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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 41173/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE 01/08/2025

In the matter between

SAMUEL RAKGWALE

Plaintiff

And

MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGEMENT

MVUBU AJ

Introduction

[1] The Plaintiff, one Mr Samuel Rakgwale, claims an amount of **R 4 100 000.00** against the First Defendant (the Minister of Police) in respect of an alleged unlawful arrest and its attended detention.¹ That is the first claim.

[2] In the said first claim, the Plaintiff alleges that on 13 May 2019 the First Defendant arrested him without a warrant. The arrest was unlawful because it cannot be justified in terms of and under section 40 of the Criminal Procedure Act, 1977 as amended (**CPA**).² Pursuant to the alleged unlawful arrest, the Plaintiff was detained from 13 May 2019 until his release on 22 January 2019.

[3] It was similarly alleged that the First Defendant's liability for detention applies all the more given that the First Defendant failed to exercise its discretion of admitting the Plaintiff to bail in terms of section 60 of the CPA.

[4] In retort, the First Defendant averred that the arrest was lawful as it was carried out in terms of section 40(1)(b) of the CPA.³ In relation to the detention, the First Defendant averred that the Plaintiff was taken to Court and remanded in detention pursuant to the provisions of section 50(1) of the CPA.⁴ It was specifically averred that the reason the Plaintiff was remanded in detention until 30 May 2019 was in order for the Plaintiff to secure legal representation as well as for purposes of bringing a formal bail application.⁵

[5] Thus was the ground laid for the first claim and two witnesses were called – one by the Plaintiff (the Plaintiff testified, I shall set out the gist of his testimony in this regard below) and one by the Defendant (one Sergeant Esther Mokwele). This Court was requested, by the First Defendant, to admit the arresting statement of one Warrant Officer Ndwamato Daniel Rangolo into evidence in terms of the provisions

¹ See CaseLines 001-1 to 001-22 – being the Plaintiff's Combined Summons. At 001-9 one finds the prayer 1 and the case in respect of the alleged unlawful arrest and detention was pleaded at 001-5 see paras 5 & 6 read with para 13 at 001-7 read with para 21 at 001-9. See also para 15 at CaseLines 001-8.

² Particulars of claim paras 5 & 6 at CaseLines 001-5.

³ See the Defendants' Plea at para 5, CaseLines 003-13.

⁴ See para 10.2 at CaseLines 003-15.

⁵ Ibid.

of the Law of Evidence Amendment Act, 1988 as amended. That constitutes everything relating to the first claim.

[6] To the second claim.

[7] The Plaintiff claims an amount of **R 2 000 000.00** for an alleged malicious prosecution.⁶ The Defendants (especially the Second Defendant) denied that the Plaintiff was subjected to malicious prosecution.⁷

[8] The Defendants, in relation to the malicious prosecution claim, specifically pleaded:

“[17.2] The Defendants specifically plead that the matter was on the roll after the public prosecutor was satisfied that there is a prima facie case of robbery which merits prosecution and prospects of successful prosecution” (sic)

[9] Three witnesses testified in relation to the second claim – the Plaintiff and two witnesses for the Second Defendant (one Public Prosecutor Mr Mxolisi Nhlayisi and Control Prosecutor, Ms Nadine Franks). I shall detail the gist of evidence in relation to the second claim, below.

[10] I first deal with the common cause facts.

Common cause facts

[11] It is common cause that the Plaintiff was arrested on 13 May 2019, and the arrest was carried out without a warrant.⁸ The Plaintiff was arrested for allegedly committing the offence of robbery with aggravating circumstances.

[12] Approximately 3 hours and 40 minutes later, (and on the same 13 May 2019), the Plaintiff made his first court appearance. The Plaintiff was then remanded in detention and the matter postponed to 30 May 2019.

⁶ See prayer 2 at CaseLines 001-9 read with paras 16, 17, 18 and 19 at CaseLines 001-8.

⁷ See CaseLines at 003-15.

⁸ See the Defendants' Plea, para 6.1 at CaseLines 003-13.

[13] The Plaintiff made sundry appearance until 22 January 2020 where the Plaintiff was acquitted, following a trial.

[14] Throughout the period, from 13 May 2019 (date of arrest) until 22 January 2020 (date of release), the Plaintiff was in detention.

Issues for determination

[15] There are three questions as follows:

15.1. First: whether the arrest was lawful. Attended to this question, whether the statement of the arresting officer (one Warrant Officer Ndwamato Daniel Rangolo) may be admitted into evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 1988 as amended.

15.2. Second: should the arrest be unlawful, one needs to determine the period of unlawful detention and the appropriate quantum for compensating such attendant unlawful detention.

15.3. Third: whether there was malicious prosecution.

[16] I turn to address whether the arrest was lawful and also, whether the statement of the arresting officer may be admitted into evidence.

Admission into evidence of arresting officer's statement

[17] At the commencement of the Defendants' case, an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 1988 (as amended) was brought. In terms of this application, the Defendants, especially the First Defendant sought to have admitted into evidence the statement of the arresting officer (one Mr Ndwamato Daniel Rangolo), without calling the arresting officer to testify and without cross examination. The application was opposed by the Plaintiff.

[18] The statement constitutes hearsay evidence and as a result, in order for it to be admitted into evidence I must be satisfied that the requirements for admission of the hearsay evidence have been met. The factors listed in section 3(1)(c) must be

viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the hearsay evidence.⁹

[19] The factors that bear consideration when a court is determining whether it is in the interests of justice for the statement to be admitted are:

- 19.1. the nature of the proceedings;
- 19.2. the nature of the evidence;
- 19.3. the purpose for which the evidence is tendered as evidence;
- 19.4. the probative value of the evidence;
- 19.5. the reason why the evidence is not given by Mr Rangolo;
- 19.6. any prejudice which the admission of the evidence might entail for the applicant; and
- 19.7. any other factor which should, in the opinion of the court, be taken into account.

[20] In support of the application, the Defendants referred this Court to the decision of the Constitutional Court in **Kapa v S**¹⁰ for the proposition that the Bill of Rights do not entitle nor guarantee that all evidence should be subjected to cross examination. One ought to look at whether the evidence sought to be admitted contains some truthfulness, reliability and some probative value.

[21] The Supreme Court of Appeal in **Ndhlovu**¹¹ held that section 3(1)(c)'s criteria – which must be “interpreted in accordance with the values of the Constitution and the ‘norms of the objective value system’ it embodies” – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of accused.¹²

[22] The Supreme Court of Appeal in **Ndhlovu** defined “probative value” in the following terms:

⁹ **Kapa v S** (CCT 292/21) [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) (24 January 2023) para 77.

¹⁰ **Kapa v S** (CCT 292/21) [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) (24 January 2023)

¹¹ **S v Ndhlovu and Others** (327/01) [2002] ZASCA 70; [2002] 3 All SA 760 (SCA); 2002 (6) SA 305 (SCA); 2002 (2) SACR 325 (SCA) (31 May 2002).

¹² **Ndhlovu** para 16.

“‘Probative value’ means value for purposes of proof. This means not only, ‘what will the hearsay evidence prove if admitted?’, but ‘will it do so reliably?’ In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness.”¹³

[23] The enquiry also encompasses the extent to which the evidence is considered to be reliable as well as the exercise of balancing the probative value of the evidence against its prejudicial effect.¹⁴

[24] There are a host of factors relevant to the reliability question, namely: (a) any interest in the outcome of the proceedings by the witness; (b) the degree to which it is corroborated or contradicted by other evidence; (c) the contemporaneity and spontaneity of the hearsay statement; and (d) the degree of hearsay.¹⁵ Having considered the matter and the statement, I am persuaded that the statement of the arresting officer is relevant because:

24.1. The arresting officer prepared the arrest statement immediately after arresting the Plaintiff. The statement, itself, contains no more than explaining the reasons for the arrest.

24.2. No facts stated in the arresting statement were contradicted by any witness that came before this Court to give oral testimony. What is more, the Plaintiff’s own testimony confirmed the contents of the arresting officer’s statement.

24.3. It beckons mentioning that the parties agreed to have the statement of the Complainant admitted into evidence and that statement is essentially of the same content as the arresting statement but for the minor difference that the arresting statement mentions the fact of the arrest.

24.4. That the Plaintiff was arrested and the date of the arrest are common cause means that the arresting statement will merely collaborate these facts. The Plaintiff can suffer no prejudice in that regard.

¹³ **Ndhlovu** para 45

¹⁴ **Kapa** para 41

¹⁵ **Kapa** para 42.

24.5. The police docket was opened on 01 May 2019 and at the time of arrest, the police docket contained the Complainant's statement, list of stolen items (through use and/or threat of force) and the Complainant was well acquainted with the Plaintiff plus was pointed the Plaintiff out. These facts which are part of the evidence echo the contents of the arresting statement.

24.6. Simply put, the arresting statement will not contribute any new fact apart from stating that the Plaintiff was arrested by the person who alleges arrested the Plaintiff.

[25] When the Plaintiff was asked what prejudice he would suffer if the arresting officer's statement were admitted into evidence, this is what he said in his written submissions:

"[26] My Lord in this case the original witness is also the author of the now contested arresting officer written statement filed in the Police docket. The Respondent had indicated in the submission of merits opening statement that they are going to challenge the credibility of this written statement of the arresting officer when he is cross examined."

[26] Of the witnesses that testified, no credibility issues arose, and those witnesses quintessentially collaborated the contents of the arresting statement. Making matters worse for the Plaintiff, the Plaintiff's own testimony confirmed the contents of the arresting statement. I have mentioned that the Plaintiff admitted into evidence, by agreement, the Complainant's written statement. That statement contains the same material content as the arresting statement.

[27] That is, it is already part of common cause facts that the Plaintiff was arrested for the crime of robbery on 13 May 2019 and that the Plaintiff was arrested at house number 1948 Zone 9, Meadowlands. It is also already part of evidence that the Plaintiff was pointed out by the Complainant. In fact, the Plaintiff testified that the Complainant accompanied the arresting officer and it was the Complainant (known to the Plaintiff for over 22 years) who pointed the Plaintiff out.

[28] Ineluctably, the arresting officer's statement is credible. It is thus difficult to conceive of any scenario in which the Plaintiff's cross examination of the arresting officer would lead an adverse credibility finding.

[29] I hasten to add, the Plaintiff failed to challenge the testimony of Sergeant Esther Mokwele and who testified that the arresting officer was in possession of the police docket when he went out to effect the arrest and that the police docket contained the Complainant's statement, the list of stolen items as well as the fact that the Complainant pointed the Plaintiff out. I must then accept that that was the information at the disposal of the arresting officer, when he effected the arrest. It is this information that is interrogated in ascertaining whether the arrest without a warrant is justifiable.

[30] One must also not lose sight of the fact that the question whether an arrest is lawful or otherwise is tested objectively not subjectively. This Court already has objective facts relating to the material that was considered by the arresting officer at the time his arrest and those facts were not challenged by the Plaintiff.

[31] In saying all that, I have considered the grounds set out in section 3(1)(c) and I am persuaded that the requirements are met for admission of the arresting officer's statement into evidence. There is one issue though, it is the manner in which the Defendants approached this matter and especially their alleged attempt at tracing their witness, the efforts lack much to be desired.

[32] This Court per Mooki AJ (as he then was) in the matter of ***Radebe v Minister of Police***¹⁶ has accepted the justification of an arrest without the arresting officer being called to testified and in circumstances where the arresting officer's statement was not admitted into evidence. Yet, in this matter the Defendants have gone the extra mile of seeking leave to have the arresting officer's statement admitted into evidence and in circumstances where the evidence is fully collaborated. I can see no prejudice to the Plaintiff.

¹⁶ Unreported case with case number 4843/2021.

[33] In the alternative, even if there is prejudice to the Plaintiff it is outweighed by the probative value of the contents of the arresting officer's statement.

[34] I am thus inclined to grant the order. In the result, the arresting officer's statement is admitted into evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 1988 as amended.

[35] I have one thing to mention, it is costs. The Defendants argued that there should be no costs ordered if successful. I do not agree.

[36] The conduct of the First Defendant warrants a costs order, despite being successful in its application. This is because:

36.1. As early as 05 February 2025 the First Defendant became aware that it was struggling to locate this witness. Other than failed telephonic attempts (but for one occasion) it does not seem the First Defendant did anything to pursue to the matter.

36.2. Indeed, during April 2025 when it became clear to the First Defendant that the arresting officer had no interest in assisting the First Defendant, no steps nor action was taken.

36.3. The First Defendant did not raise any of these difficulties during the pre—trial conferences between the parties nor during the preparation of the practice notes filed of record.

36.4. In argument, for the first time the First Defendant became aware that it would need to bring this application on Friday 25 July 2025. No application was prepared and not a word mentioned to the Plaintiff.

36.5. It was only during introduction at chambers that the intended application was first mooted. That was on 29 July 2025 at around 09h20. It is no wonder that the Plaintiff was not prepared to deal with the application when it was eventually brought – orally – in open court.

36.6. To demonstrate that the First Defendant was prepared for its application, it had a witness ready to deal with this very issue and indeed called said witness. It seemed, no warning was given to the Plaintiff in this regard and thus gravely prejudiced the Plaintiff.

36.7. Such conduct warrants sanction and for this reason, it is appropriate and certainly apposite that the First Defendant be ordered to pay the costs of the application.

[37] In the result, the application succeeds but the applicant (the First Defendant) is to pay the costs of the application on scale A.

SUMMARY OF WITNESS TESTIMONY IN RESPECT OF ARREST

[38] I shall not luxuriate on the testimony but pithily summarise it as follows:

[39] The Plaintiff's testimony:

39.1. He testified that he is a 60 year old male born on 05 November 1964 and that he resides at number 1[...] M[...] Zone 9.

39.2. That he was arrested on 13 May 2019 and that his rights were not read nor was he told of his rights.

39.3. He testified that he did not say anything to the arresting officer during his arrest.

39.4. Pursuant to the arrest he was taken to Meadowlands Police Station and about an hour later, he was taken to Court for his first appearance.

39.5. That he was remanded in detention and the matter postponed for 30 May 2019. He then testified about his appearances and the fact that he was released only on 22 January 2020 when he was acquitted.

39.6. He testified that he was told by his nephew that bail had been suggested in the amount of **R 5 000.00**.

39.7. He testified that he was alleged to have robbed, at knife point, the Complainant.

39.8. During cross examination, it emerged that bail was considered on his first appearance but not proceeded with because of his previous conviction which warranted that a formal bail application be brought. That the matter was then postponed on the occasion of the first appearance for formal bail application and appointment of his legal representative.

39.9. That, continued the cross examination, during his subsequent appearance and armed with legal representation, he failed to bring an

application for admission to bail. Yet, he (through his legal representative) was able to make other requests to the court, including a request for disclosure and a request that the matter be referred to mediation.

39.10. It was then put to the Plaintiff that the Defendants could not be responsible for his detention because his lawyer failed to bring an application for his release on bail. The Plaintiff responded; *"Okay, I hear you"*.

39.11. He confirmed that the Complainant pointed him out and that the Complainant was accompanying the arresting officer. He also testified that the Complainant knew him for over 22 years and that he (the Complainant) could not have been mistaken about his (the Plaintiff) identity. When it was put to the Plaintiff that it *"could not have been a case of mistaken identity"*, he responded by saying *"it is correct"*.

39.12. He testified that he refused to give the Police his version and conceded that in doing so, it meant that the Police could not compare his version to that of the Complainant.

[40] While the above is a summary of the Plaintiff's evidence as it relates to the arrest and detention portion of the claim, it is important to indicate that in assessing the Plaintiff as a witness, I do so wholistically. I found the Plaintiff to be an untruthful witness and highly contradictory. There were a hosts of untruths and misrepresentations during his testimony in chief which were suddenly conceded in cross examination. For example,

40.1. Whereas in chief examination the Plaintiff testified that he did not have a legal representative throughout the criminal trial, in cross examination he conceded that but for the first appearance, he was represented throughout.

40.2. Whereas he alleged that, during chief examination, that he was not afforded an opportunity to apply for bail, in cross examination he conceded that the question of bail was mooted in the first appearance and when it transpired that he has previous convictions, it was postponed for future determination. Further that on future appearances, he (or his legal representative) did not raise the question of bail.

40.3. Whereas he denied (during evidence in chief) that his rights were read to him, he conceded in cross examination that his rights were read.

[41] These are some examples of blatant untruths and misrepresentations given in the course of the Plaintiff's testimony. His evidence was thus unreliable and stands to be rejected. I accordingly reject the Plaintiff's evidence.

[42] The First Defendant's testimony:

42.1. Sergeant Mokwele testified and stated that she was the investigating officer and received the police docket on 02 May 2019. She testified that the docket was opened on 01 May 2019.

42.2. She testified that she was not present at the time the Plaintiff was arrested but testified that the arresting officer had in his possession the police docket when he went out to effect the arrest. She then testified that the police docket contained the Complainant statement, and the list of stolen items. She then stated that the Complainant pointed the Plaintiff out.

42.3. She completed the warning statement after interviewing the Plaintiff and immediately took the Plaintiff to Court on the same date of his arrest, on 13 May 2019.

42.4. She then testified that given the contents of the police docket, the arresting officer (Warrant Officer Rangolo) must have been satisfied regarding the commission of the crime because the docket evinced all the elements of the crime and it was clear who committed the crime, the weapon used and coupled with the fact that the Plaintiff was pointed out.

42.5. She testified that the contents of the docket clearly evinced the grounding of a suspicion and on objective reasonable grounds.

42.6. In cross examination, none of the above testimony was challenged. The cross examination focused itself on how the warning statement was completed and that the Plaintiff would argue that the warning statement ought not be admitted into evidence.

42.7. If anything, the cross examination confirmed that the arresting officer must have arrested based on the information contained in the police docket and coupled with the fact that the Plaintiff was pointed out.

[43] With the evidence laid out, I turn to the legal principles applicable to resolving the question of unlawfulness of an arrest, or otherwise.

LEGAL PRINCIPLES

a. General principles on arrest

[44] I mentioned, above, that the First Defendant invokes section 40(1)(b) of the CPA in justifying the arrest. Section 40(1)(b) provides:

“A peace officer may without a warrant any person... whom he reasonably suspects of having committed an offence referred to in Schedule 1.”

[45] It is trite that there are four jurisdictional facts to be proved in justification of a section 40(1)(b) defence; namely,

- 45.1. The arrestor must be a peace officer,
- 45.2. The arrestor must entertain a suspicion,
- 45.3. The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
- 45.4. The suspicion must rest on reasonable grounds.¹⁷

[46] Once the jurisdictional facts for an arrest are present, whether in terms of section 40(1)(b) or other provision empowering the police to arrest, a discretion to arrest arises.¹⁸

[47] Further, Harms DP stated in ***Minster of Safety and Security v Sekhoto*** that the:

*“decision to arrest must be based on the intention to bring the arrested person to justice...but a distinction must be drawn between the object of the arrest and the arrestor’s motive. Object is relevant while motive is not... it explains why the validity of the arrest is not affected by the fact that the arrestor, in addition to bringing the suspect to court, wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion.”*¹⁹

¹⁷ ***Duncan v Minister of Law and Order*** 1986 (2) SA 805 (A) at 818G-H

¹⁸ *Ibid* para 28

¹⁹ (2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10 (19 November 2010) at paragraphs 28 -31

[48] In our case, it is clear that the First Defendant's employees had exactly that intention in mind as the Plaintiff was in court within 5 hours of his arrest.

b. Onus -justification of arrest

[49] The act of arrest is common cause and therefore, the First Defendant bore the onus to justify the arrest; that is, to establish that the arrest was lawful.

[50] It is trite that the onus rests on a defendant to justify an arrest. As Rabie CJ explained in **Minister of Law and Order v Hurley**:

*"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to enquire that the person who arrested or caused the arrest of another person should bear the onus of providing that his action was justified in law."*²⁰

[51] This principle is captured further in **Minister of Safety and Security and another v Swart**²¹ where it was held at paragraph [20] that:

The onus rests on the arresting officer to prove the lawfulness of the arrest.
The reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule 1 offence.

[52] It is trite that once an arrest has been established, it is prima facie unlawful, and the Defendant has to justify the arrest.²²

[53] This Honourable Court in **Matsietsi** referred to **Minister of Justice v Hofmeyr**, wherein the then Appellate Division (per Hoexter JA) held:

*'The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are prima facie illegal.'*²³

²⁰ 1986 (3) SA 568 (A) at 589E-F; see also **Zealand v Minister for Justice and Constitutional Development and another** 2008 (2) SACR 1 (CC) para 24.

²¹ [2012] JOL 28772 (SCA).

²² **Matsietsi v Minister of Police** (A3103/2015) [2017] ZAGPJHC 29 (20 February 2017).

[54] Furthermore, the Honourable Court referred again to **Minister of Justice v Hofmeyr** (above) wherein the court further held:

‘Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.’ This pronouncement was in approval of the earlier decision in Minister of Law and Order and others v Hurley and another where the Court (per Rabie CJ) stated as follows: ‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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.’²⁴

[55] In **Duncan v Minister of Law and Order**, Van Heerden JA explained that once the jurisdictional requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace officer.²⁵

[56] The Plaintiff conceded that the arrest was lawful in terms of section 40(1)(b). The Plaintiff merely contended that the arresting officer did not exercise his discretion properly. However, I must stress what the Supreme Court of Appeal said in **Sekhoto**”

“[44] 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

²³ 1993(3) SA 131(A) 153D-E

²⁴ 1986 (3) SA 568 (A) 589D-E

²⁵ 1986 (2) SA 805 (A) at 818G-H

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. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting 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.”²⁶

[57] In our case, it is clear that robbery is a schedule 1 offence and thus a serious offence. For the reasons given by the Supreme Court of Appeal, the Plaintiff conceded that in such circumstances the arrest must be said to be lawful.

[58] In the result, I am impelled to find that the arrest was lawful. A lawful arrest does not lead to an unlawful detention, without more. We know that the post-first appearance detention was sanctioned by the Magistrate (sitting as a Regional Court) and that, too, after the question of bail had been considered.

[59] We know that the Plaintiff was remanded in detention and the matter postponed to 30 May 2019. On the face of it, the remand detention period was unlawful as it exceeds the statutory limit of “*not more than 7 days*”. This was explained by the Defendants witnesses by stating that the court assigned prosecutor was not available due to being on leave and that she would be back from leave on the date of 30 May 2019, hence the postponement to that date. The explanation was not challenged by the Plaintiff and ergo, it stands.

²⁶ **Sekhoto** para 44.

[60] Even if it does not stand, that decision was not taken any of the Defendants before Court and ergo, they cannot be held responsible nor liable for this detention. I am not persuaded that the chain of causation was not broken by the first appearance and for this reason, the Constitutional Court's judgment in **de Klerk**²⁷ does not find application in casu.

[61] The conduct of the police after an unlawful arrest, especially if the police acted unlawfully when arresting the plaintiff, is to be evaluated and considered through legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.²⁸

[62] There was not an iota of evidence suggesting the post-first appearance detention was nonetheless unlawful and accordingly, this question does not arise.

[63] The result, I find that the arrest is lawful and no period of the detention was unlawful.

[64] That then leaves the second claim, malicious prosecution.

MALICIOUS PROSECUTION

[65] The Plaintiff conceded that the prosecutors were simply performing their duties. Crucially, the Plaintiff gave the answer “*I hear you*” and no counter-version when it was put to the Plaintiff that (a) “*the prosecutor had no intention to harass you*”, and (b) “*the prosecutor had an honest belief that you were going to be convicted and hence they prosecuted you*”.

[66] Yet, the evidence of two witnesses called on behalf of the Second Defendant testified that they did not know the Plaintiff and could not have intended to cause the

²⁷ **De Klerk v Minister of Police** (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019).

²⁸ **De Klerk** at para 63.

Plaintiff harm by prosecuting him. They both testified that the prosecution was informed the contents of the docket and which contents revealed a *prima facie* case. It was testified that the Plaintiff failed to give his version and thus they could not have considered it. However, with the information at their disposal, they were convinced that the Plaintiff had committed the offence in question.

[67] Material evidence was not challenged by the Plaintiff and accordingly, I find that there was no malicious prosecution.

Costs

[68] Costs follow the result, as a general rule. I see no reason to depart from this longstanding legal principle.

[69] When I invited the parties on the appropriate scale for costs, both parties agreed that scale B would be appropriate. I am satisfied that scale B is appropriate in the circumstances and order that costs be on scale B.

Conclusion

[70] For all the reasons set out above, the Plaintiff has failed to prove that it was unlawfully arrested and prosecuted maliciously. I say that mindful that the onus in respect of an arrest is on the First Defendant. In so far as that is concerned, I am satisfied that the First Defendant duly discharged the onus and justified the arrest.

[71] Crucially, as stated above, the Plaintiff conceded that the arrest was lawful. The enquiry rests there and at that juncture.

Court Order

[72] In the circumstances, I make the following order:

1. The First Defendant's application in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 1988 as amended is granted.
2. The First Defendant is ordered to pay the costs of the

application on party and party scale A.

3. The Plaintiff's action is dismissed with costs on scale B.

K MVUBU

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 29, 30 & 31 July 2025

Date of Judgement: 01 August 2025

For the Plaintiff: Adv. M Maluleke

Instructed by: Matela Sibanyoni & Associates per Ms O Mgijima

For the Defendant: Adv. M Lekwape

Instructed by: The State Attorney, Johannesburg per Mr C Setlhatlole