



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 843/2024

In the matter between:

MAKOFANE WILLIAM MOHLALA

APPLICANT

and

MEC FOR TRANSPORT, LIMPOPO

FIRST RESPONDENT

MINISTER OF POLICE

SECOND RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

THIRD RESPONDENT

Neutral citation: *Makofane William Mohlala v MEC for Transport, Limpopo and Others* (843/2024) [2026] ZASCA 55 (17 April 2026)

Coram: MBATHA, UNTERHALTER and BAARTMAN JJA and MAMOSEBO and GOVINDJEE AJJA

Govindjee AJA (first judgment): [01] to [31]

Unterhalter JA (dissent): [32] to [51]

Heard: 6 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 17 April 2026 at 11h00.

Summary: Special leave to appeal – delict – unlawful detention – failure to consider or facilitate release on police bail in terms of s 59 of the Criminal Procedure Act 51 of 1977 – deprivation of liberty prima facie unlawful – Minister bearing onus to justify continued detention – liability established – quantum of general damages determined on appeal – costs adjusted to reflect partial success.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Mashamba AJ and Ngobeni AJ, sitting as court of appeal):

- 1 The applicant is granted special leave to appeal against the order of the high court, limited to the claim for unlawful detention.
- 2 The costs of the application for special leave to appeal shall be costs in the appeal.
- 3 The appeal against the order of the high court is upheld.
- 4 The order of the high court is set aside and substituted with the following:
 - ‘(i) The appeal against the dismissal of the appellant’s claim for unlawful detention is upheld.
 - (ii) The order of the magistrates’ court is set aside and replaced with the following:
 - (a) The second defendant is liable for the unlawful detention of the plaintiff at Dennilton Police Station between 1 April 2017 and 3 April 2017.
 - (b) The second defendant is ordered to pay the plaintiff the sum of R80 000 as general damages, together with interest thereon at the legal rate from 25 April 2023 to the date of final payment.
 - (c) The second defendant is ordered to pay fifty (50) percent of the plaintiff’s costs.
 - (iii) The second respondent is ordered to pay fifty (50) percent of the costs of the appeal, including the costs of counsel on scale B.’
- 5 The second respondent is ordered to pay fifty (50) percent of the applicant’s costs of the appeal in this Court.

JUDGMENT

Govindjee AJA (Mbatha and Baartman JJA and Mamosebo AJA concurring):

Background

[1] This is an application for special leave to appeal against an order of the Limpopo Division of the High Court, Polokwane, sitting as a court of appeal (the high court). The application was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The principal substantive issue concerns the liability of the second respondent, the Minister of Police (the Minister), for the alleged unlawful detention of the applicant, Makofane William Mohlala (Mr Mohlala), prior to his first court appearance.¹

[2] It is common cause that Mr Mohlala was lawfully arrested on Saturday, 1 April 2017, in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act). He had been stopped by traffic officers at a roadblock earlier that afternoon. A breathalyser test indicated a concentration of alcohol above the legal limit, and he was arrested on suspicion of driving under the influence of alcohol. When he was taken to Philadelphia Hospital for a blood sample to be drawn, Mr Mohlala refused to permit the attending doctor to draw blood on the basis that he was allergic to needles. He was taken to Dennilton Police Station, a docket was opened and he was detained on charges of driving under the influence of alcohol and defeating the administration of justice. Mr Mohlala was released on warning following his court appearance on 3 April 2017. The charges were subsequently withdrawn.

The pleadings, evidence and judgments below

[3] Mr Mohlala pleaded that members of the South African Police Service (SAPS) were 'entitled and permitted by the Criminal Procedure Act' to release him and merely warn or notify him to appear in court on a date determined by them. The failure to release him on that basis rendered his detention unlawful. Mr Mohlala accordingly

¹ A second basis for seeking special leave, namely the high court's dismissal of the appeal in relation to damages for malicious prosecution, was not persisted with during argument. This concession was properly made, as no case for special leave on that issue is foreshadowed on the papers.

claimed damages arising from the deprivation of his liberty and the consequences flowing from his detention. The Minister pleaded a bare denial to these allegations.

[4] It is accepted that Mr Mohlala was detained pursuant to his arrest for a period of approximately 48 hours, between 1 and 3 April 2017. Mr Mbonani, the traffic officer who effected the arrest, testified that he had read Mr Mohlala his rights upon arrest. He was, however, unable to testify as to what occurred at the police station after Mr Mohlala was brought there and charged. His colleague on duty that day, Ms Mothiba, likewise had no recollection of what transpired once Mr Mohlala accompanied Mr Mbonani into the police station. These were the only two witnesses called on behalf of the Minister. Mr Mohlala's evidence that he was never informed that he could apply for bail while in police custody remained unchallenged.

[5] The magistrate dismissed the claim for unlawful detention on the basis that Mr Mohlala bore the burden of proving that his detention was unlawful. He had failed to establish that a police officer of sufficient rank was available at the police station or that such an officer had refused to exercise a discretion to release him. Nor was there evidence that Mr Mohlala had requested the police officers on duty to consider bail. Having regard to the provisions of the Act, the magistrate concluded that the traffic officers who effected the arrest had no authority to release Mr Mohlala. The claim for unlawful detention was accordingly dismissed.

[6] The high court upheld the magistrate's conclusions. The reasoning of the high court reflects the view that the burden rested on Mr Mohlala to prove that a suitably ranked police officer was available and that he had applied for, and been refused, police bail:

[27] The learned Regional Magistrate found that section 59 of the Criminal Procedure Act, regulates the release of a suspect before the first appearance in court and grants discretionary powers to a commissioned police officer above the rank of a warrant officer to cause the release of a suspect after consultation with the investigating officer. The appellant did not prove that a police officer with the required rank was available at the police station or had refused to exercise his or her discretionary powers to grant police bail. The learned Regional Magistrate was not wrong to find that the appellant carried the burden of proof that his further detention was indeed unlawful.

[28] . . . in terms of section 59 of the Criminal Procedure Act, the grant or refusal of the police bail is exclusively a matter to be decided by an authorised police officer after consultation with the investigating officer. The appellant did not prove that he applied for police bail to the authorised . . . police officer and that the said police officer refused to grant police bail. The evidence which has been given by the appellant that other 2 (two) suspects arrested with him were given police bail does not help the court to conclude that the discretion in terms of section 59 of the Act was not properly exercised. The appellant did not prove that he applied for bail from an authorised police officer and that such application was refused, without just cause. The court finds no misdirection on the part of the learned Regional Magistrate when he found that the detention was lawful and the claim for unlawful detention was to be dismissed.’ (sic)

Special leave

[7] It is trite that the test for the grant of special leave is more stringent than for ordinary leave. This Court has explained the position as follows:

‘An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.’²

[8] The present matter raises a substantial point of law concerning the proper allocation of the burden of proof in claims for unlawful detention following a lawful arrest. Both the magistrate and the high court approached the matter on the basis that Mr Mohlala bore the burden of proving that a police officer of the requisite rank was available and that he had applied for, and been refused, police bail. Whether that approach is correct, having regard to the established principle that a deprivation of liberty is *prima facie* unlawful and must be justified by the detaining authority, raises an issue of legal principle of sufficient importance to warrant the attention of this Court. The apparent misdirection on the allocation of that burden also gives rise to strong prospects of success on appeal. In the circumstances, special leave to appeal should be granted, limited to the issue of Mr Mohlala’s claim for unlawful detention.

² *Van Wyk v S; Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 21, citing *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564I–565E.

Analysis

The statutory framework

[9] The Act provides that the effect of a lawful arrest is that the person arrested is placed in lawful custody and may be detained until lawfully discharged or released.³ That position is, however, subject to the provisions of the Act that permit the release of a suspect from detention.⁴ It follows that a lawful arrest does not necessarily require that an arrested person remain detained until the first court appearance.⁵ In cases involving relatively minor offences, the Act permits release on bail by the police before an accused person's first court appearance (police bail).⁶ Section 59 provides in relevant part:

'Bail before first appearance of accused in lower court

(1)(a) An accused who is in custody in respect of any offence, other than an offence –
 (i) referred to in Part II or Part III of Schedule 2;

...

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.'

[10] The jurisdictional facts for the consideration of police bail are that the accused is in custody in respect of an offence and that the offence is not listed in s 59(1)(a). Once these conditions are present, the statutory process governing the possible release of the detainee on police bail is engaged. In such circumstances the police are required to ascertain whether the detainee wishes to have the possibility of release on police bail considered.⁷

³ Section 39(3) of the Act.

⁴ *Syce and Another v Minister of Police* [2024] ZASCA 30; [2024] 2 All SA 662 (SCA); 2024 (2) SACR 1 (SCA) (*Syce*) para 42. See A van der Merwe (2009) *Annual Survey* 325 at 339.

⁵ Following arrest, the peace officer concerned is vested with a further discretion whether to detain the arrestee or warn the person to attend court: *Diljan v Minister of Police* 2022 JDR 1759 (SCA); [2022] ZASCA 103 (*Diljan*) para 9.

⁶ The effect of police bail is the same as ordinary bail: s 59(2) of the Act. See E Cameron 'The Crisis of criminal justice in South Africa' (2020) 137 *SALJ* 32 at 59.

⁷ *Syce* fn 4 para 45. See also *Setlhapelo v Minister of Police and Another* [2015] ZAGPPHC 363 (*Setlhapelo*). 'Despite this exposition of the principles, the court dismissed the plaintiff's claim because he had not specifically relied upon the provisions of s 59 in his particulars of claim. In the light of *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC); 2008 (4) SA 458; 2008 (6) BCLR 601 (CC); [2008] ZACC 3 para 24, the outcome appears erroneous.'

[11] This duty must be read together with s 50 of the Act, which regulates the procedure following arrest. It provides that a person arrested without a warrant must be brought to a police station as soon as possible. Once detained in this manner, the arrestee must be informed of the right to institute bail proceedings ‘as soon as reasonably possible’.⁸ The purpose of this requirement is to enable the detained person to exercise the right to apply for release on police bail even before the first court appearance.⁹ A failure to inform a detainee of this right, a failure to consider the possibility of release on police bail, or an unreasonable delay in that process may, depending on the circumstances and in the absence of a lawful justification for continued detention, render the continued detention unlawful.¹⁰ This reflects both the substantive and procedural protections afforded to the right to personal liberty.

Application to the facts

[12] The statutory framework imposes obligations on police officials to consider the justification for a person’s continued detention following arrest.¹¹ Even where an arrest is lawful, police officers must apply their minds to whether the detainee should remain in custody. This necessarily includes consideration of whether detention is required at all, and a failure to do so may render the ensuing detention unlawful.¹²

[13] These duties arise within the constitutional framework governing arrest and detention. South African law places a high premium on the right to liberty.¹³ The constitutional right to freedom and security of the person affords both substantive and procedural protection against deprivations of liberty.¹⁴ The Bill of Rights also

⁸ Section 50(1)(a) and (b) of the Act.

⁹ Section 50(1)(c) of the Act contemplates the release of an arrested person prior to first court appearance either because no charge is to be brought or because bail has been granted in terms of s 59 or 59A. See *Syce* above fn 4 para 44.

¹⁰ *Setlhapelo* fn 7 para 38 quoted with approval in *Syce* fn 4 para 45. Also see P du Toit ‘Criminal procedure’ (2025) 38 SACJ 314 at 317. Only a police officer of or above the rank of non-commissioned officer is authorised, in consultation with the investigating officer, to release the detainee on police bail upon payment of a sum determined by that official.

¹¹ *Botha v Minister of Safety and Security and Others; January v Minister of Safety and Security and Others* [2011] ZACPEHC 12; 2012 (1) SACR 305 (ECP) paras 29–30, quoted with approval in *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (*Mahlangu*) para 40.

¹² *Mvu v Minister of Safety and Security and Another* [2009] ZAGPJHC 5; 2009 (2) SACR 291 (GSJ); 2009 (6) SA 82 (GSJ) para 10 cited with approval in *Mahlangu* fn 11 para 40.

¹³ *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 15.

¹⁴ Section 12(1)(a) and (b) of the Constitution. See *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (CC) para 145. See also *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 13; 2010 (6) SA 1 (CC); 2010 (11) BCLR 1116 (CC) para 25. On the ambit of the prohibition against ‘detention without trial’, see *Makana People’s Centre v Minister of Health and Others* [2023] ZACC 15; 2023 (8) BCLR 963 (CC); 2023 (5) SA 1 (CC).

guarantees that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.¹⁵ The state is constitutionally obliged to respect, protect, promote and fulfil these rights, which bind all arms of government and all organs of state.¹⁶ This includes the duty on the police to ensure that a person is not deprived of their freedom other than in accordance with a fair process.¹⁷ These procedural safeguards form part of the framework within which the lawfulness of a deprivation of freedom falls to be assessed. Their observance is directly relevant to whether continued detention is justified. In the absence of lawful justification, a failure to observe them may render the continued detention unlawful.

[14] Mr Mohlala's pleaded claim for damages was premised on the alleged violation of various constitutional rights, including the limitation of his right to liberty and the impairment of his dignity. His cause of action was based on his alleged unlawful detention for a period of approximately 48 hours at Dennilton Police Station following his arrest. The case he advanced, both on the pleadings and at trial, was that members of the SAPS acted unlawfully by keeping him detained in circumstances where they were entitled and permitted by the Act to release him on police bail.¹⁸ The magistrate framed the case accordingly before holding that Mr Mohlala bore the burden of proving that his detention was unlawful, including that a police officer of the requisite rank was available and had refused to exercise the discretion to release him.¹⁹

[15] That approach cannot be sustained. Properly analysed, the claim engages delictual liability for an omission, namely a failure to act in circumstances where the law imposes a duty to do so. The existence of that duty is informed by the statutory

(*Makana People's Centre*) para 116. *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (*Zealand*) para 33.

¹⁵ Section 35(1)(f), ss 10 and 12(1)(a) of the Constitution. See *Mahlangu* fn 11 paras 21 and 38.

¹⁶ Section 7(2) and s 8(1) of the Constitution. See *Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) para 56.

¹⁷ *Makana People's Centre* fn 14 para 115.

¹⁸ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 27: 'where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged that the section is relevant and operative'. See also *Saziwa and Others v Mhlontlo Local Municipality and Others* [2026] ZACC 10 paras 98–100: 'it is incumbent upon an official [charged with legislative responsibilities] to know the legislation applicable ..., to consider and apply that legislation and to use it to do their job to serve the people in their area of responsibility.'

¹⁹ The magistrate notes: 'Secondly, the plaintiff alleged that his further detention was unlawful because he was not granted bail or released on warning by the police before his first appearance in court.'

framework regulating police bail, read consistently with the constitutional rights to freedom and dignity. The enquiry is thus whether, in light of the failure to consider and effect release, the continued detention was justified.²⁰ It is not whether the detainee had a freestanding right to be released, but whether the continued detention was justified in light of the statutory and constitutional framework governing continued detention.

[16] I do not agree that the failure to comply with the statutory safeguards governing police bail leaves the continued detention lawful. Mr Mohlala's continued detention constituted an interference with his liberty and was *prima facie* unlawful.²¹ The burden rested on the Minister to justify the deprivation.²² In the context of a claim for delictual damages, the position is as follows:²³

'[24] There is another, more important reason why this court should rule in the applicant's favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental

²⁰ J Scott 'Determining the wrongfulness in delict of a positive breach of a public duty' (2017) *TSAR* 379 at 385 and 388; Unlawful arrest and detention are exceptional delicts imposing strict liability: see J Neethling, JM Potgieter and A Roos *Neethling on Personality Rights* (LexisNexis) (2019) at 187.

²¹ *Mahlangu* fn 11 para 32.

²² *Zealand* fn 14 paras 24 and 25; *Mahlangu* fn 11 para 32. In *Minister van Wet en Orde v Matshoba* [1990] 1 All SA 425 (A); 1990 (1) SA 280 (A) at 284H-I the following appears:

'Hoewel hierdie passasies slegs verwys na 'n inhegtenisneming – dit was al wat daar in geskil was – geld dieselfde beginsel klaarblyklik ook vir die aanhouding van n' persoon.' (Although these passages refer only to arrest – the only issue in dispute – the same principle evidently applies to the detention of a person. (Own translation)) See J Brickhill and K Hofmeyr 'Constitutional law' in *Juta's Quarterly Review of South African Law* (2008) (vol 1) para 2.3.1 and following.

²³ *Zealand* fn 14; Also see *Minister of Home Affairs v Rahim and Others* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) (*Rahim*) para 27.

than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.²⁴

[17] As was the case in *Syce*,²⁵ once the jurisdictional facts were present, the police were obliged to ascertain whether Mr Mohlala wished to apply for police bail. Mr Mohlala's uncontested evidence was that he was never informed that he could apply for bail while in police custody following his arrest, with the result that he did not do so. It must be accepted that whatever rights were read to him by Mr Mbonani at the time of arrest did not include any mention of the possibility of bail. By failing to inform him of his right to institute bail proceedings, the police also failed to comply with the procedure following arrest prescribed by s 50 of the Act. Nor was there any indication that the possibility of his release on police bail was considered by SAPS members at the police station, and the Minister led no evidence explaining why he was not released in terms of s 59 of the Act.²⁶

[18] In these circumstances, the burden rested on the Minister to justify the continued detention, which he failed to do. In the absence of any explanation for the continued detention, including the failure to comply with the statutory safeguards governing possible release on police bail, the detention remained unjustified and therefore unlawful. Delictual liability accordingly followed in respect of the damages flowing from the unlawful deprivation of liberty.²⁷ Absent any compelling reason to depart from the norm, the general principles of accountability require that the state be held liable for damages arising from these failures.²⁸ The approach adopted by both the magistrate and the high court, which shifted the onus onto Mr Mohlala, constituted an error of law and cannot be sustained.²⁹

²⁴ *Zealand* fn 14 paras 24-25 (footnotes omitted).

²⁵ *Syce* fn 4.

²⁶ *Syce* fn 4 paras 47 and 51, fn 19 and fn 23: continued detention, at least where ss 59 and 59A of the Act apply, is always subject to the exercise of a discretion.

²⁷ See, generally, *Rahim* fn 23 para 20 and following.

²⁸ *Woji v Minister of Police* [2014] ZASCA 108; [2015] 1 All SA 68 (SCA); 2015 (1) SACR 409 (SCA) para 28 cited with approval in *Mahlangu* fn 11 para 38.

²⁹ *Mahlangu* fn 11 para 46.

Quantum

[19] The determination of the appropriate award of damages ordinarily falls within the domain of the trial court, which has the advantage of hearing the evidence and assessing the circumstances first-hand. An appellate court may nevertheless undertake that task where the relevant facts appear sufficiently from the record.³⁰ In the present circumstances, this Court is in as good a position as the trial court to determine an appropriate award, and it is appropriate to do so to bring finality to the matter.³¹ Doing so entails the exercise of a true discretion, guided principally by the particular facts and circumstances of the case.³²

[20] The person whose liberty was wrongfully restrained may claim damages aimed at providing personal satisfaction for injured feelings. Such damages are estimated *ex aequo et bono* (in or according to equity and good conscience) in respect of the personality infringement suffered in the circumstances, bearing in mind the high premium our law places on personal liberty.³³ The appropriate approach is as follows, bearing in mind that awards should be fair but not extravagant, and that factors tending to introduce a penal element are to be excluded:³⁴

‘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

³⁰ Syce fn 4 para 53. Also see *Diljan* fn 5 para 13.

³¹ *EF v Minister of Safety and Security* [2018] ZASCA 96; 2018 (2) SACR 123 (SCA) para 32.

³² *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; [2009] 4 All SA 38; 2009 (5) SA 85; 2009 (2) SACR 282 (SCA); (*Tyulu*) para 26.

³³ *Van der Nest NO v Minister of Police* [2025] ZASCA 42; [2025] 2 All SA 655 (SCA); 2025 (5) SA 152 (SCA) (*Van der Nest NO*) para 27; *Motladile v Minister of Police* [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (*Motladile*) paras 17 and 22.

³⁴ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (6) BCLR 759 (CC); 1997 (3) SA 786 (CC) (*Fose*) paras 63 and 72; *Tyulu* fn 31 para 26; *Minister of Safety and Security v Seymour* [2006] ZASCA 71; [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA) (*Seymour*) para 20; *De Jongh v Du Pisanie* [2004] ZASCA 43; [2004] 2 All SA 565 (SCA); 2005 (5) SA 457 (SCA) para 60. Cf *Wright v Multilateral Vehicle Accident Fund* (Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* (1992) vol IV at E3-31) cited with approval in *Road Accident Fund v Marunga* [2003] ZASCA 19; [2003] 2 All SA 148 (SCA); 2003 (5) SA 164 (SCA) paras 27 and 34; HB Klopper *Damages* (LexisNexis) (2017) at 255-9 at 259: the fact that compensation is paid using public money is a mitigating consideration.

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...'³⁵ (Citations omitted.)

[21] In applying this approach, the court must have regard to a range of factors, as explained in *Motladile*.³⁶ These include the duration of the detention; the circumstances under which the detention occurred, including the nature of the deprivation and whether other personality and constitutional rights were infringed; the conduct of those responsible for the detention, including the presence or absence of aggravating factors such as improper motive or malice, or mitigating factors such as an apology or satisfactory explanation of the events; the age, status and standing of the person detained and any publicity given to the detention; and any contributory action or inaction on the part of the person concerned.

[22] Against these considerations, it is necessary to consider the circumstances of Mr Mohlala's detention. The unlawful deprivation of liberty is itself a serious injury, involving an infringement of fundamental constitutional rights, including the rights to dignity and freedom and security of the person.³⁷ The evidence relating to the conditions of detention was sparse and failed to address most of the factors identified above, which impacts on the assessment. From his own evidence, it appears that Mr Mohlala was detained in dirty police cells for approximately two days. He testified that the conditions were such that he was unable to eat and that he was not provided with a blanket. He also stated that, as a result of the detention, he lost his employment, but this aspect was not fully canvassed before the high court.

[23] In addition to these considerations, regard may be had to awards made in comparable cases as a useful guide.³⁸ These awards provide a general sense of what experience has shown to be reasonable, to which due regard may be had in determining an appropriate award on the particular facts.³⁹ The purpose of this

³⁵ *Tyulu* fn 32 para 26.

³⁶ *Motladile* fn 33 para 17, citing JM Potgieter et al *Visser & Potgieter Law of Damages* 3 ed (2012) (Juta) at 545–8; Klopper fn 34 at 255–9. Also see *Seymour* fn 34 para 17.

³⁷ *Motladile* fn 33 para 22.

³⁸ *Seymour* fn 34 paras 17 and 20; *Hulley v Cox* 1923 AD 234 at 246.

³⁹ *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 536A–B; *Scott v Musial* (1959) 3 W.L.R. 437 at 446 cited with approval in *Sigournay v Gillbanks* 1960 (2) SA 552 (AD) at 556. In considering previous awards, allowance should be made for inflation: Neethling *et al* fn 20 at 190; *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 524.

exercise is to ensure that the award is not substantially out of line with those made in broadly similar matters.

[24] The following recent decisions of this Court, spanning the period from 2022 to 2025, provide some guidance. In *Diljan*,⁴⁰ the appellant was detained for three nights in conditions described as ‘appalling’, including dirty and malodorous blankets, a blocked toilet and the absence of toilet paper. She was unable to eat the limited food provided and was deprived of visitation; an award of R120 000 was made in respect of unlawful arrest and detention. In *Syce*,⁴¹ the appellant was detained unlawfully for approximately 13 hours in a dirty and overcrowded cell; an award of R40 000 was made in respect of unlawful detention. In *Van der Nest*,⁴² the deceased claimant, whose executor was substituted as claimant before this Court, was detained for approximately 20 hours in filthy conditions. She was deprived of food, water and a mattress, and her privacy was compromised in that male detainees were able to see her in her cell; an award of R50 000 was made in respect of unlawful arrest and detention.

[25] Mr Mohlala’s unlawful detention warrants an award of general damages as a salve to assuage the insult, indignity and suffering caused by the deprivation of his liberty, including the conditions under which he was detained.⁴³ The award must be appropriate and must reflect the importance of the fundamental constitutional rights infringed, taking into account both the physical and psychological impact of the detention.⁴⁴

[26] In all the circumstances, and having regard in particular to the duration of the detention and the conditions under which it occurred, an amount of R80 000 constitutes an appropriate award of general damages. This amount accords with the general range of awards in broadly similar cases.

⁴⁰ *Diljan* fn 5 para 22.

⁴¹ *Syce* fn 4 para 57; Also see *Masiteng v Minister of Police* [2024] ZASCA 165 paras 7 and 21.

⁴² *Van der Nest NO* fn 33 para 4.

⁴³ *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 at 123. See Amerasinghe (1967) 84 SALJ 331 at 335.

⁴⁴ *Minister of Justice v Hofmeyr* [1993] ZASCA 40; [1993] 2 All SA 232 (A); 1993 (3) SA 131 (A) at 145I–J; *Van der Nest NO* fn 33 para 33.

Costs

[27] There are competing considerations in relation to costs. While Mr Mohlala abandoned his claim for unlawful arrest before his appeal to the high court, he persisted in his claim for malicious prosecution. His application for special leave to appeal before this Court relied on prospects of success in respect of both unlawful detention and malicious prosecution. That he has succeeded only in respect of the former is a relevant consideration in the exercise of this Court's discretion as to costs.

[28] In determining who the successful party is for purposes of a costs order, this Court must have regard to the substance of the judgment. Mr Mohlala has succeeded in obtaining a damages award and, in the absence of any tender, was obliged to approach this Court to obtain that relief.⁴⁵ In my view the issues pursued in the appeals to both the high court and this Court were sufficiently interwoven such that it would be inappropriate to make separate costs orders per claim.⁴⁶ The respondents did not succeed on a distinct issue wholly unconnected to the claim for unlawful detention, and Mr Mohlala has obtained a substantial award and vindicated an important right.⁴⁷

[29] Although Mr Mohlala is entitled to a costs order in his favour, the costs of both appeals were increased by the issue of malicious prosecution, on which he has been unsuccessful. This justifies an award of only a portion of his costs and, having regard to the nature of the matter, the quantum involved and the absence of complexity, the costs of a single counsel. An award of 50 percent of his costs is appropriate.⁴⁸

[30] Finally, it should be noted that Mr Mohlala claimed in excess of R1 million in respect of unlawful arrest, detention and malicious prosecution. This was extravagant, and the inflated amounts remained unamended in the particulars of claim despite the wealth of authority indicating a far lower range. Such conduct has been deprecated by this Court, and practitioners are required to make realistic assessments of the merits of their clients' cases, including in relation to quantum.⁴⁹ Inflated claims of this nature tend to increase costs unnecessarily, both at trial and on appeal, and diminish the prospects of settlement.

⁴⁵ *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 854D–E.

⁴⁶ *Invernizzi v Port Elizabeth Municipality* 1954 (2) SA 288 (E) at 299D–F; Syce fn 4 para 72.

⁴⁷ *Du Preez v Minister of Police* [2025] ZAECKMKHC 99 para 73.

⁴⁸ Cf Syce fn 4 para 72.

⁴⁹ See, for example, *Diljan* fn 5 para 20.

[31] The following order is made:

1 The applicant is granted special leave to appeal against the order of the high court, limited to the claim for unlawful detention.

2 The costs of the application for special leave to appeal shall be costs in the appeal.

3 The appeal against the order of the high court is upheld.

4 The order of the high court is set aside and substituted with the following:

‘(i) The appeal against the dismissal of the appellant’s claim for unlawful detention is upheld.

(ii) The order of the magistrates’ court is set aside and replaced with the following:

(a) The second defendant is liable for the unlawful detention of the plaintiff at Dennilton Police Station between 1 April 2017 and 3 April 2017.

(b) The second defendant is ordered to pay the plaintiff the sum of R80 000 as general damages, together with interest thereon at the legal rate from 25 April 2023 to the date of final payment.

(c) The second defendant is ordered to pay fifty (50) percent of the plaintiff’s costs.

(iii) The second respondent is ordered to pay fifty (50) percent of the costs of the appeal, including the costs of counsel on scale B.’

5 The second respondent is ordered to pay fifty (50) percent of the applicant’s costs of the appeal in this Court.

A GOVINDJEE
ACTING JUDGE OF APPEAL

Unterhalter JA (dissenting):

[32] I have had the pleasure of reading my brother, Govindjee AJA's judgment (the first judgment). I am unable to agree with its conclusion, and certain of the reasoning that supports this conclusion. I commence, however, by setting out the matters with which I concur.

[33] First, I agree that there is a substantial point of law to be determined that warrants the grant of special leave. Second, the first judgment sets out the statutory framework for the grant of police bail. An accused who is in custody in respect of any offence, other than those set out in s 59(1)(a) of the Act, may, before his or her first appearance in a lower court, be released on bail. I shall refer to this, following the first judgment, as police bail. Third, an accused who is in custody and may be released on police bail must be informed of his or her right to seek their release on police bail. I shall refer to this right as the right of request. Fourth, should an accused wish to exercise this right, a duty rests upon the police, within a reasonable time, to consider admitting the accused to police bail. I shall refer to this as the duty of consideration. This duty entails that a police official of or above the rank of a non-commissioned officer must be available, on reasonable terms, to decide whether to release an accused on police bail, in consultation with the police official charged with the investigation.

[34] The first judgment proceeds from the premise that the failure by the police to inform an accused of his or her right of request and the failure by the police to consider the possibility of release on police bail renders the continued detention of the accused unlawful, absent justification.⁵⁰ The question that arises is this: does the infringement of the accused's right of request and the failure by the police to comply with their duty of consideration render the continued detention of the accused in custody unlawful? The first judgment holds that it does. And this holding is central because Mr Mohlala's cause of action rests upon the claim that his detention was wrongful and unlawful.

[35] Section 59(1)(a) of the Act does not invest in an accused, who may be admitted to police bail, a right to such bail. An accused who may be admitted to police bail, as

⁵⁰ First judgment para 11.

explained, has a right of request, which, if exercised, triggers the duty of consideration. Does the infringement of the right of request or a failure to comply with the duty of consideration render the continued detention of the accused unlawful?

[36] This question requires some analysis of what it means, in these circumstances, to attribute unlawfulness to the detention of the accused. There are different types of rights that are enjoyed by persons who are detained. These include the rights set out in s 35(2) of the Constitution. So, for example, s 35(2)(e) of the Constitution provides that everyone who is detained has the right ‘to conditions of detention that are consistent with human dignity ...’. If the conditions of detention do not meet the constitutional standard, an infringement of the right has occurred and that is unlawful. In this sense, the detention of the person is unlawful (subject to the state’s claim of limitation). But it does not follow that the person so detained is entitled to be released from detention. That is a question of remedy, it is not part of the content of the right. In other words, the person may not continue to be detained under conditions that do not meet the required constitutional standard, but that does not mean that this person has a right to be released.

[37] Section 35(2)(d) of the Constitution accords the right to a detained person to ‘challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released’. This right is the constitutional expression of the common law right of *habeas corpus* (the writ *de homine libero exhibendo*). The very nature of this right is that a person detained by the state must be brought to court; they are entitled to ask the court for their release; and the court is bound to grant their release, unless there is some lawful cause for their detention.⁵¹ The *content* of this right is the right to be released from detention, unless there is a lawful basis for the detention.

[38] Section 35(2) of the Constitution accords other rights to detained persons, the infringement of which would be unlawful. But unlike s 35(2)(d), these rights are not framed on the basis that an infringement of the right entails the right of the detained person to be released from detention. This distinction is reinforced in the Constitution, if regard is paid to the right of an arrested person who has allegedly committed an offence. Section 35(1)(f) of the Constitution provides that an arrested person has the

⁵¹ *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at 309A-H.

right 'to be released from detention, if the interests of justice permit, subject to reasonable conditions'. Lawfully arrested persons do not enjoy an unqualified right to be released. Their right is subject to what the interests of justice permit.

[39] This constitutional scheme demarcates and distinguishes the rights of detained persons to be released from detention, and other rights of those who are lawfully detained to enjoy rights during the period of their detention. I will refer to this latter class of rights as detention rights. In terms of s 35(2) of the Constitution, the class of persons who hold detention rights include sentenced prisoners. The content of detention rights does not include a right to be released from detention, as the inclusion of sentenced prisoners in the class of rights holders makes plain. Release may be an appropriate remedy, in very special circumstances. But detention rights are conferred upon detained persons for their benefit, whilst subject to detention.

[40] In this case, we are concerned with the rights of Mr Mohlala in terms of s 59(1)(a) of the Act. He enjoyed a right of request. The police owed Mr Mohlala a duty of consideration, if he wished to exercise his right of request. I shall consider whether Mr Mohlala made out a case for the infringement of his rights. But first, it is necessary to consider whether, if there was such an infringement, in what sense, if any, did it render Mr Mohlala's *continuing* detention unlawful.

[41] The right of Mr Mohlala in terms of s 59(1)(a) of the Act is a right of request. It is the right to be considered for admission to police bail, upon request. The first judgment correctly holds that detained persons who may be admitted to police bail must be informed of their right to request such bail. If this is not done, as a result of which police bail is not sought, and hence not considered by the police, what is the legal consequence? The first judgment holds that the continued detention of such a person is unlawful, and this reflects the right to personal liberty.

[42] I do not consider this holding to be correct. If the detained person had been accorded his rights under s 59(1)(a) of the Act, he would have enjoyed the proper consideration of his request to be admitted to police bail. He would not have had a right to be released. If the full enjoyment of the right does not extend to a right of release, how can the infringement of the right create such a right. In my view, it cannot. The infringement of the right to request police bail and have it properly considered is

unlawful. It may be actionable as a delict. But it does not render the detention unlawful in the sense that it becomes unlawful to continue detaining the person, once his right was infringed. The statutory right neither contains, nor entails, a right of release. The infringement of the right of request and the failure by the police to observe their duty of consideration is unlawful. A person who suffers detention without the observance of their right to seek police bail (if they qualify for such consideration) is entitled to enforce their right. And they may seek civil redress for the infringement of their right. But that infringement does not entail a right of release because the object of the right is the consideration of police bail by the police official clothed with the authority to do so. Hence, the infringement of the right does not render the continued detention of the person who enjoyed the right unlawful.

[43] The first judgment understands the decision of this Court in *Syce*⁵² as authority for the proposition that a failure to inform a detainee of the right of request, a failure to consider the possibility of release on police bail or an unreasonable delay in doing so, in the absence of lawful justification, renders the continued detention of the detainee unlawful.⁵³ That is not my reading of *Syce*. In *Syce*,⁵⁴ the pleaded case was that Mr Syce's continued detention was unlawful because it was no longer required. Mr Syce was released on police bail, the question was why it did not take place sooner. There was no proper explanation of this delay. Mr Syce's continued detention was unlawful in these circumstances. There was no doubt that Mr Syce was to be admitted to police bail, the only question was the delay in doing so. That decision should have been made sooner than it was. Had there been no unreasonable delay, Mr Syce would and should have been released on the evening that preceded the day of his release.

[44] *Syce* is a case of unreasonable delay in effecting the release of a detained person entitled to police bail. Mr Syce was entitled to be considered for release on police bail. He was found to warrant the grant of police bail. It was unreasonable to have delayed that grant. Consequently, he was entitled to be released from detention sooner than he was. His continued detention, from the time when the decision to admit him to police bail should have been taken, to the time of his eventual release was thus unlawful.

⁵² *Syce* fn 4.

⁵³ First judgment para 11.

⁵⁴ *Syce* fn 4 paras 48-52.

[45] The ratio of *Syce* is that an unreasonable delay in making a decision to grant police bail renders the continuing detention of the person entitled to such grant unlawful, after the time when the decision should reasonably have been rendered. Once there was reason to admit Mr Syce to police bail, he was entitled to the benefit of his release within a reasonable time for the taking of this decision. Unreasonable delay meant that he was denied his liberty which he would otherwise have been entitled to enjoy. Hence the legal conclusion of the unlawfulness of his continued detention.

[46] In the present case, Mr Mohlala was not detained in circumstances where he was entitled to be released. As I have explained, his statutory right was to be informed of his right of request and be afforded an opportunity to exercise this right. He enjoyed no right to be released from detention. As a result, even if his rights were infringed, his continued detention was not unlawful.

[47] The first judgment also refers to *Setlhapelo*,⁵⁵ which *Syce* cited with approval.⁵⁶ It did so because of its insistence that the police have a duty, as soon as reasonably possible, after the arrest of a person, to ascertain whether they wish to be considered for admission to police bail. The consequence of a failure to do so in *Syce* was that the continued detention of Mr Syce was unlawful. This holding rests on the finding, as explained, that Mr Syce was granted police bail, but after an unlawful delay. It does not follow that if the decision had been taken not to admit Mr Syce to police bail, the unreasonable delay in reaching this decision would nevertheless have rendered his continued detention unlawful. In my view, it would not have done so. To the extent *Setlhapelo* suggests otherwise, for the reasons given, it was wrongly decided.

[48] I am therefore unable to agree with the legal premise of the first judgment. A failure by the police to advise a detainee of the right of request and, further, to discharge their duty of consideration, gives rise to no right of release and hence these failures do not render, to use the language of the first judgment, the ensuing detention unlawful.

⁵⁵ *Setlhapelo* fn 7 para 38.

⁵⁶ *Syce* fn 4 para 45.

[49] I turn now to consider the case pleaded and made out by Mr Mohlala. The key averment in the particulars of claim reads as follows: 'The detention of the Plaintiff was wrongful and unlawful in that it was effected, in the circumstances that the members of the SAPS were entitled and permitted by the Criminal Procedure Act 57 of 1977 to release the Plaintiff and only warn and/or notify him to appear in court on a date determined by them. ... As a result of this unlawful and wrongful detention the Plaintiff suffered damages, being of deprivation, limitation and restriction of freedom of movement, limitation of right to liberty, impairment of her (sic) dignity, limitation of the right to privacy, emotional shock, humiliation and trauma, for a period of three days ...'.

[50] Mr Mohlala's complaint is that his detention was unlawful because the police enjoyed the statutory power to release him on police bail and did not do so. His pleaded case did not allege that he was not informed of his right of request, though in evidence Mr Mohlala said this was so. How this testimony is consistent with his evidence that two other suspects, with whom he was arrested, were granted police bail, when he was not, was not explained by him.

[51] On the most generous treatment of Mr Mohlala's pleaded case and the evidence led at trial, it amounts to this. He was not informed of his right of request. The police had the power to consider whether he should be admitted to police bail. They failed to carry out their duty of consideration. This rendered his continued detention unlawful. By when the duty should reasonably have been discharged was not specified.

[52] Mr Mohlala did not make out his cause of action because the failure by the police to discharge their duty of consideration gave rise to no right enjoyed by Mr Mohlala to be released. Nor could such right be established in virtue of any infringement of his right of request. It was common ground before us that Mr Mohlala was lawfully arrested and detained at the police station, after a breathalyser test indicated a concentration of alcohol above the legal limit, and his subsequent refusal to permit a doctor to draw a blood sample. The legality of his ongoing detention was not rendered unlawful by reason of the failure by the police to discharge their duty of consideration. That failure was unlawful, and may of itself give rise to a claim in delict. But that is not the claim Mr Mohlala sought to make. His claim was that the failure to

discharge the duty of consideration rendered his further detention unlawful. It did not, and hence his claim cannot prevail.

[53] Once that is so, no burden of proof attaches to the Minister to justify the unlawful detention of Mr Mohlala. The infringement of his rights did not render his continuing detention unlawful, and hence the wrongdoing of which he complained, that is, his continuing detention, required no justification. Mr Mohlala's continuing detention was lawful, there was nothing to justify, and no onus resting upon the Minister to discharge.

[54] I would accordingly grant special leave and dismiss the appeal, with costs.

D N UNTERHALTER
JUDGE OF APPEAL

Appearances

For Applicant:	M M Makoti (with him T P Motlatle)
Instructed by:	Ratale Mashifane Inc. Attorneys, Jane Furse Phatshoane Henney Attorneys, Bloemfontein
For Respondents:	M S Mphahlele SC (with him K S Maboea)
Instructed by:	State Attorney, Polokwane State Attorney, Bloemfontein.