



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA58/2025

In the matter between:

THE MINISTER OF POLICE

**First Appellant
(First defendant a quo)**

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

**Second Appellant
(Second defendant a quo)**

And

PHINDILE PAYI

**Respondent
(Plaintiff a quo)**

APPEAL JUDGMENT

LOWE J

Introduction

1. This is an appeal, with the leave of the Supreme Court of Appeal. I will refer to the parties as they were in the action for convenience.
2. Plaintiff brought an action against first and second defendant seeking:
 - 2.1. Claim 1: Compensation for unlawful arrest and detention on 13 August 2018, before plaintiff's first court appearance on 15 August 2018 at Gqeberha, he being arrested without a warrant on a charge of rape and or kidnapping. Plaintiff pleads that the arrest was wrongful and unlawful. He claimed damages in the sum of R100 000,00, allegedly "*general damages in respect of the plaintiff's wrongful arrest*", and then a further claim in respect of "*general damages for the wrongful and unlawful detention, the deprivation the plaintiff's liberty, as well as contumelia*" in the

sum of R300 000,00, in fact a total of R400 000,00, (but pleaded as a total of R300 000,00). In the prayers, however, plaintiff claims “*R300 000,00 in respect of plaintiff’s claim 1*”.

- 2.2. Claim 2: A claim for damages arising from plaintiff’s “*wrongful and unlawful continued detention*” for the period commencing 15 August 2018 to 12 September 2018, when he was released from custody, the claim being in the sum of R2 500 000,00 for deprivation of liberty;
 - 2.3. Claim 3: A claim for malicious prosecution, on the basis that on or about 13 August 2018 the members of the South African Police Services and the National Prosecution Authority set the law in motion against plaintiff, on a charge of rape and kidnapping, and did so maliciously those proceedings terminating in plaintiff’s favour on 12 September 2018, the charges being withdrawn. The sum of R500 000,00 is claimed as damages therefor.
3. First defendant pleads to Claim 1 denying that plaintiff was arrested unlawfully, pleading a lawful arrest on the basis of a reasonable suspicion, he having been pointed out by the complainant for the offence of kidnapping, a Schedule 1 offence in terms of the Criminal Procedure Act, further disputing any unlawfulness in the extended detention, which was admitted, and denying malicious prosecution.
 4. It appears from the plea to Claim 1 that the arrest was certainly without a warrant, plaintiff having allegedly committed the offence of kidnapping complainant pointing out the crime scene as the plaintiff’s residence and his, so-called, accomplice in respect of kidnapping and rape.
 5. It should be made clear, however, that the charge relevant is in fact a Schedule 1 offence of kidnapping, not kidnapping and rape. It is said that there was a

reasonable suspicion justifying the arrest. The period of detention is admitted but said to be lawful.

6. The Judge a quo, having heard the evidence, found for plaintiff as follows:

- 6.1. In respect of Claim 1 the plaintiff's claim succeeds, first defendant ordered to pay plaintiff R100 000,00 for unlawful arrest and detention for two days from 13 August 2018 to 15 August 2018;
- 6.2. In respect of Claim 2 the defendants jointly and severally are held liable and were ordered to pay plaintiff the sum of R800 000,00 for a further detention of 30 days from 15 August 2018 to 12 September 2018;
- 6.3. In respect of Claim 3, (malicious prosecution), that the second defendant was liable therefor and was ordered to pay plaintiff the sum of R300 000,00;
- 6.4. Interest on all the claims was to run at the prescribed rate from date of judgment;
- 6.5. The respective defendants, in accordance with the orders, were to pay plaintiff's costs.

7. The appeal on behalf of both defendants, alleges that the judge a quo erred in every respect, plaintiff's claim to be dismissed with costs, but also separately challenging the quantum of the awards in each instance.

The basic principles relevant to such actions

8. Our courts have frequently confirmed that the onus to justify an arrest and the initial period of detention, is born by first defendant, where the arrest is admitted and pleaded to be a lawful arrest.¹
9. The first defendant pleaded that plaintiff was lawfully arrested for having committed the offence of kidnapping, being an offence referred to in Schedule 1 of the Criminal Procedure Act, 1977, he being “*lawfully arrested without a warrant*”.
10. Whilst this is not stipulated in the plea, as it should have been, the arrest is clearly one purportedly in terms of section 40(1) of the Criminal Procedure Act, more particularly section 40(1)(b), being an arrest without a warrant by a peace officer of plaintiff whom he “*reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody*”.
11. Irrespective of which subsection of section 40 is relevant to this matter, the first appellant chose to rely on, the arresting officer is required to have a reasonable suspicion that an offence has been committed.²

¹ **Mahlangu and Another v Minister of Police** 2021 (2) SACR 594 (CC) at para [32].

² **Mabona v minister of Law and Order** 1988 (2) SA 654 (SE) at 658E – H which sets out the following:

The test of whether a suspicion is reasonably entertained within the meaning of s 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 me 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

12. The lawfulness of an arrest in such circumstances is intricately connected to the facts of each individual situation.³
13. This requires the objective standard of the reasonable person, in these circumstances particularly relevant to the holding of a reasonable suspicion.⁴ It is further important to note that when a peace officer has an initial suspicion, steps have to be taken to confirm this to be a “*reasonable*” suspicion before the arrest.⁵
14. As to Claim 2, in respect of the further detention, this has as its essence, the claim that this detention was unlawful for breach of what is known as a public law duty.⁶ When the police wrongfully detain a person, it may be, that they are also liable for the post-hearing detention of that person depending on all the facts and circumstances.
15. As pointed out in **Minister of Police v National Director of Public Prosecutions** and **Erasmus**⁷, the cases show that such liability will lie where there is proof on a balance of probability that: Firstly, there was culpable and unlawful conduct of the police and, secondly that this was a factual and legal cause of the post-hearing detention being demonstrated. In **Woji v Minister of Police** (*supra*) the court held that the culpable conduct of the investigating officer consisted of giving false evidence during the bail application which

but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.

³ **Minister of Safety and Security v Van Niekerk** 2008 91) SACR 56 (CC) par [20].

⁴ **Duncan v Minister of Law and Order** 1986 (2) SA 805 (A) at 814D.

⁵ **Nkambule v Minister of Law and Order** 1993 (1) SACR 434 (T).

⁶ **Woji v Minister of Police** 2015 (1) SACR 409 at para [28]; **De Klerk v Minister of Police** 2022 (1) SACR 1 CC; **Mahlangu** (*supra*) at para [38].

⁷ Supreme Court of Appeal case number 366/2021 [2022] ZASCA 57 (22 April 2022).

caused its refusal and resultant deprivation of liberty. In **Minister of Safety and Security v Tyokwana**⁸, this liability of the police for post-hearing detention was based on the fact that the police culpably failed to inform the prosecutor that the witness statement implicating the respondent had been obtained under duress and was subsequently recanted and were consequently there was no evidence linking the respondent to the crime.

16. As pointed out in **Minister of Police v NDPP** (*supra*), and **De Klerk vs Minister of Police**⁹ the decisive consideration (in both judgments), that held for the appellant, was that the investigating officer knew that the appellant would appear in a “*reception court*” when the matter would be remanded without the consideration of bail.
17. In **Mhlangu and Another v Minister of Police**¹⁰ the investigating officer had deliberately suppressed the fact that the confession which would constitute the only evidence against the appellants, had been extracted by torture, and thus thereby caused their continued detention.
18. It is clear from the authorities, referred to above, and the various judgments in **De Klerk**, that there is a difference of view, half the court in **De Klerk** considering that a deliberative judicial decision in respect of a further detention constitutes an intervening act which ends the liability of the police for wrongful arrest and detention, the other half of the court considering that a remand order by a magistrate, does not necessarily render subsequent detention lawful the issue being whether, substantively, there was just cause for the latter

⁸ [2014] ZASCA 130; 2015 (1) SACR 597 (SCA),.

⁹ 2020 (1) SACR (CC) para [58] and [76].

¹⁰ 2021 (2) SACR 595 (CC)

deprivation of liberty, in which regard attention must be given to the manner in which the remand order was made.¹¹

19. As to reasonable and probable cause for a prosecution, and malicious prosecution, the plaintiff must allege and prove that;

19.1 defendant set the law in motion – that defendant instigated or instituted the proceedings;

19.2 defendant acted without reasonable and probable cause;

19.3 defendant acted with malice (*animo iniuriandi*), that is with intention to injure plaintiff, and;

19.4 the prosecution failed.¹²

20. In summary, the lack of reasonable and probable cause provides that the proceedings must have been instituted without an honest belief, based on reasonable grounds, that the institution of proceedings were justified involving both a subjective and objective element. The proper approach to a situation where it is established that a defendant instigated the prosecution without reasonable and probable cause, is then to go on to the enquiry as to whether defendant acted with malice or *animus injuriandi*. To succeed in the second leg of the enquiry plaintiff must prove not only intent to injure but also consciousness of wrongfulness.¹³ Malice means that the defendant directed his or her will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent.¹⁴

¹¹ De Klerk para [62].

¹² **Minister of Justice and Constitutional Development and Others v Moleko** 2009 (2) SACR 585 SCA; **Minister of Safety and Security NO v Schubach** [2014] ZASCA 216.

¹³ **Ledwaba v Minister of Justice and Constitutional Development and Others** [2024] ZASCA 17 at paragraph [22] and [23].

¹⁴ **Minister of Justice and Constitutional Development v Moleko** 2009 (2) SACR 585 (SCA) par [8] and [63].

21. **Moleko** (*supra*) held that animus injuriandi “means that the defendant directed his or her will to prosecuting the plaintiff in the awareness that reasonable grounds for the prosecution were absent”.
22. As to reasonable and probable cause, or the absence thereof, the first enquiry means that plaintiff must establish that defendant did not have such information as would lead a reasonable man to conclude that plaintiff had probably been guilty of the offence charged, if despite his having such information defendant is shown not to have believed in plaintiff’s guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.¹⁵ It is important to understand that this does not mean whether there is sufficient evidence upon which the accused may be convicted, a much stronger test, this simply being the reasonable belief objectively that the person was probably guilty of the offence.¹⁶ The test for reasonable and probable cause is an objective test not based on the subjective beliefs or motives of the prosecutor.
23. In practical terms this means that the prosecutor need not have evidence establishing a prima facie case, or proof beyond reasonable doubt, when deciding to initiate a prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what “a reasonable prosecutor would have done in light of the information available at the relevant stage”.¹⁷

¹⁵ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 135 – 136 (A – C).

¹⁶ **National Director of Public Prosecutions v Mdhlovu** 2022 [ZASCA] 85 (3 June 2024); **Prinsloo and Another v Newman** 1975 (1) SA 481 (A).

¹⁷ *Mdhlovu (supra)* para [20] and [21]

24. In respect of malice this simply means the intention to injure or animus iniuriandi.¹⁸

The evidence

25. The approach, on appeal, to the evidence of a trial court is well established as is the appeal court's power to interfere with the court a quo's findings and ruling.

26. In **Bernert v Absa Bank**¹⁹ the court held that:

“The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses, as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.”

27. The trial court carefully summarised and analysed the evidence in this matter, correctly setting this out, and as I further summarise below.

28. The applicant was arrested without a warrant on 13 August 2018 for allegedly committing the offences of kidnaping and rape, being detained at the

¹⁸ **Maoki v Reckitt and Colman Africa (Ltd)** 1968 (3) SA 98 (A); **Relyant Trading Pty Ltd v Shongwe** [2007] 1 All SA 375 (SCA).

¹⁹ 2011 (3) SA 92 (CC) at [106]; **Makate v Vodacom (Pty) Ltd** 2016 (4) SA721 (CC).

Motherwell Police station. On 15 August 2018 the matter was postponed until 24 August 2018 for a formal bail application at the instance of both first and second defendants. His release from custody was opposed, and on 24 August 2018, his bail application stood over to 28 August 2018 at the instance of the public prosecutor and investigating officer. On 28 August 2018 plaintiff's bail application was again remanded to 12 September 2018 at the specific request and instance of the public prosecutor again acting in concert with the investigating officer. On 12 September 2018, despite there being no change in appellant's personal circumstances, the public prosecutor and investigating officer no longer opposed bail, and he was in any event released , the case being struck off the roll due to lack of evidence.

29. The crime with which appellant was charged was a Schedule 6 offence.
30. In the evidence, plaintiff testified, calling no other witnesses. The defendants called the arresting officer, Sergeant Mnyango, Constable Andries, Captain Sibane and the prosecutor Mr. Mavakala.
31. Put shortly, plaintiff's evidence was that on 12 August 2018, the day before his alleged unlawful arrest, he was in the company of Mr. Beyi and Mr Junior travelling in Beyi's motor vehicle, plaintiff in the back seat. They went to a tavern in Motherwell consumed alcohol, plaintiff going to the vehicle, having had too much to drink, and falling asleep. He was woken by his companions approaching the vehicle with five ladies and a male. The complainant was one of the ladies. He says that the complainant sat on Beyi's lap in the front seat, the vehicle proceeding to the beach. He was of the view that Beyi was involved in a "*love relationship*" with the complainant. They left the beach travelling

towards the complainant's home, some of the ladies already leaving the vehicle before that.

32. Plaintiff remained in the vehicle with the driver, his girlfriend, complainant and Beyi, they arriving at plaintiff's home. Beyi asked for a place to sleep, plaintiff agreeing, they leaving the vehicle. Plaintiff, Beyi and the complainant went to a bedroom where they were going to sleep for the night, he staying in the lounge, playing music and drinking. In the early hours of the morning complainant appeared, sat with plaintiff in the lounge and said she wanted to leave. He said that it was unsafe as it was about 3 in the morning, she should wait there being no taxis. He said he would accompany her to get a taxi later and gave her some food and water. When plaintiff went to the kitchen to fetch water, complainant left the house and ran away, as it was put, taking with her, says plaintiff, his money and two cellphones that had been in the bedroom where she and Beyi slept, he chasing her. She went to a neighbour's house, followed by plaintiff who informed the owner what had happened. Returning to his home, he continued with what he was doing, finding Beyi still asleep – who woke between 6 and 7 am and left the house.
33. At about 08h00 the same morning, as he was about to hang his laundry, two police officers, Mnyango and Andries arrived with complainant asking "*is this the person?*". She said no, and they asked plaintiff where Beyi was, he said that he stayed in the location. They then said that they would "*keep*" plaintiff until they found Beyi, he directing them to where Beyi lived. They found Beyi who with plaintiff was arrested for rape and kidnapping.

34. Plaintiff also testified as to the shockingly bad conditions of the police cells as also those at St Albans prison which were not as bad however.
35. Sergeant Mnyango's evidence in summary set out that he was on duty on the day in question when a Ms. Kolisi reported complainant's rape, Andries attending to her. Thereafter Mnyango, Andries and Kolisi proceeded to Kolisi's house where the complainant was. On arrival the complainant informed them that she was taken by the plaintiff and Beyi, and that Beyi had raped her while the plaintiff was present in the house. Mnyango said he entertained a reasonable suspicion that plaintiff committed an offence referred to in Schedule 1 and arrested him, he pointed out by complainant. He conceded in cross-examination however, that complainant told him that it was not plaintiff who had raped her. He said that when complainant told him that plaintiff had refused to open the door to the house (when she woke up) he concluded that plaintiff had kidnapped her. He conceded that the suspicion did not rest on reasonable grounds and in fact was unreasonable in the circumstances – although this was not for him to decide.
36. Put shortly, Andries's evidence distanced herself from the arrest of plaintiff saying there was no evidence linking plaintiff to the commission of the offences, that she did not complete the pointing out statement, but that Mnyango had done so, she saying that they had not received sufficient information pertaining to the role of the plaintiff.
37. Captain Sibane, said in evidence, that he was the investigating officer, he taking a statement from complainant on 13 August 2018 (after the arrest). He disagreed that there was no evidence implicating plaintiff, but conceding in

cross-examination, that he had said at the bail proceedings that there were no elements of rape and kidnapping against plaintiff.

38. Finally, the prosecutor, Mavakala, an acting senior public prosecutor at the time, testified that having read the statement of complainant, on 15 August 2018, he had to determine whether there was a prima facie case against plaintiff and Beyi, he so concluding. He charged them with rape and kidnapping. He and Sibane decided to oppose bail, postponing the matter to allow plaintiff and Beyi to apply for legal aid. He said that plaintiff had acted in common purpose with Beyi, but conceded that complainant's statement contained no detail indicating the role played by plaintiff in the commission of the offences.

The analysis: Claim 1

39. Applying the legal principles referred to above in this regard, the trial Judge concluded that there was nothing in the evidence to suggest that plaintiff had anything to do with forcing complainant not to alight from the vehicle, drive to his house or that he had refused to let her go from his house simply suggesting that she stayed. The trial Judge also correctly concluded that Mnyango had not informed plaintiff of his rights when arresting him and did not give the plaintiff an opportunity to explain and tell his side of the story before effecting the arrest.
40. The trial Judge held that Mnyango decided to arrest plaintiff, prior to complainant's statement being taken, having no information or further information to assess sufficiently, or give consideration as to whether an arrest was justified on the objective facts.

41. The trial Judge took into account that Andries was of the view that there was no evidence upon which plaintiff should be arrested.
42. The trial Judge concluded, perfectly correctly, on the evidence and on the appropriate application of the law, that first defendant failed to discharge the onus justifying the arrest.
43. Having analysed the facts against the legal position, I agree with the findings made by the trial Judge, and the appeal must fail in this respect.

The analysis: Claim 2

44. In this regard, the trial Judge, again, perfectly correctly summarised the relevant evidence in this regard. It is more than clear that sergeant Mnyango, and those other police officers involved, failed to apply their minds in respect of plaintiff's detention, and continued detention, let alone adopting an appropriate approach to his being granted bail, which they resisted. This is however not, without more such as to render the first defendant liable.
45. It is trite and stipulated in **Mvu v Minister of Safety and Security and Another**²⁰ citing with approval **Hofmeyr v Minister of Justice and Another**,²¹ that even where an arrest is lawful a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto and the failure to do so properly is unlawful. That is however not the end of the enquiry.

²⁰ 2009 (2) SACR 291 (GSJ) para [10]

²¹ 1992 (3) SA 108 (C)

46. The real question in this matter however, is whether, as set out above, there was culpable and unlawful conduct of the police which factually and legally was a cause of the post-hearing detention.
47. This, relevant to first defendant, is a more difficult issue to decide than the original unlawful arrest.
48. In my view, however, Mnyango should ideally have drawn to the prosecutor's attention, that he had arrested plaintiff without having taken a statement from complainant, and that constable Andries was of the view, for good reason, that there was no evidence implicating plaintiff. The persistent refusal to grant bail and the decision of the police to oppose bail was, in my view, not based on reasonable grounds and was a culpable failure on the part of the police involved. The question is however whether this was, in fact, a cause of the post-hearing detention.
49. The fact remains that a deliberative judicial decision may indeed constitute an intervening act truncating the liability of the police for the wrongful arrest and detention, the question remaining whether there was culpable and unlawful conduct on the part of the police, this being a factual and legal cause of the post-hearing detention.
50. There is no case made out, it must be recognized, that the police failed to disclose all relevant facts to the prosecutor, he having the statements and docket, just as they did. Indeed, the prosecutor Mavakala's evidence was that he had received the docket on first appearance which he read containing

complainant's statement, making a determination that there was a case against respondent.

51. The evidence discloses, however, that there was nothing in the docket that indicated the possible guilt on the part of the respondent, objectively construed.
52. On the evidence, it seems to me that the court was not a reception court as in De Klerk, nor was anything hidden from the prosecutor, the prosecutor having all the information that was at that stage available to the police, and was able to analyze same to reach an independent decision. The fact that the police participated in the bail refusal does not, of its own, render first defendant, in the circumstances, similarly liable for an unlawful further detention.
53. In my view, the court a quo erred in finding thus that first defendant liable for the continued detention, clearly had the prosecutor Mavakala applied his mind to the docket and to the statements, it would have been more than clear, that there was no evidence, of the standard required, and upon the test to be applied, binding plaintiff to the crime of which he had been charged.
54. Mavakala's suggestion that respondent had acted in common purpose with Beyi, finds no merit on the facts that were before him. Indeed in his evidence, he was unable to point to anything in the docket that indicated possible guilt on the part of the respondent nor to any logical process that he had undertaken, from which he could, by drawing inferences, have formed the view that there was any basis at all for believing that respondent had been involved in the kidnapping and rape.

55. The appeal in this respect on behalf of the first appellant must succeed, but not that of the second appellant. There was simply no basis upon which the prosecution ought to have proceeded on the appropriate test to be applied. Not only was the original arrest unlawful but on the docket there was no basis whatsoever, on an objective consideration, that plaintiff was probably guilty of the offence. Put differently, there was no evidence that would have caused a reasonable prosecutor to commence, let alone continue the prosecution against plaintiff.

Analysis: Malicious prosecution

56. On the facts, and against the legal position the only relevant enquiry is as to whether second defendants acted without reasonable and probable cause and if they did, whether this was with malice.

57. There was on the facts, and on the test set out above, no reasonable and probable cause established for the prosecution, it being quite another matter as to whether the prosecutor or prosecutorial team acted with malice.

58. Whilst Mavakala's evidence was that he had decided, after reading the docket, that there was a case against plaintiff and Beyi, and that he decided to proceed against them, he conceded that his decision was not supported by the real facts available to him and he had told the court during the bail proceedings that his seniors insisted that he proceed against the plaintiff, which he had resisted.

59. This falls far short of sufficient evidence to establish malice, and on the facts before me, I can find no basis for such a finding. The evidence failed to

establish that Mavakala, or the prosecutorial team directed their will to the prosecution with intent to injure and with consciousness of wrongfulness.

60. In my view, accordingly, the trial court erred in finding second defendant liable in respect of malicious prosecution, the appeal to succeed in this regard.
61. As will appear hereafter, in any event, the award of damages in respect of malicious prosecution overlaps substantially with the remaining awards of damages, and this would have been in any event, a pyrrhic victory.

Quantum as to detention: Claim 2

62. I commence by making it clear that the suggested quantum advanced by appellants, is entirely unsustainable on the authorities, being awards completely out of step with those applicable to this type of matter and accordingly the submissions can safely be ignored out of hand.
63. This does not mean that the appeal against quantum must not be carefully analyzed and determined.
64. A court of appeal will only interfere with the discretion of a trial Judge in the determination of an appropriate award if the award is “*palpably excessive or clearly disproportionate in the circumstances of the case*”.²²
65. **In Minister of Safety and Security v Tyulu**²³ Bosiele AJA held as follows:

“[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer

²² **Salzman v Holmes** 1914 (AD) at 471 at 477; **Sandler v Wholesale Cole Supplies Ltd** 1941 (AD) 1...; **Bee vs Road Accident Fund** 2018 [ZASCA] 52, 2018 (4) SA 366 (SCA) at para [47]

²³ 2009 (2) SA 282 (SCA) para [26]

him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (2) SACR 271 (SCA) (2009 (5) SA 94; [2009] ZASCA 39) paras 26-29)."

66. In determining the issue of quantum I taken into account a number of other decision including **Mahlangu and Another vs Minister of Police**.²⁴
67. Once again, it was worth emphasizing that when a court makes factual findings and evaluates the evidence an appeal court will invariably be hesitant to interfere with those factual findings and the evaluation of the evidence, this extending in to the determination of damages in the context referred to above.
68. Where it comes to the deprivation of liberty the quantum is always in the discretion of the trial court, to be exercised fairly and in accordance with what is equitable, considering the merits of the case itself.²⁵

²⁴ 2021 (2) SACR 595 (CC); **Mminister of Police vs Nontsele** 2025 [1] All SA 44 SCA para [29]; **Rahim v Minister of Home Affairs** 2015 (4) SA 433 (SCA).

²⁵ **Masiteng v Minister of Police** 944/2023 [2024] ZASCA 165 para [14].

69. As set out in **Mahlangu** (*supra*), the awards underscore that the assessment of damages is not based solely on the duration of the detention but gives overall weight to the detainee's treatment and the conditions in which that detainee was held. Of course, the length of that detention is highly relevant nevertheless but this is not the sole issue relevant to the quantum of damages.
70. I cannot differ in any way with the learned trial Judge's assessment of the conditions which were relevant to the two places where plaintiff was held. His first detention was two days, the second a period thirty days.
71. In my view, having regard to the period and conditions in which he was held in the first period of detention the award of R100 000,00 is not so generous as to the subject to any challenge on appeal, although on the higher side of an award.
72. It is less so in respect of the R800 000,00 awarded in respect of the second period, being a sum on the authorities in my view clearly disproportionate in the circumstances of the case. The starting point is **Ramakulakusha v Commander Vemba National Force**²⁶ where it is set out that the primary purpose of such an award is not to enrich the aggrieved party but to offer a solatium for injured feelings. This was confirmed in **Mahlangu and Others v Minister of Police**²⁷ and in **Minister of Police v Nontsele**.²⁸

²⁶ 1989 (2) SA 813 (V) at 847B – C and **Minister of Safety and Security v Tuylle** 2009 (5) SA 85 SCA at [26].

²⁷ 2021 (2) SACR 595 (CC).

²⁸ [2025] 1 All SA 44 (SCA) [29].

73. In **Mahlangu** (*supra*) the plaintiff was detained for eight months and ten days and were awarded R550 000,00 and R500 000,00 respectively by the Constitutional Court.
74. In **Rahim v Minister of Home Affairs**²⁹ the court raised the following facts as relevant: the circumstances under which the deprivation of liberty took place; the conduct of defendant; the nature and duration of this deprivation. See also **Woji v Minister of Home Affairs**.³⁰
75. In my view, the award is disproportionate and generous to the extent that warrants it being reduced to the sum of R500 000,00, having regard to all the relevant considerations and circumstances.

Quantum: Malicious Prosecution: Claim 3

76. In respect of the malicious prosecution, and as pointed out in the authorities, an award of whatever sum in respect of the general damages relevant thereto, would have been in part a duplication (as appears below) and had it been necessary, the R300 000,00 awarded in that respect would have been reduced to R50 000,00.
77. If I am incorrect in dismissing this claim I comment on quantum as follows. In awarding damages for malicious prosecution, it is necessary to be astute not to duplicate damages in other awards, in the same matter and or the same facts,

²⁹ 2015(4) SA 433 (SCA) at [29]

³⁰ 2015 (1) SACR 409 (SCA).

such as unlawful arrest and detention in the same matter as malicious prosecution.³¹

78. In **Nakana** (*supra*) it was pointed out that the amount to be awarded for “*general damages*” in a claim for malicious prosecution is in the court’s discretion.³² This is a discretion in the true sense – and can only be overturned where, on appeal, the court finds that the discretion was not exercised judicially, was influenced by wrong principle or factual misdirection or was one which could not reasonably be remade on the relevant facts and principles.³³

79. The facts to be considered in awarding general damages in malicious prosecution include, held **Nakana**:

- 79.1. the gravity of the charges;
 - 79.2. the nature of the prosecution;
 - 79.3. the length of time the person was subject to prosecution;
 - 79.4. the absence of reasonable and probable cause in setting the law in motion;
 - 79.5. the presence of improper motive or malice;
 - 79.6. the deprivation of liberty;
 - 79.7. the status, age and health of the plaintiff;
 - 79.8. the publicity given to the criminal proceedings;
 - 79.9. the absence of a reasonable explanation, or apology, by defendant;³⁴
- and

³¹ **Nakana v Claassens + others** [2025] ZASCA (7 May 2025) [26].

³² [21].

³³ [21].

³⁴ [22]

79.10. any other relevant factors.

80. In **Nakana**, the defendant was found liable for unlawful arrest and detention and in this respect, eventually on appeal, was awarded R400 000,00. Defendant was also found liable for malicious prosecution and awarded damages, on appeal, by a Full Bench of R250 000,0 as general damages therefor. On further appeal this was reduced to R80 000,00, the appeal court finding that the court below had partly duplicated the general damages award for wrongful arrest and detention, as the R250 000,00 award had taken the same facts into account relevant to the circumstances of the three days of detention. In doing so it had awarded an additional amount on the same facts, particularly in respect of the conditions of the cells in which plaintiff had been held, and thus reduced the award from R250 000,00 to R80 000,00.
81. The original sum of R250 000,00 had taken into account the acrimonious relationship between the parties; that defendant was an ex policeman; had previously laid further charges; had abused his power as an ex police officer; and that the arrest was accompanied by malice and revenge; and finally that plaintiff had spent three days in the cells under horrible conditions. (This latter aspect being the cause of the damages duplication requiring a reduction from R250 000,00 to R80 000,00.)
82. In the end the issue is simply that in awarding damages for malicious prosecution the facts must be carefully considered and the award must not duplicate other claims and awards of damages arising from the same facts.

83. In this matter it is not entirely clear how the R300 000,00 damages for malicious prosecution was comprised. The various factors to be taken into account must be weighed, considered and analysed to be sure that there is no duplication.
84. The principle issues, in considering damages for malicious prosecution in this matter, had this been relevant, and successful are:
- 84.1. the gravity of the charges;
 - 84.2. the length of the prosecution;
 - 84.3. the absence of reasonable and probable cause;
 - 84.4. the issue of improper motive;
 - 84.5. the lack of apology.
85. In my view the remaining issues including the detention and length thereof in poor conditions were already fully compensated in the award for unlawful detention, and I would have awarded only R50 000,00 for malicious prosecution had this been necessary in the event of liability therefor being established – which in my view it was not.

Costs

86. The costs in this matter must, in each instance, and in all respects follow the result in respect of all the orders save for Claim 2.2 in the appeal.

87. In this regard having regard to the parties success as to quantum in respect of second defendant an order that each party pays their own costs is just and equitable.
88. The scale of costs in this appeal is Scale C, the costs of one counsel being allowed. There is no order as to the scale of costs relevant to the order of the court a quo, thus scale A, the court a quo not making such an order.

Order

89. In the result the order is as follows

1. The appeal against claim 1 is dismissed with costs.
2. The appeal against claim 2:
 - 2.1 In respect of first defendant's liability the appeal is upheld with costs, the order a quo being set aside;
 - 2.2 In respect of second defendant, the appeal against liability is dismissed, but the appeal is successful to the extent of reducing the quantum of the award against second defendant to R500 000,00. Each party to pay their own costs of the appeal (in respect of Claim 2).
3. The appeal against Claim 3, in respect of second defendant, as to the finding of malicious prosecution, is upheld with costs, the order of the court a quo as to liability and quantum being set aside.
4. The costs award on appeal are to be on Scale C.
5. The judgment of the court a quo is set aside and replaced with the following:

“1. In respect of Claim 1 plaintiff succeeds as against first defendant who is liable to pay plaintiff R100 000,00 for unlawful arrest and detention with costs.

2.1 In respect of Claim 2 plaintiff succeeds against second defendant who is liable to pay to plaintiff R500 000,00 for his further detention with costs.

2.2 The claim against first defendant is dismissed with costs.

3. In respect of Claim 3 this is dismissed against both defendants with costs.

4. The successful awards above are to carry interest a tempora morae at the prescribed legal rate from judgment date to date of payment.”

6. The costs of the application for leave to appeal in this court, and in the Supreme Court of Appeal, are costs in the appeal as ordered in the Supreme Court of Appeal giving leave to appeal.

M. J. LOWE
JUDGE OF THE HIGH COURT

I agree,

N. GQAMANA
JUDGE OF THE HIGH COURT

I agree,

**V. NONCEMBU
JUDGE OF THE HIGH COURT**

Appearing on behalf of the Appellant:

Adv. Dala S.C. instructed by
the State Attorney's Office,
Gqerberha c/o Whitesides
attorneys, Makhanda.

Appearing on behalf of the Respondent:

Adv. Mashiyi and Adv.
Cetywayo instructed by
Yokwana Attorneys,
Makhanda.

Date heard:

28 July 2025

Date delivered:

16 September 2025