



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Not Reportable

CASE NO. CA 25/2025

In the matter between:

THANDANI JALI

Appellant

(Plaintiff in court a quo)

and

MINISTER OF POLICE

Respondent

(Defendant in court a quo)

FULL COURT APPEAL JUDGMENT

BRAUNS AJ

- [1] This is an appeal, with leave of the court a quo, against the dismissal of the appellant's claim for damages arising from his alleged unlawful arrest

and detention. The trial court dismissed the action and ordered the appellant to pay the respondent's costs¹.

- [2] The issues before this Court are whether the trial court correctly determined the point at which the appellant was arrested, whether the arrest was justified, whether the arresting officer was entitled to rely on protective custody, and whether the subsequent detention was lawful.
- [3] While the trial in the court a quo focused primarily on the merits, this Court on appeal must determine both the merits and the issue of quantum. For that purpose, it is appropriate first to set out the evidence adduced at trial, as it informs the Court's assessment of both aspects.
- [4] The background facts are largely common cause. The appellant alleges that he was arrested without a warrant on 5 February 2018 and detained until 6 September 2018². He contends that the arrest was malicious, alternatively effected without reasonable grounds, and that the arresting officer failed to exercise a proper discretion before depriving him of his liberty.
- [5] The respondent relied on section 40(1)(b) of the Criminal Procedure Act 51 of 1977, contending that the arresting officer reasonably suspected the appellant of having committed a Schedule 1 offence. On that basis, it was pleaded that the arrest was lawful, and that any detention beyond the appellant's first court appearance was by order of the magistrate.

¹ It is worth indicating that the citations used for the parties in the judgment will remain as in the court a quo.

² This is the claim as is apparent from sub paragraph 4.2, page 6 of the index of record of the court a Quo. However, From the evidence provided in the transcription, the plaintiff was detained from 5 February 2018 until his release on 6 September 2018 [page 127]

- [6] Against this background, the respondent bore the onus of establishing the lawfulness of the arrest. The trial court held that the onus had been discharged. The appellant contends on appeal that this conclusion was wrong in law and in fact.

In the court a quo

Defendant's evidence

- [7] The defendant led the evidence of only one witness, Sergeant Ntanjana "Ntanjana" as the other witness it had intended to call, Mrs Nontozana Mary Ndabambi was deceased.
- [8] The testimony under oath by Ntanjana was the following – he was stationed at Sulenkama SAPS, and was both the arresting officer and the investigating officer. He testified that on 5 February 2018 he attended the scene at Gwadana locality following the fatal shooting of Novulile Ndabambi. He arrived on the scene at the same time as the hearse and he approached Warrant Officer Totoyi "WO Totoyi" who showed him the place where the deceased was shot. Ntanjana asked WO Totoyi whether he saw the cartridge or a projectile in the house and his answer was in the negative. No projectile or cartridge was at/ on the scene. Ntanjana enquired as to what happened, WO Totoyi informed him that, there were shots fired and that he had interviewed the plaintiff, who then advised that, somebody fired shots and he did not see who it was. Ntanjana proceeded to further inspect the scene and the deceased and then decided to leave the scene.
- [9] As Ntanjana attempted to leave, a large group of community members blocked his vehicle, insisting he return to question the plaintiff regarding

the person who killed the deceased. Ntanjana found the plaintiff among community members and asked him directly who fired the shot. The plaintiff referred to his prior statement to WO Totoyi and refused to answer Ntanjana. The community claimed that the plaintiff was the one who killed Novulile Ndabambi “Novulile”. Ntanjana, familiar with the plaintiff, questioned him at the scene. The plaintiff declined to elaborate, stating he had already made a statement to WO Totoyi, and thereafter, surrendered his licensed firearm at Ntanjana’s request. Gunshot residue swabs were taken, with the plaintiff volunteering that he had washed his hands after assisting the deceased.

[10] Ntanjana informed the community that the plaintiff denied knowledge. The community insisted that if he were released, they would have to intervene. Ntanjana then instructed the plaintiff to get into the police vehicle to answer further questions at the station. Ntanjana regarded this as a credible threat to the plaintiff’s life.

[11] At Sulenkama Police Station³, Ntanjana told the court that he left the plaintiff in the back of the police van while he attended to another matter⁴ and thereafter in the afternoon took the plaintiff to Sulenkama to be interviewed. During the interview, the plaintiff told Ntanjana that he was sitting with the deceased’s mother when the deceased went outside to fetch his firearm. Gunshots were then heard. He found the deceased

³ Herein after called Sulenkama

⁴ In **Jali’s testimony under cross-examination**, he specifically disputed Ntanjana’s version about being left in a police van:

- **Jali said:** he was taken from the scene to Sulenkama police station and placed **directly into the cells**, not left in a police van. He denied Ntanjana’s claim that he was detained in the back of a van until around 3–4 a.m.
- **Ntanjana’s version:** was that, after the arrest, he left Jali in the police van at Sulenkama while he attended another matter, and only later (around 3–4 a.m.) returned and interviewed him one-on-one.
- **Jali’s denial:** he insisted this never happened; that he was taken straight into the cells upon arrival at Sulenkama and only saw officers again the next morning.

bleeding, attempted to render assistance, and left with his firearm to seek transport. He suggested that the deceased may have shot herself.

[12] Ntanjana observed material contradictions between the plaintiff's explanation to him, his earlier statement to WO Totyi, and the account given by the deceased's mother — who alleged that the plaintiff and the deceased left together shortly before the shooting. Ntanjana considered it suspicious that the plaintiff removed his firearm from the scene and washed his hands, thereby interfering with forensic examination.

[13] Having identified no other suspects, and being satisfied that the plaintiff's firearm was involved, Ntanjana arrested the plaintiff on charges of murder and defeating the ends of justice. He informed the plaintiff of his constitutional rights. Ntanjana opposed bail in light of the seriousness of the offence and the volatile community situation.

Plaintiff's evidence

[14] The plaintiff was the only witness in support of his case and denied any involvement in the deceased's death. He testified that he was a local sub-headman at Gwadana and knew Sergeant Ntanjana personally. On 5 February 2018, his partner Novulile was shot and killed. He testified that he was in the kitchen with the deceased's mother when the deceased went outside to fetch his firearm. He heard gunshots, found the deceased bleeding, and tried to assist her. He stated that she had earlier taken his licensed firearm, and when he heard a gunshot, he ran to find her lying injured. He tried to assist her and later washed his hands because they were bloody.

- [15] Police and community members arrived shortly thereafter. Community members accused him of killing Novulile. He denied any involvement, insisting she had shot herself with his firearm. When Ntanjana questioned him at the scene, he declined to repeat his account, saying he had already made a statement to WO Totoyi.
- [16] The plaintiff testified that Ntanjana disarmed and arrested him, allegedly to protect him from an angry crowd, after which he was taken to Sulenkama, informed that he was a suspect, and later detained. He maintained that he had never threatened Novulile, had no reason to harm her, and that the police failed to investigate alternative explanations for her death. He described his detention as harsh, citing poor cell conditions, lack of food and bedding, and humiliation, and he claimed the arrest was unjustified because Ntanjana had no evidence linking him to the shooting apart from community suspicion and the fact that the gun was his.
- [17] He emphasised that he had fully cooperated with police and believed the case was mishandled from the outset. He admitted removing his firearm from the scene, but explained that this was to find transport and assist the deceased, adding that he had earlier entrusted the firearm to her for safekeeping. He alleged that his arrest was unlawful and based solely on community pressure rather than any reasonable suspicion, stressing that his voluntary surrender of the firearm, willingness to submit to questioning, and consent to residue testing showed there was no risk of flight or obstruction of justice.
- [18] The plaintiff disputed the police assertion that his statements were contradictory, contending that any discrepancies were either immaterial or misinterpreted.

On appeal

The Grounds of Appeal

[19] Paraphrased for present purposes, the appellant's grounds of appeal are that the court a quo erred in the following respects:

- (a) *In finding that the respondent had a reasonable suspicion when arresting the appellant,*
- (b) *In finding that there is no legal requirement that such information for purposes of forming a suspicion must be in writing,*
- (c) *In finding that the respondent effected the arrest on the appellant on the scene without verifying any information to establish its reasonableness,*
- (d) *Failed to reject the version of the respondent that he arrested the applicant on the scene for his protective custody, and*
- (e) *Failed to reject the respondent's version that the appellant was only arrested after he had interviewed the appellant.*

The parties' submission on appeal

[20] Mr Sintwa, for the plaintiff argued that the removal of the plaintiff from the scene and being placed into a police vehicle constituted an arrest and that there was no threat to the plaintiff's life because just before Ntanjana

placed the plaintiff in the vehicle, Ntanjana was already leaving the scene as there was no suspect at that stage.

- [21] Mr Sambudla, when questioned by the court regarding the deprivation of liberty of the appellant at the scene already, conceded that it in fact constituted an arrest. This after Ntanjana had already decided that there was in fact, no suspect and that further investigation would have to be done. There was accordingly no suspicion let alone a reasonable suspicion at the time the appellant was actually arrested

Legal Framework

- [22] It is the arrestor effecting an arrest without a warrant in terms of s40(1)(b) of the CPA that bears onus to justify the arrest⁵. In doing so the arrestor must establish the jurisdictional facts for s 40(1)(b) as stated in *Minister of Safety and Security v Sekhoto*⁶ in the following terms: “*As was held in Duncan v Minister of Law and Order 1986 (2) SA 805 (A) (1986 (2) SA 805 (a) at 818G-H), the jurisdictional facts for a s 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds....*”

- [23] In *Mabona and Another v Minister of Law-and-Order*⁷ the court explained that the suspicion must be formed on factual grounds that would satisfy a reasonable person, and not merely on an officer’s intuition or community sentiment. As the Court held (at 658E–F):

⁵ Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)

⁶ and Another 2011 (1) SACR 315 (SCA)

⁷ 1988 (2) SA 654 (SE)

“The test is not whether the arresting officer believed that he had reason to suspect, but whether on an objective assessment of the facts at his disposal, a reasonable person would also have suspected that an offence had been committed.”

- [24] Writing for the majority in *De Klerk v Minister of Police*⁸, Theron J said: The lawfulness of the respondent’s arrest and detention are an issue before us and it is necessary to re-iterate the general principles relating to a claim under *actio iniuriarum* such as the present.

‘[14] A claim under the actio iniuriarum for unlawful arrest and detention has specific requirements:

- (a) the plaintiff must establish that their liberty has been interfered with;*
- (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;*
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and*
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.’*

- [25] Furthermore, in a judgment of this division, per Mbenenge JP in *Van Rooyen v Minister of Police*⁹ the following was stated: *“The onus of justifying the detention rested on the respondent, (the Minister of Police)”*. It follows therefore that if the arrest was unlawful the detention

⁸ 2020 (1) SACR 1 (CC)

⁹ 2020 (2) SACR 608 (ECM)

until the first appearance in court would be unlawful. It is now settled that the purpose of arrest is to bring the arrestee before the court, for the court to determine whether the arrestee ought to be detained further for example pending further investigations or trial.

Analysis

- [26] In the case of *Minister of Police v Mjali*¹⁰, the respondents, over and above proving the fact of their arrest and detention by the members of the defendant, also had to establish that they suffered damages as a result of the said arrest and detention (*factual causation*) and that the wrongful conduct of the appellant was closely connected to the harm they suffered (*legal causation*). This had to be done by way of adducing oral evidence.
- [27] In determining the lawfulness of the arrest and detention, what is required to be proven by the party who bears the onus is whether they took place within the confines of what the law allows, and whether they violated the constitutionally enshrined right to personal liberty. When the issue to be determined is the *quantum* of damages to be awarded for the violation of a person's liberty, evidence of the conditions under which a person was arrested and detained plays a significant part¹¹.
- [28] The issue on appeal is whether Ntanjana, acting on behalf of the defendant, had a reasonable suspicion as contemplated in section 40(1)(b) of the CPA when arresting the appellant, without a warrant on a charge of murder.

¹⁰ CA91/2022) [2023] ZAECHMHC 58 (7 November 2023)

¹¹ op cit para 35

- [29] Ntanjana, at the scene of the crime took the appellant and placed him at the back of his vehicle, this was the point at which there was a deprivation of liberty of the appellant and not when the appellant was already at the police station. The interview was conducted well after the fact that Ntanjana had declared that there was no suspect.
- [30] It is trite that any deprivation of liberty is prima facie unlawful, and the onus rests on the arresting officer to justify such arrest¹². While section 40(1)(b) permits a peace officer to arrest any person reasonably suspected of having committed a Schedule 1 offence, such suspicion must be objectively reasonable and based on specific, verifiable facts rather than conjecture or community sentiment¹³.
- [31] While Sergeant Ntanjana testified that he perceived a threat from the community and removed the plaintiff from the scene for his own safety, the act of placing him in a police vehicle without consent, informing him that he would be questioned, and subsequently detaining him overnight — all without legal justification — constituted an arrest.
- [32] The Criminal Procedure Act does not recognise "protective custody" as a lawful ground for arrest under section 40(1)(b). Arrest must be predicated on a reasonable suspicion of a Schedule 1 offence, not on speculative threats or fears of mob justice.
- [33] In *Minister of Police v Du Plessis*¹⁴, the SCA confirmed that even a benign motive for deprivation of liberty cannot override constitutional and statutory safeguards. The end cannot justify the means. The police could have ensured the appellant's safety by alternative, less invasive

¹² Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 589E–F

¹³ Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 819I

¹⁴ [2014] ZASCA 119 at para 21

means — including escorting him or arranging temporary safe housing — short of arrest.

- [34] The courts have emphasised that arrest on an untested or speculative suspicion is impermissible. In *Ramakulukusha v Commander, Venda National Force*¹⁵, it was held that, where circumstances permit, reasonable steps must be taken to verify a suspicion before resorting to the extraordinary power of arrest without a warrant. *Manala v Minister of Police*¹⁶ reaffirmed that readily available information must be evaluated before exercising the power to arrest. Similarly, *Montjane v Minister of Police*¹⁷ held that an exculpatory explanation provided by a suspect should, where feasible, be investigated before the decision to arrest. Fear of vigilante action, however pressing, is not a lawful justification for arrest under section 40(1)(b).

Applying these principles, the evidence shows that the arrest of the appellant was effected before any substantive interview or verification of his account. Ntanjana was confronted by an angry community demanding the appellant's arrest. At that point, nothing implicated the appellant, Ntanjana conceded as much since he was stopped by the community whilst leaving the scene without having identified any suspect or forming any suspicion.

- [35] The only trigger for the arrest was accordingly community pressure, not specific and articulable facts that would justify a reasonable suspicion of murder.

¹⁵ 1989 (2) SA 813 (V)

¹⁶ 2021 (2) SACR 38 (GJ)

¹⁷ 2015 (2) SACR 255 (GP)

- [36] On an objective assessment, Ntanjana did not have reasonable grounds to suspect the plaintiff of having committed a Schedule 1 offence at the time of arrest. The suspicion was premature, formed before minimal investigation, and improperly influenced by public sentiment.
- [37] South African jurisprudence is clear that the absence of a proper inquiry renders suspicion flighty or arbitrary¹⁸Community fear cannot convert speculation into reasonable suspicion¹⁹. While the threshold for reasonable suspicion is low²⁰, it nonetheless requires specific and articulable facts capable of objective evaluation. These were lacking at the time the appellant was deprived of his liberty.
- [38] The defendant has therefore failed to discharge the onus of showing that the arrest was lawful under section 40(1)(b) of the CPA. The arrest was arbitrary and in violation of the plaintiff's constitutional right to freedom and security of the person under section 12 of the Constitution.
- [39] In accepting that the defendant has failed to discharge the onus of proving the lawfulness of the initial arrest and detention, it follows that the appeal must succeed. The Court accordingly turns to the period of detention and the issue of quantum, which must be determined in light of the appellant's unlawful arrest and detention.
- [40] It is first, also necessary to distinguish between the plaintiff's initial detention by the police from 5 to 6 February 2018, when he was held overnight at Sulenkama, and his subsequent prolonged incarceration as an awaiting-trial prisoner until 6 September 2018. The first period of

¹⁸ FN 11, 12 and 13

¹⁹ FN 4 at para 28

²⁰ Duncan v Minister of Law-and-Order 1986 (2) SA 805 (A) (1986 (2) SA 805 (a) at 818G-H)

detention, though brief, remains unlawful if the arrest itself was unlawful, and it frames the later question of whether the extended incarceration can be said to flow from the initial arrest.

[41] The initial detention followed directly from the unlawful arrest and constituted a deprivation of liberty which the respondent bore the onus to justify. Having failed to do so, this period of detention must be regarded as unlawful.

[42] The law is clear that detention by the police up to the first court appearance forms part of the arrest and must be justified by the arrestor²¹. Where the arrest is unlawful, the concomitant initial detention is equally unlawful. The appellant's overnight detention from 5 to 6 February 2018 is therefore compensable and will be taken into account in the assessment of quantum.

[43] When the appellant appeared in court for the first time, there was a statement by the deceased's mother which contradicted the appellant's version given to Ntanjana and there was also a discrepancy between the version given to the two officers. The appellant failed to demonstrate that it was the wrongful conduct of the police that led to his further detention by the court.

Quantum

²¹ see *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC); *Van Rooyen v Minister of Police* 2020 (2) SACR 608 (ECM)

- [44] The Constitutional Court in *De Klerk*²² confirmed that police liability for detention usually extends until the first court appearance. Beyond that point, responsibility for continued incarceration lies with the court, not the arresting officer unless proven otherwise. This principle has been affirmed in *Van Rooyen*²³ and applied consistently in subsequent jurisprudence. In this matter, the appellant's detention after 6 February 2018 resulted from the magistrate's remand orders following the refusal of bail. That later incarceration cannot be laid at the door of the respondent and does not form part of the compensable period.
- [45] The relevant period for damages is thus the overnight police detention from 5 to 6 February 2018. Although brief, it constituted an unlawful deprivation of liberty and was aggravated by the conditions of detention described by the appellant — overcrowded and unhygienic cells, no bedding, inadequate food, and the humiliation of being treated as a criminal despite his standing as a community leader²⁴.
- [46] An award of R 35,000 aligns with comparable case law. In *Seymour*²⁵, the Supreme Court of Appeal reduced an award for five days' detention to R90,000, underscoring that damages must be fair and not unduly generous.

Costs

²² FN 07

²³ Minister of Police 2020 (2) SACR 608 (ECM)

²⁴ South African courts have recognised that even short unlawful detentions are a serious affront to dignity and personal liberty (*Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC); *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA)).

²⁵ FN 25

[47] As to costs, the general principle under South African law is that costs follow the result, meaning that the successful party is ordinarily entitled to an award of costs²⁶. This principle, however, is flexible and subject to judicial discretion depending on factors such as a party's conduct, the technicality of success, or the nature of the litigation²⁷.

[48] In the present appeal, there are no circumstances warranting a deviation from the general rule, and it is equitable and consistent with jurisprudence that the successful appellant, be entitled to his costs both in this Court and in the court a quo, which should include the costs of counsel.

[49] Resultantly the following order is made: -

- 1. The appeal is upheld.**
- 2. The order of the court a quo is set aside and replaced with the following-**
 - a. The defendant is liable for damages suffered by the plaintiff resulting from his unlawful arrest and detention from 05 February 2018 to 06 February 2018.**
 - b. The defendant, to pay, within 30 days from the date of this order, an amount of R 35 000,00 for damages suffered by the plaintiff resulting from his unlawful arrest and detention.**

²⁶ Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1996] ZACC 27; 1996 2) SA 621 (CC); 1996 (4) BCLR 441 (CC)) SAFLI.

²⁷ R v City of Matlosana [2016] ZAGPPHC 658; para 17–18) SAFLII

- c. *This award of damages shall attract interest at the prescribed legal rate calculated from the date of this judgment to date of payment.*
3. *The defendant is ordered to pay the appellant's costs of the appeal, including the costs of counsel on Scale A of Rule 67A.*

L R Brauns
ACTING JUDGE OF THE HIGH COURT

I AGREE,

FBA DAWOOD
JUDGE OF THE HIGH COURT

I AGREE,

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 04 August 2025
DATE OF JUDGMENT : 06 November 2025

Appearances:

Counsel For Plaintiff : S Sintwa with N Gama
Attorneys for Appellant M. Velembo Attorneys Inc.

Counsel For Respondent : LL Sambudla with N Mtshizana
Attorney for Respondent The State Attorney – Mthatha