REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 3469/2018
REPORTABLE: ~~YES~~/NO
OF INTEREST TO THE JUDGES: ~~YES~~/NO
REVISED.
DATE **25 MARCH 202**

In the matter between:

ABRAHAM CHRISTIAAN DERCKSEN **PLAINTIFF**

-and-

THE MINISTER OF POLICE **RESPONDENT**

CONSOLIDATED WITH:

CASE NUMBER: 3470/2018

In the matter between:

DEON CHARLES BOTHA **PLAINTIFF**

-and-

MINISTER OF POLICE **DEFENDANT**

JUDGMENT

BRESLER AJ:

Introduction:

[1] Mr. Abraham Christiaan Dercksen (hereinafter 'Dercksen') and Mr. Deon Charles Botha (hereinafter 'Botha') are respectively the Plaintiffs under case numbers: 3469/2018 and 3470/2018. The Plaintiffs were arrested simultaneously and the same charges and the two cases where therefore heard simultaneously.

[2] The Plaintiffs' cause of action is a delictual claim for damages against the Defendant arising from their alleged unlawful arrest and detention on the 24th of August 2017 to the 29th of August 2017. During the pre-trial held on the 23rd of May 2023, the parties agreed that the trial will continue on both *quantum* and merits.

[3] It is common cause between the parties that, on the 24th of August 2017, the Plaintiffs were arrested without a warrant by members of the South African Police Services (the 'SAPS'). Pursuant to the arrest, the Plaintiffs were transported to Polokwane Police Station and detained from the 24th of August 2017 to the 28th of August 2017. The Plaintiffs' first appearance in court was on the 28th of August

2017. The criminal charges were later withdrawn against the Plaintiffs. It is furthermore common cause that, at all material times hereto, the members of the SAPS were acting within the course and scope of their employment as such.

[4] This Court is consequently called upon to determine if the arrest and detention of the Plaintiffs were unlawful and if the Plaintiffs suffered any loss and subsequent damages as a result thereof.

The Defendant's evidence:

[5] The Defendant's first witness was Mr Dale Thomas ('Thomas'). Thomas was one of the complainants in the criminal case that gave rise to the arrest of the Plaintiffs.

[6] On the 24th of August 2017, and while they were hunting (without permission) at Duvenhageskraal Farm (the 'Farm' of Dercksen and Botha where the incident occurred), he saw a green bakkie coming at them at a high speed and heard shots being fired at them. (It later transpired that this was in fact a Pajero SUV). According to Thomas, Dercksen exited the vehicle and instructed someone to stab him. Botha was holding the firearm.

[7] According to Thomas, 4 to 6 shots were fired at them and although nobody was hit, they could hear the bullets flying past them.

[8] In this Court's view, Thomas' testimony did not take the current case any further. The question was, after all, not what transpired on that day but rather the perceptions and the reasonable exercise of a discretion by the investigating officer leading to the arrest of Dercksen and Botha.

[9] The Defendant also called Detective Sergeant Chokoe ('Chokoe'), who was the investigating officer in the criminal case. He testified that upon entering the Customer Services Centre on the 24th of August 2017, he noticed a couple of people reporting a case. A female police officer was assisting them. He approached them to take their statements.

[10] The Complainants informed him that their dogs ran into the Farm looking for water. This resulted in them following the dogs. They also alleged that they were chased by a Pajero at an excessive speed. There were four people in the Pajero. The driver took out a firearm and shot at them. Chokoe testified that one of Complainants knew Dercksen and Botha. He observed that the Complainants appeared to be confused and out of breath because they were running.

[11] Chokoe, assisted by four witnesses, went to the scene of the incident to determine if there were spent bullet cartridges in the grass, and to determine where the driver tried to knock one of Complainants with his vehicle. Whilst Chokoe was there, he saw a black man walking nearby. The man disposed of an item in the grass. Upon closer inspection it was a silver knife with a black handle. The man was informed of the case and was consequently arrested.

[12] No bullet cartridges could be found at the alleged scene of the incident.

[13] Chokoe then wanted to see if he could find the firearm that was allegedly utilised in the incident. He also wanted to arrest Dercksen and Botha. It is apposite to note that clearly Chokoe had the intent to arrest Dercksen and Botha from the onset and without further investigation.

[14] After gaining entrance to the property, Chokoe identified himself to Dercksen and Botha and arrested them. Only after the arrest did Chokoe request Botha to hand over the firearm that was used.

[15] According to Chokoe, a black firearm was brought from the house and handed over to Chokoe. Only when he returned to collect the Complainants was he informed by them that the firearm was allegedly silver and not black as the one handed to Chokoe.

[16] When asked during cross examination, he stated that he arrested the suspects since according to the Complainants' statements, the suspects were guilty of the stated offence of attempted murder. He furthermore testified that, after the suspects were pointed out, all that remained was to arrest them. The reasoning behind the immediate arrest was, according to him, because they committed a crime.

[17] Chokoe testified that there were four charges of attempted murder and, in his opinion Botha and Dercksen would not have come to the police station voluntarily. No basis for this contention was laid in his testimony.

[18] Chokoe furthermore conceded that no fingerprints were taken (as Botha and Dercksen were pointed out by the Complainants), the firearm that was take were also not fingerprinted (because it was the incorrect firearm), they searched for cartridges at the scene of the incident, but could not find any and they did not search for a firearm at the premises of Dercksen and Botha at the time of the arrest since a firearm was voluntarily handed over.

[19] Chokoe also testified that they checked the firearm register after Dercksen and Botha was arrested but he did not place a copy of the search on the docket. He alleged that Botha owned a silver firearm, but he could not recall the make.

[20] The Plaintiffs were taken to the Polokwane Police Station on Thursday, the 24th of August 2017. They were charged the next day. He received pressure from the prosecutor to have the Plaintiffs appear in Court. Chokoe confirmed that the Plaintiffs appeared in Court on the Monday and that they were released on bail on the Tuesday.

[21] Noticeably, no evidence was led as to the circumstances in which the Plaintiffs were detained.

[22] The Defendant then closed its case without calling further witnesses.

The Plaintiffs' evidence:

[23] Dercksen testified that he is a 58-year-old unmarried male mechanic who stays with his partner, Jacky van Jaarsveld, at 1[…] S[…] R[…], Ivydale, Polokwane. He resides at this address with *inter alia* Jacky, his fiancé, and Botha.

[24] On the 24th of August 2017 at approximately 10:30, he received a call from their herdsman, Samuel, informing him that there are people illegally hunting with dogs on the Farm where their cattle were grazing.

[25] He drove with Botha to the Farm in a Pajero. Upon their arrival, they picked up Samuel. They drove to the veld where the cattle were held. They arrived at an old, ploughed land and saw unknown individuals. The individuals started running when they approached. The drove towards them (at approximately 30 – 40 km/h because of the nature of the terrain).

[26] Dercksen exited the Pajero SUV and fired shots with an empty gas BB gun to scare them and to try and force them to stop. The Complainants stopped when they heard the noise. Botha pursued the remaining Complainants with the Pajero SUV. He drove in a semi-circle around them to force them to return to where Dercksen was waiting with the remaining Complainants. He denied knocking or hitting any of the Complainants with the vehicle.

[27] Dercksen testified that the Complainants apologised for trespassing. A dispute ensued between Samuel and one of the Complainants, and Samuel did cut him with a knife. Further conversation ensued between Dercksen, Botha and the Complainants.

[28] After apologising and attending to the wound of the one Complainant, Dercksen and Botha took five of the Complainants to the railway line next to Westenburg to enable them to return home. The other two Complainants walked home since they had the dogs with them.

[29] Dercksen and Botha returned to the Farm at approximately 15:00. Whilst they were driving there, they noticed three vehicles leaving the farm. Upon their arrival, they were informed by one of Samuel's friends that he was arrested. Dercksen and Botha left the Farm and drove home.

[30] Upon arriving at home, they saw two sedan vehicles and recognised one of the people as one of the Complainants. None of the vehicles had SAPS signage on it. He was approached by two people who did not identify themselves. They demanded the firearm, claiming that he was shooting at the Claimants. He requested Jacky to bring the firearm in the house (being the BB gun).

[31] The members of the SAPS were extremely rude to them and raised their voices whilst talking. Dercksen and Botha were both placed in the back of the police vehicle without formally indicating that they are being arrested or without the

reason for their arrest and detention being communicated to them. This was done in the presence of members of their staff, a client and members of their family. Dercksen testified that the incident caused embarrassment and distress to him and that he was afraid and humiliated.

[32] Dercksen testified that they were detained for 5 nights and 6 days. He testified that he suffered because of the indignity of appearing in court.

[33] As to his personal circumstances, Dercksen testified that both Botha and himself have fixed addresses where the SAPS could easily get a hold of them. They are also known in the community. He also testified that he was threatened by a member of the SAPS, who told him that they are going to get Julius Malema, and the EFF involved and that they should get a lawyer. According to Dercksen, it was the first time that the SAPS mentioned the involvement of a lawyer on their behalf. They were also not informed of the charges being investigated against them at this stage.

[34] He testified that Botha tried to call Attorney Jan Stemmet to assist. Mr Stemmet informed them that he does not accept cases of this nature but that he will try and get somebody else to assist them.

[35] When arriving at the police station, their phones were taken, and they were not able to call anybody else. The were not allowed to call any legal representative, they were not informed of their right to legal representation or their right to apply

for bail. They also did not have contact with any family members whilst being detained in the cells. Their constitutional rights were not read to them, and they did not sign any entry into a pocketbook. Their version of the day's events was not taken. They were also not informed of their right to remain silent. A SAPS 14A Notice (Notice of Constitutional Rights) were handed to them at a later stage without explanation, and they were informed that they are obliged to sign it.

[36] As to the conditions in the cells, Dercksen testified that the cells were terrible. There were numerous inmates, there were no beds, and they were forced to sleep on mats with only a single blanket. The toilet was blocked, and sewerage was running everywhere. There was no door for privacy.

[37] They received dry bread and bitter tea. Some pap and a watery substance were served in the evenings.

[38] Although arrested on Thursday, the 24th of August 2017, they were not taken to court on Friday, the 25th of August 2017 as the case docket was allegedly not taken to court. They appeared in court on the Monday, the 28th of August 2017 and the matter was remanded to the 29th of August 2017 for Chokoe to complete his investigation. Dercksen and Botha were released on bail of R500.00 each on the 29th of August 2017.

[39] Dercksen testified that, because of this incident, he has lost all trust in the SAPS. He also lost income and business because of the incident.

[40] Botha was then called to testify. He confirmed that he is a male adult born on the 22nd of October 1976. He resides at 1[…] S[…] R[…], Ivydale, Polokwane. He is a mechanic and conducts business from the same address.

[41] His testimony largely corresponds with the testimony of Dercksen and there are no relevant or perceivable contradictions as to what transpired herein after.

[42] As to his personal observations of the alleged arrest incident, he testified that one of the members of the SAPS threatened them by indicating that they were going to call Julius Malema and the EFF. Botha testified that this made him extremely afraid.

[43] Upon arriving at the police station, he called Jan Stemmet. He had to cut his call short because he was ordered by a member of the SAPS to switch off his phone. Botha confirmed that, at that stage, they were still not informed of the reason for the arrest or the charges against them.

[44] Botha testified that, when taken to the cells, other inmates harassed them. They were forced to take off their clothes and shower in front of other people. He felt degraded and humiliated and stated that nobody should be made to feel like that. After the shower, their clothes were thrown on the wet floor and they had to wear wet clothes.

[45] Botha testified that they did not receive any food or water on the 24th of August 2017.

[46] On the 25th of August 2017, their names were called, and they were told to wait at a certain point at the SAPS building to be taken to court. They were, however, not taken to court that day and were returned to the cells later during the afternoon.

[47] In the cells, they were provided with a mat and one blanket. The blankets were very smelly and full of bedbugs. His thighs were extremely itchy.

[48] Botha testified that he was never informed that they could apply for bail, and he did not sign a warning statement on the 26th of August 2017. Only his fingerprints were taken whereafter they were taken back to their cells. On the 27th of August 2017, they remained in their cells the entire day.

[49] They received bread and tea for break, no lunch and a soya meal in the evening.

[50] Botha testified that their names were called again on the 28th of August 2017. They appeared in court briefly. According to his understanding the matter was remanded to the 29th of August 2017 as the dockets were not at court and the paperwork was not in order. A postponement was accordingly applied for by the Defendant.

[51] They did not receive any food during the day.

[52] On the 29th of August 2017, they appeared in court and received bail of R500,00 each. After the court appearance, they were taken to another cell in the Court building. By 15:00 they were still waiting and assumed the SAPS had forgotten about them. Dercksen called out to a constable, who walked past and who they were familiar with, to assist them. They were then collected after a while and taken back to the Polokwane holding cells in a police van. Botha confirmed that they were eventually released at approximately 16:00.

[53] Botha testified that the arrest and detention made him feel afraid and stressed. He does not feel like the SAPS' conduct was correct. He also noted that the SAPS never apologised to him. He testified that they lost clients because of the incident and his staff had to apologise to several customers on their behalf. He also stated that he is wary to report any matter to the SAPS in future because he has lost trust in them.

[54] The Plaintiffs then called Ms Jacky van Jaarsveld, the fiancé of Dercksen to testify. She confirmed her relationship with Dercksen. She also confirmed that she is a homemaker and was present when the incident transpired on the 24th of August 2017.

[55] She went to court on the 25th of August 2017 and was told the matter is not on the roll.

[56] She went back to court on the 28th of August 2017 and was present when the matter was postponed to the 29th of August 2017. In her understanding it was because Chokoe did not do his work properly. She also gave permission to Chokoe to search their home without a warrant as she was warned that a refusal would result in them having to apply for a warrant which would result in another postponement.

[57] The members of the SAPS arrived with their dogs and search for evidence but could not find anything.

[58] Hereafter the Plaintiffs called Mr Deon Dercksen Jnr, the son of Dercksen. He testified that he is a male person residing with the two Plaintiffs at 1[…] S[…] R[…], Ivydale, Polokwane. He is also a mechanic and was present when the SAPS arrived on the 24th of August 2017.

[59] He confirmed that members of the SAPS took the Plaintiffs away and that he did not realise they were arrested.

<u>Legal Framework applied to the facts</u>:

The lawfulness of the arrest

[60] It is trite law that the cause of action in an unlawful arrest and detention is the *actio iniuriarum* with certain additional features thereto.[1]

[61] Section 40(1)(b) of the **Criminal Procedure Act,** Act 51 of 1977 (the 'CPA') provides that 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 lawful custody. The arrest would be lawful if the arresting officer successfully establishes the jurisdictional factors, and he/she may invoke the power conferred by s 40(1) (b) to arrest the suspect unless the plaintiff demonstrates that the discretion to arrest him/her was exercised unlawfully. The jurisdictional requirements for a lawful arrest under s 40(1) (b) defence are that:

61.1 the arrestor must be a peace officer.

61.2 the arrestor must entertain a suspicion.

61.3 the suspicion must be that the suspect committed a schedule 1 offence; and

61.4 the suspicion must rest on reasonable grounds.

[1] See ***Thompsom v Minister of Police*** 1971 (1) SA 371 (E) at 373 and ***Minister of Justice v Hofmeyer*** 1993 (3) SA 131 (A)

[62] If the arresting officer succeeds in establishing these jurisdictional factors, the arrest would be lawful, unless the Plaintiff establishes that the discretion to arrest him/her was exercised in an unlawful manner.[2] If one or more of the jurisdictional factors is / are not met, the arrest would be unlawful. The relevant enquiry is whether the suspicion was reasonable, thereby successfully establishing the jurisdictional factors.[3]

[63] In ***Minister of Safety and Security v Sekhoto and Another***[4], Harms DP quoted with approval the dictum in ***Duncan v Minister of Law and Order***[5] at 818H-J and 819A-B where Van Heerden JA held:

> *'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mahomed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt his discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in*

[2] See ***Minister of Safety and Security v Sekhoto and Another*** 2011 (1) SACR 315 (SCA)
[3] See ***Nkosinathi Justice Banda v Minister of Police N.O.*** [2020] ZAECGHC 55 para 40
[4] 2011 (1) SACR 315 (SCA)
[5] 1986 (2) SA 805 (A)

question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the Legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee (cf Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another 1966 (2) SA 503 (A) at 512; Groenewald v Minister van Justisie 1973 (3) SA 877 (A) at 884).”

(Own underlining)

Was the suspicion based on reasonable grounds?

[64] In ***Mabona and Another v Minister of Law and Order and Others***[6], Jones J held:

‘The test of whether a suspicion is reasonably entertained within the meaning of s 40(1) (b) is objective (S v Nel and Another 1980 (4) SA 28 E at 33E-H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a

[6] 1988 (2) SA 654 (SE)

reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. 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. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

(Own underlining)

[65] The Supreme Court of Appeal, in ***Duncan v Minister of Law and Order***[7], set out four jurisdictional requirements which flow from section 40(1) of the CPA, which authorises arrests without a warrant. They are: that the person arresting must be a peace officer, who entertained a suspicion, that the suspicion was that the arrestee had committed a schedule 1 offence and that the suspicion rested on reasonable grounds.

[7] ***Duncan v Minister of Law and Order*** [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H.

[66] The question that arises is whether Chokoe, in executing the arrest, exercised his discretion properly.

[67] In ***Minister of Safety and Security v Sekhoto***[8], the principles were clearly established. As stated in ***Duncan*** *supra*, a discretion arises as to whether or not to arrest.[9] There is no obligation to arrest. The general requirement is that any such discretion must be exercised in good faith, rationally and not arbitrarily.[10] The court in ***Sekhoto*** *supra* further stated thus:

> *'This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.'* (Footnotes omitted)

[68] The Constitutional Court confirmed these principles in ***Groves NO v Minister of Police***[11] as thus:

[8] ***Minister of Safety and Security v Sekhoto*** 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA).
[9] ***Minister of Safety and Security v Sekhoto*** *supra at para 28*
[10] ***Minister of Safety and Security v Sekhoto*** *supra at para 38*
[11] ***Groves NO v Minister of Police*** 2024 (4) BCLR 503 (CC) paras 52 and 60

'The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.

...

Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and "[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries". An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.'

[69] The evidence in the trial was quite clear. Chokoe intended from the onset to arrest the Plaintiffs purely premised on the testimony of the Complainants, notwithstanding the fact that there was no other physical evidence of the alleged crime and taking into consideration that it was evident that the Complainants were in fact trespassing on the farm. As they were in fact trespassing, would would expect that Chokoe would have at the very least, approach their testimony with some level of caution. Chokoe repeatedly stated that his only consideration was that the Plaintiffs were 'guilty of an offence' and he therefore had to arrest them immediately. No testimony was led as to any rational process of deliberation or consideration of alternative means, other than an arrest, of securing the Plaintiffs' presence in court.

[70] It is also evident from the testimony of both Dercksen and Botha that their version was not obtained. In fact, only after arrest did Chokoe enquire about the whereabouts of the firearm.

[71] During evidence in chief Chokoe did not sufficiently substantiate his reasoning as to why arrest was the appropriate mechanism to secure the attendance of the Plaintiffs before court. There was no justification for electing immediate arrest and detention.

[72] On this basis, this Court finds that the arrest of the Plaintiffs was in fact, unlawful.

[73] Having regard to the insistent intention of Chokoe to arrest Botha and Dercksen, notwithstanding the questionable version of the Complainants, this Court has no

reason to question the testimony of the Botha and Dercksen that the arrest was also not procedurally correct. The specific evidence to the effect that they were not informed of the charges against them and their rights at the time of the arrest, and thereafter at the Police station, is therefore found to be credible and acceptable evidence of what transpired.

Detention

[74] As enunciated herein before, the purpose of the arrest is to bring the arrested person before a court to face justice. Section 50 of the CPA regulates the process after arrest. Section 50(1)*(a)* provides that any person arrested 'shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place expressly mentioned in the warrant'.

[75] Section 50(1)*(c)* of the CPA requires an arrested person to be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. Subsection *(d)*(i) states that if the period of 48 hours expires outside ordinary court hours, the person may be brought before a lower court not later than the end of the first court day.

[76] Detention is, in and by itself, unlawful. The *onus* rests on the detaining officer to justify it. The Constitutional Court remarked on occasion that the question whether a person's detention was consistent with the principle of legality and his right to freedom and security of the person in section 12 of the **Constitution**, 1996 is a

constitutional matter. Section 12(1) of the **Constitution** guarantees that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[77] In ***Mvu v Minister of Safety and Security and Another***[12] Willis J cited with approval the case of ***Hofmeyr v Minister of Justice and Another***[13] and remarked:

> *"[10] In Hofmeyr v Minister of Justice and Another King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and that the failure by a police officer properly to do so is unlawful. The minister's appeal was unanimously dismissed by what was then known as the Appellate Division of the Supreme Court. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all. This, it seems to me, and in my very respectful opinion, enables one to get a better grip on an issue which has been debated in the law reports in recent cases such as Minister of Correctional Services v Tobani; Ralekwa v Minister of Safety and Security; Louw v Minister of Safety and Security and Others; Charles v Minister of Safety and*

[12] 2009 (2) SACR 291 (GSJ); 2009 (6) SA 82 (GSJ)
[13] 1992 (3) SA 108 (C)

Security; Olivier v Minister of Safety and Security; and Van Rensburg v City of Johannesburg.'

[78] Having regard to the authorities stated herein before, the detention of the Plaintiffs was clearly unlawful following upon their unlawful arrest.

Further detention

[79] It is clear from the evidence that the Plaintiffs were taken to court on Monday, the 28th of August 2017. The matter was then remanded to the 29th of August 2017 for 'further investigation' on which day the Plaintiffs were released on bail, presumably after a further postponement at the behest of the State was refused. It is therefore evident that the further detention of the Plaintiffs, from the 28th to the 29th of August 2017, were done at the behest of the Defendant.

[80] Theron J in ***Bryan James De Klerk v the Minister of Police***[14] remarked:

'[81] Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant's further detention after his court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala's knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her, and one which

[14] 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC)

she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the Magistrate do not amount to a fresh causative event breaking the causal chain."

[81] The learned Judge concluded:

'[86] The crucial fact in this matter is that Constable Ndala subjectively foresaw the harm arising from the mechanical remand of the applicant after his first court appearance. She knew that the applicant's further detention after his court appearance would be the consequence of her unlawful arrest of him. She reconciled herself with this knowledge in proceeding to arrest him. In addition, she knew that her mere note inside the docket recommending bail would amount to nothing at this first appearance. That the judicial process should have had a different tenor and outcome seems to me to be beside the point. The point is that Constable Ndala knew it would not.'

[82] At paragraph [88] the learned Judge continued:

'[88] On the facts of this case, the Magistrate concerned should not be exclusively liable for the subsequent detention, given the original delict by the arresting officer and her subjective foresight of the subsequent detention and the harm associated therewith."

[83] The liability of the SAPS for the detention post-court appearance of the arrestee 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. These public policy considerations will serve as a measure of control to ensure that liability is not extended too far. The conduct of the SAPS after an unlawful arrest, especially if the SAPS acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. Moreover, each case must be determined on its own facts. That is because there is no general rule that can be applied dogmatically to determine liability.[15]

[84] The determination of legal causation is based on the consideration of a range of factors which *inter alia*, include direct consequences, reasonable foreseeability, and the presence of a *novus actus interveniens*. [16]

[85] Chokoe subjectively foresaw the harm when the case was remanded after the Plaintiffs first court appearance. He reconciled himself with that knowledge. His

[15] ***De Klerk*** *supra* at para 63
[16] ***De Klerk*** *supra* at para 65

explanation for the failure to have the Plaintiffs attend court on the 25th of August 2017 and again on the 28th of August 2017, does not pass muster.

[86] In this case, to impose liability on the Defendant for the entire period of detention in the circumstances of this matter, would not exceed the bounds of reasonableness, fairness, and justice. In the circumstances, I conclude that this matter meets the criteria set out by the Constitutional Court in ***De Klerk*** *supra,* to hold the Defendant liable for the period after the Plaintiffs' first appearance in court and until released on the 29th of August 2017.

[87] Section 39(3) of the CPA provides for detention from the time of arrest until the first court appearance. That first detention must itself be lawful, which requires that it must have been preceded by a lawful arrest. In other words, the section presupposes that s 39(2) would have been complied with. Reading s 39(3) in any other way would deprive s 39(2) of any force.

[88] The subsection does not allow for perpetual detention until the court has made a ruling. To read such an interpretation into the section would infringe upon the detainee's fundamental right to liberty. In addition, it would directly offend against the provisions of section 50(1) of the CPA that require an arrested person to be brought before a lower court without delay and no later than 48 hours.

[89] This accords with the evidence that pressure was placed on Chokoe to bring the Plaintiffs before court as soon as possible. The Court can only assume it is

because the Court realised that Chokoe delayed unreasonably in ensuring that the Plaintiffs' constitutional rights are adhered to.

[90] On this basis, it follows that the continued detention of the Plaintiffs after their first court appearance, was also unlawful.

Quantum

[91] In assessing the *quantum* of damages, Bosielo AJA, as he then was, in ***Minister of Safety and Security v Tyulu***[17] held:

> *'[26] 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 any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if*

[17] ***Minister of Safety and Security v Tyulu*** 2009 (5) SA (SCA) at paragraph 26

slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 - 29)'.

[92] In ***Protea Assurance Co Ltd v Lamb***[18] the then appellate division held as follows:

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

[18] 1971 (1) SA 530 (A) at page 535G – 536B

their sequelae may have been either more serious or less than those in the case under consideration.'

[93] In the matter of ***Pitt v Economic Insurance Co Ltd***[19] the court held as follows:

'*…the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.*'

[94] In ***Motladile v Minister of Police***[20] at paragraph 17 the Supreme Court of Appeal said the following:

'*The assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the*

[19] 1957 (3) SA 284 (N) at page 287E
[20] (414/2022) [2023] ZASCA 94 (12 June 2023)

part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff.'

[95] In ***Thandani v Minister of Law and Order***[21], Van Rensburg J said:

"*In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual.*'

[96] In ***Minister of Safety and Security v Seymore***[22] at paragraph 17 Nugent JA wrote:

"*The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly*

[21] 1991 (1) SA 702 (E) at page 707A – B
[22] 2006 (6) SA 320 (SCA)

comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."

[97] As far as *quantum* is concerned, I have considered the relevant facts as it appeared from the evidence. In arriving at what I consider to be an appropriate award, I have considered the following factors in arriving at a just and fair *quantum* for the unlawful arrest and detention of the Plaintiffs:

97.1 The Plaintiffs cooperated with the members of the SAPS during their alleged arrest on the 24th of August 2017;

97.2 The members of the South African Police Services did not explain the reason for the arrest of the Plaintiffs and their detention at the time when they were arrested. They were threatened on their way to the Police station;

97.3 The Plaintiffs were not taken to court on the first opportunity being the 25th of August 2017, but only after the weekend and on the Monday on the 28th of August 2017. The delay in bringing the Plaintiffs to court was because of the conduct of the Defendant's representatives;

97.4 The Plaintiffs were not given a reasonable opportunity to present their version to the Defendant prior to their arrest and detention.

97.5 The conditions of the cells from the description by the First and Second Plaintiff were inhumane and unhygienic. They were harassed and

humiliated. Their personal circumstances (and that of the other inmates) were deplorable. They slept on dirty mats with a single dirty blanket full of bed bugs.

97.6 The arrest and detention have affected the Plaintiffs personally and influenced their relationships with members of the community and their family members;

97.7 The age of the respective Plaintiffs, their status and standing in the community at the time of their arrest were considered;

97.8 The arrest and detention were found to be unlawful. The Constitutional rights of the Plaintiffs were infringed unlawfully and to the detriment of the Plaintiffs.

[98] This Court has a discretion as to the amount to be awarded as damages for the unlawful arrest and detention of the Plaintiff. As stated before, the amount of damages must be fair and just, taking into consideration all the relevant facts and factors that plays a role in the determination of the amount of damages to be awarded. This Court is not necessarily bound by awards in previous cases as each case needs to be considered on its own merits.

[99] Having regard to the authorities stated herein before and the facts presented during evidence, this Court finds that it would be just and reasonable to award an amount of R250,000.00 (two hundred and fifty thousand rand) to each Plaintiff in respect of their unlawful arrest and detention.

Costs:

[100] The general rule is the successful party is entitled to his or her costs. I have not found any reason to deviate from the rule. The issue that needs to be determined, however, is the scale in terms of Rule 69.

[101] The matter before the Court was not complex but it involved a matter of importance to the First and Second Plaintiff. The Court has noted the importance that our courts accord to the deprivation of a person's liberty when determining the scale on which to award costs. In ***De Klerk v Minister of Police*** *supra* at paragraph 18 the Supreme Court of Appeal said the following regarding costs:

> '*Although the quantum awarded R30 000-00 is far below the jurisdiction of the high court, the appellant was justified in approaching the high court because the matter concerned the unlawful deprivation of liberty.*'

[102] I accordingly find costs should be awarded on a party and party scale inclusive of costs to counsel on Scale B.

Order:

[103] **In the result the following order is made:**

103.1 The Defendant is ordered to pay the First Plaintiff (Dercksen) an amount of R250,000,00 (two hundred and fifty thousand rand) in respect of his unlawful arrest and detention.

103.2 The Defendant is ordered to pay the Second Plaintiff (Botha) an amount equal to R250,000.00 (two hundred and fifty thousand rand) in respect of unlawful arrest and detention.

103.3 The Defendant is ordered to pay interest on the aforesaid amount to be calculated at the prescribed rate of interest from *a tempora morae* to date of payment in full.

103.4 The Defendant is ordered to pay the costs of suit of the Dercksen and Botha on a scale as between party and party, including costs to Counsel on Scale B.

M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE PLAINTIFF	**:**	**Adv. IS Herbst**
INSTRUCTED BY	**:**	**Kirk Twine Attorneys** **Polokwane**

ktwine@ktpsa.co.za

FOR THE DEFENDANT	**:**	**Adv. S Mbali**
INSTRUCTED BY	**:**	**Office of the State Attorney** **Polokwane**

ChaLedwaba@justice.gov.za

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DATE OF JUDGMENT	**:**	**25 March 2025**