

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2020/18097

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

8 May 2026

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In the matter between:

DOMINGOES JOAO NAVES

First applicant

NKOMOKAZIHLATSWA JOHN MATHE

Second applicant

And

MINISTER OF POLICE

First respondent

NATIONAL DIRECTOR OF

PUBLIC PROSECUTION

Second respondent

JUDGMENT

MIA, J

Introduction

- [1] This is an action for damages arising from the alleged unlawful arrest, detention, assault, and malicious prosecution. The matter proceeded on an unopposed basis. The record reflects and counsel submitted that the respondents' defence was struck out on 11 November 2024. The respondents were entitled to cross examine the applicants on the evidence they tendered notwithstanding that the respondents defence was struck out. The respondent's opportunity to cross examine in the context where their plea has been struck out is not novel and has addressed previously by this court.¹ It is trite that even in such circumstances, the plaintiff must prove its case.² The State Advocate sent a representative on a watching brief. Notwithstanding the absence of opposition, the plaintiffs bear the onus to establish, on a balance of probabilities, each element of the causes of action advanced.

Background facts

- [2] The plaintiffs' case, as presented through oral testimony, may be summarised as follows. On 8 November 2017, the plaintiffs were stopped and searched by members of the South African Police Service in Carletonville. No incriminating items were found, and they were initially permitted to proceed. Shortly thereafter, they were stopped again, conveyed to the police station, and subjected to further interrogation. It was alleged that at the police station they were assaulted and thereafter taken to a school that had allegedly been burgled, where they were presented to the principal but were not identified as perpetrators who had burgled the premises.
- [3] The plaintiffs were subsequently taken to their residences in Johannesburg, where items were seized. According to the plaintiffs, these items bore no relation to the property allegedly stolen from the school. The plaintiffs were detained and appeared in court on 10 November 2017 and were charged with several counts. The State opposed bail, however,

¹ *Stevens and Another v Road Accident Fund* (26017/2016) [2022] ZAGPJHC 864 (31 October 2022).

² *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at para 13.

during the subsequent bail application, it was refused and they remained incarcerated for approximately 583 days. The prosecution ultimately terminated in their favour upon a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977.

- [4] The plaintiff's evidence was limited to their arrest and their incarceration. During submissions counsel relied upon the record of the proceedings in the court a quo despite it not having been introduced into evidence.

Issues for determination

- [5] The issues for determination are:
- 5.1. whether the arrest and detention were unlawful.
 - 5.2. whether the applicants established a claim for malicious prosecution.
 - 5.3. whether the alleged assault was proven
 - 5.4. the appropriate quantum of damages, if any.
 - 5.5. an appropriate costs order.

Evidentiary framework

- [6] It is necessary to emphasise that documents uploaded to CaseLines do not constitute evidence unless properly introduced and admitted. Similarly, pleadings and heads of argument do not constitute evidence and cannot substitute for proof of factual assertions. The applicants are required to prove their case through admissible evidence. The absence of opposition or cross examination does not relax this requirement.

Unlawful arrest and detention

- [7] It is trite that an arrest without a warrant is *prima facie* unlawful, and the onus rests on the arresting authority to justify such arrest.³ The jurisdictional requirements under s 40(1)(b) are set out in *Duncan v Minister of Law and Order*.⁴ The suspicion must be objectively

³ *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E–F.

⁴ 1986 (2) SA 805 (A) at 818G–H.

reasonable.⁵ Moreover, the discretion to arrest must be rationally exercised.⁶

- [8] The justification typically rests on the existence of a reasonable suspicion that the arrestee has committed a Schedule 1 offence. The suspicion must be objectively sustainable on reasonable grounds. The applicants testified that they stopped by police officers when their vehicle was searched and nothing incriminating was found on them. They were permitted to leave however they were arrested later. No items linking them to the burglary at the school were discovered upon the initial search or at their premises. There is no evidence before this court indicating the objective basis upon which the arresting officers formed a reasonable suspicion for the arrest. In the absence of such evidence and having regard to the unchallenged version of the applicants, the arrest does not appear to be justified. The detention that followed the arrest is causally linked to that arrest, at least until the applicants' appearance in court. Accordingly, the applicants have established that their arrest on 8 November 2017 and initial detention until 10 November 2017 were unlawful.

Extent of liability for detention

- [9] The plaintiffs were detained for 48 hours before they were for an extended period of approximately 583 days after their arrest. However, once the plaintiffs were brought before court, further detention was subject to judicial oversight. In the absence of evidence demonstrating that the subsequent detention was legally attributable to the conduct of the police, the court must exercise caution in attributing liability for the entire period to the respondents. The evidentiary record before this court does not include the bail proceedings; the contents of the docket were not presented as evidence. It was merely referred to by counsel. Perusal of the docket indicates that the applicants both had several previous convictions involving crimes of dishonesty and violence which include

⁵ *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658E–H.

⁶ *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) paras 28 - 44.

robbery and house breaking with intent to steal and theft which may suggest why bail was refused. The evidence of the applicants indicated that they were charged with several offences and not only the house breaking and theft which resulted in their arrest on 8 November 2017. The docket references several cases whilst not indicating what the charges were. Accordingly, this court cannot, on the evidence presented, attribute the entire period of detention to the arrest of applicants on the charge of house breaking in and theft. The decision not to release the applicants on bail was taken by the presiding officer in the district court.

- [10] The uncontested evidence establishes that the plaintiffs were searched and nothing incriminating related to the suspected house break-in was found in their vehicle. They were permitted to leave and were subsequently re-arrested without new information. No evidence was placed before this court establishing the objective basis for suspicion. In the absence of such evidence, the arrest is unlawful.

Detention and Causation

- [11] The applicants' detention for the period prior to their appearance in court is likewise unlawful. In *Zealand v Minister of Justice*,⁷ the Court said:

"[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

⁷ 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); [2008] ZACC 3 at para 25.

fundamental 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. (footnotes omitted)"

The plaintiffs have presented evidence to prove their claims for wrongful arrest and detention for the period 8 November 2017 to 10 November 2017.

[12] However, post-appearance detention raises issues of legal causation. In *De Klerk v Minister of Police*,⁸ the Constitutional Court held that police liability may extend beyond first appearance where a sufficient causal nexus exists. The enquiry is one of legal causation, infused with considerations of fairness, reasonableness, and policy.⁹

[13] In the present matter, there is no evidence relating to the bail proceedings. It is not possible to ascertain what other charges were the applicants were indicted for, neither did they specify the nature of the other offences save that the first applicant testified that there were numerous charges. In the circumstances where the applicants were indicted on several charges as per the applicants own evidence it is not possible to ascertain whether those charges flow from the house break-in and theft or whether there were other cases unrelated to the charge of house breaking and theft. The absence of evidence related to the contents of the docket and the absence of the evidence relating to the bail proceedings as well as the prosecution preclude me from concluding that the post appearance detention related to the house break-in and theft exclusively. In the absence of this evidence the causal nexus relating to the applicants' post detention is not satisfactorily established against either respondent. The applicants have not met this onus. The absence of such evidence precludes attribution of the entire 583-day detention to the respondents related to the house

⁸ 2019 (12) BCLR 1425 (CC); 2021 (4) SA 585 (CC); 2020 (1) SACR 1 (CC); [2019] ZACC 32.

⁹ Id paras 42–45

break-in and theft. The applicants' case in circumstances where bail was denied by the court does not prove a nexus for which the respondents can be liable covering detention for 583 days.

Malicious Prosecution

[14] The requirements for malicious prosecution are set out in *Minister of Justice v Moleko*.¹⁰ There must have been proceedings instituted and terminated in favour of the applicants and there must be a reasonable cause the proceedings have been instituted with malice. The reasonable cause depends on information before the prosecutor.¹¹ Malice requires proof of improper motive.¹² A discharge under s 174 does not prove malicious prosecution.

[15] The plaintiffs led no evidence of the contents of the docket and the charges they said they were indicted on nor did they lead evidence that the prosecutor's decision to prosecute was malicious having regard to the statements in the docket. In the absence of the aforementioned they failed to address the question that the prosecutor had no reasonable cause to prosecute. It is not possible to conclude that where the respondents set the law in motion by instituting or continuing criminal proceedings against the applicants; that the prosecution was instituted without reasonable and probable cause; and was actuated by malice. The proceedings terminated in favour of the applicants however there was no evidence presented to draw the conclusion that there was no reasonable and probable cause. The proceedings in the court a quo endured for over a year. In *Moleko*, the court noted that the question is not whether the prosecution ultimately proved to be sustainable, but whether a reasonable prosecutor, possessed of the information available at the time, would have considered that there were reasonable prospects of securing a conviction.¹³

¹⁰ 2009 (2) SACR 585 (SCA) para 8.

¹¹ *Beckenstrater v Rottcher* 1955 (1) SA 129 (A) para 136A–B.

¹² *Moleko* supra para 64.

¹³ *Moleko* supra paras [62]–[65].

- [16] On the facts presented, I am unable to conclude that the prosecution was conducted with no reasonable cause and was malicious. In the absence of proof of malice, the claim for malicious prosecution accordingly fails.

Assault

- [17] The applicants' claim of assault requires proof of intentional and unlawful force. On the evidence tendered, this is a generalised statement and the extent of the unlawful force used is not evident. The submissions made on behalf of the applicants were that they were extensively tortured. The production of the record of their first appearance would assist in the applicants proving this averment. The record would reflect their report to the court about their abuse at the hands of the police. This would have been recorded as well as any injuries. There was no suggestion that the court refused to note such injuries. Where the applicants say they were extensively assaulted and tortured there would no doubt have been evidence could have been noted in the record at their first appearance. Consequently, the plaintiffs' failed to establish the claim of extensive assault and torture.

Calculation of damages-applicable principles

- [18] In *Minister of Safety and Security v Seymour*¹⁴ the court expressed the following view on the assessment of damages:

"[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that. As pointed out by Potgieter JA in *Protea Assurance*, after citing earlier decisions of this court:

'The above quoted passages from decisions of this court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay

¹⁴ 2006(6) (SCA) 320 at para 17; [2007] 1 All SA 558; (295/05) [2006] ZASCA 71.

regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration."

- [19] In *Tilo v Minister of Police and Another*¹⁵ the court awarded an amount of R400 000 for a period of under 30 days. The period of detention was not insignificant. In *Motladile v Minister of Police*,¹⁶ the SCA awarded R200 000 for a four-day detention. In *De Klerk* the Constitutional Court awarded R300,000 for approximately seven days of unlawful detention¹⁷. The period relevant to the present circumstances is the 48 hours prior to the applicants first appearance in court. I have considered the evidence that the applicants lost their source of income. The first applicant was self-employed as a gate motor technician; there was no evidence why he could not continue his business upon his release. The second applicant was a rubble removal truck driver. He lost his employment. No evidence was led regarding his entry into the labour market. I accept that there was a loss of income flowing from the period in detention. However insufficient evidence was led in this regard.

¹⁵ 2026 JDR 1391 (GJ).

¹⁶ (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) para 17.

¹⁷ *De Klerk* supra para 94.

- [20] Given that there is no set standard and previous awards merely guide subsequent awards or serve as a reference, awards must be fair and not extravagant. The court stated in *Minister of Safety and Security v Tyulu*¹⁸ that it serves as a solatium for injured feelings rather than as enrichment, noting that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. It indicated that the correct approach was to have regard to all the facts of the particular case and to determine the quantum of damages on such facts. In this manner a court ensures proportionality and consistency having regard to specific circumstances.
- [21] The applicants were arrested and detained for 48 hours before they appeared in court. Their application to be released on bail was refused. Both applicants had several previous convictions which would have influenced the bail proceedings and outcome. I have thus not considered the detention period beyond the first appearance and the bail application. There was no attempt to bring an application appealing the decision to refuse bail. It is not proper to revisit or review that court's decision. The period I have considered applicable with regard to the arrest and detention is 48 hours. The affront to dignity and deprivation of liberty is accepted as against the first respondent. There is however no proof linking the first respondent to the entire period of detention and no evidence of malice. Having regard to all the relevant circumstances, including the duration of the detention, the conditions of incarceration, the seriousness of the charges and the need for consistency with comparable awards, an amount of R300 000 constitutes fair and reasonable compensation for each of the applicants unlawful arrest and detention.
- [22] It is appropriate that costs follow the result. I am unable to determine the costs relating to prior proceedings absent an evidentiary foundation. Insufficient information has been placed before me.

¹⁸ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26.

ORDER

[23] In the result, the following order is made:

1. The claim for malicious prosecution is dismissed.
2. The claim for assault is dismissed.
3. The first respondent is ordered to pay the first applicant the amount of R350 000, with interest at the prescribed rate from date of judgment to date of payment.
4. The first respondent is ordered to pay the second applicant the amount of R300 000, with interest at the prescribed rate from the date of judgment to date of payment.
5. The first respondent is ordered to pay the costs of this action, excluding any costs relating to prior proceedings not forming part of this record.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	: Mr H.C Makhubele
Instructed by	: H.C Makhubele Incorporated reception@hcmakhubeleinc.co.za
On behalf of the respondent	: NO APPEARANCE
Instructed by	: Mr D Lebenya (Johannesburg State Attorneys) DLebenya@justice.gov.za
Date of hearing	: 25 July 2025
Date of judgment	: 8 May 2026