

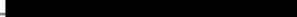
REPUBLIC OF SOUTH AFRICA



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

CASE NO: A5006/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

12 December 2025

In the matter between

ZUKE LUVUYO

Appellant

And

MINISTER OF POLICE

1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

JUDGMENT

Mdalana-Mayisela J (Mitchell AJ and Mzuzu AJ concurring)

Introduction

[1] This is an appeal against the whole of the judgment and order of Malungana AJ handed down on 26 July 2021, whereby the appellant's claim for damages arising from alleged unlawful arrest, detention, and malicious prosecution was dismissed with costs. Leave to appeal was granted by the court a quo on 14 December 2021.

[2] The appeal concerns the appellant's arrest without a warrant on 3 June 2016 on a charge of armed robbery, his subsequent 18-day detention, and the eventual withdrawal of the charges on 2 November 2016. The appeal turns primarily on the lawfulness of the arrest. At the hearing of the appeal, counsel for the appellant properly and correctly conceded that, considering the facts and the applicable law, the claim for malicious prosecution against the second respondent could not be sustained. The concession, correctly made, was that the court's remand of the appellant for further investigation or a formal bail application could not be characterised as malicious. The appeal against the second respondent must therefore fail. This judgment thus focuses on the appeal against the first respondent.

[3] The appellant has filed a condonation application for the late filing of part of the record. The explanation involves delays from the transcribers, the death of a key staff member, and efforts to obtain the record before the appeal hearing. The application appears reasonable and well-supported. Given that the whole record is now available and the delay was largely beyond the appellant's control, the condonation application succeeds.

[4] The respondents filed heads of argument on appeal. They were served with the notice of set-down. However, they were not represented by legal counsel at the appeal hearing.

Background

[5] The facts, in material respects, are common cause or not seriously in dispute. The appellant, then a 21-year-old man, was arrested at his home on 3 June 2016 by Sergeant Erven Monyela, a member of the South African

Police Service. The arrest was effected without a warrant. The appellant was initially detained at Jabulani Police Station and later at the Johannesburg Correctional Centre (“Sun City”) until he was granted bail on his third court appearance on 21 June 2016, after 18 days in custody. He was initially charged with armed robbery, which was amended to common robbery after the investigation. The charges against him were withdrawn on 2 November 2016 due to insufficient evidence.

[6] At trial, the first respondent bore the onus of justifying the warrantless arrest. Its sole witness was Sergeant Monyela, the arresting officer. The appellant testified and called a co-accused, Mr Bonginkosi Zungu, in support of his case.

[7] The crisp issue before the court a quo, and now before us, is whether Sergeant Monyela, at the time of the arrest, entertained a reasonable suspicion that the appellant had committed a Schedule 1 offence, as required by section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (“the CPA”).

The legal framework

[8] The jurisdictional facts for a defence under section 40(1)(b) of the CPA are trite: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.¹

[9] The requirement of reasonable grounds is objective. The question is whether a reasonable person in the arresting officer's position, with the same information, would have suspected that the arrested person had committed a Schedule 1 offence.² A reasonable suspicion is more than a hunch; it must be based on specific, articulable facts which would lead an ordinary, cautious person to believe that the suspect has been involved in the offence.³ While the arresting officer need not have evidence sufficient to

¹ *Duncan v Minister of Law and Order* 1986(2) SA 805 at 818G-H.

² *Minister of Safety and Security & Another v Swart* (194/11) [2012] ZASCA 16 para [20].

³ *Mabona & Another v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658E-H.

secure a conviction, the suspicion cannot be based on mere conjecture or unverified information. The officer is required to apply his or her mind critically to the information available.⁴

[10] An arrest constitutes a severe intrusion upon the fundamental right to freedom and security of the person, as enshrined in section 12 of the Constitution.⁵ Consequently, the power to arrest without a warrant must be exercised responsibly and is not a substitute for proper investigation.⁶ Where an arrest is made, the onus rests squarely on the arrestor to prove its lawfulness.

[11] Furthermore, in light of the constitutional right to freedom, our courts have emphasised that arrest should be a measure of last resort. An arresting officer must consider whether there are less invasive means to secure the suspect's attendance in court.⁷

Evaluation of the evidence and the judgment of the court a quo

[12] The court a quo found that Sergeant Monyela had a reasonable suspicion, based on the contents of the docket and the complainant's ability to point out the appellant. With respect, this finding cannot stand in light of the evidence, particularly the arresting officer's own testimony under cross-examination.

[13] Sergeant Monyela's evidence revealed the following critical points:

[13.1] The docket he received implicated two perpetrators in a robbery involving five individuals.

[13.2] Despite this, four individuals, including the appellant (accused 3), were arrested.

⁴ Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 836J-837B; Manala v Minister of Police [2020] ZAGPPHC 453 at para 22.

⁵ Constitution of the Republic of South Africa, 1996, s12(1).

⁶ Louw v Minister of Safety and Security 2006 (2) SACR 178 (T) at 187.

⁷ Louw, supra; National Instruction 11 of 2029, Arrest, Treatment and Transportation of an arrested Person.

[13.3] The statement of the complainant, Thabiso Khosi, that was in the docket did not implicate the appellant in the commission of the crime.

[13.4] The statement of the witness, Lily Matabe, who allegedly made a pointing-out, was taken after the appellant's arrest. He conceded that Lily could not identify what role the appellant played in the commission of the offence.

[13.5] Most critically, and fatally for the first respondent's case, Sergeant Monyela admitted under oath that he did not have sufficient evidence to charge the appellant at the time he effected the arrest.

[14] This admission was not a mere procedural oversight. It strikes at the very heart of the reasonable suspicion requirement. An arresting officer who concedes that he lacks sufficient evidence to lay a charge cannot, logically or legally, be said to have held an objectively reasonable suspicion that the suspect committed the offence. Any suspicion was based on speculation and an uncritical acceptance of information that the arresting officer himself later acknowledged was inadequate.

[15] The court a quo erred in finding that the pointing out by the complainant cured this fundamental defect. The appellant and his witness consistently denied that any pointing out occurred at the scene. Sgt Monyela mentioned pointing out the appellant's room, not the appellant, in his affidavit. More importantly, even if pointing out did occur, it cannot retrospectively create reasonable suspicion when the foundational information, as assessed by the officer himself, was insufficient. The officer's own admission renders the issue of pointing out irrelevant primarily to the central legal question.

[16] Furthermore, if the jurisdictional requirement of a reasonable suspicion is not met, the discretion to arrest does not arise. The court a quo misdirected itself in concluding that the discretion to arrest was exercised correctly.

[17] In sum, the first respondent failed to discharge his onus. The evidence of his own witness disproved the existence of a reasonable suspicion. The arrest was therefore unlawful.

Consequences of the unlawful arrest: Application of De Klerk

[18] The appellant's counsel correctly conceded the malicious prosecution claim. However, the unlawful arrest has significant consequences for liability. The parties in the court a quo agreed to be guided by the legal principle in *De Klerk v Minister of Police*.⁸

[19] In *De Klerk*, the Constitutional Court held that where a police officer makes an unlawful arrest with the foresight that it will result in the arrestee's detention, including detention after a first court appearance, the Minister of Police may be held liable for damages arising from the entire period of deprivation of liberty. The majority judgment, per Theron J, emphasized the role of foreseeability in establishing legal causation:

“[86] The crucial fact in this matter is that Constable Ndala subjectively foresaw the harm arising from the mechanical remand of the applicant after his first court appearance. She knew that the applicant’s further detention after his court appearance would be the consequence of her unlawful arrest of him. She reconciled herself with this knowledge in proceeding to arrest him. In addition, she knew that her mere note inside the docket recommending bail would amount to nothing at this first appearance. That the judicial process should have had a different tenor and outcome seems to me to be beside the point. The point is that Constable Ndala knew it would not.

[87] Public policy considerations, based on the norms and values of our Constitution, and the principles emerging from Zealand, point to the respondent being liable for the entire period of the detention. To impose liability on the respondent for the entire period of detention, in the circumstances of this matter, would not be exceeding the bounds of reasonableness, fairness and justice. On the contrary, following this line of reasoning, it would be fair and just to impute liability to the respondent.”⁹

[20] It was a common cause that Sergeant Monyela arrested the appellant on a serious Schedule 6 offence (armed robbery) under the CPA, which required the appellant to prove exceptional circumstances to be released on bail. He charged the appellant and placed him before a court. He must have foreseen the real and substantial risk that the appellant would be remanded in custody, as indeed occurred. Therefore, the first respondent is liable for all damages flowing from the unlawful arrest, encompassing the appellant's

⁸ *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC).

⁹ *De Klerk*, supra at paras 86-87.

entire period of detention from 3 June 2016 until his release on bail on 21 June 2016.

Quantum of damages

[21] The appellant claimed R1.1 million for general damages, deprivation of freedom, loss of earnings, and future medical expenses. The appellant did not present evidence to prove the R250,000.00 claim for future medical expenses and the R300,000.00 claim for loss of earnings. Therefore, this Court will not consider an award for the said heads of damages.

[22] The assessment of damages for unlawful arrest and detention is not a precise science. The court must determine a fair and reasonable *solatium* for the *injuria*, taking into account all the relevant circumstances.¹⁰ Relevant factors include:

The duration of the detention

[22.1] The appellant was incarcerated for 18 days.

The conditions of detention

[22.2] The appellant testified, without material contradiction, that the police cells were severely overcrowded, filthy, and unhygienic. He was later held at Sun City, where conditions were also traumatising. His evidence that he learned of his mother's death while in custody was particularly distressing.

The appellant's personal circumstances

[22.3] He was a young man (21) at the time, gainfully employed, and with no criminal record. The experience was clearly humiliating and distressing.

The nature of the infringement

[22.4] The right to personal liberty is foundational. An unlawful arrest and detention constitute a serious constitutional violation.

Comparable awards

[22.5] In his main heads of argument, the appellant has referred to comparable awards and submitted that this Court should determine a fair

¹⁰ Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at para 26.

and reasonable amount of compensation for the damages he has suffered. While each case is unique, recent awards provide guidance. In *De Klerk*, R300,000 was awarded for seven days' detention.¹¹ In *Wilson v Minister of Police & Others*,¹² R400,000 was awarded for the same detention period.

[23] Considering the duration, the appalling conditions described, the impact on the appellant, and the need for awards to reflect the seriousness with which our law views arbitrary deprivation of liberty, a fair and reasonable award is warranted.

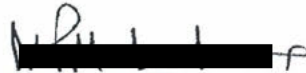
ORDER

[24] In the result, the following order is made:

1. The appellant's application for condonation for the late filing of part of the record is granted.
2. The appeal against the first respondent (the Minister of Police) is upheld.
3. The appeal against the second respondent (the National Director of Public Prosecutions) is dismissed,
4. The order of the court a quo is set aside and replaced with the following:
"1. It is declared that the arrest and detention of the appellant from 3 June 2016 until his release on bail on 21 June 2016 were unlawful.
2. The first respondent is liable to pay to the appellant the sum of R450,000.00 (Four Hundred and Fifty Thousand Rand) for deprivation of liberty and general damages.
3. The first respondent is liable to pay interest on the amount described above, calculated at 10.5% from the date of judgment.
4. The first respondent is to pay the appellant's costs of suit."
5. The first respondent is to pay the appellant's costs of the appeal, including the costs of Counsel on scale B.

¹¹ *De Klerk*, supra.

¹² *Wilson v Minister of Police & Others* (2021/56553) [2025].



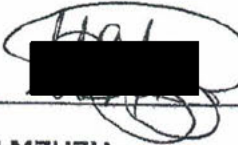
MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division,
Johannesburg

I agree



A Mitchell
Acting Judge of the High Court
Gauteng Division,
Johannesburg

I agree



N MZUZU
Acting Judge of the High Court
Gauteng Division,
Johannesburg

Digitally delivered by uploading to Caselines and emailing to the parties.

Date of hearing: 20 August 2025

Date of delivery: 12 December 2025

Appearances

Appellant's Attorneys: Ndou Attorneys Inc

Appellant's Counsel: Adv. P Uys

Respondent's Attorneys: The State Attorney, Johannesburg

First Respondent's Counsel: No appearance for the respondents

Second Respondent's Attorneys: The State Attorney, Johannesburg