REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2026/2009

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....

In the matter between:

ROWAN, ANTHONY JOHN ATHOL Plaintiff

and

MINISTER OF SAFETY AND SECURITY N.O. Defendant

J U D G M E N T

MOKGOATLHENG J

INTRODUCTION

(1) The plaintiff has instituted a claim for damages consequent upon his alleged unlawful arrest and detention. It is common cause that on the 29 May 2007 the plaintiff was arrested without a warrant and detained at the Randburg Magistrate Court's holding cells–by members of the South African Police Services acting within the course and scope of their employment with the defendant–before being "*released on warning*" pursuant ***section 72 of the Criminal Procedure Act 51 of 1977 "The Act".***

(2) What distinguishes the arrest and the concomitant detention in this matter is, irrespective of either party's jurisprudential perspective in respect of the so-called fifth "*constitutional jurisdictional pre-requisite"* espoused and enunciated by Bertelsmann J in ***Louw v Minister of Safety and Security 2006 (2) SACR 178 (T) at 186a-187e,*** purportedly arising from ***section 40 (1) (b) of "The Act"*** relating to ***Schedule 1*** offences, and regarding the execution of lawful arrest both the arrestor and the arrestee are *ad idem* that the *raison dêtre* predicating the plaintiff's arrest, was effected with the prescient settled intention to expeditiously present the plaintiff to court in order to facilitate his immediate release on bail. The case turns on whether the plaintiff's arrest and detention were lawful or not.

FACTUAL MATRIX

(3) The complainant Heyman under oath describes Unit 7 situate in Quenry Complex Lonehill, "*as his property*". On 24 May 2007 he locked and secured the unit. On 26 May 2007 he received a report from an estate agent that "*the bath was gone*". On investigation he discovered that the movables including the bath and chandelier which were *"affixed*" to the unit were removed. He estimates the value of what he terms his "*stolen property*" at R82 000.00.

(4) On enquiry from the resident RSS Security, Heyman ascertained that the plaintiff had removed the aforedescribed items from his unit. He avers that he did not give the plaintiff permission to "*steal or take anything from his apartment".* On 27 May 2007, the investigating officer Inspector Kgoedi interviewed Heyman, and subsequent thereto, attended at the crime scene where his investigations confirmed Heyman's allegations.

(5) On 29 May 2007 Kgoedi interviewed the plaintiff at his business premises. The plaintiff admitted removing the contents of Unit 7, with the *caveat* that on 24 May 2007 he returned the bath and chandelier and affixed same to the unit. The plaintiff showed Kgoedi where the missing items were stored at his business premises. He explained that he had removed the movables, together with the affixed bath and

chandelier in pursuance of satisfying a default judgment he had obtained against a certain Nathaniel, the previous owner of Unit 7.

(6) During the interview, Kgoedi afforded the plaintiff an opportunity to engage Heyman regarding what he categorised as "*a misunderstanding*" concerning the removal of the contents of Unit 7. The plaintiff failed to persuade Heyman or his superiors to withdraw the charges laid against him. Heyman implored Kgoedi to proceed with the investigation.

(7) Kgoedi arrested the plaintiff, took him to the Douglasdale Police Station, prepared the docket for court, drove to the Randburg Magistrate Court, presented the docket to the control prosecutor, and made representations that the matter be enrolled in order to facilitate that the plaintiff be released on bail.

(8) It is common cause that the matter was not enrolled on 29 May 2007. The plaintiff on written notice in terms of ***section 72 of "The Act"*** was warned to appear in court on 30 May 2007. The control prosecutor thereafter made entries to the docket instructing Kgoedi to conduct further investigations to:

> *"(a) obtain and file statements from Darren and Ian of RSS Security of their knowledge of the incident;*

(b) obtain and file a copy of the default judgment order granted against the previous Unit 7 occupier of the premises (Nathaniel) where the alleged offence took place; and

(c) the list of the properties removed from complainant's house".

(9) On 30 May 2007 the matter was again not enrolled because the requested investigations were not completed. On 27 June 2007, the plaintiff filed a comprehensive exculpatory statement with the control prosecutor. The matter has up to date not being enrolled although a *nolle prosequi* certificate has apparently not been issued.

(10) Kgoedi testified that he arrested the plaintiff after forming a reasonable suspicion that he had committed the ***Schedule 1*** offence of Housebreaking and Theft. He states that as he did not have the authority to release the plaintiff on bail or warning, the arrest was effected with the intention of expeditiously bringing the plaintiff before court in order to facilitate that he be released on bail.

THE PLAINTIFF'S SUBMISSIONS

(11) The plaintiff contends that his arrest was unlawful and infringed his constitutional right to freedom and dignity. He submits that he should not have been arrested, because he was:

(a) a reputable businessman and a practising attorney;

(b) a registered residential property owner with a fixed place of abode; and

(c) not a flight risk, he would not interfere with any further investigations and would attend his trial.

(12) The plaintiff contends that there were other less invasive methods of securing his attendance at court, and presence at the trial by for instance:

(a) the issue of a summons in terms of ***section 54 of "The Act",*** consequently, he argues that he was unlawfully arrested and detained and has suffered damages in respect of *contumelia,* the impairment of his dignity and reputation.

THE DEFENDANT'S SUBMISSIONS

(13) The defendant invokes ***section 40 (1) (b) and (e*****)** ***of "The Act"*** and argues that the plaintiff's arrest and subsequent detention in terms of ***section 50 (3)*** thereof were lawful***.***

(14) The defendant contends that because Housebreaking and Theft is an offence listed in ***Schedule 1 of "The Act",*** and Kgoedi was not a commissioned officer appointed in terms of ***section 33 (1) (v)*** thereof, the plaintiff's arrest was with the objective intention to present him to court to answer the charge.

THE APPLICABLE LEGAL PRINCIPLES

(15) ***Section 12 (1) (a) of The Constitution*** guarantees the right of security and freedom of a person which includes the right '*not to be deprived of freedom arbitrarily or without just cause'.* Any deprivation of freedom is regarded as *prima facie* unlawful and requires justification by the arrestor.

(16) '*The constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances……. There is no all purpose test for a constitutionally acceptable arrest',* per Justice Sachs in ***Minister of Safety and Security v Van Niekerk 2008 (1) SACR 56 (CC); (2007 (10) BCLR 1102) para 17 and 20.***

(17) ***Section 35 (1) of the Constitution*** decrees that an arrested person has the right to be brought before court as soon as reasonably possible but not later than 48 hours after arrest, and to be released from detention subject to reasonable conditions if the interests of justice so permit.

THE INCIDENCE OF ONUS

(18) "*The onus of justifying the detention then rests on the defendant*". ***See Zealand v Minister of Justice and Constitutional Development and Another 2008 (6) BCLR 601 (2008) (2) SACR 1 (CC) para 24 and 25.*** Rabie CJ explained in ***Minister of Law and Order v Hurley and Another 1986 (3) SA 586 (A) at 589E-F*** *"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law".*

(19) The plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove justification of his arrest. The lawful exercise of discretion is a jurisdictional fact for a lawful arrest, consequently, the arrestor bears the onus of alleging and proving that the discretion to arrest was lawfully exercised.

(20) ***Section 40 (1) (b) of "The Act"*** provides

Arrest by peace officer without warrant

(1) *"A peace officer may without warrant arrest any person -*

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1;

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

(21) In ***Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H*** Van Heerden JA held: "*in order for an arrestor to enjoy protection against an action for unlawful arrest under this section, he must establish the following jurisdictional pre-requisites for the invocation of a defence based on section 40(1) (b);*

(i) the arrestor must be a peace officer;

(ii) the arrestor must entertain a suspicion;

(iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

(iv) the suspicion must rest on reasonable grounds".

(22) ……..“*In order to prove the fourth requirement – the test is objective in that the arrestor must on an objective and subjectively justifiable grounds show that he did not only have objective reasonable grounds for believing that the arrestee has committed a Schedule 1 listed offence, but he also had objective reasonable grounds for believing that the arrestee had the requisite mens rea for committing the offence*”. ***See Duncan v Minister of Law and Order (supra) at 814D-E. See also Minister of Law and Order and Others v Hurley and Another (supra) at 579F-G; and Minister of Law and Order and Others v Pavlicevic (supra) at 684G. See Minister of Law and Order and Others v Pavlicevic at 693E-F.***

(23) *“Peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached”.* per DP Harms in ***Minister of Safety and Security v Sekhoto (131/10) [2010] ZASCA 141 delivered 19 November 2010.***

(24) Jones J in ***Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658E-G*** thus:

The test whether a suspicion is reasonably entertained within the meaning ***of section 40 (1) (b) is objective (S v Nel and Another 1980 (4) SA 28 (e) AT 33H).*** *Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen.*

It seems to be that in evaluating this information, a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes 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<u>….[the] reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest</u>". (my emphasis)

(25) ***In Le Roux v Minister of Safety and Security and Another 2009 (2) SACR 252 (KZP)*** it was held:

> *<u>"However, this does not mean that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is guilty.</u> Suffice to say that the suspicion must be based on solid grounds otherwise*

it would be flighty or arbitrary, and not a reasonable suspicion". (my emphasis)

DISCRETION

(26) *"An arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court. An arrestee may be detained for 48 hours before being brought before court. An arrestor after complying with the jurisdictional pre-requisites may invoke* ***section 40 (1) (b)*** *by properly exercising a discretion, the power conferred by the exercise of the discretion…….is narrowly circumscribed……..."An arrest under* ***section 40 (1) (b)*** *is not unlawful where the arrestor entertains the required reasonable suspicion but intends to make further enquiries after the arrest before finally deciding whether to proceed with a prosecution, provided it is the intention throughout to comply with* ***section 50*** *of the Act, that is a prosecution must follow". **Duncan v Minister of Law and Order 1986 (2) 805 (AD) at806-820.***

(27) Harms DP in ***Minister of Safety and Security v Sekhoto (131/10) [2010] ZASCA 141 (19 November 2010)*** has succinctly enunciated the pre-requisites pertaining to arrest and detention and has addressed the purported constitutional imperatives alluded to by Bertelsmann J in ***Louw v Minister of Safety and Security (supra).*** I can do no better than fully cite the Learned Judge's compendium where he expressed himself thus: *" once the jurisdictional facts for an arrest, whether in*

terms of any paragraph of ***Section 40 (1) (b)*** *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 that 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 emphasised, is not obliged to effect an arrest".*

(28) The Learned DJP Harms continued: *"The discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.' an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. The decision to arrest must be based on the intention to bring the arrested person to justice, any discretion must be exercised in good faith, rationally and not arbitrarily……."*

(29) "*Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours. Once that has been done the authority to detain is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court……."*

(30) "*The court requires a judicial evaluation to determine whether it is in the interests of justice to grant bail, if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute (i.e.* ***section 40 (1) (b)*** *) by inference is untenable……..*" (my underlining)

(31) *"'Once the jurisdictional facts are proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegation to prove it. There are in such a case two separate and distinct issues, each having its own onus (****Pillay v Krishna and Another 1946 A D 946 at p 953).*** *The first is whether the opinion was actually formed; the second, which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed, is whether it was properly formed……."*

(32) *"While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The*

purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial, the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. The mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial……."(my emphasis)

THE ANALYSIS OF EVIDENCE

(33) Mr Murray on plaintiff's behalf attempted to impugn Heyman's *locus standi* in preferring charges against the plaintiff. He disputed Heyman's ownership of Unit 7 and suggested that Nathaniel was the actual owner, apparently because same was still registered in his name at the Deeds Registry's Office.

(34) In my view there is not merit in this submission, The plaintiff admits that on 27 May 2007 after his business partner Richard Curry had

"phoned him and told him there had been some incident…..(that is relating to the removal of the property) he suspected then that may be somebody had purchased the property in execution…." And having discovered and knowing that Standard Bank had a bond over the property he "kind of put two and two together and thought that Standard Bank had foreclosed and that property had been sold in execution". (my emphasis)

(35) The attack on Heyman is unjustified, there is no ambiguity or improbability in his affidavit in describing Unit 7 as "*my property or my apartment*" which would have obliged Kgoedi to investigate this exigency. Fact of the matter is, Heyman had a proprietary interest in Unit 7 and was its lawful custodian. The contents therein were under his personal control, this is confirmed by the plaintiff, whose evidence is that he had a conversation with Heyman on 27 May 2007 during which Heyman "*had professed an interest in the unit, in that Heyman introduced himself as having had a show day although he did not tell him how he had acquired that property".*

(36) The plaintiff when asked by his counsel if he knew whether Heyman professed a proprietary interest in Unit 7 answered: "*although Heyman did not profess to speaking as an agent or owner* he (the plaintiff) made certain assumptions…… *he certainly did not ask him how he acquired it"'.* In my view the plaintiff's concession supports Heyman's statement that Unit 7 was his property.

(37) Logic dictates that a reasonable attorney unlawfully accused of Housebreaking and Theft with the attendant dire consequences, would certainly when confronting the alleged complainant attack his *locus standi* and proprietary interest in respect of the said premises and contents which are the crucible which found criminal charges against him. In any case, it is instructive that Heyman is not joined in these proceedings on a claim of malicious prosecution.

WAS THE SUSPICION REASONABLY FORMED

(38) In the formulation of his suspicion before making the arrest Kgoedi considered the following facts, he:

(a) interviewed Heyman regarding the allegations in his sworn statement;

(b) visited the crime scene Unit 7;

(c) established from the RSS Security Officers that the plaintiff had removed items from Unit 7;

(d) interviewed the plaintiff who told him he had entered Unit 7 without Heyman's consent, and had removed the items therein in satisfaction of a default judgment against Nathaniel under the belief that same still belonged to the latter;

(e) accorded the plaintiff an opportunity to discuss the matter with Heyman and his superiors with a view that the parties would arrive at an understanding;

(f) engaged Heyman regarding his discussion with the plaintiff and Heyman insisted that the plaintiff had no legal right to enter the premises and remove his property; and

(g) the plaintiff showed him the items he had removed.

WAS THE DISCRETION TO ARREST LAWFULLY EXERCISED

(39) Kgoedi was criticized for not exercising a discretion against arresting the plaintiff on the basis of the bases that the plaintiff:

(a) is an admitted attorney;

(b) has a fixed abode;

(c) was not a flight risk;

(d) did not present any danger to the society; and

(e) was in fixed employment and the Managing Director of a reputable company.

(40) The question in establishing the validity of the plaintiff's arrest is in essence predicated on the proper exercise of Kgoedi's discretion. The question is:

"(a) was the exercise of Kgoedi's discretion invoked in pursuance for a purpose not contemplated by the Legislator?

(b) was the exercise of Kgoedi's discretion exercised capriciously or unjustifiably for an ulterior purpose, or in fraudem legis and not with the intention to bring the arrestee to justice? and

(c) did Kgoedi exercise his discretion in accordance with the principles enunciated by Innes ACJ in ***Shidiack v Union Government (Minister of Interior) 1912 AD 642 at 651-652***

(41) The manner in which Kgoedi conducted the investigation shows that he evaluated the objective facts at his disposal before carrying out the arrest and his conduct in doing so shows that had: *"a semblance of knowledge of the elements of the crime as expected of him in order that he would be in position to form some basis for belief that the plaintiff had committed the crime he was accused of, Kgoedi did endeavour to ascertain the mindset of the plaintiff when considering crime of which he was accused of committing".* ***See Olivier v Minister of Safety and Security 2008 (2) SACR 446 9W)***

(43) Kgoedi solicited an explanation from the plaintiff regarding the reason why he entered the premises and removed its contents. He took into consideration the plaintiff's exculpatory explanation and in my view,

reasonably exercised his discretion before formulating his suspicion and arresting the plaintiff. From the objective facts Kgoedi believed that the plaintiff had a ***prima facie*** case to meet.

(44) The gist of plaintiff's exculpatory explained defence as I understand it is that, Kgoedi should first have established his *mens rea* and guilt beyond reasonable doubt. This, with respect, is not what the law requires of Kgoedi, this exigency is the court's exclusive prerogative,

(45) It is unfairly onerous to repose a judicial interpretative burden on Kgoedi to make a judicial pronouncement on the purported plaintiff's lack of *mens rea* defence in this particular case with its peculiar facts. In my view strictly speaking this is not a textual requirement of ***section 40 (1) (b).*** The primary overarching definitive question confronting an arrestor in such a case after the arrestors suspicion is *bona fide* and reasonably formed is whether the arrestee's exculpatory explanation vis-à-vis the objective facts negatives the complainant's accusations.

(46) The issue whether the bath and chandelier did or did not comprise movables or whether such were affixed to, or acceded to Unit 7's structure, or whether the plaintiff is entitled to rely on a "*claim of right*" in removing the items, or whether subjectively in his state of mind the plaintiff could not have committed the crime of

Housebreaking and Theft, is a judicial prerogative determined by the court after the adducement of evidence.

(47) In any event, the complexity of deciding whether a movable object accedes to the soil so as to become an immovable object is the subject of divergent legal debate in decided cases. The criminal context of proof beyond a reasonable doubt is an element to be decided by a court. It cannot reasonably be expected that Kgoedi should be seized with this issue objectively speaking.

(48) In view of the factual evidence available to Kgoedi, he cannot be faulted that he did not objectively and *bona fide* entertain a reasonable suspicion that the plaintiff had committed the offence of Housebreaking and Theft and consequently after properly exercising his discretion to arrest, did so. Kgoedi had to apply an element of objectivity relative to the prevailing circumstances in objectively reaching the decision to arrest the plaintiff. In the *bona fide* exercise of a discretion a court cannot adopt an armchair critic's posture if the arrest is not predicated or motivated by ulterior motive or by illegality.

(49) Adv. Rowan SC's intervention, which prompted the Deputy Director of Prosecution's Office to order the control prosecutor to consider the docket and enrol the matter happened after Kgoedi had taken the

plaintiff to court. Nothing turns on fact that Kgoedi told Adv. Rowan SC that he was not *"going to give the plaintiff bail"* because the determination to do so is judicial prerogative beyond Kgoedi's control. In any event, this assertion does not detract from Kgoedi's singular intention to bring the plaintiff to court to be released on bail. It has never been seriously suggested that Kgoedi opposed the plaintiff's release on bail. After all why, would Kgoedi bring the plaintiff to court, instead of detaining him for 48 hours at the police station as the law decrees?

(50) Decisively is it cannot be cogently argued that Kgoedi never intended to bring the plaintiff to court to be released on bail. Adv. Rowan SC confirms that Kgoedi told him at 2.57pm:

(a) he had personally taken the plaintiff to court;

(b) he wanted to place the matter on the roll that day; and

(c) the control prosecutor told him that as the matter was not readily (for trial) he wanted to postponed if for 7 days.

IS THERE A FIFTH JURISDICTIONAL PREREQUISITE *IN SECTION 40 (1) (b)*

(51) The constitutional jurisdictional prerequisite, laid down by Bertelsmann J in ***Louw v Minister of Safety and Security 2006 (Z) SACR 178 (T) at 186a-187e***, where the learned judge said the following:

'I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in ***Schedule 1 of Act 51 of 1977*** *has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.*

An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights….. [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court it obtained, then it is constitutionally untenable to exercise the power to arrest' is a single judge judgment and not binding if another judge believes it to be incorrect.

(52) With regard to the seismic decision of **the *Minister of Safety and Security and Sekhoto (supra)*** by Harms DP, with due respect, at the

risk of being accused of pomposity and self aggrandizement, Goldblatt J in ***Charles v Minister of Safety and Security 2007 (3) SACR 137 (W)*** was not the lone dissenting voice regarding whether there is a constitutional imperative encapsulated in the interpretation of ***section 40 (1) (b).***

(53) I also dissented from the approach adopted by my brother Bertelsmann J in ***Louw v Minister of Safety and Security supra in the judgment of Rudolph and Others v Minister of Safety and Security and Another 2009 4 All SA 3*** and followed of Goldblatt's J approach in ***Charles v Minister of Safety and Security (supra) and Tsose v Minister of Justice and Others 1951 (3) SA 10 (A).*** My judgment was not upheld by the Supreme Court Of Appeal for other reasons. I must confess though that I did not conceptualize my dissention in the intellectually articulate distinctive and rapier incisiveness of Harms DP.

(54) I agree with Harms DP that the fifth jurisdictional requirement espoused by Bertelsmann J that: *"if there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power of arrest*" does not pass constitutional muster in that there is nothing in ***section 40 (1)(b) of "The Act"*** which leads to the conclusion that the interpretation of the section encapsulates Bertelsmann J's fifth constitutional jurisdictional requirement or that

the so-called fifth jurisdictional fact is part of ***section 40 (1) (b) of "The Act",*** **or that** consequently, by parity of reasoning it forms part of ***section 43 of the Act***.

(55) I further agree with the Learned Harms DP that although ***section 12 (1) (a) of The Bill of Rights*** guarantees the right of security and freedom of a person which includes the right not to be deprived of freedom arbitrarily or without just cause, ***section 40 (1) (b)*** has not been declared unconstitutional, consequently, "*it could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights because…….a lawful arrest cannot be arbitrary……"*

(56) The instructions relating to the arrest and detention of suspects, issued by the National Commissioner of Police on 9 May 2005 are guidelines based on the case of ***Louw v Minister of Safety and Security supra*** which has since been overruled by the judgment of ***Minister of Safety and Security v Sekhoto supra,*** consequently, these guidelines are *per se* not invested with the cloak of legal force and, consequently, cannot be cited as authority governing police conduct in the exercise of their discretion in effecting lawful arrests.

(57) The only outstanding question is, whether the plaintiff's detention was lawful or not. A distinction is drawn between arrest and detention. In ***Mahlongwana v Kwatinidubu Town Committee 1991 (1) SACR 669 (E)*** the following is stated at***675d-f:***

'It is clear that the mere act of arrest itself involves deprivation of liberty, but our law recognises a clear distinction between the act of arrest, which may occur anywhere, and the act of detention in custody, which involves incarceration after the arrest, and pending the taking of further procedural steps. The power granted to detain may in particular circumstances include the power to arrest. ***See R v Moquena 1932 OPD 52.*** *However, in my view, the power to arrest does not include the power to detain save insofar as such detention may be a concomitant to the arrest itself. Arrest is the act by which a free person is apprehended, if necessary by the use of force. Once the arrest has been effected, the authority of the person effecting the arrest insofar as any further detention is concerned, ceases****. S v Van Vuuren 1983 (4) SA 662 (T) at 668E.*** *Any subsequent detention, which involves restraint in confinement for a specified or unspecified period of time, must be in terms of an authority to detain, and is not automatically conferred, without such authority, on the person authorised to arrest.'*

(58) In ***Hofmeyr v Minister of Justice and Another 1992 (3) SA 108 (C)*** King J, (as he then was) held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto…….the failure by a police officer

properly to do so is unlawful. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all. On the question of unlawful detention, *per se,* as a concept to be considered separately from the question of arrest. See ***Minister of Correctional Services v Tobani 2003 (5) S 126 (E): [2001] 1 ALL SA 370 (E); Ralekwa v Minister of Safety and Security; Louw v Minister of Safety and Security and Others; Charles v Minister of Safety and Security; Olivier v Minister of Safety and Security and Van Rensburg v City of Johannesburg 2009 (1) SACR 32 (w); Mvu and Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ).***

(59) **The Constitution** accords everyone the right to freedom and security of the person, which includes the right –

(a) not be deprived of freedom arbitrarily or without just cause.

Section 35 of the Constitution provides detailed rights to arrested, detained and accused persons, including the right to be released if the interests of justice permit and upon reasonable conditions, and to humane conditions of detention.

(60) The mere compliance with ***section 40 (1) (b)*** does not automatically render plaintiff's detention lawful. Constitutional principles pertaining to rights of freedom and dignity obliges courts to consider and harmonise these with the lawfulness or not regarding the plaintiff's detention pending trial. If the plaintiff is not a flight risk, poses no danger to society, will not interfere with the investigation, will stand trail, detention is ordinarily not an appropriate way of ensuring his attendance in court.

(61) Kgoedi testified that at Randburg Magistrate Court there is a policy that criminal dockets submitted after 10am are not placed on the roll. Despite this unlawful injunction, Kgoedi took the plaintiff to court arriving after the cut off time. Kgoedi detained the plaintiff in the holding cells and thereafter engaged the control prosecutor made representations regarding plaintiff's qualification to be released on bail and pleaded with him to place the matter on the roll.

(62) It is common cause that the control prosecutor unlawfully refused to enrol the matter. The control prosecutor's irregular refusal to enrol the matter, and the continuation of such an omission placed the fate of the plaintiff beyond the jurisdictional purview of the court to determine whether the plaintiff ought to detained or released on bail pending trial. Consequently, although textually speaking the plaintiff's detention was still within the prescribed 48 hours, he was detained in the police holding cells with the detention of facilitating his

appearance in court, such detention was not in the police station cells in pursuance of complying with ***section 50 (3)***.

(63) Kgoedi did not after the control prosecutor's unlawful refusal to enrol the matter return the plaintiff to the Douglasdale Police Station, to be detained pending his appearance in court on 30 May 2007, he persisted in harbouring the notion that the control prosecutor would be persuaded to see reason an enrol the matter, consequently, when external influence was exerted upon the control prosecution to enrol the matter, although this was in fortification of the legal process Kgoedi had set in motion, the plaintiff was in the meantime detained in the Randburg Magistrate Court holding cells despite there being no certainty that the matter would be enrolled to enable him to be released on bail if it was in the interests of justice.

(64) In *casu* it was most undesirable to detain the plaintiff inside the police holding cells at Randburg Magistrate Court given that Kgoedi's motivation after arresting plaintiff was to present him to court in order that he apply to be released on bail. The uncontroverted common cause evidence is that, the plaintiff is an attorney and a reputable businessman, and not a flight risk, consequently, there was no compelling lawful reason to detain him in the police holding cells pending his attendance in court.

(65) Correspondingly, there was no rational connection between the detention of the plaintiff in the police holding cells and the purpose Kgoedi intended to achieve, namely that the plaintiff expeditiously appear before a magistrate and be released on bail. Consequently, Kgoedi's exercise of his discretion was objectively not rational, nor was it *bona fide*, and was under the circumstances not reasonable and was consequently arbitrary and capricious.

(66) Although the plaintiff was released in terms of ***section 72 of "The Act"*** on warning, his case was not enrolled. The plaintiff did not appear in court consequently, the very essence predicating his detention in the holding cells was not realised. It is this unreasonable negligent conduct which makes the plaintiff's detention unlawful.

(67) It is illuminating that the *section 72* notice warning the plaintiff to appear in court on 30 May 2007 was signed by Kgoedi who as a non-commissioned officer, had no authority to do so. Kgoedi's irregular conduct negates the very essence of the reason which purportedly motivated him to take the plaintiff to court, namely, that only a court could release the plaintiff on bail. In my view, Kgoedi's grossly negligent conduct, is conclusively indicative of the unlawful detention of the plaintiff when there was no certainty that after the 10am cut off policy the plaintiff's matter would be enrolled. Only a commissioned police officer could on 29 May 2007 have released the plaintiff from

detention on a written ***section 72*** notice after the control prosecutor's failure to enrol the matter.

(68) In acting and conducting himself thus, Kgoedi reasonably exercised his discretion in detaining the plaintiff in pursuance of a lawful purpose namely to facilitate his release on bail, but paradoxically Kgoedi unlawfully detaining the plaintiff in the holding cells even though it was apparent that the control prosecutor is not amenable to enrolling the matter. Irrespective of the fact that strictly speaking the release of the plaintiff from detention on bail was the prerogative of the court, Kgoedi by detaining the plaintiff in the holding cells in spite of this uncertainty, he was no longer acting in pursuance of the reason that motivated him to take the plaintiff to court in the first place.

(69) I turn to the issue of quantum. The plaintiff is principally an attorney, and an officer of court. To be detained in the Randburg Magistrate Court's holding cells with awaiting trial prisoners and convicted criminals under appalling, conditions the plaintiff sustained embarrassment and humiliation. In being detained the plaintiff was unreasonable deprived of his liberty and dignity. The plaintiff's detention from 10.15am to 3.30pm caused him anguish and trauma although he suffered no further degradation than his detention.

(70) The plaintiff has also claimed payment of the amount of R5 015.00 in respect of legal costs incurred in engaging an attorney. In my view the plaintiff was justified in engaging legal representation when it became apparent that he was arrested and detained. I have already found that plaintiff's detention in the holding cells was unlawful, consequently, as he has partly succeeded in these proceedings the claim for legal costs must succeed.

(71) I agree that in the assessment of damages the primary purpose is not to enrich the aggrieved party but to offer him *solatium* for his or her injured dignity and loss liberty. ***See The Minister of Safety and Security and M Tyulu [327/08] [2009] ZASCA SS (29 May 200).*** It is trite that the award for damages in respect of the plaintiff's injuria cannot be calculated with mechanical precision, recourse must be had for guidance in previous similar fact decisions. ***See Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at paragraph [17]***

(72) I was referred to and have considered the following reported cases which were cited by the plaintiff's counsel as guidelines in the assessment of an appropriate damages award:

(a) ***Louw v Minister of Safety and Security 2006 (2) SACR 178 (T)*** Bertelsman J;

(b) ***Gellman v Minister of Safety & Security 2008 (1) SACR 446 (W)*** Saiduker J and Levenberg AJ;

(c) ***Olivier v Minister of Safety & Security 2008 (2) SACR 387 (W)*** Horn J;

(d) ***Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ)*** Willis J; and

(e) ***Minister of Safety and Security v Sekhoto & Another 2010 (1) SACR*** 388 (FB) Hancke J, Kruger J and Van Zyl J

(73) Having considered the circumstances of plaintiff's detention, its nature and duration, his social and professional status, I am of the view that an appropriate award for the plaintiff's unlawful detention is the amount of R50 000.00.

(74) In the premises the following order is made:

The defendant is ordered to pay the plaintiff –

(a) The sum of R50 000.00;

(b) The sum of R5 015.00;

(c) Interest on the aforesaid sums at the prescribed rate from date of the judgment to date of payment;

(d) Costs of suit on the High Court Scale as between party and party.

Dated at Johannesburg on the 7th March 2011.

_____

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 9TH JUNE 2010

DATE OF JUDGMENT: 9TH MARCH 2011

ON BEHALF OF THE APPLICANT: MOODIE & ROBERTSON ATTORNEYS

INSTRUCTED BY: MR MURRAY

REF. No.: Mr Povall/km/M133131

TELEPHONE NUMBER: (011) 403-5171

ON BEHALF OF THE RESPONDENT: MR LEKABE

INSTRUCTED BY: STATE ATTORNEY JOHANNESBURG

REF. NO.: Mr D Lebenya/0354/08/P26/css

TELEPHONE NUMBER: (011) 330-7624