

SOUTH AFRICA / JUDGMENT

Dukulae v Minister of Police (885/2024)
[2025] ZANWHC 129 (25 July 2025)
[2025] ZANWHC 129

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

885/2024

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 885/2024

Reportable: NO

Circulate to Judges:

NO
Circulate to
Magistrates: NO
Circulate to Regional
Magistrates: NO

In the matter between:

BAILE
LABIOS DUKULAE
Plaintiff
AND
MINISTER
OF POLICE
Defendant
DATE
OF HEARING
: 30 JUNE
2025
DATE
OF JUDGMENT
: 25 JULY
2025
FOR THE
PLAINTIFF
: MR.
LEHABE
FOR

THE DEFENDANT
: ADV.
KAPUMBA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 25 July 2025.

Summary: Whether the offence of assault with intent to cause grievous bodily harm (assault GBH) is an offence as contemplated in Schedule 1 of the Criminal Procedure Act 51 of 1977, as amended (CPA). Whether a police officer is authorized to effect an arrest without a warrant of arrest in terms of the provisions of S 40

- (1) (b) of the CPA for assault GBH. What constitutes fair, just and equitable compensation for unlawful arrest and detention.

ORDER

Resultantly, the following order is made:

1. The arrest and detention of the plaintiff from 14 November 2023 to 16 November 2023 is declared unlawful.
2. The defendant is ordered to pay an amount of R50 000.00 as damages to the plaintiff for the unlawful arrest and detention.
3. The defendant is ordered to pay interest on the aforementioned amount of R50 000.00, at the prescribed applicable rate from the date of summons until date of final payment.
4. The defendant is ordered to pay the plaintiffs' cost of suit on a party-and-party basis, on Scale C as envisaged by Uniform Rule 67A, to be taxed.

HENDRICKS JP

Introduction

- [1] The plaintiff instituted an action for damages following his unlawful arrest and detention. The action is defended by the Minister of Police (defendant), who alleged that the arrest without a warrant of arrest, was lawful. So too, the plaintiff's subsequent detention. The background facts, which are mainly common cause, is that the plaintiff was arrested on 14 November 2023 following a complaint laid by the complainant of assault with intent to cause grievous bodily harm (assault GBH) and detained until 16 November 2023.

- [2] The defendant bears the onus to prove the lawfulness of the arrest and detention, since an arrest is viewed to be *prima facie* unlawful, as it is a deprivation of a person's freedom of liberty. "This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification." [1] Incidental thereto, the defendant also axiomatically bears the duty to begin. Merits (liability) and quantum were not separated.
- [3] The defendant called three witnesses. Their evidence can be succinctly summarized as follows. Constable Andre Nkabinde (Nkabinde) testified that on 14 November 2023 he, in the presence of the complainant, proceeded to Motlhabeng village where the plaintiff was located. The complainant positively identified the plaintiff as the suspect. Nkabinde read and explained the plaintiffs' constitutional rights, since he was a suspect. He then effected the arrest of the plaintiff and transported him to the police station. He was merely the arresting officer. The arrest was effected without a warrant of arrest. It was done in the execution of an instruction written in the diary of the docket. During cross-examination it emerged that Nkabinde does not know whether the plaintiff was arrested for a Schedule 1 offence. At the time Nkabinde effected the arrest of the plaintiff, there was no medical report (J88) from a doctor in the docket. Nkabinde conceded that the arrest was effected approximately nine (9) months after the incident.
- [4] Constable Rabaone Mose (Mose) testified that she is the police officer who penned the plaintiff's warning statement on 15 November 2023. This was done to assist with the investigations. Mose stated that she interviewed the plaintiff, who was a suspect on a charge of assault GBH. She meticulously went through the statement with the plaintiff. Although the 'Notice of Rights' form is in English, she translated it into the Setswana language. Mose explained everything in detail to the plaintiff, who understood, and allegedly even admitted that he committed the offence.
- [5] There are discrepancies in the taking down of this warning statement. Mose asked the plaintiff whether he wanted to be legally represented when making the statement, to which he replied in the affirmative. Despite this indication, she nevertheless proceeded in taking down the statement. The statement also contains an incriminating portion,
- in which the plaintiff allegedly admitted to the commission of the offence. That the rights of the plaintiff as a suspect were violated behoves no argument.
- [6] The investigating officer Sergeant Sam Mphashwe (Mphashwe) testified about his investigations. Mphashwe testified that he found the plaintiff in a holding cell. His evidence therefore does not relate to the arrest of the plaintiff, as he was not the arresting officer. He stated that he booked the plaintiff out of the holding cell, and he charged him by *inter alia* punching his details into the computerized system of the South African Police Services (SAPS). He commissioned the warning statement obtained from the plaintiff (suspect) and

took his fingerprints. He could not obtain a medical report (J88) of the complainant at the hospital. He took the plaintiff as a detained suspect to court as soon as practically possible but definitely within the prescribed 48 hour' period. The matter was enrolled on the court roll of that day. As the prosecutor required more information, it was removed from the roll.

- [7] According to Mphashwe, he was carrying out the instructions of his commander as endorsed in the investigating diary in the docket. He did not see the medical report (J88) of the doctor to determine whether a serious or dangerous wound was inflicted by the plaintiff (suspect) on the person of the complainant. He, however, testified to the fact that the complainant was on crutches. According to him, to reiterate, the plaintiff was charged and taken to court before the expiration of the prescribed 48 hours of detention. This is undisputed. The plaintiff was released on the very same day he was taken to court.
- [8] He was unaware why the complainant took nine (9) months before he opened a case against the plaintiff. This, he did not investigate. In his opinion the arrest was lawful as he carried out the instructions of his commander. Furthermore, he opined that it is permissible to arrest first and then to investigate later. The complainant and the suspect are very well known to each other as they live in the same street. According to Mphashwe, this is a Schedule 1 offence.
- [9] During cross-examination it was established that if the complainant is not seriously injured, (s)he is given a J88 medical form at the police station to be completed by the doctor upon medical examination, which must be returned to the police station. This was not done. He cannot say whether the complainant was seriously injured and/or sustained a dangerous wound. He did not see or observe the injury that the complainant sustained. He therefore could not form an opinion in this regard.
- [10] The plaintiff testified that he is 55 years of age, unmarried and the father of two children. He was occasionally temporarily employed as a gardener. He was arrested on 14 November 2023, which was his first experience of being arrested and incarcerated. For him it was a very humiliating experience. He lives in the same street as the complainant. On the day of his arrest, he was performing garden duties at a nearby house, when the police (arresting officer) arrived in the company of the complainant. The complainant pointed him out to the police officer. The police officer verified his identity. After
- being positively identified, he was instructed to get into the police van, and he obliged. He was taken to the police station.
- [11] Upon arrival at the police station, he was instructed to sign documents, which he did. He was then locked up in a police cell. Two of the inmates in the cell harassed him. Because it was after 18h00 and the inmates had already eaten, he was not provided with any food. He was provided with only one filthy blanket, which he used to sleep on the floor. He used his shoes and jacket as a pillow, as there were no beds. In total, there were 15 inmates in that cell, with only one toilet to share.

- [12] The next morning they were served tea and bread for breakfast, of which he only had the tea. He ate supper that evening since he was hungry. The food was not palatable. The following day he was taken to court, whereafter he was released. He explained the circumstances which led to his arrest and the altercation he had with the complainant. This happened approximately nine (9) months before his arrest.
- [13] During cross-examination he made it common cause that he injured the plaintiff but denied that it was to such an extent that the plaintiff had to be confined to the use of crutches, some nine (9) months later. He admitted that he threw a stone at the complainant which struck him on his ankle. He learned that the complainant was back from hospital after two days.
- [14] It is common cause that the plaintiff was arrested on 14 November 2023, on a charge of assault GBH. The evidence of the arresting officer, Nkabinde, is crucial with regard to the arrest. Section 40(1)(b) of the Criminal Procedure Act (CPA) permits an arrest without a warrant of arrest, if the arresting officer reasonably suspects any person of having committed an offence referred to in Schedule 1. Schedule 1 of the CPA was amended in respect of the offence of assault with effect from 5 August
2022. Where Schedule 1, prior to its amendment provided amongst others, only for the offence of assault where a dangerous wound was inflicted, the amended Schedule 1 provides for:
- “Assault
- (a) when a dangerous wound is inflicted;
 - (b) involving the infliction of grievous bodily harm; or
 - (c) where a person is threatened-
 - (i) with grievous bodily harm; or
 - (ii) with a fire-arm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013.”
- [15] The general right to arrest without a warrant envisaged under s40(1)(b) of the CPA is limited to offences in Schedule 1, which are generally more serious offences in our law. The plaintiff was arrested on a charge of ‘assault with the intent to do grievous bodily harm’. This squarely raises the question whether assault with ‘intent to do grievous bodily harm’ is included under the forms of assault envisaged in Schedule 1.
- [16] The distinction between ‘intent to do grievous bodily harm’ and ‘infliction of grievous bodily harm’ as two distinct concepts, has engaged our courts since the 1960’s. In *R v Jacobs* 1961 (1) AD 475, Hoexter JA very succinctly distinguished these two concepts as follows:
- ‘The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, and the intention of the accused is irrelevant in answering that question.’

(emphasis added)

[17] At 485 B – D of Jacobs, Van Winsen AJA, in applying the aforesaid dictum stated:

“In deciding whether the Crown has proved the infliction of grievous bodily harm by the accused, the jury would, in my opinion, be

entitled to have regard to the whole complex of objective factors involved in the appellant’s assault upon the deceased. It could take into consideration the shock which would inevitably result to the deceased by reason of the fact that the accused directed two blows at his face with a knife. It could have regard to the wounds resulting from the stabs in the face, their number nature and seriousness, as well as to the blows directed to the accused’s (sic) stomach, their severity and the results which flowed from their infliction.”

[18] In *S v Ferreira* 1961

(3) SA 724 (E) at 725 F – G Cloete AJ posited that:

“One must assess the question of whether the injuries are serious or not directly with reference to the particular victim who has suffered them and not some arbitrarily defined average human being.”

[19] In *Rabako v S* (A234/2006) [2007] ZAFSHC 47; 2010

(1) SACR 310 (O) (7 June 2007), albeit in the context of a conviction for rape, where the Criminal Law Amendment Act 105 of 1997 provides for a minimum sentence where the rape involved the infliction of grievous bodily harm, C Musi J (as he then was), provided an informative discussion of the distinction between intention to cause grievous bodily harm and the infliction of grievous bodily harm. In following the dicta in Jacobs and Ferreira he opined that:

‘[10] It seems to me that in order to determine whether the injuries in a particular case are serious one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds – if any - inflicted their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases – where a finding in relation to infliction of grievous bodily harm is considered – medical evidence should be presented. The absence of medical evidence however is not fatal. In this matter we have the benefit of the undisputed evidence of the complainant in relation to the injuries that she sustained as well as a medical report (J88) the contents of which was admitted by the defence...’

(emphasis added)

[20] In *S v Maselani and another* 2013 (2) SACR 172 (SCA), the sole issue in regard to the appeal against conviction was whether, as a question of fact, aggravating circumstances were present in the form of the infliction of 'grievous bodily harm' upon the victim of the robbery, within the meaning of that term as contained in s 1(b)(ii) of the Act. The SCA approved of the dictum in *Jacobs* and placed it in proper context as follows:

'[9] ...'The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, and the intention of the accused is irrelevant in answering that question.' Read in its proper context, the learned judge of appeal did not intend to limit the inquiry to the specified incidents of an attack upon a victim, but did so in order to emphasise that the intention of the attacker was irrelevant to the inquiry.

[11] ...

[12] Counsel for the appellants submitted that these remarks were predicated solely upon the facts in *Jacobs* and were never intended to generally lay down what factors should be considered, in ascertaining whether grievous bodily harm had been inflicted. I disagree. It was made clear as a general proposition that the whole complex of objective factors, involved in the assault, is to be considered in deciding whether the infliction of grievous bodily harm had been established. This expressly included the 'results which flowed' from the wounds inflicted.

[13] Common sense dictates that, where the object of the provision is to penalise 'the infliction of grievous bodily harm' upon a

victim, the consequences suffered by the victim are a relevant consideration....

[14] In addition, as pointed out by the trial court, if the harm suffered by the victim is excluded from consideration, absurd consequences could result where –

'a mere threat to kill would result in a conviction with robbery by aggravating circumstances, but actual death would not if the degree or nature of the force applied in order to bring about the death could not be said to be grievous.' (emphasis added)

[21] In *S v Oosthuizen and Another* 2020 (1) SACR 561 (SCA), the distinction between assault common and assault with the intent to do grievous bodily harm was revisited. At para 21, the SCA referred to the definition of assault in *Snyman Criminal Law* 5 ed at page 455 which defines the elements of the crime of assault as follows: '(a) conduct which results in another person's bodily integrity being impaired (or the inspiring of a belief in another person that such impairment will take place); (b) unlawfulness and

(c) intention'. At para 22, the SCA elaborates on the offence of assault with intent to do grievous bodily harm as follows:

"[22] At p 461 the learned author states about assault with intent to do grievous bodily harm, that –

'(a)ll the requirements for an assault set[out] above apply to this crime, but in addition there must be intent to do grievous bodily harm'.

That intention can be inferred —

'from the nature of the weapon used, the way in which it was used, the degree of violence, the part of the body aimed at, the persistence of the attack and the nature of the injuries inflicted, if any'.

He further states that 'the crime can be committed even though the physical injuries are slight'....”

- [22] Notwithstanding the amendment of Schedule 1 since 5 August 2022, it is clear that assault GBH is not one of the forms of assault listed under Schedule 1. The position in the present matter is analogous to *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) where the arresters’ information was to the effect that the arrestee had taken part in an assault with intent to do grievous bodily harm, although there was no information that a dangerous wound had been inflicted. The arrest was unlawful and damages were awarded. There is no evidence in the present matter about the nature of the complainant’s injury, neither evidence from the complainant himself nor a J88 medical report. On that score too, there is no indication if the wound was a dangerous wound.
- [23] The common cause facts is instructive. According to the plaintiff he threw a stone at the complainant, which struck the complainant on his ankle. This corresponds with the content of the statement deposed by the complainant, which must have been at the disposal of the arresting officer. There was no medical evidence (J88) at the disposal of the arresting officer, for him to exercise a discretion and to make an informed decision whether or not to effect the arrest of the plaintiff. In any event, this matter is exacerbated by the fact that the arresting officer was carrying out an instruction from his superior, the commander, to effect the arrest, and not that he exercised any discretion whether to effect an arrest or not.
- [24] What is instructive in this case is that the plaintiff and the complainant are well known to each other. They reside in the same street. Therefore, the address of the plaintiff as well as his whereabouts were well known. It was therefore not necessary to arrest and detain the plaintiff, who is a senior citizen aged 55 years. There were less invasive measures that could have been applied, although it is trite that that does not in itself make the arrest unlawful. In the matter at hand the decisive factor is that one of the jurisdictional factors is lacking, namely that the offence for which the plaintiff was arrested, is not listed under Schedule 1. [2] Therefore, no discretion was exercised. For all the reasons adumbrated above, the arrest and subsequent detention of the plaintiff was unlawful.
- [25] The plaintiff was detained from the date of his arrest being 14 November 2023 until he was taken to court on 16 November 2023. The exact time and period spent in hours is not stipulated. The matter was placed before court, and removed from the roll, which necessitated the release of the plaintiff. The period of detention is therefore less than 48

hours, as testified to by Mphashwe. Based on the plaintiffs' evidence, which I accordingly accept, the arrest and consequent detention of the plaintiff from 14 November 2023 to 16 November 2023, was unlawful.

[26] In *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA), Potgieter JA held:

"It is settled law that the trial judge has a large discretion to award what he in the circumstances considers to be a fair and adequate

compensation to the injured party for these sequelae of his injuries ..."

[27] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para [26], Bosiello AJA said:

"[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 muchneeded 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 iniuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para [17]; Rudolph & others v Minister of Safety and Security & Others (38012008) [2009] ZASCA 39 (31 March 2009) (paras {26}[29])"

[28] In *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA), Navsa ADP held:

"The right of liberty is inextricably linked to human dignity... we as a society place a premium on the right of liberty."

[29] More recently in *Khedama v The Minister of Police* (667/2024) [2025] ZASCA 79 (05 June 2025) at paragraph [19], the Supreme Court of Appeal stated the following:

"Everyone has the constitutional right not to be treated in a cruel, inhuman or degrading way and the right to bodily and psychological integrity. Constitutionally, an arrested person has the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at the State expense, of adequate accommodation, nutrition, reading material and medical treatment'. The purpose of pretrial imprisonment remains to make certain that those accused of crimes and some transgressions attend court which has a duty to make a determination if they are guilty of those crimes or not. It is not necessary to document the suffering experienced by the appellant any further."

(Footnotes omitted)

[30] In determining an appropriate award of damages, the considerations outlined in Tyulu are particularly instructive. These include factors such as the plaintiff's age, the circumstances surrounding the arrest, the nature and duration of the detention, the plaintiff's personal and professional status, the presence of any improper motive behind the arrest, and guidance derived from similar cases. Taking all these aspects into account, the court in Tyulu deemed an award of R15,000 to be just and equitable compensation for the unlawful arrest and brief detention endured by the respondent.

[31] In evaluating damages, reference to prior case law can be informative. However, as Fischer AJ cautioned in *Steenbergen and Others v Minister of Safety and Security* (1071/2003;1072/2003)

[2011] ZAFSHC 132 (21 July 2011), such comparisons must be approached with care:

"[22] I am mindful of the fact that the assessment of awards for general damages with reference to awards made in earlier cases is "fraught with difficulty" as each case falls to be analysed with reference to its own particular facts and circumstances, which seldom, if at all, compare directly with those in another case. Earlier cases are regarded as a useful guide as to what has been considered to be appropriate in the past, but such earlier cases quite clearly serve no greater purpose than that. (See the Seymour case supra at page 325 par [17])."

[32] In Visser & Potgieter, *Law of Damages*, 3rd ed., at pages 545-548, the learned authors enumerate factors relevant to the assessment of damages, including:

- (a) Duration and nature of deprivation;
- (b) Harshness or malice;
- (c) Impact on dignity and reputation;
- (d) Absence of apology or justification;
- (e) Comparative jurisprudence;
- (f) Public policy concerns.

[33] The sentiments expressed in *Rahim and 14 Others v The Minister of Home Affairs* 2015 (4) SA 433 (SCA) are quite apposite:

"[27] The deprivation of liberty is indeed a serious matter. In cases of nonpatrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court ex aequo et bona. Inter alia the following factors are relevant:

27.1 Circumstances under which the deprivation of liberty took place;

27.2 The conduct of the defendants; and

27.3 The nature and duration of the deprivation.

Having regard to the limited information available and taking into account the factors referred to it appears to me to be just to award globular amounts that vary in relation to the time each of the appellants spent in detention.”

[34] While the determination of damages must, as a general principle, be rooted in the particular facts and circumstances of each individual case, it is equally important that courts strive for a measure of consistency in the awards granted for similar delicts. This does not imply a rigid or formulaic approach, but rather reflects the judicial imperative to ensure fairness, predictability, and equality before the law. Uniformity in comparable matters guards against arbitrary discrepancies and affirms public confidence in the legal system. With this in mind, I now proceed to assess the facts of the present matter in light of relevant judicial precedent and established legal principles concerning unlawful arrest and detention.[3]

[35] In Tyulu para [26], the Supreme Court of Appeal (SCA) held that “Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored.” The SCA went on to emphasise that awards for deprivation of liberty must be fair and reflect the seriousness of the infringement. In my view, the quantum of damages must be assessed considering the period of detention, the conditions in the cells, the humiliation and distress suffered, and the impact on his personal dignity, reputation, and mental well-being.

[36] In light of prevailing jurisprudence and the comparative cases, I am of the view that an amount of R50,000 is fair and reasonable compensation for the plaintiff, taking into account the factors highlighted above and the effect of inflationary drag, and the particularly dehumanizing circumstances of his detention.

[37] The issue of costs falls squarely within the discretion of this Court, to be exercised judicially, having regard to the facts of the case and the conduct of the parties. As a general principle, the successful party is entitled to his/her/its costs, unless there are compelling reasons to depart from this rule. The matter raised, as it would appear a novel issue on the interpretation of the issue of assault with intent to cause grievous bodily harm, following the amendment of Schedule 1 of the CPA. Costs will therefore be awarded on the highest scale of Rule 67A of the Uniform Rules, of Court.

Order

[38] Resultantly, the following order is made:

- (i) The arrest and detention of the plaintiff from 14 November 2023 to 16 November 2023 is declared unlawful.
- (ii) The defendant is ordered to pay an amount of R50 000.00 as damages to the plaintiff for the unlawful arrest and detention.

(iii) The defendant is ordered to pay interest on the aforementioned amount of R50 000.00, at the prescribed applicable rate from the date of summons until date of final payment.

(iv) The defendant is ordered to pay the plaintiffs' cost of suit on a party-and-party basis, on Scale C as envisaged by Uniform Rule 67A, to be taxed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

- [1] Zealand v Minister of Justice & Constitutional Development [2008] ZACC 3; 2008 (4) SA 458 CC.
- [2] Duncan v Minister of Law and Order 1986 (2) (SCA) SA 805 (A).
- [3] Makgotlho and Others v Minister of Police & Another (1072/2024) [2025] ZANWHC 107 (25 June 2025) at paragraph [65].

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Prepared on 12 October 2026 · Esheria