



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 2388/2017

Reportable	Yes / No
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In the matter between:

PHILASANDE KINASE

PLAINTIFF

and

MINISTER OF POLICE

1ST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

2ND DEFENDANT

JUDGMENT

CENGANI-MBAKAZA AJ

A. Introduction:

[1] The plaintiff instituted action for damages in this court against the Minister of Police, (the 1st defendant) and the National Director of Public Prosecutions (NDPP), (the 2nd defendant). In respect of the 1st defendant, the claim is premised on unlawful arrest and detention by members of the South African Police Service (SAPS), through its

employees who acted within the scope of their employment with the 1st defendant. In respect of the 2nd defendant, the plaintiff withdrew the claim for malicious prosecution. This notwithstanding, the plaintiff holds the NDPP jointly liable with the 1st defendant for unlawful detention.

B. The Pleadings:

[2] On 30 May 2017, the plaintiff issued a combined summons, the particulars of which are summarised as follows:

(a) On 11 November 2015 at Efata School for the Blind, Mthatha, Eastern Cape, the plaintiff was unlawfully arrested without a warrant by the members of the South African Police Service attached to Central Police Station on allegations of murder. On 16 November 2015, he appeared before the Mthatha Magistrate's Court and was later released on bail on 25 February 2016 following numerous postponements of the matter.

(b) In addition, it is alleged that the 1st defendant failed to bring the plaintiff to court within 48 hours, therefore the period of detention from 11 November 2015 to 25 February 2016 was unlawful and wrongful.

(c) In consequence of the aforesaid, the plaintiff alleges that he suffered damages as follows:

(i) R50 000(Fifty thousand rand) for unlawful arrest.

- (ii) R5950.00 (Five million nine hundred and fifty thousand rand) for unlawful detention and or/malicious deprivation of liberty.

[3] In the specificity of the 1st defendant's amended plea, the 1st defendant denies that the arrest and subsequent detention were unlawful. To substantiate:

- (a) The 1st defendant alleges that the 48-hour period did not fall on a regular court day. As a result, the plaintiff was brought to court no later than the first court day after the 48-hour period had expired.
- (b) After his arrest, the plaintiff did not apply for bail instead the matter was postponed in order to consider his application for legal aid.
- (c) The 2nd defendant denies that the NDPP was jointly liable with the 1st defendant for unlawful detention of the plaintiff.

[4] The trial proceeded on the basis that there would be no separation between merits and quantum.

[5] Counsel for the 1st defendant admitted that the onus rests on the defendant to justify arrest and subsequent detention. He further admitted that the duty to begin consequently rests with them.

C. The first defendant's case:

[6] The 1st defendant relied on the evidence of Warrant Officer Ndzwaiba (the arresting officer) who testified that he had been working for the SAPS, attached to the detective unit for 27 years. From 28 July 2015, he was stationed at Madeira Police Station carrying out investigations into various crimes.

[7] On 28 July 2015, one of the educators, Ms Nodumo Mzimane (the deceased) at Efata School for the Blind and Deaf (the school) was tragically stabbed to death. He was a resident in the school at hostel number 6. On 06 November 2015, the arresting officer arrested Mr Luthando Silwana (Silwana), Mr Lunga Khimbili (Khimbili) and Mr Zukile Danti (Danti) on allegations of murder. All these suspects allegedly made warning statements to one Sergeant Ngqokomo.

[8] In his alleged warning statement, Khimbili denied the allegations against him and averred that prior to the killing of the deceased, a meeting between him, the plaintiff, Silwana, Siwaphiwe and one of the teachers was held. In that meeting, the teacher hired them to kill the deceased because she felt she was a puppet at school. Although they initially refused to carry out the mandate, they later agreed to the killing the deceased. On the night of the deceased's murder, he was in the school with Danti when he noticed Silwana, Siwaphiwe and the plaintiff getting inside hostel number 6 using the hole of a door that was no longer in use.

[9] Khimbili allegedly stated that when they came out of hostel number 6, the plaintiff and one Siwaphiwe went to the river. He further indicated that he never participated in the murder but was later informed by Silwana that the person who committed the actual stabbing of the deceased was the plaintiff.

[10] Silwana allegedly made a warning statement and claimed to have seen the three men whom he initially believed to be thieves entering the hostel where the deceased lived. These men were unknown to him. Danti, in his alleged warning statement, confirmed that he also saw the plaintiff and others using the hole of the unused door to enter Hostel number 6. He indicated, however, that he saw others getting out of the hostel but never observed what happened to the plaintiff thereafter.

[11] The arresting officer testified that on 6 November 2015, the three suspects appeared in court and the case was postponed until 18 November 2015. The Senior Public Prosecutor (SPP), Mr Xhayimpi, who was in control of the police docket at that stage, instructed him to arrest two other suspects. Upon reading the warning statements, he proceeded to arrest the Deputy Principal of the school and the plaintiff. In the process, he was advised by one member of the school personnel that he would need the services of an interpreter because the plaintiff was deaf and mute. He sought an interpreter Mr Mgudwana Fumaneka whom he advised to also assist in the court proceedings.

[12] The interpreter could not make it to court because he was never delegated to do so by his superiors. When the plaintiff appeared in court, the public prosecutor advised

the court that the matter fell under Schedule 6 in terms of bail legislation. The plaintiff was further detained at Mthatha police station.

[13] The arresting officer testified further that the conditions in the cells were good. He ensured that the plaintiff received clean blankets. The plaintiff and his co-accused were incarcerated in different cells because of their physical disabilities.

[14] In cross-examination, he confirmed that the eyewitness Ma-Efese Ndziwela (Ndziwela) did not mention the plaintiff as one of the perpetrators. When asked whether it is a standard procedure to arrest a suspect based on the information received from other suspects, the arresting officer testified that the procedure is adequate. In support of this statement, the arresting officer testified that in that scenario the court is at liberty to decide on the admission of such evidence.

[15] When asked why he failed to exercise his discretion not to arrest in view of the fact that Ndziwela did not implicate the plaintiff as one of the perpetrators, the arresting officer testified that the plaintiff was implicated by other suspects. He denied that the arrest and subsequent detention were unlawful.

D. The 2nd defendant's case:

[16] In November 2015, Ms Siphokazi Maarman, the prosecutor, who is now a State Advocate in the High Court Mthatha, was employed by the National Prosecuting

Authority (NPA) at Mthatha Magistrate's Court. Her duties entailed reading new cases and deciding whether to institute prosecution or not.

[17] On 16 November 2015, she received a case docket involving the murder of the deceased. The plaintiff was joined on the charges that were already preferred against the others. She read the statement and considered its contents. On examination, she found that the plaintiff was implicated by two suspects, Danti and Khimbili. Although these were warning statements, the two suspects corroborated each other to the effect that the plaintiff was one of the perpetrators of the crime of murder. In addition to the statements, he further considered that the deceased had died and a knife which was mentioned in the warning statements was used. After consideration, she decided that there was a prima facie case of murder, and then enrolled the matter.

[18] She explained that according to their book titled 'Handy Hints' which is extracted from the National Prosecuting Authority Act (NPA Act) and NPA policy directives, she was authorised to consider warning statements. In intensification, she testified that warning statements are also a valuable tool to decide whether to prosecute or not. The admissibility or otherwise of a warning statement is something that is ventilated in a trial-within-a-trial when the court proceedings are in motion, so she testified.

[19] The prosecutor testified that when the plaintiff appeared before the court, she informed the magistrate of the charges preferred against him. She asked the court to explain his rights to legal representation including his rights to apply for bail. She further informed the court that the matter fell under Schedule 6 in terms of bail legislation.

Additionally, she advised the court that the murder was planned and was committed by a group in furtherance of a common purpose. The prosecutor explained that in light of all this information, the onus was placed on the plaintiff to convince the court that there existed exceptional circumstances which in the interest of justice warranted his release on bail.

[20] The court conveyed all this information to the plaintiff, and he elected to apply for a legal aid attorney. The legal aid attorneys were not in court at that stage. The matter was postponed for the processing of an application for a legal aid attorney. When asked how the court conveyed all this information in the absence of a sign language interpreter, the prosecutor testified that the interpreter who was present in court that day came closer to him and explained the process as directed by the court. She further testified that she never opposed the release of the plaintiff on bail.

[21] When asked to explain why the matter was postponed to different dates, she indicated that four postponements were at the instance of the plaintiff. He sought the services of a sign language interpreter. The Department of Justice (DoJ) is authorised to offer such services and not the NDPP. On the other dates, it was postponed due to the lateness of the hour in bail proceedings. In one instance the delay of the matter was due to the the absence of the presiding officer to conduct the bail proceedings. According to her evidence, the non-availability of the legal aid attorney also contributed to the delays in the matter. According to her evidence, from the date of the first appearance until the plaintiff was granted bail, the NDPP was always ready to deal with the pre-trial issues which included bail proceedings.

[22] Under cross-examination, the prosecutor conceded that a warning statement is not taken under oath and therefore carries less evidential weight than a sworn statement. When asked if it was enough to enrol the matter based on the warning statement, she confirmed. She explained the processes that the NDPP embark on before a matter is tried. She testified that enrolment is a procedure that the NDPP adopts when there is a prima facie case. When the matter is enrolled, the investigation continues. When one decides to prosecute, evidence beyond reasonable doubt must be obtained. She further stated that they had an option to utilise one of the suspects as a witness in terms of Section 204 of the Criminal Procedure Act 51 of 1977 (the CPA). According to her testimony, the matter had a public interest and due to the prima facie case, that existed in the docket, they had to enrol the matter. Certain information would have been lost had the matter not been enrolled.

E. The plaintiff's case:

[23] The plaintiff testified that since he had a hearing disability, he had to be enrolled at Efata School for the Blind and Deaf in Mthatha. In 2015, he was doing grade 11. On 12 November 2015, he was at the hostel when two police officers approached him. They asked that he should dress up. They handcuffed and took him to the police car.

[24] He then found three male persons in the car. They were taken to Savoy Correctional Centre where certain questions were posed to them to answer. Upon his arrest, it was asserted to him that he had killed a human being, which he denied. He

was later taken to Central police station where he was asked to speak, and failure to do so would result in him being denied bail in court.

[25] During his interrogation, he screamed because he felt a lot of discomfort due to being handcuffed. The plaintiff explained that he appeared in court on 16 November 2015. After the court appearance, the matter was postponed on numerous occasions until he was granted bail on 26 February 2016. He failed to write his school examination due to incarceration. In the following year, he tried to be enrolled at school, but his efforts failed. There was a stigma attached to him that he had killed a human being.

[26] Under cross-examination, the plaintiff testified that he was able to speak, and the sign language interpreter was sought for Siwaphiwe. He stated that he communicated well with the arresting officer. He maintained that there was no evidence to justify his arrest because Khimbili and Danti lied about him in their warning statements. When asked whether to blame the arresting officer or Khimbili and Dantile, he testified that the arresting officer ought to have made a follow-up and conducted a proper investigation before arrest.

[27] When the magistrate's court record was read to him, the plaintiff conceded that the postponements were not at the instance of the NDPP. In his warning statement the plaintiff made a detailed statement where he narrated that on the day of the incident, he went to the school and to the soccer fields to practice football. He explained that when the time for dinner arrived, he went straight to the kitchen to get his food. He denied

having killed the deceased and suspected that Khimbili, Silwana and Danti might have killed the deceased because they were troublesome boys at school.

F. Issues:

[28] Although the date of arrest was a contentious issue during the trial, in his heads of argument counsel for the plaintiff concedes that the plaintiff was arrested on 12 November 2015. It is common cause that the plaintiff was released on 26 February 2016.

[29] The issues for determination are:

- 29.1 Whether the arrest of the plaintiff and his subsequent detention were lawful;
- 29.2 Whether the 1st defendant is liable for the wrongful arrest and detention of the plaintiff from 12 November 2015 to 15 November 2015 and;
- 29.3 Whether the 1st and the 2nd defendants are jointly liable for the post-court appearance detention of the plaintiff from 16 November 2015 to 26 February 2016.

G. The law:

[30] It is well established that the onus rests on a police officer to justify arrest. In *Minister of Law-and-Order v Hurley and another*¹, Rabie CJ held:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require 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.”

[31] Section 40(1) (b) of the Criminal Procedure Act 51 of 1977 (CPA) prescribes arrest without a warrant as is relevant in this case. The Section reads:

“A peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody.”

[32] The Supreme Court of appeal in *Minister of Safety and Security v Sekhoto*² reiterated the jurisdictional facts as set out in *Duncan v Minister of Law and Order*³ as follows:

- (a) the arrestor must be a peace officer;
- (b) he must entertain a suspicion;
- (c) the suspicion must be that the suspect has committed a Schedule 1 offence of the CPA;
- (d) such suspicion must be based on solid grounds

¹ 1986 (3) 568 (A) at 589 para-E-F.

² 2011(1) SACR 315 (SCA).

³ 1986 (2) SA 805 (A) 818 G-H.

When these facts are complied with, the arrest is deemed lawful.

[33] In *Mabona & another v Minister of Law and Order & others*⁴, Jones J explained how a reasonable suspicion is formed and what it entails. First, he held, the test is an objective one and requires a determination on whether or not a reasonable person in the arrestor's position and having the same information would have considered that there were 'good and sufficient grounds' for suspecting that the arrestee had committed a Schedule 1 offence. Secondly, the arrestor is required to analyse and assess the quality of the information critically and not accept it without checking it where it can be checked. Thirdly, while the section requires 'suspicion but not certainty', that suspicion must be based 'upon solid grounds' because if it is not, it is 'flighty or arbitrary, and not a reasonable suspicion'.

[34] In *Biyela v Minister of Police*⁵, the court established that the test of whether a suspicion is reasonable is objectively justiciable. Musi AJA said,

"[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information." (my underlining)

⁴ 1988 (2) SA 654 (SE) at 658E-H

⁵ 2022 (1) SACR 235 (SCA) at para 34 -35.

[35] It is well settled that once the jurisdictional facts are established, the question of discretion on whether to arrest or not arises. Harms DP in *Sekhoto*⁶ matter set some limits of the reasonable suspicion discretion, he held:

“Peace officers are entitled to exercise this discretion as they see fit, provided they stayed within the bounds of rationality.”

[36] The onus rests on the plaintiff to prove that the discretion to arrest was exercised improperly⁷.

[37] Tritely, the detention is, in and by itself, prima facie unlawful. The onus rests on the detaining officer to justify the detention. Section 12(1) (a) of the Constitution of the Republic of South Africa⁸ (the Constitution) guarantees the right to be free from unjustified detention. Everyone has the right to personal security and freedom which includes the right to be free from arbitrary and unjustified deprivation of liberty. Section 7(2) of the Constitution provides that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights.

⁶ Supra note 2 at para 42.

⁷ Supra note 2.

⁸ Act 108 of 1996, the Constitution

[38] In *McDonald v Kumalo*⁹, Graham JP re-iterated that, the object of the arrest of an accused person is to ensure his attendance to court in answer to a charge, and not to punish him for an offence for which he has not been convicted.

[39] Section 50 of the CPA deals with the procedure to be adopted after a person has been arrested for any other reason or for allegedly committing an offence. In terms of Section 50(1) the procedure below is imperative:

- (a) Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place which is expressly mentioned in the warrant.
- (b) A person who is in detention as contemplated in paragraph (d) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.
- (c) Subject to paragraph (d), if such an arrested person is not released by reason that-
 - (i) Bail is not granted to him or her in terms of Section 59A, he or she shall be brought before court as soon as reasonably possible, but not later than 48 hours after the arrest.

⁹ 1927 AD 293 at 301

[40] In *Minister of Safety and Security v Magagula*¹⁰, the Supreme Court of Appeal emphasized the need to distinguish between the period of arrest and an accused's first appearance in court, on the one hand, and the period between first appearance and ultimate release, on the other. The case for unlawful detention in respect of the first period, said Lamont AJA, is dependent upon the failure of the authorities to establish that the arrest was lawful. In respect of the second period, however, the legality of detention depends upon the court's orders.

H. The parties' contentions:

[41] All the parties submitted written heads of arguments and raised very significant points which assisted the court in arriving at a decision in this matter. Gleaning from the plaintiff's heads of arguments the most crucial point of criticism revolves around the warning statements which were allegedly obtained from the suspects who implicated the plaintiff in the commission of the crime of murder. Mr Mdeyide, counsel for the plaintiff argues that these statements were obtained by Sgt Ngqokoma who presented no evidence to indicate the circumstances under which such warning statements were taken.

[42] A reasonable person in the position of Ndzwaiba would have arranged an interpreter and personally interviewed the other accused about the statement before the arrest of the plaintiff, so he argues. In amplification, counsel referred to Section 219A of the CPA which entails,

¹⁰ *Minister of Safety and Security v Magagula* (991/2016) [2017] ZASCA 103 (6 September 2017)

“Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been made freely and voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence.”

[43] Referring to the case of *JE Mahlangu and Another v Minister of Police*¹¹, counsel argues that an extra-curial statement by an accused is inadmissible against a co-accused. Considering the aforesaid, counsel contends that the arrest of the plaintiff and his subsequent detention were unlawful.

[44] He further argues that the public prosecutor ought to have informed the magistrate on the first court appearance that there was not enough evidence to justify a further detention of the plaintiff. Had the magistrate been informed of the limited information that was obtained in the police docket, the magistrate would have ordered no further detention of the plaintiff, so the argument continues. In a nutshell, counsel holds the NDPP jointly liable with the 1st defendant for post-court appearance detention of the plaintiff.

[45] Mr Halam, the 1st defendant’s counsel, on the other hand, argues that the arresting officer had a reasonable suspicion that the plaintiff had committed murder which is a Schedule 1 offence. The police had no obligation to analyse and assess the quality of the information before effecting the arrest. Referring to the case of *Mawu v*

¹¹ 2021 (2) SACR 595 (CC)

*Minister of Police*¹², he submits that suspicion is nothing more than a state of conjecture where proof is lacking, and it arises at or near the starting point of an investigation. Referring to *Biyela's*¹³ matter, he contends that the admissibility of the statements made by other suspects was not a determining factor for purposes of arrest.

[46] Counsel's further contention is that the police had no control over the detention or release of the plaintiff after his first appearance in court. On his first appearance, the Magistrate was empowered in terms of bail legislation to make a ruling on whether the plaintiff ought to be released on bail. The plaintiff bore the onus to establish the existence of exceptional circumstances which in the interest of justice permitted his release on bail. To impose liability on the police for the entire period of detention, in the circumstances of this matter, would be exceeding the bounds of reasonableness, fairness and justice. It would be unfair and unjust to impute liability to the police, so he proposes.

[47] Ms Nhantsi, counsel for the second defendant raises similar submissions to those made by the first defendant's counsel. She submits that it was not in the interest of justice to release the plaintiff on bail on his first court appearance because he was faced with a Schedule 6 offence. It should be noted that the public prosecutor made her submissions to the court regarding the nature of the charges that were levelled against the plaintiff and his erstwhile co-accused. The plaintiff sought the services of a sign language interpreter, so she argues.

¹² 2015 (2) SACR 14 (WCC)

¹³ Supra note 5.

I. Evaluation of evidence:

[48] I now deal with the arrest and detention of the plaintiff from 12 to 15 November 2015. It is common cause that before effecting arrest, warrant officer Ndzwaiba was a peace officer. It is not in dispute that a teacher was killed on the school premises. In terms of the CPA, murder falls under Schedule 1, therefore it is fair to conclude that the peace officer entertained a suspicion that a Schedule 1 offence was committed.

[49] The identity of the perpetrator(s) who killed the deceased was the mammoth task that the arresting officer was faced with. Seemingly the arresting officer had a suspicion that the plaintiff participated in the killing of the deceased. In this regard, the arresting officer relied on the alleged warning statements made by the other suspects. Considering his evidence, it would seem that he formulated a suspicion based on the alleged warning statements that the plaintiff was involved in the killing of the deceased hence he arrested him.

[50] The evidence presented demonstrates that Danti, Khimbili and Silwana were deaf and mute. The warning statements of Danti, Khimbili and Silwana were obtained by Sergeant Ngqokoma. When the warning statements were obtained, it was alleged that the services of a sign language interpreter were utilised. Before the arrest of the plaintiff, no certificate or a statement was obtained from the sign language interpreter to confirm the truth and correctness of the alleged warning statements.

[51] If a trier of fact were to make an analysis on the warning statements allegedly made, Khimbili's statement, although highly incriminating falls short of a confession on a charge of murder because he denied having participated in the killing of the deceased. This having been said, if one were to evaluate the facts on a charge of conspiracy to commit murder his statement would amount to an inadmissible confession because of the proviso in terms of Section 219 of the CPA which entails that a confession made by one person is inadmissible against the other. Similarly, the admissions allegedly made by Danti highlight some weaknesses.

[52] I recognize the judicial remarks made in the *Biyela* matter that the standard of reasonableness is very low. In addition, I accept the submissions made by counsel for the 1st defendant that the admissibility of evidence is an issue to be decided by a trial court and may not be relevant for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence. I am also alive to the fact that an arresting officer could not be expected to use the same expertise that a court would when evaluating the evidence before it.

[53] This notwithstanding, it must be borne in mind that reasonableness is assessed objectively, and each case is decided on its own facts. The case under consideration has its distinguishing features. With respect, counsel for the 1st defendant omitted to deliberate that the court in *Biyela* qualified its remarks. In that matter, the court held that in order for a suspicion to be reasonable, it must be based on specific and articulable

facts or information. The court eloquently stated that the source of information must be credible and trustworthy.

[54] Considering the evidence of the public prosecutor, the tremendous pressure that the members of the SAPS and the NPA found them in when the teacher was killed in the school premises might have led to desperation to arrest the plaintiff come what may. In support of this statement, the information implicating the plaintiff was obtained from the suspects whom the plaintiff described as naughty and troublesome boys in the school. This fact was never placed in dispute by the 1st defendant. Their warning statements are not sworn statements and a concession was made that their statements carry less probative weight than the sworn statements. To further substantiate that SAPS was under tremendous pressure to arrest, the plaintiff was even induced to confess or admit the allegation and failure to do so would lead to him being denied bail.

[55] Ndziwela who gave a detailed sworn statement to the police declared what he observed and never implicated the plaintiff in the killing of the deceased. He categorically identified all the suspects by their names. In my considered opinion, the warning statements which were allegedly obtained from Danti, and Khimbili highlighted a weakness that the suspicion was not a reasonable one. Gleaning from his evidence, the arresting officer was in limbo pertaining to the circumstances under which these warning statements were obtained. I therefore conclude that the information where the suspicion was formulated was untrustworthy and unreliable.

[56] It is my view that before effecting arrest, the arresting officer ought to have obtained information from the sign language interpreter that was utilised when the

warning statements were obtained. This would have assisted him in confirming the truth and correctness of the warning statements made by Khimbili, and Danti. Alternatively, Sergeant Ngqokoma ought to have been called to testify before this court and clarify all the obscurities. Most importantly, the arresting officer ought to have arranged a sign language interpreter and personally interviewed the suspects that implicated the plaintiff in the commission of the crime of murder.

[57] In my view, this is the case where the arresting officer ought to have investigated the quality of the information first, verified it where it needs to be verified and exercised his discretion whether to arrest the plaintiff or not. I therefore conclude that the information that the arresting officer had was scant and a high degree of circumspection was required. The suspicion was in my respectful opinion groundless and the discretion to arrest was exercised irrationally.

[58] I am not in agreement with the counsel for the plaintiff's assertions that the plaintiff was never brought to court within 48 hours from the time of arrest. The 48-hour period fell on a weekend and the plaintiff was brought to court as soon as it was reasonably possible to do so. Despite all this, I find that the 1st defendant failed to justify the plaintiff's arrest on a balance of probabilities. It then follows that the detention of the plaintiff from the period 12 to 15 November 2015 was unlawful.

[59] I proceed to deal with the detention of the plaintiff from 16 November 2015 to 26 February 2016. The magistrate's court record exhibits that on his first appearance in court, the plaintiff was advised of his rights to apply for bail and legal representative. He

was formally informed of the charges preferred against him. He elected to apply for legal aid. The matter was postponed on numerous occasions until he was released on 26 February 2016. The plaintiff conceded that the delays in the matter were not at the instance of the NDPP. The undisputed evidence is that four postponements were occasioned by the absence of the services of the sign language interpreter which delay, if proved, can only be imputed to the DoJ. The absence of the legal aid attorney and the unavailability of the presiding officer to conduct bail proceedings also caused some delays in the matter. The public prosecutor was always ready to proceed with the bail hearing.

[60] The magistrate was advised that the offence was allegedly committed by a group of persons acting for a common purpose. It is common cause that the magistrate was further informed that the matter was planned or premeditated. In terms of bail legislation, the plaintiff was faced with a Schedule 6 offence. Section 60(11) (a) of the CPA reads:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release” (emphasis added)

[61] The word ‘shall’ demonstrates that the detention is peremptory, and the court can only release the suspect after having heard the evidence and exercise its discretion based on the circumstances of the case. As soon as it was practically possible to do so, the plaintiff was given an opportunity to adduce evidence in his bail hearing. He met the necessary threshold and was released on bail on 26 February 2016. Subsequent to his

release, he appeared in court when called upon to do so by the magistrate until the matter was ultimately withdrawn by the public prosecutor.

[62] The question is whether the detention of the plaintiff from 16 November 2015 to 26 February 2016 was solely out of the defendants' wrongful, malicious, unreasonable, unjustified, and unlawful conduct of the defendants' members. I am not in agreement with the plaintiff's counsel that there is a nexus between the actions of the defendants' members and the consequences at issue.

[63] In support of my statement, the following passage which is quoted from the matter of *De Klerk v Minister of Police*¹⁴ finds relevance in this matter, the following judicial remarks were made:

[62] The principles emerging from our jurisprudence can then be summarised as follows: The deprivation of liberty, through arrest and detention, is 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.

[63] 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

¹⁴ 2020 (1) SACR 1 (CC at paras 62 -63.

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'.

[64] In the case under consideration, the plaintiff depicted himself as a mute person. Although he denied this in his testimony, his denial of this fact cannot stand because the arresting officer had to ask for a sign language interpreter on the school premises to assist him in driving the process of his arrest. The arresting officer asked the sign language interpreter to assist in the court processes. It was unfortunate that the superiors of the sign language interpreter declined to delegate him to perform this task in court. The public prosecutor brought to the attention of the magistrate that the plaintiff together with his erstwhile co-accused was deaf and mute. Gleaning from the magistrate's court record, the plaintiff did not request at any point for his bail hearing to be separated from that of his erstwhile co-accused due to his non-mute state. He kept on depicting himself as a mute person thus putting himself in a disadvantaged position. The magistrate ordered that the matter be postponed for a bail profile and a sign language interpreter.

[65] Notably, most delays in the bail hearing were occasioned by the absence of a sign language interpreter. This includes the absence of a legal aid attorney and the absence of a magistrate to handle bail hearings in one instance. The magistrate oversaw the court processes including the plaintiff's detention. The matter fell under Schedule 6 in terms of bail legislation and the magistrate had an obligation in terms of the law to hear evidence before she could apply her mind on the release of the plaintiff.

She could not perform this judicial task without the services of a sign language interpreter. It is further common cause that the public prosecutor was always ready to proceed with the bail hearing of the matter. The plaintiff also conceded that all the postponements that were ordered by the court after his first appearance were not at the instance of the public prosecutor.

[66] Therefore, no evidence was established to the effect that the Minister of Police and the NDPP through its employees intruded into the court processes and caused further detention of the plaintiff. Instead, the evidence demonstrates that regarding the post-court detention, the plaintiff was the author of his misfortune. Resultantly, the detention of the plaintiff from 16 November 2015 to 26 February 2016 cannot be imputed to the arresting officer and the public prosecutor.

J. Conclusion:

[67] Deducing from the evidence tendered and assessing the applicable law, it is my finding that the plaintiff's claim for unlawful arrest and detention against the 1st defendant should succeed. The 1st defendant is held liable to compensate the plaintiff for damages arising out of unlawful arrest and detention from the period 12 November to 15 November 2015. The plaintiff's claim against the 1st and 2nd defendants arising out of a detention from the period 16 November 2015 to 26 February 2016 must fail.

K. Quantum:

[68] The assessment of damages is to be determined from the period the plaintiff was arrested and detained to the day he first appeared in court. He pleaded that he was detained in a filthy police cell at Central police station for a period of four days. The blankets and sleeping sponge were dirty with lice, the toilet facility was non-functioning and afforded no privacy. The water was cold, the food was bad, indigestible and served during inordinate times. The other inmates were violent and thus posed some threat to the plaintiff.

[69] Mr Mdeyide refers to certain authorities on the award of damages for unlawful arrest and detention:

69.1 In *Mtola v Minister of Police* case No CA23/2016, the plaintiff spent a period of 5 days in custody and was awarded R125 000 (One hundred and twenty-five thousand rand) for unlawful arrest and detention.

69.2 In *Feni v Minister of Police (EL462/20) ZAECHC 1(26 May 2022)*, the plaintiff was unlawfully arrested and detained for a period of 2 days. He was awarded an amount of R180 000.

69.3 In *Gcamgcam v Minister of Safety and Security Case No 187/2011*, the plaintiff was awarded an amount of R200 000 for a detention of 2 days.

[70] The facts presented by the plaintiff were disputed by the arresting officer. He testified that the blankets were clean, the food catering was outsourced and there were no complaints. Despite this, Mr Halam refers mostly to cases that were decided between the period 2005 to 2009, where the award for damages fluctuated from R30 000 (Thirty thousand rand) to R80 000 (Eighty thousand rand) for unlawful detention which lasted for a period of 2-3 days. A reference was also made to the case of *Burford v Minister of*

Police CA/128/2015 (2015) ZAEC 9 HC 126, where the plaintiff was awarded an amount of R130 000 (One hundred and thirty thousand rand) for unlawful arrest and detention which lasted for 3 (three) days.

[71] It is trite that the discretion to make an appropriate award is with the court and damages awarded by the court should be proportionate with the injury inflicted¹⁵.

Section 35 (2) of the Constitution provides:

“Everyone who is detained, including every sentenced prisoner, has a right- (e) to conditions of detention that are consistent with human dignity, including at least exercise and provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.....”

[72] The SCA implored our courts to exercise discernment in ensuring that the awards they make for such violations accurately represent the value of the individual’s right to personal liberty and the seriousness with which any arbitrary deprivation is viewed in our legal system¹⁶. Bosielo AJA (as he then was) stated:

“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.”

¹⁵ Minister of Police v Tyulu 2009 (2) SACR 282 (SCA) at para 26

¹⁶ Supra note 15.

[73] The SCA warned our courts not to follow the awards made in previous cases slavishly as this may lead to treacherous results. My task is to have regard to all the facts of this case and determine the quantum of damages on the facts presented.

[74] In casu, the arresting officer's assertions that the police cells were clean, and the food was nutritious cannot be probable. His primary task was to arrest and detain the plaintiff and not to monitor the conditions in the police cells. He never investigated the circumstances upon which the plaintiff was subjected. I find the plaintiff's evidence more probable, and I accept the evidence adduced by the plaintiff in this regard.

[75] It may well be argued that a period of four days spent in detention is relatively a short period, however, this cannot be viewed in isolation. The plaintiff was arrested at school in full view of other students and his career path was interrupted. He was subjected to psychological and physical torture and out of desperation the investigating officer induced him to confess or admit the allegations against him. He is carrying a stigma that he had killed a human being.

[76] The plaintiff has claimed an amount of R50 000 for unlawful arrest and I find this to be reasonable. Considering the awards which were previously made in this Division¹⁷

¹⁷ Minister of Police v Page, a claimant was detained for one day on a charge of arson. He was awarded R30 000; In [M.....] X [...] case number 1329/206, Eastern Cape Division, Mthatha, the plaintiff was awarded a sum of R340 000 as damages for wrongful arrest and detention. He was detained for two days and was subjected to ill treatment while in custody.

including the circumstances of this case, I find that his claim for unlawful detention is exorbitant.

[77] In the circumstances, I award the plaintiff a circular amount of R175 000 (One hundred and seventy five thousand rand) as damages for unlawful arrest and detention from the period 12 to 15 November 2015, taking into account the conduct of the 1st defendant at the time of arrest, the humiliation that the plaintiff suffered throughout his period of detention until his first appearance in court and the conditions in the police cells.

L. Order:

[78] In the result, the following order is made:

1. The plaintiff's claim for unlawful arrest and detention against the 1st defendant from the period 12 to 15 November 2015 succeeds.
2. The 1st defendant is liable to compensate the plaintiff a sum of R175 000 (One hundred and seventy five thousand rand) for damages arising out of unlawful arrest and detention from the period 12 to 15 November 2015.
3. The defendant shall pay interest at the legal rate on the said amount from 14 days from the date of judgment to the date of payment.
4. The plaintiff's claim against the 1st and the 2nd defendant arising out of a detention from the period 16 November 2015 to 26 February 2016 is dismissed.
5. The defendant is ordered to pay costs of this action.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES :

A Counsel for the Plaintiff:	Adv. Mdeyide with Adv Nqabeni
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Instructed by:	State attorney Broadcast House, 94 Sisson Street, MTHATHA
DATE HEARD:	16 August 2023
DATE DELIVERED:	07 November 2023