plaintiff denied all knowledge of this document and particularly denied that it was his signature which appears on the document.

[39] It was put to the plaintiff that the arresting officer would testify that the plaintiff had told him that he had passed money to his son in the court room. The plaintiff denied this was true.

[40] It was put to the plaintiff that the assault which he had testified about was a fabrication because it had not previously been mentioned. The plaintiff reiterated he was assaulted.

[41] The plaintiff said that he appeared in court some five or six times and each time the matter was postponed due to further investigation being required.

The defendants' evidence

[42] Mr M J Netshilindi was the first witness called by the defendants. He gave evidence in English.

[43] As at September 2019, he was the supervisor of interpreters at the Johannesburg Magistrate Court. He testified that he was in Court 9 (where the plaintiff's son was due to appear) talking to the resident interpreter (he could not recall who it was or whether male or female) and he was standing parallel to the dock where the accused stood.

[44] At some point he noticed that the plaintiff was talking to the accused (who was the plaintiff's son) and then he noted that the plaintiff handed something over to the accused (in court he demonstrated the plaintiff's action by stretching his arm behind him whilst facing forward). He did not see what the object was.

[45] Mr Netshilindi immediately approached Warrant Officer Molapo who was the court orderly, told him that he suspected "foul play" and instructed W/O Molapo to search the accused. W/O Molapo duly did. He then saw the sharp "broken window pane" wrapped in cello-tape and asked W/O Molapo whether he had searched the accused in the cells before bringing him into court. He testified that he asked the accused where he had obtained the object and he did not respond and Mr Netshilindi then said to him "you received this from your guardian" (Mr Netshilindi was referring to the plaintiff.)

[46] He testified that this all happened in court in front of the public, the attorneys and the magistrate, Ms Kwele. There were many people in court although he could not say how many. He testified that the plaintiff was standing one metre in front of the accused. The accused and the plaintiff were both facing the presiding officer. Court was in session. The plaintiff was then arrested in the court room.

[47] When the plaintiff's version was put to him he said, vehemently, that it was all a blatant lie. He denied that the plaintiff had been assaulted in front of him.

[48] He testified that he personally wrote out his statement which he made to a Captain of the SAPS. His statement (this document was a discovered document and was part of the docket, CasLines 004-37) was put to him and at this point he contradicted that he had written it out personally and stated that was not his writing and that on that day he couldn't write because his thumb was sore.

[49] Under cross examination, Mr Netshlindi was abrasive, rude and dismissive, telling the plaintiff's counsel to open her ears and stating that he refused to repeat himself if he deemed that he had previously answered a question or given evidence on a particular point.

[50] Mr Netshilindi had testified that his statement was signed and stamped indicating that it was made under oath as is recorded in the statement but no commissioner's stamp appears at the bottom of the statement. Under cross examination, asked whether his statement was made under oath and commissioned, he refused to answer and repeatedly said "no comment".

[51] The defendants' counsel then advised the Court that the original docket would be brought to Court the next morning.

[52] The next morning the defendants' counsel advised from the bar that the original docket was not being brought to court and he conceded that the statement of Mr Netshilindi was not made under oath or commissioned.

[53] Warrant Officer R T Mlangeni was the first defendant's second witness. He gave evidence in English. He testified that he has been employed by the SAPS for 35 years.

[54] On 19 September 2019, he was on duty at the Johannesburg Magistrate Court, tasked with escorting the prisoners to and from court.

[55] Between 11h00 and 12h00 he was told by Warrant Officer Molapo to detain the plaintiff. At about 16h00 he took the plaintiff to Johannesburg Central Police Station. At the police station, he explained the plaintiff's rights to him.

[56] He testified that he read the Notice of Rights in terms of the Constitution (referred to in [37] above) to the plaintiff, handed a copy to the plaintiff and a copy he retained for himself. He confirmed the signature appearing on the Notice of Rights at the bottom of the page on the right was his signature and the one on the left at the bottom of the page was that of the plaintiff.

[57] He said the document was signed in his presence by the plaintiff. He testified that he definitely read out the document to the plaintiff. He was asked to read out the document in Court which he read hesitantly, jumping around the document and leaving out many paragraphs. He did not impress as being very familiar with the document at all. As an explanation for his poor reading of the document he complained that he had problems with his eyes and couldn't see properly albeit he was wearing spectacles.

[58] He indicated that the document was read and signed at 16h00. He had already testified that at 16h00 he was taking the plaintiff to the Johannesburg Central Police Station. In answer to the plaintiff's evidence that he was handed this document only on Saturday 21 September 2019, W/O Mlangeni said that was not possible because he did not work on Saturdays.

[59] He also confirmed that it is his signature which appears at the very bottom of the Notice of Rights in terms of the Constitution, under a section which is headed CERTIFICATE BY THIRD PERSON AS WITNESS (if required) and this section is completed where a detainee refuses to sign the certificate. No

evidence was given as to why W/O Mlangeni had signed this section, given that his testimony was that the plaintiff had voluntarily signed it.

[60] W/O Mlangeni gave extensive evidence on how he dealt with the sharp object which he referred to as the Exhibit. He testified that he transported it to the Johannesburg Central Police Station in his pocket at the same time as he took the plaintiff. He was shown a document in the docket which indicated that the Exhibit was received on 20 September 2019 not 19 September 2019 as he had indicated in chief. He then said that he had not filled in the document and that the date was a mistake.

[61] There were a lot of inconsistencies in W/O Mlangeni's evidence regarding the time he first took charge of the plaintiff, the time he transported him to the police station, the time at which he made the statement and the time read the plaintiff his constitutional rights. This was supposed to have been recorded in his pocket book, but the evidence was not presented.

[62] He did not know when his statement was commissioned and he could not explain why the statement appeared to be commissioned at 13h10 when he in fact took the plaintiff to Johannesburg Central Station at 16h00.

[63] The third and final witness on behalf of the first defendant was Warrant Officer Molapo. He gave evidence through an interpreter. He has been employed by the SAPS for 39 years.

[64] On 19 September 2019, he was the court orderly at the court in which the plaintiff was arrested.

[65] At 9h45 on 19 September 2019, he fetched the accused (referring to the plaintiff's son) from the cells and brought him to the courtroom as was his duty to do.

[66] When detainees are moved from the prison to the court, they are searched on arrival at the court and then placed in court cells. The accused would have been searched on arrival between 07h00 and 08h00.

[67] At the time that the accused was in court, W/O Molapo said he was occupied with writing in his occurrence book when he was approached by Mr Netshilindi who told him that he had seen the plaintiff putting his hand behind his back and passing something (Mr Netshilindi did not see what) to the accused.

[68] He waited for matter to be postponed and then went and searched the accused and found the sharp glass object wrapped in cello tape. He indicated the glass was a shard about 20cm long.

[69] The accused did not respond when asked where he got the sharp object from. He asked the plaintiff what he had handed to the accused and the plaintiff responded that he had given his son money. Warrant Officer Molapo then searched the accused the second time looking for the money which he failed to find.

[70] W/O Molapo concluded that the accused must have received the sharp glass object from the plaintiff and arrested the plaintiff. This was in the courtroom. There were many people in the courtroom including the court interpreter, the clerk, the magistrate. He arrested the plaintiff for possession of a dangerous weapon. Then he took the plaintiff to the cells and made a statement. He testified that he read the plaintiff his rights in the office adjacent to the cells. He denied any assault on the plaintiff.

[71] He contradicted Mr Netshilindi's evidence that the plaintiff and the accused spoke to each other, he said he doesn't allow people to talk in court and since the magistrate was in court it would not have been possible for them to talk.

[72] He also was extremely vague about how affidavits are commissioned and it was abundantly clear that the rules for properly commissioning a statement under oath were not followed with regards to any of the statements made by any of the witnesses who testified on behalf of the *first defendant.*

The law and legal principles applicable to arrest and detention

[73] The Constitution enshrines and promotes rights pertaining to liberty and particularly:

a. Section 7 provides that the democratic values of human dignity, equality and freedom are enshrined. The state must respect, protect and promote such rights.

b. Section 12 provides that everyone has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause, or to be detained without trial and the right not to be treated or punished in a cruel, inhuman or degrading way.

c. Section 35 deals with arrested, detained and accused persons. Section 35(2)(a) states that everyone who is detained has the right to be informed promptly of the reason for being detained.

d. S35 (1)(f) provides that anyone arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

e. S39(2) provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights.

[74] The provisions of the Criminal Procedure Act 51 of 1977 must be considered in the context of the values enshrined in the Constitiution.

Onus

[75] The defendant bears the onus of establishing on a balance of probabilities that the arrest/detention was lawful/justified[1].

[76] In *Mahlangu and Another v Minister of Police*[2], the Constitutional Court cited with approval the Court's statement in *Minister of Law and Order v Hurley*[3] as follows:

[1] *Donono v Minister of Police* 1973(4) 259 SA (C) 262 A-G
[2] (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) Par [30]
[3] 1986(3) SA 568 (A)

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[77] The above statement was referred to with approval in *Minister of Justice v Hofmeyer*[4], where the Court held that when "the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds of justification of the infraction."

Arrest in terms of S40(1)(a)

[78] During argument, the counsel representing both defendants, stated that the first defendant arrested the plaintiff in terms of S40(1)(a) of the Criminal Procedure Act 51 of 1977 which provides that a peace officer may, without a warrant, arrest any person who commits or attempts to commit any offence in his presence.

[79] The jurisdictional facts necessary for an arrest under section 40(1)(a) are

(i) the arrestor must be a peace officer;

(ii) the offence must have been committed or there must have been an attempt to commit an offence; and

(iii) in his or her presence.

[80] The crime or the attempt to commit a crime must be committed in the presence of the arresting officer. In *Minister of Safety and Security v Glisson*[5] the court on appeal held that where the arresting officer had been on the scene where the an unlawful act had been committed but had not personally witnessed it and had been told about it by another officer, the arrest in terms of S40(1)(a) was unlawful.

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[4] 1993(3) SA 131 (AD)
[5] 2007 (1) SACR 131 (E) at [5]

[81] There is a long line of judicial precedent in which it has been held that where arrest without a warrant is to be justified by S40(1)(a) there must be proof that the arresting officer knows that the offence was in fact committed. He must have first-hand knowledge of the commission of the offence. If not, he must get a warrant based on sworn testimony. It has never been regarded as sufficient that he was told about the commission of the offence by another policeman. Jones J went on to say that to impute knowledge to the arresting officer would be contrary to precedent, contrary to principle, and contrary to the spirit of the Bill of Rights, which, in the case of tension, would favour the freedom of the individual rather than giving more extensive protection to the police for making arrests without warrant[6].

[82] The assessment of the legality of an arrest in terms of Section 40 (1) (a) requires a determination whether the facts observed by the arresting officer, as a matter of law, *prima facie,* establish the commission of the offence in question. The question is whether the arresting officer had knowledge at the time of the arrest of the arrestee of such facts which would, in the absence of any further factual evidence, constitute proof of the commission of the offence in question. His honest and reasonable conclusion from the facts observed by him is not of any significance to the determination of the lawfulness of his conduct, but may, within the context of section 40 (1)(a) be relevant for the determination of the quantum of damages.

[83] The test is not whether the arresting officer has reasonable suspicion or belief that the person has committed the offence. The test is whether the arresting officer had personal knowledge of the facts upon which it can be concluded that the arrested person had prima facie committed an offence in his presence[7].

[6] Glisson above 2007 (1) SACR 131 (E) at [6]
[7] *Korkie v Minister of Police* (2129)/2020) [2022] ZAECGHC 2, at [18] and [19]

[84] This provision is not complied with where the offence is committed in the presence of someone other than the person affecting the arrest, for example, another policeman[8].

[85] The arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an initial suspicion steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests.

[86] Arrest without a warrant is an infringement on personal liberty and thus the arresting officer must arrest under these circumstances with care. Du Toit in his Commentary on the Criminal Procedure Act, states that where an arrest without warrant is effected by a peace officer and is not permissible under S40 or 41, the arrest might form the basis of a civil action for damages. He also suggests that arrest in terms of S40(1) should be confined to serious cases.

[87] In *Mvu v Minister of Safety and Security and Another* [9] Willis J held, "It seems to me that , if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all."

[88] This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to have an informed decision whether or not there is any legal justification for the further detention of the person.

Possession of a dangerous weapon

[89] Section 3 of the Dangerous Weapons Act 15 of 2013 makes it an offence to be in possession of a dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose. The offence is liable on conviction to a fine or imprisonment not exceeding three years.

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[8] *Areff v Minister van Polisie* 1977 (2) Sa 900 (A) at 908 - 9

[9] 2009 (6) SA 82 (GSJ) par 10

[90] The defendants' counsel conceded in argument that this is not a Schedule 1 offence.

[91] In relation to "possession" it has been held that "Possession is a legal concept that has developed in the context of different branches of the law. It has been the source of much confusion. Criminal possession appears to be no different. The word "possession" is not defined in the Act. As a legal concept possession consists of two core elements, the exercise of physical control (corpus) over and article with the intention (animus) to do so." [10]

Correctional Services Act 1998

[92] Section 119: Supplying certain articles to offenders.—(1) No person may without lawful authority—

(*a*) supply, convey or cause to be supplied or conveyed to any offender, or hide or place for his or her use any document, intoxicating liquor, dagga, drug, opiate, money, or any other article;

(b) bring or introduce into any correctional centre, or place where offenders may be in custody, any document, intoxicating liquor, dagga, drug, opiate, money, or any other article to be sold or used in the correctional centre; or

(*c*) …

(2) …

(3) Any person who contravenes any provision of this section commits an offence and is liable on conviction to a fine or, in default of payment, to incarceration for a period not exceeding four years, or to such incarceration without the option of a fine or both.

[93] This is not a Schedule 1 offence and as such arrest for its infringement cannot be made without a warrant of arrest.

[10] *Makeleni and Another v S* (CA & R 51/18) [2019] ZAECGHC (26 March 2019) at par 7

Duty of police officer when deciding to make an to arrest

[94] In *Olivier v Minister of Safety and Security and Another*,[11] the court said:

> "This entails that the adjudicator of facts should look at the prevailing circumstances at the time when the arrest was made and ask himself the question, was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employer, and then residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation. The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court's view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort."

[95] It has consistently been stated by the Courts that the discretion to arrest must be properly exercised. The test for the legality of the exercise of discretion to arrest is objective. The exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related for the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement.

[96] In objectively determining whether the arrestor acted arbitrarily it must be considered whether he applied his mind to the matter or exercised his

[11] (05/9489) [2008] ZAGPHC 50; 2008 (2) SACR 387 (W) (28 February 2008)

discretion at all and /or whether he disregarded express provisions of the statute[12].

Detention after first appearance

[97] The courts have repeatedly stated that interference with physical liberty is *prima facie* unlawful. It is sufficient for a plaintiff to plead unlawful detention by the defendant. The defendant then bears the onus of justifying the detention.[13]

[98] In *Minister of Police and Another v Erasmus* the Court looked at matters of wrongful detention and the potential liability of the police where the person was detained after a first court appearance. In summary the cases were approached from the perspective of legal causation.

[99] Where the conduct of the police was the factual and legal cause of the post-hearing detention, the police were held liable for such detention.

[100] In *Woji v Minister of Police [14]* the investigating officer gave false evidence during the bail application leading to the refusal of bail. The SCA said further that once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of section 12 (1) (a) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individuals detention unlawful for the purposes of a delictual claim for damages.[15]

[101] In *Minister of Safety and Security v Tyokwana[16]* the police failed to inform the prosecutor that the witness statements had been obtained under duress.

[102] In *de Klerk v Minister of Police*[17], the arresting office knew that the arrestee would appear in a "reception court" where the matter would be automatically remanded without consideration to bail. The Court set out the

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[12] *Shidiack v Union Government (Minister of the Interior) 1912 (AD) 642 at 651-652.*
[13] Zealand v Minister for Justice and Constitutional Development (CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC) ; 2008 (2) SACR 1 (CC) ; 2008 (4) SA 458 (CC) par 24
[14] [2014] ZASCA 108*;* 2015 (1) SACR 409 (SCA)
[15] Woji v Minister of Police 2015(1) SACR 409 (SCA) par 27
[16] [2014] ZASCA 130*;* 2015 (1) SACR 597 *(SCA)*
[17] [2019] ZACC 32*; 2020 (1) SACR (CC)* Par 62 and 63

principles applicable to liability in respect of detention subsequent to a first appearance in court as follows:

> "The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand,* a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.
>
> In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability."

[103] In *Mahlangu v Minister of Police* [18], the investigating officer failed to divulge that an incriminating confession had been made under torture. The Constitutional Court stated that that "It follows that a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is *prima facie* unlawful and the

[18] [2021] ZACC 10*;* 2021 (2) SACR 595 *(CC)*

defendant bears an onus to prove that there was a justification for the interference." [19] Further the Court cited with approval the following;

> "It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of the section 12(1) of the Constitution ….. These provisions, therefore, place an obligation on police officials who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention.
>
> This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case and the law casts an obligation on the police official to do so." [20]

[104] In *Zealand* [21], the Court said, "I can think of no reason why an unjustifiable breach of Section 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention."

[105] In *Minister of Safety and Security and another v Ndlovu* [22], the Minister had led the evidence only of a Captain of the Police and a prosecutor, the Court held,

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[19] Mahlangu above N 18 Par 32

[20] Botha v Botha v Minister of Safety and Security and Others, January v Minister of Safety Security and Others (575/09, 576/09) [2011] ZAECPEHC 12; 2012 (1) SACR 305 (ECP) (2 April 2011) Par 29 and 30

[21] Zealand above N 13 Par 52

[22] (788/2011) [2012] ZASCA 189 (30 November 2012) Par 15

"The inevitable consequence of these evidentiary short-comings is that the evidence of the appellants, who bore the onus to justify the deprivation of the respondent's liberty, came nowhere near discharging that onus. Quite clearly had the police conscientiously performed their duties, given that the respondent's freedom was at stake, they would have realised that the respondent had a fixed address and was thus not a flight risk. Moreover the appellants' problems are also compounded by the fact that the respondent was granted bail on his second appearance before court even though his circumstances had not changed."

Malicious Prosecution

[106] It is trite that in order to succeed in a claim for malicious prosecution a plaintiff has to prove the absence of reasonable and probable cause for the prosecution and that the legal process was instigated with malice or *animo iniuriandi* .

[107] It was held in *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B:

"'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.

It follows that a defendant will not be liable if he or she held a genuine belief founded on reasonable grounds in the plaintiff's guilt. Where reasonable and probable cause for an arrest or prosecution exists, the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one."

[108] *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) at para 64, this court said the following with regard to the element of *animus iniuriandi*:

> 'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice..'

Discussion

[109] The defendants pleaded (amended plea) somewhat ambiguously that the arrest was executed in terms of S 40(1) of the Criminal Procedure Act 51 of 1977 although the further subsection (a) was not pleaded and raised only at the time that the defendants' counsel presented argument.

[110] It was not Warrant Officer Molapo's evidence that he arrested the plaintiff in terms of S40(1)(a) for having committed or attempted to commit an offence in his presence.

[111] Warrant Officer Molapo clearly stated in evidence that he arrested the plaintiff for possession of a dangerous weapon. He was clearly unaware of what was going on around him as he testified that he was occupied with writing in the occurrence book.

[112] He was not personally aware of nor did he personally witness the event nor did he have firsthand knowledge of the event recounted to him by the interpreter, Mr Netshilindi, of the plaintiff's passing of something to the accused. This was ostensibly witnessed by Mr Netshilindi. Upon being told this by Mr Netshilinidi and according to Warrant Officer Molapo, after the court had postponed the matter, he then searched the accused and found a sharp shard of glass wrapped in cello tape.

[113] Warrant Officer Molapo testified that subsequent to the finding of the sharp glass object on the accused, he concluded that it must have been given to the accused by the plaintiff and thus he arrested the plaintiff for possession of a dangerous weapon. Indeed all the docket documents referred to during evidence record the offence leading to the arrest as possession of a dangerous weapon.

[114] The critical requirement of S40(1)(a) of the arresting officer having personal knowledge of a crime or attempt to commit a crime, is absent. Had the arrest been effected in pursuance to this section, it would nonetheless have been unlawful.

[115] The plaintiff was arrested for possession of a dangerous weapon in terms of S3 of The Dangerous Weapon Act 15 of 2013, and according to the defendants' plea for an infraction of S119 (1) of the Correctional Services Act 111 of 1998.

[116] It appears to be totally illogical to have arrested the plaintiff on a charge of possession of a dangerous weapon when at no time was this dangerous weapon found to be in the possession of the plaintiff and as a fact it was found in the possession of the accused.

[117] It is apparent that "possession" indicates the exercise of physical control over an article with the intention to do so.

[118] The evidence of the plaintiff that his son was initially brought before the court in the absence of the two monitors and thus was sent back to the cells until the monitors were present, was not seriously contradicted by the defendants' witnesses.

[119] According to Warrant Officer Molapo, the accused was searched only upon his arrival at court between 07:00 and 08:00 and thereafter not searched again. It was clear that the accused was in contact with many other prisoners who were in the court cells.

[120] Warrant Officer Molapo did not consider that the accused may have been given the sharp glass object by someone else. When asked directly in re-examination whether there were hiding places in the cells where this object could have been hidden, Warrant Officer Molapo said he did not know and could not say.

[121] Warrant officer Molapo testified that he asked the son where he got the sharp object from and when he refused to answer, he decided to arrest the plaintiff.

[122] He did not consider that there were any other means by which the accused could have acquired the sharp object.

[123] The arrest without a warrant for the possession of a dangerous weapon is unlawful. The defendants' counsel specifically stated in argument that the first defendant was not relying on S40(1)(b) which deals with arrest without a warrant and which applies specifically to Schedule 1 offences.

[124] It was correctly conceded that possession of a dangerous weapon is not a Schedule 1 offence justifying arrest without a warrant.

[125] It appears that the arresting officer, Warrant Officer Molapo relied entirely on what was told to him by Mr Netshilindi. Mr Netshilindi testified that the plaintiff stood 1 meter in front of the accused who was standing in the dock. They both were facing the magistrate who was dealing with accused's matter. There were attorneys and members of the public and police officers all present. Mr Netshilindi's evidence that whilst the court was in progress and addressing the accused, the plaintiff passed an object to the accused. W/O Molapo testified that he accepted what Mr Netshilindi said because he "trusts him".

[126] It is most improbable that in front of a multitude of witnesses, including the presiding officer and whilst court is in session, the plaintiff would have behaved in such a manner as to pass the accused (his son) an article in full view of everyone. It also begs the question why no statements and further evidence were obtained from any of the many witnesses present.

[127] In conclusion, Warrant Officer Molapo could not have lawfully arrested the plaintiff in terms of S40(1)(a) as he did not have personal knowledge of the crime or attempted crime. He could not lawfully have arrested the plaintiff without a warrant for possession of a dangerous weapon or in terms of Section 119 of the Correctional Services Act as neither of these offences are categorised as Schedule 1 offences which permit arrest without a warrant.

[128] In addition, I am unpersuaded that any of the policemen involved ever properly told or read the plaintiff his rights.

[129] In light of the aforegoing, I find that the first defendant has failed to discharge the onus to prove on a balance of probabilities, that the arrest of the plaintiff was lawful.

[130] It follows that if the arrest is unlawful the subsequent detention of the plaintiff until his appearance in court was also unlawful. The defendant cannot rely on section 50(1) of the CPA to justify the detention following unlawful arrest[23].

[131] The plaintiff pleaded that his further detention (after first court appearance and bail denied) was wrongful and unlawful in that the policeman involved in the investigation of the matter against the plaintiff knew and failed in his/their duty of care to inform the relevant public prosecutors dealing with the matter that there were no such grounds or justifications and indeed no objective facts linking the plaintiff to the alleged crime of possession of a dangerous weapon; the police failed to take any steps whatsoever to ensure that the plaintiff be released from the detention as soon as possible.

[132] Apart from the admission by the defendants that the plaintiff was denied bail and that he was further detained from 23 September 2019 to 9 October 2019 at the Johannesburg Prison and that the charges were eventually withdrawn, neither the first nor the second defendant adduced any evidence justifying or explaining the reasons for the denial of bail at the first appearance in court, nor did they lead any evidence justifying the further detention of the plaintiff.

[23] Korkie v Minister of Police (2129)/2020) [2022] ZAECGHC 2, at [31]

[133] No evidence was led as to what the arresting officer or the investigating officer put before the Court at the first appearance. No evidence was led as to the action or inaction of the prosecutor. No evidence was led as to the magistrate's reasons for remanding the case and ordering further detention and/or denying bail. No evidence was led as to what the Court considered or had before it. From the evidence that was adduced, the docket consisted of brief statements which were not made under oath.

[134] The SCA in Minister of Safety and Security and another v Ndlovu held the defendants' case suffered fundamentally due to evidentiary shortcomings, (they called the police captain and the prosecutor). According to the prosecutor he relied on the information of no fixed address to motivate that bail ought not be granted.

[135] In this matter, neither the first nor the second defendant has discharged the onus that rests on them of adducing evidence of acceptable reasons and just cause justifying the further detention of the plaintiff after the first appearance at court.

[136] This Court thus finds that the first defendant and the second defendant are jointly and severally liable to the plaintiff for the second period of detention from 23 September 2019 to 9 October 2019 during which the plaintiff was detained at the Johannesburg Prison.

[137] The onus of proving malicious prosecution is borne by the plaintiff. In this matter I find that the plaintiff has not discharged the onus and thus the claim for malicious prosecution is dismissed with no order as to costs.

Quantum of general damages for Unlawful Arrest and Detention.

[138] The liberty of an individual is a fundamental right which should be jealously guarded at all times and there is a duty on the courts to preserve the right against infringement – *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707 B.

[139] In the matter of *Mahlangu* (supra) the Constitutional Court noted that damages are awarded to deter and prevent future infringement of fundamental rights by organs of the State[24].

[140] In the assessment of damages for unlawful arrest and detention it is important to bear in mind that the purpose is not to enrich the aggrieved party but to offer a much needed solatium for injured feelings. It is crucial to ensure that the damages awarded are commensurate with the injury inflicted. However such awards must reflect the importance of the seriousness with which and arbitrary deprivation of liberty is viewed in our law. *Minister of Safety and Security v Seymour* 2006 (6) Sa 320 (SCA) Par 17; *Rudolph and Others v Minister of Safety and Security* 2009 (5) SA 94 (SCA) Par 26-29.

[141] In *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at page 535G – 536B the then court held:

> "It should be emphasised, however. that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration."

[142] In the matter of *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at page 287E the court held as follows: "…*the Court has to do the best it can with the material available, even if, in the result, its award might be described as an*

[24] Mahlangu above N 18 Par 50

informed guess. I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff but must not pour our largesse from the horn of plenty at the defendant's expense."

[143] In the matter of *Woji*[25] (supra) the court awarded R500 000 for 13 months detention.

[144] In *De Klerk* [26]the court awarded R300 000 (current value approximately R389 000) for 8 days detention.

[145] In *Gqunta v Mininste of Police* 2020 (8K6) QOD 42 (ECG) R50 000 (current value approximately R63 000) awarded for 2 days detention.

[146] In *Rikhotso v Minister of Safety and Security* 2020 (8K6) QOD 54 (ECG) R140 000 (current value is approximately R176 000) was awarded for 4 days detention.

[147] In *Sibuta and Another v Minister of Police and Another* 2020 (8K6) QOD 58 (ECG) the court awarded R470 000 (current value is approximately R728 000) for 16 days detention.

[148] In *Mahlangu* (above) R550 000 was awarded for approximately 8 months detention.

[149] The plaintiff stated that he was hand cuffed in a public place, he was detained in a cell with two other men without a functioning toilet, no showering facility as there was no water, poor food and limited drinking water, no clean blankets.

[150] The further detention exposed him to great humiliation having to be stripped of clothing in front of everyone and put in a cell with about 30 other people. Due to the stigma of arrest and detention he was precluded from participation in his church and his charity work. He was deprived of liberty for a total of 21 days. He never received an apology or any explanation.

[25] Woji above N 14
[26] De Klerk above N 17

[151] Having considered all the factors, the Court is of the opinion that an amount of R125 000 is suitable compensation for the period of detention from 19 September 2019 to 22 September 2019, payable by the *first defendant*.

[152] In respect of the further detention from 23 September 2019 to 9 October 2019, the amount of R425 000 is payable by the first and second defendant jointly and severally, the one paying the other to be absolved.

Order

The court makes the following order :

1. The first defendant is to pay to the plaintiff the sum of R125 000;

2. The first and second defendant jointly and severally, the one paying the other to be absolved, are to pay to the plaintiff the sum R450 000;

3. Interest is to accrue of the aforesaid amounts at the prescribed legal rate calculated from the date of service of summons;

4. The first and second defendants are to pay the party and party costs of suit on the High Court scale including counsel's costs on Scale C.

C VALLARO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff:	Ms Mamitja instructed by Belcher Attorneys
For the Defendants:	Mr Maimela instructed by the State Attorney