IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

JUDGMENT

Reportable:	**YES** / ~~NO~~
Circulate to Judges:	**YES** / ~~NO~~
Circulate to Magistrates:	**YES** / ~~NO~~

CASE NR :878/08

MODISAOTSILE ALFRED NTWAGAE	1ST PLAINTIFF
OTLHALOGANTSE JAMESON THEBEAPELO	2ND PLANTIFF
GOITSEMANG JIMAIMA THEBEAPELO	3RD PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY	1ST DEFENDANT
PATRICK MOLEKO DIBEBE	2ND DEFENDANT

TRIAL DATES: 06/12/2010 - 08/12/2010
12/09/2011 –15/09/2011
05/09/2012; 11/09/2012 – 13 /09/2012 and 06/12/2012

JUDGMENT DATE: 27 MARCH 2013

PHATSHOANE J.

1. Modisaotsile Alfred Ntwagae, the first plaintiff, instituted a claim for damages in respect of his alleged wrongful arrest and detention of 31 January 2007 against the Minister of Safety and Security, the first defendant (the first claim). He and Otlhalogantse Jameson Thebeapelo and Goitsemang Jimaima Thebeapelo, the second and third plaintiffs, instituted a further three claims for wrongful arrest and detention against the Minister and Inspector Patrick Moleko Dibebe, the second defendant. These claims were consolidated in terms of a Court Order dated 22 October 2010.

2. The plaintiffs are elderly citizens who at the time of their arrests were 65, 70 and 67 yearsof age,respectively. Mr Ntwagae claims to have been arrested on the morning of 31 January 2007 without a warrant and held until 14h00. It is not in dispute that all three plaintiffs were arrested without warrantson 16 March 2007on a charge of kidnapping T M, a five year old boy,who

disappeared without trace on Sunday 28 January 2007 at or near Churchill Village, Northern Cape Province. They were released on bail on 22 March 2007. The charges against them were later withdrawndue to insufficient evidence to secure aconviction. The Minister denies that Mr Ntwagaewas arrested at all on 31 January 2007 and held until 14h00. In respect of the second spate of arrests and detentions of 16 March 2007 the Minister and W/O Dibebe admitted the arrests and detentions but contended that they were lawfully effected within the purview of s 40 of the Criminal Procedure Act, 51 of 1977 (the CPA).

The first claim:

3. On the first claim Mr Ntwagae had to establish his arrest. From his evidence the following facts can be gleaned.He is a farmer who left school in standard 2.On Sunday 28 January 2007 while he was in the veld he saw wheelbarrow tracks and the footprints of a child. He was approached by a teenage boy next to his cattle-kraal who enquired if he had not seen the missing child. He told the teenager of the tracks and footprints. They parted ways. He was also approached by the police who asked him whether he had seen the child. He informed them as well about the tracks.The disappearance of the child ignited a fury in the Churchill community who went out in search of the child.

4. On 29 January 2007 whilst Mr Ntwagaewas at his kraal one Mr Motlagosele, a policeman, came looking for him. Shortly thereafter a kombi with many police officers also arrived and demandedthe child from him. They called Captain Gabaiphiwe Martha Letebele,the station commissioner of Batlharos, who also enquired about the child. The police took him to his home with sniffer dogs but did not find the child. He was taken to Batlharos police station for interrogation and later returned to his home. The next day the Vryburg police came to his home. They kicked opened his door and searched his house. They took him to his cattle-kraal where they dug around but found nothing of significance. They confiscated his cellular phone.

5. During the morning of 31 January 2007 Mr Ntwagae received another visit from the police while at his cattle-kraal. There he was grabbed, kicked,

slapped and insulted by them. One of the police officers accused him of selling the child to his church for an amount of R85 000.00. He was handcuffed and taken to Batlharos police station where he was again assaulted. The handcuffs were removed. Although he was not locked up he was kept at the police station under the watchful eye of the police who accompanied him even when he had to go to the shops. He was released at 14h00.

6. On 3 March 2007 turmoil erupted again in the village to the point where the angry mob nearly burnt his home.This time the police came to his rescue. They locked him up in the police cells for two days. On his release he was advised not to go home. He resided with an acquaintance. The arrest and detention of 03 March 2007 are not in dispute. According to Capt Letebele, Mr Ntwagae was kept in a user-friendly facility;a house for the victims of crime in Batlharos.

7. The defence of the minister is as follows. Capt Letebele stated that she was not involved in the investigation and search of the missing child. She did not meet Mr Ntwagae on 31 January 2007.She did not assault him and was unaware of any assault that was perpetrated on him by other police officers. She surmised that Mr Ntwagae was not arrested because there is no record of his arrest reflected on the SAP 14 (the occurrence book).

8. The Constitution of the Republic of South Africa Act, 108 of 1996, guarantees everyone, *inter alia*, the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; and to be free from all forms of violence from either public or private sources (s 12(1)(a)(b)(c)). The right to liberty is an intrinsic value of an individual's self-esteem and dignity and therefore a cardinal constitutional imperative worthy of protection from all interfering spheres. In *Ex parte Minister of Safety and Security and others: In Re S v Walters 2002 (2) SACR 105 (CC)* at 123 para 30 Kriegler J pronounced:

> *"[30]…The arrest of a person by definition entails deprivation of liberty and some impairment of dignity and bodily integrity. Where, in addition, it is accompanied by the use of force, the impairment of these rights is all the greater; and, ultimately, the use of potentially lethal force jeopardises the most important of all individual rights, the right to life itself."*

9. Mr Ntwagae was taken to task that in his particulars of claim he only mentioned that on his alleged arrest he was hit with an open hand yet when he testified he expanded to say that he was handcuffed, kicked, pushed and throttled. In response he intimated that he did not informhis attorneys of the further incidents of assault as he was angry. He also did not lay a charge against the police because they were the perpetrators. Ms Erasmus, for the Minister, argued that Mr Ntwagae was unhappy that a few days prior to his arrest his house was subjected to intense search without a warrant yet he failed to institute a claim in respect thereof. This was because, she argued, there was no infraction of any of his rights.

10. In his particulars of claim Mr Ntwagae further stated that Capt Letebele was amongst the police officers that were present when he was arrested. As his evidence progressed he conceded that Letebele may not have been present. His evidence should be seen in the light that there had been mayhem in the community following the disappearance of the child. Mr Ntwagae is an unsophisticated senior citizen.The incident took place at least three years prior to the commencement of the trial.Many officers were involved and he was accosted more than once.Therefore, the lack of sequence in the narration of the incidents is understandable.

11. As has been shown, the police were involved in the investigation of the missing child and had in one way or another been in contact with Mr Ntwagae. On the 31 January 2007 extract of the occurrence book at 06h32 the following inscription appears: *"06:35: Crime prevention on duty: CaptMoeti, R/CstBaotlwaeng, Elijah and R/CstSemanego to Churchill for searcing missing child per S/V BMR 3748. Kilos 277589. Inspected by CaptLetebele."* It does not end there because at 18h35 on the same day the following entry is made: "*CaptMoeti to Churchill to hand a cellphone to Mr MatlotlengNtwagae.*Later on at 21:40 Moeti reports therein*: "R/CaptMoeti: From Churchill from Mr Ntwagae. I found his family and no one wants to talk to me. I tried but all in vain. Then I came back with his cell phone and I handed it to CSC and it was correctly handed".*

12. Mr Ntwagae's evidence to the effect that he was arrested in the morning and held until 14h00, is to a certain extent, supported by that of his son who testified that in the afternoon of 31 January 2007 the police brought his father

home. When he enquired from the police what happened to him he was told to enquire from his father. His father told him that he was accused of kidnapping and selling the child. He did not notice any signs of torture on him but noticed that he was distressed.

13. By and large Mr Ntwagae's evidence was not seriously challenged. The only witness called for the Minister, CaptLetebele, was unable to testify on the incidents of 31 January 2007 save to state that she ascertained from the police records that Mr Ntwagae was not arrested. Her denial that she was not involved in the investigation is at odds with the occurrence book entries of the day described in para 11 above. Deprivation of liberty constitutes an arrest. See*Mahlongwana v Kwatinidubu Town Committee 1991 (1) SACR 669 (E)* at 675Dwhere Mullins J held:

> *"…(T)hat 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."*

14. I am satisfied that Mr Ntwagae was arrested on 31 January 2007. An arrest without a warrant under s 40(1)(b) of the CPA 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 s 50 of the Act. See *Duncan v Minister of Law and Order 1986 (2) SA 805 (A).*Section 50, *inter alia*, provides that an arrested person must be brought before a court within a prescribed period of time.

15. In *Thompson and Another v Minister of Police and Another, 1971 (1) SA 371 (E)* at 374H, Eksteen J held:

> *"The arrest itself is prima facie such an odious interference with the liberty of the citizen that animus injuriandi is thereby presumed in our law, and no allegation of actual subjective animus injuriandi is necessary (Foulds v Smith, 1950 (1) SA 1 (AD) at p. 11). In such an action the plaintiff need only prove the arrest itself and the onus will then lie on the person responsible to establish that it was legally justified."*

16. In the light thereof that the Minister cannot justify the arrest it follows as a consequence that it must have been unlawful.

The second, third and the fourth claim:

17. The plaintiffs allege that they have been wrongfully arrested and detained from 16 to 22 March 2007. Mr Strydom, for the plaintiffs, argued that the plaintiffs' further detention following their appearance in court was unlawful and a clear breach of their rights as set out in s 35 of the Constitution. Counsel argued that W/O Dibebe had an obligation to disclose favourable information to the prosecutor for the plaintiffs' release.

18. The following averments are captured in the plaintiffs' particulars of claim:

> *"11. Op of ongeveer 16 Maart 2007 en te Churchill Village, KurumanDistrik, is dieEisergearresteersonder 'n lasbriefdeurInspekteurDibebe van die Kimberley SAPD.*
>
> *12. Na die arrestasie is die Eiseraangehou by die Mothibistad SAPD selle en teKurumanKorrektieweDienste tot en met 22 Maart 2007 toe borgvirhomvasgestel is teMothibistadLanddroshof, welketydperk 7 dae in aanhoudingdaarstel.*
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> *13. GemeldeInspekteurDibebe het tealletyeopgetreebinne die omvang van sydiens as Polisiebeampte van die Suid-AfrikaansePolisiediens en is Verweerderderhalwemiddelikaanspreeklikvir die gemeldeInspekteur se optrede.*
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> *14. As gevolg van voormeldely die Eiseralgemeneskade in die bedrag van R700 000.00 weens die aantasting van syreg op vryheid van beweging, vernedering, ongerief, ongemak, skending van syreputasie en eergevoel en verliesaanlewensgenietinge."*

19. As a starting point a distinction should be drawn between wrongful arrest on one hand and malicious arrest on the other. In *Relyant Trading (Pty) Ltd v Shongwe [2007] 1 All SA 275 SCA* at 377 para [4] the court made this pronouncement:

> *"Wrongful arrest consists in the wrongful deprivation of a person's liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. An arrest is malicious where the defendant makes improper use of the legal process to deprive the plaintiff of his liberty. In both wrongful and malicious arrest not only a person's liberty but also other aspects of his or her personality may be involved, particularly dignity. In Newman v Prinsloo and another [1973 (1) SA 125 (W) at 127H] the distinction between wrongful arrest and malicious arrest was explained as follows:*
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> > *"[I]n wrongful arrest . . . the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose action he is vicariously liable, whereas in malicious arrest the interposition of a judicial act between the act of the defendant and apprehension of the plaintiff, makes the restraint on the plaintiff's freedom no longerthe act of the defendant but the act of the law."*

See also: *Minister of Safety and Security v Sekhoto and Another 2011(5) SA 367 (SCA)*at para [42].

20. The plaintiffs' detention from the period 19 – 22 March 2007 cannot be imputed on the Minister. The following were the remarks by Holmes JA in *South British Insurance CoLtd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA 708 (A)* at 714F-G:

> *"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue."*

21. The plaintiffs did not separately canvass or take issue with their alleged malicious arrest and detention following their appearance in court on 19 March 2007. Neither did they sue for malicious prosecution. If they had there may have been something to say for them. See *Garth Hash and others v The Minister of Safety and Security EC 2499/2009; 2500/2009; 2501/2009* (unreported) delivered on 02 August 2011. For the purposes hereof I will only deal with the plaintiffs' alleged wrongful arrest and unlawful detention for the period 16 -19 March 2007.

22. The defendants bore the onus to prove the lawfulness of the arrest*(Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)* at 589E-F*)*.W/O Dibebe testified that rumours were circulating at Churchill, that the plaintiffs may have been linked to the disappearance of the child. He questioned the mother of the missing child. He also received information that Thusanang John Tshukutswane ("*Trigger*"), knew what happened to the missing child. He explained that Trigger, a 24-year old man, appreciated what he was saying and appeared to him normal.

23. W/O Dibebe intimated that after recording Trigger's statement he was of a view that the state had a *prima facie* case against the plaintiffs. He says his view was fortified by the fact that the Churchill villagers staged a protest march against the plaintiffs. According to him it was strange that the community undertook the search for the child whereas Mr Ntwagae cavalierly went about his own affairs and did not join them. He established that the child went missing in the veld in the vicinity of where Mr Ntwagae had been seen.

He consulted with Brig Jappie Riet before he arrested the plaintiffs on a count of kidnapping on 16 March 2007. The plaintiffs were held in custody and brought before court on 19 March 2007. They were remanded in custody and released on bail on 22 March 2007. The docket was referred to the Director of Public Prosecutions for decision. A *nolleprosequi* was issued and on 31 May 2007 the case was withdrawn.

24. Mr Jameson Thebeapelo is also a farmer. He has been married to the third plaintiff for 49 years. He testified that on 16 March 2007 around 17h30 W/O Dibebe arrested him without furnishing any reason for his arrest. He saw papers at the police station to the effect that the charge related to kidnapping. On his release on 22 March 2007 he was advised by CaptLetebele to leave Esperenzer village, where he resides, for Seven Miles, 12 kilometres away from his home for his own safety where he stayed for a period of a month. It was for the first time that he was placed under arrest. He was locked up with other inmates.Although these inmates respected him he suffered in jail and the food was unpalatable.

25. Ms Jemaima Thebeapelo, the third plaintiff, is partially blind. Similarly, she was not informed that her arrest related to kidnapping. Like her husband she has never been in conflict with the law. She endured an unbearable prison stay, such as sleeping on a cement bed and a floor carpet. She had no access to her medication. She was similarly banished to Seven Miles with her husband.

26. Mr Ntwagae also has a clean criminal record. He stated that the prison was overcrowded which deprived him of sleep. The prison conditions were bad. On his arrest his cellular phone was taken away at the police station and only returned after 8 months. He has a sickly wife who requires constant medical care and attention because she cannot bathe herself and walks with difficulty. Her condition worsened following his arrest because he could not support her. Mr Ntwagae says that his dignity was impaired as the villagers view him as a kidnapper and order their young children to stay away from him.

27. Although the facts in *Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 564 (SE)*are quite distinguishable, I find the following

remarks by Jones J at 664 D-G apposite:

"In evaluating the lawfulness of the police actions I must bear in mind that at times it is necessary to strike while the iron is hot. If swift, effective action is not taken, but instead ponderous enquiries, suspects may be forewarned and evidence may disappear. For this reason, the second defendant's decision to search the plaintiffs' houses is entirely justified, although he may have been better advised to have obtained a warrant in case permission to search was refused. But when the search failed to produce the stolen money or any other incriminating evidence, the arrest of the plaintiffs was not justified. A thorough search by a number of trained, experienced policemen had failed to confirm the presence of a large sum of money hidden in the first plaintiff's home, which is the most important and the most incriminating part of the informer's information. If there was any reasonable basis for suspicion before, it must now have fallen away. In my view a reasonable policeman would no longer have good grounds of suspicion, and he would not have arrested the plaintiffs. Instead, he would have put the gist of his information to them, questioned them about it and conducted any further enquiries and investigations which their explanations suggested."

28. In terms of s 40(1)(b) of the CPA: "*A peace-officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody*".Here, the question to be determined is whether W/O Dibebe reasonably suspected the plaintiffs of having committed a schedule 1 offence.In the *Minister of Safety and Security v Sekhoto and Another* supraat 379 para [28] *the court held:*

> *"[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 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. This was made clear by this court in relation to s 43 in Groenewald v Minister of Justice[1973 (3) SA877(A)].*

29. W/O Dibebe obtained the following statement from Trigger on 14 March 2007 which he claims implicated the plaintiffs. It reads:

"Thusanang Jan Tshukutswane, Trigger, verklaar in Afrikaans ondereed (Tswana-sprekend).

1. *Ek is 'n volwasse man, Suid-Afrikaanse burger met identiteitsnommer: 830202 6919 086, gebore 1983-02-02, 24 jaaroud, woonagtig by huisnommer 5E, SprinzastadteKuruman met kontaknommer 082 362 8707 en is tans werkloos.*

2. *Op Maandag, 29-01-2007 omstreeks 08:00 die oggend het*

eknaThebeapeloOtlhalogentse se woningafgeloopomtegaankuier. Met aankomsdaar het ekvirThebeapeloOtlhalogantsebuitesyhuisontmoetnabysytuckshop. MeneerThebeapelo het my daarnagestuurnasyvriendMeneerMatlotlengNtwagae se huisom 'n sakdaartegaanhaal en virhom, MeneerThebeapeloOtlhalagontse, moet bring.

3. *Ek het tevoetgestapnaMatlotlengNtwagae se woningteChurchhillStad in Kuruman. Toe ek by Matlotleng se woningopgedaag het, het ekvirhomgekrywaarhybesig was omsyvoertuigte was. Die voertuigwatMatlotlenggewas het was 'n wit bakkiegewees. Ek het virMatlotlengverteldatMeneerThebeapeloOtlhalogantsevir my gestuur het om 'n saktekomhaal.*

4. *MeneerMatlotlengNtwagae het 'n grootrooistreepsakagter die bakkiewathygewas het gehaal en aan my oorhandig. Ek het met die gewiggevoeldathierdiegrootrooistreepsakbaieswaar was. Daarna het ekgeloop met die grootrooistreepsakoppadterugnaMeneerThebeapeloOtlhalogantse se woning. Terwylekalleen met hierdiesakoppad was naMeneerThebeapelo toe het ekgeloop en rus.**Op 'n stadium het ek die grootrooistreepsak met my regterduimgedruk en toe het ek 'n gehuil van 'n kind in die sakgehoor. Die grootrooisak se gulp was heeltyd toe gewees en na die gehuil van 'n kind binne-in was ekgeskrik en onderdruk van Gees. Die drukking van Gees het gemaakdateknie die sakmoetoopmaaknie. Die gehuil van 'n kind in die sak het twee keerplaasgevind.***

5. *Met my aankoms by MeneerThebeapelo se huis was hynietuisnie. MeneerThebeapelo se vrou het my gesêdathyna die veld gegaan het om die beestebymekaartegaanmaak. MeneerThebeapelo se vrou se naam is GoitsemangThebeapelo en ek het virhaar die grootrooistreepsakgegee endaarnaweggeloophuistoe. **Ek het ooknievirGoitsemanggesê van watekgehoor het binne die sak want ek was onderdruk van die gees.** Toe MeneerThebeapelo my gestuur het vir die sak het sywerknemer in die Tuckshop, Mpho gehoor toe MeneerThebeapelogepraat het met my oorhierdiesak, wateksou by MeneerMatlotlengNtwagaegaangehaal het. Dit is al watekkanverklaar.*

6. *Ek is vertroud met die bostaandeverklaring en begrypdit. Ek het geenbeswaar ten die aflê van die eed. Ekbeskou die eed as bindendvir my gewete."*(My emphasis).

30. The chronology of events would help to put matters in perspective and to try and comprehend W/O Dibebe's logic or lack thereof. He says he studied the docket before effecting the arrests of plaintiffs. Contained therein is a statement of W/O Maele, dated 12 March 2007, taken four days prior to the arrest of the plaintiffs on 16 March 2007. It reads:

'I am the investigating officer in this inv[estigation] and on 11/03/07 ± 11:30,I met Mrs Mosiapoa who the family alleged that she is having information and she cannot witness because she only heard people talking at Church. Trigger traced and Mr Mokime state that he is psychiatric patient and goes anywhere he wants without

informing them. It is alleged that he was having stripe bag from Mr Ntwagae to somewhere but Mr Ntwagae is having enough transport and cannot involve sick (mad) person to be involved in this serious matter.'

31. Mr Strydom, for the plaintiffs, confronted W/O Dibebe with W/O Maele's statement relating to the fact that the former Investigating officer was not prepared to take into account what Trigger had to say because he was a psychiatric patient. In response W/O Dibebe intimated that the statement was nothing short of hearsay. That there was no expert report evincing that Trigger had psychological problems.

32. The pre-arrest alarm bells were already ringing with the statement of W/O Maele, which W/O Dibebe Ignored. When W/O Dibebe obtained Trigger's statement on 14 March 2007 (above) the alarm bells were ringing several octaves higher, which should have alerted him outright that Trigger seems objectively mentally disturbed. He did not require a psychiatric report, as he claimed, to determine this. Sound common sense and human experience was sufficient.

33. To emphasize this fact I highlight the following absurdities in Triggers' statement:

33.1 It makes no sense that the second plaintiff (Mr Thebeapelo), a business man (Tuck-shop owner), would be so unwise to send Trigger, who was not part of the alleged kidnapping conspiracy, to fetch the victim of a crime, in a bag for that matter.

33.2 Equally, how naïve could it have been for the first plaintiff (Mr Ntwagae) to release the kidnapped victim who was still alive, to Trigger who, if sound minded, would do his civic duty and raise the alarm (to keep the metaphor) with the local chief or the police.

33.3 Thomo Mopalami, the missing boy, was five years old.If he was normal it means he could speak and spill the beans on them. We know from the statement that he could cry. He cried twice. Why would the kidnappers take such a risk.

33.4 If Thomo developed normally in his physique he would be very heavy, and

indeed he was according to Trigger. He had to rest several times. The plaintiffs stayed five kilometres apart, aten kilometres return trip that is what the evidence revealed (*ex post facto*). Nevertheless if W/O Dibebe did not know that at the time it was inherent in the nature of investigating a case to verify why Trigger had to rest several times. More blatantly, Trigger's statement shows that Mr Ntwagae had a bakkie with the cargo already loaded. This means of transport would not have escaped the alleged kidnapper.

33.5 More decisively, forget for the time being about the psychiatric expert evidence, Trigger revealed to W/O Dibebe the occult at play. He said, *inter alia*, in the statement "*en na die gehuil van 'n kind binne-in was ekgeskrik en onderdruk van Gees* (under the spiritual spell or supernatural influences). He says later: "*Ek het ooknievirGoitsemang*(the third plaintiff)*gesê van watekgehoor het binne die sak want ek was onderdruk van die gees".* This could also mean I was bewitched. Who in his sound and sober senses would not have taken a peek in the bag and rescued the child? This sounds more like the fable or fairy tale fed to children about the giant that carried Tselane (a little girl) on its back in a sack.

34. The occurrences up to this point constitute the crux of the case because it relates to the pre-arrests events. It has to do with what W/O Dibebe knew before effecting the arrests. Put differently, what the justification for the arrests was. The subsequent events are *ex post facto* and therefore of lesser importance.

35. What is astonishing is that notwithstanding W/O Dibebe's false denials concerning Trigger's state of mind, two months following the plaintiffs' release he made enquiries about Trigger's psychological state from his grandparents. The following appears on the investigation diary:

"DoenaanteLegobestraatwaar A10 (Trigger) se ouersblyvirnavraagoorsygeestoestand en of hynormaalkanpraat en dink…Rachel meld dat Trigger wel 'n geestes problem ondervindwannerhy met iemandpraat en datsymoeder A, ook die selde is. Ditkomvoorasofdit die helegesin se probleem is en Rachel verwys my naeneMevTlhomelangwiemeerkanuitbreioor Trigger omdatsyvirhomgrootgemaakhet "

36. Mr Strydompressed W/O Dibebe further as follows:

"Mr Strydom: As u geweet het wat u nounavraegaandoen het na die arrestasie in Meimaand, dit is twee maandena die arrestasie, sou u nogtans die drieeisersgearresteer het.

W/O Dibebe: U Edele, volgens my, volgens my kennis, eksouhulleeersarresteer het alvorensekhierdiegetuiegevat het na 'n sielkundige of so"

37. It does not add up that W/O Dibebe made this enquiry when he held a view that Trigger was normal. Ms Seitsing Maureen Leacwe, testifying for the plaintiffs, intimated that Trigger is mentally handicapped and suffers from epilepsy. Ms Leacwe's testimony was, to this extent, confirmed by the chief of the village Mr Moehi Samuel Petros.

38. Ms Antoinette van Wyk, a clinical psychologist, examined Trigger on 04 November 2011 by conducting a psychometric assessment due to suspected intellectual disability. Trigger was 28 years 9 months old when the test was conducted. She used non-verbal tests as Trigger's language differed from hers. She testified that his IQ can be categorized into profound intellectually disabled range. The tests revealed his mental age (cognitive ability) between 4 years 6 months and 5 years. He was not orientated to time or place and did not know which year or month it was. In Ms Van Wyk's opinion Trigger would not be in a position to make a statement on 14 March 2007 about an incident that took place on 29 January 2007 by giving accurate dates, times and places.

39. Trigger took the stand and was clearly present by default. For example he does not know his age, his grandmother who took care of him or that his grandfather has passed away. He also does not know the plaintiffs which begs the question on how he knew from whom he had to collect the sack and whom to deliver it to.What is disconcerting is that Trigger's statement reflects dates and times of the incidents with precision, something which the clinical psychologist testified he is incapable of doing. I have personally observed this fact when Trigger purported to testify. This to me presupposes that W/O Dibebe may have given him a helping hand in para 1 and 2 of his (Trigger's) statement, quoted in para 29 (above).

40. W/O Dibebe may well have had a suspicion because the child is said to have disappeared in the vicinity where Mr Ntwagae had been seen but mere suspicion is not enough.It is trite that the grounds relating to a reasonable suspicion are interpreted objectively and must be of such a nature that a reasonable person would engender a suspicion. See *R v Van Heerden 1958 (3) SA 150 TPD;Duncan v Minister of Law and Order* supra at 814 D**.**

41. The following passage appears from the headnote in *Mabona and Another v Minister of Law and Order and others* supra at 655 B-D:

> *"The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 is objective: would a reasonable man in the particular 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 the offence or offences for which he sought to arrest the plaintiffs. It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion."*

42. In my view W/O Dibebe relied entirely on a rather quirky statement he obtained from Trigger without making any effort to analyse and assess the quality thereof as already pointed out. On the evidence before W/O Dibebe, I am of the view that,his suspicion does not measure up to the standard required of a reasonable man and therefore he did not exercise his discretion properly, in fact he was close to doing it so capriciously. Nothing in the evidence show that securing the plaintiffs' attendance at court through other less restrictive or invasive means could not have achieved the same results. To the contrary, the evidence suggests that the plaintiffs had, since the disappearance of the child, been found by the police at their homes. I cannot see these elderly people, aged (65, 67 and 70), who reside in a rural area and unsophisticated, being on the run to evade standing trial. It therefore follows that the plaintiffs' arrestsand detention for the period 16 - 19 March 2007were

wrongful and unlawful.

The quantum

43. In their particulars of claim the plaintiffs claim general damages due to deprivation of their freedom of movement, humiliation, discomfort, infringement of their reputation and integrity and loss of enjoyment of life. In respect of the wrongful arrests of 31 January 2007 Mr Ntwagae claims an amount of R100 000.00 whereas in respect of the arrest for the period 16 to 19 March 2007 an amount R700 000.00 was claimed by each of the plaintiffs which, has since been reduced to R500 000.00 in the plaintiffs' heads of argument.

44. Regard being had to Mr Ntwagae's testimony the parties appears to be *ad idem* that the period of his arrest on 31 January 2007 may be approximately 7 hours.In respect of the arrest and detention from 16-19 March 2007 the period of the plaintiffs' incarceration would be approximately two and a half days.

45. The determination of an appropriate amount of damages is a matter of discretion to be exercised with the aid of all available facts.The previous awards made in comparable cases provide a useful guidance. In *Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A)*at 535B – D the court held:

> *"The further question that arises is to what extent, if any, this court should be guided in its assessment of general damages by awards in previous decided cases. In the case of Sigournay v. Gillbanks, 1960 (2) SA 552 (AD) at p. 556, SCHREINER, J.A., is reported to have said:*
>
> > *"Nothing like a hard and fast rule or definite standard is to be found in a matter so closely linked with the particular circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in size of awards, where the circumstances are broadly similar. As was said by INNES, C.J., in Hulley v. Cox, 1923 AD 234 at p. 246, a comparison with other cases though never decisive is instructive. I respectfully agree in this connection with the statement of ORMEROD, L.J., in Scott v. Musial, (1959) 3 W.L.R. 437 at p. 446, that there emerges 'a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case' to which general idea a court of appeal should give regard."*

46. The plaintiffs are elderly people who through their lives have never placed themselves on the wrong side of the law. Mr Ntwagae was subjected to

degrading treatment on 31 January 2007.As for the arrests of 16 March 2007 the plaintiffs enduredappalling detention conditions. The partially visually impaired Ms Thebeapelo had undergone an eye operation just before her arrest. W/O Dibebe admitted knowing of her medical condition and having done nothing to alleviate her situation. The plaintiffs seem to be well to do farmers in the village of Churchill and appear to have earned some respect from their fellow villagers through the years. They have lost their esteem as a result of the unlawful and wrongful arrests.

47. Determining appropriate compensation is a vexing aspect in cases involving wrongful and unlawful arrests simply because the injury through deprivation can never be reversed. Nugent JA remarked as follows in *Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)* at para [20]:

> *"Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."*

48. In *Minister of Safety and Security v Swart (194/11) [2012] ZASCA 16 (22 March 2012)* an award of R50 000.00 for a policeman who had been detained for 4 ½ hours was confirmed. In *Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP)* an award was fixed at R65 000.00 for a durational detention of just over 4 hours. In *Manase v Minister of Safety and Security and Another 2003 (1) SA 567 (Ck)* the plaintiff, a 65-year old businessman,had been unlawfully detained for 49 days. He was awarded R100 000.00 of which R90 000.00 thereof was for malicious arrest and detention while R10 000.00 was for malicious prosecution. In *Van Rensburg v City of Johannesburg 2009 (1) SACR 32 (W)* R75 000.00 was awarded to a 74-year old retired accountant who was wrongfully arrested and held for a period of approximately 6 hours. In *Van der Merwe v Minister van Veiligheid en Sekuriteit en andere*, unreported judgment of this court, case number 716/07 delivered on 27 November 2009, the plaintiff, a 60-year old building contractor, whose unlawful arrest was for a period of 2 ½ hours was awarded R25 000.00.

49. Thecompendium of all the above decisions and numerous others not cited shows that there can beno rule of thumb. It depends entirelyon the circumstances of each and every case. Regard being had to the circumstances of this case I am of the view that an award of R40 000.00 in respect of the first claim and an award of R170 000.00 to each of the claimants for the unlawful arrest and detention of 16-19 March 2007 would be appropriate.

50. On the question of costs, Mr Strydomcontended that they be awarded on an attorney and client scale. He argued that W/O Dibebe's testimony is interspersed with contradictions, untruthfulness and contempt against the plaintiffs. He referred to*Coetzee v National Commissioner of Police and Others 2011 (1) SACR 132 (GNP)* where the court held that a government official in a particular position can be ordered to pay costs *de bonispropriis*under certain circumstances as a result of such an official's actions, and in particular where the actions of the official were unlawful and gratuitously gave rise to litigation and the attendant costs. I am not swayed that the plaintiffs have laid any basis for an award of costs on a punitive scale neither is there any averment on their particulars of claim that W/O Dibebe acted *mala fide*.

51. Ms Erasmus, on the other hand, contended that if the plaintiffs were to be successful they be awarded costs on the Magistrates'court scale. Courts have granted costs on the High court scale even where the amount claimed falls within the jurisdiction of the magistrates' court. The underlying principle being the importance which the courts attach to questions of unlawful arrest and detention. See *Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ)* at 302 para 17.The costs will be on the High court scale.

52. There is no justification to single out W/O Dibebe to pay the legal costs when other officers were also involved particularly with regard to the arrest of 31 January 2007. W/O Dibebe may have been the investigating officer but was not the most senior officer involved in the investigation. For example Capt Letebele was involved in the early days of the investigation. W/O Dibebe also

intimated that he consulted with Brig Jappie Riet before effecting the arrests. The Minister of Safety and Security is vicariously liable and the plaintiffs will suffer no prejudice.

ORDER:

53. In the result I make the following order:

1. Judgment is granted for the first plaintiff (Mr Ntwagae):

    1.1 In the sum of R40 000.00 (forty thousand rand) in respect of the unlawful arrest of 31 January 2007.

    1.2 In the sum of R170 000.00 (one hundred and seventy thousand rand) in respect of the unlawful arrest and detention for the period 16-19 March 2007.

2. Judgment is granted for the second plaintiff (Mr Thebeapelo):

    In the sum of R170 000.00 (one hundred and seventy thousand rand)in respect of the unlawful arrest and detentionfor the period 16-19 March 2007.

3. Judgment is granted for the third plaintiff (Ms Thebeapelo):

    In the sum of R170 000.00(one hundred and seventy thousand rand)in respect of the unlawful arrest and detentionfor the period 16-19 March 2007.

4. The first defendant, the Minister of Safety and Security,is ordered to pay interest on the awarded damages at the rate of 15,5% per annum from 10 March 2008, the date of demand,to date of payment.

5. The first defendant is ordered to pay the costs of thisaction on party and party scale.

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MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

FOR THE PLAINTIFFS:	ADV WAF STRYDOM INSTRUCTED BY ENGELSMAN MAGABANE INC
FOR THE DEFENDANTS:	ADV SL ERASMUS INSTRUCTED BY THE STATE ATTORNEY
