

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE HIGH COURT – PORT ELIZABETH)**

**CASE NO. 2498/08**

In the matter between:

**SIYABULELA LIVINGSTONE NKABI** **Plaintiff**

**and**

**THE MINISTER OF SAFETY AND SECURITY** **Defendant**

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**JUDGMENT**

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**DAWOOD J,**

## [1] THE CLAIM

The Plaintiff herein, Mr Siyabulela Livingstone Nkabi, instituted an action for damages, in the total sum of R 150 000-00, against the Defendant claiming, inter alia that the employees of the Defendant whilst acting in the course and scope of their employment unlawfully and wrongfully arrested and detained him.

## [2] ISSUES THAT ARE COMMON CAUSE:-

- (i) The parties prior to the commencement of the trial agreed:-
  - a) That the Plaintiff was arrested on the 18 December 2007 at 15h15.
  - b) That the Plaintiff was detained until 21 December 2007.
  - c) That an armed robbery occurred at the Ackermans store in the Ziyabuya Shopping Complex, Kwadwesi and cellular phones were stolen.
  - d) That the Plaintiff was at the Ziyabuya Shopping Complex on the day in question.
  - e) That the drivers of two black Golf motor vehicles were arrested on this day.

- f) That the driver of the other Golf, in whose vehicle a toy pistol was found under the carpet of the driver's seat, as well as surgical gloves and one leather hand glove, was subsequently released.

[3] ISSUES TO BE DETERMINED

- i) The court has to determine the following issues:-
  - a. The lawfulness of the Plaintiff's arrest;
  - b. The lawfulness of the Plaintiff's detention immediately following the said arrest;
  - c. The lawfulness of the Plaintiff's detention following the expiry of the 48 hours that is from Thursday, 20 December 2007 at 15h15 until the Plaintiff's release at the New Brighton Magistrate's court on Friday, 21 December 2007 either at 10am as alleged by the Defendant or 1pm as alleged by the Plaintiff.
  - d. The period for which the Plaintiff was unlawfully detained, if any; and
  - e. The quantum of damages, if any, to be awarded to the Plaintiff.

[4] EVIDENCE TENDERED

- i) The Plaintiff in support of his claim testified himself and called Sharon Noxolo Mkumatela as a witness.
- ii) The Plaintiff, **Siyabulela Livingstone Nkabi**, testified as follows:-
  - a) He is an unmarried 33 year old building contractor and had been conducting business under a Close Corporation for a period of 6 years.
  - b) On the 18 December 2007 he was on his way to meet Noxolo Sharon Mkumatela at Kwadwesi in connection with building a house for her.
  - c) He stopped at the Ziyabuya shopping complex to buy some food for his workers.
  - d) There were a total of four occupants in the vehicle including him.
  - e) He had gone in alone to Shoprite leaving his workers seated in the motor vehicle. He had made his purchases and thereupon returned to the vehicle and proceeded to drop them off before heading towards his meeting.
  - f) He headed towards Nkwenkwe Street and saw the police

vehicle overtaking him and stopping alongside him indicating that he should stop. There were 3 occupants in the police bakkie and he was pointed with rifles.

- g) He alighted and questioned them as to what was going on.
- h) They requested him to lie on his stomach and they commenced searching the vehicle while he was lying down on the pavement.
- i) Two of them searched the vehicle whilst the third one was standing above him. All of them were in possession of rifles.
- j) The police officers informed him that a robbery had taken place at the shopping centre; they arrested him by handcuffing him, at the back, in connection with the robbery.
- k) The police officers were not prepared to listen to him and swore at him, when he told them that he had an appointment at 3pm and requested them to call the lady or accompany him there.
- l) His diary was in the vehicle and the building plans were inside his diary. He never saw his diary after that day.

- m) He was placed at the back of the police van and the police drove his vehicle to the Kwadwesi Police Station.
- n) He was taken to Ackermans at the shopping complex in handcuffs. The store was busy and there were lots of customers and he felt bad and as if his dignity had been lowered by him being paraded in front of many people. He was not known in the area. He was made to stand in front of the till area and four workers were requested to identify him and they did not identify him as one of the robbers. He again requested the police to release him because he was not part of what had happened but they instead took him to the Kwadwesi Police Station.
- o) On his arrival at the police station he noticed another black vehicle that looked similar to his vehicle, stopped there and when he was walking past, its doors were open and he saw a firearm on the mat on the drivers side and he also saw surgical gloves on the floor of the vehicle. The driver of that vehicle was also made to lie down and when that driver attempted to talk to him in response to his queries, that driver was assaulted by the police officers.

- p) He did not know the driver of the other nor had he seen that driver before. He was thereafter taken to Kwazakhele Police Station after staying for approximately 2 to 3 hours at Kwadwesi Police Station.
- q) He was refused permission to use the telephone despite him requesting to use the phone. His phone was taken when they locked him in the police van.
- r) At Kwadwesi police station he was detained in a police cell, together with more than 10 other persons. The toilet was not flushing and was blocked, the blankets were dirty and were lying on the floor.
- s) He initially indicated that nothing much happened in the cell except for him being bitten by bugs and thereafter indicated that some mischief occurred that night including an attempted rape. He spoke to the commander who informed him that the detective would come that Wednesday but she only arrived on the Thursday.
- t) On the Thursday he as well as the driver of the other black golf were called by the detective, Inspector Williams, who informed him that he was going to be charged with robbery

and detained. When he attempted to question her regarding why he was being charged when a firearm was found in the other vehicle, she responded that he was not a lawyer and must not ask her questions. She thereafter charged him and he was photographed by her.

- u) He was taken to court on the 21<sup>st</sup> of December 2007 together with 8 or 9 other people and they were placed in the police cells at New Brighton and their names were called at different times whilst his name was never called.
- v) He was eventually alone in the cell and asked his name by the police officer who informed him that the case was withdrawn and they had made a mistake and he could leave. He never went inside the court room. He left the building at about 1pm and went to his grandmother's place to freshen up. On the Monday he went with the documents for his vehicle to get it released. He spoke to Inspector Williams who said that the matter was going to be heard and she was going to meet him again which she failed to do.
- w) According to him he felt very hurt by the incident as they



stole his dignity and he subsequently never had the same energy to work as he did before the incident, although he is still operating his business.

- x) Under cross examination he indicated that he was going to meet the Municipal Inspector at the Galvendale Community Hall in order to start a painting job of the caretaker's four bedroom house. The Municipal Inspector informed him that he had other site meetings so he was unable to commence work after initially saying they did not get the job. He confirmed that he had no equipment to commence the job in his vehicle and stated that a step ladder and the paint was going to be provided and he would go and buy paint brushes at a nearby store.
- y) He confirmed that he signed the notification of rights of a detained person at 16h40 on the day of his arrest.
- z) He indicated that at the shopping centre his employees never left the motor vehicle because he never saw them leaving and he had told them to wait for him in the motor vehicle.
- aa) He denied telling Inspector Williams that they had gone

into the shopping centre with him or that he was lost whilst going to his client as contained in his statement. He indicated that the statement was not read back to him nor was there an interpreter present when he made his statement to Inspector Williams.

- bb) It took him approximately half an hour to drop off his workers.
- cc) He, for the first time under cross examination indicated that he attempted to call Sharon whilst he was on Nkwenkwe Street and he was still on the phone at the time he was stopped by the police which according to him was between 14h25 to 14h30. According to him the police pointed rifles at him whereas the Defendant's version was that he was pointed with handguns.
- dd) The police ignored him when he told them to phone the person that he had an appointment with and they told him that he would have his say at the Police Station where they were going to.
- ee) It was simply put to him that his whole story regarding Ackermans was a fabrication and it was later put to him

that Ackermans was closed after the robbery.

- ff) He indicated that the registration letters and numbers of his black Golf was CYV 301 EC.
- gg) He could not recall speaking to any police officer at the centre and saying *'hello police officer, how are you?'*
- hh) He disputed that the cells were clean and indicated that he was inside there and was kept there and those cells were dirty.
- ii) According to him the inmates were speaking in an unknown language and they attempted to fondle him, saying, *"here is a beautiful girl"*.
- jj) He responded to a question from the counsel for the Defendant that counsel knew even from the newspapers that the situation changes inside prison.
- kk) He stated that they tried to pull him closer to them and he resisted calling out for a police officer and they desisted without actually fondling him.
- ll) He re-iterated that the other suspect was assaulted in his presence and could not comment on why the entry made pertaining to that driver's detention reflected that there

were no visible injuries nor any complaints.

mm) He disputed that his arrest or detention was lawful. That concluded his testimony.

iii) The next witness **Sharon Noxolo Mkumatela**, thereafter testified.

a) Her testimony was briefly that she had a meeting with the Plaintiff on the day in question and had confirmed their meeting earlier that day.

b) She arrived at the premises just before 3pm and waited for the Plaintiff whom she called after 15 minutes and his phone went to voice mail and when he still had not arrived she left at about 15h30.

c) He contacted her 4 days later saying that he was arrested on the day whilst he was on his way to her because he had a vehicle which was the same colour as the one suspected of having been used by the robbers.

d) She got very suspicious and cancelled having the Plaintiff build a house for her. She could not recall receiving a missed call from the Plaintiff.

iv) That concluded the Plaintiff's case.

v) The Defendant thereafter opened its case and called three witnesses namely Constable Florence Marais, Constable Lindela Glaleka and Karen Hechter.

vi) **Florence Marais** testified as follows:-

- a) She was a reserve constable and according to her the Plaintiff had greeted her whilst she was in police uniform at the shopping centre just after 2pm saying “*hello police officer, how are you?*” and she greeted him back.
- b) She saw him after approximately half an hour at the police station and he confirmed that he had just greeted her and asked how she was.
- c) This was the first time that she saw this person whilst he was inside the vehicle with the engine switched on.
- d) She was certain that there were people present at the scene, who witnessed him greeting her as well as people at the police station who also witnessed him admitting this.
- e) She conceded that it was unusual that he greeted her when he did not even know her.

vii) **Mr Lindela Glaleka** thereafter testified-

- a) He stated that he is a member of the South African Police

Services and was doing crime prevention duties together with his passenger Constable Xhalisile on the day in question.

- b) 10111 broadcasted an armed robbery over the radio and he responded as a back up vehicle by driving to the area of Kwadwesi. The registration letters and numbers that was broadcasted, was CYV 301 EC of a black golf.
- c) He saw the vehicle as it was coming out of the shopping centre, he did his warnings.
- d) He confirmed with radio control the description of the vehicle given out and they confirmed that that was the vehicle and he then stopped the vehicle and they alighted, pointed the vehicle with handguns and asked that person to get out of the vehicle.
- e) When they stopped this vehicle there was another police van that assisted them in stopping the vehicle and in handcuffing the accused and searching the vehicle.
- f) He and his colleague had handguns but it is possible that the officers in the other vehicle had R5 rifles.
- g) After they searched him, they took the Plaintiff and the

motor vehicle to the police station.

- h) The Plaintiff's rights were explained to him and he was taken to the Kwazakhele Police Station.
- i) There was no identification of the Plaintiff by another police officer at the Police Station. Florence Marais was at the Police Station on the day in question, although he was not sure whether or not she was on duty.
- j) They did not go anywhere else on the day but rather went directly to the Police Station. He confirmed that the cells are cleaned and cleaners are employed specifically to clean the cells.
- k) He indicated that he was involved with the Plaintiff and did not pay attention to the occupant of the other black golf motor vehicle or what was found in his vehicle.
- l) He indicated that he had a reasonable suspicion based on the information that had been broadcasted and the description given and that he was accordingly obliged to effect an arrest.
- m) Under cross examination he confirmed that the vehicle was being driven normally.

- n) He confirmed that the Plaintiff said that he had his own construction company and was dropping off his workers and does not know about any robbery.
- o) He could not remember if the Plaintiff said that he was on his way to a site to meet a client and invited them to phone or go to her, saying that he was only concerned about the fact that the Plaintiff had committed a crime and accordingly all that he did was inform the Plaintiff that he was arresting him for a robbery.
- p) According to him he would not have given the Plaintiff the right to make the phone call, because according to the information he received the Plaintiff was in the company of other people and he thought that the Plaintiff was going to call these people. The Plaintiff switched off his cellphone at the charge office as he was going to be detained.
- q) According to him a number of officers searched the vehicle and he saw some papers and a helmet lying there but he did not see a diary nor was that something he was concerned with or had time for, nor did he see any building



plans or briefcase.

- r) His primary focus was looking for a firearm because the Plaintiff was involved in a robbery. He denied that the Plaintiff was taken to Ackermans.
  - s) He conceded that it was possible that the Plaintiff told his colleague about his client but he did not speak to the Plaintiff, about this.
  - t) The Plaintiff was taken directly to the Police Station.
  - u) He indicated that although nothing linking the Plaintiff to the offence was found in the vehicle on the information received, the Plaintiff had dropped of other occupants and it was possible that the firearm was with those people.
  - v) He disputed that he would take the Plaintiff to Ackermans stating that this was not allowed because an identification parade would be held by the investigating officer later on.
  - w) He did not take the Plaintiff's cellphone from him but the cellphone was switched off by the Plaintiff at the charge office because he was being detained. That concluded his testimony.
- viii) The next witness called was **Karen Hechter**.

- a) Her testimony was that she was employed as a casual worker at Ackermans on the day in question.
- b) She went to tea at approximately 2:30pm.
- c) When she returned from tea she saw a big man blocking the door at Ackermans and went into Ellerines who had also closed their doors.
- d) She noticed three men come out of Ackermans and get into a black Golf.
- e) Someone at Ellerines wrote the registration number 301 EC on a piece of paper for her and gave it to her.
- f) That is all that she saw.
- g) Ackermans was subsequently closed and customers let out as they could not trade because of the robbery.
- h) Mrs Williams took a statement from her on the same day.
- i) That concluded her evidence and the Defendant's case was closed.

## [5] EVALUATION OF THE EVIDENCE

- i) I shall firstly evaluate the evidence of the Defendant's witnesses.

- a) The first witness **Ms Florence Marais** created a good impression on the court and had no reason to mislead the court with regard to the fact that she saw and spoke to the Plaintiff on the day in question both at the centre and at the Police Station.
- b) I accordingly accept her testimony, which although not relevant to the issues before the court, does have a slight bearing on the credibility of the Plaintiff.
- c) **Ms Hechter** also impressed the court as a good witness and her evidence confirmed that the information that she gave to the police included the description of the vehicle as a black Golf and that the registration numbers that were written down for her were 301 EC.
- d) She also indicated that the shop was closed after the robbery and customers, let out which is contrary to the Plaintiff's version that the store was open and there were customers in the store.
- e) She was not questioned by either counsel with regard to whether or not the Plaintiff was brought to the store

for purposes of an identification parade or whether or not she was requested to identify any person at the store on the day of the robbery.

- f) She had no reason to lie or mislead the court and gave her evidence in a forthright and honest manner.
- g) I find her to be a credible witness and accept her testimony as true.
- h) The arresting officer **Mr Glaleka** was an extremely impressive witness who gave his evidence in a frank and forthright manner.
- i) He willingly made concessions with regard to inter alia:-
  - i) The fact that the Plaintiff was not allowed to make calls;
  - ii) That some of the officers present may have had R5 rifles;
  - iii) That the possibility existed that the Plaintiff had informed his colleague about the meeting;
  - iv) That even if the Plaintiff had told him this he would not have taken the Plaintiff to his client

or allowed him to call her, although he stated that this was because the Plaintiff had other passengers and he was afraid that the Plaintiff may call them;

v) That he did not see any plans or diary and even if he had seen these items, he would not have been bothered about it because his primary focus was finding a firearm; and

vi) That his primary concern was arresting the Plaintiff and not listening to his version.

j) It was evident from his testimony that the description he received from the call centre matched the description of the Plaintiff's vehicle and that prior to stopping the vehicle he verified that the description given of the vehicle that had been involved in the robbery matched the one of the vehicle he was about to stop.

k) He accordingly, based on the information received, was satisfied that the Plaintiff's vehicle was the vehicle that was suspected of being involved in the

commission of the offence.

l) I have no hesitation in accepting his testimony and accordingly accept:-

- i) That the Plaintiff was arrested based on information that he had received from the call centre;
- ii) That he verified the information prior to stopping the vehicle;
- iii) That any reasonable police officer, based on the information received and verified with the call centre, would have effected an arrest without a warrant since such information would have given rise to a reasonable suspicion;
- iv) That the information emanated from a reliable and credible source.
- v) That accordingly his arrest of the Plaintiff in the circumstances of this case was lawful and justifiable;
- vi) That he took the Plaintiff directly to the

police station and not to the Ackermans; and

vii) That there were only two officers in his vehicle and they were armed with handguns.

m) The Plaintiff on the other hand was not an impressive witness.

n) His explanation with regard to why certain of his evidence was only tendered under cross examination, inter alia, that is that he only remembered what he had forgotten, was just one unsatisfactorily aspect of his testimony.

o) It was agreed or common cause that the Plaintiff was arrested at 15h15 yet the plaintiff:-

i) Indicated that he was on his way to a meeting that was scheduled for 3pm at the time that he was arrested; and

ii) That he was early for his meeting that is that he was arrested prior to 3pm.

p) If one accepts what was common cause then the Plaintiff's contention in his testimony in this regard is untrue, since he was apprehended after the scheduled

time for his meeting at 3pm.

- q) The Plaintiff was adamant that he was taken into Ackermans whilst the store was open and full of customers and he was paraded in front of everyone at the cash terminal of the store.
- r) This evidence is disputed by the arresting officer who denies taking the Plaintiff to the store and by Ms Hechter who disputed that the store was open after the robbery.
- s) The version of the police officer and Ms Hechter is more probable in this regard.
- t) The Plaintiff's version in this regard is highly improbable in that it would be extremely foolish and irresponsible for any police officer to take a suspect into a busy shopping centre in front of a number of customers and parade him at the front of the store and have people identify him there, whilst other suspects are at large and there could be possible danger to members of the public.
- u) The Plaintiff's version seems farfetched and



improbable even if the identification of the Plaintiff at the store was not properly placed in dispute with sufficient particularity save for the bald averment that it was a fabrication.

- v) It is also highly unlikely that a store would remain open after a robbery has just occurred and Ms Hechter's version in this regard is far more probable than that of the Plaintiff.
- w) The Plaintiff initially said that his only complaint with regard to the cells was the bugs and the poor sanitary condition and only thereafter mentioned an attempted rape. He initially mentioned fondling but then indicated that they just attempted to pull him towards them.
- x) He however for the first time under cross-examination gave some details with regard to this attempted rape. His testimony in this regard is highly improbable particularly if one considers his version that all the inmates were in cahoots with each other yet by him simply standing firm and shouting for guards they left

him alone without doing anything except attempting to pull him towards them.

y) The Plaintiff's testimony does not support his version that there was any attempt to rape him.

z) The Plaintiff appears to be fabricating or at the very least exaggerating his experiences in the cells particularly with regard to the attempted rape.

aa) The Plaintiff attempted to convince the court that he knew that none of his passengers left the car despite the fact that on his version he had left them in the vehicle unattended for at least half an hour.

bb) He accordingly could not have known whether or not they left the car during his absence despite his instructions to them.

cc) This failure to concede that it was possible they could, without his knowledge, have left the vehicle is a further factor that adversely impacts upon his credibility.

dd) The Plaintiff's testimony was unsatisfactorily and

where his evidence differs from that of the Defendant's witnesses, the evidence of the Defendant's witnesses is to be preferred.

ee) The Defendant witnesses are found to be far more credible witnesses and their versions far more probable.

#### [6] LEGAL PRINCIPLES

- i) I accept the argument by counsel for the Plaintiff that the Defendant failed to dispute or challenge inter alia the following aspects of the Plaintiff's testimony:
  - a) That the Plaintiff invited the SAPS members to phone Ms Mkumatela to confirm the veracity of his explanation;
  - b) That he invited the SAPS members to accompany him to his appointment with Ms Mkumatela;
  - c) That he was only visited for the first time by the investigating officer, Inspector Williams, a mere hour before the prescribed 48 hour period was to

expire.

- d) That the Plaintiff's building plans and diary was in the vehicle at the time of his arrest but were missing when his vehicle was returned.
- e) That he did not appear before a court of law during the entire period of his detention.

ii) That the Defendant also failed to dispute that Ms Mkumatela had an appointment with the Plaintiff scheduled for 15h00 on Tuesday, 18 December 2007; and that she tried to call the Plaintiff between 15h15 and 15h30 on his cellular phone, which was by then on voicemail.

iii) Counsel for the Plaintiff accordingly argued that the Plaintiff's testimony with regard to these aspects should be accepted in light of the dictum of the case of **President of RSA v South African Rugby Football Union<sup>1</sup>**.

iv) I accept his argument in this regard with regard to the above issues.

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<sup>1</sup> 2000 (1) S.A 1 (CC) @ 37B-6

- v) He argued that this would also apply in respect of their attendance at Ackermans. I however have already indicated that despite this not being properly challenged with sufficient particularity, the inherent improbabilities in this regard render it unacceptable.
- vi) In assessing whether or not the Plaintiff's arrest without a warrant was lawful, I have taken due cognisance of the provision of the Act as well as the authorities referred to by both Plaintiff's and Defendant's counsel.
- vii) **Section 40** reads as follows: - "*A peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1.*"<sup>2</sup>
- viii) The Plaintiff's counsel argued that:
- In **Duncan v Minister of Law and order**<sup>3</sup> it was held that the jurisdictional facts for a **s40 (1) (b)** defence are that:-
- a) The arrestor must be a peace officer,
  - b) That the arrestor must entertain a suspicion,
  - c) The suspicion maybe that the suspect committed an

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<sup>2</sup> S40 (1) (b) of the Criminal Procedure Act 51 of 1977

<sup>3</sup> Duncan v Minister of Law order 1986 (2) S.A 805 (A)

offence referred to in schedule 1,

- d) The suspicion must rest on reasonable grounds, and
- e) It is trite that the onus rest on a defendant to justify an arrest. As **Rabie C.J** explained in **Minister of law and order v Hurley**<sup>4</sup>

*“An arrest constitutes an interference with the liberty of the individual concerned, and it thereof seems 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.”*

**Harms D.P** in the **Minister of Safety v Tshei Jonas**

**Sekhotos** looked at a series of cases wherein a fifth jurisdictional fact, which if justified, would be a requirement for a valid arrest under section 40 (1).

He set out the dicta in **Louw v Minister of Safety and Security**<sup>5</sup> where Bertelsmanns said following:

*“I am of the view that the time has arrived to state as a matter*

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4 1986 (3) S.A 568 (A) @ 589 E-F  
[2010] ZASCA 141 [19 November 2010]  
5 2006 (2) SACR 178 (T) @ 186 – a – 187 e

*of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officer believes, on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.*

*An arrest, being as drastic as an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights ... [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.”*

- ix) This decision was subsequent following a series of other cases<sup>6</sup>.

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6 Minister of Safety and Security v Sekhoto 2010 (1) SACR 388 (FB)  
Gellman v Minister of Safety and Security 2008 (1) SACR 446 (w)  
Le Roux v Minister of Safety and Security 2009 (2) SACR 252,  
2009 (4) SA 491 (KZP);  
Ramphal v Minister of Safety and Security 2009 (2) SACR 291 (GSJ)  
Charles v Minister of Safety and Security 2007 (2) SACR 137 (w)  
Mvu v Minister of Safety and Security 2009 (2) SACR 291 (GSJ)

- x) Harms DP commenting on these cases in the **Minister of Safety and Security v Tshe Jonas Sekhoto @** paragraph 22 held:-

*“ with all due respect to the different high court judgments referred to, applying all the interpretational skills at my disposal ... , I am unable to find anything in the provisions which leads to the conclusion that there is somewhere in the words a hidden fifth jurisdictional fact. And because legislation overrides the common law, one cannot change the meaning of a statute by developing the common law.*

*At paragraph 24, he stated further ... Absent a finding of unconstitutionality they were not entitled to read anything into a clear text.*

*And at paragraph 25... ...It could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary. ”<sup>7</sup>*

- xi) It is evident from the foregoing that all that is required

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<sup>7</sup> R v Latimer [1997] 1 SCR 217 par 22;  
R v Mann (2004) 3 SCR 59; 2004 SCC par 20



is for the arresting officer to satisfy the requirements of section 40 (1) (b) to render the arrest lawful.

- a) In this case the officer furnished an explanation that the information was broadcasted over the radio;
- b) The officer verified the information with the call centre prior to stopping the Plaintiff. This was not challenged under cross examination.
- c) The arresting officer's version has already been accepted as being true and his version is both credible and probable.
- d) On the information that he received from the call centre and subsequently verified with the call centre it is evident that the information created a reasonable suspicion to justify an arrest without a warrant on a charge of armed robbery.
- e) The arresting officer's suspicion was based on reasonable ground and is objectively justifiable as any other officer receiving similar information would have responded in a likewise fashion.
- f) The arresting officer's failure to verify the Plaintiff's

version with regard to the conduct outside the time period of the commission of the offence does not in the circumstances of this case detract from the reasonableness of his suspicion or from his reasonable belief that the driver of the vehicle whose description had been broadcasted was involved in the commission of the offence.

- g) The arresting officer's conduct was reasonable and his failure to effect an arrest in the circumstances of this case would have been a dereliction of duty and possibly created a danger to members of the public having regard to the dictum in the authority referred to by counsel for the defendant **Minister of Safety and Security v Mohofe**<sup>8</sup>.
- h) Furthermore the Plaintiff's explanation did not relate to the material time, being the time that the robbery occurred.
- i) If one has regard to the time of the Plaintiff's arrest, it does not appear to constitute a valid explanation since he was arrested after the scheduled time of the meeting.

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<sup>8</sup> 2007 (4) S.A 215 SCA

- j) I accordingly find that the Defendant has discharged the onus of establishing that the arrest was lawful and justifiable without a warrant, in terms of section 40 (1) (b).
- k) It is evident that the Plaintiff was detained upon him being arrested as a suspect in a schedule 1 offence. His detention was justified based on the information that the police had at their disposal at the time, in that there was sufficient information that warranted further investigation having regard to the fact that the description given of the get away vehicle matched his motor vehicle and the number plate of his vehicle. His detention upon arrest within the 48 hours appears to have been justified and lawful.
- xii) The detention of the Plaintiff within the 48 hours is accordingly found to be lawful in the circumstances.
- xiii) The Defendant's counsel attempted to utilise the time on the Notice of Rights in terms of the constitution which is reflected as 16h40 to argue that the Plaintiff was not detained in excess of 48 hours.

- xiv) There is no merit in this argument since it is common cause that the accused was arrested at 15H15 and that he was given his notification of rights prior to his detention. **Section 50 (1) of the Criminal Procedure Act** provides inter alia that an accused person must be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest.
- xv) The accused person must be brought to court within 48 hours of his **arrest not detention**. The Plaintiff's detention beyond the 48 hours was accordingly unlawful.
- xvi) The Defendant further did not call any witnesses to gainsay the Plaintiff's testimony that the Plaintiff was released at 1pm and not 10am as had been alleged by the Defendant.
- xvii) I accordingly accept that the Plaintiff was unlawfully detained for a period of 21 hours and 45 minutes that is from 15h15 on Thursday, 20 December 2007 until 13h00 on Friday, 21 December 2007.
- xviii) The Defendant has further failed to establish that such

detention was lawful or justified in the circumstances.

- xix) Any adverse credibility findings made against the Plaintiff with regard to certain aspects of his testimony do not detract from the fact that his detention beyond the 48 hours has objectively been established to be wrongful.

[7] DAMAGES TO BE AWARDED TO THE PLAINTIFF

- i) The issue now is what award of damages is to be awarded to the Plaintiff, in respect of his unlawful detention for a period of 21 hours and 45 minutes.
- ii) It was not disputed in this case that the Plaintiff:-
- a. Is an unmarried 32 year old building contractor;
  - b. That he has been conducting his own business for the past 6 years;
  - c. That he was placed in a cell with more than 10 other inmates;
  - d. That the experience was humiliating and degrading and upsetting; and

- e. That it was an affront to his dignity and his sense of personal worth.
- iii) The condition of the cells were placed in dispute, the Defendant alleging that the cells were regularly cleaned by cleaners whereas the Plaintiff alleged that the blankets were filthy, the cells had bugs in them and the toilet was not flushing.
- iv) The Plaintiff also alleged that there was an attempted rape upon him.
- v) It is, as has already been stated, when evaluating his evidence, highly improbable that a group in excess of 10 persons who all seemed to support each other would have left the Plaintiff unscathed if their intention was to attempt to rape him, yet all they did was attempt to pull him closer and all it took was him resisting and calling out, for them to subsequently leave him alone for the rest of the time.
- vi) This aspect was also not mentioned in his evidence in chief and he initially merely mentioned that there were bugs in the cell, and then upon further questioning

mentioned mischief and an attempted rape. His evidence with regard to an attempted rape is accordingly rejected and not taken into account in assessing his damages.

vii) He may well have exaggerated the conditions in the cell as well. However this does not detract from the fact that he was wrongfully deprived of his liberty for part of his detention and had to share a cell with in excess of 10 other unknown persons. His testimony to the effect that this experience was humiliating and upsetting and an impairment of his dignity is accepted.

viii) A brief examination of the amounts awarded in some other cases is warranted in order to determine an appropriate award of damages to be awarded to the Plaintiff:-

- a) In **Ramakulukusha v Commander, Venda National Force**<sup>9</sup>, the Plaintiff, a 41 year old businessman and director of companies, was detained for eight days. The Police closed his business and opposed bail. He was awarded R2 500 per day, which equates to a present day value of approximately R15 000 per day.

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<sup>9</sup> 1989 (2) SA 813 (V) at 849B

b) In **Manase v Minister of Safety and Security and another**<sup>10</sup>, the Plaintiff, a 65 year old, married successful businessman, was detained for 49 days. He was awarded R1 837 per day which equates to a present day value of R2 500 per day.

c) In **Olgar v Minister of Safety and Security** it was held:

“ A just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom. Furthermore, it should take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of extravagant distribution of wealth from what Holmes J called the “horn of plenty”, at the expense of the Defendant.<sup>11</sup>”

d) In **Olivier v Minister of Safety and Security and Another**<sup>12</sup> the court awarded a sum of R50 000-00 where the Plaintiff was wrongfully and unlawfully

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10 2003 (1) SA 567 (Ck) at 578 C

11 Olgar v Minister of Safety and Security ECD 18 December 2008 (case no. 608/07) unreported, para 16 as mentioned in Tommy Peterson v Minister of Safety and Security ECD 23 September 2008 (case no. 1173/08) unreported at para 18

12 2009 (3) SA 434 (W)



arrested and detained for a period of 5-6 hours;

- e) In **Louw and Another v Minister of Safety and Security and Others**<sup>13</sup>: the court awarded a sum of R75 000-00 for each Plaintiff where the Plaintiff's were wrongfully and unlawfully arrested and detained for a period of 20 hours;
- f) In **Fubesi v the Minister Safety and Security**<sup>14</sup> unreported, paragraph 24: the court awarded a sum of R80 000-00 where the Plaintiff was wrongfully and unlawfully arrested and detained for a period of 3 days and 18 hours.
- g) Having due regard to all the relevant considerations and authorities and the personal circumstances of the Plaintiff and the nature and extent and degree of the offence to his dignity and his sense of personal worth, the Plaintiff is awarded the sum of R 15 000-00 for his wrongful detention beyond the 48 hour period.

## [8] COSTS

- i) I accept that the court attaches a great deal of importance to

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<sup>13</sup> 2006 (2) SACR 178

<sup>14</sup> ECD 30 September 2010 (case no. 680/2009)

questions of unlawful detention since it violates fundamental rights of individuals.

- ii) The Magistrate Courts are equipped and able to accord adequate protection and redress to persons whose rights have been violated.
- iii) The nature of the dispute in this matter was not of such a complex nature as to preclude the Magistrate's Court from adjudicating upon the dispute.
- iv) The Defendant did not have a valid defence for the detention after the 48 hours. However the arrest and detention prior to the 48 hours, has been found to be lawful and justified.
- v) The Defendant accordingly is partially successful and the Plaintiff is partially successful.
- vi) In the exercise of my discretion in ensuring justice to both parties, the Plaintiff is granted costs of the action however such costs are to be awarded on the Magistrate's court scale.

[9] ORDER

In the circumstances I make the following order:-

- i) The arrest of the Plaintiff by members of South African

Police Services is found to be lawful;

- ii) The detention of the Plaintiff within the 48 hours is found to be lawful;
- iii) The detention of the Plaintiff in excess of the 48 hour period is found to be unlawful and wrongful;
- iv) The Defendant is directed to pay to the Plaintiff the sum of R15 000-00 as damages in respect of the Plaintiff's unlawful detention for a period of 21 hours and 45 minutes; and
- v) The Defendant is directed to pay the Plaintiff's costs of suit, on the Magistrate's court scale, such costs to include the costs of the interpreter.

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Dawood J

Judge of the High Court

DATE HEARD:

16 November 2010

DATE DELIVERED:

7 December 2010

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