IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

NOT REPORTABLE

Case No:1822/2017

XOLANI NTLANGENI	**First Plaintiff**
LUNGILE GEORGE DICK	**Second Plaintiff**
SEUNS JOHANNES	**Third Plaintiff**
JOHAN FLEURS	**Fourth Plaintiff**

and

MINISTER OF POLICE	**Defendant**

JUDGMENT

MFENYANA AJ:

Introduction

[1] The plaintiffs instituted an action against the Minister of Police. The facts giving rise to the plaintiffs' action are set out in their particulars of claim. It is common cause that on 9 March 2015 at approximately 21h00, the plaintiffs were arrested by a member of the defendant without a warrant, on a charge of possession of suspected stolen property. It is stated that on the day in question, the plaintiffs were driving at or near the gravel road in End Street, Reservoir Hills, Despatch, when they were stopped by members of the defendant, who accused them of being in possession of suspected stolen goods. They were put inside a police van and driven to the Despatch police station where they were detained until they appeared in court on 11 March 2015. They were subsequently released on warning at approximately 13h00 on the same day. The matter was postponed a few times and subsequently disposed of on 21 September 2015 following a court annexed mediation process.

[2] It is further common cause that at the time of the arrest and detention, the members of the defendant were acting within the course and scope of their employment with the defendant.

[3] The plaintiffs claim an amount of R150 000.00 in respect of each of them, for damages arising from their unlawful arrest and detention.

[4] The plaintiffs allege that the arrest by the defendant was unlawful for various reasons, inter alia, that the members of the defendant had no lawful reason to arrest them, and that the arresting officer, Mr Potgieter, 'did not entertain a reasonable suspicion that the plaintiffs had committed an offence, alternatively that he failed to take simple investigative steps to confirm or refute his suspicions'.

[5] The plaintiffs further allege that their detention was unlawful as there was no legal justification to arrest them in the first place. They challenge their continued detention on 10 March 2015, and argue that there was no valid reason for the defendant not to release them on warning on the morning of 10 March 2015. As such, the plaintiffs further allege that their detention was unreasonably long in the circumstances, as members of the defendant could have ascertained before and/ or after the detention that the plaintiffs had not committed any offence.

[6] The defendant denied that the arrest and detention were unlawful and consequently denied any liability to compensate the plaintiffs.

Plaintiffs' case

[7] Johan Fleurs (Fleurs) testified on behalf of the plaintiffs. He testified that he is 57 years old, and the fourth plaintiff in these proceedings. He is presently unemployed as he was at the time of the incident. He is married and has four children whom he support through part-time jobs. He attends church every Sunday.

[8] On 9 March 2015, he was driving from a sports meeting with the first, second and third plaintiffs. He saw people at a dumping site, handling refuse and some had wheelbarrows loading bricks. He stopped and asked them if they were loading bricks and they confirmed. He saw that some of the bricks were still whole and some were broken. He joined in and loaded some bricks onto his bakkie. The first, second and third plaintiffs also helped. They loaded approximately 100 – 113 bricks. They drove home thereafter. While on his way home, he saw a police van with the blue light on. He did not know why the police had the blue light on because he did nothing wrong. The police official came out and accused him of stealing and ordered him to come out of the vehicle. He tried to explain that the vehicle belonged to his brother in law, but the police official dismissed him. He stated that this was done in full view of residents who came out to watch because of the manner the police handled the incident. Potgieter pulled them out of their car and shoved them into the police van. He stated that he felt very bad because Potgieter handled him like an animal and he had never been handled in that manner before. He had an explanation for the bricks and offered to go and show Potgieter where he got the bricks from but Potgieter dismissed him. He arrested all four of them and took them to Despatch police station. He denied them any opportunity to call a lawyer, stating that it was not time for lawyers. They were all detained at the Despatch police station and appeared in court on 11 March 2015 where they were asked if they wanted to apply for legal aid. They were released from court at approximately 14h00 on 'free bail'.

[9] He described the condition of the cells both at the police station and at court as *'very, very, very bad, and very dirty'*. He testified that he could not eat for the two days he was incarcerated. He was traumatised *'for his whole life'*, so is his family. He stated that his whole life, even at church, has changed drastically. His children could not even finish school as they were bullied and mocked by other children, who told them that their father is a thief. He stated further that he cannot find work in Despatch as a result, as the news of his arrest spread to the whole of the community. He testified that after his release, he took photographs of the dumping site to show to the court. It later transpired that the photographs were taken two years after the incident.

[10] During cross- examination, Fleurs testified that he is an elder at his church and is involved in community sport clubs. He conceded that only his youngest child was still of school going age at the time of his arrest. He was 17 years at the time and in grade 9. He could not remember whether his son dropped out of school before or after the final examinations in that year. He further conceded that the said child had been struggling at school even prior to the incident and had to repeat some grades.

[11] When asked why he asked the obvious to the people at the dumping site when he could see that they were loading bricks, he replied that he was not sure if the bricks belonged to someone. Counsel for the defendant asked who the bricks could belong to, when by his own admission, they were at a dumping site. He appeared agitated by this question and stated that someone could have been trying to make money from the bricks as there is a high rate of unemployment. He stated further that he did not find it strange that people were removing bricks at night.

[12] Fleurs testified that he knew Potgieter before the incident, as he services the Despatch area and there is no bad blood between the two of them. He conceded that he took the photographs after his consultation with his attorney in 2017. He stated further that he wanted to prove to the court that it was a dumping site, but counsel for the defendant challenged him on his testimony stating that the dumping site would not look the same way it did two years ago when by his own admission,

people are dumping there daily. He stated further that he used his cellular phone to take the pictures but he no longer had the phone as it got broken.

[13] The remainder of Fleur's testimony was an account of his experience and perception of the police at Despatch. He testified that they were arrogant and racist, and did not inform him of his constitutional rights. It was put to him that he was raising these issues for the first time in cross examination, because he was making his story up as he went along.

[14] He initially denied signing the mediation agreement and later recalled upon prompting by the defendant's counsel, that he signed the document 'very quickly as there was no time to explain what the document was about'. At this point, he became a little aggravated.

[15] The first, second and third plaintiffs did not testify.

Defendant's case

[16] In denying liability, the defendant relies on section 40(1)(b) and 40(1(e) of the Criminal Procedure Act. The defendant further relies on section 39 and 50 in justification of the detention.

[17] The arresting officer, Warrant Officer Potgieter testified for the defendant. He stated that he has been working at the Despatch police station for twenty eight years. On the night in question, he was doing night duty and patrolling in the Kayamnandi area with his colleague, Constable Tana (Tana). They were approached by one Mr Konzapi (Konzapi) who informed them that some people were loading bricks onto a 'bakkie' at the RDP construction site. Konzapi gave them the description and particulars of the bakkie. They proceeded in the direction of End Street. A vehicle fitting the description given by Konzapi approached them from the opposite direction. They saw that it was loaded with bricks and stopped it. They established that the driver was Mr Fleurs, the fourth plaintiff and he was in the company of three other persons; the first, second and third plaintiffs in this matter. He testified that he knows the fourth plaintiff as he is a community leader in the Despatch area and knows where he lives.

[18] He asked Fleurs and his passengers where they got the bricks from and Fleurs told them he was sent by Goofy to fetch them from a dumping site. He arrested all four of them as he concluded that a 'case needed to be investigated'. When asked for comment on the plaintiff's allegation that he had no lawful reason to arrest the plaintiffs, Potgieter denied this, and added that it was not a normal thing to remove building material in the dark where no one resides. He denied that the purpose of the arrest was to embarrass the plaintiffs and stated further that the complaint came from a third party and not from him and his colleague.

[19] Potgieter testified further that he believed what Khonzapi told him, as the plaintiffs' could not convince him that it was lawful for them to remove the bricks. His aim was to arrest the plaintiffs and thereafter investigate as he would have failed in his duty had he entertained any doubt about arresting them. He further stated that the matter was referred for mediation and subsequently withdrawn on 21 September 2015 because the prosecutor was not happy that the owner of the bricks did not come forward. In conclusion he testified that he would not do anything differently if faced with the same circumstances again.

[20] During cross examination Potgieter testified that he informed the suspects that he was arresting them for being in possession of suspected stolen goods and immediately took them to the Despatch police station. He said the suspects gave their full cooperation. After all the formalities were done, the stand-by detective was notified. He confirmed that the value of the goods was R904.00. He confirmed further that he knows where Fleurs stays and did not consider him to be a flight risk, but that he did not verify the plaintiffs' addresses as this is normally done by the detectives. He further stated under cross examination that he does not know why the plaintiffs were not brought to court the next day, and that the detectives are more suitable to answer that question. When he was asked whether he requested Konzapi to take him to the site from where he reportedly saw bricks being removed by the plaintiffs, he replied that there was no need for him to do so as he was convinced that Konzapi was telling the truth. He left the verification to the investigating officer. He confirmed that the owner of the bricks was never found and if that was the case, they would have signed the mediation agreement as well. The agreement was ultimately concluded between Konzapi (as a complainant) and the plaintiffs.

[21] Potgieter disputed the plaintiff's version that they got the bricks from a dumping site, stating that none of the bricks were broken. He declined to answer who of the four plaintiffs was in possession of the bricks, and deferred this question to the court.

Issue for determination

[22] The main issue for determination is whether the arrest and detention of the plaintiffs was unlawful.

The law

[23] Section 40(1)(b) provides:

> *"A peace officer may without warrant arrest any person –*
> *(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody…"*[1]

[24] Section 40(1)(e) provides further that a peace officer may arrest any person

> "(e) *who is found in possession of anything which the peace officer reasonably*
> *suspects to be stolen property or property dishonestly obtained, and whom the*
> *peace officer reasonably suspects of having committed an offence with respect*
> *to such thing;…"*[2]

[25] For successful reliance on section 40(1)(b) the defendant must establish the following jurisdictional factors:

(a) that the person arresting must be a peace officer;

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[1] Sec 40(1)(a), Criminal Procedure Act
[2] Sec. 40(1)(e)- Criminal Procedure Act

(b) who must entertain a suspicion;

(c) that the arrestee has committed a Schedule 1 offence; and

(d) that suspicion must be based on reasonable grounds.

[26] Once the jurisdictional requirements are satisfied, the peace officer is entitled to exercise a discretion as they deem fit, provided they stay within the bounds of rationality.[3]

[27] The jurisdictional factors in respect of a defence in terms of subsection (e) require in addition, that the peace officer must entertain a reasonable suspicion that the property has been stolen or dishonestly obtained; and that the person found in possession thereof has committed an offence in respect of that property.

The present case

[28] It is common cause that Potgieter was a peace officer. It is further common cause that possession of stolen property is a schedule 1 offence. The issue turns on whether in arresting the plaintiffs, Potgieter entertained a suspicion in accordance with subsections (b) and (e), and whether that suspicion was reasonable in the circumstances. The test, is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach he in fact has reasonable grounds for the suspicion.

In ***Mabona & Another vs Minister of Law and Order & Others***[4], Jones J stated thus:

> *"The test of whether a suspicion is reasonably entertained within the meaning of s40(1)(b) is objective. Would a reasonable man in the (defendant's) position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty*

[3] Minister of Safety and Security v Sekhotho 2011 (5)SA 367
[4] 1988(2) SA 654

of (being in possession of suspected stolen (property) knowing it to have been stolen)? The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is ***only after an examination of this kind*** *that he will allow himself to entertain a suspicion which will justify an arrest."*[5] (my emphasis)

[29] Upon receiving information from Khonzapi that a crime had been committed, Potgieter set out to find the alleged perpetrators. He found them on the road with the bricks as informed by Khonzapi. His decision to arrest was based on the information he received from (Khonzapi). It is well established that the information of informers generally must be regarded with caution. In Potgieter's defence, it must be considered that not only did he receive information from Khonzapi that the plaintiffs were in possession of suspected stolen property, but he *"caught them in the act",* so to speak, when he stopped them on the road, with a bakkie full of bricks, as informed by Khonzapi. I suggest that in his mind this somewhat corroborated Khonzapi's account, and on the basis of this "corroboration", concluded that the plaintiffs had stolen the bricks as informed by Khonzapi. He asked the plaintiffs where they got the bricks from, and they told him that they were sent by Goofy to fetch them. He did not believe this explanation and at that point, decided to effect an arrest. In all the circumstances there was nothing upon which Potgieter could have been able to assess the quality of the information he received from Khonzapi or the reasonableness of the conclusion reached by Khonzapi. He did not verify the information received or make any further enquiries, independent of what his informer had told him. He did not visit the site, which according to Khonzapi's statement, was not far from where the arrest took place. He, in so doing, entertained a suspicion before critically examining the information at his disposal. In my view, a simple enquiry by Potgieter, and in the circumstances, a visit to the site would have sufficed. The purpose is to make the enquiry before the arrest, as opposed to making an arrest in order to investigate the circumstances. The suspicion must be reasonable at the time of the alleged offence in order to pass scrutiny.

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[5] at 658 F - G

[30] It was Potgieter's testimony that no one came forward to claim the bricks and up until the time they concluded the matter and withdrew the charges against the plaintiffs, they had no complainant, apart from Khonzapi. No one seemed to have been deprived of ownership of the property. This, in my view thwarts any suspicion that an offence had been committed. I am alive to the fact that the suspicion must be entertained at the time of the arrest. However even with the wisdom of hindsight it cannot be said that the suspicion in any way, lends itself to any degree of reasonableness in the manner required by the law. In his testimony, Potgieter stated that "*My aim was to arrest the people and then investigate. If I had doubted to arrest them, there and then, I would have failed in my duty."* He stated further that he did not ask Khonzapi to take him to the site, stating further that there was no need to do that as he *"was convinced that the explanation by Khonzapi was the truth"* It is on this basis that he effected the arrest. He left the site inspection to the investigating officer. While the police are entitled to 'strike while the iron is hot', this is not one such instance as by his own admission, Potgieter believed Khonzapi's information to be the truth and on the basis of this "truth", believes that he was obliged to effect an arrest. He misconstrued the powers conferred on him by section 40(1)(b) and (e).

[31] In respect of section 40(1)(e), Potgieter's testimony was that he did not concern himself about who of the four plaintiffs was in possession of the bricks, but decided to arrest all of them so that the court could decide.

[32] As a witness, Potgieter appeared to be an honest and credible witness. He answered questions with ease, even under cross examination, and offered no solution to some of the questions, where he had none. His demeanour was calm, and he maintained this demeanour throughout his testimony. The crux of his testimony was that he arrested the plaintiffs to enable the detectives to investigate whether the plaintiffs had committed an offence or not. This in my view, falls short of the requirements.

[33] The plaintiffs' witness on the other hand was not an impressive witness. His testimony was convoluted and in some instances unreliable. He gave a long-winded and exaggerated account of the impact of the arrest on him and his family, stating that his children had to drop out of school as they were mocked by other children.

During cross examination he conceded that only one of his four children was of school going age at the time, and that the said child had his own troubles with schooling, as he had repeated grades in the past, and was, as a result lagging behind his peers. His account of the happenings on the day of the arrest were no less convoluted. I view this as nothing more than the witness' eagerness to create an exaggerated impression of what happened on the day in question, perhaps in an attempt to be more believable to the court, and create an impression that he had suffered more trauma than he had. The result was the opposite. Fleurs seemed to make his evidence as he went along to a point of making allegations of racism for the first time, which did not initially form part of his case. During cross examination he admitted that the photographs he presented to the court, purportedly of the dumping site, were only taken two years after the incident.

[34] I do not consider these discrepancies or the witnesses' demeanour to go to the heart of the issue to be decided to the extent that they alter the course of the determination whether the defendant acted reasonably or not. It is also trite that the trait of an truthful witness is not their candour or ability to craft their testimony in the most forthright of ways. As Diemont JA in ***S v Kelly 1980 (3) SA 301 (A)***, stated, *"demeanour is, at best, a tricky horse to ride…".* There is thus, as the learned judge stated, little profit in comparing the demeanour only of one witness with that of the other in seeking the truth. The evidence must be looked at in its totality.

[35] Having regard to the pleadings and the evidence tendered as a whole, I find that the defendant has not discharged the onus resting on it, that Potgieter entertained a reasonable suspicion that the plaintiffs had committed an offence. I am therefore persuaded that the arrest and detention of the plaintiffs was unlawful. The ensuing detention is as a consequence, also unlawful. I must also add that by his own admission, Potgieter testified that he knew the fourth plaintiff, knew where he lived, and described him as a community leader in the area of Despatch. He added that he did not consider him a flight risk. This suggests that a little less invasive method other than arrest and detention, could have achieved the purpose of bringing the plaintiffs, all of whom were cooperative, before court.

[36] I do not agree with the defendant's counsel that there are two mutually destructive versions in this matter. The facts in this matter are common cause. The only issue facing this court is a clear question of law, whether the police acted within the scope of their powers in effecting the arrest and detaining the plaintiffs.

Locus standi of the first, second and third plaintiffs

[37] It was contended, albeit lukewarmly, by the defendant that the plaintiffs lacked *locus standi*. The basis for the defendant's contention was not disclosed nor was this contention taken any further save for a rather unexpected regurgitation thereof in the defendant's heads of argument. The defendant further submitted that on the basis that the other three plaintiffs were not called to testify, their claims should be dismissed with costs. This was met with resistance on behalf of the plaintiffs, that the submission of the plaintiffs' identity documents into evidence and confirmation thereof by the arresting officer makes it clear that the plaintiffs are all adults with the necessary *locus standi* to sue in their personal capacities. Mr Le Roux, counsel for the plaintiffs submitted that the aggravated nature of the plaintiffs' detention was reported by the fourth plaintiff who testified and in essence that they needed not testify. I will deal with this aspect in the ensuing paragraph. I was referred in this regard to the decision of Eksteen J in ***Leon Chamberlain v Minister of Safety and Security***[6]where the learned judge found the arrest and detention of the plaintiff unlawful and awarded him an amount of R100 000.00 even though he did not testify.

[38] I do not think that much can me made of the defendant's challenge in respect of *locus standi*. I now turn to consider the effect of the failure or election to not testify, on the part of the first, second and third plaintiffs. Ms Cubungu, counsel for the defendant argued that these plaintiffs' claims stand to be dismissed with costs. Their election not to testify, to my mind, affects no more than the quantum of damages to be awarded and to some degree, the extent of the evidence placed before this court. I say this for the simple fact that even on the defendant's version, all four plaintiffs were arrested by Potgieter and detained until 11 March 2015. I have already found

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6 (3500/09) [2014] ZAECPEHC 30 (8 May 2014)

that the arrest and the ensuing detention were unlawful. This, in my view, entitles the plaintiffs to some form of compensation as a result of their unlawful arrest and detention. It would seem that the real question to be answered is whether the three plaintiffs who did not testify have proved their claims in respect of quantum.

Quantum

[39] An arrest constitutes an incursion into a person's liberty. As Rabie CJ stated in ***Minister of Law and Order v Hurley***[7]**,** "*…an interference with the individual concerned.*

> *"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that 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*
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> *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 iniuria with any kind of mathematical accuracy. 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".*[8]

[40] The available case law also only serves as a guide in arriving at what could be considered a fair amount of compensation. As Nugent JA stated in ***Minister of Safety and Security v Seymour***; it is fraught with difficulty. "*The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that"*[9]*.*

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[7] 1986(3) SA 568 (A) at 589
[8] Minister of Safety and Security v Tyulu 2009 (5) SA 85(SCA) at 930 D-F
[9] [2007] 1 All SA 558 (SCA)

[41] It was submitted on behalf of the plaintiffs that the following award would be fair in the circumstances:
R150 000 in respect of the fourth plaintiff;
R100 000 each in respect of the first, second and third plaintiffs.

[42] I have considered the specific facts of the present case. It is not in dispute that the plaintiffs were detained for a period of 41 hours. From what could be gleaned from the testimony of the fourth plaintiff, the arrest and detention caused him some degree of embarrassment and humiliation although not to the degree he demonstrated. It is also not in dispute that he was detained in a dirty cell, and that his church life was affected by the incident. While the fourth plaintiff painted a gloomy picture of his entire family severely traumatised by the incident, this was refuted in cross examination. I did not find any special features that exacerbated the arrest and detention.

[43] Having considered the fourth plaintiff's age, the nature of the arrest and the duration of the detention, I consider an amount of R80 000.00 to be appropriate in the circumstances. I have given due consideration to comparative awards given by this division in relatively comparative circumstances, none of which fit squarely within the circumstances of this case.

[44] The first, second and third plaintiffs did not testify. There is no evidence before me on how the circumstances of their arrest and detention affected each of them personally. There is no evidence of any extraordinary circumstances, their social standing, occupation or anything which could be said to aggravate the humiliation beyond that which is ordinarily associated with deprivation of liberty. In the absence of their evidence in this regard, I am guided by previous comparative awards. In the circumstances, and on occasion of their arrest and deprivation of liberty, in so far as that has been established(even on the defendant's own case), I consider that an amount of R50 000 for each of the three plaintiffs is an appropriate award.

Costs

[45] It was submitted that the court has a discretion to award costs at the high court scale, regardless of the amount. In dealing with this issue, I find the following passage by Jones J, apposite.

> *"The high court frequently restricts costs to the magistrates' courts scale on the ground that the plaintiff could and should have proceeded in the magistrate's court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the judgment or settlement is always a significant factor in balancing fairness. The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more in the way costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration. Various other circumstances – for example, the complexity of the factual issues, the difficulty of the legal issues, the seriousness of an imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small. But as a general rule the proper exercise of the court's discretion on costs provides a powerful deterrent against bringing proceedings in the high court which might more conveniently be brought in the magistrate's court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour."*[10]

[46] While I agree that arrest and detention is a deprivation of constitutionally guaranteed rights to freedom of movement and dignity, I am not persuaded that the facts of the present matter presented any complex legal issues which could not have been conveniently disposed of in the Magistrate's court.

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[10] Vermaak v Road Accident Fund [2006] ZAECHC 10, at para [5]

[47] In the result I make the following order:

(a) That the defendant is liable to compensate the plaintiffs for damages arising out of the unlawful arrest and detention of the plaintiffs in the following amounts:

(i) R50 000 each in respect of the first, second and third plaintiffs.
(ii) R80 000 in respect of the fourth plaintiff.

(b) The defendant shall pay interest on the amount stipulated in (a) above, at the prescribed rate of 10.25 % calculated from date of judgment, to date of payment.

(c)The Defendant is ordered to pay the plaintiffs' costs on the Magistrate's Court scale.

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SM MFENYANA
ACTING JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff:	*Adv. Le Roux*
Instructed by:	*Lessing, Heyns, Keyter & Van der Bank Inc.*
For the Defendant:	*Adv. Cubungu*
Instructed by:	*The State Attorney*
Date Heard:	29 – 30 January 2019
Date Delivered:	14 March 2019