

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

CASE NUMBER: 29325/2017

31 March 2026

DATE

SIGNATURE

In the matter between:

COMMENT RAYMOND KWANELE KUMALO

PLAINTIFF

And

THE MINISTER OF POLICE

FIRST DEFENDANT

THE NATIONAL PROSECUTING AUTHORITY

SECOND DEFENDANT

JUDGMENT

WINDELL J:

[1] This is an action for damages arising from the plaintiff's arrest and detention on 8 December 2015 and his subsequent prosecution. The plaintiff alleges that the arrest and detention were unlawful and that the prosecution was malicious. The plaintiff claims compensation in the sum of R1 000 000 in respect of unlawful arrest and detention and R3 000 000 in respect of malicious prosecution.

[2] It is common cause that the plaintiff was arrested on 8 December 2015 for unlawful possession of a firearm and ammunition. The circumstances and location of the arrest are, however, in dispute.

[3] The plaintiff testified that at approximately 12h00 midday he was walking along Lang Street in Rosettenville, when he was stopped by occupants of an unmarked motor vehicle. He was informed that he was suspected of involvement in a robbery in Eastgate. The occupants were later identified as police officers.

[4] He stated that he had been returning from the shops after purchasing toiletries and denied that he had been driving any motor vehicle or had been in possession of a firearm. He was forced into the vehicle and taken to Moffatview Police Station, where he was detained in poor conditions. While detained at the police station, he was assaulted and "tubed" by police officers. He was only released approximately ten months later, on 17 October 2016, when he was acquitted at trial. He further testified that he applied for bail on numerous occasions, but that it was refused.

[5] Sergeant Bongani Ngobe (“Ngobe”) testified that on 8 December 2015 at approximately 16h00 he and Warrant Officer Benedict Bikizana (“Bikizana”), both detectives were on duty. They were not in uniform and were travelling in an unmarked state vehicle along Augusta Road towards Rosettenville when they observed a black VW Polo overtaking approximately ten vehicles at high speed. They regarded this as suspicious and followed the vehicle at speed.

[6] According to Ngobe, the vehicle stopped in the middle of the road at the corner of Third Street and Ben Alder Road, where two males alighted and began to run. One ran towards nearby houses and jumped over a wall, while Ngobe pursued the other, later identified as the plaintiff, over a distance of approximately 15 metres. During the chase, Ngobe observed that the plaintiff was carrying an object in his hand, which he dropped while fleeing. Ngobe did not immediately inspect the object, as he was focused on apprehending the plaintiff, whom he testified he never lost sight of.

[7] Ngobe testified that, after apprehending the plaintiff, he returned with him to the place where the object had been dropped, approximately five metres away, and established that it was a firearm, a pistol. He picked it up with his bare hands and showed it to Bikizana.

[8] The plaintiff was then placed under arrest for unlawful possession of an unlicensed firearm and ammunition, informed of his rights, and taken to Moffatview Police Station. The firearm was placed in a sealed forensic evidence bag and booked into the SAP13 register. Bikizana drove the VW Polo to the police station, while Ngobe transported the

plaintiff in the state vehicle. The plaintiff was subsequently transferred to Johannesburg Central Police Station for detention.

[9] Warrant Officer Bikizana testified that he observed the VW Polo driving at high speed and that he and Ngobe followed the vehicle. He saw the plaintiff alight from the vehicle and run away, and that during the pursuit the plaintiff dropped an object which was subsequently identified as a firearm.

[10] Bikizana testified that he and Ngobe jointly decided to arrest the plaintiff for possession of an unlicensed firearm. He completed the notice of rights which the plaintiff signed. He drove the VW Polo to the police station where it was secured pending further investigation. He denied that the plaintiff was assaulted.

[11] Under cross-examination Bikizana acknowledged that in earlier criminal proceedings he had referred to the firearm as a revolver but explained that he had not refreshed his memory before testifying and maintained that the plaintiff had dropped a firearm which he identified as a pistol.

[12] Constable Mabunda ("Mabunda") testified that he received the plaintiff upon his transfer to Johannesburg Central Police Station on the evening of the arrest. He recorded the plaintiff's details in the detention registers. He testified that he did not observe any injuries on the plaintiff and that no complaint of assault was made to him at the time.

[13] Detective Mpai ("Mpai") testified that he was the investigating officer assigned to the matter and that the docket was allocated to him on 9 December 2015. He explained that, on 8 December 2015, the plaintiff had initially been charged only with possession of

an unlicensed firearm and ammunition, as the motor vehicle involved had not yet been reflected on the system as stolen.

[14] Upon receiving the docket, Mpai examined it and verified the particulars of the vehicle by checking the chassis and VIN numbers on the system. He then discovered that the vehicle had been reported as hijacked the previous day under Cleveland case number 83/12/2015, with the time of the hijacking recorded as approximately 15h50. On the basis of this information, the plaintiff was linked to that matter and further charges relating to the motor vehicle were considered. He confirmed that the vehicle was subsequently returned to its owner and that the plaintiff was later charged with offences relating to the theft or robbery of the vehicle.

[15] Mpai further testified that the complainants in the Cleveland hijacking matter were foreign nationals who, after the recovery of the vehicle, were unwilling to cooperate with the investigation or to testify in court. He stated that attempts were made to subpoena them, but they were unwilling to engage with the process. The investigation diary confirms that subpoenas were issued.

[16] Further attempts were then made to trace and secure the attendance of the witnesses, including contacting them telephonically and seeking assistance from community policing structures. He stated that the witnesses did not answer their phones or indicated that they would not be available, and that when he visited the address they had provided, they were no longer residing there. Despite assistance sought from local police, they could not be traced.

[17] The failure to secure the attendance of the witnesses ultimately resulted in the withdrawal of the charge relating to the robbery/hijacking of the motor vehicle. The plaintiff was subsequently acquitted of the remaining charges at trial. The evidence before this court reflects that there were discrepancies in certain aspects of the police evidence, including the description of the firearm by Ngobe and Bikizana.

[18] With the evidence thus concluded, the issues are:

- (a) Whether the arrest of the plaintiff without a warrant on 8 December 2015 was lawful.
- (b) If the arrest was lawful, whether the plaintiff's subsequent detention — both prior to and after his first court appearance — was nevertheless unlawful and attributable to the defendants.
- (c) Whether the second defendant is liable for damages for malicious prosecution.
- (d) In the event that liability is established, the appropriate quantum of damages.

[19] It is trite that an arrest and detention constitute an interference with the fundamental right to liberty and are prima facie wrongful. The onus rests on the arresting authority to justify the deprivation of liberty by establishing compliance with the jurisdictional requirements of the empowering statutory provision.¹

[20] Section 40(1) of the Criminal Procedure Act 51 of 1977 (the CPA) permits a peace officer to arrest a person without a warrant in certain defined circumstances. These include where a person commits or attempts to commit an offence in the presence of the

¹ *Sigaba v Minister of Defence & Police* 1980 (3) SA 535 Tk at 544H - 545A; *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) 818G - H; *Minister of Safety & Security v Sekhoto & another* 2011 (5) SA 367 (SCA) para 6.

peace officer, or where the officer reasonably suspects that the person has committed an offence referred to in Schedule 1.

[21] The existence of a reasonable suspicion must be assessed objectively. The question is whether a reasonable person in the position of the arresting officer and possessed of the same information would have formed the suspicion that the arrestee had committed a Schedule 1 offence. The suspicion need not be based on evidence sufficient to secure a conviction, but it must rest on reasonable grounds.² Even where the jurisdictional facts for arrest are present, the arresting officer retains a discretion whether to effect an arrest.

[22] Counsel for the plaintiff relied on authorities such as *Louw v Minister of Safety and Security*³ and *Gellman v Minister of Safety and Security*⁴ to contend that, in addition to the jurisdictional requirements of s 40(1), a further consideration arises, namely whether arrest was a measure of last resort and whether less invasive means, such as a summons, ought to have been employed.

[23] That debate has, however, been authoritatively resolved by the Supreme Court of Appeal in *Sekhoto*,⁵ which made it clear that the jurisdictional requirements for a lawful arrest are limited to those set out in s 40(1), and that there is no additional “fifth jurisdictional fact”. While a peace officer retains a discretion whether to arrest, the

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

³ 2006 SACR 178 (T). See also *Charles v Minister of Safety and Security* Case No 17499/2001 Witwatersrand Local Division, where Goldblatt J declined to follow the decision in *Louw*.

⁴ 2008 (1) SACR 446 (WLD).

⁵ *Minister of Safety & Security v Sekhoto & Another supra*.

exercise of that discretion does not introduce a separate requirement that arrest be justified as a last resort. The enquiry remains whether the statutory jurisdictional facts were present and whether the discretion was exercised lawfully.

[24] Once an arrested person has been brought before a court within the period prescribed by s 50 of the Act and the court orders further detention, the subsequent deprivation of liberty ordinarily flows from judicial authority. In such circumstances liability will not attach to the police unless it is shown that they acted unlawfully in bringing about the continued detention, for example by misleading the court or withholding material information.⁶

[25] A claim for malicious prosecution requires proof that the defendant set the law in motion, acted without reasonable and probable cause, acted with malice (*animus iniuriandi*), and that the prosecution failed.⁷ The absence of reasonable and probable cause is determined with reference to the information available to the prosecutor at the time the decision to prosecute was taken or persisted in.

[26] The plaintiff's case is that he was arrested arbitrarily while walking in the street and that the arresting officers fabricated a version implicating him in the possession of a firearm. The defendants, on the other hand, rely on the evidence of the arresting officers that they observed the plaintiff driving a motor vehicle at high speed, that he alighted and

⁶ *De Klerk v Minister of Police* 2021 (4) SA 585 (CC).

⁷ 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).

attempted to flee, and that he dropped an object which was immediately discovered to be a firearm.

[27] In resolving the factual disputes, the approach set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*⁸ is applicable. The court must consider the credibility of the various factual witnesses, the reliability of their evidence, and the probabilities. These factors are interrelated and must be weighed together in determining whether the party bearing the onus has discharged it.

[28] The version of the arresting officers was detailed, broadly consistent and supported by contemporaneous documentary records relating to the seizure and registration of the firearm, the detention of the plaintiff, and the recovery of the motor vehicle later linked to a robbery in Eastgate.

[29] Ngobe and Bikizana's evidence corroborated each other in all material respects: both observed the plaintiff driving the VW Polo at high speed, both testified that he alighted and attempted to flee, and both confirmed that during the pursuit he dropped an object which was recovered and identified as a firearm. This corroboration on the central events lends considerable weight to their evidence.

[30] By contrast, the plaintiff's version was marked by material inconsistencies regarding the date and circumstances of his arrest, the number of officers involved, and the events preceding his detention.

⁸ 2003 (1) SA 11 (SCA) 14I-15E

[31] These inconsistencies were not satisfactorily explained and are material. In relation to the circumstances of his arrest, the plaintiff initially testified that four police officers apprehended him, stating that he was certain of this because four vehicle doors opened. Under cross-examination, however, he altered his version and testified that only three officers were involved.

[32] There were also inconsistencies regarding the date of his arrest. The plaintiff's evidence regarding the date of his arrest was inconsistent and unconvincing. He initially testified that he was arrested on 5 December 2015, but when confronted with the pleaded date of 8 December 2015, he sought to reconcile this by suggesting that he had been "taken" earlier and only formally arrested later. This distinction was not borne out by any objective evidence and appeared contrived.

[33] The plaintiff's evidence concerning his bail applications was vague and largely based on what he claimed to have been told by his attorney. He was unable to provide any coherent account of the proceedings or the basis upon which bail was refused. This further undermines the reliability of his evidence.

[34] The plaintiff further testified that he had not been informed of his constitutional rights upon arrest and that he was only processed after two days. This was inconsistent with his concession that he had signed a notice of rights on 8 December 2015, which recorded that his rights had been explained to him.

[35] Similarly, while he denied any knowledge of a firearm, he conceded that he had been informed at the time of his arrest that he was being arrested for possession of an unlicensed firearm, as reflected in the notice of rights which he signed.

[36] Despite these inconsistencies, the plaintiff criticised the evidence of the arresting officers on the basis that Ngobe picked up the firearm with his bare hands and that there were discrepancies in the description of the firearm, Ngobe referring to it as a pistol while Bikizana described it as a revolver. It was submitted that these shortcomings render the version of the police improbable and unreliable.

[37] These criticisms must be considered in their proper context. The fact that the firearm was handled without gloves and that no fingerprint evidence was obtained may reflect deficiencies in the subsequent investigation. However, the lawfulness of an arrest does not depend on the quality or completeness of the investigation that follows. The enquiry is whether, at the time of the arrest, the arresting officer had reasonable grounds to suspect that the plaintiff had committed an offence. The absence of forensic evidence does not negate what the arresting officer claims to have observed.

[38] As to the discrepancy in the description of the firearm, this is not, in my view, of such a nature as to render the core of the police version unreliable. The essential feature of the evidence — namely that the plaintiff was seen discarding an object which was immediately identified as a firearm — remained consistent. The difference in terminology between a “revolver” and a “pistol”, while not ideal, does not detract from the central fact that both witnesses described the object as a firearm recovered at the scene.

[39] In the result, the plaintiff’s evidence is not reliable and is rejected where it conflicts with that of the defendants, whose evidence is accepted as credible.

[40] Against that background, the probabilities do not favour the plaintiff’s version that he was arbitrarily apprehended while walking in the street and falsely implicated by the

police in offences involving the possession of a firearm and the use of a motor vehicle. Such a version would require the court to accept that the police, without any apparent reason, fabricated a case against an unknown individual and created supporting evidence, which is inherently improbable and finds no support in the available evidence.

[41] The objective evidence further undermines the plaintiff's version. The Cleveland docket reflects that the black VW Polo was hijacked at approximately 15h50, shortly before Ngobe and Bikizana encountered the vehicle on Augusta Road, and that it was subsequently brought to Moffatview Police Station following the plaintiff's apprehension. The plaintiff's version does not explain how he came to be associated with that vehicle at the relevant time.

[42] The plaintiff's suggestion that he was arrested in connection with a robbery in Eastgate is inconsistent with the evidence. The arresting officers were stationed at Moffatview and were not investigating any such robbery, which would ordinarily fall within the jurisdiction of other police stations. It is also common cause that, at the time of the arrest, they were unaware that the vehicle had been hijacked. His further evidence that complainants attended court and exculpated him was contradicted by Mpai, who testified that the complainants were unwilling to cooperate and did not attend court, resulting in the withdrawal of the charges. These features further detract from the reliability of the plaintiff's version.

[43] On those facts, as accepted, Ngobe observed the plaintiff in flight and saw him discard an object which, upon immediate inspection, proved to be a firearm. In those circumstances, the plaintiff was apprehended in the course of conduct constituting an

offence committed in the presence of a peace officer, and the jurisdictional requirements of s 40(1)(a) were satisfied. In any event, those facts provided reasonable grounds for suspecting that the plaintiff had committed a Schedule 1 offence relating to the unlawful possession of a firearm.

[44] In those circumstances, the plaintiff has failed to establish that the arrest was unlawful. The jurisdictional requirements for a warrantless arrest were present, and a discretion to arrest arose. There is no basis to conclude that Ngobe failed to exercise that discretion properly or that his decision to arrest was arbitrary or unreasonable.

[45] The plaintiff was brought before court within approximately 48 hours of his arrest. Thereafter his continued detention resulted from orders made by the magistrate dealing with his bail application and subsequent remands. This was particularly so in light of the fact that the charges fell within Schedule 6. That breaks the chain of causation unless wrongful conduct by the defendants is established.

[46] It was contended on behalf of the plaintiff that Mpai did not obtain further information linking the plaintiff to the alleged hijacking, did not secure fingerprint or other forensic evidence, and did not conduct an identification parade. On this basis, it was submitted that there was no evidential foundation to connect the plaintiff to the Cleveland case.

[47] While these criticisms may point to shortcomings in the manner in which the investigation was conducted, they do not, without more, render the arrest or subsequent detention unlawful. Mpai only became involved after the arrest had already been effected,

and his subsequent investigative steps, or lack thereof, cannot retroactively invalidate an otherwise lawful arrest.

[48] To the extent that the criticism is directed at the addition of further charges, the evidence shows that Mpai linked the vehicle to a hijacking reported earlier on the same day. In those circumstances, there was a rational basis to investigate and provisionally pursue charges arising from that information. The fact that those charges were ultimately not pursued at trial does not establish that they were instituted without reasonable and probable cause at the time.

[49] In the absence of evidence that Mpai acted mala fide or without any factual basis, the alleged deficiencies in the investigation do not found liability on the part of the defendants.

[50] The plaintiff also alleged that he was assaulted and “tubed” by members of the police following his arrest. This allegation was denied by the defendants. The plaintiff did not produce any objective medical evidence or contemporaneous complaint supporting the allegation. In addition, the evidence of Mabunda was that no injuries were observed when the plaintiff was received at Johannesburg Central Police Station.

[51] Having regard to the inconsistencies in the plaintiff’s evidence and the absence of corroboration, the allegation of assault is not established on a balance of probabilities.

[52] The plaintiff contends that the second defendant is liable for malicious prosecution on the basis that the prosecution was instituted and persisted in without reasonable and

probable cause and with the requisite intention to injure him. It is submitted that the prosecution set the law in motion and failed, as the plaintiff was ultimately acquitted.

[53] The plaintiff contends that the prosecutor did not hold an honest belief, based on objective facts, that he was probably guilty. In this regard, reliance is placed on the absence of forensic evidence linking him to the firearm, including the lack of fingerprint or DNA evidence, as well as alleged contradictions in the evidence of the state witnesses.

[54] It is further contended that the prosecution acted improperly in opposing bail on the basis of the seriousness of the charges, with the result that the plaintiff remained in custody for approximately nine months prior to his acquittal. The plaintiff maintains that there was no evidence that he posed a flight risk and that the prosecution ought to have supported his release on bail, alternatively subject to appropriate conditions.

[55] The plaintiff also relies on the fact that the charge of robbery, which formed part of the basis for opposing bail, was not ultimately pursued at trial. It is contended that, despite weaknesses in the evidence — including the inability to secure the attendance of certain witnesses and the absence of evidence linking the plaintiff to the alleged hijacking — the prosecution nevertheless proceeded. On this basis, it is alleged that the prosecution lacked reasonable and probable cause and acted with malice.

[56] The plaintiff did not adduce evidence to show that the police or the prosecution misled the court, withheld exculpatory information or otherwise acted improperly in securing his continued detention. His contention that he ought to have been released on bail amounts in substance to a challenge to the correctness of the bail decisions taken by the criminal court. Such detention cannot, in the absence of wrongful conduct on the part

of the defendants, be attributed to them. The claim based on unlawful detention must therefore fail.

[57] It bears emphasis that the charges against the plaintiff, which included robbery with aggravating circumstances, fell within the ambit of Schedule 6 to the Criminal Procedure Act. In terms of s 60(11)(a) of the Act, an accused charged with a Schedule 6 offence is not entitled to be released on bail unless he or she adduces evidence which satisfies the court that exceptional circumstances exist which, in the interests of justice, permit such release. The onus accordingly rested on the plaintiff to place such evidence before the court.

[58] In that context, the decision whether to grant or refuse bail lies within the discretion of the court seized with the criminal proceedings. In the present matter, the plaintiff's continued detention followed upon judicial determinations made during the bail proceedings. In the absence of evidence that the police or the prosecution misled the court or otherwise acted improperly, the outcome of the bail application cannot be attributed to the defendants.

[59] The plaintiff was acquitted of the charges against him. However, acquittal does not by itself establish malicious prosecution. The evidence demonstrates that, at the time the prosecution was instituted, there existed a prima facie case linking the plaintiff to the alleged offences. A firearm had been recovered in circumstances implicating him, ballistic testing had been undertaken, and investigations were conducted regarding the plaintiff's connection to a recently hijacked motor vehicle. The fact that certain witnesses were later unavailable does not establish the absence of reasonable and probable cause.

[60] There is likewise no evidence that the prosecution was actuated by malice or improper motive. The plaintiff has accordingly failed to establish the absence of reasonable and probable cause or the existence of malice. The claim for malicious prosecution cannot succeed.

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

1. The plaintiff's claims against the first and second defendants are dismissed.
2. The plaintiff is ordered to pay the costs of suit, including the costs consequent upon the employment of counsel.



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 31 March 2026.

APPEARANCES

For the plaintiff:

BZ Neshavi

Instructed by: Bongani Dyani Attorneys

For the defendants: KO Moodley

Instructed by: State Attorneys

Date of hearing: 12-13 November 2024 and 3-5 December 2025

Heads of Argument filed: 15 January 2026

Date of judgment: 31 March 2026