



Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG**

**Not reportable
CASE NO: 249/2025**

In the matter between:

**PAUL BOIKOBO MAOTWANE
LETLHOGONOLO SAM MODISANE
OBAKENG MODISANE
ISAAK MODISANE**

**1st PLAINTIFF
2nd PLAINTIFF
3rd PLAINTIFF
4th PLAINTIFF**

And

**THE MINISTER OF POLICE
THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

**1st DEFENDANT
2nd DEFENDANT**

Coram: Matlhape AJ

Heard: 18 February 2026

Reserved: 27 February 2026

Delivered: Judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for handing down of the judgment are deemed to be 16h00 on 12 May 2026.

Summary: Delict — unlawful arrest and detention — malicious prosecution-defendants ipso facto barred — plaintiffs deprived of liberty following arrest without a warrant in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 — no opposing evidence adduced — arrest and detention prima facie unlawful — onus rests on defendant to justify deprivation of liberty without a warrant — failure to establish existence of jurisdictional facts, in particular, absence of reasonable suspicion on objective grounds — failure by arresting officers to investigate exculpatory explanations — arrest and continued detention unlawful — conditions of detention aggravating infringement of dignity — malicious prosecution based on lack of reasonable and probable cause — quantum of damages — not to be assessed on a fixed daily tariff — court to exercise judicial discretion having regard to all relevant circumstances — comparable awards serving only as a guide — damages awarded as fair and reasonable compensation.

ORDER

1. The arrest and subsequent detention of each of the Plaintiffs are hereby declared to have been unlawful.
2. The institution and continuation of the prosecution by the Second Defendant are declared to have been malicious.

3. The Defendants are ordered , jointly and severally, the one paying the other to be absolved, to pay to each of the Plaintiffs the sum of R500 000.00 (Five Hundred Thousand Rands only) for unlawful arrest, detention and malicious prosecution for a period of 15(Fifteen) days from 20 September 2022 to 05 October 2022.
4. Interest on the aforesaid amounts shall accrue at the prescribed legal rate from the date of this judgment to the date of final payment.
5. The Defendants shall jointly and severally, the one paying the other to be absolved, pay the Plaintiffs' costs of suit on the party and party scale.

JUDGMENT

MATLHAPE AJ

Introduction

[1] The Plaintiffs instituted an action for damages arising from their arrest, detention, and subsequent prosecution on allegations of rape. They were detained in custody from 20 September 2022 to 5 October 2022.

[2] The matter proceeded on an unopposed basis due to the fact that the defendants, despite entering an appearance to defend, failed to plead and as a result were *ipso facto* barred.

Summary of the Plaintiff's Evidence

[3] The four plaintiffs testified in support of their claims.

The First Plaintiff: Mr Boikobo Paul Maotwane

[4] Mr Maotwane testified that he was arrested on 20 September 2022 by four police officials who were dressed in civilian clothing and travelling in two unmarked motor vehicles. On the day in question he received a telephone call from the police requesting him to meet with them. He voluntarily met the police at Rietfontein Section. He was informed that he was being arrested for rape and the name of the complainant was disclosed to him. This was done in full view of members of the public. He testified that the complainant was not present at the scene of the arrest and it appeared that the police themselves did not appear certain as to whom they were looking for because they first asked him about a person named Kruger. He denied any involvement in the commission of the alleged rape and provided an exculpatory account. He informed the police that he is familiar with the complainant as they live within the same community and that on the day in question he did see the complainant, however, she was in the company of a certain gentleman.

[5] At the police station his fingerprints as well as buccal swabs were taken for the purpose of DNA testing.

[6] Mr Maotwane made his first appearance in court on 21 September 2022. The matter was subsequently remanded on several occasions and he remained in custody until 5 October 2022 when the charges were formally withdrawn on the

basis of insufficient evidence, as confirmed by a certificate issued by the National Prosecuting Authority.

[7] He described the conditions of detention as poor, including overcrowding, lack of water, unclean blankets, and deprivation of food and toiletries. He further testified to reputational harm in that members of his community now perceive him to be a rapist following the incident.

The Second Plaintiff: Mr Letlhogonolo Sam Modisane

[8] Mr Modisane similarly testified that he was contacted by the police who asked him to meet up with them. Upon meeting the police they informed him that he is being arraigned on a charge of Rape. He was also arrested in full view of the public, in the presence of onlookers, and transported to Madikwe Police Station. He also informed the police that on the day in question he saw the complainant in the company of a certain individual, a gentleman. The complainant is someone whom he is familiar with. He testified that the police failed to investigate this exculpatory information.

[9] Like the first plaintiff, he was detained from 20 September until 5 October 2022, when the charges against him were formally withdrawn for lack of evidence. He expressed the view that both his arrest and continued detention were unjustified in the absence of evidence. He further testified that the prosecution was malicious because the prosecutor should have considered the fact that the police did not follow up on the exculpatory information that he provided them with.

[10] He testified that he was detained under harsh conditions in that the cell in which he was kept in was overcrowded. There was lack of water, unsanitary facilities and he was given too little food. He was intimidated by his fellow

detainees. He also testified to reputational harm and social ostracism following his arrest.

The Third Plaintiff: Mr Obakeng Modisane

[11] Mr Obakeng Modisane testified that he was arrested at a tavern by four police officials who were seeking several individuals. After identifying himself, he was arrested and transported to the police station, where he was informed of the rape allegation against him. He denied any involvement and informed the police that on the day in question, he did see the complainant, however, she was in the company of a certain gentleman. He testified that the police did not act upon this information.

[12] He first appeared before court on 21 September 2022 and the matter was subsequently postponed. He was detained from 20 September 2022 and remained in custody until the withdrawal of charges on 5 October 2022. He testified that there was no evidential basis for his arrest or prosecution.

[13] His evidence regarding detention conditions mirrored that of the other plaintiffs, including overcrowding, lack of water, inadequate bedding and poor food quality.

The Fourth Plaintiff: Isaak Modisane

[14] Mr Isaak Modisane testified that he was arrested on 20 September 2022 at a car wash by four detectives and subsequently taken to collect the first and second plaintiffs before being transported to the police station. He stated that he was not informed of the reason for his arrest at the time and only later learned that it related to an allegation of rape. He denied any involvement and maintained that he was not present at the scene of the alleged offence.

[15] He testified that the police ignored his explanations and proceeded with his arrest and prosecution despite the absence of evidence. He remained in custody until 5 October 2022 when the charges against him were formally withdrawn for lack of evidence.

[16] He described severe detention conditions, including extreme overcrowding, lack of water and sanitation, inadequate food, and deprivation of personal belongings. He further testified to enduring reputational harm, including being labelled a rapist. As a result, he is no longer able to secure employment within his community.

[17] In support of their evidence, each of the Plaintiffs adduced documentary evidence in the form of certificate of withdrawal of charges by the Public Prosecutor dated 27 September 2022 as well as a copy of the magistrates notes at their first appearance on 21 September 2022 and 5 October 2022 when the charges against them were formally withdrawn in court.

Legal Framework

[18] Section 12 of the Constitution of South Africa states that :

“Freedom and security of the person

(1) Everyone has the right to freedom and security of their person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause.”

[19] Section 35 of the Constitution states that:

“Arrested, detained and accused persons

(2) Everyone who is detained, including every sentenced prisoner, has the right-

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material, and medical treatment...”

[20] Section 40 of the Criminal Procedure Act 51 of 1977 provides:

“Arrest by peace officer without a warrant

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

- (a) Who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody....”

Malicious Prosecution

[21] The requirements were authoritatively restated in

Minister for Justice and Constitutional Development v Moleko¹ where the Supreme Court of Appeal held that:

“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;

¹ [2008] ZASCA 43 para 8 (31 March 2008)

(c) that the defendants acted with ‘malice’ (or *animo injuriandi*); and

(d) that the prosecution has failed.”

Analysis of the Merits

[22] The real issue is whether the arrest of the plaintiffs was unlawful. Should this aspect be decided in the affirmative, then it shall follow that their subsequent detention was also unlawful. Furthermore, the court has to decide whether their prosecution was malicious.

[23] In determining matters of this nature, the Court must commence with a consideration of the Constitution, which remains the supreme law and the primary point of departure in the adjudication of such disputes. As stated herein above, section 12(1) of the Constitution guarantees everyone a right to freedom and security and not to be detained arbitrarily. Law enforcement agencies are therefore cautioned from unlawfully depriving citizens of these rights as protected in the Bill of right.

[24] In order to determine whether the arrest was unlawful, one has to consider the manner in which the arrest was effected as well as the conduct of the arresting officer when they effected the arrest. It is trite that the lawfulness of an arrest is closely connected to the facts of each situation².

² Minister of Safety and Security v Van Niekerk, 2008 (1) SACR 56 (CC) @ 20

[25] The Criminal Procedure Act provides for instances where an arrest can be effected without a warrant. As can be gleaned from the provisions of section 40(1)

(a) above, those instances are :

(i) The arrest must have been effected by a peace officer; and

(ii) The offense or attempted offence must have been committed in his or her presence .

[26] Similarly, the jurisdictional factors of section 40(1)(b) are as follows:

(i) The arrestor must be a peace officer.

(ii) The arrestor must entertain a suspicion.

(iii) The suspicion must be that the suspect committed an offence referred to in Schedule 1.

[27] A peace officer is authorised to can effect an arrest without a warrant in instances where the offence or an attempt to commit an offence is committed in his presence. It is important to qualify this statement by mentioning the fact that section 40(1)(a) covers any kind of offences, the qualifying word being “any” offence. However, section 40(1)(b) covers an arrest for offences that are listed in schedule 1. In such a case, the peace office can only effect an arrest without a warrant after having entertained a reasonable suspicion that the suspect committed such an offence. In essence, the arresting officer has to exercise

judgment, assess the available information and conduct such basic enquiries as were reasonably necessary before depriving one of their personal liberty. A reasonable suspicion cannot be founded on conjecture, rumour or an untested allegation.

[28] The circumstances of the case at hand are that the Plaintiffs were arrested without a warrant in instances where they were accused of having committed an offence of Rape, which offence was neither committed in the presence of a peace officer nor falls within the ambits of schedule 1. The fact that Rape is a serious offence does not render the arrest lawful, the jurisdictional facts set out in section 40(1)(b) of the Act must still be present.

[29] In **Duncan v Minister of Law and Order**³, the Court set out the jurisdictional facts for an arrest under section 40(1)(b) as depicted herein above, being that the arrestor must be a peace officer; must entertain a suspicion; the suspicion must relate to a Schedule 1 offence; and the suspicion must rest on reasonable grounds.

[30] In **Mabona and Another v Minister of Law and Order and Others**⁴, the Court held that the test for reasonable suspicion is objective in that the arresting

³ 1986 (2) SA 805 (A) at 818G–H

⁴ 1988 (2) SA 654 (SE) at 658E–H

officer must have information which would induce a reasonable person to suspect that the plaintiff committed the offence.

[31] In **Minister of Safety and Security v Sekhoto and Another**⁵, the SCA reaffirmed the Duncan jurisdictional facts and held that, once they are present, the peace officer has a discretion whether to arrest or not, which discretion must be exercised rationally and for a proper purpose.

[32] In **Dukada**⁶ the Court reaffirmed that where an arrest is effected without a warrant, the onus rests on the Minister to justify its lawfulness. Mere suspicion, devoid of objective factual grounding, cannot suffice. This position accords with the constitutional imperative articulated in **Mahlangu** that any deprivation of liberty must be justified on lawful grounds. Regard must be had to the fact that the onus is upon the arrestor to prove on a balance of probabilities that the arrest was lawful.

[33] The evidence before this Court demonstrates that during their arrest, the plaintiffs voluntarily cooperated with the police. There was no evidence that they were a flight risk, that they would interfere with witnesses, or that they posed any danger to society. Their immediate arrest, without basic investigation, was therefore not shown to have been objectively reasonable. Absent the first

⁵ 2011 (1) SACR 315 (SCA) para 6

⁶ (3571/2022) [2025] ZAECMHC 10

defendant's evidence or any version contradicting that of the plaintiffs, the court can only assess the evidence that is before it. The evidence before this Court points to the fact that on a balance of probabilities, the arrest of the four plaintiff was unlawful.

[34] Having found that the arrest was unlawful, it follows that a determination should be made on whether their subsequent detention was unlawful, keeping in mind that where the initial arrest is unlawful, subsequent detention ordinarily remains tainted unless an independent lawful basis is established. No such basis was ever established in this matter. The charges against all four plaintiffs were ultimately withdrawn for lack of evidence, which reinforces the conclusion that the plaintiffs spent a period of fifteen days in custody as a result of the deprivation of liberty which was not justified.

[35] As far as the malicious prosecution is concerned, the plaintiffs assert that the prosecution was initiated by the State based on no reasonable cause in the case where the evidence showed that the police failed to investigate exculpatory evidence and proceeded to arrest them.

[36] In **Olesitse N.O. v Minister of Police**⁷, the Constitutional Court, when drawing a distinction between unlawful arrest and malicious prosecution, said the following:

⁷ [2023] ZACC 35; 2024 (2) BCLR 238 (CC) para 60

‘... [M]alicious prosecution is constituted by: (a) setting the law in motion against a claimant; (b) lack of reasonable and probable cause on the part of the defendant; (c) malice or *animus iniuriandi*; and (d) termination of criminal proceedings in the claimant’s favour. As far as the onus is concerned, here, unlike a claim based on unlawful arrest and detention, it rests on the claimant in respect of all the elements of the delict, including that of malice or *animus iniuriandi*.’

[37] Consequently, the onus is upon the plaintiffs to prove upon a balance of probabilities that the prosecution against them was malicious and without a probable cause.

[38] The SCA in the case of *National Director of Public Prosecutions v Mdhlovu*⁸ referred to the old case of *Prinsloo and Another v Newman* 1975(1) SA 481 (A) where it was found that reasonable and probable cause can be explained as follows:

‘In *Prinsloo and Another v Newman*, this Court discussed the concept of reasonable and probable cause for prosecution in the context of malicious prosecution. The Court held that the test for reasonable and probable cause is an objective one. It is not based on the subjective beliefs or motives of the prosecutor. Reasonable and probable cause exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.’

[39] The SCA went on to say that it ‘follows then, that a prosecutor need not have evidence establishing a *prima facie* proof or proof beyond a reasonable doubt

⁸ 194/2023 ZASCA 85 of 3 June 2023 para 20

when deciding to initiate a Prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what a reasonable prosecutor would have done in light of the information available at the relevant time⁹.

[40] Having regard to the findings of the SCA referred to above, a prosecutor is at the very least required to satisfy himself or herself that there exists some evidentiary basis linking the plaintiffs to the commission of the alleged offences. In the present matter, no identity parade was conducted, nor was the complainant present at the scene of arrest to identify the alleged perpetrators to the police. These shortcomings, viewed together with the fact that the plaintiffs furnished exculpatory statements which were never properly investigated or followed up by the police, ought to have alerted the prosecutor to the weakness of the case against them. Whilst the onus rests upon the plaintiffs to establish their claim, what makes this case peculiar, is that there is no evidence before this Court contradicting their version.

[41] It is trite that, in order to succeed with a claim for malicious prosecution, a mere demonstration of an improper motive is, on its own, insufficient to establish *animus iniuriandi*. A plaintiff must further demonstrate that the prosecution was instituted without reasonable and probable cause. Meaning that the prosecution

⁹ Mndlovu, paragraph 21

should have been initiated without reasonable or probable cause, based on what was present before the prosecutor at the time of initiating the prosecution.

[42] Upon a conspectus of all the evidence and a proper assessment of the probabilities, I am satisfied that the plaintiffs have discharged the onus resting upon them to prove a claim for malicious prosecution.

Quantum of Damages

[43] Having found that the arrest and detention of the plaintiffs was unlawful coupled with the fact they successfully proved malicious prosecution on the part of the second defendant I now turn to the issue of quantum. The purpose of an award of damages is not to enrich the plaintiffs, but to compensate them for the infringement of their liberty, dignity and personality rights.

[44] In **Minister of Safety and Security v Seymour**¹⁰, the SCA cautioned that previous awards are useful guides but should not be applied mechanically.

[45] In **Minister of Safety and Security v Tyulu**¹¹, the SCA held that damages are intended to provide solatium for injured feelings and must be fair to both sides.

¹⁰ 2006 (6) SA 320 (SCA) para 17

¹¹ 2009 (5) SA 85 (SCA) para 26

[46] In **Motladile v Minister of Police**¹² the SCA deprecated the mechanical approach, particularly in this Division, of awarding a fixed daily amount for unlawful detention. The Court held that such an approach is a misdirection and substituted the award given with another amount for the unlawful detention of the plaintiff in that matter.

[47] Consequently, this Court must therefore avoid a tariff-based calculation. The relevant factors that this Court takes cognisance of, include the period of detention, the seriousness of the allegation against the plaintiffs, the manner of arrest, the plaintiffs' humiliation, the impact on their dignity, the reputational harm suffered as well as the withdrawal of the charges for lack of evidence.

[48] Furthermore, the court cannot turn a blind eye to the detention conditions which the plaintiffs were subjected to such as overcrowded cells, unhygienic and degrading ablution facilities as well as lack of proper nutrition. Each plaintiff was visibly emotional when they testified about the hardship that they had to endure whilst in detention, the humiliation as well as reputational harm.

[49] Balancing these factors against the need to ensure that awards remain fair, reasonable and not extravagant. I am satisfied that an amount of R450 000 per plaintiff constitutes just and equitable compensation in the circumstances.

¹² (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) paras 13–17 and 25,

Costs

[50] As a general principle, costs follow the result. There is no reason in this matter to depart from that rule. The plaintiffs have been wholly successful in establishing that their arrest and subsequent detention were unlawful. They were also successful in proving on a balance of probabilities that the prosecution was malicious, as a result they have been compelled to approach this Court to vindicate their constitutional rights to freedom and dignity. The conduct of the first defendant's employees, in effecting the arrest without reasonable grounds and failing to properly investigate the matter, necessitated the institution of these proceedings. In such circumstances, fairness dictates that the plaintiffs should not be out of pocket in seeking redress. Similarly, the second defendant's employee initiated the prosecution without any reasonable or probable cause. I am accordingly satisfied that the defendants must bear the costs of suit.

Order

[51] The following order is made:

1. The arrest and subsequent detention of each of the Plaintiffs are hereby declared to have been unlawful.
2. The institution and continuation of the prosecution by the Second Defendant are declared to have been malicious.

3. The Defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay to each of the Plaintiffs the sum of R500 000.00 (Five Hundred Thousand Rands only) for unlawful arrest, detention and malicious prosecution for a period of 15(Fifteen) days from 20 September 2022 to 05 October 2022.
4. Interest on the aforesaid amounts shall accrue at the prescribed legal rate from the date of this judgment to the date of final payment.
5. The Defendants shall jointly and severally, the one paying the other to be absolved, pay the Plaintiffs' costs of suit on the party and party scale.



MATLHAPE B

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the plaintiff: Mr Lehabe

Instructed by: LEHABE ATTORNEYS INC
MMABATHO