



NOT REPORTABLE

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

CASE NO: CA 157/2021

In the matter between:

SABELO SANEKA

APPLICANT

And

THE MINISTER OF POLICE

RESPONDENT

APPEAL JUDGMENT

THE COURT,

Introduction:

[1] The appellant appeals against the entire judgement of a Magistrate of the New Brighton Magistrate's court pursuant to which he dismissed the appellant's claim for unlawful arrest and detention with costs.

THE APPLICATION FOR CONDONATION:

The prior appeal proceedings of 4 March 2022:

[2] The matter was previously enrolled for hearing before this court on 4 March 2022. It transpired approximately three weeks before that hearing date that the appellant had not filed a complete transcript of the trial proceedings.

[3] The respondent had contended in heads of argument filed in anticipation of the appeal that it had lapsed due to the appellant's non-compliance with the provisions of Uniform Rule 50 (4)(a) and 7(a) and (b) which relate to the expectation of filing a compliant record at the time of the appeal being prosecuted.

[4] Ms. Du Toit, who appeared for the appellant on that occasion too, had to concede as much that on the date by which the appellant was required to have filed the appeal record it was incomplete, and that the requisite certificate which had been filed together with the record confirming that it was in all respects correct, in effect misrepresented the true reality.

[5] The portion of the record that the appellant failed to include in the main record, entailing the evidence of one Constable Appolis, was in fact supplemented on 11 February 2022, on which date it was filed with the Registrar as well. However, the customary copies of the supplemented volume (comprising only 21 pages each) were not placed before the panel of judges expected to hear the appeal who, for good reason, were reluctant to read the additional volume.

[6] The appellant's non-compliance with the rules aforesaid notwithstanding, no application for condonation was made before the court on 4 March 2022. This would in our view have been necessary whether the appeal judges had read the supplemented volumes or not. As is evidenced from a transcript of the proceedings on that date, Ms. Du Toit instead simply purported to explain to the court from the bar that the omission of Constable Appolis' evidence from the appeal record was due to an oversight on the appellant's part and hoped that this could be overlooked and the appeal heard as a matter of course since the shortcoming had by then been remedied.

[7] She appeared to accept unreservedly, however, that the appeal had lapsed and that it would be necessary ultimately for the appellant to have to bring an application to reinstate it, and for condonation.

[8] In the circumstances the matter was struck from the roll and the appellant ordered to pay the wasted costs.

The application for re-instatement of the appeal:

[9] The appellant thereafter sought to reinstate the appeal, but only after a period of some two years. An application was filed on his behalf to condone the shortcomings with the record that had by all accounts by then been remedied. We emphasize “*on his behalf*”, because there is no affidavit filed by him in support of the application. The founding affidavit put up by his attorney perfunctorily repeated the excuse that had been furnished orally to the court on 4 March 2022, namely that counsel had coincidentally noticed that certain evidence had not formed part of the record, but that this mistake had almost immediately upon its realization been remedied.

[10] The view was again adopted in the supporting affidavit that this had been done well in time for the court then seized of the appeal not to have been inconvenienced, so that a condonation application at the time seemed unnecessary in the circumstances. In any event, so the appellant’s attorney contended, the degree of non-compliance was not excessive and the shortcoming confined to minimal impact. She contended that the respondent had not been prejudiced thereby. Contrariwise, the appellant had certainly suffered the fate of the appeal being struck off the roll on 4 March 2022 with a costs order against him.

[11] Also contended in the affidavit filed on the appellant’s behalf is the assertion that the case is of substantial importance to him given that he was litigating to enforce his constitutional rights to dignity and to be free from violence; and that he enjoys good prospects of success in respect of the appeal.

[12] What the affidavit does not deal with though, is the reason why there was a delay of two years or more before the present application for reinstatement and condonation was eventually prosecuted. Given Ms. Du Toit's submission from the bar it appears that his appeal was relegated to the backburner after it was struck from the roll and not pursued again until he made enquiries from his attorney. One gains the unfortunate impression that the appellant was perhaps not kept in the loop about the defeat on 4 March 2022 which Ms. Du Toit readily conceded had been a regrettable outcome that she herself felt responsible for.

[13] We take our cue from that that the appellant himself was probably innocent concerning the delay that ensued in respect of the prosecution of the condonation application and would indeed have been prejudiced if this court was not prepared to reinstate the appeal.

[14] It was not surprising that the respondent opposed the application, especially on the basis that the appellant has failed to account for the delay in its entirety. Also seriously contended for on behalf of the respondent is the submission that the appellant has no prospects of success in the appeal; a view we obviously differ with for the reasons indicated below.

[15] It is a trite proposition that an applicant for condonation is required to give a full and candid explanation for his/her non-compliance with the rules of court in order to show sufficient cause for condonation in such respect. The summary provided in *Melane v Santam Insurance Co Ltd*¹ concerning what is important for an applicant for condonation to focus upon and how the court's discretion is to be exercised in respect of such a request is instructive:

¹ 1962 (4) SA 531(A).

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated : they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits.”²

[16] The facts of the present application are unusual in that the degree of non-compliance that caused the appellant’s appeal to be struck from the roll on 4 March 2022 was indeed of minimal impact and the reach not of enduring effect. Neither does the reason for the shortcoming itself fail to commend itself to us. It was an oversight, plain and simple, which the appellant’s legal representatives made no bones about and a mistake which they fixed as quickly as they could in the hope that the appeal could still be heard.

[17] Despite its paucity, the adequacy of an explanation does not fail the standard for condonation because it is brief and curt (it is certainly reasonable enough in

² At 532 B – F.

itself to excuse the default under scrutiny),³ neither can the appellant's legal representatives be condemned for their thinking that they could still have pushed through with the appeal on 4 March 2022 without any application for condonation. Perhaps if the supplemented volumes had reached the panel of judges three weeks before the appeal was to be heard initially, instead of languishing in the Registrar's office, the day may have been saved. The inconvenience to our colleagues was, however, certainly of sufficient impact to have warranted the appeal being struck off the roll at the time with a costs order.

[18] What is of concern though is the impression given through the attorney's casual attitude in moving the desired application more than two years later without any explanation for that happenstance, that condonation was a done deal and merely for the asking. Ms. Du Toit, in good faith we believe, acknowledged that the application was hopelessly inadequate from this perspective but petitioned us to hear the appeal from the point of view that there are reasonable prospects of success therein. For the reasons which follow, we would be inclined to agree that the merits of the appeal are of particular persuasion to us, and that the matter is important to the appellant.

[19] It is, in addition, fair to consider the standard that a court will grant relief if the non-compliance with the rules is attributable to a *bona fide* mistake due to misunderstanding or an oversight on the part of the applicant or his attorney and which was not due to deliberate or willful default or to neglect or to gross negligence. Indeed, where the default has been due solely to the negligence of the

³ See *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013) in which the court emphasized that the explanation should be "*reasonable enough to excuse the default*", at para [23].

attorney, the court is reluctant to penalize the appellant by depriving him of his right of appeal.⁴

[20] This is unfortunately one of those instances where it entirely escaped the attorney's imagination to act with the necessary alacrity and when she eventually launched the application for reinstatement and condonation she missed the fact that the envisaged relief was not for the mere asking, and would in the peculiar circumstances require some explaining for the further delay that had superimposed itself and which by obvious effect was prejudicial to the respondent who must have assumed a conscious election by the appellant not to pursue the appeal any further.

[21] A person who has given his attorney full instructions is certainly entitled to assume that the attorney will do everything that is necessary to carry out those instructions.⁵ In this instance it appears to be the case that the appellant at all times intended to prosecute the appeal, which is a factor in favor of granting condonation. This is evident in our view by the very fact that the record was promptly supplemented, that an attempt was made to persuade the court on 4 March 2022 that the appeal should still be heard, and by the fact of the launching of the present application for condonation itself, albeit only on 2 October 2024.

[22] It is a trite principle that condonation relief will more readily be granted if some steps have been taken to prosecute the appeal, than if no steps had been taken.⁶

⁴ *Wessels v Bosman* 1918 TPD 351.

⁵ *Cairns' Executors v Gaarn*, 1912 AD 180.

⁶ *Palmer v Goldberg* 1961 (3) SA 692; *Van der Merwe v Steenkamp* 1925 OPD 179.

[23] Whilst the respondent was entitled to imagine that the appeal had been abandoned by the absence of an appropriate application to condone after the fact, this must be counterweighted in our view by the importance of the appeal to the appellant as well as the prospects of success. In every other respect than the belated application to condone (which apparent indifference does not appear consistent with the appellant's instructions to his attorney), the appeal was otherwise ready to be prosecuted and indeed the parties had gone to the trouble of filing heads before the first enrolment already.

[24] In our view and especially given our conclusion below on the merits of the appeal itself, we are constrained to find that it is in the interests of justice to grant condonation.

[25] Such relief should however attract a costs order in favor of the respondent whose opposition we believe was not unreasonable in all the circumstances. Further we intend, as a measure of censuring the plaintiff's attorneys for their part in the debacle, to order that such costs will not be recovered from the appellant himself but be payable by them personally.⁷

⁷ Rule 67 (2) (e) permits this court to make such an order with regard to the conduct of the litigation by a legal representative as a penalty therefor. See also *S A Liquor Traders' Association v Gauteng Liquor Board* 2009 (1) SA 565 (CC) at 54.

THE APPEAL:

The Evidence adduced at the trial:

[26] We set out below the evidence adduced at the trial and comment critically where applicable since the magistrate failed to indicate how he analyzed the evidence and dealt with the obviously conflicting versions that were before him.⁸

[27] A magistrate's obligation as a trier of fact is vital to determine where the truth lies in respect of each of the disputed issues and in bringing a professional impression to bear upon the issue of the veracity of the witnesses.⁹ This is unfortunately one of those cases where such accountability is found wanting.

[28] The appellant was arrested at his home on 9 April 2017 by one Constable Burton on a charge of having assaulted the complainant the previous night at a tavern, an accusation he did not challenge at the trial. He related that an altercation had indeed taken place between him and the complainant concerning monies which he had lent to the latter. He had on five occasions before asked him to repay him, but to no avail. According to him they had wrestled at the tavern. He hit the complainant with an empty bottle on the side of his face below the eye. In his view the complainant had merely suffered a small cut below the eye which he saw for himself. In his estimation, it was "*not a big wound*" and neither did he agree that he could have almost hurt the eye itself. The cut was next to the eye and below it.

⁸ See the attitude expressed by the Constitutional Court in *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) at 671 E – H on the importance of a presiding officer furnishing reasoned decisions to promote the rule of law and a litigant's constitutional right of access to court. See also *Mhlengi v Minister of Police* (CA 171/2020) [2021] ZAECHGHC 59 (29 June 2021) at [19] in which the court criticized the magistrate for not letting the court "*into what (method) he used to assess the credibility of the witnesses' evidence*".

⁹ *Minister of Police v Fry* (CA 250/2019) [2020] ZAECHGHC 150 (6 December 2020 at par [23])

[29] This view was offered by him in response to the assertion put to him that the complainant had, in the view of the arresting officer, suffered a “*dangerous wound*” as a result of his assault.

[30] He said that after the altercation he had started to accompany the complainant to his home to fetch the money owed to him but turned back after informing the latter to instead bring the money to his own house. Thus, he denied his presence at the complainant’s home after the assault incident, or that he had purportedly threatened him in the presence of his mother as was put to him under cross examination.¹⁰ He similarly denied threatening the complainant in the presence of the arresting officer and her colleagues at his home at the time of the arrest.¹¹ To the contrary, he maintained that he had not spoken to the complainant in their presence at all although he was present in the vehicle with him after the arrest. He coincidentally related on four different occasions in his testimony that the complainant remained outside next to the vehicle and that he was not present during the time of his own interaction with the police inside his house. (The general tenor of his evidence in this respect was not challenged in its minutiae save for the two specific assertions put to him under cross examination referenced in the footnotes below.)¹²

[31] As for the arrest itself he testified that three plain clothes police officers had arrived at his home on the Sunday around 17h00. Constable Burton took charge and did the talking. He was asked if he was “*Sabelo*”, and if he lived there. She

¹⁰ What was asserted was that according to the arresting officer, she was “*informed*” that he had made threats to the complainant at his place of residence that he was “*not done with him*”.

¹¹ Thus too it was put to him that: “*Even when Constable Burton was arresting you, you had repeated these threats because you told (the complainant) in her presence now, Constable Burton, that you were not done with (the complainant)*”.

¹² See footnotes 10 and 11.

informed him that he was accused of assaulting the complainant the previous night and told him that he was being taken to the police station. He claims that nothing else was said to him and indeed added later on in his testimony that if he had been given his rights as claimed by the police at his home already, he would have told them to call his attorney who would have arranged that he report at court rather than be detained.

[32] He, together with the police officers and the complainant, travelled in the same vehicle to the station, first going via the complainant's home and to the tavern where the incident happened. He remained in the vehicle during these two stops.

[33] At the police station Constable Burton informed him that he is "*being arrested now*". She did not say why, neither did he ask because he assumed that it was about the assault of the complainant as had been discussed with him at his house.

[34] As for the basis pleaded in his particulars of claim that despite the fact that his wife attended the Algoa Park police station and requested his release from custody, the police members, who were on duty, refused to release him, the appellant testified that he called his wife from the police station to come and collect his phone on the advice of Constable Burton. When she arrived, he says that she asked the police on duty if he could be released to go home with her. They, however, informed her that they were arresting him and did not have the right to release him. He, personally, did not request any police officer to release him or to warn him to court.

[35] He agreed that he signed the notice of rights form (SAPS 14A) but it was not clear when he received a copy of it. He thought that it was only on the ensuing Tuesday. As an aside the notice suggests on the face of it that he signed it in the presence of Constable Burton on the 9th at 17h15.

[36] He identified the warning statement taken from him by Constable Appolis on the 11th at 06h30 which he clarified he signed just before he was taken to court where he was released on warning.

[37] He agreed that he was later convicted on the criminal charge of assault with intent to do grievous bodily harm. He maintained, however, that it had been unnecessary for the police to have arrested him at all, or to have detained him at the police cells until the ensuing Tuesday when he made his first appearance in the Magistrate's court.

[38] The arresting officer's involvement with the matter was on her account brief. She received the A1 complaint from the Community Services Centre ("CSC") at 16h30 on 9 April 2017 and read it. A colleague, Warrant Officer Willemse, had taken the complainant's statement according to the A1 at 16h20. It states that he was assaulted at the tavern by the appellant who "*took an empty red bottle and hit (him) once under the left eye.*" It records additionally that he sustained an open wound of plus minus 3cm as a result. Further claimed in his statement is that the appellant had taken him by the arm and dragged him to his house to fetch the money that was owed by him to the appellant. The culmination of this is that he told his mother when he got there what the appellant had done to him. She, in turn,

so the statement reads, said to the appellant that the complainant would not be paying the money to him after all because he had already assaulted him.¹³

[39] The arresting officer, Constable Burton, also had the benefit of the injury statement that Warrant Officer Willemse recorded at the same time he deposed to the A1 Statement. It states that he saw an injury described as a plus/minus 3cm wound under the left eye. He noted in parenthesis that it was already stitched.

[40] As an aside the J88 medical report was by that date not to hand even though the complainant stated in his founding statement that he had received treatment at the Dora Nginza Hospital shortly after the assault.¹⁴ Why it was not available was not suggested, but it was put to Constable Burton under cross examination that the J88 report said that there was a soft tissue injury beneath the complainant's eye.¹⁵ Constable Burton readily conceded that if she had known of such a fact at the time of arrest, or at least if the doctor had said that it was not a serious wound, she would not have arrested the appellant but have instead issued him with a warning to appear at court.

¹³ This is notably inconsistent with the assertion put to the appellant under cross examination that he had made threats to the complainant at the latter's place of residence, that he was "*not done with him*".

¹⁴ According to the investigation diary, on 15 June 2017 the prosecutor was asking the investigating officer to file the J88 report together with the requisite section 212 (4) (of the CPA) affidavit. Whilst this may be taken to mean that the J88 was already to hand and that it was merely required to be confirmed on affidavit, it could also mean that it was not in the docket at all yet by that date. We were informed by Ms. Du Toit in her heads of argument that the J88 report was never provided to the court at the trial, nor was it furnished to the appellant. The issue of the gravity of the wound which the arresting officer applied her mind to in the course of deciding to arrest the appellant was critical, both regarding the issue the court had to determine concerning the lawfulness of the arrest, as well as the appellant's counter intimation that the wound was not as serious or life threatening as the Police sought to make out. The withholding of the medical report would suggest some impropriety on the part of the respondent by not inviting a medical opinion that was available to the police before the appellant's arrest, but the absence of the report from the bundle of exhibits handed up by agreement at the commencement of the trial seemed not to have featured as a cause for concern between the parties. The trial court did not reference the medical report at all in the judgment. Since it was not included in the record, this court can make no assumptions about its evidentiary value.

¹⁵ This aspect of the evidence is curious. The J88 report does not form part of the record and it appeared to be suggested from the way in which the questions had been posed to Constable Burton by Ms. Du Toit that she had seen the report that was in her opponent's possession in the docket. It would have been useful to know when it became available to the State for the first time. It remains a mystery why it was not central to the trial.

[41] Constable Burton testified that when she read the founding documents, she formed the impression that the appellant had inflicted a dangerous wound to the complainant based on the wound's proximity to the eye, the fact that the injury statement said that it was 3cm "*deep*" (as can be seen above the injury statement says nothing of the sort) and because in her opinion the complainant could have "*lost*" his eye. She also consulted with the complainant himself and personally noticed that his wound was stitched. Additionally, he told her that the injury is a deep wound. This was the primary reason for her decision to have arrested the appellant, which she claims she communicated to him at the time of his arrest.

[42] She could not agree with the appellant's observation that he had only inflicted a "*small wound*". As far as she was concerned, she saw a wound that was already stitched.

[43] But apart from her view that the injury was a dangerous wound, she padded on in her oral testimony that the appellant had also been aggressive in her presence when carrying out the arrest. Firstly, he was angry after she informed him of the reason for the arrest. He told her that he knew his rights while she was reciting them to him. She added that he said that he is "*not done*" with the complainant and that he was not going to "*leave him*" until he paid him his money, concepts which she was not prepared to concede under cross examination could, if true, also simply have meant that the appellant intended, whatever the circumstances, to still pursue the recovery of the loan to him. This she said happened in her and the complainant's presence. She related in her testimony that in a charged atmosphere where both the appellant and his wife were swearing at the complainant (she later watered this down to them shouting at him), she tried to "*calm him*" by "*warning*

him not to threaten the complainant in (the police's) presence." (As an aside the extent of such intervention by the police, and the involvement of his wife, were not even put to the appellant when he testified.)

[44] This significant event (of the supposed intimidation) is, co-incidentally, not borne out in the complainant's A1 Statement. Neither is it mentioned in Constable Burton's arrest statement which she made at 17h50 immediately after the arrest, or in her pocketbook, both of which (the affidavit and the related entry) would have been made contemporaneously with the appellant's arrest. What she says instead in her arrest statement is that she arrested the appellant for "*Assault GBH*" after introducing herself to him. The first paragraph of her statement says that the appellant was identified by the complainant at "*Qhaquwa Street*"¹⁶ upon investigation of the relevant complaint "*as a person who stabbed him*". She also took a statement from the complainant which she herself commissioned in which he states that at 17h00 he had pointed out the appellant to Constable Burton as "*the person who stabbed me*".

[45] If there was any doubt that she might have been mistaken in writing the description that the appellant had "*stabbed*" the complainant, this is the operative word she used in her oral testimony and which she repeated in revealing what the complainant's mother had reported to her as well.

[46] It is in our view significant that the act of stabbing the complainant is not borne out in any other document, neither did Constable Burton say in her evidence

¹⁶ It appears from the docket that both the complainant and the appellant reside in the same street. No specific address is indicated which may suggest that the affiant meant to say that the pointing out happened in the street itself. This would be consistent with the appellant's version that the complaint did not enter his home at the time of his arrest inside.

in chief that the complainant has said as much to her that he had been stabbed. Indeed, on the face of the docket which forms part of the exhibits that were referenced during the trial, the method used to commit the offence and the instrument used on its occasion records that the complainant was “*hit with empty bottle*”. This is also reflected in the contemporaneous entry made by Warrant Officer Willemse in the investigation diary at 15h50 on the 9th in noting the essence of what the First Information of the Crime indicated.

[47] Constable Burton was led on several occasions in her evidence in chief to confirm that the complainant was present at the appellant’s house at the time of the arrest. When it was put to her that the appellant would deny that the complainant was in the house, but instead outside, she discounted this as “*his version*”.

[48] Despite Warrant Officer Willemse’s recordal of his examination of the injury, Constable Burton on the face of it recorded an entry in the investigation diary supposedly at 16h30 on the 9th. Her timing cannot be correct as she notes the filing of further statements in the docket (identified as A3, A4 and A5) which were by obvious implication only deposed to after she had arrested the appellant and had returned to the station with him under arrest. She wrote, with reference to the interview which she says she held with the complainant before proceeding to the appellant’s home to arrest him, that he “*alleges*” that the appellant “*stabbed him*”. Even for the moment assuming that the complainant had said this to her, there is no supplementary affidavit amongst the exhibits making up the docket’s contents which records this significant amplification of the claimed assault first noted by Warrant Officer Willemse. There is co-incidentally also no mention in the complaint’s affidavit of the kind of intimidation Constable Burton indicated had happened on the night before either.

[49] Constable Burton testified that later, after the arrest, the police proceeded to the complainant's house to interview his mother while the appellant remained in the police vehicle outside. The mother confirmed to her that the appellant had threatened her son after he had been "*stabbed*" whereupon, so the mother said to her, she had undertaken, because of the appellant's threats, to borrow the monies herself and repay to the appellant what was owed to him on her son's behalf. No affidavit was taken from the complainant's mother. Asked why, Constable Burton astonishingly stated that she had not seen a need to have taken one.

[50] After this stop they proceeded to the tavern and interviewed Mr. Sweleni, who she was informed had been present during the altercation. This witness confirmed to her that he had indeed seen the struggle on the night of the 8th between the appellant and the complainant. He heard the sound of a bottle breaking (this was Constable Burton's recall of what he had supposedly told her) and then "*someone being hit with a bottle*". It turned out to be the complainant, who was bleeding. The witness then ran to the main house to ask for assistance.

[51] As an aside Mr. Sweleni deposed to his affidavit right there next to the vehicle. It states, contrary to what Constable Burton related in her oral testimony, that he had been present in the tavern at the time of the incident playing music. He himself had been hit by an empty bottle. When he checked what was happening, he had noticed the complainant in a struggle with the appellant. He further asserted that: "*(the complainant) was bleeding and that he quickly went to the main house for help and when I came back they were outside the tavern.*" Significantly, again, there is no mention by the witness of any glass breaking, or of a bottle neck having been used to perpetrate the assault, or that he saw the appellant stabbing the

complainant. It is opportune to mention that it was put to the appellant's under cross examination when he testified, no doubt upon the respondent's instructions, that he had assaulted the complainant with a "*bottel-kop*". (This which would usually designate the opposite of an intact bottle which the appellant maintained was instead implicated.)

[52] The next stop was the Algoa police station where Constable Burton read the appellant his constitutional rights and caused him to sign a Notice of Constitutional Rights ("*SAP14A*") in which only the offence of "*Assault GBH*" is listed as a reason for his detention. This was at 17h15 on the 9th. She left the appellant with CSC where "*things are being processed*".¹⁷ From there he went to the police cells where, by obvious implication, he was detained.

[53] That was the sum total of her dealing with him and in fact she clocked off from work at 6pm when her duty ended.

[54] Under cross examination she acknowledged that if a suspect is charged after his arrest, this means that he or she can be taken to court.

[55] She was adamant that the reason for the appellant's arrest related both to the gravity of the assault injury and the fact that he had threatened the complainant in their presence. (Later she added on that in her interview with the complainant he had also indicated to her that he did not feel safe.)

¹⁷ She clarified that this would entail registering the details in the "*register book*", the searching of the suspect and then his being taken to the cells to be detained.

[56] She had to concede under cross examination that the information in the docket, contrary to her testimony in chief and what had been put to the appellant under cross examination when he testified, did not support the suggestion that the wound was in fact 3cm “*deep*” but she persisted that the complainant had instead told her during her initial interview with him that it was a deep wound. She related that when she saw the wound herself it had about three to four stitches.¹⁸ She further volunteered that it “*was not just a small wound*”. What she saw was a wound already stitched and swollen.¹⁹

[57] In relating how the complainant felt about the incident she stated that he was more concerned than upset. In justifying the latter, she says it was because the appellant had said that he was not going to leave the complainant until he gets his money. According to her this revelation (as well as the fact that the complainant was stabbed) was made to her during her interview with the complainant prior to the appellant’s arrest. She agreed that it was not in his statement deposed by Warrant Officer Willemse.

[58] When it was suggested to her that she ought to have taken an additional statement from the complainant (or added the emphasis that he had been stabbed); she argued that it was unnecessary to do so because the A1 Statement already implied that he was hit with the bottle and stabbed at the same time. In her view this could only mean that “*a wound like this has been inflicted by ... not by a bottle but by a broken bottle*”. She added that this was her “*opinion*”, rather than that the complainant had clarified as much to her, which quite evidently flies in the face of

¹⁸ It is tempting to assume that Constable Burton had by the time of the trial seen the J88 report herself or that the respondent’s legal representative would have brought to the fore the conflict between her recall that there were three or four stitches and the entry in the report that a soft tissue injury was instead implicated.

¹⁹ Her colleague who had seen the complainant shortly before to record his injuries said nothing about the wound site being swollen.

him having supposedly told his mother that the appellant had , as a fact, stabbed him.

[59] Asked why she had decided to arrest the appellant rather than issue a warning to him to appear in court, she was adamant that it was the infliction of the dangerous wound that set the matter apart and sealed his fate. She claimed that she had had no discretion to warn him instead on such a charge. Instead, she emphasized that she had to “*go to arrest him*”. She added as another reason the fact that the purpose of the arrest was to bring him to court. She clarified that she had no mandate in respect of a charge of Assault GBH to have just told the appellant to go to court, neither authority to grant him bail. She maintained that she only had a “*discretion where there is no wound that is dangerous*”.

[60] As for the supposed threats made by the appellant in their presence, she was confident that this came down to intimidation which is why, so she explained, he was arrested for this but “*it was not put on the record.*” This concession accords with the fact that nowhere in any of the statements in the docket is it noted that the appellant threatened the complainant. She volunteered that her partners who had been present with her could vouch for the pleaded defence that the appellant committed the offence of intimidation in their presence, but ostensibly neither of the two officers were called to testify at the trial.²⁰

[61] As for the appellant’s detention, she indicated that she had told him that he could not be released “*on certain reasons*” (She did not divulge what exactly she had told him neither was she pressed further on the subject). She did not have a

²⁰ Co-incidentally, on her version the complainant would also have witnessed as much, but the respondent did not offer his corroboration at the trial.

conversation with his wife about the possibility of his being released from custody, although she was aware that the latter had indeed come to the police station. She could not dispute that his wife had requested that her husband be released from custody. She could not say with which of her colleagues these discussions may have been held.

[62] Asked why she had not charged the appellant promptly after the arrest, she explained that he was going to be charged the next day by other police officers and indeed that it was time for her shift of members to be relieved. She could not speak to the reason why he was not then in fact charged by any of the officers who came on duty after she signed off. She readily conceded however that if he had been charged, that the appellant could have appeared in court on the Monday morning already, and would therefore not unnecessarily have been in custody the whole day on Monday the 10th.

[63] Put to her that she took the decision to arrest the appellant too hastily and did not apply her mind, or wait for the J88 medical report that later indicated that there was only a soft tissue injury underneath the complainant's eye, Constable Burton retorted that the arrest was grounded on "*the facts that were there*" (this relating to the complaint itself) and the threat to the complainant in her presence that contributed to her decision. She at least conceded however that if she had known of the doctor's opinion she would have merely warned the appellant to court.

[64] The respondent also adduced the testimony of one Constable Apollis. He was responsible for charging the appellant on the morning of 11 April 2017 at 06h55. He did so in response to an entry in the docket by one Captain Zanto (his immediate commander) noted in the investigation diary section on 10 April 2017

that he must interview the complainant and charge the suspect. No time is noted in the docket opposite Captain Zanto's entry. He was initially quite certain that he had only received the docket on the day that the appellant was in fact charged.

[65] To the proposition put to him that the appellant should have been taken to court on the 10th already, he explained as follows:

“The case docket, what usually happens, the crime office used to operate on two shifts but then they shifted us to one shift due to shortage of manpower. Captain Zanto was then immediate commander whose duties was to peruse dockets before the dockets get given to us to do the preliminary investigation on the case dockets. That was on a Monday... Captain Zanto....was working Monday until Friday, 07h00 until 16h00...All case dockets registered from 4 o'clock the previous Friday up until the Monday morning...gets given to him...He peruses the dockets and sees what needs to be done...And writes instructions on these case dockets saying what must be done... He only gets the chance to peruse these dockets on Monday since he's not working weekends, which means weekends there is no commander for us like in the crime office who attends to giving us instructions in the court case dockets. He perused the dockets and then gave me the docket. This specific docket was one of the dockets that he perused and gave the instructions that was previously mentioned. My duties then thereafter was to go and get and go interview the complainant and then also interview the said suspect in the case because we need to do bail information as well as address verification.”

[66] Asked if he had gone to interview the complainant, he noted that there was no entry in the dairy made to this effect but added that it was possible that he had conducted a telephonic interview with him. To the question whether there was any address verification made, he confirmed ultimately that this was done on the 11th. (Indeed, this is borne out by objective documentation in the docket).

[67] He readily conceded under cross examination that the responsibility of the crime office to which he was assigned was to attend swiftly to the investigation of matters so that a suspect can appear in court. He maintained however that he would still have had to carry out the checklist instructions of the commander even if

Constable Burton had co-incidentally recorded that the appellant had been arrested at his home.²¹

[68] When put to him that he had made an entry on the 10th already to say that he had interviewed the appellant as a suspect in the case who had given him an address, he confirmed it as though he had already said so in his evidence in chief (which he did not). He added that he had gone to verify his address on the 11th.

[69] Asked pertinently why the Appellant had not been charged on the 10th already he replied that the investigation was “*ongoing*” which entailed him still having to go and verify his address which had been given to him during the interview with the suspect. He acknowledged though that it was “*doable*” for him to have clarified with constable Burton where she had arrested the appellant and thus have satisfied himself as to his address, but he clarified that this was still an investigation milestone resting on him that he was required to meet.²²

[70] He added to his reasons for the delay in the appellant being charged the problem of Captain Zanto being the only officer perusing the dockets and issuing the instructions and having “*no-one working...up* (the dockets).”

[71] He claimed to be unaware of the fact that the appellant’s wife had called at the police station asking for him to be released.

²¹ But for the fact that Constable Burton clocked off she would have been able to satisfy the commander both that she had personally interviewed the appellant and that she knew where he lived. This belies the fact that there was any “*ongoing*” investigation necessary at all.

²² See footnote 15.

[72] Whilst seemingly being prepared to concede that the appellant could have gone to court on the 10th already, he was adamant in asserting that this was only a possibility if the investigation permitted it. He asserted that: *“If the investigation has not been concluded...then the person doesn't get charged until it is concluded.”*

[73] No other evidence was led by the respondent at the trial to allay the appellant's concern that he could have been released from custody earlier than the Tuesday morning, assuming a lawful arrest in the first place.

The pleadings:

[74] The gist of the appellant's case for contending that the arrest was wrongful and unlawful was premised on the basis that he did not commit an offence in the presence of a peace officer; that there was no reasonable suspicion that he had committed a Schedule 1 offence; that the arresting officer did not exercise any discretion at all, alternatively, exercised her discretion in an improper manner; and that the arresting officer failed to explain his constitutional rights to him.²³

[75] The defendant admitted the arrest without a warrant but pleaded that the arrest was lawful *“in terms of both section 40 (1) (a) and section 40 (1) (b) of the Criminal Procedure Act, in that the appellant committed an offence of intimidation in the presence of the arresting officer and was also reasonably suspected of having committed an offence of Assault wherein a dangerous wound was inflicted on the complainant.”*

²³ A further ground that the arresting officer failed to comply with section (4) and (8) of the Police Standing Order G341 was also pleaded but evidently not engaged with upon trial.

[76] Any improper exercise of the arresting officer's discretion was disavowed.

[77] The further allegation that the appellant's family members attended the Algoa Park police station and requested his released from custody but that the police members on duty refused to release him, was met by a general plea that his detention was lawful in terms of sections 39 and 50 of the CPA.

[78] The appellant's particulars of claim pertinently assert that he was detained arbitrarily and without just cause at the Algoa Police Station. In this respect the allegations read as follows:

- “12. The detention and incarceration of Plaintiff was wrongful, unlawful and completely unjustified, in that, *inter alia*:
- 12.1 the arresting officer, as well as the other police officers at the Algoa Park police station, failed to apply their minds, in respect of the Plaintiff's detention and the circumstances relating thereto;
- 12.2 there were no reasonable and/or objective grounds justifying Plaintiff's subsequent detention;
- 12.3 he was wrongfully and unlawfully arrested on a Schedule 7 offence;
- 12.4 he was not released after his family members' request; and
- 12.5 notwithstanding Plaintiff's arrest, without a warrant, none of the Defendant's employees took any or reasonable steps to release Plaintiff, as soon as reasonably possible, even though no reasonable grounds or sound reasons for his continued detention had existed.”

[79] Apart from pleading that the arrest and detention had assailed his constitutional rights to dignity, freedom, and freedom of movement, the appellant asserted that his rights in terms of section 35 (1) (a) and (b) and 35 (2) (e) of the Constitution had been infringed.

[80] The respondent relied on the provisions of sections 39 and 50 of the CPA to justify the appellant's initial and continuing detention and claimed contrariwise that he "*was immediately brought to a police station and was brought before a lower court within 48 hours*".

The judgment of the trial court:

[81] The judgement appealed from, although supplemented by the magistrate twice, is extremely pithy.

[82] In his primary judgment, whilst recognizing that he could find "*nothing negative*" that he could attribute to the witnesses on either side, he yet accepted the respondent's version as the prevailing one. This is evident from his comment in the judgement that: "*Considering the issues raised it seems Defendant has managed to put clear issue before court hence the version of the defendant is accepted as the manner the event happened.*"

[83] What the issues in dispute were (or what he found to be "*clear*"), are not articulated in his judgment.

[84] There is no mention in the first judgement of the supposed fact of the intimidation (as a fact found proven) featuring as a reason why the Magistrate considered that the arresting officer was justified in arresting and detaining the appellant. But in further reasons provided²⁴ for his finding that Constable Burton

²⁴ These additional reasons were provided pursuant to the provisions of Rule 51 (8)(a) following the filing of the appellant's Notice of Appeal. The reasons ought to have spoken to the challenges framed in the Notice of Appeal.

was justified in arresting the appellant, he for the first time alluded to the supposed fact that the appellant had committed an offence of intimidation in the presence of the police, revealing his bias against the appellant's version in this respect that the complainant had not even been present at the time of his arrest inside his home, as well as his denial that he had threatened him at all.

[85] The only focus in the magistrate's first judgment was on the issue of the wound which he went on to find "*qualified*" to be "*a dangerous wound*". He added in this respect: "*Also the weapon used has a potential inflicting a serious wound. The wound was too delicate.*" Nothing was said about the controversy surrounding the actual weapon, the reliability of Constable Burton's observations, or the other evidence detracting from the suggestion that she could have formed a reasonable suspicion to have arrested the appellant on a Schedule 1 offence.

[86] When asked to show the facts found proven and to provide reasons for his judgment,²⁵ the magistrate merely stated his conclusion that the information that had been presented to Constable Burton and upon which she exercised her discretion qualified to be within the requirements stated in *Mabona & Others v Minister of Law and Order & Others*.²⁶

[87] Presumably his further comment that the injury that had been sustained by the complainant "*...was a real dangerous wound and also next to an eye. That injury was on a delicate part of the body complainant could have lost the entire eye*" was added to indicate why he was inclined of the view that Constable Burton had reasonably entertained the suspicion that the assault complained of was one

²⁵ These were reasons in terms of Rule 51 (1)(a) of the Magistrate's Court Rules.

²⁶ 1988 (2) SA 654 (SE). The judgment emphasizes the test of whether a suspicion is reasonably entertained within the meaning of section 40 (1)(a) of the CPA.

involving the infliction of a dangerous wound, although the impression is given that it was up to the court itself as an isolated exercise to determine if the injury “*was a real dangerous wound*”.

[88] In this respect he referenced the judgment of the Supreme Court of Appeal in the matter of *Mxolisi Mananga and others v Minister of Police* (“*Mananga*”),²⁷ without exactly saying why, except to state that “*the issue of a dangerous wound has been further confirmed in the judgment*”.²⁸

[89] Ultimately, the magistrate dealt with the evidence concerning both statutory defences (in the process conflating the two defence grounds somewhat) as follows:

“Plaintiff uttered the word “*I have not finish(ed) with you*” to (the complainant) in the presence of Burton...If a person uttered such words I do not think at any time it can be expected that he will give the other person a pat on the back. Also in view of the fact that Plaintiff has already inflicted an injury on this (complainant). A strong possibility was that plaintiff will continue adding injuries on the victim. It (is) so that assault with intent to do grievous bodily harm is not a Schedule 1 offence. The legislature decided to put the assault with in the ambit of Schedule 1 by adding “*When a dangerous wound is inflicted*” therefore Constable Burton viewed the wound as a dangerous wound and therefore the offence qualifies to be within Schedule 1. This was a cut wound on the face and had to be sutured, Therefore I have to accept that the wound was a dangerous wound as required by schedule 1.

I also align myself with the comments of the Learned Judge of Appeal Justice Eksteen in the case of *Mxolisi Mananga and Others v Minister of Police* case number 342/ 2020 [2021] ZASCA 71 (04 June 2021) in paragraph 16 where he said “It is not required of a police officer to examine the wound of a victim as a doctor would, nor would that be appropriate. He is merely required to have regard to the facts and circumstances at his

²⁷ Case No. 342/2020 [2021] ZASCA 71 (4 June 2021).

²⁸ *Mananga* was delivered three months after the magistrate’s primary judgment.

disposal and where reasonably possible to satisfy himself of the merit thereof. If, on a consideration thereof there are reasonable grounds to suspect that a dangerous wound has been inflicted he is entitled to arrest the suspect without first obtaining a warrant.” (sic)

The issues upon appeal:

[90] The main issue which arises on appeal is whether the court was correct in preferring the respondent’s version of the events as the premise for his application of the law. This would relate principally to the questions both whether the appellant intimidated the complainant and also to the factual nuances relating to the question whether Constable Burton reasonably entertained a suspicion that the appellant had committed a Schedule 1 offence.

[91] The Magistrate’s reasons unfortunately do not indicate how he got to the conclusion that the respondent’s version was to be preferred. Settling the obvious disputes of fact in this matter was an essential preliminary exercise before applying the law to determine whether the respondent’s employees were justified in arresting the appellant. Without any real evaluation of the evidence, we are obliged to step into the breach in order to do justice to the case.

[92] A further challenge on appeal is against the court’s conclusion in the final, unintelligible, throwaway statement that: *“Therefore Plaintiff’s claim has to be dismissed with costs on the records it is clear that Plaintiff was brought before court within the 48 hours stipulated in the Criminal Procedure Act”*.

[93] In this regard it appears that the Magistrate failed to engage with the pleaded basis for the appellant’s claim that his detention, (both inherent in the arrest and

thereafter) was unlawful for the reasons indicated in the appellant's particulars of claim. The manner in which the appellant's case was framed triggered the application of the onus on the respondent to prove that the appellant's detention was not unlawful in the context of the specific reasons relied upon by the appellant in his particulars of claim. It required the court below to have applied its mind to these allegations and the evidence adduced, or not adduced, in this respect.

[94] It certainly did not follow either, upon the finding by the magistrate that the arrest itself was lawful, that the continuing detention, alleged to have been unlawful for the particular reasons indicated, should automatically have escaped judicial scrutiny.²⁹ Whilst the provisions of section 39 (3) of the CPA, on which the respondent relied, asserts that if the arrest is lawful the ensuing detention follows lawfully, this section deals only with the general legal consequences of an arrest. It follows axiomatically however that any subsequent detention which is not sanctioned by the law cannot be legalized by section 39 (3). Of course, it is for a plaintiff to allege and prove why he or she contends that the detention is not so sanctioned thereby rendering it unlawful.³⁰ In this instance the appellant said so, but the magistrate below ignored these features of his case.

[95] The Constitutional Court in *De Klerk v Minister of Police*³¹ especially brings to the fore the complex and nuanced features of a delictual claim for unlawful arrest and detention versus a possibly different framed delict based upon an

²⁹ Given the drastic powers of arrest, and the implication of the obvious infringement thereby of arrestee's constitutional rights of personal liberty and dignity thereby, by necessary implication entailing detention, a court is expected to carefully scrutinize in each case whether the infringement of these rights is legally in order. See *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 38 C.

³⁰ *Minister of Safety and security v Slabbert* [2009] ZASCA 163 at [21]-[22].

³¹ (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019) at [19] – [20].

omission by a police officer that causes the harm suffered. It was certainly not argued before us that in this instance anything other than the claimed unlawful arrest itself conduced to the harm, but often the plaintiff's pleaded case in similar actions is not examined with any particular focus and this was one of those judgments. Magistrates are required to be sensitive to evolving jurisprudence and the obligation on the courts to carefully scrutinize claims of the breach of constitutional rights of personal liberty.

[96] We point out finally, on the issue of the Magistrate's lack in producing a helpful judgment, that even for the moment assuming that he was correct in finding that the arrest was lawful, there was no engagement either with the issue of the arresting officer's discretion to arrest. It is a trite principle that once the jurisdictional facts for an arrest are present, the discretion whether or not to arrest arises.³²

Resolving the disputes of fact:

[97] In applying the technique generally employed by the courts in resolving factual disputes in civil trials in the well-known matters of *National Employees General Insurance v Jagers*³³ and *Stellenbosch Farmers Winery Group Ltd & Another v Martell and CIE South African & Others*³⁴ it is our conclusion that Constable Burton was not a credible or reliable witness and that her version of the events concerning the supposed basis for the exercise of her suspicion are questionable and improbable.

³² *Minister of Safety and Security v Sekhoto & Another* 2011 (5) 367 (SCA) at [25].

³³ 1984 (4) SA 437 E at 440D – 441A.

³⁴ 2003 (1) SA 11 (SCA) at par 5.

[98] The first conflict concerns the appellant supposedly having intimidated the complainant both at his home the night before his arrest and in the presence of the police and the complainant shortly before he was taken away by them from his home on the 9th.

[99] The suggestion that the appellant was not charged “*on the record*” for intimidation is simply absurd and inherently improbable. The premise that a serious offence had been committed in the presence of the arresting officer and her two colleagues (who could have vouched for the supposed events taking place before their very eyes but did not) is entirely inconsistent with the objective documentation in the police docket. Most notably there is an absence of any statement by the complainant to the effect that the appellant committed such offence, not just at the appellant’s home, but also at his house on the night before after the assault incident.

[100] It is further curious that the arresting officer would bother to interview the complainant’s mother shortly after the appellant’s arrest concerning such a threat and what he reported to her in this respect, but not take down a statement from her, especially regarding the narrative that the appellant had pointedly said that he was “*not done with him*”.

[101] The same applies to the seemingly contrived second issue that the complainant and his mother reported that the appellant had stabbed him as opposed to merely having hit him with an empty bottle.

[102] Although Constable Burton wrote down in the investigation diary after the arrest that the complainant had supposedly alleged that the appellant stabbed him,

it does not make it true, or likely true. Indeed, such a narrative is entirely inconsistent with the complainant's statement. Bearing in mind the assertion put to the appellant during cross examination that a "*bottle neck*" was the instrument that caused the complainant's injury and her convoluted explanation for why she imagined a stabbing, her account can hardly be accepted as reliable where this differs from what was officially recorded elsewhere in the docket.

[103] What is also notably absent from the record is any recording that a dangerous wound had been inflicted. If the complainant was minded to elevate the original complaint of Assault GBH to one more serious, especially on the basis of a supposed stabbing, then one would plausibly have expected an amplification by him especially, and medical corroboration that seems to have been available at the time. If Warrant Officer Willemse had come up short in describing the injury or the charge, one would also have expected some account from him in the docket that he had underestimated the gravity of the incident and the harm inflicted. The recorded account, for example, does not say that the wound was open, neither that it was deep, nor that it involved a stabbing with broken glass.

[104] We have in our analysis of the evidence above highlighted inconsistencies between versions put to the appellant and Constable Burton's in-chief evidence on the disputed aspects. There were also several indications in her testimony that she embellished her case as the shoe began to pinch. For example, her adding that the complainant expressed in the interview with her that he did not feel safe and that both the appellant and his wife had also threatened the Police that they are going to take legal action against them. (Later she adjusted her version to suggest that it was only an assumption on her part that they would sue, based on the fact that he said that he would call his attorneys.)

[105] She was further an evasive and argumentative witness and resorted to adding her own flourishes to the scenarios at hand. An example is her adamant belief that the appellant having purportedly said he was “*done with*” the complainant meant unequivocally that he was going to hit or assault him if he did not give him his money. Her explanation given in this respect was quite specious without any intimation by the complainant himself that any threat at all was made to him.

[106] This leaves the unfortunate impression of a contrived defence (with reference to the respondent’s defence relied upon in pursuance of the provisions of section 40 (1) (a) of the CPA), and an irresponsible exaggeration of the assault (with reference to the provisions of section 40 (1) (b) of the CPA).

[107] We are satisfied that Constable Burton’s evidence is unreliable and falls to be rejected as false where it is in conflict with that of the appellant and the objective documentary evidence (save her own contrived entry made after the fact of the arrest in the investigation diary that the complainant had alleged an actual stabbing).

[108] In the circumstances the pleaded statutory justification for the appellant’s arrest on the contrived basis that the appellant committed the offence of intimidation in the presence of Constable Burton cannot be sustained. The further premise that she satisfied herself on the merits that a dangerous wound had been inflicted cannot be reliably accepted.

The issue concerning whether the appellant was informed of his rights:

[109] On the issue of whether the appellant was informed of his constitutional rights, it is in our view improbable that he only signed the SAP 14A on the Tuesday morning. Indeed, he was not certain if this was the case, but the document itself reflects that he signed it on the 9th at 17h15 which is also consistent with corresponding entries in the SAP 14A register and occurrence book, noting at least the fact that according to the police, his constitutional right were administered to him at the Algoa Park police station.

[110] On the question whether he was informed of his rights at home, Constable Burton said herself he was not because the appellant told her that he knew his rights.

The statutory defence in terms of section 40 (1)(b) of the CPA:

[111] Concerning the defence that the appellant's arrest was justified on account of Constable Burton having satisfied herself that he had committed an assault, where a dangerous wound was inflicted, section 40(1)(b) of the CPA provides as follows:

- “1. A peace officer may without warrant arrest any person
 - (a) ...
 - (b) whom he reasonably suspects of having committed an offence referred to in schedule 1 ...”

[112] The offence of assault with intent to do grievous bodily harm of which the appellant was charged, is not listed in Schedule 1 of the CPA as an offence for which an arrest without a warrant may be justified by section 40 (1)(b) of the CPA,

but such an assault may be brought within the ambit of Schedule 1 of the CPA when a “*dangerous wound*” has been inflicted.³⁵

[113] The respondent’s plea relied on in this instance would have attracted the onus to prove the justification pleaded, that is the lawfulness of the arrest in accordance with the second statutory ground relied upon, on a balance of probabilities.

[114] As indicated in *Mananga* the section requires the respondent to have established, on the requisite standard of proof, that the arresting officer held the suspicion, on reasonable grounds, that such a wound had been inflicted.³⁶ It would not have been necessary for the respondent to have established as a fact that the inflicted wound was dangerous.³⁷ Rather, as the court reminds one in *Mananga*, “*suspicion*” implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.³⁸

[115] In order to discharge this onus, the respondent was required to establish: (i) that Constable Burton is a peace officer; (ii) that she in fact entertained a suspicion; (iii) that the suspicion which she held was that the appellant had committed an offence which is referred to in Schedule 1 (in this case, an assault when a

³⁵ At the time of the incident the wording of Schedule 1 may have been different, although only marginally so. The original text seems to implicate an “*assault, when a dangerous wound is inflicted*” whereas the latest version reads “*assault, involving the infliction of a dangerous wound*”.

³⁶ *Supra* at [6].

³⁷ *R v Jones* 1952 (1) SA 327 (E) at 332

³⁸ *Duncan v The Minister of Law and Order* 1986 (2) SA 805 (A) at 819 I – 820 B.

dangerous wound had been inflicted); and (iv) that the suspicion rested upon reasonable grounds.³⁹

[116] Whether she had reasonable grounds for the belief must be approached objectively.⁴⁰

[117] Constable Burton read the complainant's founding statement and the injury statement prepared by Warrant Officer Willemse. She claims to have established in her subsequent interview with him the fact that he conveyed that the wound was "deep", a premise we reject. The suggestion that the wound was inflicted with a broken bottle neck was Constable Burton's own illogical assumption, no doubt to give a plausible context to the notion that she was justified in arresting the appellant for an assault when a dangerous wound was inflicted. There is nothing in this either. We are not prepared to accept her testimony that there were four or five stitches over the breadth of the +3cm wound without the corroboration of the J88 medical report. Thus, the objective evidence establishes that the officer who received the First Information of the Crime was satisfied to record the complaint as one limited to an "Assault GBH". His injury statement does not reflect an open wound, or cut, although the annotation "*stitched already*" leaves the question begging. There is an absence of any of the atmosphere Constable Burton purported to bring to the description of how the wound was inflicted. We reject the narrative of the intimidation and stabbing. There is, albeit anomalous, the situation that there is no J88 medical report although the complaint had already been treated for his injury. The report (which only came to hand later), so all the parties concede,

³⁹ These jurisdictional requirements are trite. *Duncan, Supra*, at 818 H – J and *Sekhoto, Supra*, at paras 6 and 28.

⁴⁰ *R v Van Heerden* 1958 (3) SA 150 (T) at 152 D-E. The concept of reasonable grounds is to be interpreted objectively, and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion. This *dictum* was relied on by the Appellate Division in *Wiesner v Molomo* 1983 (3) SA 151 (A) at 159 B.

suggests that it records a soft tissue injury which appears to us to be consistent with what Warrant Officer Willemse noted in his injury statement and what the A1 Statement provides. Constable Burton states that she did not have the J88 medical report at her disposal at the time she set out to arrest the appellant. Such an impediment would not absolve a reasonable arresting officer from making proper enquiries when there is room for doubt that the offence is a Schedule 1 one, justifying an arrest without a warrant on the sheer basis of the seriousness of the offence. As indicated in *Mabona*, a reasonable arresting officer would further remind herself that section 40 (1) (b) of the CPA authorizes drastic police action and an arrest on the strength of a suspicion without the need to obtain a warrant, something which would otherwise be an invasion of private rights and personal liberty.

[118] There was at the stage Constable Burton purported to arrest the appellant no objective entry in the police docket recording a stabbing or the infliction of the wound with an open bottle neck. (For the first time after the arrest, and without any supplementation by the complainant, she writes in the investigation docket, and nowhere else, that the appellant stabbed the complainant, a premise for the arrest that we reject as contrived.)

[119] Absent the atmosphere of the supposed intimidation, as a premise, which we also reject, there is no other reason to suppose that the manner in which the wound came to be sustained would engender the belief in Constable Burton that the wound was a dangerous one.

[120] The only factor of relevance is that the wound is relatively close to the complainant's eye, but the complainant never complained of any fear that his eye

was at risk of being injured. In fact, it appears that Mr. Sweleni was also hit with the intact empty bottle in the tavern during the scuffle, but he was not concerned to lay a criminal complaint against the appellant as a result.

[121] It is evident that the concepts of “*grievous bodily harm*” and “*dangerous wound*” are not necessarily synonymous as was pointed out in *Bobbert v Minister of Law and Order*,⁴¹ thus it is not enough to assume that a suspicion would be reasonable based on the mere fact that a suspect is charged with the offence of Assault GBH.

[122] In *R v Jones*⁴² the court settled upon a meaning of “*dangerous wound*” as follows:

“It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted.”

[123] In *Mananga*⁴³ the court demonstrated the application of the test whether a suspicion was reasonably entertained by the arresting officer in that unique fact set as follows:

“[13] Nevertheless, Warrant Officer Qunta testified that he first acquainted himself with the contents of the docket. It related to a charge of Assault GBH and it identified the appellants, amongst others, as the perpetrators. He then proceeded to Ncora to interview the complainant because he appreciated that he could not arrest the appellants without an investigation to verify the information contained in the docket. Upon seeing the

⁴¹ 1990 (1) SACR 404 (C) at 409 E – H.

⁴² *Supra* at 332 E.

⁴³ *Supra*.

complainant, he perceived that he had been ‘severely injured’ and noted the fractured arm and the injuries to his head. Warrant Officer Qunta did not describe the injuries which he observed in any finer detail, but, as I have said, the complainant testified that he had sustained five lacerations to his scalp, which had been sutured, and that his wrist had been fractured and immobilised in a plaster cast. These are the injuries which Warrant Officer Qunta observed.

[14] The complainant testified that, following the assault, he bled profusely and was ‘dehydrated’, to the extent that he was unable to speak, and that he was admitted to hospital for approximately four days. It is not apparent from the evidence of Warrant Officer Qunta that the content of the docket revealed the extent of the blood loss sustained. However, in explaining the reason for the arrest, Warrant Officer Qunta testified that he decided to arrest the appellants as a case of assault had been opened and that the complainant had been detained in hospital for a period of four days. He considered it imperative to look for the assailants by virtue of the ‘nature of his injuries’.”

[124] In *de Klerk*, the Minister did not rely on an assault where a dangerous wound had been inflicted as justification for the arrest but the concept of a dangerous wound came to the fore in that matter. De Klerk had confronted the complainant in his office about money owed by him and a scuffle ensued. In the course of the scuffle, de Klerk grabbed the complainant and pushed him against the wall causing him to bump into the frame of a wall picture. The glass broke and cut the complainant’s back. The cut was sutured and a medical report was issued. The complainant laid a charge of assault and de Klerk was arrested. De Klerk sued for damages for wrongful arrest. No medical evidence was tendered, the report was entirely illegible, and, because no reliance had been placed on a “*dangerous wound*” in the justification pleaded, the nature of the injury was not canvassed in evidence. No reason was demonstrated for the arresting officer to have suspected that the wound may have been dangerous, in the sense of endangering life or limb.

[125] In the present matter, the notion of dangerous wound was exaggerated by Constable Burton. The complainant did not suggest in his founding statement that the wound had been incurred in any way other than by being hit with an empty, intact, bottle. A reasonable person in Constable Burton's position possessed of this limited narrative would not have considered that there were good and sufficient grounds for suspecting that the appellant was guilty of an assault involving the infliction of a dangerous wound. As indicated above, we reject the embellishment of the wound by her that she held out for in her testimony as well as the contrived atmosphere she sought to add to the whole debacle to give colour to the statutory defences relied upon by the respondent in the plea.

[126] As was stated in *Mabona*, the reasonable man (being informed how the wound was occasioned and seeing what she objectively must have seen), if somehow minded to imagine that the wound might instead have been inflicted by a stabbing, would have analyzed and assessed the quality of the information at her disposal critically with regard to what the doctor's opinion was before deciding to arrest without a warrant.

[127] Although the court in *Mananga* cautions against an expectation that a police officer examining the wounds of a victim would do so as a doctor would, the expectation remains that a court will consider that a reasonable person will have regard to the facts and circumstances at his disposal and, where reasonably possible, satisfy himself of the merits thereof.⁴⁴ Here there was no such consideration. Indeed, Constable Burton arrested the appellant even before she had interviewed the complainant's mother or Mr. Sweleni. She also missed a vital

⁴⁴ *Supra* at par [16].

opportunity to have had regard to the doctor's report of the complainant's injuries which, as it transpired after the fact, confirmed a soft tissue injury instead.

[128] In our view the magistrate erred in his determination that the injury had to “qualify” as a dangerous wound as opposed to actually applying the *Mabona* test to the facts.

[129] In the result we find that the arrest was unlawful.

[130] It is therefore unnecessary to consider the issue of the exercise of the arresting officer's discretion.

The claimed unlawful detention:

[131] It is also unnecessary in our view to consider this aspect (as a discrete issue) given that the pleadings do not suggest a separate cause of action other than the claim of arrest and detention. The pleaded case is that the unlawful arrest, and the detention inherent therein and continuing, aggravated by the fact that the appellant only appeared in court on the Tuesday, was in fact the cause of the harm suffered by the appellant.

[132] The “culpable conduct”, as it were, relied upon by the appellant (which we consider made the deprivation of liberty all the more egregious) was clearly set out in his particulars of claim and about the features of this part of his case there is not much in dispute.

[133] The respondent conceded in the plea, or rather did not pertinently deny the allegation, that the appellant's wife asked for him to be released from custody. Further and in any event Constable Appolis was under the misapprehension, from his perspective, that the Police could not release him from custody before his first court appearance because of the nature of the charge against him.

[134] At the time of the incident section 59A (1) of the CPA however provided as follows in this respect:

“59A. Attorney-General may authorise release on bail

(1) An Attorney-General or a prosecutor authorised thereto in writing by the Attorney-General concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.”⁴⁵

[135] Schedule 7 offences, listed for purposes of section 59A of the CPA at the time included: “Assault, – *involving the infliction of grievous bodily harm*”.

[136] Constable Appolis confirmed that as far as he was concerned that the appellant could not have expected to be released by the Police on bail. He was, however, evidently mistaken in his appreciation of the situation regarding the appellant's right to be released on this basis on the charge as indicated on the docket.

[137] He himself offered that the police usually call a standby prosecutor who would come in to peruse the docket, thereby conceding that although it was not his

⁴⁵ The current proviso was only added later.

prerogative to release him, such a procedure may well have availed the appellant for an immediate release on bail if his wife's request had been appropriately responded to. The objective of informing a person arrested of his right to bail is exactly so that that right may be exercised even before the first appearance.⁴⁶

[138] It appears to be the case, however, that the real reason for the appellant's late release on warning from court related to the fact that Constable Appolis was adamant that he could not charge him until his investigation milestones had been met and because the manpower challenges at the police station meant that these processes, that set the milestones via a senior officer, were in themselves an unreasonable impediment and an affront to his right in terms of section 35 (1)(d) and (e) of the Constitution to be brought before a court as soon as reasonably possible. What is dictated by sections 50 (1) (b) and (c) of the CPA and the Constitution is expedition relative to the circumstances.⁴⁷

[139] Constable Appolis conceded that the appellant could have been charged earlier. Although he conducted what he thought was the minimum standard of investigation before the appellant could be released from custody by the court (address verification and interview with the complainant), he, in fact, did not charge the appellant until the morning of the 11th and therein too lies the rub.

[140] There is no legal requirement for charging a suspect but in our view, it would follow upon the premise that Constable Burton presented for the exercise of her purported discretion to arrest that she had in mind that the appellant should be brought to justice on the charge of "*Assault GBH*" in respect of which she gave

⁴⁶ *Syce and Another v Minister of Police* [2024] ZASCA 30 (27 March 2024) at [44] read with footnote 18 and the cases cited therein.

⁴⁷ *Mashilo and Another v Prinsloo* [2012] ZASCA 146 at [16].

him his rights at the police station at 17h15 on the 9th. She had already verified with the complainant, his mother and a witness from the tavern that he had purportedly made himself guilty of such an offence. She had arrested him from his own home which the complainant had pointed out to her. She was adamant that the appellant should have been charged and went so far as to say that she would have done so herself but for the fact that her shift had come to an end.

[141] The premise for the indirect judicial review of the Police's conduct in purportedly unreasonably precluding the possibility of the appellants' earlier release on bail is the peremptory provision in section 50 (1) of the CPA that arrestees are to be brought before a lower court "*as soon as reasonably possible*", but not later than 48 hours after the arrest. The purpose for this imperative must be read together with section 35 (1)(d) and (e) of the Constitution which provides that "(e) *everyone who is arrested for allegedly committing an offence has the right ...to be brought before a court as soon as reasonably possible, but not later than ...48 hours after the arrest...and...to be released from detention if the interests of justice permit, subject to reasonable conditions*".

[142] The right to be charged as soon as possible is among the implied rights of a suspect. So, for example, the gauntlet is laid down by section 50 (1) of the CPA to either charge or release a suspect so that his rights as a detainee can be meaningfully exercised. It is of no use to inform him of his right to apply for bail if there remains a likelihood that he will not be charged at all, but if he is charged and can be released on police bail forthwith, there is every imperative to move the process along. Put differently, while a suspect is routinely informed of his right to apply for bail at the point where he is given his constitutional rights, of what value

is this legal imperative if he cannot exercise that right because he has not been charged?

[143] It appears to us that the appellant fell through the proverbial cracks of staff handovers and best practices to get around a lack of manpower, but that should not have been the case. It rings hollow to suggest that the respondent can perfunctorily rely on such factors as a reasonable excuse for infringing the appellant's liberty rights.

[144] In our view the evidence establishes overwhelmingly that the respondent failed to justify his "*continued*" and unnecessary detention as a result of the failures on the part to have made it possible for the appellant to have been released immediately after he was charged. There is no question that these failures resulted in the appellant's extended detention and rendered the deprivation of his liberty, inherent in the unlawful arrest, all the more egregious.⁴⁸

Quantum:

[145] We do not perceive that there is any purpose in remitting this matter to the trial court to consider the question of the extent of the appellant's damages. We have all the necessary information to consider this aspect and are in as good a position as the trial court to do so. In any event Ms. Ntsepe, who appeared for the respondent, indicated at the hearing that the issue of the quantum was not contentious, neither the issue of interest on the damages award nor costs, at least such costs as pertain to the trial in the magistrate's court. The appellant claimed

⁴⁸*De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR (CC)

R200 000.00 as damages but Ms. Du Toit conservatively put the appellant's claim at R120 000.00 based on comparative awards.

[146] The appellant's was 44 years when he was arrested and detained. He is a longstanding employee of 19 years at VW South Africa in its production section. He is a family man.

[147] He was detained for 40 hours. He gave evidence that the conditions of the detention cell were unhygienic and filthy. He could not sleep because of the stench, and he cried because he had never been arrested before, this being his first experience of being detained.

[148] We have already alluded to the features that render the deprivation of the appellant's liberty more egregious and lacking in consideration for his dignity.

Costs:

[149] The final issue concerns the scale of the costs of the application for reinstatement and the appeal itself. We see no reason why the scale in the related application for reinstatement should not be on the same scale that Ms. Du Toit suggested was appropriate in respect of the appeal, namely scale C.

Order:

[150] The following order is made:

- (1) The application for the reinstatement of the appeal is granted.

- (2) The appellant's attorneys are to pay the respondent's party and party costs of opposing the application for reinstatement, on Scale C.
- (3) The appeal is upheld.
- (4) The finding by the Magistrate that the appellant's action is dismissed is set aside and substituted with the following order:

- “(i) The arrest and detention of the plaintiff is declared to be unlawful.
- (ii) the defendant is ordered to pay damages to the plaintiff in the amount of R120 000.00, plus interest thereon at the legal rate, calculated from the date of issue of summons to date of payment.
- (iv) the defendant is liable for the costs of the action on a party and party scale, such costs to include the costs of counsel which is awarded at three times the court's tariff subject to the discretion of the Taxing Master/Mistress.”

- 4. The respondent is liable for the costs of the appeal, payable on Scale C.

B HARTLE

JUDGE OF THE HIGH COURT

V V SANGONI

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 25 April 2025

DATE OF JUDGMENT : 28 August 2025

Appearances:

For the Appellants: Ms. M Du Toit instructed by Carol Geswint Attorneys c/o Dullabh & Co, Makhandha (Mr. Dullabh).

For the Respondents: Ms. N L Ntsepe instructed by the State Attorney, Gqeberha (ref. 14/1301/2017).