REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 07151/2013

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
_____	_____
DATE	SIGNATURE

In the matter between:

DEVENISH, BARRY PHILLIP Plaintiff

And

MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

NOCHUMSOHN AJ

1. This is a claim for damages arising out of the arrest and detention of the plaintiff at the Fairland Police Station on the evening of 9 December 2010, at 22h00.

2. The plaintiff a 58 year old male (at the time of the arrest), civil engineer, was arrested without a warrant, by Constable Richard Ndebele of the Fairland Police Station and was detained overnight in Police cells at Fairland Police at the instance of the said constable and other members of the South African Police Services, whose names and ranks are unknown to the plaintiff.

3. The arrest and detention is common cause and was admitted by the defendant in the Plea.

4. I was informed by counsel at the commencement of the second day of the hearing that it was common cause between the parties that the plaintiff was liberated at 11h00 on the morning of 10 December 2010.

5. It was further admitted that Constable Ndebele and other members of the South African Police Service were all acting within the course and scope

of their employment as Policemen with the South African Police Services in relation to the arrest and detention of the plaintiff.

6. The summons embraces two claims. The first claim lies in general damages for R300 000.00, arising out of the arrest and detention. The second claim is for special damages of R10 000.00 and general damages of R100 000.00, arising out of the wrongful and malicious laying of a criminal charge. In argument, plaintiff's counsel abandoned the claim for special damages of R10 000.00.

7. With reference to *Minister of Law and Order & others v Hurley & another 1986(3) SA 568 (AD) 589 E – F,* Counsel for the plaintiff, Adv L du Bruyn, rightly persuaded me that unlawfulness is not an element required to be alleged inasmuch as the onus lies upon the State to prove the lawfulness of the arrest.

8. In relation to the second claim, the plaintiff's case was that the criminal proceedings were initiated without reasonable or probable cause, with *animus iniuriandi* and with malice.

9. In argument Plaintiff's counsel agreed with me that the second claim is academic for purposes of this case, given that the true damages flow as a product of the arrest and detention of the plaintiff overnight. Counsel conceded that there is not much room for entitlement to any damages arising out the initiation of the charge, if same was initiated on the morning following the arrest, in circumstances where such charge was brought to an end some two to three hours later by the Senior Public Prosecutor who declined to prosecute. Had a malicious prosecution ensued and the plaintiff been made to stand trial, it would have been incumbent upon me to deal with such claim. This was not the case and whatever damages arise out of the initiation of the charge, in the circumstances of this case, coincides with the damages which flow arising out of the arrest and detention.

10. On the morning of 10 December 2010, a charge for the defeating the ends of justice was initiated and the plaintiff was taken to the Newlands Magistrate's Court where he was released from custody after the

prosecutor declined to prosecute. As stated, it is common cause that the release took place at 11h00 on 10 December 2016.

11. In terms of the Pre-Trial Minute, it was agreed between the parties that the defendant had the duty to begin and must prove the lawfulness of the arrest and detention.

12. In his opening address, counsel for the plaintiff argued that the defendant must prove that in terms of Section 40(1)(j) of the Criminal Procedure Act the arresting officer who arrested the plaintiff on a charge of wilfully obstructing him in the execution of his duties, is required to prove the following:

12.1. That there must be an element of physical force;

12.2. That the defendant must show in respect of the arrest and detention that the arresting officer exercised his discretion properly;

12.3. That arrest is the only method available in order to secure an attendance at court, in terms of Section 38 of the Criminal Procedure Act.

13. Counsel submitted further in his opening address that there is a standing Police Order to the effect that arrest is the harshest of inroads into deprivation of liberty and that the requirements of the Criminal Procedure Act are to determine a person's full name, his address, his employment, address of his employment, and only thereafter can one determine whether or not one would be a flight risk. It was argued that without making these inquiries, an arresting officer is unable to exercise such a discretion.

14. In relation to the detention of the plaintiff, it was argued that the plaintiff ought to have been granted police bail.

15. In his opening address, counsel for the plaintiff mentioned that the requirements for proving a case based upon a malicious prosecution are the following:

15.1. The defendant must have set the law in motion in order to instigate the proceedings;

15.2. The defendant must have acted without reasonable and probable cause;

15.3. The defendant must have acted with malice;

15.4. The prosecution must have failed.

16. For the reasons mentioned above the second claim is academic in this case and there is no need for me to make a finding as to whether or not the requirements set out in paragraph 15 above were met.

17. At the commencement of the trial, the parties informed me that no evidence would be lead on quantum and that this aspect of the case would be dealt with in argument.

18. The defendant began by calling as its one and only witness, Warrant-Officer Motlokwa Athangs Monyemangene.

19. Mr Monyemangene testified that he is a Warrant-Officer in the employ of the defendant, that he could slightly recall the events in relation to the plaintiff's case, that he worked at the Fairland Police Station at the time

and still does, that he was not on duty on the night of the 9 December 2010, that he remembered that Officer Ndebele had arrested the plaintiff, who was detained overnight at the Fairland Police Station.

20. He was asked in chief if he could confirm that the arrest took place at 11h00. Counsel for the plaintiff rightfully objected on the basis that if the warrant-officer was not present at the time of the arrest, he could not testify to any of its details.

21. He testified that he arrived at the police station the following morning, went to the Charge Office, to check the dockets that had arrived and to be informed of people who were arrested. He looked at the names, and saw the plaintiff had been arrested together with his son. He later corrected this to say his daughter and I accept the interpreter's explanation that the confusion between son and daughter was an error on the part in interpretation.

22. Monyemangene testified further that he started to read the Record and saw that there was a case against them and from there he took the matter

to court. He testified that it was the duty of the court to make its decision concerning the alleged case. From this I deduce that Monyemangene initiated the charge on that morning.

23. Monyemangene was asked what made him charge the father with interfering with the police duties. The answer was that when they opened the docket he was swearing at the police and he was saying "*my daughter was not supposed to be arrested".*

24. When asked whether he could have decided to release the plaintiff, the answer was that he could have decided whether to release him on bail or whether to take him to court. He testified that it would be in the hands of the court to decide whether it is going to release the plaintiff.

25. He qualified this by saying he was vested with the discretion to grant police bail but that would be rendered dependent upon the circumstances as to whether the accused had a fixed address, fixed employment, had previous convictions and was considered to be a flight risk.

26. Mr Monyemangene went on to testify that once he had read the docket, he thought it best to take the plaintiff to court.

27. When asked what the reasons for the arrest was, he uttered words to the effect that the plaintiff had been interfering with the police in the execution of their duties, had insulted the police and gave the police instructions as to how they should go about doing their work.

28. This witness testified that he was on standby and when asked to explain what that means, he answered that he could be phoned to attend serious cases such as robbery, murder, business robbery but that for minor cases he would not be informed after hours. He qualified this answer further by adding that he would only attend to minor cases on the following morning and testified that he was not phoned for the arrest of Mr Devenish, as this was not a serious case.

29. In response to being asked how police bail operated, Mr Monyemangene testified that for schedule 1 cases he was allowed to grant police bail whereas for schedule 6 offences, this was not allowed. He qualified this

by stating that in order to grant police bail, the police would ascertain whether an accused has a fixed address, fixed employment, whether or not there are previous convictions and whether or not the person is a flight risk.

30. When asked what the elements are for wilfully obstructing police in the course of their duties, Monyemangene responded in specific terms to the plaintiff's case rather than to answer the question in general terms, as it was put to him. This was this witness' style of answering questions under cross-examination throughout. His answer to the question was when the person arrives in a fighting mood with the police saying "I want this person to be released" and starts swearing at the police, that person must be arrested.

31. He was then asked "Is it your evidence that swearing at the police or if the person tells the police how to do their job, that such conduct would be obstructing the police in the course of their duties." Monyemangene's response was "If you see the person arrive in a fighting mood saying I

want my daughter released now, using abusive language, that person will never be released because he is in a fighting mood."

32. I pause to mention that swearing does not give rise to obstructing the police in the execution of their duties. I refer to *S v Sharp 2002(1) SACR 360 paragraph 13 at 372 E,* where a police officer was called a "*bitch",* it was said:

> "*By the very nature of her work as a police inspector in the SA Police Services it is more than likely that she had been exposed to situations previously where individuals had used rude or abusive language in her presence and probably even directed it at her. Such language, I dare say, may even have made a sailor blush…….. Further, the word bitch is now also part of everyday parlance and scarcely raises an eyebrow in conversations."*

33. Counsel for the plaintiff then put it to the Warrant-Officer that for somebody to wilfully obstruct the police in the execution of their duties, there must be a physical element, the answer was words to the effect that

it is an obstruction if the conduct is insulting, pointing fingers, how then do the police defend?

34. Counsel then reasserted to the witness that there must be a physical obstruction to which the witness correctly answered that as far as this matter is concerned I cannot go deeper as I was not there.

35. The Warrant-Officer testified further under cross-examination that when he arrived at work on the morning of 10 December there was no indication of any attempt to verify the plaintiff's residential address, work address or whether or not the plaintiff had been afflicted with previous convictions. His answers were simply to the effect that it takes time to ascertain previous convictions, it was not a computerised process and one Peter was vested with the duty to establish this and he was unable to ascertain whether or not it had been done. The Warrant-Officer did however testify that in his own judgment, he did not consider the plaintiff to be a flight risk.

36. It leaves one mystified as to why no steps were taken to ascertain all these elements set out in paragraph 35 above on the evening of the arrest

and detention, as the answers to these questions would have undoubtedly led to the granting of Police bail.

37. Finally, Monyemangene testified that he did not know the plaintiff, he did not have any details of who he was. He testified that the person whose duty it was to verify the plaintiff's profile was one Mostert, but he did not know whether Mostert had made these inquiries.

38. The defendant then closed its case without calling any further witnesses.

39. The plaintiff was then called to testify as the first witness for the plaintiff's case.

40. The plaintiff testified that he was born on 16 March 1953, making him 58 years of age in December 2010 at the time of his arrest, that he lived at number 40 Deneys Reitz Road for the past twenty-two years, has been married since 18 March 1995, has two natural children and two step-children, the step-children being 31 years and 28 years of age respectively and his daughter, Erin, being 25 years of age and his son, Liam, being 20 years of age respectively.

41. The plaintiff testified that when he was arrested, his daughter, Erin was 19 years of age and that the events of the arrest took place on Thursday night 9 December 2010.

42. The plaintiff was at home with his wife, Helen, when he received a call between 9 and 10 p.m. from his daughter, Erin, to say that she had been arrested for jumping a red robot. He instructed her to wait at the scene, corner Mountainview Road and Beyers Naude Drive in Blackheath. When he arrived at the scene, he was confronted by arrogant unco-operative police and was arrested by two male and one female member of the police. He did not know their names but subsequently discovered that the male constable who was running the operation was named Constable Ndebele.

43. The plaintiff testified that he tried to explain to the police his policy that he had instructed his children to drive to the nearest police station as had been mentioned by the media.

44. When asked in chief what had been said by the media, he explained that if one was worried about the identity of people (referring to the police), one ought to drive to a police-station or to a well-lit spot.

45. The plaintiff testified that he tried to explain this to the constable, but this explanation was dismissed as unacceptable. Thereafter his wife pleaded with the officials and explained that his daughter had not gone through a red robot, that there had been a right flashing arrow, but the explanations were to no avail.

46. Two policemen arrived thereafter in an unmarked car, but both in uniform. The name tag on one was Dooley and the other was an unidentified constable.

47. The plaintiff testified that he tried to explain the position to Dooley and the unidentified constable, but they were also unco-operative.

48. He said his wife pleaded with them to let them go home, but that did not work either.

49. He testified that Constable Ndebele then said he was arresting Erin and taking her to the Fairland Police. The plaintiff said he would not allow her to ride in a police van on her own. The plaintiff offered to take Erin in his car, which was unacceptable to the constable. The plaintiff then said he would go with her in the back of the van. Thereafter, the constable said 'You also go in the back, you are also arrested'.

50. The plaintiff was then informed in chief that the State's evidence was that he had sworn at the police, which the plaintiff denied.

51. The court asked the plaintiff if he inquired from the constable why Erin was being arrested. His answer was no it was implied that it was as a result of going through a red robot.

52. The plaintiff then testified that upon arrival at the Charge Office they were jeered and laughed at and that Dooley and the other unidentified constable failed to arrive at Fairland Police.

53. The plaintiff testified that when he asked to be released on bail, he was informed that it was not possible. This was the only response.

54. When asked in chief whether he or Erin had been accused of anything else, the plaintiff testified that he has a speech impediment which activates when tired or excited as a result of which the police thought that he was drunk, but he was not, and he had offered to undertake a breathalyser test and was not taken up on that offer. He testified further that the demeanour at the police-station was one of jeering and the police in question had said words to the effect that "We are the law and you cannot touch us."

55. The plaintiff testified that he was unimpressed with the behaviour of the police officials.

56. The plaintiff testified further he was then placed in the police cells and that his daughter had been asked to sign a sheet stating her rights, but no such offer had been extended to him.

57. The plaintiff described the conditions in the cell as sub-human, last cleaned in 1950, with a tap running with smelly awful blankets. He

described the toilet as a hole in the ground against a wall, which was not private, the cell was dirty and not well-ventilated.

58. His bedding comprised a pile of smelly mattresses which had been thrown on concrete.

59. The plaintiff testified that there was one other male inmate, but the cell could accommodate eleven or twelve people.

60. Although I am not called upon to make Constitutional findings, these conditions would appear to be quite appalling and in contravention of Section 35(2)(e) of the Constitution of the Republic of South Africa which provides:

> *"Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."*

61. The plaintiff testified that his daughter had been placed in the cell next door with another lady.

62. The plaintiff testified that he obtained the services of a lawyer the next morning, he did not make a statement and was informed that he would be taken to Newlands Magistrate's Court.

63. The plaintiff confirmed that he was charged that morning but when taken to court, the public prosecutor declined to prosecute him.

64. The plaintiff testified that prior to being taken to court, the station commander at Fairland Police invited him to an interview with the Community Police Forum Chairman. In this interview the Station Commander enquired why he had not phoned him and mentioned words to the effect that 'this could have gone away', but that he could not squash the case now, as the docket was opened.

65. The plaintiff testified that he was not able to call the Station Commander the previous evening.

66. When asked to comment about the events, the plaintiff testified that he could not believe that the police had acted with such little discretion. He felt that as a citizen both his and his daughter's rights had been violated.

67. He testified that he was a structural engineer in private practice with some 35 to 40 years experience. At no stage had Constable Ndebele asked him for his full name or his surname. At no stage did anybody at the police station request his full name. This was first done when the Detective interviewed him the next morning. Furthermore, at no stage did Constable Ndebele ask what his employment was or whether or not he was afflicted with previous convictions. Neither was he asked anything about his status in the community.

68. When asked how these events affected the plaintiff, he testified that he felt as though he had been raped and unable to defend his family.

69. Under cross-examination by the defendant's counsel, the plaintiff was asked to read out paragraph 4 of an Affidavit deposed to by Jacqueline Trollope, who was not called to testify.

70. This affidavit appeared at page number 8 to bundle C of the court documents.

71. Although item 15 to the Pre-Trial Minute reads that "No proof will be produced by way of Affidavit" in terms of Rule 38(2)", in item 17 of the Pre-Trial Minute it was agreed that documents would serve as evidence of what they purport to be and would not form part of the Record unless referred to in evidence.

72. As soon as counsel for the defence attempted to utilise this Affidavit in cross-examination of the plaintiff a lengthy objection was debated before me on the part of plaintiff's counsel to the effect that Trollope had not been called by the defence, the defence had closed its case and could not call Trollope, and, the plaintiff would not be calling Trollope who was apparently on a cruise ship.

73. Counsel for the defence argued that I ought to allow questioning on this Affidavit in the interests of justice, which I reluctantly yielded to, but in doing so expressed my reservations as to its probative value without Trollope having been called.

74. The plaintiff was then asked to read paragraph 4 of the Affidavit into the Record, but was not questioned as to whether that version was true or false. The paragraph in question reads as follows:

> "*Erin's parents then arrived and tried to explain why Erin had wanted to drive to the nearest police station. However they were just ignored. Barry Devenish advised that he had always explained to Erin that if she felt unsafe and was unsure that she should drive directly to the nearest police station and deal with the situation there. Erin was arrested and when her father refused to let Erin go in the police van alone, the policeman then refused to let her father go in the van with her and told him that if he insisted on going in the van with her then he would be arrested. He was then arrested."*

75. At best for the defence. the Affidavit demonstrates, on Trollope's version, that the policeman refused to let the plaintiff go in the van and told him that if he insisted on going in the van with his daughter, he would then be

arrested. Nothing much turns on this version and it does not materially differ from the version which the plaintiff himself put forward.

76. The plaintiff's version was that he would not allow his daughter to go in the police van alone. It is perfectly understandable that as the father of a 19 year old girl, he would have concerns about her being taken away in the back of a police van late at night as she would no longer be under his parental care and control.

77. The plaintiff did what any caring and concerned father would do in circumstances where his daughter was being arrested in the middle of the night on frivolous charges. Whilst climbing into a police van may be a contravention of other legislation, it does not give rise to obstructing the police in the exercise of their duties. Even if the police were exercising a lawful duty in arresting the plaintiff's daughter, the act of climbing into the van with his daughter does not give rise to an obstruction.

78. As the content of the Affidavit of Trollope does not take the matter any further or serve to prove the lawfulness of the arrest in any manner, it

becomes an exercise in futility for me to apply my mind as to whether the Affidavit is admissible.

79. The plaintiff then called its second and final witness, Herbert William Joseph Stephens, who testified that he was the brother-in-law of the plaintiff, that he had received a telephone call at around 10h00 or 11h00 p.m. on the evening of 9 December 2010 and informed of the arrest.

80. He proceeded to the Fairland Police and inquired whether or not his brother-in-law and niece were in custody at the police station. He was asked whether or not he was an attorney and indicated that he was a family member. He requested to see the officer in charge and was referred to a sergeant, but could not remember his name. It was then confirmed to him that his brother-in-law and niece were in custody.

81. When he asked on what charges his niece had been arrested, he was advised that it was on a charge of reckless and negligent driving.

82. When he was asked on what basis the plaintiff had been arrested, he was advised that it was on defeating the ends of injustice and in his words

"*They considered him to be under influence of alcohol because his speech was slurred".* When asked how he responded to this, he mentioned he responded by saying to the police that the plaintiff suffered from a speech impediment and had he been tested for alcohol, they would have realised that there was no foundation to this suspicion.

83. This witness indicated that he mentioned to the sergeant that he did not think that the police were conveying a good public image by having six police officers involved in the arrest of a 19 year old girl for a minor offence.

84. Mr Stephens testified that he then asked if he could see his brother-in-law and niece and was told that he could not, but the sergeant then said that he was not the person in charge and that he would have to see Warrant-Officer Naidoo.

85. Stephens testified that he proceeded through to the offices and was told to wait outside Warrant-Officer Naidoo's room, when the sergeant went inside and conversed with Naidoo. Naidoo then walked out and ignored

him and walked down the passage. The sergeant then came out and said that they must see another Warrant-Officer whose name Stephens could not recall. They went looking for this other Warrant-Officer, found him sitting in a car listening to the radio.

86. Stephens then asked why his brother-in-law and niece could not be released. The Warrant-Officer got out of his car, and informed Stephens that there was nothing that he could do to release them as a docket had already been opened.

87. Stephens then testified that there was nothing more that could be done. His sister-in-law then raised the question of bail and they said they could not find the Bail Book or the Bail Register. He then made no further reference to this bail discussion, which he testified took place in his presence.

88. Stephens testified that he then left the police station and indicated that he would return in the morning as the plaintiff needed his medication. He left without having seen his brother-in-law or niece that night.

89. Stephens testified further that on arrival the next morning he met the Warrant-Officer, who he identified as Warrant-Officer Monyemangene, who he found to be rather arrogant. Stephens testified that he had been instructed to inform the Warrant-Officer that there would be a case of wrongful arrest opened against the police and at that stage there was an altercation between his wife, her sister and the other officers. At this time one of the officers waved a finger under his wife's nose and said words to the effect :

"*We are the law, we can do what we like".*

90. Stephens testified that he then requested his wife to leave before she ended up arrested.

91. He was told by the Warrant Officer that he had not as yet completed the docket and did not know if he could complete it that day and that his brother-in-law and niece might have to spend the weekend in jail. Stephens testified that he started to become annoyed and put it to the Warrant-Officer that he thought that he was abusing his powers and would

take whatever steps he could to make sure that he does not get away with this.

92. I put to the counsel for the plaintiff that I could not attribute too much cogency to this evidence as this version had not been put to Warrant-Officer Monyemangene who had testified the day before, which served to neutralise this evidence.

93. Stephens testified that he arranged for an attorney, he left the charge office and waited for the outcome at court.

94. All that was extracted from Mr Stephens under cross-examination by the defence was that he was unable to call an attorney at 1.00 a.m., he was not in the legal field, he is an insurance loss-adjuster, did not know where to find an attorney at 1.00 a.m., had left the police station at 1.00 a.m. and did not know who to call.

95. The plaintiff then closed its case.

96. Having regard to all the evidence, I am required to determine whether or not the defendant has proved the lawfulness of the plaintiff's arrest and

detention. If the arrest is not proved to have been lawful, I am then required to determine the quantum of the general damages to be awarded to the plaintiff, as well as the costs of the suit.

97. The defendant's case was that the arrest was one in terms of Section 40(1)(j) of the Criminal Procedure Act 51 of 1977 ("the Act") in terms of which a peace officer may without a warrant arrest any person who wilfully obstructs him in the execution of his duty.

98. Counsel for the plaintiff, correctly in my view , submitted that the jurisdictional facts for a section 40(1)(*j*) defence are

98.1. the arrestor must be a peace officer;

98.2. the arrestee must wilfully obstruct the arrestor in the execution of his duty;

98.3. the arrestor must exercise a lawful duty; and

98.4. the arrestor must properly exercise his discretion to arrest.

99. To bring the case within the ambit of section 40(1)(*j*), the Defendant had to prove that there was a physical aspect to the Plaintiff's alleged obstruction of Constable Ndebele in the execution of the latter's duty, although it may not be necessary that any force or violence should be used. This is in line with *R vs Weyer 1958 (3) SA 467 (GWLD) 472A*, per Diemont J *"to bring a case within the section it must be proved that the obstruction had a physical aspect, although it may not be necessary that any force or violence should be used."* This was reiterated in *S v Serra 1968 (1) SA 292 (ECD) 293 F*.

100. On the evidence of the plaintiff which must be accepted as the truth, absent the calling by the defence of Constable Ndebele, there was nothing in the plaintiff's conduct which constituted a physical aspect which would serve to have obstructed Ndebele in the execution of his duties. Although I am not called upon to make a finding, I have some doubt as to whether or not Ndebele was exercising a lawful duty in arresting the plaintiff's daughter. Counsel for the plaintiff suggested in argument that I could take judicial notice of the fact that Erin had launched a separate

action in this division relating to her unlawful arrest, which was settled on the basis of the State having capitulated on the merits. I make no finding as to whether or not I may take such judicial notice, but do find that the climbing into the police van by the plaintiff for the protection of his daughter, as he did, could not have served to physically obstruct Ndebele in the arrest of Erin, whether such arrest was lawful or not.

101. The point was well made in *Minister of Safety and Security v Sekhoto & another 2011(5) SAC 367 (SCA) paragraph 28 at 379 (D)* *"Once the jurisdictional facts for an arrest, whether in terms of any paragraph of Section 40(1) or in terms of Section 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering Statute in a manner which is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasized is not obliged to effect an arrest. This was made clear by this*

court in relation to Section 43 in Groenewald v Minister of Justice 1973(3) SA 877 (A) at 883G to 884B.

102. From the evidence it is clear that no proper discretion was exercised on the part of Ndebele in effecting either the arrest or detention of the plaintiff. To some extent the plaintiff may have arrested himself by insisting upon climbing into the back of a police van on the way to the police station in order to accompany his daughter, but it did not end there, as he could and should have been released upon the arrival at the police station. There was simply no just cause to detain him.

103. With reference to *"Pharmaceutical Manufacturers Association of South Africa & another: in re Ex parte President of the Republic of South Africa and others 2000 (2) SA 674 (CC) paragraphs 85 – 86 at 709 D – F,* I find that the discretion exercised by Ndebele was arbitrary and not executed properly or objectively, as one would have expected of a policeman in the circumstances. His decision to arrest and detain was not rational and

did not meet the purpose for which his powers were conferred upon him, in an objective sense.

104. Section 38(1) of the Criminal Procedure Act contains the following relevant provisions:

> "*[T]he methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.*"

105. There is no evidence that Ndebele considered –

105.1. applying for a warrant for the Plaintiff's arrest in terms of section 43 of the Act;

105.2. requesting the prosecuting authority to issue a summons for the Plaintiff in terms of section 54 of the Act; or

105.3. handing to the Plaintiff a written notice in terms of section 56 of the Act.

106. It is apparent that Ndebele never considered any of these options, because he –

106.1. immediately arrested the Plaintiff when the latter allegedly obstructed him; and

106.2. did not ask the Plaintiff for his full names, surname, residential address, occupation or status (as he would have been required to do in terms of Section 56 of the Criminal Procedure Act).

107. With all of the above law and facts on the evidence correctly contextualised, I am left with no doubt that the arrest of the plaintiff was unlawful. Furthermore, there was nothing in the defendant's case that could have come remotely close to proving the lawfulness of the arrest. It therefore stands to reason that the detention of the plaintiff was similarly unlawful. I support this supposition with reference to *Minister of Safety and Security v Tyokwana 2015 (1) SACR 597 (SCA) 600 G* and I quote "*If the arrest of the respondent was unlawful it would follow that his subsequent detention was also unlawful".*

108. Even where an arrest is lawful, a police official must apply his mind to the arrestee's detention and the circumstances relating thereto. The failure by

the police official properly to do so is unlawful. The mere compliance with section 40(1)(*j*) of the Act does not automatically render the Plaintiff's detention lawful.

109. Section 59(1)(*a*) of the Act provides as follows:

> *"An accused who is in custody in respect of an offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official''*

110. It remains a mystery as to why police bail was not offered to the plaintiff and no attempts were made to ascertain the facts necessary to meet bail criteria, all of which were present. The plaintiff had a permanent address for some twenty years, worked as a civil engineer for some 35 to 40 years, had been married for fifteen years, had two children, had two step-children and was not a flight risk.

111. The following was held in *MacDonald v Kumalo 1927 EDL 293 at 307 and 308*:

> "*[I]t is the duty of the officer authorised to grant bail to do so, unless he has substantial grounds for refusing, and the intention of the proviso appears to us to be defeated if, as disclosed in the evidence in this case, the officer empowered to grant bail goes off duty at 5 p.m., and the bail book is locked up. This practice is certain to lead to abuse, and many presumably innocent men may be compelled to spend the night in a police cell on charges of petty offences, who undoubtedly would have been released if the officer had been present… This is another reason why the police should exercise the power of summoning for petty offences in place of arresting and charging the offender.*

112. The only thing left for me to determine is the quantum of the general damages to which the plaintiff is entitled. With reference to the unreported judgment of *Epstein A J* in this division *Phasha, Thabo Sydney v Minister of Police Case No. 25524/2011,* an award of R80 000.00 was made in circumstances where the claimant had been incarcerated for nine hours terminating at 9.30 p.m., without spending a night in the cells. Such judgment was delivered on 29 November 2013 and if one applies the Consumer Price Index, such award would equate to some R93 500.00 in today's terms. More pertinently, at paragraph 39 of the judgment, *Epstein A J* says: "*Insofar as costs are concerned, a*

plaintiff is required to make an estimate when issuing summons. Although the amount awarded falls within the jurisdiction of the Magistrate's Court, the plaintiff was in my view entitled to bring this action in the High Court."

113. Similarly, in the case of *Van Rensburg v City of Johannesburg 2009 (2) SA101* in this division, *Horwitz A J,* awarded in similar circumstances an amount of R70 000.00 to a 74 year old gentleman, a retired accountant, a very decent person, dignified, courteous, soft-spoken and urbane. The detention in this instance was for a very short space of time between the hours 11h00 to 06h00. At (i) on page 110 *Horwitz A J* ruled "*Viewing of the facts of the case as a whole, I believe that justice would be done were I to award an amount of R75 000.00."* Although the quantum falls within the jurisdiction of the Magistrate's Court, the plaintiff was in my view, justified in seeking redress in the High Court. Added to that is my distaste for the behaviour of the defendant's Metro Police and their indifference to the lot of a respectable citizen. I intend therefore to award costs on the High Court scale.

114. I too note my distaste, as did *Horwitz A J* in *Van Rensburg supra,* at the manner in which Constable Ndebele and others at both the time of arrest and detention conducted themselves.

115. The plaintiff made a very good impression as a witness, as did his brother-in-law, Mr Stephens. The plaintiff is clearly a refined gentleman, a highly contributory member of society, a good citizen, a professional civil engineer of some 40 years standing, a family man with strong family values who did what he did for the protection of his daughter, whom he was left to worry about whilst placed in his police cell, knowing that she had been placed in the adjacent cell. This all falls to be taken into account in the determination of a general damages award to compensate for the plaintiff's deprivation of liberty, distress, inconvenience, humiliation and injury to his dignity. In debate with me in argument, counsel for the plaintiff suggested, in the context of the judgments referred to and the dates upon which they were delivered, that the sum of R150 000.00 would suit.

116. Accordingly, judgment is hereby granted against the defendant in favour of the plaintiff for:

116.1. Payment of R150 000.00;

116.2. Interest thereon at the mora rate from the date of summons;

116.3. Costs of the suit on the scale as between party and party at the rate applicable for actions instituted out of the High Court.

G NOCHUMSOHN

ACTING JUDGE OF THE HIGH COURT

20 MAY 2016

Date of Hearing:	17, 18 and 19 May 2016
Date of Judgment:	20 May 2016
Counsel for the plaintiff:	Mr L du Bruyn
Instructed by:	Levin, Tatanis Incorporated
Counsel for the defendant:	Adv Liphosa
Instructed by:	The State Attorney