

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2016/30595

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

27 March 2026

DATE

SIGNATURE

In the matter between:

THABO JACOB TILO

PLAINTIFF

And

THE MINISTER OF POLICE

FIRST DEFENDANT

THE NATIONAL PROSECUTING AUTHORITY

SECOND DEFENDANT

JUDGMENT

WINDELL J:

Introduction

[1] This is an action for damages arising from the alleged unlawful arrest and detention and malicious prosecution of the plaintiff following an incident on 1 April 2014 in which two police officers were shot. The plaintiff claims compensation in the sum of R1 000 000, comprising R500 000 in respect of unlawful arrest and detention and R500 000 in respect of malicious prosecution.

[2] It is common cause that members of the Organised Crime Unit arrested the plaintiff without a warrant on 23 April 2014 and that he was thereafter detained until he was released on bail on 15 May 2014. The first defendant relies on s 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA") to justify the warrantless arrest and denies that the arresting officer acted unlawfully, contending that he entertained a reasonable suspicion that the plaintiff had committed the offences of attempted murder and unlawful possession of a firearm. This suspicion is said to have arisen from the plaintiff allegedly being positively linked to video footage depicting the perpetrators at the scene, and from the recovery of a firearm at the residence of his friend, Amos Thebe ("Thebe"), whose address the plaintiff provided when asked about his alibi.

[3] The second defendant denies that the plaintiff was maliciously prosecuted and pleads that the decision to institute and continue criminal proceedings was based on the existence of prima facie evidence linking the plaintiff to the offences. It is further alleged that, although the charges were provisionally withdrawn on 12 March 2015, a prima facie case existed for the prosecution to be reinstated. In this regard reliance is placed on the outcome of an identification parade, video material relating to the incident and facial recognition evidence which, it is contended, implicated the plaintiff. The evidence at trial,

however, revealed that this factual premise was not borne out from the facts as the facial recognition expert was unable to make any comparison linking the plaintiff to the person depicted in the footage.

[4] It is trite that any deprivation of freedom is prima facie unlawful and require justification by the arresting officer.¹The central question is whether these pleaded grounds objectively constituted reasonable suspicion justifying the plaintiff's arrest without a warrant and whether they provided a lawful basis for his continued detention and prosecution.²

Background

[5] On 1 April 2014 two police officers, Constables Tiyané Wessel Makhoana ("Makhoana") and Terrence Sebele ("Sebele"), who both have since been promoted to the rank of Sergeant, were shot at and wounded while attempting to search three suspects near Lewisham, Krugersdorp. Both officers were admitted to hospital and later furnished statements in which they indicated that they would be able to identify the perpetrators. Eleven 9mm cartridges were recovered at the scene and a 9 mm bullet was surgically removed from Sebele.

[6] On 23 April 2014 the plaintiff was arrested at his residence by Sergeant Curt Oosthuizen ("Oosthuizen"), who is now deceased. A purple top and black and white

¹ *Minister of Safety and Security v Sekhoto & Another* 2011 (1) SACR 315 (SCA) para [16].

² *Supra* para [6]; *Minister of Justice and Constitutional Development and Others v Moleko* 2009 (2) SACR 585 (SCA) para [8].

takkies were found in the room he shared with his girlfriend. The police also proceeded to the residence of the plaintiff's friend, Thebe, where 6.35 mm firearm was recovered.

[7] The plaintiff was charged with two counts of attempted murder and one count of possession of a firearm without a license.³ He was detained at the Krugersdorp police cells and appeared in court on 26 April 2014, after the intervening public holiday. He was remanded in custody and was granted bail on 15 May 2014 after a formal bail application. An identification parade was held on 29 July 2014 during which the two police witnesses pointed him out. The prosecution was ultimately provisionally withdrawn in March 2015.

[8] The evidence suggests that the charges were provisionally withdrawn after further investigative steps revealed evidential weaknesses, particularly concerning the quality of the video material and the absence of forensic linkage between the firearm recovered during the investigation and the cartridges found at the scene. The withdrawal occurred pending further investigation rather than as a definitive abandonment of the prosecution.

Plaintiff's evidence

[9] The plaintiff testified that he was arrested on 23 April 2014 at the outside room where he lived with his pregnant girlfriend. He stated that when he opened the door the police showed him a black-and-white photograph depicting a male wearing what appeared to be a purple jacket and black-and-white takkies. He immediately denied that he was the person in the photograph and said that he did not know who the person was.

³ Contravention of section 3 of the Firearms Control Act 60 of 2000.

According to him the police then accused him of having shot two police officers in Lewisham, Krugersdorp on 1 April 2014, which allegation he also denied.

[10] He testified that the police then pushed him back into the room and assaulted him. They searched the room and found a purple top belonging to his girlfriend and a pair of black and white takkies which were his. These items were confiscated and he never saw them again. He stated that the purple top taken from the room differed from the one in the photograph in that it had no writing on it and was shorter in length, whereas the garment in the photograph had writing on the side and appeared longer. He further testified that he was not questioned about the clothing at the time of the search and that his explanation that the top belonged to his girlfriend was rejected.

[11] He maintained that he had no knowledge of the shooting incident and that on the night in question he had been with his friend Thebe in Randfontein. Oosthuizen then instructed him to show the police where Thebe lived. He accompanied the police in their vehicle but was instructed to remain inside while they entered Thebe's residence. He explained that, contrary to the police version, that Thebe ran away and was apprehended, the police had in fact stopped next to Thebe while he was standing outside with his girlfriend, and only thereafter entered the house.

[12] He stated that he was not informed whether anything had been found inside Thebe's residence. The police emerged with Thebe and placed him in another vehicle. He testified that his trousers were wet at that stage because he had urinated on himself as a result of the assault. The police then returned him to his room, conducted a further

search during which nothing additional was found, and instructed him to change clothing before leaving with them.

[13] The plaintiff testified that he only later became aware, from the arresting officer Oosthuizen's statement, that a firearm had been recovered at the residence of his friend Thebe. He denied any knowledge of the firearm or any connection to it.

[14] At the police station photographs were taken of him while he stood against a wall. He was informed that Thebe would be taken to Randfontein for detention, while he would remain at Krugersdorp. He was placed in the cells and testified that he was not informed of the reason for his arrest. He described the cell conditions as dirty and overcrowded. He was provided with only a sponge to sleep on and a dirty blanket, and the toilets were not functioning. The cell windows were fitted with burglar bars and could not be opened. He was detained with other inmates. He stated that he felt heartbroken and believed that his life was over because he knew nothing about the shooting incident.

[15] A warning statement was taken from him, and the notice of rights was handed to him without explaining it. He was not initially allowed to contact his family. Later, on the Saturday, he used another detainee's cellular phone to contact his family, informing them of his detention, the assault, and requesting that they pawn his belongings to raise R5 500 to secure the services of an advocate. He explained that the advocate was contacted and visited him in the cells on that Saturday.

[16] He appeared in court on the Tuesday following his arrest, Monday having been a public holiday. No identification parade had been conducted prior to his first appearance. Bail was refused and he was transferred to prison. He testified that bail was initially

opposed on the basis that an identification parade still had to be finalised, yet the parade was only conducted several months later while he was already out on bail.

[17] During the bail proceedings, the police opposed bail on the basis that he had previous convictions, that his clothing matched that seen on camera, that he was directly linked to the offence, that he might evade arrest, interfere with investigations, commit further offences, and that he was allegedly part of a gang syndicate. He denied these allegations.

[18] He testified that he attended court on numerous occasions before an identification parade was eventually held, at which both police officers pointed him out. Although he accepted that he had been identified at the parade, he maintained that this was because photographs taken of him after his arrest had been shown to the witnesses beforehand, a concern he said he had raised with his advocate. He said he was shocked that Sebele pointed him out as he recognised him from the area where he had grown up.

[19] The plaintiff testified that although a firearm was recovered at Thebe's residence and Thebe was subsequently charged with unlawful possession thereof, he himself was never found in possession of any firearm. According to the charge sheet he was nevertheless charged with possession of a 6.35 mm pistol. The forensic evidence, however, reflected that the cartridges recovered at the scene and the bullets removed from the injured police officer were 9mm rounds, and that eleven such cartridges had been fired from the same firearm. This demonstrated that the firearm found at Thebe's residence was not linked to the shooting incident and that there was no evidential basis to connect him to the weapon or the offence.

[20] He testified that the charges against him were provisionally withdrawn on 12 March 2015. According to him, his advocate later informed him that the video footage had only then been properly considered by the prosecutors and that it showed the suspect limping. He stated that he had been unaware of the content of the footage until that stage and that, when asked to walk, he did not limp.

[21] The plaintiff testified that the prosecution was malicious because, in his view, there was no evidence linking him to the offence. He stated that his arrest negatively affected his reputation in the community and caused him significant emotional distress. He maintained that he deserved compensation because the police had made a mistake in arresting him and later asserted that they had deliberately targeted him. He further testified that expert evidence obtained by the investigating officer in March 2015 indicated that no facial comparison could be made from the available video material due to its poor quality, which, according to him, showed that the police later sought to justify their actions by relying on unclear footage.

[22] At the time of his arrest he washed taxis and was self-employed. He maintained two children who lived with him and also supported his girlfriend.

Defendants' evidence

[23] Makhoana testified that on 1 April 2014 he was stationed at Krugersdorp SAPS and was on duty with Sebele. At approximately 22h00 they observed a stationary silver-grey Nissan bakkie with three black males. He approached the occupants and began searching one of the two men who were standing outside the vehicle. He then heard a gunshot and was struck in the right cheek. He felt dizzy and heard another shot. He ran

in a different direction, drew his service firearm, a Z88 9mm pistol, and fired multiple shots, after which the men fled the scene. He called for back-up and an ambulance transported him and Sebele to hospital. He testified that he made a statement on 25 April 2014 in which he indicated that he would be able to identify the suspects. After his discharge he attended an identification parade on 29 July 2014 and pointed out the plaintiff as one of the suspects who had shot at him. He was never called to testify in the criminal trial as the matter did not proceed.

[24] Under cross-examination he explained that the lighting at the scene was poor, although there was a large light across the street. He maintained that he could see the suspects' faces when the police vehicle approached and that they had turned towards the vehicle before it stopped. He stated that he was hospitalised for about a week and only thereafter made his statement. He corrected aspects of his evidence regarding whether the search had been completed when the first shot was fired. He remained adamant that the plaintiff had been present at the scene.

[25] He testified that he never saw the video footage. He was aware that 9mm cartridges were recovered but could not comment on whether any 6.35 mm cartridges were found. He denied having seen photographs of the plaintiff prior to the identification parade.

[26] Sebele testified that on 1 April 2014 he was the driver of the police vehicle with Makhoana as his crew member. They observed a small bakkie with two men standing outside next to a wall and another man inside the vehicle. They stopped in front of the bakkie. Makhoana approached the two men while he moved towards the driver. As he

turned back, he heard a gunshot and saw that Makhoana had been hit. He then saw another man shoot at him and he was struck in the right arm. He drew his service firearm and returned fire. They managed to call for back-up and he was taken to hospital where he remained for approximately two weeks. He made his statement on 26 April 2014 and indicated that he would be able to identify the suspect. He later attended the identification parade on 29 July 2014 and pointed out the plaintiff.

[27] In cross-examination he testified that the men had appeared suspicious and that the lighting conditions were poor. He stated that he saw their faces when they turned as the police vehicle approached and that he had less than a minute to observe them. He explained that the first shot was fired at Makhoana but could not be certain which of the suspects had fired it. He maintained that he saw the face of the person who shot at him clearly and that this person was the plaintiff.

[28] He denied knowing the plaintiff prior to the identification parade and denied that photographs had influenced his identification. He testified that the shooter had been wearing a purple hoodie and jeans. He confirmed that he had not seen the video footage. He acknowledged that 9mm cartridges were recovered at the scene and could not comment on the absence of 6.35 mm cartridges. He stated that he did not know why the plaintiff had been arrested and denied that the prosecution had been malicious.

[29] Investigating Officer Lieutenant-Colonel Baloyi ("Baloyi") testified that he had been in the police service for 34 years. He explained the procedure relating to the opening and management of a docket which he received on 2 April 2014. He referred to the "First Information of Crime" entries dated 2 April and 29 April 2014. He testified that the

identification parade had initially been cancelled because the complainants were not ready and later because the plaintiff had been transferred to prison instead of being kept in the police cells.

[30] Baloyi stated that there were delays in the investigation relating to the obtaining of video footage which was in the possession of the expert who had downloaded it, arranging the identification parade, facial recognition analysis and ballistic testing. He testified that clothing was found in the plaintiff's possession and entered in the SAP 13 register, although it was not reflected in the investigation diary.

[31] He explained that after he was assigned to the investigation, informants were contacted and video footage was obtained. The footage was downloaded and processed by an expert, who extracted still photographs from it. He confirmed that the complainants' witness statements were only obtained on 25 and 26 April 2014, that is after the plaintiff had already been arrested. He testified that clothing matching the description of one of the suspects was found in the plaintiff's possession. He gave instructions regarding the opposition of bail, explaining that the matter was a Schedule 5 offence and that the plaintiff had previous convictions.

[32] Under cross-examination he explained that the investigation was conducted by a team. He stated that he did not personally handle the video footage as he did not wish to tamper with it and that an expert was required. He was unable to say whether the arresting officer, Oosthuizen, had viewed the footage. He maintained that he had charged the plaintiff notwithstanding that the occurrence book reflected otherwise, suggesting that the entry may have been made in error. He further testified that the complainants required

time before they were ready to participate in further investigative steps due to the trauma they had experienced. According to him, this was the reason why their witness statements were only taken approximately 25 days after the incident and why the identification parade was only conducted in July 2014. He was unable to explain why this alleged lack of readiness was not mentioned in their evidence.

[33] He testified that the firearm sent for ballistic testing was the firearm recovered from Thebe's residence and that it had not been found in the plaintiff's possession. He denied that this constituted a mistake, stating that the purpose was to determine whether the firearm was linked to the attempted murder. He stated that docket queries were sometimes answered late because the docket did not always return promptly from court. He confirmed that he had not personally inspected the clothing but relied on the SAP 13 entry. He acknowledged that he had briefed the officer who opposed bail. He conceded that the SAP 13 documentation was not filed in the docket. He testified that the allegation made during bail proceedings that the plaintiff was part of a gang may have arisen from the fact that three suspects had been involved. He denied having instructed that such an allegation be made.

[34] He stated that he was unable to locate the photograph which had been in the possession of the arresting officer, Oosthuizen (marked A5), and could not say when it had been placed in the docket. It was put to him that the photograph was only filed after the complainants' statements had been obtained. He further testified that the arresting officer had since passed away and could therefore not clarify what information had been available at the time of the arrest. He confirmed that ballistic testing excluded the firearm

recovered from Thebe as having fired the 9mm cartridges found at the scene and the bullet removed from Sergeant Sebele.

[35] He testified that on 10 February 2015 he was requested by the prosecutor to provide the video footage together with a facial recognition report. The report subsequently indicated that the images were of poor quality and that no reliable comparison could be made, with the result that the plaintiff could not be linked to the person depicted in the footage. He was unable to explain why this issue had been raised only at that stage. He confirmed that the matter was provisionally withdrawn on 12 March 2015.

[36] He stated that after 2016 he had no further involvement in the investigation, although there was an entry made in 2017. He denied that the plaintiff had been arrested solely on the basis of a photograph and clothing and suggested that informant information had also been received. He, however, acknowledged that the arresting officer's affidavit merely recorded that the police proceeded to the plaintiff's residence after receiving information from an informant, without setting out any details of the nature, source or reliability of that information, and no further particulars appear from the contemporaneous entries in the investigation diary. He further denied that the delay in holding the identification parade had resulted in prolonged detention, as bail had been granted before the parade took place, and denied any failure in the performance of his duties.

[37] In re-examination he confirmed that the plaintiff had been granted bail on 15 May 2014 and that the identification parade could therefore not have been the reason for any

further detention. He testified that the plaintiff had not disputed ownership of the clothing and that SAP 13 documentation existed, although it had not been filed in the docket.

[38] Mr Rhungulani Mhlongo (“Mhlongo”), the control prosecutor, testified that he enrolled the case on 29 April 2014. He explained that his role was to assess whether prima facie evidence existed against the plaintiff. When he received the docket, it contained the complainants’ statements, the arresting officer’s statement and photographs. The complainants had indicated that they would be able to identify the perpetrators and he therefore instructed that an identification parade be conducted. He confirmed that the clothing that was found in the plaintiff’s room was also a factor considered. Had there been no prima facie case he would have closed the matter or requested further investigation. He later prepared a report after a civil claim had been instituted.

[39] Under cross-examination he testified that he had seen photographs at the first court appearance, even if they were no longer contained in the docket. He remembered the matter clearly as he had had a disagreement with the investigating officer. He described the photographs as unclear and testified that this was the reason he insisted on an identification parade. He relied primarily on the complainants’ anticipated identification evidence. He did not view the actual video footage but had only seen still images. He also did not request to see the clothing as he did not know whether it belonged to the plaintiff. He was unable to comment on whether the jacket in the photograph bore writing.

[40] He testified that prosecutors have a discretion to add charges and confirmed that the plaintiff had later been charged in the district court with unlawful possession of a firearm. He stated that another prosecutor may have had evidence justifying that charge. He confirmed that a prosecutor named Zihlangu had later requested to see the actual video footage. He stated that, in his view, the identification evidence of the complainants would have been sufficient to proceed to trial. It was put to him that the addition of the firearm charge was malicious; he declined to answer. It was also put to him that there was no expert evidence identifying the plaintiff as the person in the video. He responded that such matters would depend on the evidence presented at trial and might require a trial-within-a-trial to determine admissibility.

Evaluation of the evidence

Unlawful arrest

[41] The legal principles governing arrest without a warrant are well established. Section 40(1)(b) of the CPA permits a peace officer to arrest a person whom he reasonably suspects of having committed a Schedule 1 offence. The suspicion must rest on reasonable grounds and must be objectively sustainable. As explained in *Mabona and Another v Minister of Law and Order and Others*,⁴ the question is whether a reasonable person in the position of the arresting officer, possessed of the same information, would have formed the suspicion. In *Minister of Safety and Security v Sekhoto and Another*⁵ the Supreme Court of Appeal emphasised that, even where the jurisdictional facts are

⁴ 1988 (2) SA 654 (SE) at 658E-F.

⁵ 2011 (5) SA 367 (SCA) paras [28] and [39].

present, the discretion to arrest must be exercised rationally and in accordance with constitutional norms.

[42] The lawfulness of the plaintiff's arrest must therefore be assessed with reference to the information that was objectively available to the arresting officer at the time he exercised his discretion to arrest without a warrant. Subsequent developments in the investigation may be relevant to the broader probabilities, but they cannot retrospectively justify an arrest.⁶

[43] The plaintiff's evidence concerning the sequence of events at his residence was, in material respects, coherent and consistent with the objective probabilities. His version was that the police first showed him a photograph depicting a male wearing a purple top and black takkies and accused him of having shot two police officers. Only thereafter did they search the room and seize clothing of a similar colour. This sequence was not contradicted by direct evidence from the arresting officer, who was not called to testify. The absence of such evidence leaves the court without a clear explanation of how the suspicion leading to the arrest was formed. This evidential gap must be weighed against the defendants, who bear the onus of justifying the arrest.

[44] The probabilities suggest that the plaintiff had already been singled out as a suspect before the search of his room was conducted. The arresting officer's statement indicates that the police had received information from an informant and were in possession of still photographs said to have been derived from video footage of the incident. These factors appear to have influenced the suspicion directed at the plaintiff

⁶ See *Scheepers v Minister of Safety and Security 2015 (1) SACR 284 (ECG)*.

prior to the search. The subsequent discovery of clothing of a similar colour then served to reinforce that suspicion rather than to constitute an independent basis for forming it. The plaintiff immediately offered an innocent explanation that the purple top belonged to his girlfriend and differed in length and markings from the garment depicted in the photograph. There is no evidence that this explanation was investigated or that any attempt was made to verify the distinctive features of the clothing.

[45] The chronology of the investigation further undermines the reasonableness of the suspicion. It is common cause that the two injured police officers only furnished their formal witness statements on 25 and 26 April 2014, after the plaintiff had already been arrested. At the time of the arrest there was therefore no identification evidence linking the plaintiff to the offence. No identification parade had yet been conducted. Ballistic analysis had not been performed. The video material had not been subjected to expert comparison. The evidential basis for the arrest was thus confined to unclear still photographs, the discovery of clothing of similar colour and vague references to informer information whose content and reliability were never established.

[46] The objective evidence relating to the firearm also weakens the foundation for suspicion. The firearm recovered during the investigation was found at the residence of the plaintiff's friend, Thebe, and not in the possession of the plaintiff. Eleven 9mm cartridges were recovered at the scene and the projectile surgically removed from Sergeant Sebele was likewise a 9mm bullet. No forensic testing established any link between the firearm recovered at Thebe's residence, which was a 6.35 mm pistol, and the shooting incident. On the available evidence there was therefore no ballistic material connecting the plaintiff to the weapon used in the offence.

[47] The identification evidence of the injured officers must be approached with caution. Both witnesses accepted that lighting conditions at the scene were poor and that their opportunity for observation was brief and occurred in highly stressful circumstances. Their versions contained inconsistencies regarding the sequence of events and the extent to which they were able to observe the suspects before shots were fired. Makhoana was unable to state with certainty what role the plaintiff played, while Sebele expressed confidence in his identification only several months later at an identification parade. That confidence must be weighed against the lapse of time, the trauma of the incident and the absence of contemporaneous identification evidence at the stage when the arrest was effected.

[48] The delay in conducting the identification parade was inadequately explained. The investigating officer attributed it partly to the witnesses not being ready and partly to the plaintiff having been transferred to prison rather than kept in police cells. These explanations do not satisfactorily account for the failure to secure this crucial investigative step within a reasonable time. Identification evidence obtained months after the incident carries an inherent risk of suggestion or reinforcement, particularly where the suspect has already been arrested and discussed in investigative processes.

[49] Finally, the reliance on informer information was vague and unsupported by evidence regarding its content, reliability or verification. The arresting officer's statement merely recorded that the police went to the plaintiff's residence after receiving information from an informant, without furnishing any detail as to its nature, source or reliability. In the absence of evidence demonstrating that such information was assessed and corroborated, it cannot materially strengthen the reasonableness of the suspicion.

[50] When these factors are considered cumulatively, the conclusion is inescapable that the first defendant failed to establish that the arresting officer entertained a reasonable suspicion, based on objectively reasonable grounds, that the plaintiff had committed the offences in question. At the time of the arrest there was no identification evidence from the complainants, no forensic linkage between the plaintiff and the weapon used in the shooting, and no properly substantiated informer information. The suspicion appears to have been formed on the basis of unclear photographic material and the subsequent discovery of clothing of a similar colour, without adequate investigation of the plaintiff's explanation or verification of distinguishing features.

[51] In these circumstances the jurisdictional facts required by s 40(1)(b) were not established. Even if it were to be accepted that some level of suspicion existed, the evidence does not demonstrate that the discretion to arrest was exercised rationally and in accordance with constitutional norms. The defendants, who bear the onus of justifying the warrantless arrest, have failed to discharge that onus. It follows that the plaintiff's arrest was unlawful.

Unlawful detention

[52] The unlawfulness of the arrest does not automatically render the first defendant liable for the entire period of the plaintiff's subsequent detention. The enquiry must be directed at whether the detention that followed was legally and factually caused by the unlawful arrest. In *De Klerk v Minister of Police*⁷ the Constitutional Court confirmed that the arresting authority may, in appropriate circumstances, be held liable for post-

⁷ 2021 (4) SA 585 (CC)

appearance detention where such detention is sufficiently closely connected to the unlawful arrest, including where such detention was reasonably foreseeable.

[53] The plaintiff was arrested without a warrant and remained in police custody until his first court appearance on the Tuesday following his arrest. During this period he was detained in police cells in conditions he described as unhygienic and overcrowded. There is no evidence that any new incriminating material emerged between the time of his arrest and his first appearance which could independently justify his continued detention.

[54] At his first appearance bail was opposed and he was remanded in custody. The evidence shows that bail was opposed primarily on the basis of the seriousness of the charges, the alleged strength of the State case and concerns that the plaintiff might evade trial, is part of a gang, or interfere with the investigation. These considerations were founded on the same evidential material that had informed the decision to arrest.

[55] In this regard, it is relevant that a reasonable arresting officer in these circumstances would have foreseen the real possibility that a person arrested on such serious charges would be remanded in custody after his first appearance and not immediately considered for bail. The arresting officer must therefore be taken to have foreseen that the plaintiff would likely remain in custody beyond his first court appearance as a result of the arrest.

[56] The plaintiff remained in custody until 15 May 2014, when bail was eventually granted. Although the identification parade had by then still not been conducted, the delay in holding that parade cannot be regarded as the sole cause of his continued detention.

The evidence indicates that the postponements were also linked to the ordinary processes of opposing bail in respect of serious offences.

[57] In the present matter the arrest was not followed by the emergence of strong independent evidence implicating the plaintiff. The investigation continued to depend largely on delayed identification evidence and inconclusive forensic material. In these circumstances the plaintiff's continued detention cannot be said to have resulted from new and independent grounds arising after his first appearance, but remained closely connected to the unlawful arrest.

[58] On the totality of the evidence, and applying the principles articulated in *De Klerk*, the unlawful arrest remained a sufficiently direct and proximate cause of the plaintiff's detention until his release on bail on 15 May 2014. The first defendant has failed to discharge the onus of justifying that detention. They are accordingly liable for damages arising from the plaintiff's detention for that period.

Malicious prosecution

[59] The plaintiff further claims damages on the basis that he was maliciously prosecuted. To succeed with such a claim he must establish that the defendants set the law in motion by instituting or continuing criminal proceedings against him; that the prosecution was instituted without reasonable and probable cause; that it was actuated by malice; and that the proceedings terminated in his favour.⁸

⁸ See *Minister for Justice and Constitutional Development & Others v Moleko* 2009 (2) SACR 585 (SCA) para 8 ("*Moleko*"); *Minister of Safety and Security N.O & another v Schubach* (437/13) [2014] ZSCA 216 (1 December 2014).

[60] It is not in dispute that criminal proceedings were instituted against the plaintiff and that he was required to attend court on numerous occasions. It is also common cause that the charges were provisionally withdrawn on 12 March 2015. The central enquiry is therefore whether the prosecution was pursued without reasonable and probable cause and whether it was actuated by malice.

[61] The evidence shows that, at the stage when the matter was first enrolled, the prosecuting authority relied on the statements of the injured police officers indicating that they would be able to identify the perpetrators, still photographs said to have been derived from video footage which were believed to link the plaintiff to the incident, and information that clothing found in the plaintiff's possession corresponded with that worn by one of the suspects depicted in the photographs. The control prosecutor testified that, on this basis, he considered that a *prima facie* case existed and that further investigative steps, including the holding of an identification parade and the obtaining of ballistic and expert evidence, were necessary.

[62] It is correct that subsequent developments weakened the State's case. The identification parade was only conducted several months after the incident. Facial recognition analysis later indicated that no reliable comparison could be made from the available images because of their poor quality. The firearm recovered during the investigation was not found in the plaintiff's possession and there was no forensic evidence linking that firearm to the shooting incident. These factors inevitably diminished the strength of the prosecution.

[63] However, the absence of reasonable and probable cause must be clearly established. As explained in *Moleko*,⁹ the question is not whether the prosecution ultimately proved to be sustainable, but whether a reasonable prosecutor, possessed of the information available at the time, would have considered that there were reasonable prospects of securing a conviction. The evidence indicates that the prosecuting authority believed that the anticipated identification evidence of the complainants would provide the necessary linkage between the plaintiff and the offence. The decision to proceed pending further investigation cannot, without more, be characterised as unreasonable.

[64] The requirement of malice entails more than proof that the prosecution was misguided or even negligent.¹⁰ *Animus iniuriandi* requires not only an intention to injure, but also consciousness of wrongfulness. The defendant must have directed his or her will to instituting or continuing the prosecution in the awareness that reasonable grounds for doing so were absent, or at least have foreseen that possibility and nevertheless persisted, reckless as to the consequences. An honest belief in the guilt of the accused, even if mistaken, excludes the existence of *animus iniuriandi*. Negligence, even gross negligence, does not suffice.

[65] On the evidence, the plaintiff has not established that the prosecutors acted with such state of mind. While aspects of the investigation and prosecution may be criticised, particularly in relation to delays and the weakness of the evidential material, there is no basis to conclude that the prosecutors were aware that there were no reasonable grounds for the prosecution, or that they acted reckless as to that possibility. The evidence rather

⁹ *Moleko supra* paras [62]-[65].

¹⁰ *Moleko supra*.

indicates that they believed that identification evidence would ultimately sustain the charges.

[66] The fact that the charges were provisionally withdrawn does not, without more, establish that the prosecution was wrongful. The evidence suggests that the withdrawal occurred pending further investigation rather than because the case was recognised to have been baseless from the outset.

[67] In the result, the plaintiff has not discharged the onus of proving that the prosecution was instituted or continued without reasonable and probable cause or that it was actuated by malice. The claim for malicious prosecution must therefore fail.

Quantum

[68] The plaintiff seeks damages in the sum of R500 000 for unlawful arrest and detention. The purpose of an award of damages in such matters is to afford solatium for the injury to dignity, personal freedom and emotional well-being resulting from the deprivation of liberty. Awards must be fair to both parties and should reflect comparable awards in broadly similar circumstances, while recognising that each case turns on its own facts.

[69] The general approach in the assessment of damages for unlawful arrest and detention was discussed in the matter of *Minister of Safety and Security v Tyulu*,¹¹ where the Supreme Court of Appeal held as follows:

¹¹ 2009 (5) SA 85 (SCA) paragraph 26 at 93D-F.

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) (SCA) ([2009] ZASCA 39) paras 26–29).”

[70] The plaintiff was deprived of his liberty from the date of his arrest until his release on bail on 15 May 2014. During this period he was initially detained in police cells in conditions he described as dirty and overcrowded, with limited bedding and malfunctioning sanitary facilities. He was thereafter transferred to prison where he slept on the floor with a single blanket. There was no evidence of assault or unusually harsh treatment during his incarceration, but the conditions were plainly uncomfortable and degrading.

[71] The plaintiff testified that the arrest and detention caused him emotional distress and affected his standing within his family and community. At the time he was self-employed, washing taxis, and supported his partner and children. His incarceration

inevitably disrupted his ability to earn an income and to fulfil his responsibilities towards his dependants. He was also confronted with serious charges of attempted murder, which carried the potential for severe consequences.

[72] The period of detention was not insignificant. However, it must also be recognised that the detention followed a court order refusing bail at the first appearance and that the plaintiff was released on bail within a matter of weeks. The detention did not extend over many months and there was no evidence of lasting psychological injury or reputational harm of an exceptional nature.

[73] Having regard to all the relevant circumstances, including the duration of the detention, the conditions of incarceration, the seriousness of the charges and the need for consistency with comparable awards, an amount of R400 000 constitutes fair and reasonable compensation for the plaintiff's unlawful arrest and detention.

[74] In the result the following order is made:

1. The first defendant is ordered to pay the plaintiff damages in the amount of R400 000 (four hundred thousand rand) arising from the plaintiff's unlawful arrest and detention.
2. The aforesaid amount shall bear interest at the prescribed legal rate from date of demand to date of final payment.
3. The plaintiff's claim for malicious prosecution is dismissed.
4. The first defendant is ordered to pay the plaintiff's costs of suit on Scale B.


L. WINDELL**JUDGE OF THE HIGH COURT****GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 March 2026.

APPEARANCES

For the plaintiff:	S Maziba
Instructed by:	Nemakanga Attorneys
For the defendants:	N Makopo
Instructed by:	State Attorneys Johannesburg
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Heads of Argument filed:	4 December 2025 and 23 January 2026
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