THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 154/2024

In the matter between

TRISCE JANE VAN DER NEST NO **APPELLANT**

(In her representative capacity of
Estate Late Lend Mogapi 6914/2023)

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Van der Nest NO v Minister of Police* (154/2024) [2025] ZASCA 42 (10 April 2025)

Coram: MOCUMIE, SCHIPPERS and COPPIN JJA and MUSI and VALLY AJJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 10 April 2025 at 11h00.

Summary: Civil procedure – whether a court of appeal can raise an issue *mero motu* – Interpretation of s 39(2) of the Civil Proceedings Evidence Act 25 of 1965 – unlawful arrest and detention – quantification of general damages – whether an appellate court can substitute an award of the high court on appeal.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Reddy AJ, Djaje AJP and Mfenyana J concurring, sitting as a court of appeal):

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraph (i) of the order of the full court is set aside and substituted with the following:

'The defendant is ordered to pay the plaintiff an amount of R50 000 (fifty thousand) plus interest, at the prescribed rate per annum, reckoned from the date of the trial court's judgment to the date of payment.'

JUDGMENT

Mocumie JA (Schippers and Coppin JJA and Musi and Vally AJJA concurring):

[1] This is an appeal against the judgment and order of the full court of the North West Division of the High Court, Mahikeng (per Reddy AJ, with Djaje AJP and Mfenyana J concurring) (the high court). The issues for determination are (a) whether the full court correctly raised, *mero motu,* as an issue the swearing-in of a witness at the trial (b) whether the full court correctly concluded that the witness was not properly sworn-in, as contemplated in s 39(2) of the Civil Proceedings Evidence Act 25 of 1965 (the Act) and (c) the quantification of damages on appeal. The appeal is with special leave of this Court. It is unopposed and the parties agreed that it may be disposed of without oral argument on the appellant's papers, as contemplated in s 19*(a)* of the Superior Courts Act 10 of 2013 (the SC Act).[1]

[1] Section 19(*a*) of the Superior Courts Act 2013 provides that the Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any other powers, dispose of an appeal without the hearing of oral argument.

[2] On 11 November 2019, around 18:00, the plaintiff in the high court, Ms Lend Mogapi (Ms Mogapi), was arrested by Warrant Officer Kgananyane (W/O Kgananyane), without a warrant, at her home in Stella, North West province while she was with her partner, Mr Maruping. She was arrested with her neighbours looking on, which embarrassed and humiliated her. She was put in the back of the police van in which there was a rifle. The police drove at high speed through potholes and in the darkness to the police station. She experienced pain in her right leg due to an old injury she had sustained. She was frightened.

[3] W/O Kgananyane was acting in the course and scope of his employment as a police officer in the South African Police Service. He informed Ms Mogapi that she was being arrested for possession of suspected stolen property. She was transported to and detained at the Pudimoe police cells. She was held there until 12 November 2019, around 15:00, when she was released on warning.

[4] Ms Mogapi was not given food or water. The police cells were filthy and dusty and the toilet was not working. She was detained in a cell where she had to sleep very close to the toilet bowl. There was no mattress. The blankets she was given were dirty, and as a result, her body itched. Although she was alone in the cell, there were male detainees in a cell close by. They could see her and insulted and hurled profanities at her. She had no privacy. She was not allowed to leave the police station to use the bathroom privately. She was not offered a chair to sit on. She sat on a toolbox-like structure.

[5] The police gave no explanation why she had been arrested in public. They did not explain why they did not use any of the other methods provided for in s 38 of the Criminal Procedure Act 51 of 1997 (the CPA) to secure her attendance at court and why they had to resort to the following extreme measures: arresting her publicly, transporting her in the back of a police vehicle, detaining her for a day and a half in a police cell, approximately 98,7 kilometers away from her home.[2] Ms Mogapi has regrettably passed

[2] Section 38 of the Criminal Procedure Act 51 of 1977:
‘Methods of securing attendance of accused in court

away before the hearing of this appeal. She is now substituted by the Executor of her estate, Ms Trisce Jane van der Nest NO.

[6] Following her ordeal, Ms Mogapi issued summons in the high court for general damages suffered as a result of the unlawful arrest and detention, in the amount of R500 000 (five hundred thousand rand), plus interest. The matter proceeded to trial on both merits and quantum before Snyman J. The Minister of Police (the Minister), as the responsible Minister under whom W/O Kgananyane worked, called three witnesses. Ms Mogapi testified in person and called one witness, her partner, Mr Maruping, in support of her case. The high court found that the arrest and detention of Ms Mogapi were unlawful. On 30 May 2022, it granted an order against the Minister in the amount of R15 000 (fifteen thousand rand). It did not order interest to be paid. Aggrieved by this decision, Ms Mogapi, applied for leave to appeal to the full court. On 20 January 2023, Snyman J granted leave to appeal the correctness of the amount and the failure to grant interest on the amount awarded.

[7] On 9 June 2023, the full court heard the appeal and reserved judgment. Whilst writing the judgment,[3] Reddy AJ (as he then was), writing for the court, concluded that the oath had not been properly administered to the appellant during the hearing in the high court. On 22 August 2023, Djaje AJP issued a directive in which she requested the parties to submit additional heads of argument addressing this issue. Counsel for Ms Mogapi apparently could not obtain instructions from her and did not file heads of argument.

[8] The full court held that the oath was not properly administered to Ms Mogapi. It referred to 39 read with ss 40 and 41 of the Act, and concluded:

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(1) Subject to section 4(2) of the Child Justice Act, 2008 (Act 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.
(2) . . . ’

[3] The judgment is reported on SAFLII as *Mogapi v Minister of Police* (CIV APP FB 02/23) [2023] ZANWHC 189 (16 October 2023).

'[w]hat is apparent from section 39(1) of the CPEA was to make it explicit that a witness who was about to testify should speak the truth, the whole truth and nothing but the truth. In the administering of the oath on the appellant, the words impressing on the appellant to tell the truth do not feature, in whatever form. The oath was not properly administered as there was no innovation, to tell the truth, and as a result of the oath not being properly administered. Ms Mogapi's evidence did not have the status and character of admissible evidence.'

[9] Consequently, the full court set aside the order of the high court and remitted the matter for trial before another presiding officer on both the merits and quantum. This is the issue to which I turn before considering the actual issue that was before the full court for determination, namely: the quantum of the damages awarded by the high court and the interest on the quantum which the high court omitted to add to its order.

[10] The approach to interpreting legislative provisions, whether acts or regulations made pursuant to an Act, is well settled. It was recently summarised in *AmaBhungane Centre for Investigative Journalism NPC v President of South Africa*:[4]

'[O]ne must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.' (Footnotes omitted.)

[11] Section 39(1) of the Act provides that '[n]o other person other than a person referred to in section *forty* and *forty-one* shall be examined as a witness otherwise than upon oath'.[5] Section 39(2) stipulates that '[t]he oath to be administered to any person as a witness *shall* be administered in the form which most clearly conveys to him the

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[4] *AmaBhungane Centre for Investigative Journalism NPC and Another v President of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.
[5] Section 39(1) of the Civil Proceedings Evidence Act 25 of 1965.

meaning of the oath and which he considers to be binding on his conscience'. Section 40 stipulates:

'40 Affirmations in lieu of oaths

(1) In any case where any person who is or may be required to take an oath object[s] to do so, it shall be lawful for such person to make an affirmation in the words following:

"I do truly affirm and declare that"

(here insert the matter to be affirmed or declared).

(2) Any person authorized, required or qualified by law to take or administer an oath shall accept, in lieu thereof, an affirmation or declaration as aforesaid.

(3) Such affirmation or declaration shall be of the same force and effect as if the person who made it had taken such oath, and the same penalties and disabilities which are respectively in force in respect of and are attached to any false or corrupt taking and subscribing of any oath administered in accordance with section *thirty-nine*, and any neglect or refusal in regard thereto, shall apply and attach in like manner in respect of the false or corrupt making or subscribing respectively, of any such affirmation or declaration as in this section mentioned and any neglect or refusal in regard thereto.'

[12] Section 41 provides:

'41 When unsworn or unaffirmed testimony [is] admissible

(1) Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature or to recognize the religious obligation of an oath or affirmation, may be permitted to give evidence in any civil proceedings without being upon oath or affirmation, if, before any such person proceeds to give evidence, the person presiding at the proceedings in which he is called as a witness, admonishes him to speak the truth, the whole truth and nothing but the truth and administers or causes to be administered to him any form of admonition which appears, either from his own statement or from any other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of inhuman, immoral or irreligious nature, obviously unfit to be administered.

(2) Any person to whom an admonition has been administered as aforesaid, who in evidence willfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, shall be deemed to have committed that offence, and shall upon conviction be liable to such punishment as is by law provided as a punishment for that offence.'

[13] A plain reading of these provisions shows that there are different ways in which a witness may be sworn in before they testify in a court of law. Where they are incapacitated to testify, they may be admonished. The importance of the provisions is for the judicial officer to get a sense that the witness concerned understands that they are about to give evidence; that what is required is the truth; and that they appreciate that they must speak the truth. Although s 39(2) uses peremptory language, 'shall', apart from the exceptions mentioned in ss 40 and 41, the exercise envisaged is not formalistic to the point of preferring form above substance. The provisions must be applied practically, supported by the trial court's own observance of the witness when they are about to testify. Section 39(2) must be read in context with ss 40 and 41.

[14] The context is also important. It is common cause that the full court found that the Minister conceded liability. The Minister did not challenge the high court's findings on the merits or the oath taken by the witnesses. It is Ms Mogapi who challenged the amount of the damages awarded by the high court. The issue (of the witness not being sworn in) did not arise during the argument, nor was it ventilated at all in the open court; the high court or the full court. It was not canvassed in the papers. The high court and the parties were satisfied that all the witnesses, including Ms Mogapi were properly sworn in. The record shows that Ms Mogapi was asked if she objected to taking a prescribed oath. And she clearly stated that she had no objection to taking the prescribed oath, indicating that she knew what it meant to take an oath or the import of taking an oath. Furthermore, she was asked whether she considered the oath to be binding on her conscience. She was asked to raise her right hand and say, 'So help me God,' and she did.

[15] Assuming the full court was correct to prefer a detailed process which it did not see on the record, it correctly raised the issue with the parties as it was duty-bound to do. Counsel for Ms Mogapi sought an indulgence to get instructions and to peruse the transcribed record to appreciate the issue and respond adequately, within the three days provided. He raised an important aspect, namely, the state of transcribed records, which tend not to be complete and do not give a verbatim account of what happened in court. Since Ms Mogapi gave evidence through an interpreter, some words might not have been

translated onto the record, he argued. Thus, he expressed a need to thoroughly peruse the transcribed record to determine what exactly had happened.

[16] The answer to the request by the full court in the judgment was this:

'The submissions and proposals for further investigations as requested by Mr Nienaber, the attorney of record, for the appellant does not take the matter further. The issue that was alluded to in the Directive by this Court is crisp. The complete record is before the court. No further affidavits need to be deposed to. In the instance of the appellant, the language service practitioner was not used as an independent conduit by the court a quo in the administering [of] the oath. The extracts from the record to be referred to set out the exchange that occurred in the administering of the oath. The submissions by Mr Nienaber that the record be listened to is of no moment, given the record is laid before this Court.'

[17] As indicated, this was the first time the parties got to know how critical the issue was to the determination of their appeal, to the extent that Ms Mogapi's appeal on both the merits and quantum was dismissed with costs. I have already indicated that s 39(2) cannot be interpreted as the full court has done, regardless of the dire consequences of setting aside the entire proceedings on a technicality; particularly when the Minister conceded the merits as stated in the full court's judgment. The context tells a different story: Ms Mogapi, as observed by the trial judge and all legal representatives, in the absence of any objection raised by any of the parties, must be deemed to have been properly sworn in.

[18] The issue which the full court did not determine, as it was supposed to, revolves around the crisp issue of the quantum. Ms Mogapi was not given an opportunity to go through the transcribed record to give a proper account of what exactly transpired. The submission on her behalf that the interpreter's translation may not have been recorded properly is not far-fetched. The full court denied her constitutional right to be heard before any decision could be made. Thus, the full court breached that right by delivering the judgment without all the information presented to it on the issue.

[19] As aptly stated in *S v Baadjies*,[6] which the full court cited, but failed to follow:

'Experience shows that even in cases where witnesses are much older than the complainant, the word 'oath' remains a nebulous concept, whereas the invocation to speak the truth is more readily appreciated and understood. *The transcript demonstrates unequivocally that the judge was satisfied that the complainant comprehended the difference between the truth and falsehood, and his admonishment that she speaks the truth was in my view sufficient to render the complainant's evidence admissible.'* (Emphasis added).

It follows that there is no basis for the full court to have declared the proceedings before the high court a mistrial on both the merits and quantum.

[20] This touches on the question of whether a court can, on appeal, *mero motu,* raise an issue which was not raised by any of the parties. The powers of an appellate court are circumscribed in terms of s 19 of the SC Act. It may: dispose of an appeal without hearing of oral evidence (s 19*(a)*); receive further evidence (s 19*(b)*); remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as it deems necessary (s 19*(c)*); and confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require (s 19*(d)*). Ms Mogapi was aggrieved with the order of the high court in respect of the quantum and she approached the full court in that regard.

[21] It is trite that courts adjudicate issues outlined by the parties in their pleadings, as was found by this Court in *Fischer and Another v Ramahlele and Others*.[7] It is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone. In some cases, the parties may expand the issues for determination by the way they conduct the proceedings. In others, the court may, *mero motu*, raise a question of law that emerges fully from the evidence and is necessary for the decision of the case, subject to the proviso: no prejudice will be caused to any party by its being decided.

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[6] *S v Baadjies* 2017 (2) SACR 366 (WCC) para 29.

[7] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13.

[22] It is, however, also trite that a court can also raise an issue *mero motu* where:[8] raising it is necessary to dispose of the matter, and it is in the interests of justice to do so, which depends on the circumstances at hand.[9] Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal with it.[10]

[23] As indicated, the full court raised the issue of Ms Mohapi's swearing-in. It was not raised by the parties at any stage. The parties were required to deal with that issue as per a directive that the Acting Judge President (AJP) issued. And the issue was decided, and judgment was delivered before the parties could respond. In principle and as precedent shows, there is nothing wrong with a court raising a point of law which the parties did not raise. The caveat is how a court proceeds to invoke this power. Fairness is paramount, and the trite principle of *audi alteram partem* is central. The principle, now enshrined in our Constitution in the Bill of Rights, requires, inter alia, that a person be given a fair hearing before their matter can be determined. Section 34 of the Constitution provides that every litigant is entitled to a fair public hearing before a court of law if such a litigant has a dispute which can be resolved by the application of the law. To the extent that Ms Mogapi, through her counsel, was not allowed to address the issue raised pertinently by the full court before it delivered judgment, the full court regrettably erred fundamentally. This, on its own, vitiates the entire proceedings.

[24] I now turn to the issue which was for determination before the full court which remains in abeyance. The assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained is not a mechanical exercise that has regard only to the number of hours a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be

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[8] *Booi v Amathole District Municipality and Others* [2021] ZACC 36; [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC); 2022 (3) BCLR 265 (CC).
[9] Ibid para 35.
[10] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) ; [2009] 1 BLLR 1 (CC) ; (2008) 29 ILJ 2461 (CC) para 67.

fair and reasonable compensation to award.[11] The award must be fair to both sides. The correct approach is to have all the facts of the particular case and to determine the quantum of damages on such facts.[12]

[25] In his heads of argument, counsel for Ms Mogapi submitted that this Court should not remit the matter to the full court as it would be an exercise in futility even if the full court did not deal with the issue on appeal before it. He submitted further that the issue of the merits was decided in favour of the plaintiff, Ms Mogapi, 'which finding was based on the defendant's own evidence. . . [M]oreover, this finding of Snyman J was never challenged by the defendant.' Counsel for Ms Mogapi further contended that the trial court, in a mechanical approach of awarding R15 000 per day, applied a one-size-fits-all approach, followed in the North West Division at the time, and which was recently criticised by this Court in *Motladile v Minister of Police (Motladile).*[13]

[26] In arriving at the amount of R15 000, the high court purportedly had regard to comparable cases.[14] It stated that it took into account the psychological effect of the detention on the plaintiff in that she was humiliated in front of her neighbours, the duration of the detention, that she was arrested and transported in a police vehicle as well as the humiliation of other detainees' shouting profanities at her in the holding cells. It then concluded that 'the quantum in the amount of R15 000 would be a fair and just amount'. It then granted costs in favour of Ms Mogapi but made no order on the interest payable on that amount.

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[11] *Motladile v Minister of Police* [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) para 17.
[12] *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA); 2009 (5) SA 85 (SCA) para 26.
[13] Op cit fn 11.
[14] *Tlhaganyane v Minister of Safety and Security* [2013] ZANWHC 12; *Solomon v Visser and Another* 1972 (2) SA 327 (C); *Areff v Minister van Polisie* 1977 (2) SA 900; *Lui Quin Ping v Akani* 2000(4) SA 68 (W); *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (Ck); *Seria v Minister of Safety and Security* [2004] ZAWCHC 26; 2005 (5) SA 130 (C); [2005] 2 All SA 614 (C). *Masisi v Minister of Safety and Security* [2010] ZAGPPHC 280; 2011 (2) SACR 262 (GNP); *Tyulu*; *Woji v Minister of Police* 2015 (1) SACR 409 (SCA); *Mahleza v Minister of Police and Another* [2019] ZAECGHC 137; 2020 (1) SACR 392 (ECG); and *Skosana v Minister of Police* [2021] ZANWHC 79.

[27] It is trite that in cases involving deprivation of liberty, the quantum of damages to be awarded is in the discretion of the trial court, to be exercised fairly, and generally calculated according to what is equitable and just, and on the merits of the case itself (*ex aequo et bono*). As a result, an appeal court should be slow to interfere, unless there are specific reasons to do so.[15] Also, no judgment can be all-embracing, and the omission of a specific factor from a judgment does not necessarily imply that the court *a quo* failed to consider that factor in exercising its discretion.[16] Furthermore, in the absence of material, demonstrable misdirection on the part of the trial court, its findings of fact must stand as presumptively correct.[17]

[28] The law on assessing damages for unlawful arrest and detention has been canvassed in comparable cases over the years. This Court stated the following in *Minister of Safety and Security v Tyulu:*[18]

'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 some much needed *solatium* for injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach, if slavishly followed, can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts. . . ' (Footnotes omitted.)

[29] In *Diljan v Minister of Police (Diljan),*[19] this Court stated:

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[15] *Neethling v Du Preez and Others; Neethling v Weekly Mail and Others* [1994] ZASCA 133; 1995 (1) SA 292 (A); [1995] 1 All SA 441 (A) at 301H.
[16] *R v Dhlumayo and Another* 1948 (2) SA 677 (AD) at 702.
[17] *S v Hadebe and Others* [1997] ZASCA 86; 1997 (2) SACR 641 (SCA) at 645E-F.
[18] Op cit fn 12 above para 26.
[19] *Diljan v Minister of Police* [2022] ZASCA 103; 2022 JDR 1759 (SCA) paras 18-19.

'The acceptable method of assessing damages includes the evaluation of the plaintiff's personal circumstances; the manner the of arrest; the duration of detention; the duration of the detention; the degree of humiliation which encompasses the aggrieved party's reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

…

Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in *Protea Assurance Co Ltd v Lamb*:

"It should be emphasised, however, that this process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation".'

[30] In *Brits v Minister of Police & Another*,[20] this Court further held :

'Although awards of damages made in previous decisions may serve as a guide in the consideration of an appropriate amount of damages for the injury resulting from unlawful arrest and detention, such awards are not to be followed slavishly, for every case must be determined on its facts. It must be borne in mind that the primary purpose of an award of damages for unlawful arrest and detention is not to enrich the aggrieved party but to offer him or her some solatium for their injured feelings.' (Footnotes omitted.)

[31] It is trite that once an appellate court finds that a trial court has not exercised its discretion judiciously in awarding damages, it must substitute the trial court's award of damages. This Court restated the approach of an appellate court to the question of whether it can substitute a trial court's award of damages in *Motladile*[21] as follows:

'The approach of an appellate court to the question of whether it can substitute a trial court's award of damages is aptly summarised by the Constitutional Court in *Dikoko v Mokhatla* as follows:

"…[S]hould an appellate Court find that the trial court had misdirected itself with regard to material facts or in its approach to the assessment, or having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate

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[20] *Brits v Minister of Police & Another* [2021] ZASCA 161; 2021 JDR 2998 (SCA) para 33.

[21] Op cit fn 11 above para 12.

court, it not only has the discretion but is obliged to substitute its own assessment for that of the trial court. In its determination, the Court considers whether the amount of damages which the trial Court had awarded was so palpably inadequate as to be out of proportion to the injury inflicted".'[22]

[32] I agree with counsel for Ms Mogapi that to remit the matter to the full court to consider the quantum would be an exercise in futility. With all the evidence on record, this Court is in as good a position as the trial court to make the determination. If all the peculiar circumstances of this matter are taken into account, and considering the comparable cases the high court referred to, damages between R500 000 and R50 000 were awarded, with the period of detention ranging between three months and twenty-four hours. There is no justifiable reason why the high court awarded R15 000. The disparity between the amount awarded by the high court and what is considered an appropriate award is striking. That justifies interference with the high court's award.

[33] In *Diljan*, for the unlawful arrest and detention for four nights, this Court, on appeal, awarded damages in the amount of R120 000. In *Motladile*, for the unlawful arrest and detention for four nights, damages in the amount of R200 000 were granted on appeal. In *Minister of Police v Page*[23] for the unlawful arrest and detention for one night, R30 000 was awarded as damages. From a survey of the cases, it is reasonable to conclude, without setting a bar, that the courts have awarded damages ranging from R15 000 to R30 000 per night, with awards varying in light of the circumstances of each case. The award must be just to reflect the importance of the fundamental constitutional right infringed, the right to freedom of movement and residence.[24] And in this instance the right to dignity and privacy.

[34] The following should be taken into account: the fairly short duration of the detention - just over 20 hours; the fact that the plaintiff did not suffer any further detention; 'the psychological effect of the detention on the plaintiff in that she was humiliated in front of

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[22] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC).
[23] *Minister of Police v Page* (CA 231/2019) [2021] ZAECGHC 22 (23 February 2019).
[24] Section 21 of the Constitution of the Republic of South Africa,1996.

the neighbours, that she was arrested and transported in a police vehicle as well as the humiliation of [them] shouting profanities at her in the holding cells'; that there was no justifiable reason to have arrested Ms Mogapi. Section 40 of the CPA states that a police officer may arrest a suspect without a warrant of arrest. The use of the word 'may' shows that a police officer upon arresting a suspect or accused person has a discretion to exercise any of the options. Not only arrest. On the undisputed facts, the arrest in itself was undoubtedly malicious, and the execution thereof despicable and humiliating.

[35] In following the awards made in previous comparable cases, as well as the deterioration in the value of the currency over the years, taking into account that eg in *Page*,[25] which was decided in 2021, the claimant was awarded R30 000, I regard R50 000 to be an appropriate award for Ms Mogapi's unlawful arrest and detention. It is important that all concerned, including the judiciary and legal practitioners of the North West division of the high court, take heed of this Court's findings in *Motladile,* and expressly disavow an approach that there is a 'one-size-fits-all' standard that is to be applied when determining the quantum in claims of this nature.

[36] Last, is the issue of interest. It is correct that the high court did not indicate the interest payable on the damages in its order. Section 2 of the Prescribed Rate of Interest Act 55 of 1975 prescribes that interest on damages is payable from the date of the judgment.[26] *Ex lege*, interest is payable on the costs granted.

[37] In the result, the following order is issued:

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraph (i) of the order of the full court is set aside and substituted with the following:

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[25] Op cit fn 23 above para 16.

[26] Section 2 of the Prescribed Rate of Interest provides that every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.

‘The defendant is ordered to pay the plaintiff an amount of R50 000 (fifty thousand) plus interest, at the prescribed rate per annum, reckoned from the date of the trial court’s judgment to date of payment.’

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B C MOCUMIE

JUDGE OF APPEAL

Appearances

For the appellant	A B Rossouw SC with D Smit
Instructed by	Nienaber & Wissing Attorneys, Mahikeng
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