

**REPUBLIC OF SOUTH AFRICA**



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

Case Number: A2025/123350

|                                 |                                                                                                 |
|---------------------------------|-------------------------------------------------------------------------------------------------|
| (1)                             | REPORTABLE: YES                                                                                 |
| (2)                             | OF INTEREST TO OTHER JUDGES: YES                                                                |
| (3)                             | REVISED: NO                                                                                     |
| <hr/>                           |                                                                                                 |
| <b>16 February 2026</b><br>DATE | <br>SIGNATURE |

In the matter between:

**TELMA ESMERELDA MACKETT**

First Appellant

**JAYLYNN MACKETT**

Second Appellant

And

**MINISTER OF POLICE**

Respondent

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**JUDGMENT**

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**MODIBA, J** (Dambuza AJ concurring)

[1] The issue in this appeal is very succinct. It is whether the appellants' unlawful arrest and detention was justified in terms of s 40 (1) (b) of the Criminal

Procedure Act (CPA).<sup>1</sup> Magistrate Evans (the Magistrate), sitting at the Magistrate's Court for the District of Johannesburg Central held at Protea, found that it was and dismissed their action with costs. They had sought damages for unlawful arrest and detention against the Minister of Police (the Minister). Dissatisfied with the Magistrate's decision, the appellants appeal against his order. The appeal is with the Magistrate's leave.

- [2] The background facts as pleaded by the parties are largely common cause. On 27 February 2024 at approximately 10:20am, members of the South African Police Services (SAPS), referred to in the particulars of claim as Sergeant Potgieter and Sergeant Ngobeneni (the arresting officer(s)), arrested the appellants in Ennerdale on a charge of common assault. They did not bear a warrant authorising the arrest. They took them to the Ennerdale police station. At about 1pm, they issued them with a warning to appear in court the following day.
- [3] The appellants instituted the damages action referenced above. They pleaded various basis on which they alleged that their arrest and detention was unlawful. The Minister barely denied most of the allegations. Ultimately, the issue for determination by the Magistrates' Court culminated into the following – whether the appellant's arrest was justified in terms of s 40 (1) (b) of the CPA and if it was, whether their detention was unlawful and they suffered damages as alleged.
- [4] The Minister sought to justify the arrest in terms of s 40 (1) (b) of the CPA. This provision empowers a police officer to arrest a person suspected of committing an offence referred to in Schedule 1, other than the offence of escaping from lawful custody, without a warrant.<sup>2</sup> He denied that the appellants' arrest was

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<sup>1</sup> 51 of 1977 ("CPA").

<sup>2</sup> Section 40(1)(b) of the CPA provides as follows:

**"Arrest by peace officer without warrant**

(1) A peace officer may without warrant arrest any person-

(a) ...

(b) who is reasonably suspected of having committed or of having attempted to commit an offence referred to in schedule 1;

... "

unlawful as the arresting officers acted within the scope of this provision. He also denied that the appellants' detention was unlawful as alleged and contended that they were only taken to the police station for profiling. Thereafter, they were released. I deal with the Magistrate's factual findings at a pertinent point in this judgment. It suffices at this point only to mention that he found that the appellants' arrest was justified in terms of s 40 (1) (b) of the CPA.

- [5] The appellants contend that the Magistrate misdirected himself on the facts. According to the appellants, the Magistrate was tasked with determining the unlawfulness of the arrest with reference to the authorising statutory provision and not whether the appellants were guilty or innocent of the charges against them, or what those charges should look like. The appellants also contend that the Magistrate lost sight of the fact that the appellants were charged with common assault and conflated the offences of "assault where a dangerous wound is inflicted" with the common law assault with intent to do grievous bodily harm, and common assault.
- [6] Lastly, they contend that the Magistrate should have interpreted the authorising provision narrowly as it involves the curtailment of fundamental human rights, specifically, an individual's right to liberty. He ought to have recognised that where the state is endowed with such an authority, it must be exercised sparingly and with circumspection. The appellants seek an order upholding the appeal, setting aside the order of the Magistrate and replacing it with one upholding their action and ordering the respondent to pay R 70,000 to each of them as damages, interest on this amount at the applicable rate and costs on the attorney and client scale.
- [7] The Minister contends that the appellants incorrectly place primacy on the label of the offence rather than the substantive facts that confronted the arresting officers. He contends that the appellants were provisionally charged with an offence of common assault and that they were never detained. They were

processed in terms of s 50 (1)<sup>3</sup> of the CPA and released on the same day on written notice. The whole process took a maximum of 2 hours. The arresting officers had a reasonable suspicion that a Schedule 1 offence had been committed. They had investigated the matter and were entitled to act on the facts before them.<sup>4</sup> The arrest was therefore lawful in terms of s 40 (1) (b) of the CPA.

- [8] The gravamen of the appellants' case on appeal, purportedly on the authority of the then Appellate Division's (AD) judgment in *Areff* and the Supreme Court of Appeal's (SCA) judgment in *De Klerk*, is that common assault is not an offence listed in Schedule 1. Therefore, according to the appellants, no justification for the arrest can be premised on s 40 (1) (b). As I find below, these contentions are not supported by the judgments the appellants are relying on.
- [9] *Areff* is inapplicable as it dealt with a different statutory provision. It is also distinguishable on the facts. The applicable provision in *Areff* was s 22 (1) (b) of Act 56 of 1955, read with the First Schedule to that Act. Act 56 of 1955 was repealed by s 344 (1) of the CPA.<sup>5</sup> Most common law offences were not listed in the First Schedule. An arrest without a warrant for such offences could never be justified in terms of s 22 (1) (b). Only common law offences which were listed in the First Schedule could be justified in terms of that provision.
- [10] *Areff* had been charged with contempt of court, a common law offence. It was not listed in the First Schedule. The AD found that the common law offence of contempt of court is not one for which a peace officer was authorised to arrest a person without a warrant in terms of s 22 (1) (b). It also held that there was no other provision on which a peace officer who does so could invoke.

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<sup>3</sup> Section 50(1)(a) provides as follows: "Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant."

<sup>4</sup> See *Minister of Safety and Security v Van Niekerk* [2007] ZACC 15; 2007 (10) BCLR 1102 (CC); 2008 (1) SACR 56 (CC).

<sup>5</sup> Section 22(1)(b) of Act 56 of 1955 was formulated as follows:

"Any peace officer may, without warrant, arrest -

(a) ...;

(b) any person whom he has reasonable grounds to suspect of having committed an offence mentioned in the First Schedule;"

Therefore, the AD further held, an arrest without a warrant for such an offence was unlawful.

- [11] Although s 40 (1) (c) read with Schedule 1 to the CPA was applicable in *De Klerk* and there are material similarities between the facts in that matter and the present one, it is important to clarify the scope of Schedule 1 to the CPA where any of the common law offences of assault are implicated.
- [12] While Schedule 1 to the CPA follows the scheme of the repealed Act as it lists certain common law offences and excludes others, the principle in *Areff* regarding the exclusion of common law offences from the First Schedule cannot simply be applied in matters regulated by Schedule 1 without reference to the implicated offence as defined in Schedule 1. This is particularly so in a case such as the present one where the implicated offence is differently formulated in the First Schedule and Schedule 1.
- [13] The First Schedule does not list any of the common law offences of assault. It only lists “[A]ssault” and defines it as an “[A]ssault in which a dangerous wound is inflicted”. Similarly, Schedule 1 does not list any of the common law offences of assault. It lists “[A]ssault” and defines it more elaborately. It defines it as an “[A]ssault where a dangerous wound is inflicted, involving the infliction of grievous bodily harm, or when a person is threatened with grievous bodily harm, or with a firearm, or a dangerous weapon as defined in section 1 of the Dangerous Weapons Act, (Act No 15 of 2013).”
- [14] In *De Klerk*, the appellant was charged with assault with intent to do grievous bodily harm. When determining whether the arresting officers could justify De Klerk’s arrest in terms of s 40 (1) (c) read with Schedule 1, the SCA held as follows:
- “[9] It is common cause that Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of ‘assault when a dangerous wound is inflicted’. Therefore, one of the jurisdictional facts is absent. It cannot be said that Ms Ndala entertained a reasonable suspicion that the listed offence had been committed. It is trite that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1, and that the suspicion must

rest on reasonable grounds (see *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1986] ZASCA 24) at 818G – J). The learned judge in *Duncan* stated further that:

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohamed v Duke* [1948] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed' .”

[15] From *De Klerk*, I glean the approach to determining whether an arrest can be justified in terms of s 40 (1) (c) to be the following: (a) the arresting officer must entertain a reasonable suspicion that an offence listed in Schedule 1 has been committed; (b) the suspicions must be based on reasonable grounds; (c) only then may an arresting officer exercise a discretion whether or not to exercise the power to arrest. The grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.

[16] In the present appeal the appellants are not questioning the grounds on which the discretion to arrest them was exercised. Their issue is that the jurisdictional basis for the exercise of the discretion to arrest them was absent.

[17] In my view, two jurisdictional facts must be met for the appellants' arrest to be justified in terms of s 40(1)(c) read with Schedule 1. The first jurisdictional requirement is that the offence for which the appellants are arrested must be listed in Schedule 1. It is to this determination that I now turn.

[18] Schedule 1 does not list specific common law offences of assault. It lists an assault in which the factors referred to above are present. Having referred to assault in the generic sense, it cannot be loosely said that common law assault offences are excluded from Schedule 1. It matters not that common assault is not listed. By listing assault and defining it as it did, the Legislature did not prescribe specific common law offences of assault as a jurisdictional requirement for s 40 (1) (c). But, most importantly, it did not exclude any of the two common law offences of assault namely, common assault or assault with intent to cause grievous bodily harm. If a person is charged with any of these

offences, the first jurisdictional requirement of Schedule 1 is met. I therefore find that the first jurisdictional requirement is met in the present appeal.

- [19] When a person is charged with any offence of assault, the second jurisdictional requirement is met if the arresting officer bears a reasonable suspicion that any of the factors in the definition of assault in Schedule 1 are present, namely; when a dangerous wound has been inflicted, a grievous bodily harm has been inflicted, or when a person has been threatened with grievous bodily harm, or with a firearm, or a dangerous weapon as defined in section 1 of the Dangerous Weapons Act.
- [20] The fact that a person is charged with the common law of assault does not in and of itself mean that an arresting officer lacks the authority to arrest them without a warrant. Such a finding would frustrate the object of listing assault in Schedule 1. It could happen that a charge of common assault is registered. However, when attending the scene of the crime or otherwise investigating the offence, an arresting officer suspects that an assault in which any of the factors in assault as defined in Schedule 1 are present has been committed, he would be justified in effecting an arrest notwithstanding how the charge is formulated. The charge can always be amended to mirror findings from the police investigation.
- [21] It appears to me that assault was listed not to hamstring the police from protecting complainants from eminent or further violence when attending the scene of a crime or arrest by empowering them to effect an arrest without a warrant where any of the factors mentioned in Schedule 1 are present. The object of s 40 1(c) read with Schedule 1 should not be frustrated by how a charge is formulated.
- [22] On the authority of *De Klerk and Duncan v Minister of Law and Order*<sup>6</sup>, the suspicion that an assault in which any of the factors in assault as defined in Schedule 1 are present has been committed must rest on reasonable grounds. This means that the arresting officer must satisfy himself based on reasonable

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<sup>6</sup> 1986 (2) SA 805 (A) ([1986] ZASCA 24) at 818G – J.

grounds, for example, by investigating the assault and securing evidence to satisfy himself that any of the relevant factors are present. As I find below, the arresting officer failed to do so.

[23] The above interpretation accords with the purpose of s 40 of the CPA. The police must be equipped with the necessary powers to perform their duties which include securing the safety of victims and members of the public. When performing their duties, the police may only do so as authorised by the law. In certain instances, such as those described in paragraphs 20 and 21 above, an arrest may be necessary to secure the safety of a victim or members of the public. Obtaining a warrant prior to effecting an arrest may defeat this. It is such situations that s 40 (1) (b) addresses.

[24] At the trial, the parties' respective witnesses testified concerning the common cause issues set out above. In respect of the disputed issues, Sergeant Ngobení denied that he arrested the appellants after they were pointed out by the complainant. During their arrest, he advised them of their constitutional rights. He then took them to the police station where he further explained their constitutional rights and got them to sign the notice of rights.

[25] According to the appellants, the police arrested them at their place of work after the complainant pointed them out. They were taken to the police station where their fingerprints were taken. Thereafter, they were released on warning to appear. Although they were not locked in the cells, they stood in an area where the first appellant was able to walk to the desk where the police were completing forms to enquire how much longer they would take.

[26] The Magistrate found that the appellants were not detained as they were not locked in cells; they stood where the police processed documents in the cell block area; and could move freely as testified by the first appellant. They were released on a notice to appear. He also found that the J88 form recorded that the complainant was assaulted by a mother and daughter who are her neighbours, with a pole and glass mug on her head and body. The J88 form recorded "swelling, tender abrasion; right parietal bone of skull; bruises on face

under both right eye and left eye, tender on right temporal aspect of the face”. Therefore, the Magistrates’ Court concluded:

“from the history of the alleged assault and clinical findings in the J88 and the fact that the complainant pointed out the plaintiffs as the persons who assaulted her, it would appear that the arresting officer acted within the provisions of s40(1)(b) of the Criminal Procedure Act 51 of 1977 and exercised his discretion to arrest reasonably.”

[27] As I find below, the Magistrate’s factual findings are not borne by the record. I am therefore justified to depart from them in these proceedings. The main difficulty confronting the Minister is that his case, as pleaded, is not supported by Sergeant Ngobeni’s evidence which is also riddled with contradictions. While the Minister pleaded that the appellants’ arrest is justified in terms of s 40 (1) (b), Sergeant Ngobeni denied that he arrested the appellants. He testified that he only took them to the police station for profiling. Yet, in his investigation diary, he had recorded that he arrested, charged and released the appellants on the same day on bail.

[28] Under cross examination, Sergeant Ngobeni contradicted himself. He testified that common assault is a Schedule 1 offence and he had the right to arrest the appellants because the complaint had pointed out. As already stated, Schedule 1 does not list common law assault. So, the fact that the complainant pointed them out as persons “who committed an offence of common assault” on her falls short of the second jurisdictional requirement. To arrest them without a warrant, he had to satisfy himself as to the presence of any of the factors in the definition of assault in Schedule 1. He failed to do so.

[29] It is clear from the trial record that Sergeant Ngobeni only read the complainant’s statement in the docket. However, from his evidence, there is no basis to find that he was influenced by what is on that stated in the statement for example, the way the assault was carried out. He also did not observe any injuries on her and did not have regard to the J88 prior to arresting the appellants. There is therefore no factual basis on which to find that he had a reasonable suspicion that the appellants had assaulted the complainant and inflicted a dangerous wound on her.

- [30] For the above reasons, I must find that the second jurisdictional requirement was not met. It follows that the discretion to arrest was unlawfully exercised. Therefore, I must find that the appellant's arrest was unlawful.
- [31] The appeal in respect of the alleged unlawfulness of the detention must also succeed. As argued on behalf of the appellants, their detention flowed from their unlawful arrest. They were accordingly detained from the time they were arrested until they were handed a warning to appear in court and released. This is what Sergeant Ngobeni had recorded in his investigating diary, notwithstanding that he denied detaining them during his examination in chief. He decided to release them when he was advised that he does not have the authority to arrest them on a charge of common assault without a warrant.
- [32] This, as I have found above is wrong in law. He could exercise his discretion to arrest them if the two jurisdictional requirements described above are met even where they are charged with common law assault. Under cross examination, Sergeant Ngobeni also recorded in his arresting statement that he detained them. When asked why he wanted to create the impression before court that he did not detain them, he testified that he did not proceed to detain them after he received instructions not to detain them as they should not be detained for common assault. It is in these terms that he explained his reason for releasing them which could only be necessary because he had detained them. When regard is had to the contradictions in Sergeant Ngobeni's testimony, the fact that his evidence is inconsistent with the Minister's pleaded case and is not supported by the documents he completed during their arrest, I must find that his version is improbable. By admitting his evidence, the Magistrate erred.
- [33] On the other hand, the appellants' testimony was consistent in material respects and is also supported by the documents Sergeant Ngobeni completed during their arrest. I find their version more probable. By rejecting their evidence, the Magistrate erred.
- [34] When determining the appropriate award for damages, I consider that the appellants were detained for 2 hours and 40 minutes and that the second

appellant was still a juvenile at the time. I also consider that they were arrested at their place of work. These factors justify a finding that they were humiliated and that their dignity was impaired. However, the unlawfulness of the detention was readily remedied when the arresting officers was advised of it. It is for that reason that their detention was relatively brief.

[35] In the circumstances, damages in the amount of R 20 000 per appellant are appropriate. I have taken into account other cases brought to my attention by the appellants' counsel where R 15 000 was awarded for 3-hours detention and R 40 000 for 15- hours detention.<sup>7</sup> There are dissimilarities in these cases that justify a slightly higher amount than the R 15 000 awarded in *Majola* and substantially lower than the R 30 000 awarded in *Lenoke*. In the present matter, the fact that they were arrested at work justifies a high amount. That they were not assaulted as the plaintiff in *Majola*, justifies a substantially lower amount.

[36] The appellants seek interest on this amount at the rate of 11.25% per annum from date of institution of proceedings to date of payment in terms of s 2A of the Prescribed Rate of Interest Act.<sup>8</sup> I am satisfied that this claim meets the requirements of this provision and the Minister has not established exceptional circumstances why interest should not be offered from the date the appellants complied with s 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act,<sup>9</sup> being 13 May 2024 to date of payment.

[37] I am not persuaded that a case is made out for punitive costs as the factors that justify the exercise of the Court's discretion to award costs on that scale are not present. Neither am I satisfied that the complexity of the matter, the value of

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<sup>7</sup> See *Lenoke v Minister of Police* [2024] ZANWHC 277 where R30 000 was awarded for unlawful and arrest and detention that lasted three (3) hours. The appellant was arrested in her home, interrogated about a murder and assaulted. Her freedom of movement was inhibited for approximately three hours. The court weighted that the detention was not in a formal cell, but her freedom was inhibited. She was not taken to the cells. In *Majola v Minister of Police* (2014/40666) [2025] ZAGPJHC 921 (15 September 2025), the court awarded the plaintiff an amount of R 15 000 for being arrested for public drinking and detained for 15 hours.

<sup>8</sup> 55 of 1975.

<sup>9</sup> 40 of 2002.

the claim or the importance of the matter warrant costs on a scale higher than scale B as provided for in rule 67(A). Therefore, the following order is made:

**Order**

1. The appeal succeeds with costs. The order of the Magistrate's Court is set aside and replaced with the following:

“1. The action succeeds with costs on scale B.

2. The Minister is liable for the plaintiffs' damages in the amount of R 20 000 each.

3. Interest on the aforesaid amount shall be calculated from 13 May 2024 to date of payment.”

[REDACTED]

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**LT MODIBA**

Judge of the High Court,  
Johannesburg

[REDACTED]

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**N DAMBUZA - GCAWU**

Acting Judge of the High Court  
Gauteng Local Division, Johannesburg

**Appearances**

For the Appellant: F Q Sathekge  
Instructed by: Office of the State Attorneys,  
Johannesburg

For the Respondent: AP Billings  
Instructed by: Wits Law Clinic

Date of Hearing: 18 November 2025  
Date of Judgment: 16 February 2026

***MODE OF DELIVERY:*** This judgment is handed down electronically by transmitting it to the parties' legal representatives by email, uploading on CaseLines and release to SAFLII. The date and time for delivery is deemed to be 10:00am.