



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

Case no: 2021-14530

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED: Yes

Date: 15 December 2025

~~Colin Plessis~~

In the matter between:

PHUMLANI MIYA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**THE NATIONAL PROSECUTION
AUTHORITY**

Second Defendant

JUDGMENT

DU PLESSIS J

Introduction

[1] This is an action brought by the plaintiff, Mr Miya, against the Minister of Police, arising from damages claimed for alleged unlawful arrest, unlawful detention, and malicious prosecution. As is customary with trials, the hearing was not as straightforward as either party had perhaps anticipated, and I wished. It is therefore

first necessary to address the issues that arose on the date the trial was scheduled to commence, before considering the merits of the case.

[2] At the commencement of proceedings, counsel for the defendant informed the court that he had only recently been instructed and that an amended plea, foreshadowed in the pre-trial minutes, would be presented later that afternoon. Before the plaintiff was called, counsel outlined the essence of the intended amendment: that the arrest would no longer be denied and that the defendant's case would be that the arrest was lawful, with the grounds therefore to be properly pleaded.

[3] The court permitted the trial to proceed under the conditions outlined below, mindful that pleadings may be amended at any point before judgment, provided no prejudice results, and that the facts intended to be introduced through the amendment had already been examined in the evidence, ensuring that no irreparable harm to the plaintiff is likely to occur.

[4] This issue was also raised before any evidence was led, although it was only formally argued after the plaintiff had testified. To ensure fairness, the defendant was permitted to proceed and present its version, consistent with the proposed amendment, to the plaintiff during cross-examination. This was provisionally allowed on the explicit understanding that, if the amendment was later refused or did not align with what was discussed, such evidence would be disregarded. The plaintiff thus gave evidence.

[5] Once the amended pleadings were filed, it was allowed, in the absence of mala fides and manifest prejudice. In the interests of justice and fairness, the plaintiff was granted leave to consider the amended pleadings and, if necessary, to apply to reopen his case. They did not wish to do so.

Evidence

[6] [6] Before addressing the plaintiff's evidence, it is appropriate to mention that various documents were admitted into evidence, and several witnesses were called. The documentary exhibits included: a certified copy of the plaintiff's identity

document¹; his SAPS 69 criminal record, indicating no previous convictions²; his warning statement to the police³; the docket cover⁴; the charge sheet, which states that the case was withdrawn before plea due to a lack of a prima facie case⁵; the bail application record⁶; the statement of the arresting officer, Sgt Molate Rasetsoke⁷; the statement of the supporting officer, Sgt Lebogang M Dikok, along with scene photographs depicting, among others, the hijacked vehicle and the toy firearm recovered at the scene⁸; and the statement of the investigating officer, Sgt Bonginkosi Baloyi⁹. The plaintiff, Mr Phumlani Miya, testified in support of his claim, while evidence was also led from Sgt Rasetsoke, Sgt Dikok, Sgt Baloyi, and Ms Coert, a regional prosecutor then stationed at the Roodepoort Magistrates' Court.

Plaintiff's Evidence

[7] The plaintiff seeks damages for unlawful arrest, detention, and malicious prosecution arising from events that took place on the night of 30 August 2020. The plaintiff's evidence can be summarised as follows: on the evening of 30 August 2020, between approximately 7 pm and 8 pm, the plaintiff visited a friend, Siphesihle, in Braamfischer, where they attended a "street bash". Later that evening, two individuals unknown to him, a male driver and a female passenger, arrived in a red Volkswagen Polo. The male driver was introduced to him as Linda, and Siphesihle told him it was his brother. He does not recall the name of the female passenger.

[8] Siphesihle then invited him (the plaintiff) to join them on a drive to buy alcohol and drugs at a shebeen, which is how he ended up in the vehicle. The plaintiff stated that he sat behind Linda, in the right rear seat. The woman sat in the front passenger seat, and Siphesihle sat behind her in the left rear seat. His evidence was that when

¹ Exhibit A.

² Exhibit B.

³ Exhibit C.

⁴ Exhibit D.

⁵ Exhibit E.

⁶ Exhibit F.

⁷ Exhibit G.

⁸ Collectively referred to as Exhibit H.

⁹ Exhibit J.

he entered the vehicle, he did not know that it had been hijacked and was unaware of any police investigations relating to the hijacking. He testified that he had no reason to believe or suspect that the vehicle did not belong to Linda, whom he had just met.

[9] They drove through the streets when police suddenly stopped them with flashing lights. As soon as the vehicle halted, Linda alighted from the vehicle without saying a word and ran away. Siphesihle followed immediately thereafter. The plaintiff testified that he then heard gunshots and, fearing for his life and not knowing who the police were shooting at or why, he also alighted from the vehicle and ran away. He ran in the direction Siphesihle had gone and, as he did so, saw what he believed to be Siphesihle lying on the ground, though he initially thought Siphesihle had merely tripped. The plaintiff stated that, in his opinion, he posed no threat, either by words or conduct, to the police and that neither he nor any of the other occupants were in possession of any weapons. When he later ran into police officers, he did not resist their detention. However, the police assaulted him, striking him on both sides of his head with their hands and accusing him of theft, though he protested his innocence.

[10] The plaintiff was arrested on 30 August 2020 and detained in the holding cells at Dobsonville Police Station. He made a statement to the police, explaining how he ended up in the car and expressing his surprise at being stopped by the police. Importantly, in this statement, his sequence of events was that Linda and Siphesihle jumped out of the car and started running, and that he then followed them, and that he then heard gunshots, whereafter the police arrested him on the adjacent property. He stated did not know that the car had been stolen.

[11] His first court appearance was via audiovisual link at the Roodepoort Magistrate's Court on 1 September 2020, where the State opposed bail. He was formally refused bail on 23 September 2020 after a bail hearing. He remained in custody at Krugersdorp Correctional Services from 1 September 2020 until 2 November 2020, when the charge of robbery with aggravating circumstances was withdrawn due to lack of prima facie evidence. The plaintiff testified that he was detained for 63 days in inhumane conditions, causing him severe psychological and emotional harm and violating his rights to freedom and dignity.

[12] The plaintiff further testified that this experience has left him unable to trust anyone, damaged his relationships, and made it difficult for him to seek assistance from the police. He stated that he grew up in a religious family and now finds it hard to process what happened to him. He expressed a desire for a cleansing ceremony to help him move on with his life.

[13] The plaintiff was not a nervous witness, although he chewed gum quite vigorously until the interpreter told him to stop. His request that the court perform a “cleansing ceremony” can also be interpreted as his wish for his name to be cleared.

[14] In general, his evidence was plausible. However, his warning statement, read alongside the subsequent testimony of the other witnesses, significantly undermines his version that he only started running after the police fired shots. On a balance of probabilities, it is more likely that he ran before the shots were fired. This finding is relevant to the assessment of whether the arresting officer’s suspicion was reasonably formed and that the arrest was lawful.

[15] The plaintiff then closed his case.

Absolution from the instance application

[16] At the close of the plaintiff’s case, the defendant applied for absolution from the instance for the unlawful arrest, unlawful detention, and malicious prosecution, submitting that the plaintiff’s burden of proof had not been met as they had not established their claim against the defendant.

[17] The test for absolution is well-established.¹⁰ It requires that, at the close of the plaintiff’s case, the court consider whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff. This requires a court to find prima facie evidence on all elements of the claim.¹¹

¹⁰ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) is the classic case.

¹¹ Schwikaard PJ (2023) *Principles of Evidence* (Juta) p 32-665.

[18] Erasmus¹² points out two ways to understand prima facie evidence in this context. Firstly, in the sense that there is some evidence on each element of the claim to prevent absolute dismissal. And secondly, in the sense, that there is evidence that demands a response from the opposing side, or that if the other side fails to rebut, that the evidence then becomes conclusive, and the party bearing the burden will have fully discharged that burden. In both instances, the court must accept that the plaintiff's evidence is true. In instances of doubt, the court should rather lean on the side of allowing the case to proceed, rather than depriving the plaintiff of his remedy without the evidence of the defendant.¹³

[19] The court refused absolution from the instance as the position in unlawful arrest cases, in my view, is more nuanced. When the defendant denies the unlawfulness of an arrest, the defendant bears the burden of proving that the arrest was lawful.¹⁴ The plaintiff simply needs to prove that he was arrested, which is undisputed. The arrest will then be deemed unlawful. The defendant must then bear the burden of proving the lawfulness of the arrest, and the lawfulness of the arrest remains to be established. In situations where the onus is on the defendant, there can be no question of absolution from the instance at the end of the plaintiff's case.¹⁵ If the defendant fails to discharge that burden, the proper order is judgment in favour of the plaintiff, not absolution from the instance.¹⁶

[20] The court cannot assess the lawfulness of the arrest without hearing the defendant's evidence, as the plaintiff was detained without a warrant, which requires evidence concerning the arresting officer's discretion. This was not possible based solely on the plaintiff's account in this case. Naturally, the issue of the lawfulness of detention follows from the arrest. Concerning malicious prosecution, the plaintiff has provided evidence indicating that the elements may be satisfied and that the defendant might have a case to answer for continuing the prosecution despite the deficiencies in the investigation.

¹² Erasmus D1 Rule 39-17.

¹³ Erasmus D1 Rule 39-18.

¹⁴ *De Klerk v Minister of Police* [2019] ZACC 32.

¹⁵ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 SCA para 8.

¹⁶ *Arter v Burt* 1922 AD 303 at 306.

[21] The defendant then called its witnesses.

Evidence for the Defendants

Witness 1: Seargeant Molate Rasetsoke (Arresting Officer)

[22] Sgt Rasetsoke, a sergeant in the South African Police Service with over ten years' experience at the Westrand Flying Squad, testified in Sepedi through an interpreter. On the night of 30 August 2020, he and his colleagues were on crime prevention duty when they received a radio report of a hijacked red VW Polo Vivo, along with its registration number, and a vehicle tracker signal indicating that the vehicle was "repeating" in Braamfischer.

[23] In the early hours of the morning, at approximately 00h30–01h30, they located a red Polo matching the description and registration. As the police vehicles approached, the Polo stopped, and the occupants began to alight and run away. According to his evidence, the plaintiff was the first person he saw running from the vehicle. He immediately pursued the plaintiff on foot. While chasing him, he heard gunshots. He continued pursuing him through the nearby area, apprehended him, and informed him of his constitutional rights before and again after the arrest. His evidence was that plaintiff was unable to provide any explanation for why he had run. He admitted that he was not in possession of a warrant of arrest and stated that he effected the arrest based on the hijacking report and the radio information that multiple African male suspects were being sought in connection with that suspected hijacking.

[24] He denied assaulting the plaintiff and stated that he apprehended, searched, and detained him following standard SAPS procedures. He testified that he bore no ill-will towards the plaintiff. He confirmed that a firearm was found at the scene, booked in at Dobsonville SAPS, and that photographs of the firearm and the hijacked vehicle, including its number plate, were taken and later admitted into evidence as part of the scene documentation.

[25] During cross-examination, he was questioned about the lack of any prior complainant statements or identification, the fact that no independent investigation

was conducted at the scene to differentiate between innocent and guilty occupants, and the seeming arbitrariness of targeting the plaintiff. He asserted that he acted based on real-time vehicle tracking information and radio instructions, and that he targeted the plaintiff because he saw him getting out of the hijacked vehicle and running away. Counsel for the plaintiff challenged the notion that running away, in a situation where shots were being fired, necessarily indicated guilt. Nevertheless, he remained firm that fleeing from a hijacked vehicle upon police arrival constituted reasonable suspicion and that he had followed all required procedures.

[26] His evidence gave rise to conflicts on the number of people in the vehicle and the order in which they fled. He testified that he personally saw only the plaintiff leaving the vehicle, and that he learnt about the other occupants, including the deceased and the female passenger, from his colleagues when he returned to the scene.

[27] He reiterated that he did not witness or participate in any assault on the plaintiff and that, once apprehended, the plaintiff did not resist and was cooperative during the return to the scene and the subsequent proceedings detention.

[28] In re-examination, he confirmed that he arrested the plaintiff because he found him alighting from the hijacked vehicle and fleeing the scene. He stated that if the plaintiff had not been in that vehicle, or had he been able to provide a satisfactory explanation for his behaviour, he would not have arrested him.

Witness 2: Seargeant Lebogangh Dikok

[29] Sgt Dikok, attached to the same Westrand Flying Squad unit, testified that he was on duty on the night of 30 August 2020 when his team received information from the vehicle tracking company that a recently hijacked red VW Polo Vivo was “reporting” in Braamfischer.

[30] Alongside Warrant Officer Jacobs and other members, he proceeded to intercept the a alleged hijacked vehicle. When they spotted the Polo and approached with blue lights flashing, the vehicle stopped. The driver’s door opened, and the driver immediately got out of the vehicle and ran across the road towards nearby houses,

shortly followed by a rear-seat passenger. According to Sgt Dikok, the rear right passenger appeared to be holding what looked like a firearm and pointed it towards the police. W/O Jacobs first fired a warning shot and shouted at the man to drop the firearm, then fired two more shots in his direction. That passenger, later identified as Siphesihle, fell and was later found to have been fatally wounded. The female front passenger, later identified as Ms Minaar, remained in the vehicle, was questioned at the scene, and was then arrested by Sgt Dikok for further investigation. Sgt Rasetsoke returned shortly after, having apprehended the plaintiff, whom he had pursued into the veld. Both the plaintiff and Ms Minaar were placed under arrest and informed of their constitutional rights.

[31] In cross-examination, he was confronted with discrepancies regarding the exact number of suspects, the order in which the occupants left the vehicle, and the nature of the threat allegedly posed by the rear passenger. He acknowledged that the “firearm” found next to the deceased was later identified as a small black plastic toy gun but stated that this fact only became known during the subsequent investigation and that, at the time of the incident, it appeared to them to be a real firearm.

[32] He maintained that, given the circumstances, it was necessary and appropriate to arrest all individuals found in the hijacked vehicle to ensure their attendance in court and facilitate a proper investigation, describing this as standard procedure in serious violent crime cases. He denied that the plaintiff had been manhandled or subjected to excessive force, stating that once the plaintiff was brought back from the veld, he was not acting in any strange or threatening manner. During re-examination, he confirmed that he was the officer who arrested Ms Minaar, that four people were with the vehicle at the time (the driver, the deceased rear passenger, the female front passenger, and the plaintiff as the remaining rear passenger), and that his description of the seating arrangement matched the plaintiff’s account of where each person had been seated Polo.

Evidence of Sergeant Bonginkosi Baloyi (Investigating Officer)

[33] Sgt Bonginkosi Baloyi, attached to the serious violent crime unit, was the investigating officer responsible for the docket after the hijacking that led to the

plaintiff's arrest. In his statement, he noted that four suspects were linked to the hijacked vehicle: two were apprehended, one fled the scene, and one was fatally shot and he confirmed that the vehicle matched the hijacking report. He obtained the Roodepoort hijacking docket and, together with the arresting officers' statements and the SAP 13 entries for cartridges and the firearm, prepared the matter for court.

[34] Sgt Baloyi was not present when the plaintiff's warning statement was taken, as this was done by the arresting officers. He did not re-interview Sgt Rasetsoke, instead relying on his written statement. He testified that he returned to the scene, but this did not provide new information.

[35] As to the plaintiff's explanation that he was a passenger in the vehicle with one woman and three men, Sgt Baloyi stated that the plaintiff's presence in the hijacked vehicle shortly after the hijacking, his attempt to run away and, in Sgt Baloyi's view, the lack of a satisfactory explanation for his presence, formed the basis for considering him a suspect. He testified that the complainant in the hijacking could not identify any of the perpetrators because the incident occurred too quickly, and that no identity parade was conducted after the arrest.

[36] Sgt Baloyi stated that he completed his investigation and finalised the docket within approximately 24 hours of the arrest and that the matter was brought before the court within 48 hours of the arrest. He considered his role to be limited to investigation and docket preparation. The remand of the plaintiff and the refusal of bail were, in his opinion, matters for the court. He was aware that the case was later withdrawn with the endorsement that there was "no prima facie case", but he testified that he could not recall the exact reasons for the withdrawal and that, at the time of handover, he believed the case was ready for prosecution.

[37] In cross-examination, Sgt Baloyi acknowledged that his investigation mainly depended on the existing police statements and exhibits, and that he did not undertake any further detailed interviews with the arresting officers or other witnesses apart from contacting the complainant, who stated that he would not be able to identify the alleged hijackers. He admitted that no identity parade was arranged. He also accepted that he was not present when the plaintiff and the female co-accused, Ms Minaar, made their

statements, and that at the time of giving evidence, he did not have a clear recollection of the contents of those statements or the exact outcome of the case against Ms Minaar.

[38] In cross-examination, Sgt Baloyi admitted that, by the time the case reached court and bail was opposed, he knew that the complainant would not be able to identify the alleged hijackers. However, he stated that this was not the only evidence connecting the plaintiff to the incident, and that the plaintiff's explanation for his presence in the vehicle was not, in his view, convincing.

Evidence of Ms Coert (NPP, Roodepoort Magistrate Court)

[39] Ms Coert, a regional court prosecutor at the Roodepoort Magistrates' Court, testified that when she received the docket, the charge being prosecuted was robbery with aggravating circumstances, a Schedule 6 offence. The contents of the docket at that stage included statements by the police officers involved in the arrest, the Tracker documentation, and the warning statement(s). She explained the usual bail position in Schedule 6 matters, namely that the State is expected to oppose bail unless the accused can demonstrate exceptional circumstances and confirmed that the magistrate, ultimately, refused bail in this case.

[40] Ms Coert stated that, based on the information in the docket, the matter established a prima facie case: the plaintiff had been found in the hijacked vehicle shortly after the incident and had fled when the police arrived. She indicated that the prosecutor who initially placed the matter on the roll did so within their mandate, and that, had she been involved in the enrolment decision on the same facts, she would also have enrolled the case.

[41] She testified that, although there is liaison between police and prosecutors, the ultimate discretion whether to enrol or withdraw a matter lies with the prosecution. She denied acting with any malice or improper motive, stating that she acted lawfully and objectively, and that the later withdrawal of the charges with an endorsement of "no prima facie case" did not, in her view, make the earlier decision to proceed improper.

The law

[42] A foundational value in our Constitution is the rule of law, and in the context of arrest without a warrant, it requires that the State's authority be exercised within the confines of the law. Authority not exercised within the parameters of the law will, thus, also offend the Constitution. When it comes to arrest without a warrant, the Criminal Procedure Act¹⁷ sets out the legal requirements.

Unlawful arrest

[43] Unlawful arrest must be scrutinised through the lens of section 12(1) of the Constitution and the right not to be arbitrarily deprived of freedom and security of the person. Since an arrest removes an individual's freedom and security, it must not be arbitrary to comply with the Constitution. Section 40(1)(b) of the Criminal Procedure Act¹⁸ and relevant case law help the court determine whether an arrest is lawful and falls within the scope of section 12(1) of the Constitution.

[44] Section 40(1)(b) of the Criminal Procedure Act¹⁹ provides that a peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 (which includes robbery and theft). The onus is on the arresting officer to show that the arrest was lawful.

[45] The requirements were set out in *Duncan v Minister of Law and Order*,²⁰ namely:

- a. The arrestor must be a peace officer.
- b. The arrestor must entertain a suspicion.
- c. The suspicion must be that the arrestee committed a Schedule 1 offence.
- d. The suspicion must rest on reasonable grounds.

[46] It is not in dispute that the arrestor is a peace officer.

¹⁷ 51 of 1977.

¹⁸ 51 of 1977.

¹⁹ 51 of 1977.

²⁰ 1986 (2) SA 805 (A).

[47] As for the requirement of a “reasonable suspicion”, *Mabona v Minister of Law and Order*²¹ stated the following:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty.

The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[48] The test is objective: would a reasonable person, confronted with the same information, suspect the arrestee? The officer must assess the information critically, but does not need *prima facie* proof of guilt, only reasonable grounds for suspicion.

[49] Once the jurisdictional facts are met, the officer has discretion to arrest. This discretion must be exercised rationally and in good faith.²² *Minister of Safety and Security v Sekhoto*²³

²¹ 1988 (2) SA 654 (SE).

²² *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 SCA.

²³ 2011 (1) SACR 315 SCA para 28.

"once the required jurisdictional facts are present, the discretion or not to arrest arise. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. The standard was not breached because an officer exercised the discretion in a manner other than that deemed optimal by the Court. The standard was not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached".

[50] In other words, this court must determine whether the arresting officer acted rationally when he arrested the plaintiff.

[51] From the facts outlined above, it is undisputed that Sgts Rasetsoke and Dikok are peace officers. They suspected the plaintiff of robbery with aggravating circumstances (hijacking), which is a schedule 1 offence. This suspicion was reasonable: the police received real-time information that a red VW Polo Vivo had been hijacked in Florida and was being tracked in Braamfischer. When the police located the vehicle matching that description, they stopped it, and the applicant exited the vehicle and fled the scene. Fleeing from a recently hijacked vehicle is a strong objective indicator of at least potential involvement in the hijacking. Considering the evidence before the court, on a balance of probabilities, the plaintiff got out of the vehicle and left the scene before the shots were fired, and not because they had been fired. This enhances the reasonableness of the suspicion.

[52] It might be so that the complainant mentioned "six or seven African males", and that only four people (including a female) were found in the vehicle. This, however, does not negate suspicion. It is reasonable to suspect that the occupants of a stolen vehicle found shortly after the theft are involved in the crime, and in the absence of an explanation upon being found in such a stolen vehicle, the officers acted reasonably in arresting the plaintiff. The officers also acted reasonably when they decided to release the female but not the plaintiff, as the complainant had only seen males during the hijacking.

[53] The officers did not need proof beyond a reasonable doubt at the time of the arrest; they needed only reasonable suspicion to arrest and secure the suspects (the

plaintiff in this case) for further investigation. While the purpose of arrest is to bring the arrestees before a court, this does not mean that all investigations must be completed and that the arresting officer must be of the opinion that there is sufficient proof of an eventual conviction.²⁴ Accordingly, there was reasonable suspicion that the plaintiff was involved, and the arresting officer exercised his discretion rationally in making the arrest. The arrest was, thus, within the parameters of section 40(1)(b) of the Criminal Procedure Act,²⁵ and thus lawful.

Unlawful Detention

[54] Section 35(1) of the Constitution requires that an arrested person has the right to be brought before a court as soon as reasonably possible, but no later than 48 hours after arrest.²⁶ In this case, the plaintiff was brought to court upon the first available court date, and within 48 hours of the arrest. There was reasonable suspicion that he might have been involved in a serious crime, and the police did not accept his explanation for how he ended up in the vehicle. There is nothing to suggest that the police acted maliciously or thought that the plaintiff was innocent and still detained him.

[55] Once the plaintiff was brought before the court, the authority to detain him shifted from the police to the judiciary. The refusal of bail was thus a judicial decision, rather than malice on the part of the police. The police cannot be held liable for further detention unless they misled the court or acted *mala fide*.²⁷ It is then the court's role to determine whether the plaintiff should be detained pending trial.

[56] After the plaintiff's first appearance, he was remanded by the magistrate. This was due to the plaintiff's lack of legal representation. The court also takes judicial notice that it was during the Covid pandemic, when attorneys faced considerable

²⁴ *Manala v Minister of Police* [2020] ZAGPPHC 453 paras 25 and 26.

²⁵ 51 of 1977.

²⁶ Section 50(1)(c) and (d)(i) of the Criminal Procedure Act 51 of 1977.

²⁷ *De Klerk v Minister of Police* [2019] ZACC 32.

challenges accessing their clients who were detained during that time period.²⁸ There is nothing indicating mala fides on the part of the police or that the police tried to mislead the court into remanding the plaintiff. When bail was later opposed, it was on the basis that this was a Schedule 6 offence and that the State is statutorily instructed to oppose it. The refusal of bail was a judicial decision based on the plaintiff's failure to show "exceptional circumstances", rather than malice on the part of any of the role players.

[57] Accordingly, I cannot find any evidence that the police or the prosecutor misled the court or hid exculpatory evidence that would have changed the outcome. The fact that the case was later withdrawn does not mean that the detention during the remand period was unlawful.

Malicious Prosecution

[58] *Minister of Justice and Constitutional Development v Moleko*²⁹ sets out the requirements for malicious prosecution. The plaintiff must prove:

- a. The defendant set the law in motion (instigated or instituted proceedings).
- b. The defendant acted without reasonable and probable cause.
- c. The defendant acted with malice (*animus injuriandi*).
- d. The prosecution failed.

[59] It is not disputed that the second defendant set the law in motion or that the prosecution failed.

[60] To prove a lack of reasonable and probable cause for prosecution, the matter of *Beckenstrater v Rottcher*³⁰ set out the test that the plaintiff must satisfy. Firstly, the *objective* test requires that the information available to the prosecutor must be

²⁸ See, for instance, the report of the Democratic Governance and Rights Unit entitled "Impact of COVID-19 on the administration of justice in Namibia, Malawi and South Africa" available at <https://www.judgesmatter.co.za/wp-content/uploads/2022/05/COVID19-Report-State-of-Judiciary-in-Malawi-Namibia-and-South-Africa-2022.pdf>

²⁹ [2008] ZASCA 43 para 8.

³⁰ 1955 (1) SA 129 (A) at 136A-B.

such that a reasonable person would not have concluded that the accused was probably guilty of the offence charged. Alternatively, under the *subjective* test, even if a reasonable person might have believed the accused guilty on the facts presented, the prosecutor themselves must be shown not to have honestly believed in the accused's guilt. If the prosecutor lacked a genuine, honest belief in the accused's guilt, regardless of how the facts might appear to a reasonable outsider, then reasonable and probable cause did not exist.

[61] The malice requirement was dealt with in *Relyant Trading (Pty) Ltd v Shongwe*³¹ where the Supreme Court of Appeal stated:

“Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant’s true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.”

[62] Furthermore, in *Minister of Justice and Constitutional Development v Moleko*³² the Supreme Court of Appeal added that

“The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.”

[63] At the time this case was enrolled, the prosecutor had the same objective facts as the arresting officer: that the plaintiff was caught in a hijacked vehicle and ran away. There was a vehicle tracking report that placed the stolen vehicle at the scene, there was a relatively short time period from the hijacking to the vehicle being stopped, and even if it was possible that people could have been dropped off and picked up, it does not change the fact that the plaintiff was caught in a stolen car, and ran away when

³¹ 2007 1 All SA 375 (SCA) para 14.

³² [2008] ZASCA 43 para 64.

the police stopped the vehicle. He did not explain at the scene why he was there, and his warning statement did not provide an adequate explanation to the officers either. An objective look at the docket in September 2020 supports the conclusion that reasonable and probable cause existed. The later withdrawal on the basis that there is “no prima facie case” indicates a prosecutorial decision, after further investigation or, rather, non-investigation, and that the case does not have much merit. The fact that the case later became hopeless does not mean it was so at the beginning of the process. The plaintiff, thus, failed to prove that he acted without reasonable and probable cause.

[64] Even if one could find in favour of the plaintiff on the first three requirements, there is no evidence that the fourth requirement is met. There is simply no evidence of personal animosity, spite, or an intent to injure the plaintiff on the part of any of the second defendant’s role players. It does not logically follow that because the female passenger was released, the plaintiff was pursued spitefully or with malicious intent. This rested on the complainant’s description of the hijackers, who did not include a female.

[65] There is no evidence of personal animosity, spite, or intent to injure the plaintiff on the part of the police or the prosecution. They acted within the confines of the law, relied on a prima facie case as set out in the docket, and had no personal knowledge of the plaintiff. Mere continuation of prosecution, and later withdrawal of charges, does not justify an inference of malice.

Conclusion

[66] To conclude, the plaintiff has failed to prove that the arrest or detention was unlawful. The plaintiff has also failed to prove the requirements for malicious prosecution (specifically, the absence of reasonable cause and the presence of malice). The claim must thus be dismissed.

[67] The plaintiff’s request that the court perform a cleansing ceremony, or clear his name, is not possible, also because what was before the court was not his guilt or innocence. The plaintiff may be innocent, and the arrest and detention lawful, and the

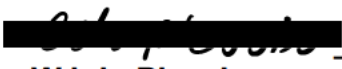
prosecution not malicious. These things can all exist together. Unless a court of law finds the plaintiff guilty of theft with aggravating circumstances, our law requires that he be presumed innocent. The plaintiff thus remains presumed innocent.

[68] As to costs, it should follow the result.

Order

[69] The following order is made:

1. The Plaintiff's claim is dismissed, with costs.


WJ du Plessis
Judge of the High Court
Gauteng Division,
Johannesburg

Date of hearing:	7 October 2025, 21 October 2025, 17 November 2025, and 3 December 2025.
Date of judgment:	15 December 2025
For the applicant:	DW Cloete instructed by Nematikanga Attorneys.
For the respondent:	S Tshungu instructed by the State Attorney.