

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A2025-042686

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

28 NOVEMBER 2025

Judge Dippenaar

In the matter between:

ASTON INNOCENT FOSTER

APPELLANT

and

THE MINISTER OF POLICE

RESPONDENT

JUDGMENT

Summary: Appeal against dismissal of appellant's claim for unlawful arrest and detention – court a quo misdirected in casting onus on appellant – evidence not establishing arrest or detention was lawful – principles restated – parties agreed on quantification of appellant's claim – appeal upheld.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 28th of NOVEMBER 2025.

DIPPENAAR J (FISHER J concurring):

[1] This appeal concerns the dismissal of the appellant's claim for unlawful arrest and detention in the Randfontein District Court (the court a quo). At the commencement of the hearing, the appellant sought condonation for the late prosecution of the appeal and that the appeal be reinstated in terms of r 49(6)(b), as it had lapsed. That application was not opposed. We are satisfied that good cause was shown and that a proper case for relief was made out. Such an order will be granted.

[2] The relevant facts are by and large common cause. The appellant was arrested without a warrant by Detective Constable Simelane, a member of the South African Police Services stationed at the Mohlakeng police station. She is a peace officer as envisaged by s 40(1)(b) of the Criminal Procedure Act¹ ('CPA').² The appellant was arrested at approximately 23h50 on 18 August 2020 pursuant to a Mr John laying a charge of theft of a bicycle with a value of R1 000. The offence of theft is listed in Schedule 1 of the CPA. The complainant accompanied the arresting officer and pointed out the appellant's residence and the appellant. The arresting officer was acting within the course and scope of her duties. The arresting officer placed reliance on the statement made by the complainant and did not verify the information therein. A docket had already been opened

¹ 51 of 1977 as amended.

² It provides: A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody'.

which contained the complainant's statement. The appellant was arrested in front of his family and people staying at the residence. According to Detective Simelane he was cooperative and did not present a flight risk. Thereafter the appellant was detained at the cells at the Randfontein police station after he was given a notice of rights. The appellant was released from the cells at the magistrates court on 20 August 2020 at approximately 12h00 without appearing in court pursuant to the complainant withdrawing his complaint. The appellant was thus detained for a period of some 36 hours.

[3] The appellant instituted a delictual claim for unlawful arrest and detention. The action was heard by the court a quo. At the trial, two witnesses testified: the appellant himself and the arresting officer, Detective Simelane. The appellant's case was that he did not commit any offence and his arrest was not justified under s 40 of the Criminal Procedure Act 5 of 1977 as amended.

[4] The court a quo dismissed the appellant's claim with costs. It held: *"The Plaintiff failed to prove before Court the wrongfulness of his arrest & unlawful detention. Court finds no evidence that the arresting officer had an animus in affecting the arrest. No evidence was place (sic) before Court to suggest that the arresting officer's motive for making the arrest was improper, wrongful and unlawful in any manner. In this case Plaintiff was lawfully arrested and detained with Court sanction'.*

[5] Dissatisfied with the result, the appellant appealed to this court. He raised some seventeen grounds of appeal. It is not necessary to particularise all of them in any detail as the understated issues are dispositive of this appeal.

[6] In our view the court a quo misdirected itself in placing the onus on the appellant to prove that his arrest and detention was unlawful. This inverted the onus. It is trite that the onus rests on the respondent to establish that the arrest and detention was lawful

once the appellant established an interference with his constitutional right not to be deprived of his physical liberty.³ That much was common cause.

[7] It is also trite that an officer making a warrantless arrest must comply with the jurisdictional prerequisites set out in s 40(1) of the CPA. If those prerequisites are satisfied a discretion arises whether to arrest or not.⁴ The arresting officer must consider the facts and exercise his or her discretion based on those facts.⁵ The jurisdictional requirements are set out in s 40(1)(b) of the CPA as follows:

‘A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody’.

[8] These grounds are to be interpreted objectively. It was undisputed that the arrestor was a peace officer.⁶ A suspicion that a person committed an offence must rest on reasonable grounds.⁷ It was common cause that the offence was not committed in the presence of the arresting officer. She did not verify any of the information contained in the complainant’s statement or verify the allegations made by the appellant’s wife, Poppy.

[9] A reasonable person would analyse and assess the quality of the information at his or her disposal critically and would not accept it lightly or without checking it where possible. On her own version, the arresting officer relied solely on the statement of the complainant and did not conduct any independent investigations. Having taken no steps to confirm the facts contained in the statement, despite the alleged offence having occurred at the same premises where she arrested the appellant, it cannot be concluded

³ *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) at 589E-F; *Mahlangu and Another v Minister of Police* 2021 (2) SACR 595 (CC).

⁴ *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA) para 14.

⁵ *Groves NO v Minister of Police* 2024 (1) SACR 286 (CC) para 52; *Radhuvha v Minister of Safety and Security and Another* [2016] ZACC 24 paras 42-46; *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (W) at 445C-F.

⁶ Under s 1 of the Act, peace officers include police officers.

⁷ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA (SE) 654 at 658E-H

that the respondent established that the jurisdictional requirements of s 40(1)(b) were met or that the arresting officer's suspicion was reasonable prior to affecting the arrest.

[10] Once the jurisdictional facts are established, a discretion arises whether to arrest or not. The relevant principles are set out in *Minister of Safety and Security v Sekhoto and Another*⁸ and it is not necessary to repeat them. Here too, the evidence did not support the respondent's case. Detective Constable Simelane testified that as a docket was opened it was one of her duties to arrest the suspect mentioned in the docket. Although there are other methods to secure the appellant's attendance at court, she mostly uses arrest. She testified that the appellant cooperated and there was no reason to believe that the appellant was a flight risk or that he would not attend his trial. Considering all the facts and the relevant factors which must be taken into account,⁹ the arrest of the appellant was not the only reasonable means of obtaining the objectives of the police investigation. The evidence did not establish that the arresting officer applied her mind to the facts relevant to the appellant's circumstances or took all the relevant factors into account prior to arresting him.¹⁰ Rather, it established the opposite. We conclude that the appellant's arrest was unlawful.

[11] Turning to the issue of the appellant's detention, it is trite that the onus rested on the respondent to establish that the appellant's detention was lawful.¹¹ The investigating officer did not consider bail and resumed other duties after delivering the appellant to the police station. No further evidence was presented by the respondent on the issue and no evidence was presented justifying the appellant's detention. It was incumbent on the respondent to do so. Considering that the value of the allegedly stolen bicycle was under the threshold of R2 500 as listed in Schedule 2 Part II of the CPA, the appellant was

⁸ *Minister of Safety and Security v Sekhoto and Another* (131/10) [2010] ZASCA 141 (19 November 2010.) 2011 (5) SA 367 SCA paras 28-34, 39-41; *Radhuva v Minister of Safety and Security and Another* [2016] ZACC 24 paras 42-46.

⁹ *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (W)

¹⁰ *Mtetwa v Minister of Police* [2023] ZAGPJHC 1294 para 17.

¹¹ *Syce and Another v Minister of Police* 2024 (2) Sady in respect of any offence, other than an offenceCR 1 (SCA) para 40.

eligible to be released on bail as envisaged in s 59 of the CPA.¹² Section 59(1)(a) in relevant part provides:

‘An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official’.

[12] There was no evidence that this issue was considered by the respondent. The appellant’s detention was thus unlawful. The court a quo also did not consider the issue in dismissing the appellant’s claim. These misdirections constitute sufficient grounds to set aside the order of the court a quo. Its conclusion was clearly wrong and this court is thus entitled to intervene.¹³ The appellant was entitled to judgment in its favour.

[13] Having dismissed the appellant’s claim, the court a quo did not consider its quantification. As held in *Mahlangu*:¹⁴ *‘Damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place’*. The relevant factors that must be taken into consideration as set out in *Diljan*¹⁵ and it is not necessary to repeat them. The appellant testified as to the poor conditions in the police cells where he was detained.

[14] During argument the parties agreed, as had been argued before the court a quo, that an award of R50 000 would be appropriate in the circumstances. Considering all the facts and taking into account all the relevant factors, we agree.

¹² *Setlhapelo v Minister of Police and Another* [2015] ZAGPPHC 362 (20 May 2015) para 38-54.

¹³ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 106.

¹⁴ Fn 3, para 50.

¹⁵ *Diljan v Minister of Police* [2022] ZASCA 103 para 22.

[15] It follows that the appeal must succeed. There is no reason to deviate from the principle that costs follow the result. The respondent did not strenuously dispute that the appellant would be entitled to interest from the date of service of the summons as sought under s 2A of the Prescribed Rate of Interest Act ¹⁶.

[16] In the result, the following order is granted:

[1] The appeal is reinstated;

[2] The appeal is upheld with costs;

[3] The order of the court a quo is set aside and substituted with the following order:

Judgment is granted in favour of the plaintiff for:

1. Payment of the sum of R50 000;

2. Interest on the amount in 1) above at the legal rate a tempore morae from date of service of the summons to date of payment

(3) costs of suit.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

¹⁶ *Vermaak v Road accident Fund* [2008] ZAWCHC 12; *Naidoo v Minister of Police* 2016 (1) SA SACR 486 (SCA)

HEARING

DATE OF HEARING : 21 OCTOBER 2025

DATE OF JUDGMENT : 28 NOVEMBER 2025

APPEARANCES

APPELLANT'S COUNSEL : MR E LUBBE

APPELLANT'S ATTORNEYS : JJ GELDENHUYS ATTORNEYS

RESPONDENTS' COUNSEL : ADV LOABILE-RANTAOT

RESPONDENTS' ATTORNEYS : STATE ATTORNEY