

SOUTH AFRICA / JUDGMENT

Feni v Minister of Police (EL462/20)

[2022] ZAECHC 1 (26 May 2022)

[2022] ZAECHC 1

COURT

High Courts - Eastern Cape

BEFORE

T.V. Norman

CASE / FILE NUMBER

EL462/20

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE CIRCUIT LOCAL DIVISION, EAST LONDON

CASE

NO: EL462/20

In

the matter between:

SIPHIWO

FENI

Plaintiff

and

MINISTER

OF

POLICE

Defendant

JUDGMENT

NORMAN J:

1 The plaintiff instituted an action for unlawful arrest and detention in the sum of R500 000,00. The plaintiff was represented by Mr Mhlanti and the defendant by Ms Magadlela. The parties agreed that the defendant bore the duty to begin and to justify both the arrest and the detention.

2 The following facts are common cause between the parties. On Sunday, 24 November 2019 at approximately 22h00 the plaintiff was arrested by Constable Witbooi who at the time was on patrol duty in the Duncan Village area. Thereafter the plaintiff was detained at the Duncan Village police station until he was released on Tuesday, 26 November 2019 at about 12h00 without him appearing before court.

3 The defendant led the evidence of Constable William Witbooi, a member of the South African Police Services. He testified that:

3.1 He has been a policeman for ten years. He is stationed at the Duncan Village Police Station and has been stationed there for the duration of his employment.

3.2 On 24 November 2019 he was on duty as a van driver doing patrols together with Constable Mtshizana. At about 22h00 as they were patrolling they were stopped by a young African girl who introduced herself as “L”. She told them that she was a victim of rape and had reported the matter to the police the previous year, however, the suspect had not been arrested.

3.3 The girl looked young and he formed a view that if the case was reported the previous year then the girl would have been a minor at the time. She told him that she had seen that night the person that raped her.

3.4 He enquired from her who accompanied her to go and open a case. She gave them the name of the person that accompanied her as it was somebody that she was staying with. They went to the person that was mentioned to confirm that a case had been opened. They went to the place around Duncan Village. In evidence he was not able to identify the place he went to. He did not even recall the name of the person he spoke to. He stated that, that person confirmed that the girl was indeed raped and a case was opened. She also confirmed that she was the person that had accompanied the victim to the police station. They also confirmed the case number which was given to him.

3.5 When he was satisfied about what the girl had conveyed to him, he then asked the girl to go and point out the suspect. The girl pointed out an African male, the plaintiff in this case, who was standing next to a red VW Golf vehicle. At that time the VW Golf vehicle was stationery on Florence Street in Duncan Village. He approached the plaintiff and introduced himself as a policeman and plaintiff introduced himself as Siphiwo Feni. He enquired from the girl whether she was sure that was the person who had raped her and the girl indicated that she was certain. Thereafter he asked the plaintiff to accompany him to the police

station. The plaintiff drove his vehicle to the police station. Upon arrival at the police station he explained to his Commander what happened. The Commander also asked the girl whether she was certain about the identity of the plaintiff. The girl confirmed that it was the right person. He was then satisfied and then he arrested the plaintiff. The plaintiff was detained.

4 Under cross-examination by Mr Mhlanti he was asked why he did not get a warrant of arrest before arresting the plaintiff. His response was that he could not because the offence had been committed a year ago and he was apprehensive that if he went to obtain a warrant of arrest the plaintiff would have disappeared. He stated that he needed to be sure that there was a case that had been opened before effecting an arrest. He stated that after he had established that there was a case that had been opened he was satisfied that he could arrest the plaintiff.

5 He recalled that the plaintiff did inform him that he was new in the area because he arrived on 8 September 2019. It was put

to him that the plaintiff would also testify that he did advise the police officers at the police station that he was working for the Buffalo City Municipality as a truck driver and that during the period of the commission of the offence he was working for ANCA chickens in Keiskammahoek. Constable Witbooi confirmed that the plaintiff did tell him that he was not in town when the alleged rape incident happened. When asked whether he did not think that there were other methods of securing his attendance at court, his response was that he did not know the suspect and the complainant also did not know him.

6 Because the incident happened the previous year he thought that it was necessary for him to arrest the plaintiff in order to secure his attendance at court. He did not contact the investigating officer. His response was that in rape cases it is the station that

usually informs the investigating officer that there is a suspect that has been arrested. He stated that once he handed over the

suspect, he had nothing else to do with him thereafter. He did not know why and how the plaintiff was released.

7 It was put to him that the charges were withdrawn against the plaintiff because he was advised by the investigating officer that the person who was a suspect was a foreign national who was speaking English. He responded that he had no comment to that.

8 He stated that he exercised his discretion and decided to arrest the suspect and secure his attendance at court. He was aware of the other methods of securing attendance. When asked about statistics in relation to drug and gun offences, he answered that indeed there was a practise within the police force in relation to drugs and guns that the statistics for a particular year should be more or less the same as the previous years. He was not sure whether that practise applies to other crimes as well including rape cases. The defendant closed his case.

9 The plaintiff testified and gave an account of the events of 24 November 2019. He stated that:

9.1 On that day he had travelled from his home in Keiskammahoek to Duncan Village where he was staying since he was working in East London. Later on he went to get something to eat and parked his red VW Golf next to a container. He wanted to order wings but was advised that there were many people that had placed orders already. He waited for a long time and decided to go to another container but was also told to wait as the queue was long. He went back to sit in his car and he opened his front windows.

As he was seated there, two young girls approached him. One went to the container and one approached him. The one who approached him asked him whether he was going to town and he told her that he was not. He told her that he was waiting to order wings. The girl told him that she arrived in Duncan Village on Friday because she had visited her friend and she was rushing to go back home for school. He commented that she was too young to stay away from home the whole weekend and only worry about school on Sunday. He told her that he was still looking for a container to get wings and if he did not succeed he would go to Kentucky Fried Chicken in town.

9.2 The girl asked to use his phone and he advised her that he only had R1,39 airtime. She took the phone from the passenger seat. She moved away from the vehicle to make the call. She came back and gave him the phone. Both girls left.

9.3 When he realized that he was not getting any joy in placing his order he decided to get them from town. As he was about to move away, he saw a vehicle approaching him. He observed that it was a police van. The policeman introduced himself and indicated to him that he needed some information from him and asked him to follow them. He drove to the police station and parked his vehicle.

9.4 When he was inside the police station, he saw the same girls that he was with earlier entering the police station. One of them, who happened to be the one he was talking to, was crying. She pointed at him saying that he is the man that had raped her who was in a black Jeep. He indicated to the police that he did not know the girl and did not own a Jeep vehicle.

9.5 He told the police that he only arrived in Duncan Village during September 2019 and was new in Duncan Village. He told them that he was working close to the police station. He gave the police the name of his employer. There were female police officers who were heckling him and telling him to sit down and keep quiet.

9.6 It was at that point that he looked closely at the girl that was accusing him of rape and realized that she appeared to be under the influence of alcohol. He asked the police officers to use a breathalyser to establish her state of sobriety. He was told to wait for the investigating officer. After a while another officer arrived. He was a tall black officer. He asked him why he was there and he told him that the girl was accusing him of rape. That officer went to speak to the Captain. The Captain did not want the plaintiff to say anything. He did not know what they spoke about and then the officer left. He was then detained. The complainant and her friend also left.

9.7 Nobody approached him during the day on Monday, 25 November 2019. During the evening on Monday, another gentleman arrived and indicated that he was going to take a statement as the investigating officer was out of town. He told the plaintiff he was going to take a statement and charge him so that he could appear in court.

9.8 On Tuesday, 26 November 2019, in the morning they were driven to court and he waited there until approximately 12h00 when a policeman arrived and called his name. He thought that he was going to appear in court. He followed the policeman. Whilst they were walking he realized they were outside the building and were not going to court. He enquired from the police officer where were they going. His response was that he must go home he was released.

9.9 Sometime after that incident he got a call from a lady who indicated that she was the investigating officer. They arranged to meet and indeed they met. The investigating officer told him that she heard about his arrest. She showed him an identikit of the suspect they were looking for. She told him that the suspect was an English speaking foreign national who had a beard just like him. The investigating officer apologised to him for the arrest and told him that if she was present on that day he would not have been arrested. She enquired from him whether he was willing to subject himself to a DNA test. He agreed and the tests were done.

9.10 He did not hear from the investigating officer thereafter. He gave the investigating officer all of his work history. He told them that for ten years he worked at Amahlati and then during 2017 he was employed at ANCA a place that sells chicken, but was retrenched on 31 July 2019. In September 2019 he started working in East London. He also told the investigating officer that she could go to ANCA and request his trip sheets. The trip sheets would indicate where he went and off-loaded orders from ANCA during the period of the alleged rape incident. He stated that during the last month of his employment at ANCA he was doing deliveries largely in the Port Elizabeth area.

10 Under cross-examination by Ms Magadlela he admitted that the issue about the young lady being drunk was not canvassed with the defendant's witness. He stated that it is because he was recalling the events of that evening and that is something that came to mind. When asked why he did not give the full personal details to the police officials, he indicated that it is because he was being heckled by the female police officers who were at the police station whenever he tried to say something. The arresting officer did not have a one-on-one interview with him because several police officials at the police station were speaking to him at the same time. He stated that the arresting officer was present when he tried to put his version that he only arrived in the area in September, however, the difficulty for him was that he was not being listened to due to the heckling. He also stated that the arresting officer did not take a statement from him. The plaintiff closed his case.

11 Ms Magadlela submitted that the claim should be dismissed with costs. She submitted that the court should apply caution in treating

the evidence of the two witnesses as both parties relied on the evidence of single witnesses. She referred the court to the decision

in Themba Lepota v Minister of Police Case No. 29067/2013 (2015) ZAGPJHC 222 dated 2 October 2015 for the contention that section 40 (1)(b) of the Criminal Procedure Act 51 of 1977, sanctions an arrest without a warrant. She submitted that as long as the discretion was exercised within the law the arrest would be lawful. She conceded that the defendant did not tender any evidence on the issue of detention. She submitted that the plaintiff was brought before court within 48 hours.

12 Mr Mhlanti submitted that when a policeman is confronted with the situation that Constable Witbooi was confronted with, he had an

obligation to serve justice by ensuring that a wrong person is not subjected to the treatment meted out to the plaintiff. He submitted

that it was incumbent on Constable Witbooi, prior to arrest, to, at the very least have sight of the docket. He submitted that in this case Constable Witbooi was convinced when he effected arrest that the plaintiff was guilty of rape. Although he testified that he tried to verify the case number from the police station he made no attempt to contact the investigating officer. He further argued that Constable Witbooi did not consider the invasion of the arrest on the plaintiff. He disregarded the fact that the plaintiff had told him that he only arrived in the area on 08 September 2019. He did not consider the fact that the plaintiff was employed and was not a flight risk. He submitted that the witness thought that his role was to arrest the plaintiff. He argued that if the arresting officer exercised a discretion, such discretion was irrational. The fact that the arresting officer disregarded the plaintiff's exculpatory statement shows that he did not exercise his discretion properly, he argued.

13 He submitted that there was no explanation from the defendant about the failure of the police to take the plaintiff to court on Monday. The arresting officer failed to consider less invasive methods other than arrest. In addressing the point that Constable

Witbooi was concerned that if he did not arrest the plaintiff there and then he would flee, he submitted that, had he considered the personal circumstances of the plaintiff and the fact that the complaint of rape was laid against a person who was a foreign

national, who spoke English, he would not have arrested and detained the plaintiff. He submitted that the arrest was unlawful and

unwarranted. He submitted that the condition in the cells were unpalatable. Although he did not canvass the conditions of the cells

with the witness, Mr Mhlanti submitted that the conditions of the cells were sufficiently dealt with in the pleadings. He

submitted that the only witness that was called by the defendant justified only the arrest. He submitted that the defendant who bore the onus did not rebut in evidence what was contained in the particulars of claim in relation to the condition of the cells and therefore the particulars of claim should stand. He submitted that an appropriate award should be R350 000.00 having regard to the particular circumstances of this case.

14 In reply Ms Magadlela submitted that the proposed amount of R350 000.00 is excessive. She submitted that an amount of R40 000.00 would be appropriate. At the time of argument she referred to an appeal judgment, a copy of which was submitted after argument, which was penned by Govindjee J with Mbenenge JP concurring, in *Minister of Police v Edgar Page*, Case No: CA 231/2019, ECD, Makhandla, delivered on 23 February 2021. It was an appeal against an award made by the Magistrate sitting in Joubertina in respect of a claim arising from unlawful arrest and detention. The Magistrate awarded R60 000.00. On appeal that amount was reduced to R30 000.00.

Discussion

15 The evidence of Constable Witbooi demonstrated a total disregard of the plaintiff's version, namely, that he only arrived in Duncan Village on 08 September 2019. He did not apply his mind to the matter and, in particular, the version of the plaintiff

which was at his disposal prior to him making a decision to arrest. In *Mabona and Another v Minister of Law and Order and Others* 1988

(2) SA 654 (SE) at 658 F-H, Jones J in employing the reasonable man test said: "A reasonable man would bear in mind that section 40 (1) authorises drastic police action because 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." What the reasonable man would do, according to Jones J is the following: He would:

- (i) analyse and assess the quality of the information at his disposal critically, and
- (ii) not accept it lightly or without checking it where it can be checked,
- (iii) only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest,
- (iv) ensure that the suspicion must be based on solid grounds otherwise it will be flighty or arbitrary and not a reasonable suspicion (See: *Mabona* page 658 para F-H)

16 The test espoused by Jones J in the *Mabona* judgment applies equally herein. Constable Witbooi did none of the things that a reasonable man would do. Just like in the *Manqalaza v MEC for Safety & Security, Eastern Cape* [2001] 3 All SA 255 (Tk) at para 18 where Jafta J (as he then was) stated:

“[18] Zotweni did none of these things. All that he did was to verify the accuracy of the statement by the complainant and on the basis of that statement he decided to arrest the plaintiff. It is common cause that the complaint was lodged on 25 February and that the plaintiff was only arrested on 27 February. Therefore Zotweni did not act on the spur of the moment with no time to reflect on the allegations made by the complainant. The statement upon which he acted was obtained from the. Complainant on 25 February. In the circumstances he could have and should have investigated the allegations before deciding to arrest the plaintiff. Although it was not relevant to the enquiry before this Court, it was also common cause that it later transpired that the complainant’s goods were not stolen but merely misplaced in his car. See also Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 836 H – 837 B.”

17 The fact that there was a young girl who was accusing the plaintiff of rape did not relieve Constable Witbooi of the obligation to assess and analyse the information that the girl gave to him. Rape is a very serious offence. It has serious consequences for both the victim and the suspect. On his version, he did not contact the investigator. The investigator was in charge of the case and would have known whether, the suspect Constable Witbooi was about to arrest, was the right person. He did not know who the person was that he went to verify the information from or where she stayed. He did not know the name of that person. I found his evidence in this regard to be less candid and unreliable. Under cross-examination he said he exercised a discretion to arrest but it was clear that he ignored the information given to him by the plaintiff and omitted to verify the details relating to the rape incident itself.

18 In his particulars of claim the plaintiff alleged that the arrest was made without probable cause. He also alleged that in effecting the arrest the said officers did not give the plaintiff the opportunity to rebut the allegation of rape. The plaintiff further alleged that in detention he suffered inhumane and unbearable living conditions, namely, an overcrowded cell that he shared with

gangsters, dirty blankets, the cell was filthy and infested with fleas and mosquitoes, poor diet, unhygienic conditions, he vomited

when he ate the meals provided and he decided to eschew all his meals and drank only tap water. As a result he lost weight. The defendant’s plea to those allegations and in fact the plea in its entirety was simply a bare denial.

19 In defining reasonable and probable cause in *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at paragraph 14, the Supreme Court of Appeal said:

“The requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause was explained in Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 A 136 A-B as follows:

‘When it is alleged that a defendant had no reasonable cause for prosecuting. I understand this to mean that he did not have such

information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if,

despite his having such information, the defendant, of reasonable and probable cause’.”

20 Constable Witbooi relied on the plaintiff’s identity made by way of a pointing out in respect of an offence that was allegedly committed a year prior to the date of arrest. It was made at night and he had nothing else other than the case number to verify the case report. That was not sufficient. He did not take a statement from the complainant even after the plaintiff was at the police station in the custody of the police and the risk to flee was no longer possible. Instead he, together with his superior, were content with the pointing out at the police station. He did not have regard to the docket that was opened a year ago when the complaint was filed. Most importantly, he disregarded completely what he was told by the plaintiff about him not having been in East London during the period within which the offence was allegedly committed. He did not even contact the investigating officer, a person who was in charge of the investigation. When asked why he did not contact the investigating officer, his response was that “in rape cases it is the station that usually informs the investigating officer that there is a suspect that has been arrested”. In this case the plaintiff and the complainant were at the police station and there was a Commander present. It is Constable Witbooi who effected the arrest and in the Mabona judgment referred to, *supra*, it is him that had an obligation to do the critical analysis and not the station.

21 In casu he was at the station with the plaintiff who had told him that he was new in Duncan Village and during the alleged incident he was not in East London. A police officer acting reasonably would have followed up on his alibi by asking questions and getting information that he would follow up even telephonically. The pointing out without any access to the docket or at least a statement made by the complainant when she lodged the complaint or enquiries made to the investigator demonstrate that Constable Witbooi acted in haste and in total disregard of the plaintiff’s constitutional right, in particular, that he should not be deprived

of his liberty unlawfully. In this regard he acted irrationally.

22 When Constable Witbooi was asked under cross-examination:

“Q: Didn’t you think that instead of arresting the plaintiff other means of securing his attendance could be used rather than putting him in jail.

A: I don’t know the suspect and the complainant did not know him. The incident happened a previous year. For me to secure his attendance it was necessary to arrest him.”

23 The evidence of Constable Witbooi is that after arresting the plaintiff he had no further interaction with him. When he was asked

about what transpired at the police station and the fact that the plaintiff told the police at the police station that he was seeing

the complainant for the first time that night, he did not recall that. He conceded that the plaintiff told him that he arrived in the area on 8 September 2019, about a year after the commission of the offence. He did nothing about that vital piece of information and proceeded to arrest the plaintiff. On the reading of Sekhoto below, the disregard of that information without investigation gave rise to the unlawful arrest and detention of the plaintiff. I reject the evidence of Constable Witbooi to the extent that he tried to justify the arrest. He did not act in the manner expected of a reasonable man as articulated by Jones J in the Mabona decision. I accordingly find that the defendant failed to discharge the onus resting on him. I accept the evidence of the plaintiff. He testified clearly and gave a detailed account of events. I find that his evidence is reliable.

24 In the circumstances I find that the arrest of the plaintiff was unlawful. Although the defendant had accepted that he bore the onus to justify the arrest and the detention, he was content with the evidence of one witness who did not deal with detention at all. In this regard the issue of detention follows the unlawful arrest.

25 In *Minister of Police v Sekhoto* 2011 (1) SACR page 333, the Supreme Court of Appeal found that unlawful detention is inherent in unlawful arrest. At page 333 para 52 of Sekhoto the SCA stated:

[52] One can test this with reference to the rules of pleading. A defendant, who wishes to rely on the s 40 (1)(b) defence, traditionally has to plead the four jurisdictional facts in order to present a plea that is not excipiable. If the fifth fact is necessary for a defence, it has to be pleaded. This requires that the facts on which the defence is based must be set out. If regard is had to para 28 of the judgment of the court below, it would at least be necessary to allege and prove that the arrestor appreciated that he had a discretion whether to arrest without a warrant or not; that he considered and applied that discretion; that he considered other means of bringing the suspect before court; that he investigated explanations offered by the suspect; and that there were grounds for infringing upon the constitutional rights because the suspect presented a danger to society, might have absconded, could have harmed himself or others, or was not able and keen to disprove the allegations. But that might not be enough because a court of first instance, or on appeal, may always be able to think of another missing factor, such as the possible sentence that would be imposed. (my emphasis)

[53] Grosskopf JA said in the pre-constitution case of (*See Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 286 C) “Die reg op persoonlike vryheid is meer fundamenteel as eiendomsreg, en daar kan myns insiens geen twyfel bestaan dat ‘n persoon wat teen sy aanhouding beswaar maak, in eerste instansie niks meer hoef tebeweer as dat hy deur die verweerder of respondent aangehou word nie (waarskynlik hoef hy nie eers te beweer dat die aanhoudingwederregtelik of teen sy sin is nie – sien Chetty v Naidoo (supra op20D-E)). Die verweerder of respondent dra dan die bewyslas om die aangehoudene se aanhouding te regverdig.

[54] Loosely translated it means that there can be no doubt that a person who is detained against his will does merely has to state that he has been unlawfully detained. It is unnecessary for him to allege anything more than that he was detained against his will (apparently not even needing to allege that his detention was unlawful). The defendant then bears the onus to justify the plaintiff's detention."

26 Recently the Constitutional Court stated the position as follows in *J E Mahlangu and Another v Minister of Police* [2021] ZACC 10 at para 32:

"It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is prima facie unlawful and the defendant bears an onus to prove that there was a justification for the interference."

27 The defendant as aforementioned filed a bare denial. He did not adduce any evidence to justify the detention. He did not plead the justification for the arrest and detention at all. The fact that it was not pleaded was not objected to by the plaintiff and for that reason I accept that the plaintiff was content that justification of the defendant's actions be dealt with in evidence. The defendant did not call any of the police officers who were at the police station on the night in question and in particular

Constable Mtshizana who was in the company of Constable Witbooi, to corroborate his evidence and deal with the matters relating to the detention of the plaintiff. That, of course, was well within the defendant's right to conduct his case as he deemed fit. Its failure to call more witnesses is not in itself a licence that an adverse inference be drawn against him. Professors Zeffert and Paizes in their work entitled: *The South African Law of Evidence*, third edition, at page 145 when the discussing the rule in *Galante v Dickinson* (See: 1950(2) SA 460 (A) at 465) at para 5.3.2, stated:

"In civil cases the fundamental question is still whether the party who bears the onus has discharged it. Sometimes the absence of an explanation is no more than a circumstance to be taken into account in arriving at a conclusion (New Zealand Construction (Pty) Ltd v Carpet Craft 1976

(1) SA 345 (N) at 349)."

28 In drawing a difference between 'prima facie proof' and 'prima facie evidence', the learned authors wrote:

28.1 "The only useful sense was set out in *ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478, where Stratford JA said:

"Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus."

29 It seems to me that where the defendant who fully appreciated and even assumed a duty to begin and to justify both the arrest and

detention, elected to lead evidence only on the arrest and not on the detention, I would be justified in adopting the principle set out in the Galante decision, supra, where Schreiner JA said:

“It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternate explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.”

30 The reasons for the detention of the plaintiff are matters that are within the defendant’s peculiar knowledge, who, in any

event agreed that he bore the onus to prove that both the arrest and detention were justified. I had regard to the caution sounded by the authors at page 147:

“But one should never lose sight of the fundamental consideration that it is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon ‘the particular circumstances of the litigation’ in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness (See: Titus v Shield Insurance Co Ltd 1980 (3) SA 119 (A) at 133 E-F per Miller JA.)”

31 I am satisfied that the defendant, by electing not to call a witness to justify the detention of the plaintiff in circumstances where his arrest was unlawful can only lead to one conclusion that there was no reasonable and probable cause to detain the plaintiff. I accordingly find that the defendant failed to discharge the onus resting on him on the issue of detention. The plaintiff must

accordingly succeed in his claim against the defendant.

32 On the issue of the awards, the parties in their submissions on reasonable awards differed to a large extent. Ms Magadlela suggested an amount of R40 000.00 as being reasonable. As aforementioned she relied on the appeal judgment in the Minister of Police v Edgar Page case. That case is distinguishable from this one because Mr Page was detained for one day. Plaintiff in this case was detained from Sunday evening to Tuesday at 12h00. The charge Mr Page was detained and arrested for, was arson. In this case the charge was rape, a more serious offence that could lead the suspect to be convicted and sentenced to life imprisonment. The magistrate awarded the plaintiff R60 000.00 which was reduced on appeal to R40 000.00.

33 In casu, the plaintiff testified about the harsh treatment meted out to him by the female police officers at the police station who heckled him when he was giving details about where he came from and his denial of the accusations of rape. A Captain who was on duty also refused to let him speak. That conduct which was not disputed by the defendant distinguished the Page case from this one. The allegations of the inhumane conditions in the cell where he was detained were left unchallenged by the defendant.

34 I was referred by Mr Mhlantsi to the case of Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at para 26 where the Supreme Court of Appeal emphasised the point that 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.

35 I had regard to all the authorities relied upon by the parties. I am not persuaded that this is a case where an award in the sum between R360 000 and R400 000 as submitted by Mr Mhlanti, should be made. I am also not persuaded by Ms Magadlela that

an amount of R40 000.00 would constitute a reasonable award. The conduct of the police in this matter should be frowned upon. The plaintiff was treated harshly at the police station. He was simply charged so that he could appear in court not because it was believed that there was a case against him. He was released without even appearing in court and with no explanation. All these factors are demonstrable of the total disregard of the constitutional rights of the plaintiff by the police who are “supposed to be the protectors of the people”.

36 I had regard to the case of Mahlangu v Minister of Police [2011/6573] [2012] ZAGPJHC 180 (5 October 2012) the Court awarded an amount of R150 000.00 as compensation to a young lady who was detained for 2 days and, unlike in this case, was released without being charged.

37 In Pavier, Johanna v Minister of Police : Case No. 37286/2016, Gauteng Division, Pretoria, Nkosi AJ awarded a plaintiff who had been unlawfully assaulted, arrested and detained for 22 hours a sum of R160 000.00.

38 From the evidence it appears that the plaintiff was arrested around 22h00 on Sunday. I will allow (2 hours) on Sunday from 22h00 until 24h00, (24 hours) on Monday because he was in police custody the whole day and night and (12 hours) on Tuesday as he was released around 12h00. The total hours of detention is 38 hours.

39 I am satisfied that an amount of R 180 000.00 will constitute fair and reasonable compensation. On the issue of costs it was submitted on behalf of the defendant that the costs should be on the Magistrate’s Court scale. I disagree. The trial in this matter was concluded within a few hours. It did not last the whole day. It was conducted in this Court as was agreed by

both parties in their pre-trial minute dated 04 October 2021. I accordingly find that the plaintiff as a successful claimant is

entitled to the costs of suit.

40 I accordingly make the following Order:

40.1

The arrest and detention of the plaintiff was unlawful.

40.2

The defendant is liable to compensate the plaintiff for unlawful arrest and detention in the sum of R180 000.00.

40.3

The defendant is liable to pay interest on the sum of R180 000.00 at the applicable legal rate from the date of judgment to date of payment.

40.4

The defendant is ordered to pay the plaintiff's costs of suit.

T.V. NORMAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Mhlanti instructed by Sipunzi Attorneys, Office No.9, Beacon Bay, East London

For the Respondent: Adv Magadlela instructed by the State Attorneys, Old Spoornet Building, East London

Date Heard:

05 May 2022

Date Delivered: 26 May 2022

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