REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A102445/2024

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES

18 March 2026 [redacted]

DATE SIGNATURE

In the matter between:

DANIEL LETHENA MOTLOUNG First Appellant

EDWARD STRIKE THOKOANE N.O. Second Appellant
(on behalf of the Estate Late Pitsi Solomon Thokoane)

and

THE MINISTER OF POLICE First Respondent

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

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JUDGMENT

WANLESS J (WINDELL J and YACOOB J concurring)

Introduction

[1] This is an appeal against the whole of the judgment and order of Halgryn AJ *(the court a quo)* delivered on 16 August 2023. In that judgment, the court *a quo* dismissed the Appellants' claims for damages arising from their alleged unlawful arrest, unlawful detention and malicious prosecution, with costs.

[2] The Appellants are Daniel Lethena Motloung *("the First Appellant")* and Edward Strike Thokoane N.O*.,* cited in his representative capacity as executor of the estate of the late Pitsi Solomon Thokoane *("Solomon"),* who was originally cited as the Second Appellant. Solomon passed away on 19 September 2020 and the executor was substituted by order of this Court dated 31 May 2022. For convenience, Solomon will continue to be referred to as *"the Second Appellant".*

[3] The First Respondent is the Minister of Police, cited in the official capacity as the executive authority responsible for the South African Police Service *("SAPS")* and the Second Respondent is the National Director of Public Prosecutions, cited in the official capacity as the head of the national prosecuting authority.

[4] This matter has a lengthy history. The action was initially instituted in 2016 and the trial was heard over several days, culminating in the judgment of the court *a quo* on 16 August 2023. As set out above, the court *a quo* dismissed all of the Appellants' claims. On 3 May 2024, the court *a quo* refused the Appellants' application for leave to appeal, with costs. Thereafter, the Appellants petitioned the Supreme Court of Appeal *("the SCA")* for leave to appeal. On 8 August 2024, the SCA granted leave to appeal to the Full Court of the Gauteng Division, Johannesburg, and ordered that the costs of the application for leave to appeal to this Court and the court *a quo,* be costs in the appeal.

[5] The Appellants have instituted an application for condonation for the late prosecution of the appeal. This condonation application falls to be determined before this Court considers the merits of the appeal.

Background

[6] The relevant facts before the court *a quo* are largely common cause or not seriously in dispute. Both Appellants were reservist police officers attached to the Meyerton Police Station prior to their arrest. During the night of 4 to 5 November 2013, a number of police officers embarked on a joint operation based on information from an informer about business robberies that had occurred in the Evaton area. At approximately midnight, the police team arrived at the residence of one Happy Maseko *("Maseko"),* where she resided with her partner, Samuel Mphuthi Moeketsi *("Moeketsi").*

[7] Upon arrival, Moeketsi pointed out a number of illegal firearms found under the bed, including a Vector Rifle and two 9mm pistols. Moeketsi informed the police that the firearms had been brought to the house by the Second Appellant. Moeketsi was arrested at the scene.

[8] Acting on this information, police officers proceeded to the residence where the Second Appellant was staying with his girlfriend. The officers entered the premises and informed the Second Appellant that he had been implicated in the business robberies and in the *"delivery"* of illegal firearms. He denied the allegations and stated that he had visited Moeketsi's residence to borrow money. Constable Khabo arrested the Second Appellant without a warrant for possession of unlicensed firearms.

[9] Captain Fouche, an experienced police officer, was requested to investigate the matter. He arranged for Maseko to be brought to the Meyerton Police Station for questioning. On 6 November 2013, whilst walking with Captain Fouche in the yard of the police station, Maseko spontaneously identified the First Appellant, who was seated as a passenger in a police vehicle entering the yard. Maseko informed Captain Fouche that the First Appellant was the driver of the vehicle that had brought the firearms to her residence on the night of 4 November 2013.

[10] Captain Fouche approached the First Appellant and informed him of the allegations. He also advised the First Appellant that the tracking device fitted to the police vehicle confirmed that the vehicle had been at Maseko's residence on

the relevant date. The First Appellant admitted being at the premises but maintained that he was there to borrow money. Captain Fouche arrested the First Appellant without a warrant for unlawful possession of firearms.

[11] Both appellants were brought to court within 48 hours of their arrest. The matter was enrolled by one Coetzee, a senior public prosecutor with over 30 years' experience, who assessed the contents of the docket, including the statements of Maseko and the arresting officers, as well as the tracking report. He determined that there was sufficient evidence linking the Appellants to the offences and accordingly enrolled the matter.

[12] The Appellants were detained pending trial. The Second Appellant abandoned his bail application. The First Appellant's initial bail application was refused but he was granted bail at a second application on 30 July 2014 after Maseko recanted her earlier statements. The criminal trial proceeded and, on 17 February 2015, both Appellants were discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 *("the CPA").*

[13] In the subsequent civil action, the Appellants claimed damages for unlawful arrest, unlawful detention and malicious, *alternatively,* negligent, prosecution. The court *a quo* dismissed all these claims with costs, finding that the arrests were lawful; that the prosecutors had acted reasonably and that there was no basis for a finding of malicious or negligent prosecution.

<u>Application for condonation</u>

[14] The factual matrix of the condonation application is set out in the founding affidavit deposed to by the First Appellant and the confirmatory affidavit of Peter Jordi, the Appellants' attorney of record.

[15] Leave to appeal to the Full Court was granted by the SCA on 8 August 2024. In terms of Rule 49(6)(a) of the Uniform Rules of Court, the Appellants were required to make a written application to the Registrar for a date for the hearing of the appeal. The Appellants delivered their application for condonation approximately four months later, on 9 December 2024. They concede that the

appeal was not prosecuted timeously and seek condonation for the delay. Whilst the Notice of Motion in the condonation application refers to a delay of *"around 7 days",* this is an understatement. The delay was in fact substantially longer, extending from August 2024 to December 2024. However, the Appellants explain that the application for a date for the hearing of the appeal was delivered simultaneously with the condonation application.

[16] The explanation for the delay is as follows:

16.1. On 15 August 2024, the Appellants' attorney received an email from correspondent attorneys in Bloemfontein indicating that leave to appeal had been granted. Advocate Kerr-Phillips, who had conducted the trial and drafted the applications for leave to appeal, was unavailable, and on 27 August 2024, he instructed Advocate van Rooyen to draft the necessary notice of appeal to this Court.

16.2. Advocate van Rooyen required time to familiarise himself with the intricacies of the matter. He provided a draft notice of appeal on 8 September 2024, which was served and filed on 9 September 2024.

16.3. An electronic copy of the appeal record was received on 1 October 2024. The attorney then had to print, collate, index, paginate and arrange for the copying and binding of the record.

16.4. On 4 October 2024, Advocate Kerr-Phillips was instructed to draft the Appellants' Practice Note, Heads of Argument and list of authorities. However, Advocate Kerr-Phillips was engaged in numerous other matters between October and December 2024, as detailed in the Appellants' Founding Affidavit.

16.5. On 6 November 2024, the Appellants' attorney instructed Advocate van Rooyen to prepare the Heads of Argument, as Advocate Kerr-Phillips remained unavailable. Advocate van Rooyen was also engaged in numerous matters during November and December 2024, as set out in the founding affidavit.

16.6. The Heads of Argument and the condonation application were finalised on 9 December 2024.

[17] The Appellants submit that the grounds of appeal are numerous and intricate, requiring careful analysis, and that the delay was not caused by them personally but by the unavailability of counsel and the complexities of the matter. They contend that they are *bona fide* in pursuing the appeal and that the matter is of great importance both to them and the community.

[18] The Respondents oppose the condonation application, arguing that the explanation is inadequate and that the Appellants have not demonstrated reasonable prospects of success on appeal. They point out that the Appellants were represented by the Wits Law Clinic, which has multiple counsel available to brief, and that the delay could have been avoided.

[19] The legal principles governing condonation applications are well-established. In *Van Wyk v Unitas Hospital and Another* (*Open Democracy Advice Centre as Amicus Curiae),*[1] the Constitutional Court held that condonation is not a mere formality but is to be granted when it is in the interests of justice to do so. The factors to be considered include, *inter alia,* the extent of the delay; the explanation for the delay; the prospects of success; the importance of the matter; the prejudice to the parties and the overall interests of justice. In the matter of *Federation of Governing Bodies of South African Schools (FEDSAS) v MEC for Education, Gauteng*,[2] the Constitutional Court reiterated that the standard for determining an application for condonation is the interests of justice. A reasonable and acceptable explanation for the delay must be proffered and the court must consider all relevant circumstances, including the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice; the reasonableness of the explanation and the importance of the issues to be raised.[3]

[20] Applying these principles to the present matter, this Court is satisfied that condonation should be granted. Whilst the delay is more substantial than the seven days claimed by the Appellants, the explanation for the delay is, in the opinion of this Court, reasonable and acceptable. The Appellants are laypersons

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[1] 2008 (2) SA 472 (CC) at paragraph [20].
[2] 2016 (4) SA 546 (CC) at paragraph [44].
[3] See also *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at paragraph [22].

who are dependent on legal representatives provided by the Wits Law Clinic. Also, the matter is fairly complex, involving numerous grounds of appeal and legal issues. The unavailability of counsel who was intimately familiar with the matter necessitated the involvement of other counsel who required time to prepare. The Appellants have demonstrated that they were diligent in pursuing the appeal, albeit with some delays occasioned by circumstances beyond their control.

[21] The Respondents have not demonstrated that they will suffer any significant prejudice if condonation is granted, beyond the usual prejudice of having to meet the appeal. Conversely, the Appellants would suffer substantial prejudice if they were denied the opportunity to have their appeal heard, given, *inter alia,* the importance of the matter to them.

[22] The prospects of success on appeal, whilst ultimately found to be lacking, are not so hopeless as to render the granting of condonation an exercise in futility. Had they been, the SCA is unlikely to have granted leave to appeal. The issues raised on behalf of the Appellants were arguable and warranted consideration by this Court.

[23] In the circumstances, it is in the interests of justice that condonation be granted for the late prosecution of the appeal. The costs of the condonation application will be costs in the appeal.

The grounds of appeal

[24] The Appellants' Notice of Appeal, dated 9 September 2024, sets out numerous grounds of appeal. In summary, the Appellants submit that the court *a quo* erred in finding that:

25.1. an arrest without a warrant for unlawful possession of firearms is competent in terms of section 40 read with Schedule 1 of the CPA;

25.2. an arrest founded upon an *(allegedly)* unlawful confession or admission by a co-accused is lawful;

25.3. an arrest founded upon information from an informer is lawful, particularly where the arresting officer was not seized with the contents of the informer's statement;

25.4. the conduct of the prosecutor in enrolling the matter was reasonable, particularly regarding his failure to consider the circumstances of the arrest; the admissibility of evidence and the defence raised by the Appellants;

25.5. the claims of the Appellants should be dismissed, particularly having regard to the court *a quo's* assessment of the evidence relating to the recantation of Maseko's statements and the continuation of the prosecution thereafter;

25.6. the First Respondent had discharged the onus to prove a reasonable suspicion for arrest without a warrant;

25.7. the Second Respondent had shown compliance with prosecutorial responsibility and the duty of prosecutors to consider defences raised by accused persons;

25.8. the claim for negligent prosecution, in the alternative, should be rejected.

[25] In their Supplementary Heads of Argument, the Appellants further contend that:

26.1. the court *a quo* failed to properly assess the hearsay nature of the informer's evidence, which could not form the basis of a reasonable suspicion without corroborating circumstances;

26.2. the confessions obtained from Moeketsi were inherently unreliable. They were obtained in violation of due process and should not have been used to justify the Appellants' arrests;

26.3. Captain Fouche's consultation with Moeketsi, who was legally represented, without his attorney present, constituted an irregularity that tainted the entire prosecution;

26.4. the prosecution failed in its duty of disclosure during the bail application and failed to keep the court properly informed of weaknesses in the State's case;

26.5. the police and prosecution failed to have regard to standing orders and prosecutorial regulations, which are binding and should inform the exercise of their discretion.

The case for the Appellants

[26] The Appellants' case, as articulated in their Heads of Argument and Supplementary Heads of Argument, is that the use of illegally or improperly obtained evidence to satisfy the requirements for arrest without a warrant, together with the enrolment and continuation of the prosecution, renders the entire process unlawful. They contend that the court *a quo* failed to properly consider the *"seepage"* of fair-trial rights into pre-trial procedures and that the decision-makers at each watershed moment ought to have considered the admissibility and reliability of the evidence before them.

[27] Specifically, the Appellants submit that:

28.1. The arrests were triggered by information from an informer, the content of which was never disclosed. No statement was taken from the informer, and the arresting officers relied on double hearsay, which cannot form the basis of a reasonable suspicion. Reliance was placed on the decision in *Biyela v Minister of Police,*[4] where the SCA held that whilst hearsay evidence may be relied upon for arrest, it must be credible and trustworthy.

28.2. The confession or admission made by Moeketsi was inadmissible against the Appellants, having been obtained by non-commissioned officers without proper warnings, following an unlawful entry and arrest. This inadmissible evidence was nonetheless used to justify the Appellants' arrests. In this regard, the Appellants relied upon *S v Maliga*[5] and *S v Gqoki and Others*[6] for the proposition that confessions obtained in violation of constitutional safeguards cannot be relied upon, even at the pre-trial stage.

[4] 2023 (1) SACR 235 (SCA).
[5] 2015 (2) SACR 202 (SCA).
[6] 2025 (1) SACR 465 (ECM).

28.3. It was also submitted that Maseko's evidence was problematic as she was a single witness; an accomplice and later recanted her statements entirely. Her evidence ought not to have been relied upon without corroboration and the prosecution should have re-assessed its position once she recanted.

28.4. No firearms were found in the possession of either appellant; no fingerprint evidence connected them to the firearms found at Moeketsi's residence and there was no evidence establishing joint possession or common purpose.

28.5. The prosecutors failed in their duty to consider the Appellants' defence, which was known to the arresting officers but not disclosed to the prosecutors. The failure to consult with key witnesses and to reassess the case when evidence deteriorated, amounted to negligent prosecution. Reliance was placed on *Minister of Safety and Security v Tyokwana*[7] and *Matsose v Minister of Police*[8] regarding the duty of the police to keep prosecutors properly informed.

28.6. Captain Fouche’s consultation with Moeketsi, who was legally represented, without his attorney present, constituted an irregularity that tainted the subsequent proceedings. In this regard, the Appellants relied upon *S v Masoka and Another*[9] as support for the prohibition on interfering with defence witnesses.

28.7. The court *a quo* erred in finding that prosecutors are not required to consider the admissibility of evidence at the enrolment stage. Here, the Appellants relied upon the decisions in *Menyo v Minister of Police*[10] and *The National Director of Public Prosecutions v Swarts*[11] which, it was submitted, emphasised the prosecutor's duty to ensure that prosecutions are based on admissible evidence.

28.8. It was also submitted that the Appellants' rights under section 35(1) of the Constitution were violated, as they were not properly informed of their rights upon

[7] 2015 (1) SACR 597 (SCA).
[8] 2023 JDR 2923 (NWM).
[9] 2015 (2) SACR 268 (ECP).
[10] 2024 JDR 4084 (ECM).
[11] 2020 JDR 1197 (ECG).

arrest. Reliance in this regard was placed upon *Ndawana v Minister of Police*[12] and *Wilson v Minister of Police and Another*.[13]

[28] The Appellants seek an order upholding the appeal with costs and substituting the order of the court *a quo* with an order granting them damages in the amount of R1 600 000 each, together with interest and costs on the attorney and client scale.

The case for the Respondents

[29] The Respondents contend that the judgment of the court *a quo* is correct and should be upheld. They submit that:

30.1. The arrests were lawful in terms of section 40(1)(b) of the CPA and the arresting officers possessed reasonable grounds for suspicion based on the information available to them at the time. It is trite that the test for reasonable suspicion is objective and does not require certainty or even *prima facie* proof. Reliance was placed upon the matters of *Minister of Safety and Security v Sekhoto and Another*[14] and *Mabona and Another v Minister of Law and Order and Others*.[15]

30.2. The offence of unlawful possession of firearms falls within Schedule 1 of the CPA, as it is an offence for which imprisonment exceeding six months without the option of a fine may be imposed. The arrest without a warrant was therefore competent.

30.3. The use of a confession or admission by a co-accused for the purpose of arrest is permissible. Section 219 of the CPA only prohibits the use of a confession as evidence against another person at trial, not for the purpose of forming a reasonable suspicion to arrest.

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[12] 2025 JDR 0356 (ECM).
[13] 2025 JDR 1088 (GJ).
[14] 2011 (5) SA 367 (SCA).
[15] 1988 (2) SA 654 (SE).

30.4. The prosecutors acted reasonably in enrolling the matter and continuing the prosecution. They were entitled to take the contents of the docket at face value and were not required to make credibility findings or investigate defences raised by the accused.

30.5. The Appellants' detention was lawful, particularly having regard to the fact that same had been ordered by the court after consideration of the First Appellant's first bail application. As set out earlier in this judgment, the First Appellant's initial bail application was refused but he was granted bail at a second application on 30 July 2014 after Maseko recanted her earlier statements. There was no evidence of malice or *animus iniuriandi* on the part of any of the Respondents' officials. Reliance was placed upon *Minister for Justice and Constitutional Development v Moleko*[16] and *Relyant Trading (Pty) Ltd v Shongwe and Another*.[17]

30.6. The court *a quo* correctly applied the principles governing unlawful arrest, unlawful detention and malicious prosecution. Moreover, it was submitted that the findings of the court *a quo* on the facts are supported by the evidence.

30.7. Regarding the informer evidence, the Respondents contend that the arrests were not based on informer evidence but on direct evidence from Moeketsi and Maseko, as well as the tracking report. By the time of the arrests, the police had moved beyond the initial information from the informer.

30.8. Regarding Captain Fouche's consultation with Moeketsi, the Respondents contend that there was no improper interference, as Moeketsi was a suspect, not a defence witness, at the time of consultation.

[30] The Respondents seek an order dismissing the appeal with costs, including the costs of the application for leave to appeal and the petition to the SCA.

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[16] 2009 (2) SACR 585 (SCA).
[17] [2007] 1 All SA 375 (SCA).

The facts

[31] The following facts are either common cause or cannot be seriously disputed by any of the parties, namely:

32.1. The Appellants were reservist police officers attached to the Meyerton Police Station prior to their arrest.

32.2. On 4 November 2013, Moeketsi was arrested at his residence following a police operation. Illegal firearms were found at the premises.

32.3. Moeketsi implicated the Second Appellant in the delivery of the firearms to his residence.

32.4. On 5 November 2013, the Second Appellant was arrested at his girlfriend's residence without a warrant.

32.5. On 6 November 2013, Maseko identified the First Appellant at the Meyerton Police Station as the driver of the vehicle that had brought the firearms to her residence.

32.6. The First Appellant was arrested without a warrant on 6 November 2013.

32.7. Both appellants were detained from the date of their arrest. The First Appellant was released from custody on 30 July 2014 (*after being granted bail at a second bail application)* and the Second Appellant was released from custody on 17 February 2015 *(when he and the First Appellant were both discharged in terms of section 174 of the CPA).*

32.8. Maseko made three statements implicating the Appellants but later recanted these statements during the First Appellant's second bail application. The Second Appellant never applied for bail whilst he was in custody.

32.9. Maseko was not called as a witness in the criminal trial and the Appellants were discharged in the criminal trial on 17 February 2015.

The law

[32] The legal principles governing unlawful arrest, unlawful detention and malicious prosecution, are well-established in our law. As to whether negligent prosecution forms part of South African law, this will be dealt with at an appropriate stage later in this judgment.

[33] Section 40(1)(b) of the CPA provides that a peace officer may, without a warrant, arrest any person whom he or she reasonably suspects of having committed an offence referred to in Schedule 1. The jurisdictional requirements for a lawful arrest without warrant are: (a) the arrestor must be a peace officer; (b) the arrestor must entertain a suspicion; (c) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (d) the suspicion must rest on reasonable grounds.

[34] In *Sekhoto*,[18] Harms DP stated:

"The jurisdictional facts required for a lawful arrest without warrant in terms of s 40(1)(b) are that the arrestor must be a peace officer; he must entertain a suspicion; the suspicion must be that the suspect committed an offence referred to in Schedule 1; and the suspicion must rest on reasonable grounds. <u>If these requirements are satisfied, the arrest is lawful and it is not necessary that the arrestee should in fact be guilty of the offence. As it is sometimes put, the test is objective whether, on the facts available to the peace officer at the time, a reasonable person would have entertained the same suspicion."</u>[19]

[35] The court further held,[20] that *"reasonable grounds for suspicion"* means that the suspicion must be based on grounds that would induce a reasonable person to have the suspicion. It does not require certainty or *prima facie* proof, but the suspicion must be more than a mere hunch or intuitive feeling.

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[18] At paragraph [8].
[19] Emphasis added.
[20] At paragraph [9].

[36] Regarding the use of information from an informer, the court in *Sekhoto*[21] endorsed the approach in *Mabona*,[22] where it was held that the reasonable person will analyse and assess the quality of the information at his disposal critically, and will not accept it lightly without checking it <u>where it can be checked.</u> [23]

[37] In *Biyela*,[24] the SCA held that a reasonable suspicion can, depending on the circumstances, be formed based on hearsay evidence, regardless of whether that evidence is later found to be admissible or not. However, the information must be credible and trustworthy, and the arresting officer must genuinely act on the information received from a credible source.

[38] The elements of a claim for malicious prosecution were set out in *Moleko*,[25] where it was held*, inter alia,* as follows:

"In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

(a) that the defendants set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with malice (or animo iniuriandi); and

(d) that the prosecution has failed."

[39] In *Moleko*,[26] the court clarified that *animus iniuriandi* includes not only the intention to injure but also consciousness of wrongfulness. The defendant must have been aware of what he was doing and must at least have foreseen the possibility that he was acting wrongfully but nevertheless continued to act,

[21] At paragraph [14].
[22] At 658E-F.
[23] Emphasis added.
[24] At paragraphs [35] to [40].
[25] At paragraph [8].
[26] At paragraph [64].

reckless as to the consequences. Negligence, even gross negligence, will not suffice. [27]

[40] Regarding the role of prosecutors, the court in *Relyant Trading*[28] held that a prosecutor is expected to apply his or her mind to the contents of the docket, to ascertain if there is evidence which, if proved at the trial, will show that an offence was committed and that the accused is linked to that offence. A prosecutor only has to establish if reasonable and probable cause exists which warrants prosecution and that no compelling reason exists not to prosecute. [29]

[41] In *National Director of Public Prosecutions v Zuma*,[30] the SCA held that a prosecutor's discretion to prosecute is not immune from scrutiny, but courts will not lightly interfere with the legitimate exercise of prosecutorial authority. A prosecution will be wrongful if reasonable and probable grounds for prosecuting are absent and the prosecutor acts with malice.

[42] Section 219 of the CPA provides: that *"No confession made by any person shall be admissible as evidence against another person."* This prohibition is directed at the trial, where no confession may be used as evidence directly or indirectly against any co-accused. However, there is no statutory prohibition on using a confession for the purpose of forming a reasonable suspicion to arrest.

[43] In *S v Baartman*,[31] the erstwhile Appellate Division held that an extra-curial statement of one accused is inadmissible against a co-accused. This rule applies to both admissions and confessions and has been given statutory force in respect of confessions by section 219 of the CPA.

[44] However, as the court *a quo* correctly observed, this prohibition is expressly aimed at the use of such statements as evidence at the trial. It does not preclude an arrest being made based on information received from a co-accused,

[27] Emphasis added.
[28] At paragraph [6].
[29] Emphasis added.
[30] 2009 (2) SA 277 (SCA) at paragraph [37].
[31] 1960 (3) SA 535 (A) at 538E-F.

provided the arresting officer reasonably suspects that the person to be arrested has committed an offence.

[45] The duty of police to keep prosecutors properly informed was emphasised in *Tyokwana*,[32] where it was held:

"It has often been stressed by our courts, that the duty of a policeman who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not."

[46] In *Matsose*,[33] the court held that prosecutors are bound by the Code of Conduct for Members of the National Prosecuting Authority, which requires them to proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not to continue a prosecution in the absence of such evidence.

[47] Also, in *Menyo*,[34] the court stated that a *prima facie* case in criminal matters requires that the allegations, as supported by statements and available evidence, are of such a nature that if proved in court on the basis of admissible evidence, the court should convict.

[48] In *Swarts*,[35] the court, citing *Minister of Police v Du Plessis*,[36] held that a prosecutor has a duty not to act arbitrarily, must act with objectivity, and must pay attention to the contents of the docket. The prosecutor's function is not merely to have the matter placed on the roll to be postponed for further investigation.

[49] Section 35(1) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right to remain silent; to be informed promptly of that right and of the consequences of not remaining silent. Section

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32 At paragraph [23].
33 At paragraph [31].
34 At paragraph [22].
35 At paragraphs [13] and [14].
36 2014 (1) SACR 217 (SCA).

35(2)(b) provides that everyone who is detained has the right to choose and to consult with, a legal practitioner and also to be informed of this right promptly.

[50] In *Ndawana,*[37] the court held that failure to advise an arrested person of these rights is tantamount to denying the exercise thereof, rendering the arrest wrongful and unlawful.

[51] Further, in *Wilson,*[38] the court emphasised that the word *"promptly"* conveys that the detained person must be informed of the right to legal representation at least in reasonable time to permit of its meaningful exercise. Rushing to secure a confession before there is an opportunity for such consultation is a material breach of constitutional rights.

<u>Does negligent prosecution form part of South African law?</u>

[52] In its judgment, the court *a quo,* relying on the decision of *Heyns v Venter,*[39] held that:

"222. The Plaintiffs claim negligent prosecution in the alternative.

223. It is so that the court introduced negligence as a cause of action for liability in delict, but gross negligence has to be shown."

[53] Insofar as the pleadings are concerned, it appears that this *"alternative"* cause of action received very little, if any, attention. The Plaintiffs' *(Appellants')* Amended Particulars of Claim only rely thereon in passing, and the grounds upon which the Plaintiffs rely do not draw any clear distinction between malicious or negligent prosecution. In the premises, it appears that negligent prosecution *(as per the pleadings)* was not pleaded as a separate *(alternative)* cause of action, but negligence was pleaded *"as an alternative basis"* for the alleged malicious prosecution.

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37 At paragraphs [48] to [50].
38 At paragraph [21].
39 2004 (3) SA 200 (T).

[54] The Amended Plea of the Respondents does not deal specifically therewith, and no exception was ever raised by the Defendants to the fact that negligent prosecution is not a recognised cause of action in South African law and/or *"negligence"* cannot be used in the *"alternative"* to support an allegation of malicious prosecution. The Appellants' Heads of Argument deal only with malicious prosecution and the requirements therefor. No mention is made, at all, of any unlawful prosecution *(either malicious or negligent)* in their Supplementary Heads of Argument. Also, no mention of negligent prosecution is made in the Appellants' Practice Note. The Respondent's Heads of Argument deal only with malicious prosecution. Any alternative cause of action, if relied upon by the Appellants, was not argued before this Court.

[55] In *Heyns,* the High Court, on the basis that it was developing the common law in terms of section 39(2) of the Constitution, held that the requirement of *animus iniuriandi* when proving malicious prosecution would also be established where the defendant was grossly negligent. The court did *not* hold that negligent prosecution was a distinct claim separate to malicious prosecution.[40] Moreover, in the matter of *Minister for Justice and Constitutional Development & Others v Moleko*,[41] the SCA, having considered both *Heyns* and *Relyant Trading* held[42] that:

"The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice." [43]

[56] In the premises, the finding in *Heyns* that gross negligence is sufficient to establish malicious prosecution, has been overruled by the SCA in *Moleko*. It must follow that the court *a quo* was incorrect in relying upon *Heyns.* However, *Moleko* does not address whether there is a claim in South African law for

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[40] At paras 13 and 14.
[41] 2009 (2) SACR 585 (SCA).
[42] At paragraph [64].
[43] Emphasis added.

negligent prosecution, as opposed to a claim for malicious prosecution. It was unnecessary for the SCA to do so. For it to be established that there is, would require a development of the common law. This was not argued, at all, before this Court. In light of the pleadings in this matter *(as dealt with above)* and the manner in which the trial unfolded before the court *a quo*, this is not at all surprising. As a result, this Court is unable, even if it wished to do so, to develop the common law in this regard. It is one thing to potentially consider negligent prosecution as an alternative claim to malicious prosecution. However, it is an entirely different matter to consider a need to develop the common law to include a separate claim for negligent prosecution. For these reasons, this Court declines to do so.

[57] In the premises, it is clear that negligent prosecution was not raised as an alternative cause of action on the pleadings in the court *a quo* and it was incorrect for the court *a quo* to deal with it on that basis. In addition, the court *a quo* was incorrect in holding that gross negligence was sufficient to prove *animus iniuriandi* as a requirement when considering whether the Appellants had proven malicious prosecution.

Discussion

[58] Having carefully considered the record; the comprehensive submissions of counsel *(including the Supplementary Heads of Argument)* and the applicable legal principles, this Court finds that the appeal should be dismissed. The court *a quo's* judgment is comprehensive, well-reasoned and correctly applies the relevant legal principles to the facts of this case.

[59] The central question in this appeal is whether the arrests; subsequent detentions and prosecutions of the Appellants were unlawful and malicious. The court *a quo* answered this question in the negative and this Court can find no basis on which to interfere with that conclusion.

Arrest without a warrant for unlawful possession of firearms

[60] The Appellants contend that an arrest without a warrant for unlawful possession of firearms is not competent because the offence is not specifically listed in Schedule 1 of the CPA and, they argue, does not fall within the general definition of *"any offence... the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine."*

[61] This argument is without merit. Section 3 of the Firearms Control Act 60 of 2000 *("the Firearms Act")* prohibits the possession of a firearm without a licence. Section 121 of the Firearms Act provides that any person convicted of a contravention of section 3 may be sentenced to a fine or to imprisonment for a period not exceeding fifteen years. Schedule 4 of the Firearms Act lists the maximum sentences for various offences, including fifteen years for a contravention of section 3.

[62] The phrase *"may be sentenced to a fine or to imprisonment"* in section 121 does not exclude the offence from Schedule 1 of the CPA. The proper interpretation is that a sentencing court has the power to impose a sentence of imprisonment exceeding six months without the option of a fine. That is sufficient to bring the offence within the Schedule 1 definition. As the court *a quo* correctly held "*the emphasis should not be on the fact that the sentencing court is empowered to impose imprisonment or a fine, but rather the sentencing court 'may' impose a sentence of imprisonment (of more than six months) without the option of a fine."*

[63] This interpretation is consistent with the legislative intention to include serious offences within Schedule 1, thereby permitting arrest without a warrant in appropriate circumstances. Unlawful possession of firearms is undoubtedly a serious offence and it would be anomalous if the legislature intended to exclude it from the schedule.

[64] The court *a quo's* finding on this issue is correct and there is no basis to interfere with it.

Arrest founded on a confession by a co-accused

[65] The Appellants argue that the arrest of the Second Appellant, which was based, in part, on Moeketsi's statements implicating him, was unlawful because Moeketsi's statements amounted to an inadmissible confession. They rely on section 219 of the CPA and a Full Bench decision in this Division in the matter of *Ngwenya v Minister of Police*,[44] which they submit supports their position.

[66] This argument conflates the distinct legal questions of admissibility of evidence at trial and the existence of reasonable grounds for suspicion to justify an arrest. Section 219 of the CPA provides that no confession made by any person shall be admissible as evidence against another person. The crucial phrase is *"as evidence".* The prohibition concerns the use of a confession as evidence in criminal proceedings against a co-accused. It does *not* address the use of information derived from a confession to form a reasonable suspicion to effect an arrest.

[67] As the court *a quo* correctly observed "*the purpose of an arrest is, inter alia, to allow for further investigations."* It is neither practical nor desirable to require arresting officers to ignore information obtained from an arrested person merely because it might ultimately be inadmissible at trial. The question at the arrest stage is whether the information gives rise to a reasonable suspicion, not whether it would be admissible as evidence.

[68] The Appellants' reliance upon *S v Maliga*[45] and *S v Gqoki*[46] does not assist them. Those cases address the admissibility of confessions at trial, not the formation of reasonable suspicion for arrest. The safeguards surrounding confessions are designed to ensure a fair trial, not to restrict police investigations at the arrest stage.

[69] The court *a quo's* analysis of *stare decisis* and its conclusion that the full bench decision relied upon by the Appellants was rendered *per incuriam,* is persuasive.

[44] *(A3128/2017) [2018] ZAGPJHC 610 (29 October 2018).*
[45] Subparagraph 28.2 ibid; footnote 5 above.
[46] Subparagraph 28.2 ibid; footnote 6 above.

The Full Bench provided no *ratio* or reasoning for its finding, and its apparent reliance on section 219 overlooks the express wording of that section and the distinction between the arrest stage and the trial stage.

[70] This Court is satisfied that the arrest of the Second Appellant was not rendered unlawful by virtue of having been based, in part, on information received from Moeketsi. The arresting officer had reasonable grounds for suspicion, including Moeketsi's statements implicating the Second Appellant; the discovery of firearms at Moeketsi's residence and the Second Appellant's admission that he was present at the premises on the relevant date.

Arrest founded on informer evidence

[71] The Appellants submit that the arrests were based on information from an informer, the content of which was never disclosed, and that this renders the arrests unlawful. They argue that the arresting officers relied on *"double hearsay"* and could not have exercised an independent discretion to arrest. They rely on *Biyela*[47] for the proposition that hearsay evidence must be credible and trustworthy.

[72] Whilst it is correct that the police operation was initially prompted by information from an informer regarding business robberies, the arrests of the Appellants were not based on that information. The Second Appellant was arrested based on Moeketsi's statements and the discovery of firearms at his residence. The First Appellant was arrested based on Maseko's identification and the tracking evidence. By the time these arrests took place the police had moved beyond the initial informer information and had obtained direct evidence linking the Appellants to the offences of business robberies and unlawful possession of firearms.

[73] The court *a quo* correctly found that Maseko's spontaneous identification of the First Appellant at the police station was significant and negated any suggestion that the arrests were a contrived affair. This identification was not based on informer evidence but on Maseko's personal knowledge and recollection.

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[47] Subparagraph 28.1 ibid; footnote 4 above.

[74] Applying the test in *Biyela*, the information relied upon by the arresting officers was credible and trustworthy. Moeketsi's statements were made in the presence of his partner, who did not dispute them. Maseko's identification was spontaneous and unequivocal. The tracking evidence provided objective corroboration. There is no merit in the Appellants' contention that the arrests were founded on inadmissible informer evidence.

The requirement of a reasonable suspicion

[75] The Appellants submit that the arresting officers could not have formed a reasonable suspicion because they relied on inadmissible evidence and failed to properly investigate the Appellants' explanation that they were at the premises to borrow money.

[76] The jurisdictional facts required for an arrest without a warrant are well-established. The arresting officer must entertain a suspicion based on reasonable grounds. The test is objective, that is, would a reasonable person in the position of the arresting officer have entertained the same suspicion.

[77] In the present matter, the arresting officers had ample grounds for suspicion. Regarding the Second Appellant, Moeketsi implicated him in the delivery of the firearms; the firearms were found at Moeketsi's residence and the Second Appellant admitted being present at the premises. In respect of the First Appellant, Maseko spontaneously identified him as the driver of the vehicle; the tracking device confirmed the vehicle was at the premises and the First Appellant admitted being present. These facts would induce a reasonable person to suspect that the Appellants had committed the offence of unlawful possession of firearms.

[78] It must further be recognised that, for purposes of offences relating to the unlawful possession of firearms, possession is not limited to the physical holding of the weapon/s. It encompasses both a physical component *(corpus)*, which may be exercised directly or through intermediaries, and a mental component *(animus),* namely the intention to exercise control over the item/s. The fact that

the firearms were not found on the Appellants' persons does not, in itself, negate the existence of reasonable grounds to suspect their unlawful possession.[48]

[79] The fact that the Appellants offered an innocent explanation *(that they were there to borrow money)* does not negate the existence of a reasonable suspicion. As the court *a quo* correctly noted, *"it was not for the arresting officer to make credibility findings."* The arresting officer is entitled to act on the information available, even if the suspect offers an alternative explanation.

[80] The SAPS standing orders regarding arrest as a last resort do not assist the Appellants. The standing orders are internal guidelines, not rules of law. The court *a quo* correctly followed the approach in this Division as articulated by Goldblatt J in *National Commissioner of Police and Another v Jack Coetzee,*[49] that there is no rule of law which demands the use of *"milder"* means of securing attendance at court. Once the jurisdictional requirements are met and the discretion is exercised rationally the arrest is lawful.

The application of section 35 of the Constitution

[81] The Appellants rely extensively on section 35 of the Constitution and the concept of *"seepage"* of fair trial rights into pre-trial procedures. They argue that the use of evidence that would be inadmissible at trial to justify an arrest renders the arrest unlawful. They rely upon *Ndawana*[50] and *Wilson*[51] regarding the rights of arrested persons.

[82] Whilst it is correct that section 35 rights apply throughout the criminal justice process, including pre-trial procedures, the Appellants' argument stretches this principle too far. The question at the arrest stage is *not* whether the evidence would be admissible at trial but whether the arresting officer had a reasonable suspicion. The two inquiries are distinct and serve different purposes.

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[48] See *S v Adams* 1986 (4) SA 882 (A), at 890G-H; *S v Jacobs* 1989 (1) SA 652 (A) at 656E-F*; S v Cameron* 2005 (2) SACR 179 (SCA).
[49] Case number 649/11, 16 November 2012 at paragraph [14].
[50] Subparagraph 28.8 ibid; footnote 12 above.
[51] Subparagraph 28.8 ibid; footnote 13 above.

[83] Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. This provision is directed at the admission of evidence at trial, *not* at the formation of a reasonable suspicion for arrest.

[84] There is no authority for the proposition that an arrest is unlawful simply because it was based on information that might ultimately be ruled inadmissible at trial. The adoption of such a principle would, in the opinion of this Court, paralyse law enforcement and is not required by the Constitution.

[85] Regarding the Appellants' rights under sections 35(1) and (2) of the Constitution, the court *a quo* accepted the arresting officers' evidence that they informed the Appellants of their rights. There is no basis for this Court to interfere with that credibility finding.

Captain Fouché's consultation with Moeketsi

[86] The Appellants submit that Captain Fouche's consultation with Moeketsi, who was legally represented, without his attorney present, constituted an irregularity that tainted the entire prosecution. They rely on the principles enunciated in *Masoka*.[52]

[87] This argument is without merit. At the time of Captain Fouche's consultation, Moeketsi was a suspect, not a defence witness. The rule against interfering with defence witnesses, as articulated in *Masoka*, applies to witnesses who have been identified as witnesses for the defence. Moeketsi was not a defence witness. He was a co-accused who had implicated the Appellants. There was no improper interference.

[88] In any event, even if there were any irregularities in respect of the consultation, it would not render the Appellants' arrests unlawful. The question is whether the arresting officers had reasonable grounds for suspicion, not whether this evidence from Moeketsi was improperly obtained.

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[52] Subparagraph 28.6 ibid; footnote 9 above.

Malicious prosecution

The conduct of the Prosecutors

[89] The Appellants level extensive criticism at the prosecutors involved in the matter, alleging that they failed in their duties by failing to consider the admissibility of evidence; by not investigating the Appellants' defence and by continuing the prosecution after Maseko recanted. They rely on *Menyo*,[53] *Swarts*,[54] *Matsose*[55] and the prosecutorial guidelines.

[90] This Court is satisfied that the court *a quo's* analysis of prosecutorial responsibility is correct. A prosecutor is entitled to take the contents of the docket at face value and is not required to make credibility findings or investigate defences raised by accused persons. As the court *a quo* stated, *"a prosecutor takes what he or she finds in the docket at face value and cannot be expected to make any value judgments as to the reliability and credibility of the witnesses' statements contained in the docket."*

[91] Coetzee, the enrolling prosecutor, assessed the docket and found statements from Maseko implicating both Appellants; statements from the arresting officers and the tracking report. He was satisfied that there was evidence linking the Appellants to the offences with which they were charged. There was no duty on him to investigate the lawfulness of the arrests or to consider the admissibility of evidence at that stage. The decisions relied upon by the Appellants do not impose such a duty. *Menyo* and *Swarts* emphasise the need for a *prima facie* case based on admissible evidence but do not require the prosecutor to conduct an inquiry into admissibility at the enrolment stage.

[92] Regarding the continuation of the prosecution after Maseko recanted, the court *a quo* correctly held that this did not render the prosecution unlawful. It was not

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[53] Subparagraph 28.7 ibid; footnote 10 above.
[54] Subparagraph 28.7 ibid; footnote 11 above.
[55] Subparagraph 28.5 ibid; footnote 8 above.

irrational or arbitrary to continue the prosecution. Maseko's evidence was not the only evidence available to the State at trial.

[93] The fact that Maseko was ultimately not called as a witness at the criminal trial does not render the earlier decisions to prosecute unlawful. A prosecution must be assessed on the basis of the information available at the time each decision is made, not with the benefit of hindsight.

[94] Further, the Appellants' reliance on the prosecutorial guidelines and the Code of Conduct does not assist them. These guidelines, whilst instructive, do not impose legal obligations the breach of which automatically gives rise to delictual liability. The question is whether the prosecutors acted reasonably and in good faith. The evidence supports a finding that they did.

[95] To succeed in a claim for malicious prosecution the Appellants must prove that the Respondents acted without reasonable and probable cause and with malice *(animus iniuriandi).* The evidence does not support such a finding.

[96] The prosecutors had reasonable and probable cause to institute and then to continue with the prosecution. The docket contained sworn statements implicating the Appellants. The fact that Maseko later recanted does not mean that the initial decision to prosecute was unreasonable. The prosecutors were entitled to proceed on the basis of the information before them.

[97] There is no evidence establishing malice or *animus iniuriandi* on the part of any of the Respondents' officials. The Appellants' contention that Captain Fouche withheld their version from the prosecutors finds no support in the record. Captain Fouche testified that he did not deliberately withhold any information, and his evidence was accepted by the court *a quo*. There is no basis to interfere with that finding.

Cumulative effect of alleged irregularities

[98] The Appellants submit that the cumulative effect of the various irregularities should lead to a finding of liability. Whilst it is correct that a combination of factors may, in appropriate circumstances, lead to a finding of unlawfulness, the alleged

irregularities in this case, whether considered individually or cumulatively, do not establish that the arrests, detentions or prosecutions were unlawful, or malicious.

[99] The arresting officers had reasonable grounds for suspicion. The prosecutors acted reasonably based on the information before them. The court ordered the First Appellant's detention after proper consideration of his first bail application. After Maseko recanted the First Appellant was released on bail. The fact that the criminal trial ended in a discharge does not, in itself, render the prior decisions unlawful.

Conclusion

[100] For all of the reasons set out above, this Court is satisfied that the court *a quo* correctly dismissed the Appellants' claims. The arrests and subsequent detentions were lawful and the prosecution was not malicious.

[101] An appeal court will not interfere with the factual findings of a trial court unless they are shown to be demonstrably wrong. The Appellants have failed to establish any basis for interfering with the court *a quo's* factual findings or its application of the correct principles of law to those facts.

[102] The appeal must therefore be dismissed.

Costs

[103] The Respondents seek costs on the party and party scale, such to include the costs of the application for leave to appeal in the court *a quo*; the petition to the SCA and the costs of this appeal *(including the costs of the condonation application).*

[104] There is no reason to depart from the general rule that costs should follow the result. The Appellants have been unsuccessful in their appeal and should bear the Respondents' costs.

[105] The order of the SCA dated 8 August 2024 provided that the costs of the application for leave to appeal in that court and the court *a quo* are costs in the

appeal. Since the appeal has been dismissed, the Appellants are to pay those costs.

[106] Earlier in this judgment,[56] this Court ruled that the costs of the condonation application be costs in the appeal. In light of the appeal having been dismissed, the Appellants are to pay the costs of the condonation application.

Order

[107] This Court makes the following order:

1. Condonation for the late prosecution of the appeal is granted.

2. The appeal is dismissed.

3. The Appellants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the application for leave to appeal in the court *a quo*; the costs of the petition to the Supreme Court of Appeal and the costs of this appeal, including the costs of the condonation application.

4. The costs payable by the Appellants, as set out in paragraph 3 hereof, are on the party and party scale, Scale B.

[redacted]

BC WANLESS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

[56] Paragraph [24] ibid.

Date of Hearing: 26 November 2025

Date of Judgment: 18 March 2026

Appearances

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